AUS17 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION AND ANOR (S71/2020)

Court appealed from: Federal Court of Australia
[2019] FCA 1686

Date of judgment: 16 October 2019

Special leave granted: 24 April 2020

The Appellant is a Sri Lankan citizen of Tamil ethnicity who arrived in Australia in 2012. On 10 September 2015 he applied for a protection visa, an application that was later withdrawn. On 10 February 2016 the Applicant applied for a class of protection visa known as a Safe Haven Enterprise Visa ("SHEV"). The Appellant claimed to fear persecution on a number of grounds, including: imputed political affiliation, his Tamil ethnicity, the fact that he left Sri Lanka illegally and his membership of the particular social group comprising failed asylum seekers.

On 9 September 2016 a delegate refused the Appellant a SHEV. On 14 September 2016 that decision was referred to the Immigration Assessment Authority ("the Authority") for a review. On 9 January 2017 however, the Authority decided to affirm the delegate's decision.

Prior to the Authority making its decision, the Appellant's then representative gave it a letter which enclosed various documents. Those documents included a letter dated 12 October 2016 ("Letter of Support") from a Mr Appathuray Vinayagamoorthy, someone who had been a Sri Lankan member of parliament. Relevantly, the Authority did not consider this information to be the type of "new information" to which it would otherwise be obliged to have regard.

Upon judicial review to the Federal Circuit Court, the Appellant submitted that the Authority had fallen into jurisdictional error by failing to consider the Letter of Support. On 8 December 2017 Judge Driver agreed and quashed the Authority's decision.

On 16 October 2019 Justice Logan upheld the First Respondent's appeal. His Honour held that the Letter of Support simply recounted the claims already provided by the Appellant. His Honour was not therefore satisfied that any exceptional circumstances existed to justify considering that document to be "new information".

The grounds of appeal include:

- The Federal Court erred in law in holding (at [26]) that the Authority finding that the Letter of Support could have been "obtained and furnished to the Minister before the delegate made the decision under review" provided a "sufficient basis" for the Authority not considering the letter pursuant to s 473DD of the *Migration Act 1958* (Cth). The Court should have held that:

a) On the proper construction of s 473DD, it is not necessary for an applicant to satisfy the Authority of the matters in paragraph (b)(i) for there to be "exceptional circumstances" to justify considering new information under para (a);

b) Accordingly, a finding that new information was or could have been "provided to the Minister before the Minister made the decision under s 65" cannot be a sufficient basis for concluding that there are not "exceptional circumstances" to justify considering the new information;

c) The new information in this case was capable of answering the description of "credible personal information which was not previously known and, had it been known, may have affected consideration of the referred applicant's claims" within the meaning of para (b)(ii), and the Authority did not find otherwise;

d) In the premises, the Authority misunderstood or took an unduly narrow view of the breadth of the expression "exceptional circumstances" in para (a); and

e) The primary judge was correct to hold (at [50]) that the Authority erred in applying s 473DD and constructively failed to exercise jurisdiction.