FEDERAL COURT OF AUSTRALIA

SZWAQ v Minister for Home Affairs [2018] FCA 1482

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| Appeal from: | *SZWAQ v Minister for Immigration & Anor* [2018] FCCA 555 |
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| File number: | NSD 269 of 2018 |
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| Judge: | **LEE J** |
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| Date of judgment: | 10 September 2018 |
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| Catchwords: | **MIGRATION** – appeal from decision of the Federal Circuit Court; whether Tribunal failed to properly consider the appellant’s claim |
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| Date of hearing: | 16 August 2018, 10 September 2018 |
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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 First Respondent: | Mr L Leerdam |
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| Solicitor for the First Respondent: | DLA Piper Australia |
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| Counsel for the Second Respondent: | The second respondent entered a submitting appearance, save as to costs |
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| Solicitor for the Second Respondent: | DLA Piper Australia |

ORDERS

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|  | | NSD 269 of 2018 |
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| BETWEEN: | SZWAQ  Appellant | |
| AND: | MINISTER FOR HOME AFFAIRS  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | LEE J |
| DATE OF ORDER: | 10 SEPTEMBER 2018 |

THE COURT ORDERS THAT:

1. The appeal is dismissed with costs.

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. The appellant is a Sri Lankan citizen who arrived in Australia in June 2012 and who, in November that year, lodged an application for a protection visa. In summary his claims as set out in the statement accompanying his application were that: (a) the appellant and his family suffered past harassment by the Sri Lankan army which led to the appellant fleeing to India in 1990 (when he was 10 years old); (b) the appellant’s brother also left to Australia and is now an Australian permanent resident; (c) the appellant feared harm in Sri Lanka because of his Tamil ethnicity, his imputed political opinion (including from his association with his uncle, a Liberation Tigers of Tamil Eelam (**LTTE**) member), and his status as a failed Tamil asylum seeker.
2. The application for a protection visa was refused by a delegate of the first respondent, the Minister for Home Affairs (formerly the Minister for Immigration), in August 2013. In December 2014, the second respondent, the Administrative Appeals Tribunal (formerly the Refugee Review Tribunal) (**Tribunal**), made a decision affirming the decision under review. It will be necessary to return to the reasons of the Tribunal below.
3. The appellant made an application in the Federal Circuit Court for judicial review of the Tribunal’s decision. The primary judge dismissed the application with costs on 7 February 2018. The current appeal is, of course, an appeal from the decision of the Federal Circuit Court.
4. The notice of appeal filed in February 2018 identifies three grounds of appeal which are as follows:
5. The appellant believes that the honourable judge of the Federal Circuit Court errored/overlooked in making his findings in relation to the issues that was appealed (the critical issues about protection claims)) which issues the Refugee Review Tribunal had originally failed to consider by applying the relevant laws, regulations and conventions and case laws
6. The error in law i.e. not making the correct application of protection obligations of Australia in terms of the Sec 36 of Migration Act or the complimentary protection provisions by the delegate of Minister for Immigration and Border Protection and by the Refugee Review Tribunal in its review process, was not looked into by the honourable Judge of the Federal Circuit court
7. Refugee review Tribunal's failure of not exercising its review power properly was ignored by the honourable judge who heard the appeal.

(Uncorrected).

1. Unlike the position before the primary judge, the appellant has no legal representation before this Court. In these circumstances, regrettably, the notice of appeal does not provide any particularisation of the errors alleged by the appellant to have affected the decision of the primary judge.
2. Before the primary judge, detailed written submissions were filed on behalf of the appellant. These materials were not included in the appeal book when the matter was initially called on for hearing. I adjourned the current appeal when it came before me on 16 August 2018 for a period in order (among other things) to allow me to access these submssions and other materials filed in the Federal Circuit Court proceeding.
3. When obtained, the submissions filed in the Federal Circuit Court proceeding indicated that the appellant’s then counsel received instructions to prepare submissions and appear for the appellant on a direct access basis shortly before the hearing. A further amended application was filed and the primary judge allowed those grounds to be advanced at the hearing. They were as follows:

**[Ground one**:] The Tribunal dealt with the applicant’s claim on the basis that “Issues relating to Tamil race, political opinion and being a returned asylum seeker are all integrally connected and these will be considered together” (CB223, para 40) and assessed his claim “with specific respect to his Tamil race and associated with that an imputation of political – LTTE – connections and as a failed asylum seeker” (CB 233, para 66). A distinct integer of the applicant’s claim was that he fears persecution by reason of his direct family links to the LTTE, not merely imputation of LTTE involvement arising from his Tamil ethnicity. The Tribunal failed to independently consider this integer of the applicant’s claim.

**[Ground two**:] The Tribunal accepted that the applicant’s uncle was a member of the LTTE who disappeared in 1985 and “reappeared in India”: CB223, para 38. The applicant became aware that his uncle was in Chennai: CB49, para 13 and CB221, para 25. Although the Tribunal accepted the applicant’s uncle no longer held pro-LTTE views, the Tribunal did not consider whether he may still be of interest to the Sri Lankan authorities. In the circumstances a question for the Tribunal to consider was whether the applicant, if required to return to Sri Lanka, would be interrogated about his uncle’s whereabouts and suffer harm during such interrogation or as a result of his knowledge of his uncle’s whereabouts. This question arose squarely on the materials before the Tribunal. The Tribunal failed to deal with this aspect of the applicant’s claim.

1. The primary judge rejected Ground 1 at [10] where his Honour noted:

In my view, it is apparent from a consideration of paras.76 and 77 of the Tribunal’s decision that the applicant’s claim to fear persecution by reason of his direct family links to the LTTE was not only identified by the Tribunal but discussed in some detail. At the risk of doing a disservice to the very articulate submissions of Mr Kulkarni who appeared for the applicant, I believe that those paragraphs provide an answer to the allegation made in the first ground of the further amended application.

1. His Honour then turned to Ground 2 and his Honour’s reasons for dismissing this ground are set out at [11]-[13] as follows:

The substance of the second ground of the further amended application is that the Tribunal failed to consider a claim which, although not expressed, was one which it ought to have considered in accordance with the principles discussed in *NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No.2)* [2004] FCAFC 263; (2004) 144 FCR 1. The applicant argued that, when looked at as a whole, it was apparent when he was before the Tribunal that a claim was available to him that:

1. the Sri Lankan Government would be interested to know the whereabouts of his uncle who was, by that time, living in Chennai; and
2. the authorities were likely to interrogate him in relation to that matter, such an intention being evidenced by the fact that, according to him, in 1985 his father had been severely mistreated by the Sri Lankan authorities and another uncle had disappeared. It may be presumed that the allegation is that that uncle was murdered.

The difficulty for the applicant in making that argument is that too many disparate strands of different parts of the claim need to be knitted together to create the claim propounded. As the Full Court said in *NABE* at 19 [58]:

*... a claim not expressly advanced will attract the review obligation of the Tribunal when it is apparent on the face of the material before the Tribunal. Such a claim will not depend for its exposure on constructive or creative activity by the Tribunal.*

The way the applicant presented his case to the Tribunal does not suggest that a claim of the sort for which he contended was apparent on the face of the material, such that perceiving it did not require constructive or creative activity. The Tribunal did not fail in its duty by not considering a claim which it ought to have considered.

1. It is fair to say that the reasons of the primary judge are expressed economically. In relation to Ground 2, it appears that his Honour rejected the contention made by the appellant’s counsel that the Tribunal had failed to consider whether the appellant, if required to return to Sri Lanka, would be interrogated “about his uncle’s whereabouts and suffer harm during such interrogation or as a result of his knowledge of the uncle’s whereabouts”.
2. At the initial hearing of this appeal on 16 August 2018, I expressed the preliminary view that I considered there to be some tension between the way in which the primary judge dealt with Ground 1, in particular, his Honour’s consideration of paragraphs [76] and [77] of the Tribunal’s decision, and the notion that the claim referred to in Ground 2 was not advanced before the Tribunal. The solicitor who appeared on behalf of the Minister at the initial hearing of the appeal on 16 August 2018, submitted that the substance of Ground 2 (that is, that the Tribunal failed to consider the claim in relation to the appellant’s uncle) had been the subject of detailed findings in the Tribunal’s decision at [76]-[77], which the primary Judge had extracted in his judgment at [9]. The solicitor submitted that, in those identified paragraphs of the Tribunal’s decision, the Tribunal had in fact determined the substance of Ground 2.
3. Although this contention was initially put on the basis that such a process of reasoning was evident from the primary judge’s decision, when I raised some scepticism as to this contention, the argument, as it developed, turned into a submission that it would be futile to send the matter back in the event that I considered that the primary judge’s reasons identified an inadequate basis for determining Ground 2. Put another way, what eventually was submitted was that even if I was not persuaded that the primary judge had dealt adequately with Ground 2, the decision below should be affirmed on grounds in addition to those expressly referred to by his Honour.
4. In these circumstances I considered that if such an argument was to be maintained, it was necessary to understand, with precision, what was put by Counsel before the primary Judge, and that, if the Minister was to contend the decision should be affirmed on other grounds, a notice of contention should be filed. In addition to being provided with the material filed by counsel for the appellant in the Federal Circuit Court proceeding, a notice of contention was filed on 6 September 2018.
5. The starting point for understanding the way in which the primary judge dealt with Ground 2 is by reference to the outline of submissions in the Federal Circuit Proceeding. Counsel for the appellant (then the applicant) submitted:

Part of the applicant’s claim is that he fears persecution by reason of his direct family links to the LTTE, including his uncle’s previous membership of the LTTE. The applicant’s father was questioned and beaten by the Sri Lankan army and another uncle was taken for questioning by the Sri Lankan army and never returned in connection with the uncle’s disappearance … Although the Tribunal accepted the applicant’s claim that his uncle no longer held pro-LTTE views, the Tribunal did not consider whether the uncle may still be of interest to the Sri Lanka authorities. Nothing in the material suggests that the uncle had ceased being of interest to the Sri Lankan authorities.

In the circumstances a question for the Tribunal to consider was whether the applicant, if required to return to Sri Lanka, would be interrogated about his uncle’s whereabouts and suffer harm during such interrogation or as the result of his knowledge of his uncle’s whereabouts.

1. What the Tribunal said relevant to this part of the appellant’s claim is evident in paragraphs [74]–[77] of the Tribunal’s reasons (the primary judge extracted paragraphs [76] and [77]). Those paragraphs provide as follows:

As the independent information makes clear, the systems of the Sri Lankan state are quite sophisticated and therefore there is a possibility that they may pick up the fact that the applicant's uncle and father had involvement with the LTTE. Although the events of the applicant's father's and uncle's association with the LTTE occurred decades ago, the Tribunal proceeds on the basis that the authorities will establish the link.

The Tribunal notes the decision in *SQPA v Minister for Immigration and Anor* [2012] FMCA 123 (29 March 2012) in which Driver FM indicated that it was necessary to look at both the process of interrogation that a Tamil returnee may face in addition to the outcome bearing in mind that the harm could occur during the process of convincing authorities that the person was not an LTTE member.

The Tribunal acknowledges that if his uncle's and father's involvement in the LTTE is identified, then this may cause particular questioning of the applicant on the subject. The applicant is likely to indicate to the authorities that he was 10 years old when he left Sri Lanka, that he has lived in refugee camps in Tamil Nadu ever since, that he has and has never had any LTTE involvement or provided any support for the LTTE cause. He will indicate that his key priority has been to survive in India and provide support to his family. He will indicate that his family have all lived in India since 1990 and have not provided any support for the LTTE since then. The applicant will be in a position to verify his status as a long standing refugee in India with documentation such as his Sri Lankan refugee identity card and schooling certificate from India.

The Tribunal is of the view that the applicant will be able to establish his bona fides and convince the authorities that he is not a pro-separatist advocate or at risk to the unity of the Sri Lankan state with relative ease. The independent information already referred to indicates that the key priority of the Sri Lankan government is to prevent pro-separatist activity. The Tribunal does not consider that the applicant presents a risk profile, particularly given that he left Sri Lanka at the age of 10, such that he would be at real chance of serious harm during the process of questioning as to his identity, background and intentions. The authorities will well recognise that the applicant, coming as he does from the North of the country during the period in which his area was occupied by the LTTE, will have had family connections to the LTTE. The chance that they will now have an adverse interest in the applicant that would result in him facing serious harm as a result of those connections some 30 years ago is remote. While it is the case that the applicant has family links to LTTE members in terms of UNHCR guidelines, the Tribunal considers that those links are too attenuated and in the distant past to create a real chance of the applicant suffering harm as a result, or as a result of the questioning process.

1. As I noted above at [9], Ground 2 was dismissed by the primary judge on the basis that “too many disparate strands of the different parts of the claim need to be knitted together to create the claim propounded” (see [12] of the primary judge’s reasons) and that “the Tribunal did not fail in its duty by not considering a claim which it ought to have considered” (see [13] of the primary judge’s reasons). The problem with these conclusions is that it seems to me it is fairly clear from the appellant’s submissions that the appellant did expressly claim that he had feared persecution by reason of his uncle’s previous membership of the LTTE and that he did contend that his uncle may still be of interest to the Sri Lankan authorities.
2. The submission made by the appellant in respect of Ground 1 was that the Tribunal treated the “links to the LTTE” ground as being based only on imputation of LTTE involvement as arising from the appellant’s Tamil ethnicity, rather than also as being based on his direct family links. Ground 1 maintained that by failing to deal with the distinct grounds alleged by the appellant separately, the Tribunal failed to consider independently the appellant’s claim that he fears persecution by reason of his direct family links to the LTTE. As can be seen, expressed in this way, Ground 1 and Ground 2 are closely linked. It seems to me clear that, although there was a distinct claim that the appellant feared persecution by reason of his direct family links to the LTTE, as the extract of the Tribunal’s reasons above at [11] make plain, the Tribunal formed the view that:
   1. any family association with the LTTE, including that of the uncle, occurred decades ago;
   2. if the appellant’s family association was identified, this may cause some questioning of the appellant;
   3. the appellant would be able to indicate a number of matters including that he has never had any personal involvement in the LTTE or provided any support for the LTTE, that his family have all lived in India since 1990 and have not provided any support for the LTTE since then; and
   4. the appellant will be able to verify his status as a long standing refugee in India with documentation.
3. In those circumstances I do not, with respect, agree with the conclusion of the primary judge that there was no obligation upon the Tribunal to deal with the claim. Having said this, my task is to determine whether the primary judge’s determination was affected by appealable error as alleged and also to consider whether relief should be granted. Notwithstanding that I do consider that the reasons the primary judge gave for rejecting Ground 2 were erroneous, it is clear that the detailed findings at [76]-[77] of the Tribunal’s decision, in which the Tribunal made findings about the appellant’s “direct family links to the LTTE”, were sufficient to deal with the claim advanced before the Tribunal. This point was raised by the Minister in the notice of contention.
4. As can be seen from [4] above, the grounds of appeal where expressed at a high level of generality and were unparticularised. Other than as indicated above, there does not seem to me to be any identifiable error in the way in which the primary judge dealt with the application.
5. Even though the appellate jurisdiction of this court is concerned with the correction of error and that it would potentially erode the appellate nature of this court’s jurisdiction if orders remitting proceedings to the Federal Circuit Court were not usually made in the event that error is shown in a Federal Circuit Court judgment, such an approach, in the circumstances of this case would be futile. In these circumstances, the appeal is 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: 2 October 2018