FEDERAL COURT OF AUSTRALIA

ATK16 v Minister for Immigration and Border Protection [2017] FCA 334

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| Appeal from: | *ATK16 v Minister for Immigration & Anor* [2016] FCCA 2765  |
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| File number: | NTD 59 of 2016 |
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| Judge: | **GLEESON J** |
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| Date of judgment: | 4 April 2017 |
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| Catchwords: | **MIGRATION** – appeal from a decision of Federal Circuit Court of Australia – no appellable error identified in the decision below – new grounds argued did not raise any issue that ought to be considered on appeal – appeal dismissed  |
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| Legislation: | *Migration Act 1958* (Cth) |
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| Cases cited: | *Lansen v Minister for Environment and Heritage* [2008] FCAFC 189; (2008) 174 FCR 14*WAJS v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 139 |
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| Date of hearing: | 23 February 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: | 54 |
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| Counsel for the Appellant: | The appellant appeared in person |
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| Solicitor for the First Respondent: | Ms B Griffin of Australian Government Solicitor |

ORDERS

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|  | NTD 59 of 2016 |
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| BETWEEN: | ATK16Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| JUDGE: | GLEESON J |
| DATE OF ORDER: | 4 April 2017 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent’s costs.

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

REASONS FOR JUDGMENT

GLEESON J:

1. The appellant appeals from a decision of a judge of the Federal Circuit Court of Australia (“FCCA”) dismissing the appellant’s application for judicial review of a decision of the Administrative Appeals Tribunal (“Tribunal”): *ATK16 v Minister for Immigration & Anor* [2016] FCCA 2765. The Tribunal had affirmed a decision of a delegate of the Minister for Immigration and Border Protection not to grant the appellant a protection (Class XA) visa.
2. The notice of appeal contains the following three grounds of appeal:
3. The FCCA judge “failed error of law and relief under the judiciary Act. He failed to find that the [Tribunal] has not found any evidence in relation to may [sic] claims and thus its decision influenced by sufficient doubt.”
4. The Tribunal’s decision was “affected by the recent High Court reported decisions”.
5. The Tribunal “did not follow the proper procedure as required by the Act in arriving its decision in deciding my Protection visa 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”.

# Background facts

1. The appellant applied for a protection visa on 27 August 2013. Accompanying the application was a statement, signed by the appellant, which sets out claims for protection.
2. The statement said that the appellant had fled Bangladesh because he feared persecution and harassment from the “BNP (Bangladesh Nation Party)”. The statement said that the appellant owned a small shop and that supporters of the BNP would come to his shop and take goods without paying for them. According to the statement, when the appellant would demand payment for the goods, they would beat him and start smashing things in the shop. The appellant tried to complain to the authorities, who had no courage to arrest the BNP supporters.
3. The statement noted that the Awami League was the ruling party in Bangladesh but that the BNP had two seats in parliament in the appellant’s area. The statement said that the appellant was targeted by the BNP because he did not support them. It said that the appellant approached the “AWAMI party”, which I take to be a reference to the Awami League, and struck a deal with them. The deal was that, if the Awami League assisted the appellant to fight back against the BNP supporters who were harassing him, the appellant would start supporting their party. The statement claimed that a big fight ensued between the appellant and the Awami League on one hand, and the BNP supporters on the other.
4. The statement said that the appellant’s brother was facing the same treatment by the BNP supporters, and had joined the Awami League so that the BNP did not bother him as much.
5. The statement also said that, since the appellant’s flight from Bangladesh, the BNP supporters have told the appellant’s brother that, if they find the appellant, they will slaughter him.
6. On 1 August 2014, the appellant’s migration agent provided the Department of Immigration and Border Protection (“Department”) with a document which sought to amend the appellant’s original statement. The migration agent told the Department that a friend read the appellant’s statement to him and the appellant had discovered incorrect details in the statement. In particular, the appellant claimed that he was afraid of Awami League and not BNP supporters as reflected in the statement.
7. On 10 October 2014, the Minister’s delegate refused the appellant’s application for a protection visa. The delegate did not accept that the appellant was a BNP supporter as he claimed. The delegate did not find the appellant to be a credible witness.
8. On 15 October 2014, the appellant applied to the Refugee Review Tribunal for a review of the delegate’s decision.
9. On 2 February 2016, the appellant’s migration agent provided the Tribunal with submissions and additional documents. The submissions repeated the appellant’s claim to fear persecution from the Bangladeshi government, namely, the Awami League on the basis of “[h]is political opinion and political opinion imputed to him”. The appellant claimed a well-founded fear of persecution because of “his political opinion and imputed political opinion as a BNP supporter”.
10. By email dated 4 February 2016, the appellant’s migration agent provided the Tribunal with a statement signed by the appellant and dated 3 February 2016, and a translation of a warrant of an arrest dated 10 November 2013. In his statement, the appellant referred to his entry interview on 29 January 2013 with a migration officer. The appellant said that the transcript was not read back to him in Bengali but was taken with the assistance of an interpreter over the phone. The appellant said that there were many errors in that statement of which he did not become aware until his interview with an immigration officer on 15 August 2014.
11. On 10 February 2016, the appellant attended the hearing of the Tribunal, accompanied by his migration officer. The hearing record shows that the appellant was to provide “information/comments/response in writing” by 17 February 2016.
12. On 15 February 2016, the appellant’s migration agent provided a three page written submission to the Tribunal. The submission recorded relevantly:

[The appellant] attended a Tribunal Hearing held on 10th February 2016. The applicant was represented by Mr. Dominic Gomez.

Dominic Gomez advised during the Hearing the Member questioned the credibility of a number of documents provided with the appeal namely;

– an arrest warrant;

– a letter from a solicitor outlining the nature of the warrant; and

– a letter from the BNP confirming the applicants membership in the party.

And the questions on credibility surrounded;

a) the ease that fraudulent documents can be obtained in Bangladesh (based on the country information the member had on hand); and

b) that the documents only ‘appeared’ after the review application had been lodged (at [sic] not at any initial stages of the application).

The Member also raised questions regarding credibility of the Applicants mothers statement, specifically the first statement referenced ‘local extortionists’ terrorising the applicant whereas the second statement specified a particular party.

We will now provide the Applicants response to these matters

…

Upon refusal of his initial application and subsequent appeal to the AAT he contacted his family to ask about the ongoing situation and his family advised him the situation was worse. After contacting his family his mother advised him of the arrest warrant but he presumed email copy would be sufficient. The applicant claims his mother obtained the arrest warrant from the police station.

The Applicant’s mother sought assistance from the police but when they would not assist her she sought assistance from a solicitor who provided her with a letter outlining the nature of the warrant. The BNP provided the letter confirming the applicants Membership.

The applicant claims the documents are with his mother and are all genuine documents. The Applicant is aware people provide fraudulent documents but advised this is not the case and that his mother has the originals.

Migration Agent, Ruth Nowlan advised the client to make arrangements for his mother to forward the “Original” documents direct to Australian Migration Options by DHL courier not ordinary post. The Applicant was concerned about the safety of his mother sending the documents but was advised of the importance of these documents in relation to verifying that they are not fraudulent. The Applicant will contact his mother and ask her to send them as soon as possible.

1. By letter dated 19 February 2016, the Tribunal referred to the “post hearing submission received by email on 15 February 2016” and requested any original documents referred to in the submission.
2. The appellant’s migration agent sent eight original documents to the Tribunal on 1 March 2016.

# Tribunal’s decision

1. The Tribunal did not accept the appellant’s explanations for misidentifying, in his 20 August 2013 statement, the main antagonist of his troubles, that is, the Awami League rather than the BNP. The Tribunal also rejected the submission that what was said at the entry interview (concerning the appellant’s fear of the BNP) was consistent with the appellant’s current claim (concerning his fears of both the Awami League and the BNP).
2. The Tribunal concluded that the appellant intentionally claimed harm from the BNP but has subsequently changed his claims in view of the prevailing political climate in Bangladesh, where the Awami League is the governing party and its members and supporters are involved in much of the violence reported against the BNP. The Tribunal found that the appellant’s claim that, in the end, he was persecuted by both parties was inconsistent with his claims, made in his revised statement and at the Tribunal hearing, that he was a member of the BNP.
3. The Tribunal referred to a letter from BNP attesting to the appellant’s membership and active involvement in the party which, the Tribunal noted, was inconsistent with the appellant’s original claims. The Tribunal recorded that it had put to the appellant that country information indicates that fraudulent documents are readily and easily obtainable in Bangladesh and together with the concerns the Tribunal had over the inconsistencies of his claims in general, this may cause the Tribunal to question the reliability of the statement provided by the BNP.
4. Ultimately, the Tribunal gave no weight to the statement from the BNP.
5. The Tribunal recorded the appellant’s statement that he played no role in the BNP other than as a supporter and its opinion that the appellant had demonstrated little knowledge of the BNP (or indeed the Awami League). The Tribunal found that the appellant was not a member or active supporter of the BNP.
6. The Tribunal concluded that the appellant was not at risk of any serious harm on return to Bangladesh for reasons of his actual political opinion or any past or future involvement with the BNP. Similarly, the Tribunal did not accept that the appellant was or would be harmed by members and supporters of the BNP for being perceived to have joined the Awami League due to his non-attendance at BNP meetings.
7. The Tribunal considered the arrest warrant. The Tribunal expressed surprise that the arrest warrant was only produced to the Tribunal given the significance of such a document. The Tribunal found no plausible explanation as to why the appellant had not produced the arrest warrant and court documents earlier, as evidence of the problems he faces in Bangladesh. The Tribunal considered this to be a serious omission that reflected poorly on the appellant’s credibility.
8. The Tribunal noted the appellant’s post-hearing submission that the original documents were available and would assist in verifying that they were not fraudulent.
9. The Tribunal recorded at [100]:

The Tribunal has examined these documents and acknowledges that they implicate the applicant, along with several other people, in charges made by an Awami League member. However, in the Tribunal’s view the question is not whether the documents before the Tribunal are original documents or photocopies. As discussed with the applicant at hearing, the question is whether the documents are genuine. For all the above reasons, including the late submission of such relevant documentation dated in 2013, the inconsistency of the applicant’s evidence in relation to why he did not have the documents in his possession earlier, together with the country information referred [to] above regarding the prevalence of fraudulent documentation in Bangladesh, the Tribunal does not find the arrest warrant, court documents and the letter from the applicant’s Lawyer to be reliable evidence in this matter. The provision of what are claimed to be original documents does not overcome the Tribunal’s concerns about the manner in which the documents were obtained. The Tribunal has given the documents no weight. In the absence of any other compelling information and in view of the significant credibility concerns already expressed in this decision, the Tribunal does not accept an arrest warrant has been issued in the applicant's name, that there are court proceedings pending against him or that he has anything to fear on return to Bangladesh for this reason.

1. The Tribunal was not satisfied that there was evidence to establish that the applicant would be arrested, imprisoned and harmed on his return to Bangladesh.
2. The Tribunal was therefore not satisfied that the appellant satisfied the criterion set out in s 36(2)(a) of the *Migration Act 1958* (Cth) (“Act”) for a protection visa.
3. The Tribunal also considered the appellant’s claims against the complementary protection criterion in s 36(2)(aa) of the Act and found that there were no substantial grounds for believing that, as a necessary and foreseeable consequence of the appellant being removed from Australia to Bangladesh, there was a real risk that he would suffer significant harm for the reasons claimed or any other reason. Therefore, the Tribunal was not satisfied that the appellant was a person to whom Australia had protection obligations under s 36(2)(aa) of the Act.

# The FCCA decision

1. In the FCCA, the sole ground of review was that the Tribunal “failed to afford the Applicant procedural fairness as required by Sections 424(A) and 424(AA) [sic] of the *Migration Act* and in doing so failed to exercise its jurisdiction”.
2. Section 424A provides:

(1) Subject to subsections (2A) and (3), the Tribunal must:

(a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and

(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the decision that is under review; and

(c) invite the applicant to comment on or respond to it.

(2) The information and invitation must be given to the applicant:

(a) except where paragraph (b) applies—by one of the methods specified in section 441A; or

(b) if the applicant is in immigration detention—by a method prescribed for the purposes of giving documents to such a person.

(2A) The Tribunal is not obliged under this section to give particulars of information to an applicant, nor invite the applicant to comment on or respond to the information, if the Tribunal gives clear particulars of the information to the applicant, and invites the applicant to comment on or respond to the information, under section 424AA.

(3) This section does not apply to information:

(a) that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member; or

(b) that the applicant gave for the purpose of the application for review; or

(ba) that the applicant gave during the process that led to the decision that is under review, other than such information that was provided orally by the applicant to the Department; or

(c) that is non‑disclosable information.

(4) A reference in this section to affirming a decision that is under review does not include a reference to the affirmation of a decision that is taken to be affirmed under subsection 426A(1F).

1. Section 424AA provides:

(1) If an applicant is appearing before the Tribunal because of an invitation under section 425:

(a) the Tribunal may orally give to the applicant clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and

(b) if the Tribunal does so—the Tribunal must:

(i) ensure, as far as is reasonably practicable, that the applicant understands why the information is relevant to the review, and the consequences of the information being relied on in affirming the decision that is under review; and

(ii) orally invite the applicant to comment on or respond to the information; and

(iii) advise the applicant that he or she may seek additional time to comment on or respond to the information; and

(iv) if the applicant seeks additional time to comment on or respond to the information—adjourn the review, if the Tribunal considers that the applicant reasonably needs additional time to comment on or respond to the information.

(2) A reference in this section to affirming a decision that is under review does not include a reference to the affirmation of a decision that is taken to be affirmed under subsection 426A(1F).

1. The FCCA judge identified the nub of the appellant’s attack on the Tribunal’s decision (at [3] of his Honour’s reasons) as that:

…the Tribunal, having requested and been provided with the originals of the documents, most particularly to the arrest warrant and the letter from the BNP after the hearing, found that they were not genuine. It was asserted that sections 424A and 424AA required the Tribunal to give notice of the reasons for finding these documents were not genuine.

1. The FCCA judge rejected the appellant’s application for the following reasons:

13. The applicant’s counsel submitted that having invited provision of original documents – and I emphasise original – that the Tribunal implied that it would be a determining factor in the Tribunal’s decision whether or not the documents were genuine. The submission from counsel went on to say that if, having given such an implication, the Tribunal was obligated to provide reasons for its thinking and invite submissions from the applicant.

14. I do not accept that the Tribunal’s letter of 19 February 2016 contained any such implication. In my view, the proper interpretation of that letter is that it is merely an agreement to receive further documents provided by the applicant, in response to a request from the applicant. The applicant’s letter, or at least the applicant’s migration agent’s letter of 15 February 2016, showed an awareness of that concern and, in my view, the Tribunal, once it indicated that there were reasons based on country information for doubting the genuineness of documents such as the documents put forward by the applicant, was not required to provide reasons for doubting the genuineness of the particular documents. It appears to me that the specific is subsumed in the general in this case.

15. Nevertheless, the Tribunal has, on my reading of its decision, and this is supported by the migration agent’s letter of 15 February 2016, indicated that its general concerns about the genuineness of the documents were based on the inconsistent narrative of the applicant at various times, the late appearance of the documents and the country information that such documents were commonly forged. All of those matters were clearly flagged to the applicant in the Tribunal and, in my view, there was no further requirement for the Tribunal to set out further the reasons for its doubts about the credibility of the applicant himself and the genuineness of the documents he put forward.

16. I also accept the respondent’s submission that disbelief of an applicant is not information that is subject to the requirements of section 424A or section 424AA, and I refer to the decision of the High Court in *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26; [2007] 235 ALR 609 at paragraphs [sic] [18] for that proposition. For these reasons, I dismiss the application.

# Appeal to this Court

1. The appellant filed an 11 page submission.
2. At the hearing of the appeal, the appellant appeared unrepresented with the assistance of a Bengali interpreter. He provided an additional written submission to the Court, and made brief oral submissions.

## Grounds 1 and 2 of notice of appeal

1. Ground 1 does not engage with the decision of the FCCA judge. The application for review to the FCCA was concerned with alleged denial of procedural fairness and the Tribunal’s finding that documents provided to the Tribunal were not genuine.
2. Insofar as the appellant is suggesting that the Tribunal did not have any evidence to rebut his claims, adverse credibility findings do not require positive evidence. A Tribunal may disbelieve evidence because of inconsistencies or surrounding circumstances: cf. *WAJS v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 139 at [17].
3. To the extent that the appellant takes issue with the Tribunal’s credibility findings, the appellant did not identify any basis on which the Tribunal erred in reaching those findings. The Tribunal’s findings were open to it and it gave cogent reasons for making them.
4. As to ground 2, no relevant recent High Court decision was identified by the appellant or by Ms Griffin, the solicitor who appeared for the Minister. Accordingly, ground 2 must fail.

## Ground 3 of notice of appeal

1. Ground 3 does not identify any appellable error by the FCCA judge.
2. Insofar as ground 3 seeks to take issue with the FCCA judge’s reasons, I accept the Minister’s submission that the FCCA judge was correct for the reasons that his Honour gave, set out at [33] above.
3. Insofar as ground 3 takes issue generally with the conduct of the review proceedings by the Tribunal, the Minister submitted that the Tribunal conducted the proceedings in compliance with Pt 7, Div 4 of the Act, which codified the requirements of natural justice for decisions of this kind: s 422B of the Act. I accept that submission for the following reasons:
4. First, the Tribunal complied with its obligation under s 425 of the Act to invite the appellant to give evidence and present arguments at a hearing on the issues arising on the review. This included its concerns arising from country information before it, that there was a prevalence of document fraud in Bangladesh.
5. Second, according to the Tribunal’s reasons, it advised the appellant at hearing that it had “serious concerns about the credibility of significant aspects of his claims and evidence”.
6. Third, there was no information required to be put to the appellant in accordance with s 424A(1) of the Act, other than the country information relating to the prevalence of document fraud in Bangladesh, which the Tribunal did put to the appellant.

## Appellant’s affidavit affirmed 31 October 2016

1. In his affidavit filed with this Court on 4 November 2016, the appellant complained that the FCCA judge:
2. dismissed his application for review without giving any reasonable grounds;
3. failed to take into account all relevant grounds; and
4. breached the rules of natural justice and procedural fairness.
5. The appellant did not identify any matters that support these complaints. No such errors are apparent from the judgment given by the primary judge.

## Appellant’s oral submissions

1. At the hearing of the appeal, the appellant sought additional time to obtain legal representation. I refused that request because there was no reason to think that the appellant would be able to secure legal representation in the foreseeable future.
2. The appellant submitted that the Tribunal had failed to understand his situation but did not identify any particular error in the Tribunal’s understanding. This submission does not reveal any appellable error by the FCCA judge.

## Appellant’s 11 page written submission

1. This submission alleges multiple errors by the Tribunal which were not raised before the FCCA. It does not bear any obvious relationship to the grounds in the notice of appeal.
2. An appellant may be permitted to raise grounds on appeal that were not raised before the FCCA, in certain circumstances: *Lansen v Minister for Environment and Heritage* [2008] FCAFC 189; (2008) 174 FCR 14 at 18 to 20; [4] to [6].
3. To the extent that the written submission sought to identify appellable errors by the FCCA judge, the errors related to matters that were not in issue in the FCCA (where the appellant was legally represented), including a failure to find that the Tribunal failed to apply the correct test of persecution in relation to the complementary protection claim, a failure to find that the appellant was denied procedural fairness because he was “not given enough time through which [he] could expand [his] arguments” and because he was “misled” into believing that the Tribunal had read certain documents, and a failure to find that the Tribunal “did not take up and separately deal with the factual issues”. The submission also contended that the Tribunal made its decision with a closed mind, and that there was no evidence or other material to justify the Tribunal’s decision.
4. I have considered the written submissions and I am not satisfied that they raise any issue which ought to be considered on the appeal. In particular, the appellant did not identify any basis for a conclusion that the Tribunal made a legal error in disbelieving the appellant’s claims for protection.

## Appellant’s additional written submission

1. The additional written submission also does not bear any obvious relationship to the grounds in the notice of appeal. It repeats the contention that the FCCA judge failed to hold that the Tribunal committed jurisdictional error when it failed to apply the correct test in relation to the complementary protection provision contained in s 36(2)(aa) of the Act.
2. The submission also contends that the Tribunal failed to take into account unspecified relevant considerations.
3. The submission does not develop either of these contentions, but makes other complaints about the Tribunal’s procedure and its findings of fact. I have considered the written submissions and I am not satisfied that they raise any issue which ought to be considered on the appeal.

## Conclusion

1. The appeal must be dismissed with costs.

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| I certify that the preceding fifty-four (54) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gleeson. |

Associate:

Dated: 4 April 2017