FEDERAL COURT OF AUSTRALIA

BMU15 v Minister for Immigration and Border Protection [2016] FCA 964

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| Appeal from: | *BMU15 v Minister for Immigration & Anor* [2015] FCCA 3253 |
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| File number: |  |
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| Judge: | **LOGAN J** |
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| Date of judgment: | 19 August 2016 |
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| Catchwords: | **MIGRATION** - Refugee Review Tribunal – Protection (Class XA) visa – whether the Tribunal failed to consider the appellant’s medical evidence – whether the Tribunal failed to take into account the appellant’s claims in relation to determining the risk of significant harm – whether the Tribunal’s reasons were unreasonable or illogical – whether the Tribunal allowed the appellant to give evidence and present arguments – no jurisdictional error – appeal dismissed.  |
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| Legislation: | *Migration Act 1958* (Cth) ss 424, 424A |
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| Cases cited: | *BMU15 v Minister for Immigration and Border Protection* [2015] FCCA 3253*Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611*Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407*SZUUM v Minister for Immigration and Border Protection (No 2)* [2016] FCA 526*SZVAP v Minister for Immigration and Border Protection* (2015) 233 FCR 451 |
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| Date of hearing: | 9 August 2016 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 24 |
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| Counsel for the Appellant: | The appellant appeared in person with the assistance of an interpreter |
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| Solicitor for the Respondents: | Sparke Helmore |

ORDERS

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|  | NSD 1717 of 2015 |
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| BETWEEN: | BMU15 Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| JUDGE: | LOGAN J |
| DATE OF ORDER: | 19 AUGUST 2016 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent’s costs of and incidental to the appeal, to be taxed if not agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

LOGAN J:

1. The appellant is a citizen of Sri Lanka. He arrived in Australia as an unauthorised maritime arrival on 12 August 2012. On 13 December 2012, he applied under the *Migration Act 1958* (Cth) (the Act) for that class of visa known as a Protection (Class XA) visa. On 18 December 2013 a delegate of the Minister now known as the Minister for Immigration and Border Protection (the Minister), who is the first respondent to this appeal, refused that application.
2. The appellant then sought the review of the Minister’s delegate’s decision by the then Refugee Review Tribunal (the Tribunal). On 26 June 2015, for reasons given in writing that day, the Tribunal decided to affirm the Minister’s delegate’s decision. Shortly thereafter, by reason of amendments to the Act, the role of the Tribunal was assumed by the Administrative Appeals Tribunal. That tribunal is the second respondent to this appeal. Quite properly, it has signified to the Court and to the other parties that it will abide the order of the Court.
3. The appellant applied to the Federal Circuit Court for the judicial review of the Tribunal’s decision. On 7 December 2015, for reasons delivered *ex tempore* that day, that court (Street FCJ) dismissed with costs that judicial review application. It is against that judgment that the appellant now appeals to this Court.
4. The appeal was originally listed for hearing during the Court’s May 2016 sittings. On the day appointed for the hearing of the appeal during those sittings, application was made on behalf of the appellant by a legal practitioner for an adjournment of the hearing of the appeal so that the appellant might have the benefit of legal representation on the hearing of the appeal. That application was not opposed by the Minister. The hearing of the appeal was adjourned to the present sittings. In the result, the appellant came not to be legally represented but the grounds of appeal did undergo considerable change in the interval. The appellant was a few days late in filing his amended notice in accordance with the leave granted in May. This notwithstanding, and quite properly in the circumstances, the Minister did not oppose the appellant being granted leave to amend his notice of appeal.
5. As amended, the grounds of appeal are these:

**Adverse Finding on Credit – the Appellant was not a fisherman**

6. The Appellant says that his Honour erred in agreeing with the findings of the Refugee Review Tribunal (**Tribunal**) that the Appellant was not a fisherman:

**Particulars**

1. The Appellant refers to the RRT’s “Statement of Decision and Reasons” dated 26 June 2015 (**RRT Reasons**).
2. The Appellant also refers to the transcript of the RRT hearing (pages 286-323 of the Appeal Book) (**Transcript**).
3. The Tribunal Member found the Appellant’s evidence in respect of being a fisherman to be “vague” and “implausible” because “*he had completed a Year 12 education and had a wealthy father, who operated a successful wholesale/retail food business*” (para. 22 of the RRT Reasons).
4. The Tribunal Member goes on to say that “*In view of the unsettled conditions and restrictions on fishing which prevailed in the Northern province during the civil war, the applicant’s comments lend weight to the Tribunal’s view that he was never engaged in fishing as a means of earning his livelihood*.”
5. The finding by the Tribunal Member was illogical because:
6. The Appellant provided reasons for being a fisherman, including:
7. That he had been fishing since childhood (page 14 of the Transcript; p299 of the Appeal Book);
8. That he did not want to work the long hours working in the shop demanded (page 32 of the Transcript; p316 of the Appeal Book).
9. The Appellant claimed to have been detained, interrogated and tortued [sic] as a result of being detained while fishing (see para. 15 (h) of the RRT Reasons; p232 of the Appeal Book).
10. The Tribunal Member did not put the matter of the Appellant’s detention while fishing to him in the Transcript (refer the Transcript).
11. Despite not having put the issue to the Appellant in the Transcript, the Tribunal Member found that the Appellant was not a fisherman as he claimed and therefore he was not detained by the Sri Lankan army (para. 23 of the RRT Reasons; page p234 of the Appeal Book).
12. This adverse finding on credit was critical to the Appellant’s narrative about being tortured and detained by the Sri Lankan army, particularly the Criminal Investigation Department (**CID**).
13. This adverse finding on credit tainted the RRT’s consideration of the Appellant’s claimed that he was repeatedly detained and tortured by the CID;

*“The Tribunal has not accepted the applicant’s claim that he was arrested while fishing in 2008, detailed and tortured on suspicion of LTTE links”*.

1. The Tribunal did not act in a way that was fair and just as it was required to under section 422B (3) of the *Migration Act 1958* (Cth).
2. His Honour erred by agreeing with the Tribunal.

**Particulars**

Paragraph 15 of his Honour’s judgement (page 332 of the Appeal Book).

**LTTE Connections**

7. The Appellant says that his Honour erred in agreeing with the findings of the RRT that the Appellant was not in danger from the Sri Lankan authorities.

**Particulars**

1. The Tribunal Member found that the Appellant had not been interrogated about LTTE links following the end of the war in 2009. The Tribunal Member found that:

“*Significantly, by his evidence at paragraph 15.i, although living in the Northern province which had been under LTTE control, unlike many Tamils suspected of LTTE links, the applicant was never interrogated about any possible association with the LTTE after the civil war ended in 2009*” (para 23 of the RRT Reasons; p234)

1. The Tribunal Member’s finding was illogical because the Appellant was never allowed the opportunity to respond to the issue of post-war interrogation.
2. At page 20 (p305 of the Appeal Book) the following exchange occurs:

*M: You were working for then, and you weren’t interrogated about LTTE again after the war? Is that right?*

*I: Well they caught me when I was working for (indiscernible) in 2010.*

*M: What happened in 2010?*

*I: They had a celebration that they had won the war, and I and other office mates went for the event and CID who already questioned me, saw me at that event. After that when I was going to Mukkomban from Ariankanthir, they chased me and I was running away from them, and at the time I had a fall.*

*M: So?*

*I: So I fell down from the bicycle nds they caught me and took me to te camp, and kept me in the camp and asked me to call my father, they made me to call my father and ask for money. And your father paid the money and you were released*”.

1. The Appellant was not properly afforded the opportunity to respond to the issue of whether he had been interrogated about any possible LTTE connections post war.
2. The Tribunal did not act in a way that was fair and just as it was required to do under section 422B(3) of the *Migration Act 1958* (Cth).
3. His Honour erred by agreeing with the Tribunal.

**Particulars**

Paragraph 12 of his Honour’s judgement.

**Medical report**

8. The Appellant says that his Honour erred in agreeing with the findings of the RRT in respect of the medical report as that report was incomplete.

**Particulars**

1. The Tribunal Member refers to the medical report in paragraphs [14] and [24] of the RRT Reasons (pages 231 and 234 of the Appeal Book).
2. His Honour found (para. 10) that it is “*clear that pp. 8 to 15 of the medical report were not provided to the Tribunal*”.
3. Those missing pages contained crucial evidence in relation to the Appellant’s medical disposition, including trauma and suicide.
4. Despite finding that the missing pagers were not provided to the Tribunal, his Honour goes on to say (para. 11) that “*Neither the X-ray report nor the psychologist’s report was material that was capable of proving that the applicant suffered trauma in the particular circumstances.*”
5. The Tribunal clearly did not consider the report as it is required to do under section 424(1) of the *Migration Act 1958* (Cth).
6. His Honour erred in coming to this conclusion despite finding that:
7. An incomplete medical report had been provided; and
8. Not allowing the Appellant the opportunity to provide the complete medical report.

(Errors in original)

1. The grounds of review before the Federal Circuit Court are set out at para 14 of the Reasons for Judgment of the learned primary judge: see *BMU15 v Minister for Immigration and Border Protection* [2015] FCCA 3253. The Minister did not, in the appeal, take any issue with whether, as amended, the grounds of appeal ventured beyond issues which had been raised by the grounds of review. He is hardly to be criticised for that in a case where, if the appellant’s claimed basis for a protection visa were to be believed, to say the least, unpleasant consequences might await him upon return to Sri Lanka. In any event, it is possible, having regard to amended grounds of review three, five and seven, to see that the amended grounds for appeal do not, in substance, raise issues which were not considered by the Federal Circuit Court. Further, albeit exceptionally, it would be possible to allow the appellant to advance a new issue of law on the appeal so as to avoid an injustice in the particular case. The Minister engaged fully with the amended grounds of appeal.
2. Before turning to the merits of the amended grounds of appeal, it is as well to summarise the basis upon which the appellant sought a protection visa. His application was based on an asserted fear that, if he returned to Sri Lanka, he would face serious harm from the authorities because he was a Tamil who had been arrested in 2008 on suspicion of links to the LTTE and had been targeted by the Criminal Investigation Department (CID) over his support for the Tamil National Alliance (TNA).
3. The appellant had the benefit of assistance from a migration agent in the presentation of his review application to the Tribunal. His case, for the Tribunal to be satisfied as the Act required, that he was eligible for a protection visa, did not just rely upon acceptance of his written statements and oral evidence. Via his migration agent, the appellant tendered to the Tribunal a number of documents. Materially, these included a copy of medical reports (appeal book pp 207, 222 and 223) and what proved to be an incomplete copy of a psychological assessment report (appeal book pp 213 - 220). The Tribunal made express reference in its reasons (paras 6 and 14) to these documents forming part of the material presented on the appellant’s behalf in support of his application. Of these, the Tribunal observed (at para 24):

The Tribunal has had regard to the medical documents provided (paragraph 14) to support his claims of torture in 2008. While the medical letters indicate that the applicant may have suffered a lower back and leg injury, it does not identify clearly how this was sustained. The Tribunal notes that the Psychologist’s report is based largely on information provided by the applicant during the course of two visits and cannot be conclusive as to what may have caused the applicant’s mental health issues.

1. Contrary to the appellant’s contention, these observations make it patent that the Tribunal did consider the medical reports and psychological assessment report.
2. In the Federal Circuit Court, the learned primary judge made (at [10] and [11] of the judgment) these observations about the Tribunal’s treatment of these materials:

10. In relation to ground 3 it is apparent from the Tribunal’s decision that it took into account “*copies of medical documents*” that were provided to the Tribunal as referred to in para.14 and it is clear that the Tribunal was aware that it had been provided with such medical reports as identified in appendix B, referred to in para.6 of the Tribunal’s reasons. It was a matter for the applicant’s migration agent and the applicant to select the material to be provided to the Tribunal. From the evidence before the Court it is clear that pp.8 to 15 of the medical report were not provided to the Tribunal. It is equally clear from the summation of the psychological report that the applicant alleged he had been the subject of torture and trauma. The psychologist was not in a position to opine further on the issue addressed in the radiographer’s report identifying the potential consistency of either previous trauma or denervation.

11. Neither the X-ray report nor the psychologist’s report was material that was capable of proving that the applicant suffered trauma in particular circumstances relating to his alleged fears and it is clear that it was for the Tribunal to assess the applicant’s credibility in relation to the trauma that he alleged. In that regard the adverse findings of credit by the Tribunal were open and cannot be said to lack an evident and intelligible justification. This is not a case where the absence of the complete psychologist’s report was a matter that required the Tribunal to take further steps in relation to the same, nor given the issue of the applicant’s credit, was the complete psychologist’s report a matter that required the Tribunal to raise the missing pages with the applicant. Accordingly, ground 3 fails to make out any jurisdiction error.

1. It is convenient first to consider the last of the appellant’s amended grounds of appeal (that numbered “8”). It is that ground which seeks to impeach the primary judge’s reasoning with respect to the Tribunal’s treatment of the medical reports and the psychological assessment.
2. That there were, as the learned primary judge found, pages missing (8 – 15) from the psychological assessment report furnished by the appellant to the Tribunal may be accepted. But it was the appellant, via his agent, who tendered this report in this incomplete way. The Tribunal was not, in the circumstances, obliged to insist upon the tender of a complete report, although there was certainly no inhibition in law on its ability, if it wished, to make a request for a complete copy (s 424 of the Act). Contrary to the appellant’s submission, the Tribunal was under no obligation, in the circumstances, to offer the appellant an opportunity to provide a complete copy. Further, he made, through his agent, no such request.
3. The appellant submitted that, in the face of the medical reports and the psychological report, the Tribunal was obliged to accept his account of physical abuse by the authorities in Sri Lanka. That the medical reports, in particular, were capable of corroborating his account in this regard may be accepted. A note in respect of a CT scan of the appellant’s abdomen and pelvis states:

Note is made of in valuation and fatty atrophy of a segment of the posterior erector spinae musculature on the left side. This can be seen following previous trauma or denervation. Is there a history of this?

1. This note was taken up in a general practitioner’s report (appeal book p 207) with the observation, “suggestive of possible trauma is [sic – read, “as”] the cause of the … pathology”.
2. At para 22 of its reasons, the Tribunal stated:

The applicant claims that he was arrested, detained and tortured while working as a fisherman in Mannar in 2008. The Tribunal found his evidence about the fishing business vague and does not find it plausible that the applicant worked as a fisherman at the peak of the civil war in the Mannar area, given he had completed a Year 12 education and had a wealthy father, who operated a successful wholesale/retail food trading business, in which his elder brother also worked. When this was discussed with him at the hearing, the applicant responded that he liked fishing, which he had learned from his uncle on weekends while still at school; wanted to have his own business; and that, as far as he was concerned, ‘fishing is an easy job’ and ‘only a three hour job’, while in the other businesses it was a long day. In view of the unsettled conditions and restrictions on fishing which prevailed in the Northern province during the civil war, the applicant’s comments lend weight to the Tribunal’s view that he was never engaged in fishing as a means of earning his livelihood.

1. In the course of the hearing before the Tribunal the following exchanges had occurred between the Tribunal and the appellant (appeal book pp 315 – 316):

“*Member: One thing I am finding it difficult to understand is why it is someone like you with twelve years education and a father who was involved in transportation of fishing products, sea food products between Mannar and Colombo and who has moved on to sell out, what you say is most successful of his business the food and wholesale of items, why you would to go to the fisherman in 2008 at the Very peak of the civil war in your area. That doesn’t make sense to me.*

*Appellant: One thing is that I like … I like fishing and I wanted to be on my own foot I didn’t want to be depended on my father so I want to do my own business. As far as I am concerned the other thing is that fishing is easy job. The fishing is only three jobs and can return to shore within three hours. But if you start a business you have to start early like 4.30 or so and they close business at 10.30 so it is a long day.*” *(errors in original)*

1. In turn, the Tribunal’s lack of satisfaction that the appellant was, as he claimed, a fisherman by occupation interplayed with an absence of satisfaction as to his credibility based on inconsistencies in his evidence about his political and social involvements (see para 25 of the Tribunal’s reasons). Overall, the Tribunal was not satisfied that the appellant had been truthful about his experiences in Sri Lanka, including that he had been called in for inquiries on several occasions and had been questioned by the CID (see para 28 of the Tribunal’s reasons).
2. The logicality of this reasoning may have been open to question if the medical evidence was that the findings on the CT scan were consistent only with torture. As it was, the findings rose no higher than sounding an interrogative note about possible past trauma. That rose no higher than consistency with the appellant’s account but did not compel its acceptance.
3. In *SZVAP v Minister for Immigration and Border Protection* (2015) 233 FCR 451, Flick J, offered a helpful collection and analysis of a number of authorities concerning challenges to an absence of satisfaction based on adverse credibility findings. I respectfully agree with that analysis. His Honour’s analysis discloses that it is not the case that credibility findings do not admit a challenge on judicial review. In *SZUUM v Minister for Immigration and Border Protection (No 2)* [2016] FCA 526 at [15], having referred to this analysis and this proposition, I observed that, “If, for example, a finding as to an absence of credibility based on demeanour were inconsistent with unimpeachable contemporaneous documentation corroborative of an appellant’s account, a basis for a challenge to credibility may well be revealed.” In this case, the Tribunal was entitled to observe, as it did (at para 24) of the medical reports that, “While the medical letters indicate that the applicant may have suffered a lower back and leg injury, it does not identify clearly how this was sustained. [sic]”
4. The state of the medical evidence was not such that there was an absence of logical connection between the evidence and the Tribunal’s reasons: cf *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at 627, [51]. However much the appellant might disagree with the Tribunal’s reasoning, and his submissions on the appeal made it plain that his disagreement was genuine and emphatic, those reasons are not illogical. The learned primary judge was correct in so concluding.
5. There is therefore, no merit in the last of the appeal grounds.
6. The reasons given in respect of rejecting the last of the amended appeal grounds overlap with why there is no merit in the first two amended grounds of appeal. The Tribunal put directly to the appellant in the course of the hearing the nature of its concern about his claim that he was a fisherman. Whether, in so doing, this met or even exceeded a statutory procedural fairness obligation which fell on the Tribunal it is unnecessary to decide because, at the very least, it met any such obligation. What followed in the Tribunal’s reasons was a logical basis for an absence of satisfaction as to his credibility and, thus, of the basis of his claim for a protection visa. The case was truly, one where, *par excellence*, the credibility finding was for the Tribunal and one not to be disturbed on overzealous judicial review: *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407.
7. Contrary to the appellant’s contention, he was afforded an opportunity at the hearing to advance such evidence as he chose either personally or otherwise in support of his claim. The Tribunal was not obliged to disclose to him its thought processes or even generic information which might intrude upon those thought processes in a credibility assessment; it was only obliged to disclose personal information (s 424A). This aside, the complaint which he makes in the first two amended appeal grounds is, on analysis, nothing more than a solicitation to this Court to conduct on the hearing of the appeal an assessment of the factual merits of his claim. It was not open to do this in the original jurisdiction and neither is it open to this Court so to do in the exercise of appellate jurisdiction.
8. For these reasons, the appeal must be dismissed.

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| I certify that the preceding twenty-four (24) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Logan. |

Associate:

Dated: 19 August 2016