FEDERAL COURT OF AUSTRALIA

BGP16 v Minister for Immigration and Border Protection
[2017] FCA 261

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| Appeal from: | *BGP16 v Minister for Immigration and Border Protection (No 2)* FCCA 2660 |
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| File number: |  |
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| Judge: | **RARES J** |
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| Date of judgment: | 16 February 2017 |
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| Legislation: | *Migration Act 1958* (Cth) s 36*Federal Circuit Court Rules 2001* r 13.03C  |
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| Cases cited: | *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407  |
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| Date of hearing: | 16 February 2017 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | No Catchwords |
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| Number of paragraphs: | 40 |
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| Counsel for the Appellant: | The Appellant appeared in person |
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| Solicitor for the First Respondent: | Mr K Eskerie of Sparke Helmore |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice |

ORDERS

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|  | NSD 1839 of 2016 |
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| BETWEEN: | BGP16Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| JUDGE: | RARES J |
| DATE OF ORDER: | 16 FEBRUARY 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

(REVISED FROM THE TRANSCRIPT)

**RARES J:**

1. This is an appeal from the decision of the Federal Circuit Court dismissing the appellant’s application for Constitutional writ relief in respect of the decision of the Administrative Appeals **Tribunal** given on 3 May 2016 to affirm the **Minister**’s **delegate**’s decision not to grant the appellant a protection visa: *BGP16 v Minister for Immigration (No 2)* [2016] FCCA 2660.

## Background

1. The appellant is a citizen of India who lived in the state of Telangana. He is a Hindu. He was granted a business visitor visa on 8 May 2013 and entered Australia on 2 June 2013. He stayed here until returning to India on 30 June 2013, and remained in India for seven more months, re‑entering Australia on 1 February 2014 on his original business visitor visa, that was still current for a further three months. On 30 April 2014, the day before his business visitor visa was due to expire, the appellant lodged his application for a protection visa.
2. The delegate refused to grant the visa on 12 January 2015, and the appellant sought review by the then Refugee Review Tribunal whose functions subsequently were assumed by the Tribunal.
3. The appellant, who appeared with the assistance of an interpreter before me today, told me himself in English that he was quite good at English and spoke it fluently, but had some difficulties from time to time with specific terms.
4. He wrote a letter to the Department, as part of his application for the protection visa, which was in English. He claimed that he worked with a company called **Genpact**. The letter did not include any dates for the events he described but the appellant gave various dates for those events to the delegate and the Tribunal. In order to give context to his account, I should interpolate here that the Tribunal found that the appellant worked for Genpact from February 2013 to January 2014, just prior to his second arrival in Australia. He claimed that he had resided in the same apartment block in the city of Secunderabad from December 2012 to January 2014, although he claimed to have changed apartments in that block in August 2013, after his return from his first visit here. (Those dates also came from the Tribunal’s findings.)
5. He claimed that Genpact had originally required him to work in a particular village on a highway and that, one day, he saw a woman who appeared to be poor, with three children, who lived near the company’s office. He claimed that he began giving the woman and her children monthly payments and bought books and clothes for them. He claimed that, on one occasion, when he was talking to the woman, she told him that her husband had died. Afterwards he began providing that family with food as well.
6. He claimed that, however, the woman had misled him and that her husband was alive and was a Naxalite. (The Tribunal found that the **Naxalites** were a force of about 40,000 persons who had been waging a Maoist-inspired insurgency against the Indian government since the late 1960s and had caused difficulties for India’s security forces in a vast mineral-rich region in eastern India known as the “Red Corridor”, which was near to where the appellant was located.)
7. The appellant claimed that, one day, two men followed him to his apartment, that was located near his office, asked him to join the Naxalites and threatened that, if he did not do so, they would kidnap him and kill his family. He claimed that, two weeks later, they came again to ask him to join the group and that he then changed his accommodation, thinking that they would not know where to find him next. He claimed that, two months later, Naxalites kidnapped him and took him to the jungle and kept him there for two months, forcing him to work for them, after they had threatened to kill him and his family and tied him to a chair, leaving him without food for two days.
8. He claimed that, after a month and half, he escaped and changed the location of his family’s home. He said that he was “totally scared then”, but got the opportunity with Genpact to go to Australia in June 2013, where he stayed for a month. He claimed that he thought that he had escaped from the Naxalites but that they were observing his family and, one day, came to his family house and told his mother, father and sisters that if he did not return to join the Naxalites, they would kill everyone.
9. He claimed that when he returned from Australia, he was happy to have rid himself of the Naxalites. He claimed that one Monday at 2.30am, when he was going to his office, Naxalites stopped him in the middle of the highway and took him back into the jungle, where they beat him and harassed him severely while he was naked. They told him that he should not try to “act to[o] smart” with them and that they were observing him daily. He claimed that they scared his mother by threatening her that they would kill him and that they had taken all the gold that he had saved for his sister’s marriage.
10. He claimed that the Naxalites told him that he had to work with them and that they had people in every department who would give them information about him. He claimed that when he did not do as they demanded, they beat him, took his clothes and fed him only boiled rice with salt. He claimed they threatened him with a gun to his head, and told him that they would kill him and throw him in the forest if he did not listen to them or thought of escaping again.
11. He claimed that he seized the chance to escape and then came to Australia. He claimed that if he returned to India, the Naxalites would kill him and that he needed protection here.

## The delegate’s decision

1. The appellant was interviewed by the delegate, during which he changed his evidence about when he had first been abducted from March 2012 to March 2013. She explored during the interview a number of aspects of his various claims, explaining in her reasons for refusing his application for protection that the answers he gave had not satisfied her that he was entitled to protection.
2. The delegate found that the appellant’s claims to have been abducted by the Naxalites were unsubstantiated assertions that she did not accept as true. She found that, as an intelligent and highly educated man, the appellant could easily have made enquiries about protection in Australia well before he applied and that his delay in applying cast significant doubt on the genuineness of his claimed fear of persecution. She found that his and his family’s circumstances in India were not what he claimed, that he was not a credible witness and that he delayed seeking protection. She found also that if the appellant were to return to India and still felt insecure in his local area, he could move to another part of India, such as one of the large cities which had populations of millions, in which he would be just another member of society, and that there was no obvious barrier to his relocating. After having considered country information supporting that conclusion, she found that he would be able to relocate within India and that that was a safe and reasonable option.
3. The delegate also found, in addition to her reasons why he was not entitled to protection under the *Refugees Convention* in accordance with s 36(2)(a) of the *Migration Act 1958* (Cth), that the appellant could seek State protection and that relocation would be a safe and reasonable option for him, so as to warrant her not being satisfied that he had a real risk of being subject to significant harm should he be returned to India. Therefore, she found that he was not entitled to complementary protection under s 36(2)(aa).

## The proceedings in the Tribunal

1. The appellant appeared before the Tribunal and gave evidence in English. He relied before the trial judge on the transcript of the hearing before the Tribunal which he had prepared and which, subject to one correction which the Minister led in evidence before his Honour, was an accurate translation. The Tribunal asked the applicant at the beginning of the hearing, whether he was happy to proceed without an interpreter, to which he responded “yes.” A little way into the Tribunal’s questioning of him, it asked whether he needed an interpreter and he said that he did not.
2. The Tribunal summarised the appellant’s claims and the course of the hearing. It found that the appellant was “a highly unreliable witness”. It found that he had given inconsistent and unreliable evidence about when his family changed addresses. It did not accept the appellant’s evidence that such a change had occurred in order to flee serious harassment, as he claimed. The Tribunal did not accept as true the appellant’s claim that he had changed his work location after he returned to India and, instead, found that he had continued to work in the same location, both before and after his Australian visit. Having made that finding, it did not accept that he had taken any action on return to India, through his employer, to avoid being in a position to be located once more near Naxalites. It found that his evidence about why the Naxalites abducted him or what they wanted him to do was vague and implausible, including his claim to the Tribunal that the Naxalites wanted him to “do [their] accounts”. It said:

[30] … I have the very strong impression, on the evidence before me, that he improvised his evidence about being expected to do the Naxalites’ accounts for them. I find that he has been inconsistent about simply escaping from the Naxalites the second time and then coming to Australia before anyone knew.

[31] The main reason why I am not satisfied that [the appellant] is a truthful witness is that I do not accept that his company Genpact would have gone so far, in and up to May 2013, to organise his training in Australia without knowing whether he was still working for the company and available to travel if and when asked to do so. Giving weight to the 2 May 2013 letter discussed at the hearing, and ultimately disbelieving [the appellant’s] far‑fetched explanation for it, I find on the evidence before me that I do not believe he was absent from his work with Genpact in April *or* May 2013. Accordingly I do not accept that he was abducted by the Naxalites prior to his coming to Australia in June 2013 and for this reason, on cumulative consideration of the evidence before me, including his linking of the second abduction to the first, I find that [the appellant] has fabricated claims about the second abduction as well.

[32] I do not accept that [the appellant] ceased working with Genpact in September or October 2013; I give more weight to his original claim about having worked with the company up until the time he left for Australia the second time.

1. The Tribunal also gave some weight to the appellant’s delay in bringing his application for protection, finding that it was implausible that a person who had been kidnapped and tortured, and feared similar mistreatment were he to return to India, would seize what he called the “golden opportunity” to come to Australia and then, when his employer decided he should return, simply go back to the same area where he had been previously abducted and tortured.
2. The Tribunal accepted that the Naxalites were active in rural areas in the vicinity of the locations where the appellant lived and worked, but it did not accept that he had been, or in the reasonably foreseeable future would be, a person of any potential significance to them. It did not accept that the appellant’s family had been or would be harassed by the Naxalites.
3. Moreover, it also found that it was not satisfied that it would be unreasonable or impracticable for him, with his skills, to relocate to another part of India. The Tribunal did not accept that the Naxalites would pursue the appellant throughout India. It said that a political factor formed a background to his claims, but that it did not need to consider any nexus to the *Refugees Convention* in light of the appellant’s “overwhelming lack of credibility. I find that his claims are simply untrue”.
4. For those reasons, the Tribunal was satisfied that Australia did not owe protection obligations either under the *Refugees Convention* or under the complementary protection ground because of the appellant’s “comprehensive lack of reliability as a witness”. Accordingly, the Tribunal affirmed the delegate’s decision.

## The proceedings before the trial judge

1. The appellant applied to the Federal Circuit Court for judicial review of the Tribunal’s decision on the grounds that the Tribunal, *first*,had misunderstood his claim because of his poor language and, *secondly*, “took part of [his] evidence” (sic) and was not satisfied that he was a truthful witness, and had not based that finding “on strong evidence”. (The appellant had included as a numbered ground 2 a statement that he would amend the application, but he did not and I have treated the third numbered ground as his second in these reasons.)
2. On 21 July 2016, the appellant appeared before the registrar who gave directions and fixed the matter for hearing on 13 October 2016 at 10.15am before the trial judge. The directions required the appellant to file and serve any amended application, giving complete particulars of each ground of review, and any affidavit containing additional evidence to be relied on, by 18 August 2016. No such further documents were filed, although as I have said, the appellant had earlier filed a transcript of the proceedings in the Tribunal.
3. On the morning of 13 October 2016, the appellant did not appear when the matter was called on and his Honour dismissed the application under r 13.03C(1)(c) of the *Federal Circuit Court Rules 2001*. However, his Honour set that order aside when the appellant arrived later that day and fixed the matter to be heard at 3.00pm that day. His Honour explained to the appellant, as I did, that it was important for him to identify an error in the way in which the Tribunal proceeded. The appellant handed up some written submissions to his Honour, saying that the Tribunal had misunderstood his evidence in relation to the Naxalites. The appellant told his Honour, as he told me, that he had been telling the truth to the Tribunal, but it did not accept him.
4. His Honour found that there was nothing in the transcript of the Tribunal hearing to indicate any such misunderstanding. His Honour found, in relation to the first ground of the application, that there was nothing on the face of the transcript to suggest that the appellant’s language had given rise to any difficulty in his presenting his evidence or his arguments. The trial judge was satisfied that the appellant had had a real and meaningful hearing before the Tribunal and that, on the face of the material in evidence, the Tribunal correctly identified the appellant’s claims and complied with its statutory obligations in the conduct of the review. He found that there was nothing on the face of that material to establish any failure of the Tribunal to afford the appellant procedural fairness in the conduct of the review, noting that the appellant had not requested that an interpreter be present during the hearing or expressed any difficulty with being able to answer questions or otherwise conduct himself during the hearing before the Tribunal. Thus, his Honour rejected the first ground of review.
5. The trial judge found that the Tribunal’s adverse findings relating to the appellant’s credibility were open to it and that there was no basis to suggest that they lacked an evident and intelligible justification. He dismissed the second ground of review on that basis.
6. He found that the appellant’s written submissions to him were, in substance, an invitation for the Court to engage in merits review. Accordingly, the trial judge dismissed the application.

## This appeal

1. The appellant’s notice of appeal recorded, as the grounds, that the trial judge had dismissed his case on 13 October 2016, but, although he had not received a copy of the reasons for judgment, he believed that both his Honour and the Tribunal had misunderstood his fear of persecution and harm.
2. As I have said, the appellant appeared today with the assistance of an interpreter, although he broke into what appeared to be reasonably fluent English from time to time. He also brought to Court this morning written submissions, in English, that articulated his case.
3. The written submissions contended that the material that he had put before the Tribunal, being his claims for protection filed with his protection visa application, the interview with the delegate and the transcript of the hearing before the Tribunal, accurately recorded his claims and what he had said. He argued that, however, both the Tribunal’s decision not to accept his evidence and the trial judge’s decision were not reasonable. He claimed that the trial judge had accepted the Tribunal’s findings but had also, so the written submissions claimed, found that, “my fear of [C]onvention-related persecution was not well founded and that I was not a refugee”. The appellant argued that the trial judge had agreed with the Tribunal without considering the facts and circumstances of his case that supported the truth of his claims. He also asserted that he was not in a position to demonstrate his fear of harm to the Tribunal because of (unspecified) psychological trauma that he suffered. He contended that the trial judge had been very busy when he fixed the further time for hearing at 3.00pm on the day that the case had been fixed.
4. The appellant argued that the trial judge and the Tribunal had misunderstood his evidence. He asked that I hear the CD recording of the Tribunal hearing to demonstrate that his English was poor. He argued that what upset him was its comment that he was not a truthful witness and that I should be in a position to see that the Tribunal’s comments were not relevant and those comments should not have allowed it to conclude that his evidence was fabricated and that he was not a truthful witness.
5. During the course of the hearing today, the appellant argued that he had communication problems during the Tribunal hearing and that, because he had been upset, he had difficulties in answering its questions. However, he was not able to demonstrate any question which, *first*, the Tribunal did not appear to understand the answer to or, *secondly*, that misrepresented his position.
6. As I have said, the appellant told me today that his English was quite good and he spoke it fluently, but that, during the course of his interview with the delegate, he was nervous and did not answer her questions properly. He also told me that he was upset when giving evidence to the Tribunal and could not answer questions properly. He told me, but not the trial judge, about those matters and, in the written submissions which he brought to Court this morning, he said that he was not in a position to demonstrate fear of harm because of psychological trauma that he suffered. I asked the appellant where in the transcript of the Tribunal hearing in the appeal book he could point to any questions or answers that indicated that he had any difficulty either in understanding a question or statement or explaining what his answer was, but he was unable to do so.
7. In particular, I asked him about whether any of the Tribunal’s findings in [31] and [32] of its reasons set out above, concerning his employment with Genpact and the dates on which he was its employee, had been misinterpreted or misunderstood at the Tribunal hearing. He agreed that the Tribunal’s findings in [31] and [32], about his continuing employment with Genpact in the period between April 2013 and October 2013, were correct. He said that it was very hard for him to figure out the mistake the Tribunal had made.

## Consideration

1. I have considered all of the material in the appeal book, including the appellant’s claims for protection, the delegate’s decision, the Tribunal’s decision and his Honour’s decision. There is no evidence before me of any psychological or other difficulty which the appellant faces or which could have affected him at the time he gave evidence to the Tribunal.
2. Moreover, the Tribunal based its findings in [31] and [32] on its assessment of the appellant’s substantive claim to fear harm in circumstances where, after claiming to have experienced a life-threatening kidnap event between April and May 2013, during which time he necessarily would have been absent from work with Genpact, yet, his employer, so he claimed, immediately on his return sent him to Australia from 2 to 30 June 2013, where he stayed and then returned home to the life-threatening situation. The Tribunal simply could not accept that account as true. The assessment of credibility is quintessentially a matter that the Parliament has left for the administrative decision maker in the position of the Tribunal: *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407 at 423 [67] per McHugh J.
3. I see no illogicality or circumstance in which it could be said that the Tribunal was not able to make such a finding. The Tribunal depended, essentially, on the appellant’s account and the self-evident logical difficulties which that account presented. As I have said, the appellant could point to nothing in the transcript that he had prepared and to which he had had access to demonstrate any misunderstanding on the part of the Tribunal of any evidence or some inability on his part to communicate accurately his evidence and argument to it. Moreover, in my opinion, even if there were those difficulties, the Tribunal’s finding that the appellant could relocate to another part of India is irrefragable, regardless of its non‑acceptance of the appellant’s claims. That finding was based on country information and an assessment of the appellant’s abilities, which were not in issue, as a skilled, intelligent and educated person.
4. The appellant did not put before me any CD of the hearing before the Tribunal. Even if I had to listen to it, the appellant has not put on any evidence or demonstrated any basis on which it could be said that a playing of the recording would have been likely to have had a useful result.
5. In my opinion, the appeal has no substance, because it invites the Court to engage in impermissible merits review of the function of the Tribunal to make findings about whether or not the appellant had satisfied it of his entitlement to a protection visa.

## Conclusion

1. For those reasons, I am of opinion that the appeal must be dismissed with costs.

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| I certify that the preceding forty (40) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rares. |

Associate:

Dated: 16 March 2017