FEDERAL COURT OF AUSTRALIA

DUO18 v Minister for Home Affairs [2020] FCA 1

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| Appeal from: | *DUO18 v Minister for Home Affairs & Anor* [2019] FCCA 1561 |
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| File number: |  |
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| Judge: | **LEE J** |
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| Date of judgment: | 7 January 2020 |
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| Catchwords: | **MIGRATION** – fast track reviewable decision by the Immigration Assessment Authority under Pt 7AA of the Migration Act 1958 (Cth) – appeal from judicial review of Authority decision by the Federal Circuit Court – whether Authority entitled to consider “new information” under s 473DD – whether Authority erred in construction of s 473DD – exceptional circumstances – whether second stage of cumulative requirements may be considered at first stage – no appealable error |
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| Legislation: | *Migration Act 1958* (Cth) s 473DD |
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| Cases cited: | *DUO18 v Minister for Home Affairs* [2019] FCCA 1561  *Minister for Immigration and Border Protection v CQW17* [2018] FCAFC 110; (2018) 264 FCR 249  *Plaintiff M174/2016 v Minister for Immigration and Border Protection* [2018] HCA 16; (2018) 353 ALR 600 |
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| Date of hearing: | 18 November 2019 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | Catchwords |
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| Number of paragraphs: | 20 |
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| Counsel for the Appellant: | The appellant appeared in person |
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| Counsel for the Respondents: | Ms K Hooper |
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| Solicitor for the Respondents: | Australian Government Solicitor |

ORDERS

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|  | | NSD 1155 of 2019 |
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| BETWEEN: | DUO18  Appellant | |
| AND: | MINISTER FOR HOME AFFAIRS  First Respondent  IMMIGRATION ASSESSMENT AUTHORITY  Second Respondent | |

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| JUDGE: | LEE J |
| DATE OF ORDER: | 7 JANUARY 2020 |

THE COURT ORDERS THAT:

1. The appeal be dismissed with costs.

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

REASONS FOR JUDGMENT

LEE J:

1. The appellant, who is unrepresented, has had some assistance in preparing an amended notice of appeal and written submissions. That assistance has been useful as it has commendably narrowed the issues to, in effect, two contentions as to error (although only one is articulated with specificity in the one ground of appeal, which is as follows):

The Federal Circuit Court erred when it did not uphold the Appellant’s 1st Ground of Appeal, found the Appellant failed to establish the decision of the Authority is affected by jurisdictional error, and dismissed the Application. [50]

**Particulars**

The Federal Circuit Court incorrectly accepted the proposition that ‘the mere fact that some of the applicant’s siblings have been granted protection on the basis the applicant claims is the same as his own claims’ has little, if any, probative value to the assessment of the applicant’s own claims for protection [29], was correct. [30]

1. There is no need for me to repeat the introduction and background to the appellant’s application for a protection visa or canvass the history and nature of the proceedings before the primary judge. They are set out in comprehensive detail under the heading “Introduction and background” and “The current proceedings” at [1]-[19] of the judgment below: *DUO18 v Minister for Home Affairs* [2019] FCCA 1561.
2. The issue relevant to the ground of appeal arises in the following way. In November 2017, the appellant provided submissions and some supporting documentation to the second respondent (**Authority**), in support of his application for a review of the Minister’s decision. The material provided to the Authority by the appellant commences at Appeal Book (**AB**) 222. Relevantly, the appellant stated (at AB 222-223):

Some of my siblings have also fled Sri Lanka and had successfully sought refuge in the US, France and even Australia. My two brothers [A] and [K] have applied for refuge in Australia and the latter has been granted protection. My brother [R] is in France. Sister and family have been granted refuge in the US.

The basis for grant of protection to my siblings is the same as mine, and that is we all belong to a particular social group; That (sic) social group is members of LTTE fighter family.

1. Accompanying these submissions were various documents corroborating the appellant’s claim that two of his siblings had been granted refugee status in the United States and France.
2. Before coming to the way in which the Authority dealt with this information, it is necessary to have regard to s 473DD of the *Migration Act 1958* (Cth) (**Act**). It provides as follows:

For the purposes of making a decision in relation to a fast track reviewable decision, the Immigration Assessment Authority must not consider any new information unless:

(a) the Authority is satisfied that there are exceptional circumstances to justify considering the new information; and

(b) the referred applicant satisfies the Authority that, in relation to any new information given, or proposed to be given, to the Authority by the referred applicant, the new information:

(i) was not, and could not have been, provided to the Minister before the Minister made the decision under section 65; or

(ii) is credible personal information which was not previously known and, had it been known, may have affected the consideration of the referred applicant’s claims.

1. The statutory scheme of which s 473DD is a part works in such a way so that the Authority does not have a duty to accept new information in any circumstances (s 473DC(2)) but may “get” any documents or information which were not before the Minister which the Authority considers to be relevant, and may invite a person to give new information (s 473DC(1) and (3)); such “new information” gained under s 473DC must not be considered unless the Authority is satisfied that there are exceptional circumstances which justify its consideration, and the applicant satisfies the Authority that the new information could not have been provided to the Minister before the original decision was made, or, more relevantly for present purposes, is credible personal information which was not previously known but which may have affected the consideration of the applicant’s claims (s 473DD). The requirements of sub-s 473DD (a) and (b) are cumulative, and the precondition set out in sub-s (a) (that there are exceptional circumstances) must always be met before the Authority can consider any new information: *Plaintiff M174/2016 v Minister for Immigration and Border Protection* [2018] HCA 16; (2018) 353 ALR 600 at 609 [29]-[31] per Gageler, Keane and Nettle JJ.
2. In the balance of these reasons I will refer to the requirement of sub-s 473DD(a) as **limb 1**, and the requirements of sub-s 473DD(b) (the only part of which in the present case is controversial being sub-s 473DD(b)(ii)) as **limb 2**.
3. When one has regard to the definition of “personal information” it is:

information or an opinion about an identified individual, or an individual who is reasonably identifiable:

* 1. whether the information or opinion is true or not; and
  2. whether the information or opinion is recorded in a material form or not.

Note: Section 187LA of the *Telecommunications (Interception and Access) Act 1979* extends the meaning of personal information to cover information kept under Part 5-1A of that Act.

1. It is accepted by the Minister that the claim regarding the appellant’s siblings being granted protection in other countries was information which was credible, personal, and not previously known. Properly analysed, the only issue that arises on limb 2 was whether the information, had it been known, may have affected the consideration of the claim made.
2. The Authority dealt with the issue of the new information in its reasons at [8] as follows:

I accept that the claim about the applicant’s siblings being granted protection in other countries is credible personal information. However, whether a person does or does not meet the requirements to be granted protection is based on the facts of each individual case. **The mere fact that some of the applicant’s siblings have been granted protection on the basis the applicant claims is the same as his own claims, has no probative value when assessing the applicant’s claims for protection in Australia**. In those circumstances, I am not satisfied that there are exceptional circumstances to justify considering the new information and I have not had regard to it.

(emphasis added)

1. Turning to the primary judge’s reasoning, his Honour expressed concern as to this aspect of the Authority’s reasoning. When dealing with the emphasised part of the above quotation, the primary judge said at [26]-[28]:

I raised with the representatives at the trial my difficulty in interpreting [8] of the Authority’s reasons. In particular, it is not clear what part of that paragraph relates to s.473DD(b)(ii) and what part (apart from the last sentence) relates to s.473DD(a). If the Authority was purporting to make a positive finding for the purposes of s.473DD(b)(ii) and then in consequence a negative finding for the purposes of s.473DD(a), the reasoning would not make sense. That is because such a finding would have necessarily carried with it the finding that the information, had it been known to the Minister and his delegate, may have affected the delegate’s consideration of the applicant’s claims. That would necessarily provide some probative weight to the information. It would be contradictory to say that the information had no probative value.

Counsel for the Minister submitted orally that the better view of [8] is that it does not purport to make any finding for the purposes of s.473DD(b)(ii), notwithstanding the reference to “credible personal information” but, rather, only leads to a negative finding for the purposes of s.473DD(a). Viewed in that way, the paragraph is coherent and I accept that that is the preferable interpretation.

I agree with the Minister’s submissions in relation to the first ground.

1. Although not directly identified in the ground of appeal, in his written submissions to the Court, the appellant contends that the primary judge was incorrect to adopt the interpretation of the relevant part of the Authority’s reasons urged upon him by the Minister’s counsel. In summary, it was contended that the Authority’s reasons state both that: (a) “I am not satisfied that there are exceptional circumstances to justify considering the new information”; and (b) “the [new information] has no probative value”.
2. I confess I do find the reasoning of the primary judge difficult to follow. As explained above, the licit approach was for the Authority to only consider new information if it was satisfied of both limb 1 and limb 2; that is, when considering the controversial aspects of the new information in this case, if it was satisfied that there were exceptional circumstances which justified its consideration, and the new information was credible personal information which was not previously known and which may have affected the consideration of the appellant’s claims.
3. In understanding how the Authority expressed itself, it is important to recall that limb 1 and limb 2 cannot be placed into hermetically sealed boxes. As the High Court (Gageler, Keane and Nettle JJ) said in *M174/2016* at 609 [30]:

Quite what will amount to exceptional circumstances is inherently incapable of exhaustive statement. The word “exceptional” in such a context, is not a term of art but “an ordinary, familiar English adjective”: “[t]o be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered

1. The Full Court of this Court has since explained that despite the requirements in s 473DD being cumulative, they may overlap to some extent, and the question of whether new information is credible personal information which may properly have affected the consideration of the appellant’s claims is relevant to the Authority’s consideration of whether there were “exceptional circumstances” for the purposes of s 473DD(a): *Minister for Immigration and Border Protection v CQW17* [2018] FCAFC 110; (2018) 264 FCR 249at 259-260 [47], [50], [51] and [54]. Having reviewed the relevant authorities, it seems to me plain that what the Authority was doing at [8] was following the approach outlined in these authorities and taking into account what parts of limb 2 it considered to be relevant to the question of whether exceptional circumstances existed.
2. Given the Authority was entitled to take an assessment of probative value into account when assessing “exceptional circumstances” the meaning of [8] of the Authority’s reasons becomes clear. Notwithstanding the difficulty, with respect, in following what the primary judge said at [26]-[28], the real issue is whether taking the question of probative value into account in assessing limb 1 reveals jurisdictional error? It does not, and I am satisfied that the Authority considered both limb 1 and limb 2 appropriately.
3. Moving on from this argument developed in submissions, as the particularised ground of appeal makes plain, the appellant submitted that in any event, the Authority’s finding as to probative value was incorrect, and therefore led the Authority into error since it relied upon an incorrect proposition in finding there were no exceptional circumstances. The Appellant’s submission was made on the basis that the Authority’s analysis at [8] (extracted at [10] above):

… makes it plain that, in the [Authority’s] view, in **no** circumstances could evidence that some of an applicant’s siblings have been granted protection on the basis an applicant’s claims is the same as his own claims, have probative value when assessing the applicant’s claims for protection in Australia…

Accordingly, in circumstances where a sibling’s claims are accepted as being the same as the applicant’s, any evidence which may assist in determining the applicant’s application could never be considered.

…

The gravamen implicit in the [Authority]’s decision is that evidence some of an applicant’s siblings have been granted protection in Australia and elsewhere on the basis an applicant’s claims is the same as his own claims could not have affected the consideration of the referred applicant’s claims. (S. 473DD(b)(ii) 2nd limb).

(emphasis in original)

1. It seems to me, however, that a fair reading of the relevant paragraph of the reasons, with an eye not attuned to error, is that the Authority was only expressing the proposition as to a lack of probative value in relation to the *particular applicant before it,* and there is no reason for reading that paragraph as purporting to address any broader supposed principle applicable indiscriminately to all cases. Focussing upon the actual conclusion drawn by the Authority, the appellant has not attempted to prove with any specificity how such a finding was not open in the circumstances of his application. It was a matter for the Authority to assess the probative value of the new information before it. I do not consider that the appellant’s submission accurately characterises the Authority’s analysis and this is sufficient to reject the ground of appeal.
2. Before leaving this point, the primary judge did go on, at [30], to make the general observation that “what another decision-maker, considering different material associated with a different visa applicant, may have found in a different protection visa case **cannot** have influenced the Authority in the conduct of its review of the delegate’s decision” (emphasis added). This comment was the subject of some discussion during oral submissions. For my part this obiter observation is expressed at too high a level of generality but this goes nowhere given that the Authority’s reasoning does not contain jurisdictional error.
3. It follows the appeal must be dismissed with costs.

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| I certify that the preceding twenty (20) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Lee. |

Associate:

Dated: 7 January 2020