FEDERAL COURT OF AUSTRALIA

CUO16 v Minister for Immigration and Border Protection [2017] FCA 1038

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| Appeal from: | *CUO16 v Minister for Immigration and Border Protection* [2017] FCCA 878  |
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| File number: | QUD 228 of 2017 |
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| Judge: | **LOGAN J** |
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| Date of judgment: | 3 August 2017 |
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| Catchwords: | **MIGRATION** – appeal from Federal Circuit Court of Australia – application for Protection (Class XA) visa – a delegate of the Minister refused application for protection visa – procedural fairness obligations of the Federal Circuit Court – court not permitted to make an applicant’s case or to act as inquisitor – Federal Circuit Court dealt with each ground of review without appellate error – no denial of procedural fairness – appeal dismissed **PRACTICE AND PROCEDURE** – address for service – specified address for service on notice appeal different to that specified in judicial review application in Federal Circuit Court – use by Federal Court National Operations Registry of address for service on judicial review application for the purpose of giving notice of listing of appeal – use of such an address for the purpose not permitted  |
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| Legislation: | *Migration Act 1958* (Cth) ss 5J, 36, 91R, 424A, 424AA*Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth)  |
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| Cases cited: | *SZBYR v Minister for Immigration and Citizenship* [2007] 81 ALJR 1190  |
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| Date of hearing: | 3 August 2017 |
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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: | 30 |
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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 First Respondent: | Minter Ellison |
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| Counsel for the Second Respondent: | The second respondent filed a submitting notice |

ORDERS

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|  | QUD 228 of 2017 |
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| BETWEEN: | CUO16Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| JUDGE: | LOGAN J |
| DATE OF ORDER: | 3 AUGUST 2017 |

THE COURT ORDERS THAT:

1. A copy of Exhibit 1 not be made available to any person who is not a party to the proceeding unless the name of the appellant is obliterated.
2. The appeal be dismissed.
3. 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

(REVISED FROM TRANSCRIPT)

LOGAN J:

1. By an application received on 2 April 2015 by the Department of Immigration and Border Protection, the appellant applied under the *Migration Act 1958* (Cth) (the Act) for that class of visa known as a protection (class XA) visa. Later that month, the Minister for Immigration and Border Protection (Minister), the first respondent to the appeal, by an officer of his Department, acknowledged that the appellant had made a valid application for that visa. Prior to deciding the application, a delegate of the Minister invited the appellant to attend for an interview in relation to his visa application. The appellant was not obliged to attend for such an interview. In the result, he chose not to.
2. The Minister’s delegate then, on 27 July 2015, determined the visa application on the basis of the material before the Department, without the benefit of any supplementation at interview by the appellant. The delegate decided to refuse the application.
3. The following month, as was his right under the Act, the appellant sought the review of the Minister’s delegate’s decision by the Administrative Appeals Tribunal (Tribunal). The Tribunal invited the appellant to attend at a hearing. The appellant took up that invitation. Having heard from the appellant at the hearing and on the basis of other material before the Tribunal, the Tribunal decided, on 4 September 2016, to affirm the decision of the Minister’s delegate not to grant a protection visa to the appellant.
4. On 28 September 2016, the appellant sought the judicial review of the Tribunal’s decision by the Federal Circuit Court of Australia (Federal Circuit Court). On 24 April 2017, for reasons delivered that day, the Federal Circuit Court dismissed the appellant’s judicial review application. The appellant now appeals to this Court against that order of dismissal.
5. There are two grounds of appeal. They are:
6. The FM failed to consider that the Tribunal acted in a manifestly unreasonable way when dealing with the applicant claim and ignoring the aspect of persecution and harm in terms of Sec.91R of the Act. The Tribunal failed to observe the obligation amounted to a breach of Statutory Obligation.
7. The learned Federal Judge has dismissed the case without consider the legal and factual errors contained in the decision of the AAT.
8. Subject to one statement in respect of ground 2 to which I shall refer below, the appellant did not in oral submissions develop these grounds of appeal. He chose not to file a written submission. That does not, of course, relieve me from an obligation of considering the merits of each of the grounds of appeal.
9. By way of initial observation in respect of the grounds, ground 1 does not in its terms engage with an issue raised in the Federal Circuit Court, having regard to the grounds set out in the judicial review application. In particular, there was no issue before the Federal Circuit Court as to whether the Tribunal had dealt with the appellant’s claim in respect of persecution in a way that complied with s 91R of the Act.
10. In theory, the interests of justice may, in a particular case, require that an appellant be granted leave to raise on appeal an issue which was not at large in the Federal Circuit Court’s original judicial review jurisdiction. As it happens, it is not necessary to consider whether such leave ought to be granted. That is because s 91R had been repealed prior to the lodgement with the Department of the appellant’s protection visa application. It was omitted from the Act by an amendment made by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth), with effect on and from 16 December 2014.
11. Quite fairly, the Minister approached ground 1 on the basis that there was but an error of reference in the reference to s 91R, given that definitional content earlier found in that section could be regarded as having been taken up and now found in s 5J of the Act. Approaching the ground on that basis, it is not at odds with an issue which was before the Federal Circuit Court.
12. Another initial observation in respect of the grounds of appeal is that ground 2 on its face is cast at such a level of generality as to not make it meaningful in terms of giving particulars of the legal and factual errors said to be contained in the Tribunal’s decision which were not considered by the Federal Circuit Court. However, in respect of that ground, and by way of oral submission, the appellant stated that the judge had “just asked him a couple of questions”. What I understood by that, and the Minister’s submissions were cast accordingly, was that the learned primary judge had not engaged with the issues which were before the court. It was also apparent in an exchange which I had with the appellant that he was expecting to be asked rather more questions by the judge than occurred.
13. It is convenient to deal further with ground 2 first. As the Minister correctly highlighted, there is no transcript in evidence of the proceedings in the Federal Circuit Court. That in itself very probably presents an insuperable difficulty for the appellant in demonstrating any lack of the affording of an opportunity to be heard. Particularly that is so as the reasons for judgment of the learned primary judge display a close engagement with the grounds of review.
14. Taking up, though, the sentiment so evident in the appellant’s oral submission this morning, the following ought to be stated. The system of justice here is inherited from the British and it is an adversarial system. It is for each party to develop that party’s case as opposed to under an inquisitorial system where a judge directs inquiries but also receives submissions from parties. The nature of the system does not change merely because a person is not represented by a lawyer. A judge must be astute not to become an advocate for either party. To do so might give rise to an apprehension that the judge was biased. Of course that may mean that a judge nonetheless asks questions in order to understand the nature of a party’s case. But that does not mean that the judge needs to, or ought to, act as an inquisitor.
15. There is no basis for a conclusion that the appellant was not afforded an opportunity to make his case by way of oral submissions supplemented by written submission if he so chose before the Federal Circuit Court.
16. The Minister quite properly and fairly approached ground 2 not just on this narrow basis, but also on the basis that it might be read as alleging that the Federal Circuit Court judge had erroneously dismissed the grounds of review. I shall return to that subject later in these reasons.
17. It is first necessary to deal with ground 1. For that purpose, more needs to be said of the protection visa application, as disclosed by the findings made by the Tribunal. The appellant arrived lawfully in Australia in March 2009 as a dependant of his then wife, whose entry and his into Australia was governed by a student visa. The appellant and his now former wife had met in 2006. They are each citizens of the Republic of India. They are each Sikhs, but the appellant is from a much higher caste than his former wife.
18. The appellant’s protection visa claim centred upon a fear of persecution based on an apprehension that his former wife’s brother and people in the village where they had married in 2007 would harm him. He alleged that his former wife’s brother had threatened to kill both him as well as his former wife because of a dislike for the appellant and also because one of the wife’s brother’s friends was smitten by her. He further claimed that he and his former wife’s brother had been involved in a physical altercation. The apprehension insofar as persecution grounds were concerned had as its foundation his membership of a different caste.
19. There were two children of the marriage, one born in India in 2008, the other in Australia in 2010. They have each returned to India to live with the former wife’s family. On the evidence before the Tribunal, the separation which occurred in Australia was attended with acrimony.
20. The appellant claimed that his former wife’s brother and friends had threatened both him and his mother since then, that police in India had threatened his family and that his former wife’s political connections would result in his being harmed, if he returned to India.
21. The basis of the claim was evaluated closely by the Tribunal, as the Tribunal’s reasons disclose. A particular basis for the Tribunal’s disbelief of the appellant was a delay of some 15 months between separation and when the protection visa application came to be lodged. The Tribunal also highlighted inconsistencies and a lack of particularity in the appellant’s claim in respect of prior harm and threats.
22. The learned primary judge regarded these conclusions on the factual merits as reasonably open; so they were. In other words, it is not on judicial review, much less on appeal, a judicial function to evaluate whether or not particular conclusions of fact should be made, as opposed to whether there was a reasonable basis for the Tribunal to make them. Of course, the Tribunal must assess what are called the “integers” of a protection visa application, but the Tribunal did this. In so doing, the Tribunal did not misconstrue the requirements of s 36 of the Act in respect of a fear of persecution.
23. Another ground before the Federal Circuit Court, which one might regard as having been incorporated by reference on a benign view of ground 2 of the appeal grounds, is non-compliance with s 424A. The difficulty about that alleged error, as the Federal Circuit Court judge correctly found, is that there was no “information” considered by the Tribunal which would form part of a reason for refusing the visa application. The Tribunal’s subjective thought processes are not “information” for the purposes of s 424A: see *SZBYR v Minister for Immigration and Citizenship* [2007] 81 ALJR 1190 at [18].
24. The Tribunal’s primary function was that of review, not inquisition. It was in the appellant’s interest to advance such evidence as he was able and disposed to advance to support his application, but he had no formal onus of proof. This is just a case where, for reasons that are logical, the Tribunal reached a conclusion on the factual merits adverse to the appellant. The Federal Circuit Court was correct so to conclude.
25. That adverse conclusion does not, in itself, equate either to actual, or apprehended bias. There is no evidence which would support any such characterisation of the Tribunal member’s approach to the making of the review decision.
26. In short, then, as to ground 2, this is just a case where the basis of the protection visa claim was correctly apprehended, and the requirements of the Act in relation to a foundation for a protection visa application in terms of a fear of persecution correctly understood. As to s 424A the section was not engaged. That being so, s 424AA had no relevance. Beyond this, it is just a case where findings with which the appellant is understandably in disagreement were reasonably open to be made, having regard to the Tribunal’s reasons and the material before it. Disagreement, though genuine, is neither a basis for judicial review nor for the allowing of an appeal.
27. It follows from this that the appeal must be dismissed.
28. It is necessary to add the following in respect of the practice adopted in the Registry in respect of the listing of the appeal, which became evident on the day of hearing. On his notice of appeal, the appellant specified an address for service. The address for service given was a postal address, not an email address. The appellant had specified, in his judicial review application before the Federal Circuit Court, an email address. As it happened, an officer in the Court’s National Operations Registry, located remotely from Queensland in Melbourne, chose, for reasons which are difficult to understand, to use the email address specified in the judicial review application as the address to which to send the notice of listing of the appeal. That was not the appellant’s specified address for service for the purposes of the appeal. The notice should have been sent by prepaid letter post to the address specified in the notice of appeal.
29. That particular want of attention to the requirements of the rules flowing from the specified address for service came to light when the appellant did not appear before the court at the appointed time. Understandably, the Minister applied for dismissal of the appeal on the basis of a default in appearance. The appellant’s appearance later this morning obviated any need to deal with that application. But the absence of an appearance usefully highlighted the want of attention to detail which I have mentioned in relation to the listing. As it happened, the method used still led the appellant to come to Court today, but it may well, have embarrassed both the Minister and the administration of justice in the sense that, had the appellant not appeared, the administrative error made by the Registry may well have meant that it was not possible to conclude that the appellant had been given notice of the listing at his address for service. The result might then have been that the interpreter was excused, the appeal adjourned for hearing at a later date and then, when the appellant came later to the courtroom, an embarrassment occasioned by the earlier excusing of the interpreter and a consequential need to adjourn the appeal for later hearing.
30. As it was, the appellant had the burden, flowing from the way in which the listing notice was cast, of not knowing to which courtroom he should proceed or even which level in the Commonwealth Law Courts building he should proceed today for the purpose of the hearing of his appeal. The listing notice mentioned that he ought to attend at the ground floor and look at the Law List. He did do this but it needs to be remembered that in many, if not most, of these cases, that direction places on a person unfamiliar with the English language the burden of trying to read a court list which is in English.
31. In many, if not most, cases heard in the Queensland registry it will be readily ascertainable well in advance which courtroom will be used by a particular judge. This is well known to officers of the Queensland District Registry. It needs to be well known to officers of the National Operations Registry. With that knowledge the other embarrassment which occurred today, so far as the appellant was concerned, would have been lessened. Had a precise courtroom and level been specified in the listing notice, he would have had the opportunity in advance of today of having that notice translated for him. I therefore consider it my duty to tender to the appellant an apology in respect of the stress which he doubtless encountered in his genuine endeavour to attend at the appointed time for the hearing of his appeal today.
32. That apology, of course, cannot alter the result on the merits of the appeal.

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| I certify that the preceding thirty (30) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Logan. |

Associate:

Dated: 31 August 2017