FEDERAL COURT OF AUSTRALIA

CCP16 v Minister for Immigration and Border Protection [2019] FCA 358

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| Appeal from: | Application for an extension of time: *CCP16 & Anor v Minister for Immigration & Anor* [2018] FCCA 1864 |
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| File number: |  |
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| Judge: | **LEE J** |
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| Date of judgment: | 28 February 2019 |
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| Catchwords: | **MIGRATION** – appeal brought out of time – extension of time granted – appeal from orders of Federal Circuit Court of Australia dismissing application for judicial review of Tribunal decision – claim to fear harm – unreasonableness – whether treatment of material regarding psychological harm and mental health issues was arbitrary – decision within scope of authority conferred on decision-maker – appeal dismissed |
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| Legislation: | *Migration Act 1958* (Cth) s 65 |
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| Cases cited: | *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; (2016) 237 FCR 1  *Singh v Minister for Home Affairs* [2019] FCAFC 3 |
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| Date of hearing: | 28 February 2019 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 19 |
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| Counsel for the Applicants: | Mr P W Bodisco |
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| Solicitor for the Applicants: | McArdle Legal |
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| Counsel for the First Respondent: | Mr D Hughes |
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| Solicitor for the First Respondent: | HWL Ebsworth Lawyers |
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| Counsel for the Second Respondent: | The second respondent filed a submitting appearance, save as to costs |

ORDERS

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|  | | NSD 1434 of 2018 |
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| BETWEEN: | CCP16  First Applicant  CCQ16  Second Applicant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | LEE J |
| DATE OF ORDER: | 28 FEBRUARY 2019 |

THE COURT ORDERS THAT:

1. The application for extension of time is allowed.
2. The appeal is dismissed.
3. The costs of the first respondent are to be paid by the first appellant.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

(Revised from the transcript)

LEE J:

1. Pursuant to leave granted at the commencement of oral submissions to bring an appeal out of time, the appellants appeal from orders made by the Federal Circuit Court of Australia dismissing an application for judicial review of a decision of the second respondent (**Tribunal**). The primary judge had rejected four grounds identified in a further amended application. For reasons that will become evident, it is only necessary to deal with arguments now advanced by the appellants in relation to one of those four grounds agitated below.
2. There is no need to set out the background in a manner differently to as set out at [3]-[18] of the primary judge’s reasons. No party identified any inaccuracy in this regard. It sufficies to say for present purposes that the applicants are Tongan with the first appellant being the mother of the second. The first appellant claimed to fear harm if she were to return to Tonga for the following reasons: (a) because a male cousin (with a history of violence) had threatened her; (b) she did not believe the police would protect her; (c) she feared sexual harassment or worse harm from men; and (d) she feared that she would face economic harm in that she would not be able to work on return to Tonga.
3. The second appellant claimed to fear harm in Tonga because he would be at risk of abuse, both physical and sexual, and would be teased or harmed by other children at school. The contentions of both appellants have a common component: the notion that the harm was connected to the fact that the first appellant was a single mother and the second appellant was an illegitimate child.
4. During the course of oral submissions today, counsel for the appellants, Mr Bodisco, carefully took me through the evidence that was before the Tribunal and, in particular, psychiatric reports of Dr Prem Naidoo; the first most extensive report having been prepared in January 2013, and a second updated report which was prepared April 2016. Additionally, I was taken to a separate report by Professor Lee from the Department of Social Inquiry at La Trobe University, a “summary of psychological treatment” for the first appellant prepared by the New South Wales Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (**STARTTS**) prepared in November 2015, and a report of a Dr Antony Milch (a child, family and adult psychiatrist) of May 2016, which was focussed on, and related to, the second appellant.
5. This exercise was undertaken in aid of two grounds of appeal which are in the following terms:

1. His Honour erred by making findings that were unreasonable in circumstances where recent improvements on the condition of the Application noted at paragraphs [54] and a deterioration in her mental state at paragraph [55] could be equated to a finding that the Appellant was fit to return to Tonga

2. His Honour erred in the court by determining that there had not been a breach of the “real chance” test in circumstances where the Tribunal had effectively conducted its assessment at paragraph [52] as a binary proposition, assigning “relatively greater weight” too (sic) the reports of Dr Milch and the STARTTS report than those of Dr Naidoo.

1. Although, read literally, the grounds are misconceived insofar as they assert that it was the primary judge who made unreasonable findings of fact about the fitness of the appellants to return to Tonga; read beneficially they are directed (as counsel’s oral argument confirmed) to one core contention: that is, that the primary judge erred in failing to find that the Tribunal committed jurisdictional error by making a legally unreasonable decision, the unreasonableness being the in the way in which the Tribunal dealt with what was broadly described as the material before it going to psychological harm and mental health issues affecting the first appellant.
2. Put another way and more specifically, the contention was that the Tribunal engaged in an arbitrary process where, having identified some contradiction in the evidence as to the first appellant’s current mental state, it did not seek to analyse those contradictions which, on the material before it, were able to be reconciled but instead, chose arbitrarily to accept those factors which were adverse to the conclusion that there was a real chance or risk of the first appellant suffering serious or significant harm as a consequence of her mental health issues should she return to Tonga.
3. Before dealing with this more refined ground of appeal, it is necessary to say something about the question of when a decision is legally unreasonable in the relevant sense. As is well established, the question is answered by reference to whether or not the decision is within the scope of the statutory authority conferred on the decision-maker and involves an assessment of whether the decision was lawful or authorised, having regard to the scope, purpose and objects of the statutory source of power: see *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 111; (2016) 237 FCR 1; *Singh v Minister for Home Affairs* [2019] FCAFC 3 at [61].
4. In *Singh*, the Full Court (Reeves, O’Callaghan and Thawley JJ) explained that a conclusion of legal unreasonableness might be drawn, for example, if the impugned decision at [61]:
5. is “illogical”, though an inference of unreasonableness will not be supported merely because a decision appears to be irrational: *SZVFW* at [10] (Kiefel CJ); [82] (Nettle and Gordon JJ); *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [68] (Hayne, Kiefel and Bell JJ);
6. “lacks an evident and intelligible justification”: *Li* at [76] (Hayne, Kiefel and Bell JJ); *SZVFW* at [10] (Kiefel CJ), [82] (Nettle and Gordon JJ);
7. is plainly unjust, arbitrary, capricious or lacking in common-sense: *Stretton* at [11] per (Allsop CJ, with whom Griffiths and Wigney JJ relevantly agreed at [87], [90]); *Muggeridge v Minister for Immigration and Border Protection* (2017) 255 FCR 81 at [35] (Flick, Perry and Charlesworth JJ).
8. As noted above, the particular species of legal unreasonableness relied on by the appellants in this case is the arbitrary treatment of the material relating to the psychological harm and mental health issues affecting the first appellant. The critical part of the Tribunal’s reasoning is at [130]-[137]. Despite the length of the extract, it is convenient to set these paragraphs out in full:

130. The Tribunal accepts on the psychological and psychiatric evidence before it that the applicant has experienced mental health issues including Chronic Major Depressive Disorder, anxiety and symptoms of Post-Traumatic Stress Disorder. There is, however, some contradiction in the evidence as to the applicant’s current mental state. Whilst Dr Naidoo has recently confirmed her 2013 assessment of the applicant and expressed the view that some of her symptomology has worsened, the reports from STARRTS and Dr Milch and the applicant’s oral evidence to the Tribunal indicated some improvement in her condition. Dr Milch, for example, did not identify any current abnormalities on mental state examination, and noted that the applicant had ceased attending psychological treatment and had not been prescribed medication. The reports from STARTTS and Dr Milch indicated that the applicant had developed effective coping strategies and was managing her problems herself. As these reports are consistent with the applicant's own oral evidence at the Tribunal hearing, the Tribunal has given them relatively greater weight than Dr Naidoo’s assessment.

131. The Tribunal accepts on the basis of the psychiatric and psychological evidence before it that there may be a significant deterioration in the applicant's mental state if forced to return to Tonga, in part due to the separation from her family and lost opportunities in Australia but also because of her experiences of past trauma in Tonga, including separation from her parents and abuse as a child. The Tribunal also accepts that the applicant may experience increased anxiety, fear or depression arising from her status as a single mother, her financial position, family property dispute and concerns about her son’s future well-being.

132. A deterioration in the applicant's mental health due to a change in her circumstances does not, of itself, involve persecution or significant harm. The concept of persecution requires there to be systematic and discriminatory conduct by another party who is either an agent of the Tongan State or a non-State agent whose conduct is tolerated or condoned by the State. Similarly, the concept of significant harm requires there to be an act or omission by another party.

133. Having considered the totality of the evidence, the Tribunal is also not satisfied there is a real chance or risk of the applicant suffering serious or significant harm as a consequence of her mental health issues should she return to Tonga. It has been suggested on the applicant's behalf, for example, that the applicant would be stigmatised socially, be more vulnerable to violence and be unable to find or maintain employment as a person with mental health issues.

134. The evidence before the Tribunal, however, indicates that the major events contributing to the applicant's mental health issues occurred during her childhood or following the birth of her daughter. Despite these circumstances, the applicant has subsequently been able to find employment and maintain employment in Tonga. The applicant has not personally complained of any past stigma, discrimination, harassment or violence attributable to her · mental health issues in her evidence to the Department or Tribunal.

135. The evidence also suggests that in the course of her psychological treatment and as a result of having been assisted to process her traumatic memories, the applicant's symptoms have significantly reduced or abated. The applicant has developed positive coping strategies and is not currently receiving treatment including medication in Australia. In these circumstances, the Tribunal is not satisfied that even allowing for a deterioration in her mental health, there is real chance or risk of the applicant suffering social stigma, discrimination, harassment, violence or lack of employment to a level constituting serious or significant harm as a consequence of any mental illness. Nor is the Tribunal satisfied that there is a real chance or risk of the second applicant suffering serious or significant harm as a consequence of his mother's mental illness.

136. The Tribunal is prepared to accept that mental health services may be less readily available in Tonga than in Australia. However, noting that the applicant is not currently availing herself of any mental health services in Australia, and has not in the past sought such services in Tonga, the Tribunal is not satisfied that this circumstance involves persecution or significant harm.

137. The Tribunal has also considered the opinions expressed by Dr Milch in relation to the second applicant, notably that his developmental progress is likely to be compromised and he may be more vulnerable to future depression should he return to Tonga, However, the Tribunal is also not satisfied that these circumstances involve any conduct, act or omission by another party amounting to persecution or significant harm.

1. Before the primary judge, the focus of ground four was that it was legally unreasonable for the Tribunal to accept the diagnosis in the initial and updated report of Dr Naidoo, but reject the recommendations made in the same report. Further, it was contended, the Tribunal’s decision was unreasonable because it relied on the findings in the report by Dr Milch (who it will be recalled had been engaged to provide a report in relation to the second appellant) to “rebut” the opinions drawn by Dr Naidoo. As will by now be evident, the refined ground of appeal before me is subtly different and includes the premise that there was a range of material before the Tribunal which pointed in different directions.
2. On the one hand, there was material which suggested recent improvements in the first appellant’s mental condition, in particular, the reports from STARTTS and Dr Milch. This is reflected in the finding identified at [130] of the Tribunal’s reasons identified above. On the other hand, the appellant submitted, there was the careful analysis of Dr Naidoo who, in his 2016 report, sought to re-emphasise his analysis documented three years earlier and noted that “the evidence shows there has been little change from the opinion that I stated in the [earlier report]”. Further, in his 2016 report, Dr Naidoo explained that the first appellant did have some psychological treatment at the end of 2015 and that this may have been positive for her in that it reduced her symptomatology and given her some skills to deal with ongoing anxiety.
3. But despite this, Dr Naidoo came to the conclusion that he expressed in the following terms:

Again, I would repeat my statement in my previous report that I think a return to Tonga would be, given her vulnerability, extremely damaging to her in terms of her psychological and psychiatric functioning. I believe it would be unconscionable, especially when one considers the consequent flow-on psychological trauma that would affect her child.

1. The following month, in May 2016, Dr Milch expressed the view that, following a brief interview with the first appellant in which she provided an account that Dr Milch regarded as being “consistent with the two reports prepared by Dr Nadu (sic)”, she was not identified by Dr Milch as having “any current abnormalities on mental state examination”.
2. As counsel for the appellant correctly conceded, there was clearly scope for the Tribunal to reach the conclusion that it expressed at [130] of its reasons that there was “some contradiction in the evidence as to the applicant’s current mental state”. What is then set out, in the balance of the extract set out above, is an identification of how the Tribunal proceeded to identify which parts of the evidence it accepted, and the weight which it afforded to different elements of the evidence.
3. The submission of the appellant ultimately amounts to a claim that the Tribunal should have afforded different weight to the evidence, and should have reconciled the contradictions in a different way.
4. Although the appellant submits that the way in which the Tribunal did analyse the evidence was legally unreasonable, the process of reasoning adopted by the Tribunal, however, seems to me to be one which is fairly clear and not arbitrary. The reasons relevantly set out the Tribunal’s findings and explained the bases for the conclusions drawn. It unexceptionally noted that there were factors pointing in different directions in the overall assessment as to whether the relevant state of satisfaction had been reached. It preferred or gave relatively greater weight to some aspects of the material before the decision-maker (the reports from STARTTS and Dr Milch) because it formed the view that those reports were consistent with the subjective assessment made by the Tribunal as to the evidence given by the first appellant during the course of the hearing. The Tribunal was ultimately not satisfied that the relevant circumstances involved any conduct, act or omission by another party amounting to persecution or significant harm.
5. Whether another decision-maker might have formed a different view on the basis of the material before that decision-maker is not to the point. The Tribunal accepted that the applicant’s mental health may suffer or deteriorate due to her change in circumstances should she returned to Tonga, but held that this did not amount to persecution or significant harm: CB 390 [131].
6. The metes and bounds of the notions of legal unreasonableness are clear and there is no lack of an intelligible justification or illogicality in the process of reasoning identified in [130]-[137], nor could the decision be described as arbitrary in the sense explained by the authorities. In those circumstances, the appeal must be dismissed.

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| I certify that the preceding nineteen (19) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Lee. |

Associate:

Dated: 14 March 2019