Federal Court of Australia

CVT19 v Minister for Immigration, Citizenship and Multicultural Affairs [2022] FCA 1482

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| Appeal from: | *CVT19 v Minister for Immigration & Anor* [2020] FCCA 606 |
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| File number: | NSD 404 of 2020 |
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| Judgment of: | **STEWART J** |
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| Date of judgment: | 9 December 2022 |
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| Catchwords: | **MIGRATION** – protection visa – appeal from Federal Circuit Court’s dismissal of review of Immigration Assessment Authority’s decision to affirm delegate’s decision not to grant protection visa – application for leave to file amended notice of appeal – where proposed new grounds of appeal lack merit – application for leave and appeal dismissed  |
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| Legislation: | *Migration Act 1958* (Cth) ss 5H(1), s 5J(3)(c)(iii), 36(2)(a), 36(2)(aa) |
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| Cases cited: | *AYY17 v Minister for Immigration and Border Protection* [2018] FCAFC 89; 261 FCR 503*BHD18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 151; 280 FCR 26*EKN17 v Minister for Immigration and Border Protection* [2019] FCA 1135*ESQ18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 44; 283 FCR 164*Khalil v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 26 at [34]-[37] *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; 264 CLR 421*Minister for Immigration and Multicultural Affairs v Rajalingam* [1999] FCA 179; 93 FCR 220*MZXSA v Minister for Immigration and Citizenship* [2010] FCAFC 123; 117 ALD 441*NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* [2004] FCAFC 263; 144 FCR 1 |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Number of paragraphs: | 30 |
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| Date of hearing: | 6 December 2022  |
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| Counsel for the Appellant: | B Zipser |
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| Solicitor for the First Respondent: | G Pasas of Clayton Utz |
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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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|  | NSD 404 of 2020 |
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| BETWEEN: | CVT19Appellant |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS First RespondentIMMIGRATION ASSESSMENT AUTHORITYSecond Respondent |

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| order made by: | STEWART J |
| DATE OF ORDER: | 9 DECEMBER 2022 |

THE COURT ORDERS THAT:

1. Leave to file an amended notice of appeal be refused and the appeal be dismissed.
2. The appellant pay the first respondent’s costs.

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

REASONS FOR JUDGMENT

STEWART J:

## Introduction

1. The appellant is a Tamil male now in his mid-30s from the Northern Province of Sri Lanka. He arrived in Australia in 2012 as an “unauthorised maritime arrival”. In 2017, he applied for a protection visa on the basis that he has a well-founded fear of persecution if he returns to Sri Lanka.
2. The appellant claims to fear harm from the Sri Lankan authorities on the basis of being an ethnic Tamil male and being suspected of being a supporter of the Liberation Tigers of Tamil Eelam (LTTE) due to past familial links with the LTTE. He also fears harm from the Eelam People’s Democratic Party (EPDP) which is associated with the Sri Lankan authorities. The appellant fears harm from the Sri Lankan security authorities on account of his real and imputed political opinion due to his long-term residence in Australia, his active participation in Tamil diaspora activities in Australia as well as being a Tamil/Sri Lankan asylum seeker in Australia who departed Sri Lanka illegally.
3. The appellant’s protection visa application was dismissed by a delegate of the Minister for Home Affairs in May 2019. The delegate was not satisfied that the appellant is a refugee as defined in s 5H(1) of the *Migration Act 1958* (Cth) and was therefore not satisfied that the appellant is a person in respect of whom Australia has protection obligations as outlined in s 36(2)(a) of the Act. The delegate was also not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of being removed to Sri Lanka, there is a real risk that the appellant would suffer significant harm as outlined in s 36(2)(aa) of the Act. On that basis, the delegate found that the appellant is not a person in respect of whom Australia has complementary protection obligations as outlined in that section.
4. As required by the Act, the appellant’s protection visa application was referred to the Immigration Assessment Authority for review. In July 2019, the Authority affirmed the delegate’s decision not to grant the appellant a protection visa.
5. The appellant then filed an application for judicial review of the decision of the Authority in what was then known as the Federal Circuit Court. The appellant was self-represented in the Circuit Court on account of not being able to afford legal representation. The judicial review application was dismissed with costs at a hearing on 17 March 2020. The appellant now appeals against that dismissal.

## The grounds of appeal

1. The notice of appeal records grounds that were prepared with the assistance of an unidentified person in the Sri Lankan diaspora. It is not suggested that that person is legally qualified. The appellant was otherwise self-represented at that stage.
2. More recently, a barrister, Mr Zipser, agreed to appear on behalf of the appellant. Mr Zipser accepts that there is no merit in the original grounds of appeal which he does not press, and seeks leave to amend the notice of appeal. The two proposed new grounds of appeal raise issues which were not the subject of grounds of review in the Circuit Court. Mr Zipser accordingly accepts that the appellant requires leave to file an amended notice of appeal that raises new grounds.
3. The principles governing whether the appellant should be granted leave to raise a new point on appeal in the context of a migration case such as this are not in dispute. The relevant authorities were recently discussed and applied in *Khalil v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 26 at [34]-[37]. Although there are various other considerations, given that it is accepted that neither of the proposed new grounds is precluded on the basis that it might have been answered by additional or different evidence adduced below had it been raised there, it suffices for present purposes to identify that the merits of the proposed new grounds of appeal are relevant; if the merits are poor then there is no prospect that leave would be granted. Also, it is inappropriate in this context to consider those merits in the depth and detail that would be required in the context of the appeal itself.
4. The proposed new grounds of appeal are expressed as follows:
5. The appellant claimed that in 2012, while working in a grocery store with a relative which they owned, unidentified individuals entered the store and demanded money and told the appellant that if they did not pay they would be kidnapped. The Immigration Assessment Authority (“**Authority**”) at [40]-[41] was not satisfied this event occurred. The Authority fell into jurisdictional error in dealing with this claim. First, the Authority found at [40] that “the applicant’s evidence regarding the number of times the unidentified individuals demanded money evolved from one time in the protection visa statement to three times in the protection visa interview”. This finding of fact was wrong and, in the circumstances, involved jurisdictional error. Second, with reference to *Minister v Rajalingam* (1999) 93 FCR 220 at [67], a fair reading of the reasons of the Authority at [40]-[41] indicates that the Authority had a real doubt that its finding that the incident in 2012 did not occur was correct. The Authority erred by failing to take into account the possibility that the event occurred.
6. The Authority accepted at [44] that “the applicant has a political opinion opposed to the Sri Lankan government and is pro LTTE, pro Tamil and supports a separate state for Tamils (pro Tamil separatism)”, and that “the applicant has shared publicly various pro LTTE, pro Tamil, pro Tamil separatism and anti Sri Lankan government comments and images on his Facebook profile”. As to whether the appellant would continue to espouse and act on these political opinions if returned to Sri Lanka, the Authority found at [61] “I am not satisfied that he will engage in or have any interest in political groups or similar activities to those which he has engaged in Australia on return”. The Authority fell into jurisdictional error in making this finding. First, in light of the Authority’s findings at [44], the Authority was required to apply s 5J(3) of the Migration Act 1958 (Cth), but it did not do so. Second, the Authority’s single reason in support of its finding at [61] was that “prior to his arrival in Australia he had [not] been involved in any political groups or similar activities”. This reason is unsound, since the appellant would have been persecuted or killed by the Sri Lankan authorities if he had espoused these opinions in the years leading up to leaving Sri Lanka in 2012, and a person’s political opinions often change over time.
7. It is convenient to deal with each in turn.

## Ground 1: the 2012 demands for money

1. I am not satisfied that any error by the Authority in respect of this ground amounts to jurisdictional error. That is in two respects.
2. First, the error that is contended for is an error of fact. An erroneous finding of fact will typically not amount, in and of itself, to jurisdictional error: ***BHD18*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 151; 280 FCR 26 at [29]. In essence, the complaint is that the Authority made an erroneous assessment of the evidence. For the reasons submitted by Mr Pasas on behalf of the Minister, any such error is not of such a nature as to amount to jurisdictional error on the basis that it is, for example, irrational, or unreasonable, or lacking in an intelligible justification.
3. The Authority rejected the appellant’s account that on three occasions in 2012 unidentified individuals had demanded money from him and a relative of his at a grocery store which they ran, and threatened to kidnap them if they failed to pay. One of the reasons for that rejection was that the appellant’s evidence “regarding the number of times the unidentified individuals demanded money evolved from one time in the protection visa statement to three times in the protection visa interview”. In fact, before the protection visa interview the appellant had stated in his protection visa application that money had been demanded in that way on three occasions. The Authority apparently overlooked that evidence, and construed the statement in the appellant’s protection visa statement that “In 2012, … Unidentified people came to our shop and demanded that we paid money to them” as referring to only one occasion when that is not necessarily so – textually, the statement could equally have covered numerous occasions.
4. However, even if that conclusion by the Authority against the appellant is regarded as perverse given the prior account of the three occasions, the Authority gave two further independent reasons for rejecting the appellant’s account of the 2012 incidents. On that basis, jurisdictional error is not established. See *BHD18* at [29].
5. A further argument is put on behalf of the appellant with regard to ground 1. With reference to *Minister for Immigration and Multicultural Affairs v Rajalingam* [1999] FCA 179; 93 FCR 220 at [60]-[62] and [67] and *EKN17 v Minister* *for Immigration and Border Protection* [2019] FCA 1135 at [42]-[47], it is submitted that the Authority was obliged to take into account the possibility that alleged past events occurred even though it found that the events probably did not occur. However, as Mr Pasas submitted, because a fair reading of the Authority’s reasons as a whole shows that it had no real doubt that the claimed events had not occurred, there is no warrant for holding that it should have considered the possibility that its findings were wrong: *MZXSA v Minister for Immigration and Citizenship* [2010] FCAFC 123; 117 ALD 441 at [95(f)].
6. Secondly, the error is not material in the sense that a different finding on the factual question in issue could realistically have resulted in a different decision: *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; 264 CLR 421 at [45]. In that regard, the incidents in question are said to have taken place in 2012, ie, more than 10 years ago. The delegate accepted that they took place but on the basis of country information with regard to the change in character and activities of the EPDP and that there are no longer any active paramilitary groups operating in Sri Lanka, found that there was nothing to suggest that the appellant would face a real chance of being targeted with criminality of the nature that he faced in 2012 for any reason to do with his race, religion, political opinion or membership of a particular social group.
7. There does not appear to be any reason why those findings are not correct, and the appellant does not criticise them. Considering how long ago the incidents in question occurred and that the appellant appears to have been targeted because he was running a supermarket which he will not necessarily be doing on return to Sri Lanka, there does not appear to be any credible basis upon which it might be said that the incidents in question support an inference that the appellant would face relevant persecution on return to Sri Lanka.
8. The case that the appellant advanced to the delegate and the Authority on this question does not go any further. In the submissions prepared for him by a migration agent to the delegate following the protection visa interview but before the delegate’s decision, it was submitted that although the EPDP claims to have given up their activities such as kidnapping and extortion and have joined the democratic process in Sri Lanka by forming a political party, “the criminal activities of this group is well-documented, and it is ongoing in a different guise” (sic). In submissions to the Authority after the delegate’s decision, the appellant’s migration agent identified the relevant ground of fear and persecution if returned to Sri Lanka as being his “adverse profile with EPDP”.
9. In light of the appellant’s acceptance that the EPDP became a political party and joined the democratic process and to the extent that kidnapping and extortion associated with the EPDP continued those activities were of a criminal rather than a political nature, any error in the relevant fact-finding cannot be regarded as material.
10. In the circumstances, I conclude that the proposed new ground of appeal 1 has poor prospects of success.

## Ground 2: political activity on return to Sri Lanka

1. Before the delegate and the Authority, the appellant claimed that, since his arrival in Australia, he has been actively involved in supporting the independence of a separate Tamil state for Sri Lankan Tamils. That gave rise to the question whether the appellant faces a real chance of serious harm in Sri Lanka as a result of his Tamil diaspora activities in Australia. On the basis of country information, the Authority concluded that because the appellant does not have, or claim to have, a significant role in diaspora activities but has rather been merely a participant, he would not be perceived as being a threat to the integrity of the Sri Lankan state and does not face the risk of persecution on return to Sri Lanka.
2. Mr Zipser submits that a further question arises from the appellant’s participation in Tamil diaspora activities in Australia, namely whether he would continue to espouse and act on his Tamil-separatist views if required to return to Sri Lanka and, if so, whether he faces a real chance of serious harm. He submits that although the appellant did not expressly claim that he would continue to espouse or act on his political views if returned to Sri Lankan, the claim clearly arose on the materials before the Authority. He refers to ***NABE*** *v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* [2004] FCAFC 263; 144 FCR 1 and ***AYY17*** *v Minister for Immigration and Border Protection* [2018] FCAFC 89; 261 FCR 503.
3. More specifically, Mr Zipser submits that because the Authority accepted that the appellant has a political opinion opposed to the Sri Lankan government, is pro-LTTE, is pro-Tamil and supports a separate state for Tamils (ie, pro- Tamil separatism), and that he has acted on those beliefs in Australia, the question of whether he would continue to act on those beliefs if returned to Sri Lanka and on that account may face persecution arose squarely enough on the materials. Mr Zipser refers to *ESQ18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 44; 283 FCR 164 at [68] where it was held that it was significant to the question of whether the unarticulated claim is one that clearly emerges from the materials that the delegate had considered the unarticulated claim as relevant based on the “established facts”.
4. However, as Mr Pasas submits, that case is materially different in that it was the delegate that had considered the unarticulated claim in its reasons and those reasons were part of the material before the Authority. On that basis, it was said that the unarticulated claim clearly emerged from the materials, ie, the materials before the Authority. In the present case, in contrast, the delegate did not identify the unarticulated claim. The question is whether that claim nevertheless clearly emerges from the materials before the Authority.
5. As identified in *AYY17* at [18], the various bases on which it has been found that the relevant Tribunal or Authority is required to consider a claim includes if it is the subject of a substantial clearly articulated argument relying on established facts, or if it clearly emerges from the materials (citing *NABE* at [55] and [68]). As to whether a claim clearly emerges, such a finding is not to be made lightly and the fact that a claim might be said to arise from materials is not enough (*NABE* at [68]), and to clearly emerge from the materials, the claim must be based on “established facts”.
6. The principal difficulty for the appellant in the present case is that it is not established on the facts that if he were returned to Sri Lanka he would espouse, or otherwise undertake activities in support of, his political beliefs. Indeed, the Authority said that it was not satisfied that the appellant would engage in or have any interest in political groups or similar activities to those which he has engaged in in Australia on return to Sri Lanka. It may be, as submitted by Mr Zipser, that it is difficult to reconcile that conclusion with the Authority’s conclusion mentioned earlier that the appellant has pro-LTTE, pro-Tamil and pro- Tamil separatist opinions and that he has engaged in public activity in support of those opinions in Australia. However, since the appellant never advanced a case that he would engage in or have any interest in political groups or similar activities to those which he has engaged in in Australia on return to Sri Lanka, the Authority cannot be faulted for not being satisfied that he would.
7. In the latter regard, it is clear from the materials that the appellant’s case insofar as presently relevant was always advanced on the basis that he was engaged in pro-Tamil political-type activities in Australia and that it was his profile in that respect that imperilled him in Sri Lanka. It was never his case that if he returned to Sri Lanka he would continue to engage in such activities, or that if he was to refrain from doing so that was because he would be required to alter or conceal his true political beliefs in order to avoid a well-founded fear of persecution within the meaning of s 5J(3)(c)(iii) of the Act. Had he made such a case, then country information relevant to that question, ie, relevant to whether the espousal of or engagement in activity in support of such political beliefs might lead to persecution in Sri Lanka, could have been the subject of inquiry.
8. In the circumstances, I conclude that proposed appeal ground 2 also has poor prospects of success.

## Conclusion

1. In view of my conclusions with regard to the poor prospects of the proposed new grounds of appeal, there is no justification for granting leave for them to be advanced. It is not necessary to enter into consideration of the appellant’s explanation for the grounds not having been raised below, the prejudice that may be faced by the Minister and other considerations relevant to the question of leave.
2. In the result, leave to file the amended notice of appeal should be refused and the appeal dismissed. The parties were agreed that the costs should follow the result. Therefore, the appellant should pay the first respondent’s costs.

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| I certify that the preceding thirty (30) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Stewart. |

Associate:

Dated: 9 December 2022