BVD17 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR (S46/2019)

Court appealed from: Full Court of the Federal Court of Australia
[2018] FCAFC 114

Date of judgment: 25 July 2018

Special leave granted: 15 February 2019

BVD17 is a Sri Lankan Tamil who arrived in Australia, without a visa, by boat in 2012. He later applied for a protection visa, claiming to fear harm by the Sri Lankan Army and the Criminal Investigation Department, on account of an imputed support of the Liberation Tigers of Tamil Eelam. He also feared harm by the Karuna Group, from which he claimed to have escaped after being abducted and beaten (in an attempt to force him to join the Group) in 2008. BVD17's visa application was refused by a delegate of the Minister for Immigration and Citizenship on 30 September 2016.

The Immigration Assessment Authority ("the Authority") reviewed the delegate's decision and affirmed it. The Authority's findings included that BVD17 had never been targeted by the Karuna Group. In its reasons for decision, the Authority stated that it had given some weight to the fact that a summary of details that had been given by BVD17's brother in support of a protection claim of his own ("the Summary") had made no mention of an abduction of BVD17 by the Karuna Group.

A record of the claims made by BVD17's brother was the subject of a certificate dated 30 September 2016 ("the Certificate") issued to the Authority by a delegate of the Minister under s 473GB(5) of the *Migration Act 1958* (Cth). The Certificate (which was issued by a delegate other than the original decision-maker) stated that in the delegate's view the claims made by BVD17's brother should not be disclosed to BVD17, since the information had been given in confidence. None of that information, including the Summary, was ever disclosed to BVD17 and the existence of the Certificate was not disclosed until after the Authority's reasons had been published.

An application for judicial review of the Authority's decision was dismissed by Judge Street on 6 December 2017. His Honour held that, in the circumstances of BVD17's case, it was open to the Authority not to exercise its discretion to disclose to BVD17 the material which was the subject of the Certificate ("the Material").

BVD17 appealed, contending that the Authority ought not to have assumed that the brother was aware of BVD17's abduction by the Karuna Group, since there was no evidence as to the brother's state of knowledge of that alleged event. BVD17 submitted that it was therefore unreasonable for the Authority to have given weight to the Summary's omission of the event and unreasonable for the Authority not to have disclosed the Material to BVD17.

The appeal was unanimously dismissed by the Full Court of the Federal Court (Flick, Markovic and Banks-Smith JJ). Their Honours held it was not irrational for the Authority to have assumed that BVD17's family members would have some knowledge of their respective experiences, given that BVD17 had stated both that his brother was abducted in 2009 and that his brother had contacted the family in 2012. Further, the Summary had been only one of several pieces of information used by the Authority to discredit BVD17's claim that he had been detained by the Karuna Group. The Full Court found that there was insufficient evidence from which to infer that the Authority had failed to exercise its discretion as to whether to disclose the Material to BVD17. Their Honours then held that BVD17 had not established that it was legally unreasonable for the Authority to have exercised its discretion not to disclose the Material and invite BVD17 to comment on it.

The grounds of appeal are:

- The Federal Court erred in failing to conclude that the Authority denied procedural fairness to BVD17 by not disclosing to him that it was in possession of material that was the subject of a certificate made under s 473GB(5) of the *Migration Act 1958* (Cth).

- The Federal Court erred in failing to find that the decision of the Authority is affected by legal unreasonableness.