HIGH COURT OF AUSTRALIA

7 April 2021

DQU16 & ORS v MINISTER FOR HOME AFFAIRS & ANOR
[2021] HCA 10

Today, the High Court dismissed an appeal from a judgment of the Federal Court of Australia. The sole question for determination was whether, in assessing a claim for a protection visa under the complementary protection criterion in s 36(2)(aa) of the *Migration Act 1958* (Cth), a decision-maker commits a jurisdictional error in failing to apply the principle stated in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 ("*Appellant S395*"). In *Appellant S395*, this Court held that, in assessing a claim for a protection visa under the refugee criterion in what became s 36(2)(a) of the *Migration Act*, an asylum seeker cannot be expected to hide or change behaviour that is the manifestation of a protected characteristic under the Convention relating to the Status of Refugees as modified by the Protocol relating to the Status of Refugees in order to avoid persecution.

Section 36(2) of the *Migration Act* relevantly provides two criteria for the grant of a protection visa: that the applicant is a non-citizen in Australia "in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee" under s 36(2)(a); and, if the person does not satisfy that criterion, that the applicant meets the complementary protection criterion under s 36(2)(aa), which gives effect to some of Australia's non-refoulement obligations under the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Section 36(2)(aa) asks whether there is a real risk that a person will suffer "significant harm" as a "necessary and foreseeable consequence" of the person's return to a receiving country.

The first appellant, an Iraqi national, sought a protection visa on the basis that he feared persecution (relying on s 36(2)(a)), and would suffer significant harm (relying on s 36(2)(aa)), if returned to Iraq because he sold alcohol while in Iraq, which is banned by local law in some parts of Iraq and considered "immoral" and "un-Islamic" by Sunni and Shi'ite extremists. The second and third appellants are the wife and child of the first appellant. When considering the first appellant's claim for complementary protection under s 36(2)(aa), the Immigration Assessment Authority ("the Authority") found that the first appellant did not face a real risk of significant harm if returned to Iraq because he would not continue to sell alcohol upon his return. An application for judicial review of the Authority's decision in the Federal Circuit Court of Australia was dismissed. An appeal to the Federal Court on the ground that the Authority committed jurisdictional error by failing to apply the principle in *Appellant S395* when considering the complementary protection criterion under s 36(2)(aa) was also dismissed.

The appellants were granted special leave to appeal. Dismissing the appeal, the High Court unanimously held that the differences in the text, context and purpose of s 36(2)(a) and s 36(2)(aa) compel the conclusion that the principle in *Appellant S395* does not apply to the statutory task when considering the complementary protection criterion in s 36(2)(aa). The statutory question and the nature of the harm at which each provision is directed is different. Assessment of the risk of harm under s 36(2)(a)(a) requires an assessment of the "necessary and foreseeable consequence[s]" of a person's return to a receiving country. It does not involve finding a nexus between the harm feared by a person and that person's beliefs, attributes, characteristics or membership of a particular social group. To the extent that the factual bases for claims under s 36(2)(a) and s 36(2)(aa) overlap, a decision-maker is entitled to refer to and rely on any relevant findings made under the refugee criterion when considering the complementary protection criterion. The Authority's approach to, and

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determination of, the first appellant's claims under s 36(2)(a) was not in issue in the Federal Court or this Court.

This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.