

MINISTER FOR HOME AFFAIRS v DUA16 & ANOR (M57/2020);
MINISTER FOR HOME AFFAIRS v CHK16 & ANOR (M58/2020)

Court appealed from: Federal Court of Australia, Full Court
[2019] FCAFC 221

Date of judgment: 10 December 2019

Special leave granted: 29 May 2020

Respondent DUA16 is a male of Tamil ethnicity from the Northern Province of Sri Lanka who arrived by boat in Australia on 28 September 2012. On 21 January 2016 he lodged an application for a Safe Haven Enterprise Visa (SHEV). A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa on 24 August 2016. The second respondent, the Immigration Assessment Authority (IAA), affirmed this decision on the basis that they were not satisfied that there were substantial grounds for believing that there was a real risk that DUA16 would suffer significant harm if returned to Sri Lanka.

Respondent CHK16 is also a male of Tamil ethnicity from the Northern Province of Sri Lanka. CHK16 applied for a protection visa on 10 September 2015. The delegate refused to grant the visa on 14 June 2016. The IAA affirmed this decision on the basis that there were not substantial grounds for believing that there was a real risk that CHK16 would suffer significant harm if returned to Sri Lanka.

Both DUA16 and CHK16 sought judicial review of the IAA's decision in the Federal Circuit Court of Australia. On 30 April 2019 Judge Riethmuller found that the misconduct by DUA16 and CHK16's migration agent deprived them of an opportunity to make submissions to the IAA that new evidence should be considered. The agent had provided four-page "submissions" to the IAA on behalf of each respondent, in a similar form which the agent (with some variations) ultimately used in around 40 cases. Each submission stated that it was made on instructions. The respondents each paid the agent a fee for her work. The "submissions" said "little" or "virtually nothing" about the respondent's respective personal circumstances. But each "submission" included information that: did not relate to the respondent or their claims; had not been given by the respondent to the agent; and which instead related to another client of the agent. Consequently, Judge Riethmuller ordered that in both matters a writ of certiorari issue quashing the decision of the IAA and a writ of mandamus issue requiring the IAA to re-hear the applications for review according to law.

The Minister for Home Affairs appealed to the Federal Court of Australia on the basis that Judge Riethmuller erred in finding that the conduct of the migration agent stultified the performance of the function of the IAA such that their decision was affected by jurisdictional error.

By majority (Mortimer J and Wheelahan JJ, Griffiths J dissenting), the Full Federal Court found that the agent's conduct did stultify the performance of the Authority's review function.

The grounds of appeal are that:

- the Federal Court (Mortimer J, Wheelahan J agreeing, Griffiths J dissenting) erred in dismissing ground 2 of the Minister's appeal, in upholding ground 2 of the respondent's notice of contention, and thereby in concluding that the primary judge did not err in finding that fraud of the first respondent's migration agent (the Agent) stultified the decision of the second respondent (the Authority) under section 473CC(2)(a) of the *Migration Act 1958* (the Act) to affirm a decision of a delegate of the Minister under section 65(1)(b) to refuse to grant the first respondent a protection visa such that the Authority's decision was affected by jurisdictional error.

Each first respondent has filed a notice contending that the decision of the Court below should be affirmed on the ground that:

- The Federal Court ought to have upheld the decision of the Federal Circuit Court to quash the decision of the second respondent on the basis that the second respondent acted unreasonably in the conduct of the review by making a decision on the review in circumstances where it was aware that the submissions before it did not relate to the case of the review applicant but related to the claims of some other person, without contacting the first respondent or his representative to seek clarification, or to get information under s 473DC.