FEDERAL COURT OF AUSTRALIA

CUF18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 144

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| Appeal from: | *CUF18 & Anor v Minister for Home Affairs & Anor* [2019] FCCA 2505 |
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| File number: | WAD 497 of 2019 |
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| Judge: | **MCKERRACHER J** |
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| Date of judgment: | 18 February 2020 |
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| Catchwords: | **MIGRATION** - appeal from the Federal Circuit Court – judicial review of a decision of the Immigration Assessment Authority – whether country information can indicate a serious problem generally which is also worse in some areas – conclusion was rationally open – no real chance of harm. |
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| Cases cited: | *DHW17 v Minister for Home Affairs* [2019] FCA 985  *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611  *NAHI v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 10 |
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| Date of hearing: | 11 February 2020 |
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| Registry: | Western Australia |
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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: | 22 |
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| Counsel for the Appellants: | Mr N Draper |
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| Solicitor for the Appellants: | D’Angelo Legal |
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| Counsel for the First Respondent: | Mr P Macliver |
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| Solicitor for the First Respondent: | Sparke Helmore |
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| Counsel for the Second Respondent: | The Second Respondent submits to any order of the Court, save as to the question of costs |

ORDERS

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|  | | WAD 497 of 2019 |
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| BETWEEN: | CUF18  First Appellant  CUD18  Second Appellant | |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS  First Respondent  IMMIGRATION ASSESSMENT AUTHORITY  Second Respondent | |

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| JUDGE: | MCKERRACHER J |
| DATE OF ORDER: | 18 FEBRUARY 2020 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellants pay the costs of the first respondent, fixed at $4,500.

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

REASONS FOR JUDGMENT

MCKERRACHER J:

1. The appellants are citizens of Sri Lanka. They arrived in Australia by boat in July 2013 as unauthorised maritime arrivals, as that expression is understood under the *Migration Act 1958* (Cth). The appellants had formerly resided in India. In February 2017, they applied for a Safe Haven Enterprise visa (**SHEV**). Their applications were supported by a submission from the appellants’ migration agent, written statements by the appellants and other supporting documents.
2. The appellants attended an interview with a **delegate** of the **Minister** for Immigration, Citizenship, Migrant Services and Multicultural Affairs. The migration agent subsequently provided a further submission on country information relating to Sri Lanka. In July 2017, the delegate refused to grant a SHEV. The delegate’s decision was referred to the Immigration Assessment **Authority**. The appellants’ migration agent provided a submission to the Authority in relation to both appellants. Also provided were country information reports which were referred to in the written submissions.
3. The reasons the appellants gave for fearing return to Sri Lanka were summarised by the Authority as follows (at [5]-[6]):

5. [The first appellant’s] claims can be summarised. as follows:

* He was born in 1989 in … the Eastern Province of Sri Lanka, an area formerly controlled by the Liberation Tigers of Tamil Elam (LTTE). As a result of the conflict and persecution, and owing to the civil conflict in Sri Lanka, he fled with his parents to India in or around 1995, where he remained living until coming to Australia in 2013.
* He fears harm if he was returned to Sri Lanka because of his father’s work history as a driver for a man who was an LTTE supporter in Sri Lanka.
* His family continues to reside in India. He has no family support in Sri Lanka and is vulnerable because of his long absence from the country. If he is detained in Sri Lanka, there is no one who can vouch for his identity, pay bail monies for his release or negotiate with the authorities on his behalf.
* He would also face extreme financial hardship. He would be unable to find employment or accommodation due to his ethnicity, lack of work experience and general unfamiliarity with Sri Lanka. Tamils are not afforded basic human rights and do not have the power to change the situation.
* He also holds fear for the safety of his wife, [the second appellant]. He claims she has never lived in Sri Lanka and fears she would be the target of harassment and sexual assault by the security forces there.
* If he is returned to Sri Lanka, he will be arrested, tortured and killed by the Sri Lankan Army because he will be suspected of being involved in the LTTE because of his father’s work history as a driver for LTTE supporters, because he lived in an Indian refugee camp for the duration of his adult life and Sri Lankan refugees in these camps are often suspected of being LTTE members or sympathisers, and because he sought asylum abroad.

6. [The second appellant’s] claims:

* She is an Indian born Tamil woman who has never travelled to Sri Lanka. Her parents fled Sri Lanka due to the hardships of the civil war.
* Her father worked as a … and would build … for … LTTE soldiers and was targeted as a result.
* As a woman, she would be a greater risk if she was forced to relocate to Sri Lanka with her husband. She does not believe her husband alone would be able to keep her safe. She has no other family in Sri Lanka to assist her. She believes she will be isolated as a foreigner because she will have a different Tamil accent, drawing further unwanted attention from the … authorities. As a woman she will be subjected to physical, mental and sexual torture.

1. In April 2018, the Authority affirmed the decision of the delegate. The appellants lodged an application to the **Federal Circuit Court** of Australia seeking judicial review of the Authority’s decision.

# BEFORE THE FEDERAL CIRCUIT COURT

1. An amended application was filed in the Federal Circuit Court containing the following ground:

1. The Authority made a jurisdictional error in that it unreasonably concluded and/or addressed the wrong question in concluding that the [appellant] does not have a well-founded fear of persecution.

***Particulars***

a. The Authority failed to consider, in making a choice, on a reasonable basis, as to what of the conflicting information to accept and which of that information was reliable in respect of sexual abuse and discrimination in Sri Lanka;

b. The Authority failed to consider, in making a choice on a reasonable basis all the relevant country information before it regarding sexual abuse and discrimination in Sri Lanka.

1. The appellants were represented by a solicitor at the hearing before the Federal Circuit Court.
2. In August 2019, the primary judge dismissed the application and the appellants appealed to this Court.

# GROUNDS OF APPEAL

1. The notice of appeal is in similar terms:

The learned Federal Circuit Court Judge erred in law by failing to conclude that the [Authority] erred in law by:

1. Failing to direct itself that it had an obligation to consider, in making a choice, on a reasonable basis, as to what of conflicting information to accept and which of that information was reliable; and

2. Failing to direct itself that it had an obligation to consider, in making a choice, on a reasonable basis, of all the relevant country information before it[.]

# THE APPELLANTS’ SUBMISSIONS

## Ground 1 – error of law and the primary judge’s failure to conclude that the Authority erred in law by failing to direct itself to have an obligation to consider what of conflicting information to accept and which of that information was reliable

1. In written submissions, the appellants argued that:

14. The Authority did not direct itself in such way as to arrive at a rational conclusion as to what country information may establish a well-founded fear, or real chance, of persecution.

15. The Authority, instead, based its conclusion upon an irrational selection of country information to come to a conclusion that as a result of the Appellants personal circumstances a number of ‘triggers’ (marital status, place of residence) exempt or prevented her from suffering significant harm.

16. In the Authority’s direction to itself it did not, for example, direct itself to whether the information that sexual violence is a serious, ongoing social problem and violence against women is a persuasive [sic] social problem throughout Sri Lanka, should be taken into account and lead to the inevitable conclusion that the Appellant had a well-founded fear, or that that there is a ‘real chance’, that she could be a victim of such violence.

17. The test whether there is a real chance of suffering such persecution is not a matter of statistical probability. There may be no ‘certainty’ or ‘real probability’ that, if the Appellant resides in an urban area or is married, she will fall victim to sexual violence and abuse but, given the fact that sexual violence is an ongoing, persuasive [sic] social problem throughout Sri Lanka, the chance is ‘real’, rather than ‘remote’.

18. The Federal Circuit Court Judge erred in reaching the conclusion he did that the conclusions of the Authority as to the Appellant’s personal circumstances, based on the country information, were a sufficiently rational basis upon which to select and weigh the country information and come to a conclusion that the Applicant did not have a well-founded fear of persecution or risk significant harm.

1. The same ground was argued below and dealt with in the reasons of the primary judge: *CUF18 & Anor v Minister for Home Affairs & Anor* [2019] FCCA 2505, where his Honour said (at [23]-[24]):

23. In relation to the [appellants’] arguments concerning the reliability of the country information relied upon by the [Authority] to conclude that the second [appellant] did not face a real risk of harm as a result of her gender, the Court notes the findings of Justice Mortimer in *DHW17* at [41]-[43], where Her Honour stated:

*41 … a decision-maker must act on probative material which is rationally and reasonably capable of supporting the findings that are made: see* Minister for Immigration and Citizenship v SZMDS *[2010] HCA 16; 240 CLR 611 at [124] (Crennan and Bell JJ);* Australian Broadcasting Tribunal v Bond *[1990] HCA 33; 170 CLR 321 at 367-368 (Deane J).*

*42 One reason, in a particular case, that information may not be probative is because it is not objectively “reliable”: for example, if it could be properly characterised as nothing more than government propaganda without a basis in fact.*

*43 Making that assumption in favour of the appellant, on this appeal the ground has insufficient merit because no argument was developed about why the material upon which the Authority based its decision was not “reliable”. The principal source was the 2017 DFAT country report on Sri Lanka. That is a document produced by the Australian Government, which draws on a variety of sources, and expresses opinions which do not bind a decision-maker such as the Authority, but which can certainly be taken into account and adopted if the decision-maker is satisfied it is appropriate to do so in a particular case. Without development, at some considerable level of particularity and by reference to other evidence, about what in that report could be described as not reliable, the argument goes no further than an assertion of general principle without application to the specific circumstances of the Authority’s decision. That is insufficient for the grant of leave where the appeal turns on the application of general principle to the particular reasoning of the Authority.*

24. In this case, **the Court is also not satisfied that the [appellants] have sufficiently articulated why the material relied upon by the [Authority] was not “reliable”**. The [appellants’] simply assert that the country information that was relied upon by the [Authority] is contradictory and inconsistent.

(Emphasis added.)

1. The primary judge concluded (at [33]) that there was nothing to suggest that the information relied upon by the Authority was inconsistent or unreliable. The appellants had failed to particularise with sufficient clarity, if any, what was not reliable or contradictory. There was one example given, which the primary judge rejected (at [26]):

The [appellants] argue that the country information relied upon to conclude that the second [appellant] would not suffer harm was not reliable as it was contradictory – referencing, as an example, the fact that the [Authority] noted that the country information stated that ‘…sexual violence is a serious, ongoing social problem throughout Sri Lanka’, yet the information also indicated that urban areas are safer than rural areas.

1. His Honour’s reasoning cannot be faulted; the information is not contradictory. The problem can be serious generally, while still being more acute in rural areas.
2. The conclusion by the learned primary judge was also correct when his Honour noted (at [34]) that the accuracy of the country information was ultimately a matter for the Authority and that there were three different sources of information that referred to the particular vulnerabilities of women in Sri Lanka.  It could not be said that it was not open to the Authority to consider the information as accurate and to rely upon it.
3. The appellants’ real complaint was that a different conclusion should have been reached in relation to the country information. This is essentially merits review. Merits review is not open to the Federal Circuit Court or this Court.
4. The reasoning of the primary judge was correct for the reasons given.

## Ground 2 – error of law in that the primary judge failed to conclude the Authority erred by failing to direct itself that it had an obligation to consider all of the relevant country information before it

1. Again, this argument was advanced before the primary judge. In reasons (at [35]-[40]), his Honour said:

35. Particular (b) of the applicants’ ground states that the [Authority]:

*failed to consider, in making a choice on a reasonable basis all the relevant country information before it regarding sexual abuse and discrimination in Sri Lanka.*

36. Matters concerning country information are, in almost all circumstances, matters for the relevant decision-maker without interference from the Court. The weight that a decision-maker gives to such information is a matter for it, as part of its fact-finding function. Similarly, the question of the accuracy of the ‘country information’ is one for the decision-maker, not the Court: *NAHI* at [11].

37. The [Authority] is not required to refer in its reasons “to every piece of evidence and every contention made by an applicant”: *Carrascalao v Minister for Immigration & Border Protection* (2017) 252 FCR 352 at [45]; *Applicant WAEE v Minister for Immigration & Multicultural &Indigenous Affairs* (2003) 236 FCR 593 at [47].

38. At [2] of its reasons the [Authority] stated that it had regard to the material referred by the Secretary under s.473CB. The Court notes the statement of Justice Mortimer in *DHW17* at [24] that:

*While a general statement such as this is not determinative, it is also not to be set at nought. For a supervising court to find, against such a statement, that certain materials which should have been considered have not been requires a sufficient probative basis in the remainder of the reasons, and in other evidence before the supervising court.*

39. **Here, no particulars are provided of the alleged relevant country information in relation to sexual abuse and discrimination in Sri Lanka that it is claimed the [Authority] failed to consider. Further, the applicants’ submissions did not point to any particular issue relevant to the applicants’ claims or circumstances which they contended had not been considered by the [Authority]**.

40. In the absence of any evidence before this Court about the contents of any country information to which the [Authority] did not expressly refer, this claim must be rejected.

(Emphasis added.)

1. The primary judge was correct to note (at [36]) that the weight to be given to country information and the question of accuracy was a matter for the decision-maker, not the Federal Circuit Court, citing *NAHI v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 10 (at [11]). There is no doubt that for a court to find that certain materials have not been considered would require sufficient probative basis in the remainder of the reasons and in other evidence before the supervising court: see ***DHW17*** *v Minister for Home Affairs* [2019] FCA 985(at [24]).
2. The primary judge was of the view, and correctly so, that no particulars had been provided as to the alleged relevant country information in relation to sexual abuse and discrimination in Sri Lanka that it was claimed the Authority had failed to consider. The appellants’ submissions did not point to any particular issue relevant to their claims or circumstances which they identified as not being considered by the Authority.
3. The primary judge was correct in that approach. The argument in this Court fails for the same reasons. Ground 2 also fails.
4. However, the oral submissions for the appellants seemed to rely more on illogicality or irrationality, claiming that it was not open to conclude there was not a substantial or real risk of sexual violence for a Tamil woman when the risk was serious and applied to all women. But the finding of the Authority was more nuanced than this. The Authority made these findings (at [31]-[35]):

31. The [appellants] referred to, and provided information about, the situation for women in Sri Lanka and cited the prevalence of harassment and violent sexual assault including by the security forces who they say cannot be trusted to protect Tamil women. Violence against women is a serious, ongoing social problem throughout Sri Lanka. It cuts across all socioeconomic groups but was worst in areas affected by the war. Women and girls belonging to minority communities often face particular challenges emanating from their gender and their status as persons belonging to minorities.

32. Rape and domestic violence are criminalised in Sri Lanka under the *Prevention of Domestic Violence Act 2005* (Sri Lanka) and sexual harassment is a punishable offence. Enforcement of the law is, however, inconsistent and sexual assault; rape and spousal abuse are pervasive social problems. DFAT assesses that reported incidents of sexual assault and rape have increased in recent years, and tend to be higher in remote areas, but the majority of cases are likely to go unreported due to social stigma.

33. There were a number of credible reports of sexual violence against women in which the alleged perpetrators were armed forces personnel, police officers, army deserters, or members of militant groups. Many women did not file official complaints, however, due to fear of retaliation. There has been some progress. Awareness programs have been implemented to encourage women to file complaints and the police continue to establish women’s units in police stations, although despite the establishment of Children and Women’s Bureau Desks at local police stations, minority women reported difficulties in access owing to language barriers which can further discourage reporting of violations. I further note that armed forces personnel are generally restricted to barracks.

34. President Sirisena has expressed a commitment to taking action to prevent the abuse of women and children, including speeding up the trial process for these offences. He canvassed the possibility of implementing the death penalty for such offences in the wake of public outrage over a number of recent high-profile cases of violence against women and girls. DFAT assesses that overall women in Sri Lanka face a high risk of societal discrimination and violence, but states that risk particularly relates to domestic or intimate partner violence which [the second appellant] has not claimed. Female headed households, which are mainly found in the north and the east, have also been identified as a vulnerable group. Again, this does not apply to [the second appellant].

35. I accept that women in Sri Lanka face particular vulnerabilities. However, I do not accept [the second appellant’s] claim that the state security forces would not help them because they are the ones committing the violent atrocities. All Sri Lankan citizens have access to redress through the police, judiciary and the HRCSL regardless of religion or ethnicity, even if, as discussed above language difficulties can pose an obstacle. [The second appellant] will not be returning to Sri Lanka on her own but with her husband. I do not accept the submission that her husband will not be able to keep her safe. It appears from [the first appellant’s] written statement that they may return to the city of …, not to a remote or rural area where women may be more vulnerable. I accept she does not speak Sinhala. However, she is educated and speaks two languages (Tamil and English) which I consider will assist in negotiating her way through official channels should it be required. And, as discussed above, I do not accept that the mere fact of having a different accent will increase her vulnerability. Having considered the [second appellant’s] personal circumstances within the context of the country information, I am not satisfied that the risk faced by [the second appellant] if returned to Sri Lanka is more than a remote one. I am satisfied that the [first appellant] will not face a real chance of harm on the basis of her gender, if returned to Sri Lanka, now or in the reasonably foreseeable future.

1. Even if reasonable minds may differ, the conclusion was rationally open. The Authority was entitled to conclude that despite the serious widespread problem for women from minorities, the factors it identified, including likely return to a city and (by implication) protection from her husband, meant the second appellant, in particular, was not exposed to a real chance of harm. There were a variety of factors to balance, including other factors which would support the conclusion of the Authority, even if views may differ as to the weight to be attached to those factors. This analysis is not illogical/irrational as contended and as considered by the High Court in *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 (at [57], [86] and [130]-[131]).

# CONCLUSION

1. The appeal must be dismissed with costs.

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| I certify that the preceding twenty-two (22) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice McKerracher. |

Associate:

Dated: 18 February 2020