Federal Court of Australia

 BDT17 v Minister for Immigration and Border Protection [2023] FCA 452

|  |  |
| --- | --- |
| Appeal from:  | *BDT17 v Minister for Immigration and Border Protection* [2018] FCCA 3133 |
|  |  |
| File number: |  |
|  |  |
| Judgment of: | **WIGNEY J** |
|  |  |
| Date of judgment: | 12 May 2023 |
|  |  |
| Catchwords: | **MIGRATION** —Application for protection visa — application refused by delegate of Minister for Immigration and Border Protection — refusal affirmed by Immigration Assessment Authority decision — judicial review of Authority’s decision in Federal Circuit Court — appeal from Circuit Court — whether primary judge erred in finding that Authority did not fail to consider two elements of claim said to arise from visa application — claims not articulated in or otherwise evident on the face of the application — whether primary judge erred in finding that the Authority did not deny procedural fairness to appellant by improperly dealing with s 473GB certificate and notification — certificate invalid — notification contended to bar disclosure of Minister’s report opining that appellant’s evidence was non-genuine — appellant never requested disclosure of report such that no practical injustice arose from non-disclosure — no obligation to disclose report under s 473DA — no obligation to disclose s 473GB notification — no failure to exercise discretion to notify appellant of report — appeal dismissed  |
|  |  |
| Legislation: | *Migration Act 1958* (Cth) ss 36(2), 473GB  |
|  |  |
| Cases cited: | *BDT17 v Minister for Immigration and Border Protection* [2018] FCCA 3133*BIK17 v Minister for Home Affairs* [2020] FCA 1086*BVD17 v Minister for Immigration and Border Protection* (2019) 268 CLR 29; [2019] HCA 34*Minister for Immigration and Border Protection v BBS16* (2017) 257 FCR 111; [2017] FCAFC 176*Minister for Immigration and Border Protection v CED16* (2020) 380 ALR 216; [2002] HCA 24  |
|  |  |
| Division: |  |
|  |  |
| Registry: |  |
|  |  |
| National Practice Area: |  |
|  |  |
| Number of paragraphs: | 45 |
|  |  |
| Date of hearing: | 2 March 2022  |
|  |  |
| Counsel for the appellant: | Appellant was self-represented |
|  |  |
| Counsel for the first respondent: | Mr B Kaplan |
|  |  |
| Solicitor for the first respondent: | HWL Ebsworth  |
|  |  |

ORDERS

|  |  |
| --- | --- |
|  | NSD 2316 of 2018 |
|   |
| BETWEEN: | BDT17Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentIMMIGRATION ASSESSMENT AUTHORITYSecond Respondent |

|  |  |
| --- | --- |
| order made by: | WIGNEY J |
| DATE OF ORDER: | 12 May 2023 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent’s costs of the appeal.

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

REASONS FOR JUDGMENT

WIGNEY J:

1. The appellant is a citizen of Sri Lanka who on 28 September 2012 entered Australia by boat without a visa. He was subsequently permitted to apply for a protection visa and did so on 21 December 2015. His visa application was refused by a delegate of the first respondent, the **Minister** for Immigration and Border Protection. That decision was referred to the Immigration Assessment **Authority** for review. The Authority affirmed the Minister’s decision. The appellant challenged the Authority’s decision in judicial review proceedings commenced in the then Federal **Circuit Court** of Australia. That application was dismissed: *BDT17 v Minister for Immigration and Border Protection* [2018] FCCA 3133 (**J**). The appellant appealed to this Court from the dismissal of his application.
2. The appeal raises two issues. The first is whether the Authority failed to consider elements of the appellant’s claim for protection which he contended clearly emerged from the materials he had provided in support of his visa application. The second issue is whether the Authority denied the appellant procedural fairness, or otherwise made a jurisdictional error, by not disclosing to the appellant the content of a report which impugned the authenticity of two documents which the appellant had relied on in support of his visa application.

# VISA APPLICATION AND REFUSAL BY THE DELEGATE

1. The key criteria that an applicant for a protection visa must satisfy are well known. In short summary, the applicant must satisfy the Minister that Australia owes them protection obligations because either: they are a refugee, which means that they have a well-founded fear of persecution in their country of nationality (or country of their former habitual residence) for reasons of race, religion, nationality, membership of a particular social group, or political opinion (ss 36(2)(a), 5H and 5J of the *Migration* ***Act*** *1958* (Cth)); or the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of them being removed from Australia to their country of nationality or former habitual residence, there is a real risk that they will suffer significant harm (s 36(2)(aa) of the Act).
2. In his protection visa application, the appellant asserted that he feared that he would be detained and physically harmed by the army and police if he was required to return to Sri Lanka. His fear in that regard was said to arise from his Tamil ethnicity, previous incidents of detention and torture in Sir Lanka, and because he suspected that the police may falsely charge him in respect of the disappearance of his wife and child.
3. One of the appellant’s main factual claims concerning his past experiences in Sri Lanka was that in 2009 he had been detained, interrogated and tortured by the army for six weeks on suspicion of involvement with the Liberation Tigers of Tamil Eelam (**LTTE**). He sought to corroborate that claim by producing a letter from the Sri Lankan police addressed “to whom it may concern”. That letter, which was dated 20 August 2009, certified that the appellant had been taken into custody by the police “On Suspicious of Adding and Abbeting The L.T.T.E”. The appellant also sought to support his claims by producing a second letter from the Sri Lankan police which was dated 6 December 2011. That letter requested the appellant report to police headquarters “for further inquirie [sic]” or “produce” his wife to the “relevant officers”.
4. The appellant was interviewed by the delegate. The appellant told the delegate that in 2009 he had been detained in an army camp, along with his wife and daughter and that, while he was subsequently released, his wife and daughter were not. He said that he had not heard any news regarding his wife and daughter since that time. The appellant also told the delegate about the letter from the Sri Lankan police that he received in December 2011. He said that it was given to him by his mother.
5. Following the interview, the delegate wrote to the appellant and advised him that the two letters from the Sri Lankan police that he had produced in support of his visa application had been examined by the Document Examination Unit of the Department of Immigration and Border Protection and that “it is the opinion of the examiner that the documents are fraudulently produced”. The letter advised the appellant that that information could lead to an “adverse credibility finding which may result in refusal of [his] application” and invited the appellant to “provide comment” in relation to the information.
6. The appellant responded to the delegate’s invitation by providing a statutory declaration in which he said that he “sincerely and honestly” believed that the two letters were “not fraudulently produced” and that he had been given the letters by his brother-in-law (in the case of the 2009 letter) and his sister (in the case of the 2011 letter). He also provided affidavits affirmed by his brother-in-law and sister in which they claimed that the letters had been given to them by police officers.
7. On 10 January 2017, the delegate decided to refuse the appellant’s visa application. The delegate was not satisfied that the appellant met the criteria in either ss 36(2)(a) or 36(2)(aa) of the Act. The delegate did not accept that the appellant had been detained, interrogated or assaulted by the Sri Lankan army and found that the two letters from the police which the appellant had provided in support of his application were fraudulent. Given those findings, and having regard to detailed “country information” concerning the current state of affairs in Sri Lanka, the delegate found that the appellant did not have a well-founded fear of persecution in Sri Lanka and that there was no risk that he would suffer significant harm upon return.

# THE AUTHORITY’S REVIEW AND DECISION

1. The delegate’s decision was a “fast track reviewable decision” as defined in s 473BB of the Act. The Minister therefore referred the decision to the Authority as required by s 473CA of the Act and the Authority conducted a review of the decision as required by s 473CC of the Act. The Authority was required to conduct a review “on the papers”; the “papers” being the “review material” provided by the Secretary of the Minister’s department and any “new information” provided by the visa applicant, or requested by the Authority, which met certain requirements: see ss 473CB, 473DB, 473DC and 473DD of the Act.
2. In the appellant’s case, the Authority determined that it was able to have regard to certain new information. That information was contained in a submission from the appellant’s migration adviser, which attached a letter from an attorney based in Sri Lanka, and a Department of Foreign Affairs and Trade report concerning Sri Lanka. The letter from the Sri Lankan attorney contained information about the appellant’s detention by the Sri Lankan police. The Authority was satisfied that there were exceptional circumstances to justify considering the new information and that the other requirements of s 473DD of the Act were met in relation to it.
3. The Authority affirmed the delegate’s decision not to grant the appellant a protection visa. The Authority provided the appellant with a lengthy and detailed record of its Decision and **Reasons** dated 24 February 2017. Given the appellant’s relatively narrow appeal grounds, it is unnecessary to give detailed consideration to the Authority’s reasons. It suffices to briefly note the following findings.
4. First, the Authority accepted that the appellant, his wife and their daughter were detained in an army camp during the final stages of the civil war in Sri Lanka in 2009. The Authority also accepted that the appellant was released after about 25 days, but that his wife and daughter were not. That was the last contact the appellant had with his wife and daughter: Reasons [14]. The Authority accepted that the appellant’s wife and daughter had “tragically gone missing”: Reasons [17].
5. Second, the Authority appeared to accept that the appellant’s wife was not released because she was from Jaffna and was suspected of supporting the LTTE: Reasons at [14]. As for the appellant, the Authority found that he was released from the army camp because the “authorities … did not consider him to be an LTTE member or supporter and nor did they consider it necessary to detain him further on account of his connection to his wife”: Reasons [15].
6. Third, in relation to the disappearance of the appellant’s wife and daughter, the Authority found that the Sri Lankan authorities were unaware of her whereabouts and that, while they had questioned the appellant about her whereabouts, they had not questioned him about whether she was “an LTTE member, supporter or sympathiser”: Reasons [17]. That indicated to the Authority that the Sri Lankan authorities had not imputed the appellant’s wife with a “pro-LTTE opinion”. The Authority was accordingly not satisfied that the appellant’s wife is “a person of adverse interest to the authorities or that the [appellant] is a person of interest on account of her profile”: Reasons at [17].
7. Fourth, the Authority accepted that in August 2009 the appellant was taken from his house by the police and detained by the Sri Lankan army for a period of around six weeks, during which time he was interrogated and physically harmed: Reasons [22]; see also [37]. The Authority found, however, that the appellant was released after six weeks because he was not suspected “of carrying out LTTE activities or of otherwise having LTTE connections” and was not “a suspect in the disappearance of his family members, or otherwise accused of hiding his wife after her release from the camp”: Reasons [23]; see also [37]. The Authority did not accept that the appellant was “of adverse interest to the authorities subsequent to his release in 2009” and was “not satisfied that the [appellant] is under suspicion as a person responsible for his wife and daughter’s disappearance or that he is otherwise suspected of harming them”: Reasons [26]; see also [37], [38] and [45].
8. Fifth, the Authority found that the two letters purporting to be from the Sri Lankan police that the appellant had produced in support of his visa application were “non-genuine” and did not accept that they were provided to any member of the appellant’s family: Reasons [21]. The Authority noted, in that regard, that forensic document examiners had provided a report to the delegate which advised that the letters had been “fraudulently produced” and that the appellant had been invited to comment on that information and had provided affidavits from his brother-in-law and sister, and a letter from a Sri Lankan attorney, which supported his evidence concerning the letters: Reasons [20]. The Authority found, however, that the affidavits and attorney’s letter contained details which were inconsistent with statements the appellant had made concerning the letters and on that basis gave “more weight to the opinion of the forensic document examiner”: Reasons [21].
9. On the basis of those findings of fact, as well as findings concerning other presently irrelevant aspects of the appellant’s protection claims, the Authority concluded that the appellant was not a refugee and that there were no substantial grounds for believing that, as a necessary and foreseeable consequence of being returned to Sri Lanka, there was a real risk that the appellant would suffer significant harm. The appellant therefore did not meet the criteria for a protection visa in ss 36(2)(a) and (aa) of the Act: Reasons [57] and [66].

# JUDICIAL REVIEW IN THE CIRCUIT COURT

1. The appellant commenced a proceeding in the Circuit Court seeking prerogative relief in respect of the Authority’s decision pursuant to s 476 of the Act. The appellant pressed two main arguments in support of the proposition that the Authority erred jurisdictionally in conducting and determining its review of the delegate’s decision.
2. The appellant’s first argument was that the Authority failed to deal with two “integers” of his claims. The first integer was said to be a claim, arising from his evidence, that “if he is returned to Sri Lanka and tries to trace what happened to his wife and daughter and look for whoever in the army who is responsible for their disappearance … he will be seriously/significantly harmed by the army and police in that pursuit”: particular (a) of ground 3 of the appellant’s **Amended Application** dated 14 August 2017. The second integer was said to be his claim that “if he returns to Sri Lanka he will be subject to cruel or inhuman treatment or punishment by the authorities in that the authorities will not assist him in locating his family or assist in finding what happened to them but rather hinder him because of the blame that may come to the army”: particular (b) of ground 3 of the Amended Application.
3. The appellant’s second argument was that the Authority had denied him procedural fairness for two reasons: first, because it did not provide him with the basis for the forensic document examiner’s opinion that the two letters purporting to be from the Sri Lankan police were fraudulent; and second, because the Authority had “acted upon a certificate invalidly issued under s 473GB of the Act”: grounds 5 and 6 of the Amended Application. That certificate related to the non-disclosure of the document examiner’s report and purported to notify the Authority that disclosure of the report would be “contrary to public interest because the document is an internal working document”. The appellant also sought leave to amend his Amended Application to raise an additional argument relating to the certificate. That additional argument was that the Authority had unreasonably failed to exercise its discretion under s 473GB(3)(b) of the Act to disclose the document examiner’s report.
4. The primary judge rejected all of the appellant’s arguments.
5. In relation to the argument that the Authority had failed to deal with two integers of the appellant’s claims, the primary judge concluded that the appellant’s claims did not include either of those integers. They were not the subject of any clearly articulated argument, relying on established facts; nor did they clearly emerge from the materials: cf *AYY17 v Minister for Immigration and Border Protection* (2018) 261 FCR 503 at [18]. His Honour reasoned as follows (J [32]):

On his own submissions, the claims relied on by the applicant only arose because of the “necessary implication that anyone whose wife and child disappeared while at the Army camp wants a closure and would actively pursue that issue”. However, it is simply not the case that any such claims arose necessarily from the facts asserted (or from any other facts or evidence before the Authority). Rather, this is a construct added, too late in proceedings, by a lawyer looking to make a case that was never made and was never apparent before either the delegate or the Authority. On a proper application of the principles summarised above, this ground must be rejected.

1. In relation to the appellant’s arguments concerning the denial of procedural fairness, the primary judge concluded that the forensic examiner’s report and the s 473GB certificate were not “new information”, which “meant both that the Authority had to have regard to the certificate and the report, and that it was not required to disclose either of them, or any information in them, to the applicant”: see *Minister for Immigration and Border Protection v BBS16* (2017) 257 FCR 111; [2017] FCAFC 176 at [89] – [99]: J [28].
2. The primary judge also refused to grant the appellant leave to raise the new argument concerning the exercise of the discretion under s 473GB(3)(b) because “there was no explanation for the very considerable delay in raising this ground”, and the ground in any event had “insufficient merits”: (J [25]).
3. In relation to the merits of the argument, the primary judge reasoned that there was an “evident and justifiable reason” for the Authority not exercising the s 473GB(3)(b) discretion, that reason being that the certificate was invalid: J [26]. The certificate was invalid as the stated reason for its being issued, as accepted by the Minister, “could not properly form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding”: J [21]. His Honour also considered that it was “readily understandable” why the Authority did not disclose any of the information in the document examiner’s report: “first, as a general proposition, the Authority is not required to disclose any information that was before the delegate: s 473DA(2), and secondly, the applicant had already had an opportunity to address the opinion in the report and had produced, in response, evidence of his own seeking to establish the authenticity of the documents in question”: J [26].

# GROUNDS OF APPEAL AND SUBMISSIONS

1. The appellant filed a notice of appeal from the Circuit Court’s decision on 10 December 2018. The appellant’s notice of appeal contained two appeal grounds.
2. The first ground of appeal, in summary, is that the primary judge should have found that the appellant’s claims concerning the disappearance of his wife and daughter from the army camp “arose on the materials”. In failing to deal with those claims, the Authority “committed jurisdictional error”.
3. The second ground of appeal, in summary, is that the primary judge “erred in finding that the Authority has correctly dealt with the non-disclosure of the existence of the certificate”. The particulars of that contention included that: the primary judge “presumed that any disclosure would reveal the methodology / procedure adopted by the forensic examiner”; the delegate relied on the “comments” of the document examiner; there was a denial of procedural fairness as “comments other than methodology was relevant to the claims”; and the primary judge erred in finding that “the underlying facts did not have to be disclosed”.
4. The appellant did not file any written submissions. The appellant was not legally represented at the hearing of the appeal and did not advance any oral submissions directed at either of the grounds of appeal.

# GROUND 1 – FAILURE TO CONSIDER CLAIMs

1. The primary judge did not err in rejecting the appellant’s contention that the Authority had failed to consider certain integers of the claims that the appellant had made in support of his application for a protection visa.
2. The appellant’s argument in the Circuit Court was, in substance, that the Authority did not deal with his claim that, if he was returned to Sri Lanka, the Sri Lankan army would cause him serious harm if and when he tried to find out what had happened to his wife and daughter, or that he would suffer mental or physical harm because the army would hinder that pursuit. The problem with that argument, however, is that the appellant had made no such claim. No such claim was the subject of any clearly articulated argument. Nor did any such claim arise from the materials.
3. It may of course be accepted that the appellant told the Minister’s department and the delegate that his wife and daughter were missing in Sri Lanka. The Authority accepted that to be the case. The appellant also told the delegate that he would like to engage the Red Cross “tracing services” to find his wife and daughter. That is entirely understandable. The difficulty, however, is that the appellant never suggested that he would be harmed if he engaged the Red Cross, or if he otherwise tried to find his wife and daughter. It is simply not possible to discern any such claim in any of the material that was before the delegate or the Authority. It does not arise from the materials.
4. The appellant’s first ground of appeal is accordingly unmeritorious and must be rejected.

# GROUND 2 – DENIAL OF PROCEDURAL FAIRNESS

1. There is also no merit in the appellant’s contention that the primary judge erred in finding that the Authority did not deny him procedural fairness because it failed to disclose the basis of the document examiner’s opinion or the existence of the non-disclosure notification. The primary judge was correct to reject that contention, though perhaps not precisely for the reasons given by his Honour.
2. The appellant was told by the delegate that the department’s document examination unit had expressed the opinion that the two letters purporting to be from the Sri Lankan police were “fraudulently produced”. The delegate invited the appellant to respond to that information and he did so. The appellant, who at that point in time was represented by a migration agent, provided a detailed response to the information, but did not request a copy of any report prepared by the document examination unit. Nor was any such request made when the delegate’s decision was referred to the Authority for review, though further detailed information and material was provided in respect of the asserted provenance and authenticity of the documents.
3. Moreover, the appellant’s contention in the Circuit Court was not that the Authority was obliged to disclose the document examination report. Rather, he argued that procedural fairness obliged the delegate and the Authority to “provide sufficient detail for the applicant to respond as to why it should not be accepted as correct” or so as to enable the appellant to get an independent expert to “analyse the documents and give a report”.
4. There were and are a number of difficulties with that contention. First, the appellant never requested the delegate to provide further detail concerning the document examiner’s report. Second, it was always open to the appellant, if he wanted to do so, to obtain his own forensic document examiner to examine the documents. He did not request the delegate to give him access to the documents for that purpose. Third, the Authority’s findings in respect of the authenticity of the letters did not depend at all on the detail in the document examiner’s report or the precise basis upon which the document examiner arrived at the opinion that the letters were fraudulent. The Authority simply relied on the document examiner’s opinion. And fourth, the appellant never explained what further “detail” was required for him to be able to respond to the document examiner’s opinion.
5. It is, in all the circumstances, impossible to accept that there was any practical injustice to the appellant arising from the fact that he may not have been aware of the precise details of the document examiner’s report.
6. There is, however, a more fundamental problem with the appellant’s arguments concerning procedural fairness. Section 473DA of the Act provides as follows:

(1) This Division, together with sections 473DA and 473GB, is taken to be an exhaustive statement of the requirements of natural justice hearing rule in relation to reviews conducted by the Immigration Assessment Authority.

(2) To avoid doubt, nothing in this Part requires the Immigration Assessment Authority to give a referred applicant any material that was before the Minister when the Minister made the decision under section 65.

1. The effect of s 473DA is that the Authority was not obliged to give the appellant the document examiner’s report, which clearly formed part of the material that was before the delegate when the delegate made the decision to refuse to grant the visa under s 65 of the Act. It must also follow that the Authority was not obliged to give the appellant further details of the content of that report. Given the terms of s 473DA, there is no scope for the appellant’s contention that procedural fairness obliged the Authority to give him any further details concerning the report.
2. Nor was the Authority required, by either the requirements of procedural fairness or the natural justice hearing rule, to disclose that it had received notification pursuant to s 473GB(1) in respect of the document examiner’s report. In ***BVD17*** *v Minister for Immigration and Border Protection* (2019) 268 CLR 29; [2019] HCA 34 at [2], the High Court held, by majority, that “procedural fairness does not oblige the Authority to disclose the fact of notification under s 473GB(2)(a) to a referred applicant in a review under Pt 7AA” of the Act because “s 473DA precludes such an obligation from arising”. If the Authority was not obliged to disclose a valid notification under s 473GB(2)(a), it is difficult to see how or why it was obliged to disclose the fact of a notification which was invalid: see *BIK17 v Minister for Home Affairs* [2020] FCA 1086 at [64]. It would appear that the Minister conceded that the notification received by the Authority concerning the document examiner’s report was invalid. That concession was well made given the reason provided in the notification: see *Minister for Immigration and Border Protection v* ***CED16*** (2020) 380 ALR 216; [2002] HCA 24 at [12].
3. There also was and is no merit in the appellant’s contention that the Authority somehow erred in acting upon an invalid notification under s 473GB(1) of the Act. It may be inferred that the Authority had regard to the document examiner’s report as it referred to it in its reasons: Reasons at [20]. The Authority did not, however, refer to the notification and did not state that it had exercised its discretion in s 473GB(3)(a) to have regard to the report. It cannot, in those circumstances, be inferred that the Authority acted on the notification. Rather, the available and more compelling inference in the circumstances is that the Authority disregarded the notification on the basis that it was invalid.
4. Finally, there is no basis for concluding that the primary judge erred in refusing to permit the appellant to raise the additional argument to the effect that the Authority erred in exercising its discretion under s 473GB(3)(a) to disclose the contents of the report notwithstanding the notification. It was open to the primary judge to refuse to permit the appellant to raise that argument on the basis that the appellant had failed to explain his delay in seeking to raise that argument. It was also open to the primary judge to find that the proposed new argument lacked sufficient merit to warrant the grant of leave. That is so for at least two reasons. First, because the notification was invalid, “the whole of s 473GB (including … the powers conferred on the Authority by s 473GB(3)(a) and (b)) simply had no application”: *CED16* at [12]. Second, there was in any event insufficient evidence from which to infer that the Authority failed to consider exercising the discretion conferred by s 473GB(3)(b): see *BVD17* at [37] – [40].

# CONCLUSION AND DISPOSITION

1. The appellant has not made out his grounds of appeal or otherwise demonstrated that the primary judge erred in dismissing his judicial review challenge to the Authority’s decision. His appeal must accordingly be dismissed with costs.

|  |
| --- |
| I certify that the preceding forty-five (45) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Wigney. |

Associate:

Dated: 12 May 2023