FEDERAL COURT OF AUSTRALIA

SZUOW v Minister for Immigration and Border Protection [2016] FCA 871

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| Appeal from: | *SZUOW v Minister for Immigration & Anor* [2016] FCCA 1003  |
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| File number: | NSD 747 of 2016 |
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| Judge: | **ROBERTSON J** |
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| Date of judgment: | 2 August 2016 |
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| Catchwords: | **MIGRATION** – appeal from Federal Circuit Court of Australia dismissing an application for judicial review of a decision of the then Refugee Review Tribunal – Tribunal affirmed decision not to grant the appellant a Protection (Class XA) visa – whether jurisdictional error on the part of the Tribunal – whether Tribunal proceeded without taking into account the appellant’s dizziness or injury – whether Tribunal failed to take into account the appellant’s fear of persecution and the harm he said he would face as a result of the previous harm and the country information – whether Tribunal failed to ask itself what will happen to the appellant if he went back to Egypt, especially as a targeted person – whether Tribunal misapplied the law and misunderstood the appellant’s claim and evidence and what happened to him at the hand of his previous migration agent – whether it was reasonably open to Tribunal not to accept the appellant’s evidence  |
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| Legislation: | *Migration Act 1958* (Cth) ss 36, 65 |
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| Date of hearing: | 2 August 2016 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Category: | Catchwords |
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| Number of paragraphs: | 27 |
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| Counsel for the Appellant: | The Appellant appeared in person with the aid of an interpreter  |
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| Solicitor for the First Respondent: | Mr D McLaren of MinterEllison |
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| Solicitor for the Second Respondent: | The Second Respondent submitted save as to costs |

ORDERS

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|  | NSD 747 of 2016 |
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| BETWEEN: | SZUOWAppellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| JUDGE: | ROBERTSON J |
| DATE OF ORDER: | 2 AUGUST 2016 |

THE COURT ORDERS THAT:

1. The appeal be dismissed, with costs.

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

REASONS FOR JUDGMENT

# ROBERTSON J:

## Introduction

1. This appeal is from orders made by a judge of the Federal Circuit Court of Australia on 6 May 2016 dismissing, with costs, an application for judicial review made to that Court on 25 June 2014. That application was for judicial review of a decision of the then Refugee Review Tribunal (the **Tribunal**) made on 27 May 2014.
2. As found by the Tribunal, the appellant is a citizen of Egypt who arrived in Australia on 12 February 2013 holding a Business (short stay) visa. He applied to the Department of Immigration for a Protection (Class XA) visa on 22 February 2013. He claimed that he needed protection because of his political opinion as a former member of the National Democratic Party (**NDP**).
3. The appellant attended an interview with a delegate of the Minister on 1 August 2013 to discuss his claims.
4. The delegate refused the appellant’s application for a protection visa and this decision was notified by letter dated 30 August 2013.
5. On 20 September 2013, the appellant applied to the Tribunal for review of the delegate’s decision.
6. There was a hearing before the Tribunal on 22 May 2014.The appellant represented himself with the assistance of an interpreter.

## Decision of the Tribunal

1. On 27 May 2014, as I have indicated, the Tribunal affirmed the decision not to grant the appellant a Protection (Class XA) visa.
2. The decision of the Tribunal, as summarised by the judge of the Federal Circuit Court at [7]–[10] was as follows, omitting footnotes:

The Tribunal:

a) accepted the applicant was a member of the NDP, and was involved in NDP activities, but did not accept the applicant held a senior or official role within the Party, and found that the applicant had exaggerated the significance of his role in the NDP;

b) accepted the applicant participated in political demonstrations, and that he may have been subjected to some violence, but the Tribunal did not find the applicant was a specific target of the violence;

c) accepted that during 2011 and 2012 the applicant may have experienced violence at the demonstrations, but considered that any such violence was in the context of the volatile political situation and security conditions which existed at the time;

d) accepted the applicant may have been subjected to minor harm during the demonstrations, but noted that there was no evidence before it suggesting the applicant was seriously harmed; and

e) accepted that the applicant may have been threatened and targeted by members of the Muslim Brotherhood because he was known as a “violent partisan of the NDP”.

Further, the Tribunal:

a) considered the applicant’s evidence did not indicate there was a real risk of serious or significant harm during 2011 and 2012: it found the applicant’s evidence regarding the incidents in which he claimed to have been assaulted and threatened to be “very unsatisfactory” because the applicant was vague about the dates of the incidents, and the applicant’s accounts did not match the documents he submitted;

b) did not accept the applicant’s evidence that he was shot: the applicant did not mention that incident in his application for a Protection visa, and the Tribunal did not accept the applicant’s explanation that his advisor had omitted the incident from the application; and even if it did occur, the Tribunal found it difficult to accept it was politically motivated;

c) found the applicant did not suffer serious harm as a result of his claimed assaults because of the concerns it had about the credibility of the applicant’s account, and the discrepancies between his evidence and the applicant’s supporting documents;

d) did not accept the applicant’s wife was compelled by her family and the Muslim Brotherhood to divorce the applicant;

e) did not accept that there was a real chance the applicant would suffer serious or significant harm because of his political opinion;

f) found that the applicant’s having travelled outside Egypt, and returned to Egypt on three occasions during 2011-2012, when the applicant [sic] his life was in danger, was inconsistent with the applicant’s claimed fear; and

g) found that the applicant’s waiting to depart Egypt for one month after he had been issued with a visa was inconsistent with his claimed fear.

The Tribunal also found that the political situation had substantially changed in Egypt since the applicant was last in Egypt. The Morsi government has been removed, and the Muslim Brotherhood had been declared an illegal organisation. The Tribunal referred to country information that provided no support for the contention that former ordinary members of the NDP are currently targeted in Egypt.

The Tribunal summarised its findings as follows [at [38] of its reasons]:

As noted above, I find that the applicant has exaggerated the actual harm he faced in Egypt prior to his departure, and the risk of harm that he was under at that time. I consider that if the applicant had really been systematically and seriously targeted because of his past activities, it would have been easy for the MB to make good its threats at that time. His own conduct in returning to Egypt three times after trips overseas, and his delaying his departure for Australia for one month after his visa was issued also undermines his claims that he was at serious risk of harm, and fearful for his safety at the time. I consider that any harm faced by the applicant arose spontaneously in the context of violent and volatile demonstrations against the ouster of Mubarak, and later against the MB government. There is no reason to suppose, given the changed circumstances since then, that the applicant would be engaged in similar activities on return. I do not accept, based on the credible information before me, that the applicant would now be targeted for serious harm in a systematic, deliberate manner, when he was not before. I find there is no real chance that he would face persecution now or in the reasonably foreseeable future, as a member of the former NDP, or indeed, as a perceived opponent of the MB.

## The proceedings in the Federal Circuit Court

1. That application for judicial review was in the following terms:

1. The Refugee Review Tribunal accepted that I have been subjected to minor harm and did not accept that I will be subjected to harm when I return.

2. The tribunal did not take into account that my evidence was affected by my medical condition which was submitted to the tribunal on 17 May 2014.

1. The judge of the Federal Circuit Court found as follows, omitting footnotes:

*Ground 1*

14. The first ground of review does not disclose any jurisdictional error. It seeks to traverse the Tribunal’s findings. In making its findings, the Tribunal applied the correct legal criteria and made findings that it was reasonably open for it to make for the reasons it gave. Ground 1, therefore, is not made out.

*Ground 2*

15. The Tribunal referred in its reasons for decision that, before the hearing, the applicant had submitted medical reports relating to injuries he had recently sustained in a car accident. The medical evidence consisted of the following:

a) A psychologist’s report dated 17 May 2014 expressing the opinion that, as a result of a car accident on 7 May 2014, the applicant was suffering post-traumatic stress disorder.

b) Medical certificates which relate to the injuries the applicant sustained as a result of the car accident.

16. The applicant provided these documents under cover of a letter dated 17 May 2014 in which he stated

*I hope that I will be able to give evidence with the assistance of an Arabic interpreter but I need the Tribunal’s patience during the hearing.*

17. The Tribunal also recorded in its reasons for decision that, at the hearing, the applicant informed the Tribunal that he had taken “*pain killing medication that made him dizzy*”*,* but he was “*able to give evidence*”.[35]

18. There is in evidence a transcript of the hearing before the Tribunal. The following was said about the applicant’s dizziness

*Member: Mr [applicant] I just want to mention first of all that I received the medical documents that you sent in so I just want to have a bit of a talk about how the hearing should proceed today. Now are you in any pain at the moment?*

*A through an interpreter: No I have taken a painkiller.*

*Member: Ok what pain killer have you taken?*

*A through interpreter: The doctor prescribed it for me. It’s called (inaudible).*

*Member: And does that make you feel drowsy or confused or forgetful?*

*A through interpreter: It does make me a bit dizzy.*

*Member: Do you feel able to give evidence today?*

*A through interpreter: Yes.*

19. Shortly after this exchange, the Tribunal member said:

*Ok now the hearing will probably go for 2 or 3 hours. If you would like a break at any time please let me know. If you would like to stand up for a while rather than sitting or if you just want to get up and move around the room that is perfectly fine and if you need to take another painkiller please let me know. If at any point you fell* [sic] *unable to continue giving your evidence please say so.*

20. In its reasons for decision, the Tribunal referred to the applicant’s having stated he felt dizzy, and to the applicant’s injuries as described in the medical reports the applicant had submitted to the Tribunal. The Tribunal recorded that the applicant informed the Tribunal that he had taken pain killing medication which made him dizzy, but that he was able to give evidence. The Tribunal also recorded that it explained to the applicant that if he felt his capacity to give evidence was impeded by his injuries or the medication he should inform the Tribunal. The Tribunal found that the applicant was capable of giving evidence at the Tribunal hearing, and that he was not prevented from doing so as a result of any medical condition or treatment. The Tribunal’s conclusion is supported by the transcript of the hearing before the Tribunal. The transcript reveals nothing occurred, or failed to occur, at the hearing that could reasonably have indicated to the Tribunal the applicant was troubled by his being a bit dizzy or by the injuries referred to in the medical reports he had submitted to the Tribunal, or that his being a bit dizzy or having suffered the injuries impaired or, at least impaired in any material way, his ability to effectively participate in the hearing.

21. That there was nothing that could reasonably have indicated to the Tribunal the applicant was affected by his dizziness or injuries does not, however, necessarily mean that he was not in fact affected by these conditions, and that the applicant was necessarily given the hearing he was entitled to be given under s.425 of the *Migration Act 1958* (Cth). The onus, however, is on the applicant to show he was unfit to take part in the Tribunal hearing, or was otherwise impaired in his ability to fully and effectively participate in the hearing. There is no evidence before me that could permit me to make any such finding.

22. Ground 2, therefore, fails.

**Submissions made at hearing**

23. The applicant, who is not legally represented, made a number of submissions at the hearing before me. The first submission was that the statement he provided in support if his application for a Protection visa was incomplete, but the account he gave to the delegate was complete. The applicant submitted “*I did not say anything but the truth*”. Whether or not the applicant spoke the truth in his claims for protection, however, was a matter for the Tribunal, not this Court, to determine.

24. The applicant’s second submission relies on the Tribunal having accepted that:

a) country information indicated that general conditions of insecurity and political violence currently exist in Egypt;

b) the applicant has been harmed in such circumstances before; and

c) there is a small possibility the applicant may, in the future, be harmed in indiscriminate violence, or violence of which he was no [sic] an intended target.

25. The applicant submits that, notwithstanding the Tribunal’s having accepted these matters, the Tribunal did not consider that the country information indicates the risk of such harm occurring was real, rather than remote or insubstantial. The applicant submitted this was a legal error because “*no one can predict in the future whether it’s going to be real danger or its real danger*”.

26. I do not accept the applicant’s submission. The Tribunal was required to make an assessment of what was to occur to the applicant if he were to return to Egypt. The Tribunal applied the correct legal criteria for making that assessment, and the findings it made, based on its applying the correct legal criteria, were reasonably open to the Tribunal for the reasons it gave.

27. The third submission the applicant made was that the Tribunal erred in finding he was not specifically targeted. He submitted there was solid evidence to suggest he was targeted. He said he was a businessman and asked rhetorically why he would leave work, his country, and family if he were not afraid. This submission, too, raises no jurisdictional error. It was for the Tribunal to assess the applicant’s claim that he feared persecution and harm. The Tribunal assessed the applicant’s claims by applying the correct legal criteria. Its conclusions were reasonably open to it, for the reasons it gave.

28. The applicant’s fourth submission is that his migration agent erred in the manner in which he presented the applicant’s case. As I understood the applicant, the complaint is that his migration agent did not include in his application for a Protection visa the applicant’s claim that he was shot at. This discloses no jurisdictional error.

29. The applicant gave evidence to the Tribunal that his agent had not included this part of the applicant’s claim in his application for a Protection visa. The Tribunal, however, did not accept the applicant’s evidence. The Tribunal found it hard to believe that the applicant’s adviser would include details of less serious and less recent incidents in the application, but leave out the most serious incident that happened only months before the applicant left Egypt. It was reasonably open to the Tribunal not to accept the applicant’s evidence for the reasons the Tribunal gave. In any event, the truth of the applicant’s evidence that he was shot at was not material to the Tribunal’s decision because the Tribunal found that, even if, as the applicant claimed, he had been shot at, the Tribunal did not accept the shooting would have been politically motivated.

## The appeal to this Court

1. The grounds of appeal to this Court, the appeal having been filed on 20 May 2016,were as follows:
2. The Tribunal had strong evidence about my serious injury and medication yet proceeded with the hearing without taking into account my dizziness or injury.
3. The Tribunal failed to take into account my fear of persecution and the harm I will face as a result of the previous harm and the country information.
4. The Tribunal failed to ask itself what will happen to me if I go back to Egypt especially as a targeted person.
5. The Tribunal misapplied the law and misunderstood my claim and there is no basis for misunderstanding my claim and my evidence and what happened to me at the hand of my previous migration agent.
6. Contrary to the findings and judgment of His Honour it was not reasonably open to the Tribunal not to accept my evidence.
7. The appellant filed no written submissions but made the following oral submissions. First, he said he was in a very bad psychological condition at the time of the Tribunal hearing and the Tribunal had the relevant medical reports. He said he believed the Tribunal and the primary judge were not fair to him in this respect. Secondly, the appellant took issue with the Tribunal’s assessment of the risk of harm to him if he returned to Egypt and he referred to the photographs of his participation in demonstrations and to the evidence of his membership of the NDP.
8. The first respondent, the Minister, made written and oral submissions, the substance of which was as follows.
9. The Minister submitted that ground 1 made the same complaint as the second ground before the primary judge. The Minister submitted that the primary judge was correct to find, at [21], that the onus was on the appellant to show that he was unfit to take part in the Tribunal hearing, or was otherwise impaired in his ability to participate in the hearing fully and effectively. There was no evidence before the primary judge to permit his Honour to make such a finding. In making this finding the primary judge had regard to the medical evidence that had been submitted to the Tribunal, being the psychologist's report dated 17 May 2014 and medical certificate relating to the car accident in which the appellant had been involved on 7 May 2014, as well as the Tribunal’s record of the oral evidence given by the appellant at the Tribunal hearing.
10. The Minister submitted that ground 2 took up elements of the first ground before the primary judge, as well as the oral submissions made by the appellant at the hearing before the primary judge. The Minister submitted that the primary judge was correct to find at [14] and [25]–[26] that the Tribunal applied the correct legal criteria, and that the findings made by the Tribunal (based on its application of the correct legal criteria) were reasonably open to it for the reasons that it gave.
11. The Minister submitted that ground 3 also took up elements of the first ground before the primary judge, as well as the submissions made by the appellant at the hearing before the primary judge. The Minister submitted that the primary judge was correct to find at [14] and [27] that the Tribunal applied the correct legal criteria, and that the findings made by the Tribunal (based on its application of the correct legal criteria) were reasonably open to it for the reasons that it gave.
12. In relation to ground 4, to the extent that the appellant alleged that the Tribunal misapplied the law or misunderstood his claims, the Minister submitted that the primary judge was correct to find that it did not do so. To the extent that the appellant raised alleged errors made by his migration agent, such allegations being raised in oral submissions before the primary judge, the Minister submitted that the primary judge was correct to find that these allegations did not disclose jurisdictional error for the reasons stated at [28]–[29].
13. The Minister submitted that ground 5 appeared to request impermissible merits review. To the extent that it alleged that the Tribunal’s findings were not reasonably open to it, the Minister submitted that there was no basis for a finding that the Tribunal acted unreasonably, let alone acted unreasonably to the standard required to make out jurisdictional error. The Minister submitted that the primary judge was correct to find that the Tribunal’s findings were reasonably open to it.
14. The Minister submitted that for these reasons, the appeal should be dismissed with costs.

## Consideration

1. I should first indicate that I reject as evidence the affidavit affirmed by the appellant and dated 19 May 2016. It is not relevant to the task of this Court, which is to correct any error on the part of the judge of the Federal Circuit Court. I will treat that material as a submission on behalf of the appellant.
2. In my opinion, ground 1 fails on the facts. As the primary judge said at [15]–[21], the Tribunal took into account the medical evidence and proceeded on the basis that the appellant stated that he was able to give evidence. The Tribunal also gave the appellant the opportunity to tell it if he felt unable to continue giving his evidence. The appellant has not shown that he was unfit to take part in the hearing before the Tribunal. I see no error in the reasons of the primary judge in respect of this ground. I do not accept the appellant’s submission that the primary judge or the Tribunal was unfair to him.
3. As to ground 2, I see no error in the conclusions of the primary judge at [14] and at [25]–[26]. This ground fails in my opinion because the Tribunal did take into account the appellant’s fear of persecution and the harm he claimed he would face if he returned to Egypt. As framed, and in light of the Tribunal’s reasons, ground 2 fails as it does not claim jurisdictional error on the part of the Tribunal: it does no more than disagree with its conclusions.
4. As to ground 3, I see no error in the conclusions of the primary judge at [14] and at [27] that, in making its findings, the Tribunal applied the correct legal criteria and made findings that it was reasonably open for it to make for the reasons that it gave. I understood the appellant in his oral submissions to direct attention to [37]–[38] of the reasons of the Tribunal, but I see no jurisdictional error in the Tribunal’s evaluation in those paragraphs, or indeed elsewhere, of the degree of the risk of harm.
5. As to ground 4, that the Tribunal misapplied the law and misunderstood the appellant’s claim and evidence, to the extent that this ground involved a complaint that the appellant’s migration agent made an error, as identified by the primary judge at [28], I see no error in the conclusion of the primary judge at [28]–[29] that this disclosed no jurisdictional error. To the extent that the ground travels more widely, it is stated too generally to establish a claim of jurisdictional error. The Tribunal evaluated the documentary and oral evidence that was before it.
6. As to ground 5, that it was not reasonably open to the Tribunal not to accept the appellant’s evidence, at this level of generality the ground does not raise an issue of jurisdictional error. The ground suggest no more than that the appellant disagrees with the Tribunal’s findings. This ground also fails.
7. In summary, no error has been shown in the reasons for judgment or in the orders of the primary judge. No jurisdictional error on the part of the Tribunal has been made out.

## Conclusion and orders

1. For these reasons, the appeal should be dismissed, with costs.

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| I certify that the preceding twenty-seven (27) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Robertson. |

Associate:

Dated: 2 August 2016