FEDERAL COURT OF AUSTRALIA

CEE17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 359

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| Appeal from: | *CEE17 v Minister for Immigration & Anor* [2019] FCCA 2621  |
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| File number: | VID 1113 of 2019 |
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| Judge: | **BEACH J** |
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| Date of judgment: | 17 March 2020 |
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| Catchwords: | **MIGRATION** – refusal of safe haven visa – judicial review by Federal Circuit Court – appeal dismissed  |
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| Legislation: | *Migration Act 1958* (Cth) ss 36(2)(a), 36(2)(aa), 473CB, 473DA(1), 473DB(1), 473DC(3)  |
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| Cases cited: | *DCP16 v Minister for Immigration and Border Protection* [2019] FCAFC 91*DUZ17 v Minister for Home Affairs* [2019] FCA 1593  |
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| Date of hearing: | 13 March 2020 |
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| Registry: | Victoria |
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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: | 21 |
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| Counsel for the Appellant: | The Appellant appeared in person with the assistance of a Tamil interpreter |
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| Counsel for the First Respondent: | Mr N Swan  |
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| Solicitor for the First Respondent: | Mills Oakley Lawyers  |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice save as to costs |

ORDERS

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|  | VID 1113 of 2019 |
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| BETWEEN: | CEE17Appellant |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRSFirst RespondentIMMIGRATION ASSESSMENT AUTHORITY Second Respondent |

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| JUDGE: | BEACH J |
| DATE OF ORDER: | 17 March 2020 |

THE COURT ORDERS THAT:

1. The name of the first respondent be changed to “Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs”.
2. The appeal be dismissed.
3. The appellant pay the first respondent’s costs of and incidental to the appeal.

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

REASONS FOR JUDGMENT

BEACH J:

1. The appellant appeals from a judgment of the Federal Circuit Court dismissing his application for judicial review of a decision of the Immigration Assessment Authority which had affirmed a decision of a delegate of the Minister refusing to grant to the appellant a Safe Haven Enterprise Visa (the visa). Now although the appellant had suggested in his material that an extension of time within which to appeal was required, this is not necessary.
2. For the reasons that follow I would dismiss his appeal.
3. The appellant is a citizen of Sri Lanka born in 1990. He first arrived in Australia on 21 October 2012 as an unauthorised maritime arrival. On 7 April 2016 he applied for the visa.
4. In support of his application for the visa, the appellant raised the following matters. First, he is of Tamil ethnicity and Hindu religion. Second, when he was young, the Liberation Tigers of Tamil Eelam (LTTE) forced him to stay in their camp and do manual labour tasks for them on about four occasions. Third, he and his family were displaced between February and May 2007. On return, in June 2007, he was detained by the Army, asked about work he had done for the LTTE, and beaten. He was arrested by the Army on two further occasions. Fourth, at the end of 2011, cattle went missing from the appellant’s family’s farm. He attempted to lodge a complaint with the police, but they refused to accept it. The next day, his father received a call from the police stating that the appellant was causing trouble. A few days later, people in a van came looking for the appellant. The appellant went into hiding and left Sri Lanka. Fifth, the appellant raised other matters concerning events that he said had occurred since he left Sri Lanka.
5. On 20 March 2017, a delegate of the Minister refused to grant to the appellant the visa. On 23 March 2017, the delegate’s decision was referred to the Authority for review. On 5 May 2017, the Authority affirmed the delegate’s decision.
6. The Authority had regard to the material provided to it by the Secretary pursuant to s 473CB of the *Migration Act 1958* (Cth) (the Act); no further material was obtained or received.
7. The Authority accepted that the appellant grew up in the Batticaloa District in Sri Lanka, which was under LTTE control for some time, that he was forced to do manual labour for the LTTE on four occasions, and that he was given LTTE civil defence training. It accepted that his family were displaced, as claimed, and that on return, he was detained and beaten by the Army. It also accepted that cattle had gone missing from the family farm in 2011, that the appellant attempted to report this matter to the police who refused to accept the complaint, and that soon after calls were made to his father about the appellant and that people in a van came looking for the appellant. It further accepted that the appellant went to hide with his aunt and then fled Sri Lanka in 2012.
8. But the Authority held concerns about the truthfulness of the appellant’s other claims. It did not accept his claim that Sinhalese persons threw stones at his father. The Authority also did not accept the appellant’s claims that enquiries had been made about him when he was in hiding at his aunt’s house. The Authority also did not accept the appellant’s claims about events in Sri Lanka after his arrival in Australia. The Authority did not consider it plausible that the police would have maintained an ongoing interest in the appellant, especially after two and a half years. It also found other aspects of the appellant’s claims about these events to lack credibility. It further considered, given the country information as to the prevalence of document fraud in Sri Lanka, that the police letter, hospital report and written police complaint relied on by the appellant were not genuine. The Authority rejected the appellant’s claims that his father had made enquiries in Sri Lanka about whether it was safe for the appellant to return to Sri Lanka, that a letter was received requiring the appellant to attend the police station, and that men had visited the appellant’s family home looking for him and had attacked his father.
9. The Authority accepted that the appellant and his family had suffered some harassment from Sinhalese persons, but it was not satisfied that this amounted to serious harm. Further, it did not accept that the appellant was at any risk of harm on account of any links to the LTTE or any imputed political opinion. Further, it was not satisfied that the appellant had a reputation with the authorities as a trouble maker or opponent of the government, and found that the appellant did not have a profile that suggested that he was at risk of harm from the authorities, or that the authorities would have any adverse interest in him on return. The Authority was also not satisfied that the appellant faced a real chance of persecution on account of being a failed asylum seeker who had departed Sri Lanka illegally.
10. Accordingly, the Authority was not satisfied that the appellant met the criterion of s 36(2)(a) of the Act. Further, the Authority was also not satisfied that the appellant met the criterion of s 36(2)(aa) of the Act. Accordingly, the Authority affirmed the delegate’s decision.
11. The appellant sought judicial review. Before the primary judge, the appellant advanced four grounds of review. The first ground alleged that the Authority acted unreasonably by not inviting the appellant to an interview or obtaining new information pursuant to s 473DC(3) of the Act. The primary judge rejected this allegation, observing that the Authority’s adverse findings against the appellant arose because inter-alia there were inconsistencies in the appellant’s evidence to the delegate and that parts of his claims were implausible. So, according to the primary judge, it was not legally unreasonable for the Authority to make the relevant findings without inviting the appellant to an interview or obtaining further information. The second ground related to the first ground and was dismissed for similar reasons. The third ground alleged that the Authority had rejected, without considering, the appellant’s claim that the authorities visited his father three or four times since the appellant left Sri Lanka. His Honour rejected this allegation, observing that the Authority had not accepted any of the appellant’s claims about events that had allegedly occurred after he departed Sri Lanka. Finally, his Honour rejected the fourth ground on the basis that the Authority’s non-acceptance of some of the appellant’s claims did have an evident and intelligible justification and were findings that a rational and logical decision maker could have reached.
12. The appellant’s notice of appeal before me in essence seeks to re-agitate the matters raised by the appellant before the primary judge. No written submissions were filed by the appellant on the present appeal, who I note had been legally represented below and in this Court until 25 February 2020. The appellant nevertheless indicated to me that he relied on his written submissions below which I have obtained and read.
13. The first ground asserts that the Authority erred by not inviting the appellant to an interview or seeking further information from him or his father pursuant to s 473DC(3) of the Act, in circumstances where the appellant’s credibility was in issue before the Authority and the Authority was proposing to make adverse credibility findings. Presumably legal unreasonableness is the relevant jurisdictional error being asserted.
14. Now the Authority’s review was conducted pursuant to Part 7AA of the Act, and on the ground asserted I would refer to what I said in *DUZ17 v Minister for Home Affairs* [2019] FCA 1593 at [40] to [43]. The primary requirement is that the Authority is to review decisions referred to it by considering the review materials provided to it on the papers, without accepting or requesting new information and without interviewing the referred applicant (s 473DB(1)). Part 7AA contemplates that the Authority will evaluate for itself the material before the delegate. Moreover, there is no obligation on the Authority to notify the referred applicant that it is considering taking a different view to the material than the delegate did, or to inform the referred applicant of specific reservations it holds about his case and provide the referred applicant with an opportunity to respond to them. Moreover, even if the Authority undertaking an assessment of inconsistencies in a referred applicant’s narrative identified inconsistencies or other implausibilities in the referred applicant’s evidence that the delegate did not himself identify, this is not of itself sufficient to make a failure to consider exercising or failing to exercise the power under s 473DC(3) to invite comment or further information from the referred applicant legally unreasonable. But in any event, in the present case there is no substantive difference in the assessment between the delegate and the Authority on the principal questions. I am not dealing with the type of scenario I discussed in *DUZ17* at [44] to [49].
15. On a fair reading of the Authority’s reasons, it did not accept some of the appellant’s claims because they had been raised late, involved inconsistent and changing evidence being given to the delegate about them, were inherently implausible, and because of country information which indicated that document fraud was prevalent in Sri Lanka. Those findings were reached on the basis of the Authority conducting an assessment of the appellant’s claims and evidence for itself, as it was required to do. There was no obligation on the Authority to seek comment from the appellant or further information from him or his father about the concerns it held. And there was nothing legally unreasonable in it not doing so. The appellant’s first ground must be rejected.
16. The second ground asserts that the Authority denied the appellant procedural fairness for the same reasons as identified in the first ground. But similarly, this ground cannot succeed. Moreover, there are other difficulties with seeking to breathe independent life into this ground given the stipulation in s 473DA(1).
17. The third ground asserts that the Authority failed to consider the appellant’s claim that the authorities came on three to four occasions to question his father about him after his departure from Sri Lanka. Now at [15], the Authority observed that it had concerns about the truthfulness of some of the appellant’s claims. Then at [18] the Authority stated that it did not accept the appellant’s claims about subsequent events in Sri Lanka after he came to Australia. And it stated that it rejected the appellant’s claim that after he left Sri Lanka there were three or four occasions when men visited his family’s home to enquire about his whereabouts.
18. I would also note the following. In the appellant’s statement made on 7 April 2016, he clearly detailed his claims ([15] to [18]) concerning 2014 and events involving his father. The Authority clearly considered these matters and discussed them in its reasons (at [9] and [10]). Further, as I have indicated, at [18] it said, inter-alia:

I reject as fabrications the applicant’s claims that his father made enquiries about whether it was safe for him to return in 2014; that as a result of those enquiries his father received a letter from the police, via the GS, asking the applicant to attend an interview on 14 March 2014; that on the night of 17 March 2013 [sic] two men wearing helmets went to his family home, asked after the applicant and beat up his father and his father was hospitalised as a result; that his father attended the police station on 26 March 2014 and reported the assault of 17 March 2014; and that after he left Sri Lanka there were three or four occasions when men visited his family’s home to enquire about his whereabouts.

1. Accordingly, the Authority did turn its mind to his claims and did not accept them or, indeed, any of the claims the appellant made about events occurring in Sri Lanka after his departure (see also the last sentence of [35]). There is no substance to this ground in either of the ways the appellant has expressed it in his notice of appeal.
2. The fourth ground asserts that the Authority fell into jurisdictional error because there was no logically probative evidence and no evident and intelligible justification for its non-acceptance of the appellant’s claims. The relevant principles are not in doubt (see *DCP16 v Minister for Immigration and Border Protection* [2019] FCAFC 91 at [83] to [88] per Beach, O’Callaghan and Anastassiou JJ). The Authority did not accept certain of the appellant’s claims because they had been raised late, involved inconsistent and changing evidence being given about them, and were inherently implausible. Moreover, as to the subsequently produced documents, country information indicated that document fraud was prevalent in Sri Lanka and the produced documents were, given that context, questionable to say the least. Clearly, there was a logical and probative basis for the Authority’s findings. Moreover, to the extent that the appellant brings under this ground an assertion of unreasonableness, there is no substance to that complaint. No error is disclosed as to the Authority’s approach or as to the primary judge’s consideration thereof.
3. The appeal must be dismissed.

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| I certify that the preceding twenty-one (21) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Beach. |

Associate:

Dated: 17 March 2020