

FEDERAL COURT OF AUSTRALIA

ADG17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2) [2021] FCA 1629

Appeal from: *ADG17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCCA 3408

File number: NSD 27 of 2021

Judgment of: **STEWART J**

Date of judgment: 21 December 2021

Catchwords: **MIGRATION** – where appellant gave conflicting accounts of being detained by the Sri Lankan Army – where account contained discrepancies in relation to when and where the alleged incident occurred – where appellant gave numerous explanations for giving conflicting accounts – where two of three explanations expressly rejected by the Immigration Assessment **Authority** – where Authority did not mention third explanation – whether the Authority erred in failing to address the third explanation

Cases cited: *Applicant WAEE v Minister for Immigration* [2003] FCAFC 184; 75 ALD 630
BVD17 v Minister for Immigration and Border Protection [2019] HCA 34; 268 CLR 29
Carrascalao v Minister for Immigration and Border Protection [2017] FCAFC 107; 252 FCR 352
Minister for Immigration v SZGUR [2011] HCA 1; 241 CLR 594
Minister for Immigration v SZSRS [2014] FCAFC 16; 309 ALR 67

Division: General Division

Registry: New South Wales

National Practice Area: Administrative and Constitutional Law and Human Rights

Number of paragraphs: 29

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Counsel for the Appellant: J Donnelly

Solicitor for the Appellant: Zarifi Lawyers

Counsel for the First
Respondent: G Johnson

Solicitor for the First
Respondent: HWL Ebsworth Lawyers

ORDERS

NSD 27 of 2021

BETWEEN: **ADG17**
Appellant

AND: **MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT
SERVICES AND MULTICULTURAL AFFAIRS**
First Respondent

IMMIGRATION ASSESSMENT AUTHORITY
Second Respondent

ORDER MADE BY: **STEWART J**

DATE OF ORDER: **21 DECEMBER 2021**

THE COURT ORDERS THAT:

1. The appeal be dismissed with 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 This is an appeal from a decision of a judge of the Federal **Circuit Court**, namely *ADG17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCCA 3408 (hereafter **J**).

2 The appellant is a citizen of Sri Lanka who arrived in Australia in September 2012 as an “unauthorised maritime arrival” at Christmas Island. His application for a Class XE Subclass 790 Safe Haven Enterprise visa (a form of protection visa) was refused by a delegate of the relevant Minister in November 2016. In December 2016, the Immigration Assessment **Authority** affirmed the decision not to grant the appellant a protection visa.

3 By application filed in January 2017, the appellant sought judicial review of the decision of the Authority in the Circuit Court. That application was heard in December 2020 and dismissed.

The decision of the Authority

4 The reasons for the decision of the Authority (hereafter **A**) (at A[4]) record the following summary of the appellant’s claims for protection – I have numbered the dot points for ease of reference:

1. As a child the applicant was forced to move house many times. A house that the applicant once lived in was destroyed in a targeted attack;
2. While in Jaffna in March 2007, the applicant was kidnapped by the CID (Criminal Investigation Department), beaten and questioned regarding his involvement with the Liberation Tigers of Tamil Eelam (LTTE);
3. Later in 2007, while in Karainagar, Jaffna, the applicant was detained and taken to the Sri Lankan Navy’s Elara base and questioned about his connections to LTTE;
4. In 2012, the applicant was detained by the Sri Lankan Army, questioned under suspicion of involvement with the LTTE, physically assaulted and had a plastic bag placed over his head;
5. Over a period of time, the applicant has been detained and/or beaten by the Sri Lankan authorities on 10 to 15 occasions;
6. Since arriving in Australia, the CID have visited the applicant’s father;
7. The applicant fears he will be harmed by the Sri Lankan authorities because of his Tamil ethnicity;

8. The applicant fears he will be harmed by the Sri Lankan authorities because he will be identified as a failed Tamil asylum seeker.

5 As will become apparent, the appeal focusses in particular on the claim numbered 4, i.e., that in 2012 the appellant was severely assaulted by the SLA on suspicion of being an LTTE sympathiser.

6 In affirming the delegate's decision, the Authority:

- (1) accepted that the appellant was detained and mistreated by the CID and by the Army in 2007: A[13], [15];
- (2) did not accept the appellant was detained and harmed by the Army in 2012: A[22];
- (3) found the appellant's claim that he had been detained "up to 15 times" was vague, but accepted he had been visited periodically by the authorities at home or at work, but not threatened or harmed on these occasions: A[25];
- (4) was not satisfied the appellant was of ongoing interest to the authorities in Sri Lanka: A[30];
- (5) was not satisfied that the appellant faced a real chance of serious harm for reason of being a failed asylum seeker if he returned to Sri Lanka: A[36]; and
- (6) accepted the appellant had breached Sri Lankan law by departing illegally and may face consequences for this if returned, but that this did not amount to a real chance of serious harm: A[41].

7 Specifically with regard to the appellant's claim to having been harmed by the Army in 2012, the Authority noted that there were inconsistent dates provided as to when the incident occurred and differing accounts as to whether the appellant was at home or on his way to the shops when he was detained: A[20]. In rejecting the appellant's 2012 claim, consistent with the reasoning of the delegate, the Authority found that the discrepancies in the appellant's testimony were "not insignificant". Those "discrepancies" were identified as conflicting evidence as to the date the appellant was detained by the Army and where he was when he was detained: A[22].

8 In relation to this incident, the Authority concluded that the appellant failed to provide a persuasive or satisfactory explanation for the discrepancies, which led it to conclude that the appellant was not recalling a personal experience. On that basis, the Authority did not accept that the appellant was detained and harmed by the Sri Lankan Army in 2012: A[22]. That conclusion was critical to the ultimate conclusion that the appellant is of no ongoing interest to

the Sri Lankan authorities and hence does not face a real chance of serious harm if he returns to Sri Lanka.

The decision of the Circuit Court

9 The appellant advanced two grounds of review in the Circuit Court upon which he contended that the Authority had made a jurisdictional error.

10 First, he asserted that the Authority erred in failing to find that he would be imputed with an LTTE profile and would suffer harm. The primary judge rejected the ground on the basis that the material before the Authority was not reasonably or rationally capable of only one conclusion, namely that the appellant would be imputed to have links to the LTTE: J[11]. The appellant made oral submissions in support of the ground, which the primary judge held went to the merits of the case: J[12].

11 Secondly, the appellant asserted that the Authority erred in failing to consider all of his claims. The primary judge held that there was nothing to suggest that the Authority did not identify and consider all of the claims that were expressly made and which reasonably arise from the materials that were before it: J[14].

12 The primary judge made orders dismissing the application, with costs.

The ground of appeal

13 As explained in an interlocutory judgment in this appeal, the appellant's single ground of appeal in this Court was initially that the primary judge erred in holding that the material that was before the Authority was not of such a quality that the only reasonable or rational finding that could have been made is that there is a real chance that the applicant would be perceived to have links with the LTTE, and that it was therefore open to the Authority not to be satisfied that the applicant might be imputed to have links with the LTTE. Because of the nature of that ground, focusing as it did on the material that was before the Authority, I ordered that a transcript of the appellant's protection visa interview be prepared. That was so that the Court on appeal would have before it the material that was before the Authority. See *ADG17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1011.

14 Subsequently, a pro bono certificate was issued and pro bono counsel, in keeping with the fine tradition of the Bar, volunteered to represent the appellant. I acknowledge the invaluable assistance of counsel.

15 Having for the first time received the transcript of his protection visa interview, the appellant filed an amended notice of appeal to substitute the existing ground for the following:

The primary judge erred in failing to find that the second respondent constructively failed to exercise jurisdiction.

- (a) The second respondent (the **IAA**) was required, pursuant to s 473DB of the *Migration Act 1958* (Cth) (the **Act**), to review a fast track reviewable decision referred to it by considering the review material provided to the IAA.
- (b) The IAA failed to lawfully consider material evidence that formed part of the review material.
- (c) First, the IAA rejected the appellant's claim that he was detained and harmed by the Sri Lankan Army in 2012 ([22]) (the **2012 claim**).
- (d) Secondly, the IAA reasoned that the appellant provided conflicting evidence as to the date he was detained by the army and where he was when he was detained ([22]) (**adverse credibility finding**).
- (e) Thirdly, the IAA reasoned that the appellant did not provide a persuasive or satisfactory explanation for the discrepancies in relation to the adverse credibility finding ([22]).
- (f) Fourthly, the IAA did not consider material evidence adduced by the appellant in relation to the discrepancy issue. In the appellant's protection visa interview (26 April 2016), the appellant advanced a reason for the discrepancy being that he felt fearful in answering questions from the officer because it brought him back (i.e. reminded him) to the questions he received from relevant authorities in Sri Lanka (the **fear claim**). The fear claim was not resolved by the IAA ([20], [22]).
- (g) Finally, the error was material. Lawful compliance could realistically have led the IAA to determine the adverse credibility finding differently, the 2012 claim and the appellant's individual circumstances.

The appellant's submissions

16 The appellant's submissions are based on a short exchange in the appellant's protection visa interview in April 2016 between the Departmental officer and the appellant who answered through an interpreter:

Q Now there are some aspects of this that I would like to clarify with you. In your statement of claims for this application you said that the most recent time I have suffered harm at the hands of the Sri Lankan authorities was in or around August 2012 in the afternoon.

A One month before I left.

Q In this statement I was at home and the army came and took me to a camp.

A So I was worried about my mother's death and I must have told it different.

Q That is quite a critical piece of information to remember incorrectly.

A So now when I was out I was alright. Now when you come and you are asking me various questions which happen at that time I also get sort of fear like those people you are asking question. I get into fear. So I feel like going out that is what I said to finish that and to allow me to go.

17 The appellant submits that the last answer recorded above is to the effect that the questioning by the Departmental officer had the effect of reminding the appellant of his interrogation by the Sri Lankan Army which put him into a state of fear. The appellant submits that this is an explanation for the discrepancies in his accounts and that it was not considered by the Authority. He refers to this as "the fear claim".

18 The appellant submits that the Authority's failure to consider the fear claim is evident from the Authority's note of the appellant's explanation to the delegate as to the discrepancies between his accounts of the 2012 incident as being the following (A[20]): "The applicant's response was that he may have provided some wrong information because he was new in detention and because his mother had recently passed away." There is no mention of the fear claim in that note, or elsewhere in the Authority's reasons.

Consideration

19 It is first convenient to identify what the appellant said at different times about the 2012 incident.

20 First, in his entry interview at Curtin in January 2013, shortly after his arrival in Australia, the appellant said that the last incident at the hands of the Army was "6 months before I came to Australia". He said that "they covered our faces with plastic bags, tying it around our necks and made it difficult for us to breathe" and "they also poured petrol on us and beat us badly while questioning us". Six months before arriving in Australia would put the incident in approximately March 2012.

21 Secondly, in a signed statement dated 9 October 2013 attached to his protection visa application in September 2015, the appellant said that "the most recent time" when he had suffered harm at the hands of the Sri Lankan authorities was "in or around August 2012 in the afternoon". He said that he was at home and the army came and took him to a camp. He said that he was questioned, a plastic bag that had some petrol in it was put over his head so that it was difficult for him to breathe, he fainted and when he woke up he heard his family screaming for the

authorities to release him. It was after “this last time” that he decided that he needed to leave Sri Lanka.

22 Thirdly, in his protection visa interview in April 2016 the appellant said, in relation to this incident, that he was going to the shop to buy some items which meant that he had to pass through the camp. He said that “they” called him inside and “enquired” him and “applied petrol plastic bag and beat” him. He said that he was going to the shop to buy household items “like sugar flour” and that on passing the camp he was taken inside an unoccupied house that was being used as a checkpoint by an army soldier. He said that the incident occurred “one month before I left ... August – the beginning of August”.

23 Following the passage which is specifically relied on by the appellant and quoted at [16] above, in his protection visa interview the appellant was further questioned about the discrepancy in the dates, i.e., that in his entry interview he had said that the incident had occurred six months before he came to Australia (i.e., in about March 2012) and in his protection visa application and interview he said that it had occurred in August 2012. The following exchange then took place:

A So I might have told six months from the date I was given the interview. From January backwards.

Q So in January backwards would take it to – it was early January which would take it about mid-2013 [scil. 2012] so about June-July 2013 [scil. 2012].

A 6 months it is – that is how I calculated it at the time.

Q But you did not say in the interview that it was 6 months before or 6 months ago. You said six months before I came here.

A So at the time maybe I was new and I did not know how to tell and what to tell and all that see. So I was in tension [scil. detention] at the time.

Q Would there be any other reason?

A So no other reason, I was always thinking of my mother. So was not taking my food regularly and I has to go to mental health check-up but I did not go. I had gone only two or three times.

24 It is apparent from the Authority’s reasons (A[22]) that it was concerned about the discrepancies in the appellant’s description of what occurred, both in relation to when the incident occurred and where it occurred. The Authority acknowledged that the time discrepancy was a matter of “months and not years”, and it took into account that the appellant may have had difficulty recalling specific dates during his entry interview given that his mother had recently passed away. The Authority expressly mentioned two explanations for the

discrepancies given by the appellant in his protection visa interview, namely that his mother had recently passed away and that he was new in detention. The appellant's complaint on appeal is that the Authority did not consider the third explanation given by him, namely the fear claim.

25 It is for the appellant to establish that the Authority actually overlooked the fear claim: *Minister for Immigration v SZGUR* [2011] HCA 1; 241 CLR 594 at [67]-[68] per Gummow J; *BVD17 v Minister for Immigration and Border Protection* [2019] HCA 34; 268 CLR 29 at [39]-[40] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ. A finding that the Authority did not consider a matter it was bound to take into account will not lightly be made and must be supported by "clear evidence": *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107; 252 FCR 352 at [48] per Griffiths, White and Bromwich JJ. Also, the Authority was not bound to refer to every item of evidence and a failure to refer to an item of evidence does not, of itself, necessarily mean that the item has not been considered: *Applicant WAEE v Minister for Immigration* [2003] FCAFC 184; 75 ALD 630 at [46] per French, Sackville and Hely JJ; *Minister for Immigration v SZSR5* [2014] FCAFC 16; 309 ALR 67 at [43] per Katzmann, Griffiths and Wigney JJ.

26 Given the references that the Authority made to what had been said by the appellant in his protection visa interview, it is readily apparent that the Authority listened to the recording of the interview and gave consideration to what the appellant had said. I do not consider that there is a proper basis to draw the inference that the Authority overlooked the appellant's fear claim given in that interview. Rather, the more probable inference is that the Authority did not find the fear claim to be significant. That was a matter for the Authority to weigh up within its jurisdiction, and even if the Court were to come to a different view as to the significance of the fear claim, that would not amount to the Authority having fallen into jurisdictional error.

27 There is a particular problem with the fear claim which may have led the Authority to not consider it significant. The problem is that even if the exchange quoted at [16] above is understood as the appellant submits that it should be understood, namely that the questioning by the Departmental officer in the protection visa interview ("Now when you come and you are asking me various questions...") reminded him of the harm that he had suffered at the hands of the Army which put him in fear, it does not explain the differences between the accounts given by him in his entry interview and the written statement attached to his protection visa application. Logically, it could only serve to explain why he had given different accounts in

the protection visa interview, being the occasion on which he is said to have been put in fear. However, he gave essentially the same account in that interview as he gave in his written statement in support of his protection visa, and there is nothing to suggest that his written statement was prepared in circumstances such that it was wrong on account of the fear that he complained of.

28 In the circumstances, the ground of appeal fails at the first hurdle: it is not established that the Authority failed to have regard to the fear claim. There may be other difficulties in the appellant's case, including whether the Authority was bound to have regard to the fear claim, but those need not be considered.

Conclusion

29 In the circumstances, the appeal falls to be dismissed with costs.

I certify that the preceding twenty-nine (29) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Stewart.

Associate:



Dated: 21 December 2021