FEDERAL COURT OF AUSTRALIA

CCC15 v Minister for Immigration and Border Protection [2017] FCA 201

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| Appeal from: | *CCC15 v Minister for Immigration & Anor* [2016] FCCA 2335 |
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| File number: | NSD 1672 of 2016 |
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| Judge: | **BROMBERG J** |
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| Date of judgment: | 2 March 2017 |
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| Catchwords: | **MIGRATION** – Protection (Class XA) visa – appeal from the Federal Circuit Court of Australia (“FCC”) – whether the judgment of the FCC was affected by actual or apprehended bias – no basis for suggesting actual bias – where the reasons for judgment indicate that the primary judge listened to the transcript of the Tribunal hearing and addressed each of the appellant’s complaints about the conduct of the hearing – no basis for suggesting that a fair-minded lay observer might reasonably apprehend that the primary judge might not have brought an impartial mind to the resolution of the question before him – appeal dismissed |
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| Legislation: | *Migration Act 1958* (Cth) s 474 |
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| Cases cited: | *CCC15 v Minister for Immigration and Anor* [2016] FCCA 2335  *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507  *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476  *Re Refugee Review Tribunal; Ex Parte H* [2001] HCA 28  *SLMB v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 129  *VAAD v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 117 |
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| Date of hearing: | 2 March 2017 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | Catchwords |
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| Number of paragraphs: | 25 |
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| Counsel for the Appellant: | The Appellant appeared in person assisted by an interpreter |
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| Solicitor for the First Respondent: | Mr J Pinder of Minter Ellison |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice, save as to costs |

ORDERS

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|  | | NSD 1672 of 2016 |
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| BETWEEN: | CCC15  Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | BROMBERG J |
| DATE OF ORDER: | 2 MARCH 2017 |

THE COURT ORDERS THAT:

1. The appeal is dismissed.
2. The appellant pay the first respondent’s costs as agreed or taxed.

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

REASONS FOR JUDGMENT

BROMBERG J:

1. The appellant is a citizen of Lebanon who arrived in Australia on 23 February 2008 on a student visa. On 18 June 2013, the appellant lodged an application for a Protection (Class XA) visa (“**visa**”). On 18 July 2014, a delegate of the first respondent (“**Minister**”) refused the appellant’s application. On 21 September 2015, the second respondent (“**Tribunal**”) affirmed the delegate’s decision. The appellant sought judicial review of the Tribunal’s decision in the Federal Circuit Court of Australia. The subject of this appeal is the primary judge’s dismissal of that application on 15 September 2016. The primary judge’s judgment is published as *CCC15 v Minister for Immigration & Anor* [2016] FCCA 2335.
2. The task of the primary judge was to determine whether the Tribunal’s decision was affected by jurisdictional error: s 474 of the *Migration Act 1958* (Cth) (“**Migration Act**”) and *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476. The task of this Court is to determine whether the primary judge’s judgment is affected by appellable error: *SLMB v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 129 at [11] (Branson, Finn and Finkelstein JJ).
3. The appellant’s claim for a protection visa was based on his alleged bisexuality and his asserted fear that, if he was to live openly as a bisexual in Lebanon, he would be harmed by his relatives, others in the community including the police, and possibly beaten or raped. The appellant presented multiple submissions to the delegate and the Tribunal as well as medical reports. He also appeared at a hearing before the Tribunal.
4. The manner in which the Tribunal dealt with the appellant’s claims is helpfully summarised in the submissions of the Minister which I will here recount.
5. The Tribunal considered the medical evidence submitted by the appellant but did not accept that the appellant had provided a truthful account to those whom were treating him. It found that the appellant had fabricated his claims about his sexuality and sexual history. In making that finding, the Tribunal considered it “striking” that the appellant had failed to mention to those treating him that his brother had been shot. The Tribunal found the appellant’s evidence about being unable to study because of his father’s reaction to being told about the appellant’s sexuality to be inconsistent with his evidence that he was unable to study because of the shooting of his brother. The appellant’s evidence was that he only told his father about his sexuality a few weeks before his father returned to Lebanon on 26 May 2013—that is, in late April or early May. Whereas, he told the Tribunal that he had not studied from January to May 2013 following the shooting. The Tribunal found that his non-attendance at class was not caused by his father’s reaction to his sexuality. The Tribunal also observed that the period of the appellant’s depression noted in the medical records was not congruent with the time the appellant claimed to have told his father about his sexuality. The reference in the medical records about the appellant experiencing social isolation was also, so the Tribunal found, inconsistent with the appellant’s evidence about the support he received from his friends.
6. The Tribunal also found that the appellant had given inconsistent evidence about the number of homosexual relationships he had had in Lebanon, and also about whether he had a sexual relationship with a girl in Lebanon, and that it did not accept his explanation for those inconsistencies. The Tribunal found that the various accounts of where the appellant engaged in sexual relationships were inconsistent as he had altered the location of where he claimed to have engaged in those activities. The Tribunal also found the appellant’s claim that it was safe to have his ongoing and regular secret homosexual relationships in Lebanon in close proximity to his relatives inconsistent with his claim that he had not engaged in any sexual activities in Australia for fear that someone would see him.
7. The Tribunal came to the view that the appellant was not a credible witness and that the appellant’s claims for protection were fabricated. It therefore did not accept that there was a real chance the appellant would suffer serious harm in the reasonably foreseeable future for a Convention reason if he were returned to Lebanon. Accordingly, the Tribunal was not satisfied that the appellant was a person in respect of whom Australia has protection obligations under the Refugee Convention.
8. On the judicial review application before the Federal Circuit Court, the appellant raised two grounds. The first was that the Tribunal misunderstood his claims and misapplied the law. In respect of that ground, the primary judge found that the allegations made in the ground were patently incorrect in light of the reasons given by the Tribunal for its decision. In my view, the primary judge was undoubtedly correct in reaching that conclusion. There was, in essence, only one claim before the Tribunal and that was a claim, as I have said, based on the appellant’s alleged bisexuality. There can be no doubt, from a fair reading of the Tribunal’s decision, that the Tribunal did not misunderstand that claim, and there is no basis for suggesting that the law was misapplied in relation to it.
9. The second ground before the Federal Circuit Court was that the member of the Tribunal was biased and rude. In the reasons of the primary judge, his Honour identified each of the particular allegations relied upon by the appellant to allege that the Tribunal’s decision was affected by actual bias or a reasonable apprehension of bias. Those allegations were as follows:
10. that the Tribunal member spoke loudly;
11. that the Tribunal member spoke with a rude or arrogant tone of voice;
12. that the Tribunal member banged her hand on the table;
13. that the Tribunal member threw papers on the table;
14. that the Tribunal member was frightening and insensitive; and,
15. that the Tribunal member expressed surprise, including by having “bulging eyes” when the appellant gave evidence of the nature of his relationship with a girlfriend in Lebanon and when the appellant told the Tribunal member that he had been supporting himself on Centrelink benefits.
16. The primary judge considered each of those allegations. He did so after receiving further submissions from the parties—that is, written submissions received after the hearing before the primary judge. The primary judge’s reasons record that to consider those allegations, his Honour listened to the entirety of an audio recording of the hearing before the Tribunal and also had regard to the transcript. Whilst the appellant’s contentions were made in support of a contention of actual bias, the primary judge also considered whether the Tribunal’s decision was affected by a reasonable apprehension of bias.
17. The primary judge found that none of the allegations raised by the appellant gave rise to any inference of actual or apprehended bias. Having rejected each of the appellant’s grounds of appeal, the primary judge dismissed the appellant’s application.
18. The appellant’s appeal to this Court raises one ground. That ground is in the following terms:

I ask the Honourable Court to give me the opportunity to appear before it as I believe that His Honour Judge Smith's judgment is affected by error of law by an apprehension of bias as well as by misunderstanding my fear of harm and the facts presented to the Tribunal.

1. That ground of appeal was not particularised.
2. The appellant appeared before me unrepresented but assisted by an interpreter. Insofar as the appellant’s ground of appeal was particularised through the submissions made by the appellant, I understand that particularisation to be this. *First*, that the primary judge ignored the appellant’s post-hearing submissions made to the primary judge. *Second*, that the primary judge only listened to the audio recording of the Tribunal’s hearing and that without viewing a video of the Tribunal’s hearing the primary judge should not have come to the conclusions that he did.
3. On that basis, as I understand the appellant’s contention, this Court should come to the view that the primary judge was biased, or alternatively, that the primary judge’s judgment is affected by apprehended bias.
4. Allegations of bias must be distinctly made and clearly proved: *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 at [69] (Gleeson CJ and Gummow J). The onus of establishing bias or apprehended bias falls upon the person making the allegation: *VAAD v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 117 at [45], (Hill, Sundberg and Stone JJ); *AZAEY v Minister for Immigration and Border Protection* (2015) 238 FCR 341 (North, Besanko and Flick JJ).
5. The proposition that the primary judge was actually biased is completely untenable and I reject it. Nothing whatsoever has been put before me which could support that conclusion.
6. I then turn to consider apprehended bias. The test for apprehended bias in relation to curial proceedings is whether a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question to be decided: *Re Refugee Review Tribunal; Ex parte H* [2001] HCA 28 at [27] (Gleeson CJ, Gaudron and Gummow JJ).
7. I will first address the appellant’s contention based on the primary judge determining without reference to a video of the hearing, the allegation that the Tribunal was biased. It is apparent from [25] of the primary judge’s reasons for judgment that during the hearing before the primary judge the appellant proffered the audio discs of the Tribunal hearing. The appellant said that he wanted to rely on the video recording of the Tribunal hearing, but that he did not have a video recording and was not sure whether there, in fact, was one. No attempt to tender a video recording was made, and no video recording was received. The primary judge did, by consent, allow the admission of the audio recording of the hearing, and granted to the parties leave to file submissions in respect of that recording. As the primary judge recorded in his reasons at [25], his Honour indicated that he would listen to the audio recording in chambers and make a decision without any further oral hearing. It is evident from the reasons of the primary judge that that is what then occurred. The primary judge obviously did not have reference to any video, there being no video produced, and, as I am informed today, no video available to be produced.
8. The question then is whether a fair minded lay observer might reasonably apprehend that the primary judge might not have brought an impartial mind to the resolution of the question of whether the Tribunal was biased because the primary judge decided that question without reference to a video that does not exist. Merely posing the question makes evident the obvious answer. In my view, there can be no suggestion that a fair minded lay observer might reasonably apprehend that the primary judge, in making his determination based on the best evidence available to the primary judge at the time, might not have brought an impartial mind to the resolution of the question then before him.
9. The second aspect of the appellant’s contention is that the primary judge ignored his post‑hearing submissions. In support of that contention, the appellant took me to [26] of the reasons for decision of the primary judge. That paragraph states as follows:

Both the applicant and the Minister filed written submissions. The applicant’s submissions went beyond the leave granted and addressed further grounds of review. To the extent that they did so, I have given them no attention. I have listened to the audio recording of the hearing.

1. It may be that the appellant misunderstands the content of that paragraph. Clearly, the primary judge is not there saying that the submissions filed were ignored in their entirety. What the primary judge is saying is that, insofar as those submissions went beyond the leave granted, that is, the leave granted to the parties to file submissions in respect of the audio recording, those submissions were not taken into account. There can be no suggestion that a fair-minded lay observer might reasonably apprehend by reason of the content of [26] that the primary judge might not have brought an impartial mind to the resolution of the question before him. It was completely appropriate for the primary judge to not permit the appellant to raise new issues beyond those issues the subject of the leave granted. No suggestion of apprehended bias is raised.
2. Insofar as the appellant contended that his submissions dealing with the audio tape and its content were ignored, I reject that contention. The reasons of the primary judge on the question of whether the Tribunal member was biased or whether the Tribunal’s decision was affected by apprehended bias are comprehensive. It is evident from any fair reading of the reasons that the primary judge went to great lengths to consider carefully each of the specific challenges made to the conduct of the hearing which I have outlined above at [9]. Indeed, the approach taken by the primary judge to that task can only be described as admirable. The primary judge had regard to both the transcript and the audio recording. The primary judge carefully identified passages in the audio recording which were the subject of the challenges made by the appellant. To the extent the primary judge considered that the Tribunal’s conduct required some censure, that was done, as is apparent from [45] of the primary judge’s reasons for judgment.
3. In my view no tenable proposition can be made that, in dealing with the particulars of bias relied upon by the appellant, the submissions of the appellant were ignored, or, more pertinently, ignored in a way which could give rise to a conclusion that a fair-minded lay observer might have reasonably apprehended that the primary judge might not have brought an impartial mind to the resolution of the question before him.
4. For those reasons this appeal must be dismissed.

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| I certify that the preceding twenty-five (25) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromberg. |

Associate:

Dated: 21 March 2017