FEDERAL COURT OF AUSTRALIA

DTJ16 v Minister for Immigration and Border Protection [2018] FCA 415

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| Appeal from: | *DTJ16 v Minister for Immigration & Anor* [2017] FCCA 2049  |
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| File number: |  |
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| Judge: | **COLLIER J** |
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| Date of judgment: | 28 March 2018 |
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| Catchwords: | **MIGRATION** – appeal from a dismissal of a judicial review application by the Federal Circuit Court of Australia of a decision refusing to grant a protection visa under the *Migration Act 1958* (Cth) – leave to rely on grounds of appeal not in issue before the primary Judge  |
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| Legislation: | *Migration Act 1958* (Cth) Pt 7 Div 4, ss 26(2)(a), 26(2)(aa) |
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| Cases cited: | *Gupta v Minister for Immigration and Border Protection* [2017] FCAFC 172*Murad v Assistant Minister for Immigration and Border Protection* [2017] FCAFC 73; (2017) 250 FCR 510 *Primary Health Care Limited v Commonwealth of Australia* [2017] FCAFC 174 |
|  |  |
| Date of hearing: | 8 March 2018 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 21 |
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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: | Mr B Rayment of Sparke Helmore |
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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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|  | QUD 451 of 2017 |
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| BETWEEN: | DJT16Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| JUDGE: | COLLIER J |
| DATE OF ORDER: | 28 MARCH 2018 |

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

COLLIER J:

1. This is an appeal from a decision of the Federal Circuit Court of 21 August 2017, which dismissed an application to review a decision of the Administrative Appeals Tribunal (the **Tribunal**). In its decision, the Tribunal had affirmed the decision of a delegate of the Minister for Immigration and Border Protection (the **Minister**) not to grant the appellant a protection visa.
2. The appellant’s grounds in his notice of appeal do not match the grounds outlined in the appellant’s written submissions. Further, as the grounds were not raised in the Federal Circuit Court, the appellant requires leave of this Court to rely on those grounds. This is opposed by the Minister on the basis that the grounds have insufficient prospects to warrant the exercise of the discretion to grant such leave.

## Background

1. The appellant, who is 32 years old and previously lived Bangladesh, arrived in Australia as an unauthorised maritime arrival on 6 May 2013 after having left Bangladesh in April 2013. He lodged an application for a protection visa on 2 September 2013 and attended an interview with the Department of Immigration and Border Protection (the **Department**) on 24 September 2014.
2. The appellant is an ethnic Bengali and Sunni Muslim and applied for a protection visa on the basis that he said that he feared harm if he returned to Bangladesh because of his association with Jamaat-e-Islami (**JEI**). He also said that he fears that the Awami League (**AL**) will harm or kill him if he returns. Before the Tribunal, the appellant gave evidence that the AL had been trying to recruit him so that they would gain the support of the appellant’s father, who had practised as an imam and whom the AL believed could influence the village. The appellant stated that he resisted this pressure to join but, in 2013, some men went to the shop that he ran and threatened him or extorted him to pay a large sum of money. He refused and knew that he would be beaten as a result, so he fled the village. The shop was ransacked and vandalised and the appellant also gave evidence that his father had later been attacked.
3. The appellant’s visa application was refused on 31 October 2014. The Tribunal affirmed that decision on 7 November 2016, following a hearing on 13 September 2016 at which the appellant was represented and for which the representative had provided written submissions.
4. The Tribunal accepted that the appellant had some involvement with JEI but that this did not extend beyond a cursory involvement. The Tribunal accepted parts of the appellant’s evidence in relation to some demands being made of him. However, the Tribunal did not accept the appellant’s evidence that the AL had forcibly tried to recruit the appellant and raised its concerns about the truth of the appellant’s claims and was not satisfied there was a real chance of the appellant being targeted for his political views or those of his father or other family members. The DFAT country information also indicated that simply favouring JEI was not sufficient to attract the attention of the AL. The Tribunal, like the delegate, was not satisfied that the criteria in ss 26(2)(a) or (aa) of the *Migration Act 1958* (Cth) (the **Act**) were met.

## Federal Circuit Court proceeding

1. In his application in the Federal Circuit Court, the appellant did not specifically identify any grounds of review. He did, however, raise a number of grounds of review in his written submissions which the primary Judge examined.
2. First, the appellant alleged that the Tribunal had made an error of law in dismissing the application on the basis that the Tribunal did not consider that the appellant was a victim of persecution. The Tribunal had raised concerns about the appellant’s credibility, especially since the appellant had provided different information during his two interviews with the Department. The appellant took issue with the Tribunal comparing the two interviews because he thought the case officer for the second interview would have asked him why he had not mentioned the additional details in the first interview. The appellant also submitted that the Tribunal failed to understand the political culture of Bangladesh and that the Tribunal had determined the case according to the Australian political context. The primary Judge rejected this ground, stating that it merely cavilled with the factual basis of the Tribunal’s findings. The primary Judge considered that it was within the purview of the Tribunal to compare the information provided during the two interviews.
3. Second, the appellant contended that there was a lack of procedural fairness in the Tribunal hearing. The appellant complained of the Tribunal’s finding that the appellant was not a credible witness. The appellant also submitted that the Tribunal should not have used the Department of Foreign Affairs and Trade country information, but rather should have used other sources of information to support his refugee claim. The primary Judge rejected this ground as an attempt to engage the Court in impermissible merits review.
4. Third, the appellant submitted that the Tribunal erred by failing to accept that the appellant would be imprisoned and tortured in the event that he was returned to Bangladesh. The appellant referred in particular to evidence in the “general diary”; however:
* there was no reference to such a document in the Court Book;
* the Minister was not aware of its existence; and
* it had not been in the materials before the Tribunal.

The appellant indicated that some of what he said orally during his Department interview had been misinterpreted, and also complained that the Tribunal did not accept his claims because doubts had been raised as to whether he was a credible witness. The primary Judge rejected this ground and considered that there was no merit to the appellant’s claims.

1. Finally, the appellant stated that the Tribunal erred in not finding that the appellant had a fear of persecution for a Convention reason because it considered that the harm or punishment to the appellant was entirely politically motivated. The primary Judge found that this was also an attempt to engage the Court in impermissible merits review and that there was no error in the Tribunal’s reasoning.

## Grounds of appeal

1. The appellant has departed from his notice of appeal in preparing his written submissions. The grounds as they appear in the appellant’s submissions were not raised before the Federal Circuit Court. The appellant’s grounds of appeal as set out in his notice of appeal are:

1. The Judge of the Federal Circuit Court in his honourable judgement delivered on the 21 August 2017 failed error of law and relief under the judiciary Act. The Judge failed to find that the Administrate Appeals Tribunal (AAT) has not found any evidence in relation to my claims and thus its decision influenced by sufficient doubt.

2. Honourable Judge failed to hold that the Tribunal made an error of law when it did not take up and separately deal with the factual issues. The Tribunal failed to find low profile political activists are mostly persecuted because of their role for the party like Jamaat-e-Islami. The Tribunal failed to understand the persecution until political killing in Bangladesh under present dictatorial role in Bangladesh. The Tribunal member concluded that I will not suffer from any harm if I go to Bangladesh, which is not feasible.

3. I was denied procedural fairness, when the Tribunal member made opinion based on assumption and possibilities without any proper investigation. The Tribunal failed to assess the current situation in Bangladesh where thousands of my party leader all the level Jamaat-e-isiami workers are arrested and killed by so called crossfire and harassed by the autocratic present Awami League Government & the Authority. My party most leaders were Hang by so called trial. It well established independent report like Amnesty International Country Reports. Present circumstance very danger to me, the Tribunal undermined the danger, I will face if I am compelled to return Bangladesh as returned asylum seeker. And also, I came by boat in Australia only protect my life.

4. Besides, the Administrative Appeals Tribunal did not follow the proper procedure as required by the Act in arriving its decision dated 7 November 2016 in deciding my protection visa merit review application. Thus, the procedures that were required by the act or regulations to be observed, in connection with the making of the decision were not observed.

(Errors in original.)

1. In written submissions the appellant argued, in summary:
* The Tribunal should adopt the “sliding scale” of irrationality which renders irrationality easier to establish in a case such as the present where human rights or humanitarian protection is at stake;
* This “sliding scale” should also be adopted by the Federal Circuit Court of Australia;
* The Tribunal’s decision was not based on identifiable evidence and was arbitrary and irrational;
* The decision of the Tribunal was unreasonable; and
* The appellant left his country of origin by boat as an illegal maritime arrival to save his life.

## The hearing

1. At the hearing the appellant informed the Court that he did not know the content of his written submissions and sought an adjournment to enable him to accumulate sufficient funds to engage a lawyer. This application for an adjournment was opposed by the Minister. I refused to adjourn the hearing on the grounds advanced by the appellant, in circumstances where:
* the notice of appeal was filed in September 2017, since which time the matter had been transferred to the New South Wales Registry following the relocation of the appellant;
* there was no prospect of the appellant being in a position to engage a lawyer;
* there was no evidence before the Court of a lawyer being prepared to act for the appellant; and
* there grounds the appellant sought to raise in the appeal had, in any event, not been raised in the Court below and it was questionable whether those grounds had any prospects of success.
1. Subsequently, the appellant sought to rely on the written submissions filed on his behalf. In oral submissions, the appellant also claimed that he had no documents when he arrived in Australia, but had given honest evidence to the Tribunal.
2. The Minister relied on detailed written submissions. Oral submissions were also made by Ms Rayment for the Minister.

## Consideration

1. Principles referable to whether an appellant should be granted leave to rely on grounds not raised in the Court below have been revisited by the Full Court in *Murad v Assistant Minister for Immigration and Border Protection* [2017] FCAFC 73; (2017) 250 FCR 510, *Primary Health Care Limited v Commonwealth of Australia* [2017] FCAFC 174 and *Gupta v Minister for Immigration and Border Protection* [2017] FCAFC 172. In summary, an appellate Court will only allow an appellant to raise a new argument where it is expedient in the interests of justice to do so. Relevant factors for the appellate court to take into account include whether there has been adequate explanation for the failure of the appellant to raise the relevant issues at first instance, whether the proposed grounds have merit and whether the respondents would suffer real prejudice if the proposed grounds were agitated.
2. In this case, the first respondent has not identified any prejudice should the appellant rely on the grounds of appeal or the issues to which the appellant referred in his outline of submissions.
3. However, no explanation has been offered by the appellant for his failure to raise new grounds. Further, and critically, the grounds of appeal on which the appellant seeks to rely have no merit. In summary, this is because:
* In respect of ground 1:

○ the findings of the Tribunal in respect of the appellant’s credibility were open to it;

○ the Tribunal was not required to accept uncritically any or all of the appellant’s claims;

○ and the Tribunal was not required to find evidence rebutting the appellant’s claim.

* Ground 2 constituted an attempt by the appellant to engage the Court in impermissible merits review of the Tribunal’s decision.
* Notwithstanding the appellant’s claims in grounds 3 and 4, Pt 7 Div 4 of the Act sets out the obligations of the Tribunal insofar as concerns procedural fairness, and there is no material before the Court to substantiate a finding that the Tribunal did not comply with those provisions. Further, there is no general duty of investigation in the Tribunal of “investigation”.
* In respect of the set of written submissions filed by the appellant, I note that they are generically similar to arguments advanced in other migration proceedings in this Court. More particularly, however, there is no basis to find that the decision of the Tribunal in this proceeding was irrational or unreasonable. I also note that the submissions in no way refer to the filed grounds of appeal of the appellant, the specific decision of the Tribunal in this case, or the reasons of the primary Judge.
* The appellant’s submission that he gave honest evidence to the Tribunal simply seeks to cavil with the factual findings of the Tribunal in assessing the appellant’s evidence.
1. In the circumstances I am not prepared to grant the appellant leave to rely on the grounds of appeal.
2. The appropriate order is to dismiss the appeal with costs.

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| I certify that the preceding twenty-one (21) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Collier. |

Associate:

Dated: 28 March 2018