FEDERAL COURT OF AUSTRALIA

BZAIN v Minister for Immigration and Border Protection [2015] FCA 1335

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| Citation: | BZAIN v Minister for Immigration and Border Protection [2015] FCA 1335 |
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| Appeal from: | BZAIN v Minister for Immigration & Anor [2015] FCCA 2115 |
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| Parties: | **BZAIN v MINISTER FOR IMMIGRATION AND BORDER PROTECTION and ADMINISTRATIVE APPEALS TRIBUNAL** |
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| File number: | QUD 709 of 2015 |
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| Judge: | **COLLIER J** |
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| Date of judgment: | 26 November 2015 |
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| Catchwords: | **MIGRATION** – s 36(2)(a) *Migration Act 1958* (Cth) – impermissible merits review – no sustainable arguments – appeal dismissed |
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| Legislation: | *Migration Act 1958* (Cth) ss 36(2)(a), 36(2)(aa)  *Federal Court Rules 2011* (Cth) r 36.01(1)(a) |
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| Cases cited: | *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259  *SZSGA v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCA 774 |
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| Date of hearing: | 26 November 2015 |
|  |  |
| Place: | Brisbane |
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| Division: | GENERAL DIVISION |
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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 Dube of Sparke Helmore |
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| Solicitor for the Second Respondent: | The Second Respondent filed a submitting notice save as to costs |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 709 of 2015 |

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| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

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| BETWEEN: | BZAIN  Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent |

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| JUDGE: | COLLIER J |
| DATE OF ORDER: | 26 NOVEMBER 2015 |
| WHERE MADE: | BRISBANE |

THE COURT ORDERS THAT:

The notice of appeal filed 11 August 2015 is dismissed with costs.

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

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 709 of 2015 |

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| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

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| BETWEEN: | BZAIN  Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent |

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| JUDGE: | COLLIER J |
| DATE: | 26 NOVEMBER 2015 |
| PLACE: | BRISBANE |

**REASONS FOR JUDGMENT**

1. Before the Court is a Notice of Appeal filed on 11 August 2015 by the appellant under r 36.01(1)(a) of the *Federal Court Rules 2011* (Cth) (the Rules), in which the appellant appeals the whole judgment of the Federal Circuit Court given 29 July 2015.

## Notice of Appeal

1. The appellant makes the following claims:

**Grounds of Appeal**

1. The Tribunal failed to consider the complementary protection in my case.

2. RRT has denied me procedural fairness by failing to provide adequate reasons for the finding of a fact.

3. Tribunal unfairly refused to offer me protection saying my case was not covered by the Convention.

4. The Tribunal under evaluated the risk of serious harm that I will face if going back to China.

(Errors in original.)

1. The appellant seeks the following orders:

1. The orders made by the Federal Magistrates Court set aside.

2. My application to be remitted back to RRT for reconsideration.

3. The Respondents pay the costs.

(Errors in original.)

## Background

1. The appellant is a citizen of China who arrived in Australia on 2 August 2013 as the holder of a tourist visa. He was born on 15 September 1970 and married in October 1991. The appellant completed his high school education in 1987, was a general worker in Tianjin City doing track maintenance between 1987 and 2002, worked in Korea between 2002 and 2012 and returned to China between 2010 and July 2013.
2. The primary Judge provides a summary of the appellant’s experiences following his return to China from [4]:

He says that when he returned, in short compass, the village where he was living had a great quality of arable land. The local village government then illegally and forcibly appropriated that land for building a textile industrial park. The compensation given to the village was inadequate and because of that there was unrest and an uprising of sorts. There were petitions made to the local government and there was forcible destruction of buildings by the villagers.

The Applicant says that he was elected as a village leader, only to have that result not recognised because of corrupt activity by persons within the village government. After that, he was the subject of threats, including the semi-destruction of his house and two instances of unlawful detention, the second of which he was subject to torture.

He says that, after being released from that unlawful detention, his family helped him to apply for a visa and he fled China to early August 2013. …

1. On 28 October 2013, the appellant made an application for a protection visa claiming to fear harm on the basis of his political opinion and specifically, this opposition of the Communist Party. On 7 March 2014, a delegate of the Minister refused to grant the appellant a protection visa.
2. On 3 April 2014, the appellant made an application for review of the decision of the delegate to the Refugee Review Tribunal (now the Administrative Appeals Tribunal). He was invited to attend and give evidence at a hearing on 1 December 2014.
3. On 3 December 2014, the Tribunal affirmed the decision of the delegate, citing credibility concerns and finding that the appellant did not satisfy s 36(2)(a) or (aa) of the *Migration Act 1958* (Cth) (the Act). In summary, the Tribunal did not accept that:

* the appellant’s land was resumed;
* the appellant participated in protests or fought the government;
* the appellant’s family were involved in villagers rights;
* the appellant was arrested or detained or beaten or threatened;
* the appellant’s home was bombed;
* the appellant was elected as a village director or that elections were disrupted;
* the PSB visited his home after he left China or assaulted his wife or took anything;
* the appellant would be targeted by the Communist Party leader, PSB or anyone else upon returning to China; or
* the appellant would be tortured, detained, arrested, killed, beaten or otherwise harmed upon returning to China.

1. The Tribunal did not accept the appellant’s evidence that he would face persecution upon return to China. The Tribunal concluded:

[33] The tribunal discussed its credibility concerns with the applicant throughout the hearing in a number of respects. In summary the applicant’s evidence at hearing was evasive, vague, lacked details and was inconsistent with his written statement. The tribunal asked the applicant numerous times about key aspects of his claims and to describe events, but the applicant frequently did not answer the question and when pressed gave vague evidence or was inconsistent with his written statement. When contradictions were pointed out, the applicant said he was nervous and could not remember dates. The Tribunal reassured the applicant it was not concerned with specific dates but what occurred. The Tribunal also adjourned the hearing to allow the applicant to collect his thoughts.

[35] The Tribunal does not accept nervousness or attending a hearing for the first time explainses (sic) for the many discrepancies and vague account. The problems with the applicant’s evidence were extensive, and the tribunal considers the applicant’s claims are fabricated and he is not a witness of truth.

[36] While the tribunal does not expect precise recall of details and events, the applicant’s evidence at hearing was inconsistent with his written statement in a number of respects. His description of events at hearing was also vague and lacked details and the tribunal had to prompt the applicant frequently to provide details. The applicant’s evidence lacked spontaneity and he had difficulty recalling most things, such that it suggested to the tribunal that the applicant was not recalling actual events that happened to him.

1. The appellant filed an application for judicial review of the decision of the Tribunal in the court below on 22 December 2013, claiming:

1. Since I was persecuted my anxiety and poor education level led to the limited ability to provide evidences, which totally conformed to reality. RRT made use of their advantages beating about the bush continually and making meaningless logical trap in the hearing. I could not recall the specific events in order to provides evidences by questioning and answering specific. RRT never questioned me specific or just questioned general questions, but RRT required me to provide details answers. This ignored my own situation and was against the law. According to the law, the RRT should make full sense of my own situation and not require excessive evidences.

2. Tribunal unfairly refused to offer me protection saying my case was not covered by the Convention. The Tribunal made an acceptable judgment about my experience in China; neither did it reflect the truth in a logic way. My case was not only a dispute regarding land value, but also I had different political opinion against the Chinese authority.

(Errors in original.)

1. In respect of ground one, the primary Judge concluded that the appellant was claiming that the manner in which the Tribunal asked the questions of him was unfair. At the hearing in the court below, the appellant explained that “he was questioned on the written statement and that the language barriers meant that the questions asked and the answers given were prone to be inconsistent”: see [15]. His Honour concluded that, although the appellant continued to explain that he was nervous and that it was his first time he had been in a court or tribunal, it could not be said that the actions of the Tribunal were unfair.
2. In respect of ground two, the primary Judge held that the appellant was seeking an impermissible merits review. At [18] his Honour explained:

To my mind, where the questions of credibility loomed large, it cannot be said that this conclusion was one that could not have been reached. Therefore, I find that there is no substance in ground 2.

1. On the evidence before the court, the primary Judge found that there was no jurisdictional error and therefore dismissed the application.

## Consideration

### Submissions of the applicant

1. The appellant has not provided the Court with written submissions in respect of his notice of appeal. In his affidavit filed 11 August 2015, in support of the notice of appeal, the appellant deposed:

1. I am the applicant of this application. I am the witness of the all my experience of being persecuted in China.

2. All my evidence given in RRT interview and in front of Magistrate is true on my own knowledge and the best of my information and true belief on my inquiries.

3. I wish to apply for judicial review of our case.

4. I lodged my notice of appeal to Federal Court.

5. I wish to have the case reviewed by justice of law.

(Errors in original.)

### Submissions of the respondents

1. The second respondent filed a submitting notice in this matter on 26 August 2015. The second respondent submits to any order the Court may make in the proceeding, save as to costs.
2. The first respondent (the Minister) has provided the Court with detailed written submissions. The Minister submits that grounds 2 – 4 of the notice of appeal are, without further particularisation, largely meaningless and, as before the court below, seek impermissible merits review. The Minister submits that there is no substance to the grounds of appeal.
3. In respect of ground 1, the Minister submits that it is clear from the Tribunal’s reasons that the Tribunal did consider the complementary protection criteria. In summary:

* Those findings relied upon earlier findings with respect to the credibility of the applicant in considering the application of s 36(2)(a) of the Act: *SZSGA v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCA 774 at [56-57].
* To the extent that the applicant attacks the appraisal of his evidence, he invites impermissible merits review: *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259.
* The appellant has not identified any error in his Honour’s clear findings on the evidence that the Tribunal did give proper consideration to the appellant’s claims.

1. In the circumstances, the Minister submits that the notice of appeal should be dismissed.

### Conclusion

1. This morning the appellant appeared in person with the aid of an interpreter. His oral submissions were, in summary, that:

* he had told the truth at all times concerning his persecution in China;
* he has been disadvantaged by a language barrier in presenting his case for protection;
* he had difficulty acquiring more evidence from China because of changes of office-holders in certain positions; and
* he is disappointed that he has been denied refugee status.

1. The appellant is clearly a person of education and eloquence. However he has produced no sustainable arguments to support his appeal against the decision of the Federal Circuit Court.
2. The proper order is that the appeal be dismissed 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: 26 November 2015