FEDERAL COURT OF AUSTRALIA

SZVRM v Minister for Immigration and Border Protection [2016] FCA 919

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| Appeal from: | *SZVRM v Minister for Immigration and Border Protection and Anor* [2016] FCCA 639 |
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| File number: |  |
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| Judge: | **MARKOVIC J** |
|  |  |
| Date of judgment: | 11 August 2016 |
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| Legislation: | *Migration Act 1958* (Cth) s 424AA |
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| Cases cited: | *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437  *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332  *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429 |
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| Date of hearing: | 2 August 2016 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | No Catchwords |
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| Number of paragraphs: | 36 |
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| Counsel for the Appellant: | The Appellant appeared in person |
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| Solicitor for the Respondents: | Mr J Pinder, Minter Ellison Lawyers |

ORDERS

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|  | | NSD 444 of 2016 |
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| BETWEEN: | SZVRM  Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | MARKOVIC J |
| DATE OF ORDER: | 11 AUGUST 2016 |

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

MARKOVIC J:

# introduction

1. The appellant is a citizen of Bangladesh. He appeals from orders made and judgment given by the Federal Circuit Court of Australia (**Federal Circuit Court**) on 14 March 2016 dismissing an application for judicial review of a decision of the second respondent (**the Tribunal**) dated 23 October 2014: see *SZVRM v Minister for Immigration and Border Protection and Anor* [2016] FCCA 639 (***SZVRM***). The Tribunal had affirmed a decision of a delegate of the first respondent (**the Minister**) not to grant the appellant a protection visa.
2. The appellant arrived in Australia in 2008 as the holder of a student visa. He lodged an application for a further student visa which was refused. In March 2013 he withdrew his application for review of that decision.
3. On 12 March 2013 the appellant applied for a Protection (Class XA) visa (**the Visa**). On 26 September 2014 a delegate of the Minister refused to grant the Visa.
4. On 29 October 2013 the appellant applied to the Tribunal (which was then the Refugee Review Tribunal) for review of the delegate’s decision. On 23 October 2014 the Tribunal affirmed the decision not to grant the appellant the Visa.

# the applicant’s claims

1. In his application for the Visa and at his interview with the Minister’s delegate the appellant claimed that:
2. he left Bangladesh because he and his family were being threatened by “underworld groups” who were supported by the current ruling party;
3. those groups asked his father to give them money but he refused to do so. They threatened the appellant’s family saying that they would attack the appellant and kill him. As a result of those threats the appellant hid at home;
4. those groups are still looking for the appellant and they may kill him if they find him back at his home;
5. after the appellant came to Australia his family moved from the home in which they had lived for decades. They continue to hide from the underworld groups who are very dangerous;
6. his father had a stroke in mid 2004 as a result of which he stopped working. The telephone threats of extortion continued;
7. after the appellant came to Australia, in 2008, his parents relocated back to their home town in Tangail and remained there until May or June 2012 when they moved back to Dhaka due to his father’s medical needs. The appellant’s father did not receive any further telephone threats after 2009 but the appellant believed that these people were still looking for his father for revenge;
8. the appellant claimed that he would not receive adequate state protection from the authorities because the underworld groups are supported by the current ruling party.
9. On 3 September 2013, after his interview with the delegate, the appellant claims that he sent the delegate an email which relevantly included:

… I am writing to you regarding my case. I forgot to tell you about one more thing. Back in 2006 when my father was not ready on their demand they followed me everywhere..means my collage, my tutor home, with my frnds and took those photos and send it back to my father and threatened to kill me.

…

1. By letter dated 6 August 2014 the appellant was invited to appear before the Tribunal to give evidence and present arguments relating to the issues in his case. At the Tribunal hearing the appellant made the following further claims:
2. between 2003 and 2005 the gang members came to his home two or three times. The appellant said he did not see them but that his parents told him about the conversations they had with them;
3. after 2005 the gang members did not continue to come to the house but the phone threats increased and they started following the appellant and sending photographs of him to his parents;
4. the appellant never saw the people following him, he only knew this was occurring because of the photographs;
5. after sending him out of the country the appellant’s parents returned to their village, where they remain. They visit Dhaka for medical treatment and for financial reasons; and
6. written threats continue to be sent to the family home and all members of the appellant’s family were threatened with harm.

# the Tribunal decision

1. The Tribunal did not accept the appellant’s claims. It provided four reasons for rejection of those claims.
2. First, it found the appellant’s claim that his family had been pursued by extortionists since 2001, in circumstances where his father had continued to refuse to meet their demands, but no harm had ever been done to any family member, to be so implausible that it simply did not accept it. The Tribunal considered that the claim so lacked credibility that it did not accept that threats were ever made to the appellant’s family. Alternatively, even accepting that a demand for money was made in 2001, it did not accept that there followed threats representing a serious or genuine intention to actually inflict harm of any kind on the appellant or any member of his family.
3. Secondly, it noted that the appellant changed details of his account over time. In his application for the Visa the appellant said that the group “tried to look for him” when he was in Bangladesh but that he used to hide at home. At the hearing the appellant raised new claims saying that the gang members came to his family home two or three times from 2003 to 2005, that he was followed, especially during 2006 and 2007, and that the gang members took photographs of him which they sent to his parents as threats. He also said that written threats were sent to his parents’ home. At his interview with the Minister’s delegate, and as recorded in the delegate’s reasons, the appellant did not mention the visits to the home or that he was followed and that photographs were sent to his parents. He said that his father continued to receive telephone threats until his parents relocated to their village in 2008 but he said that there was no further contact after his father moved away from Dhaka in 2008, even after he returned there in 2012.
4. The Tribunal was concerned that the appellant’s claim that he had been followed and photographs had been taken of him and sent to his parents had not been mentioned before the hearing. The Tribunal noted that this was a significant claim and that it would expect that the appellant would have mentioned it earlier if he was telling the truth. The appellant claimed that he had sent an email to the delegate after the interview mentioning the photographs and provided a print out of the email and showed the Tribunal member the “sent” items box of his mobile phone which appeared to show that the email was sent on 3 September 2013, six days after the interview with the delegate. However, a copy of the email was not on the departmental file.
5. The Tribunal informed the appellant that it had some doubts about whether the email had actually been sent. The Tribunal was not satisfied with the appellant’s explanation of why he would not have mentioned what the Tribunal described as a highly significant piece of information in the general context of the presentation of his account, either in writing or at the interview with the delegate, if it were true. Further the Tribunal found that the claim appeared to contradict the claim made in the Visa application that the extortionists “tried” to look for the appellant but he hid at home. It noted that he now suggests that they knew where he was at all times.
6. Thirdly, the Tribunal noted a discrepancy between what the appellant said at hearing and what he said at his interview with the delegate about whether his parents returned to Dhaka. At the interview with the delegate the appellant claimed that his father received no further telephone threats and had no further contact with the extortionists after moving away from Dhaka in 2008. At the Tribunal hearing the appellant claimed that written threats continued to be delivered to the family home in Dhaka but that his parents no longer lived there, that they remained in the village and returned to Dhaka on a temporary basis for medical care and to attend to financial matters. The Tribunal was not satisfied with the appellant’s explanation for the discrepancy which it considered was significant.
7. Fourthly, the Tribunal found that the appellant’s evidence that he was required to remain at home in order to avoid harm was inconsistent with his evidence that the extortionists knew his home address and had in fact been to the family home. It did not accept that remaining at home, in circumstances where his home address was known to those threatening him, would have provided protection against a genuine and serious threat of harm.
8. In light of the deficiencies which the Tribunal identified in the appellant’s account, the Tribunal did not accept that the appellant had told the truth about his reasons for leaving Bangladesh and his reluctance to return. At most the Tribunal was prepared to accept that a demand for money had been made of the appellant’s father in 2001 but it did not accept that the appellant or any of his family members were subjected to ongoing threats of harm over a period of seven years leading up to the appellant’s departure or that threats had continued in the six years since his departure. The Tribunal did not accept that there was a real risk or real chance that the appellant would be subjected to harm of any kind arising from the claimed circumstances if he returned to Bangladesh.
9. The Tribunal was not satisfied that the appellant had a well founded fear of persecution for the reasons he claimed and was not satisfied that he was a person in respect of whom Australia has protection obligations under the Refugees Convention and found that he did not satisfy the criterion set out in s 36(2)(a) of the *Migration Act 1958* (Cth) (**the Act**). As the appellant had not put forward any additional basis for claiming complementary protection, beyond the claims made and dealt with in relation to the refugee criterion, the Tribunal was not satisfied that the appellant was a person in respect of whom Australia had protection obligations under s 36(2)(aa) of the Act.

# Proceedings before the Federal Circuit Court

1. In his application for review filed in the Federal Circuit Court the appellant raised one ground of review in the following terms:

1. The Tribunal denied the applicant procedural fairness.

*Particulars*

(a) The Tribunal failed to make an obvious enquiry as requested by the applicant in relation to the photographs the applicant emailed to the DIBP case officer after his Departmental interview, which the Member conceded was a “highly significant piece of information” (para 14 of the statement of reasons).

1. The appellant relied on an affidavit of Winnie David affirmed 18 February 2015 annexing a transcript of the Tribunal hearing. The appellant did not file any written submissions but made oral submissions at the hearing in which he raised additional grounds.
2. The first ground raised in submissions by the appellant was that he had not been able to understand the tape of his interview with the delegate and that this was, in some way, indicative of jurisdictional error on the part of the Tribunal. The primary judge took this to be an assertion of a denial of procedural fairness by the Tribunal: *SZVRM* at [25].
3. In relation to this ground the primary judge found that there was nothing in the transcript of the Tribunal hearing to indicate that the applicant had asked the Tribunal at the hearing to provide him with a fresh copy of the tape of the departmental interview. The primary judge noted that when the Tribunal questioned the appellant about his parents’ movements, the issue in relation to which the recording was raised by the appellant, it put to the appellant that it seemed that he was changing his claims from what he had said at his interview with the delegate, as recorded in the delegate’s decision, and that this might make the Tribunal think that he was not being truthful. The primary judge went on to note that, as the Tribunal explained to the appellant, it was referring to what the delegate had recorded in her reasons, a copy of which were provided to the appellant. Thus the primary judge held that, even if the appellant was claiming that he could not understand the recording of the interview, he was on notice of what the delegate recorded that he said in the departmental interview: *SZVRM* at [28]–[32].
4. The primary judge observed that there had been no suggestion, either to the Tribunal or in the proceedings before her, that the Tribunal or the delegate inaccurately recorded what the appellant said at the departmental interview. The primary judge noted that the appellant appeared to be suggesting that his evidence may have been inconsistent because he had not been able to verify what he had said at the interview and thus provide consistent information to the Tribunal. In those circumstances, the primary judge held that it was open to the Tribunal to find that the appellant had not given a satisfactory explanation for the inconsistency between what the delegate recorded he had said in his interview and what he said to the Tribunal. Her Honour also held that it was open to the Tribunal to find there was a “significant discrepancy between the recorded evidence to the Department and the evidence to the Tribunal which had not been explained and which reflected poorly on the [appellant’s] overall credibility”: *SZVRM* at [33].
5. The primary judge held that more generally the concerns that the appellant raised about alleged deficiencies in the tape of the departmental interview were not such as to establish any lack of procedural fairness or jurisdictional error on the part of the Tribunal. Her Honour noted that it was apparent from the transcript of the Tribunal hearing that the Tribunal raised with the appellant dispositive issues and gave him the opportunity to comment or respond: *SZVRM* at [34].
6. The second issue addressed by the primary judge was the ground raised by the appellant in his application that the Tribunal failed to make an “obvious enquiry” in relation to photographs that the appellant emailed to the departmental case officer after his interview. In relation to this ground the primary judge first noted that, to the extent there was any suggestion that the appellant emailed photographs to the delegate, as opposed to sending an email claiming that photographs had been taken of him by the gang in Bangladesh, it was apparent from the transcript of the Tribunal hearing that he did not do so. The primary judge noted that the appellant had told the Tribunal that the photos were sent to the family in 2006 to 2007, that his parents decided that they did not want to keep him in the country and that, importantly, he told the Tribunal that his parents did not save the photographs. The primary judge held that, contrary to the appellant’s assertion, photographs were not emailed to the delegate by the appellant and held that the ground raised in the appellant’s application was not made out: *SZVRM* at [36]-[40].
7. The next claim addressed by the primary judge was the appellant’s submission that the Tribunal should have checked with the department that he did in fact send the email of 3 September 2013. This concern arose because at the hearing before the Tribunal, after expressing concern about the late claim, the Tribunal explained to the appellant that there was no such email on the departmental file and suggested that it looked as though the email had not actually been sent: *SZVRM* at [41].
8. The primary judge noted that at the hearing the Tribunal had before it the departmental file but that the appellant showed the Tribunal member his “sent” box on his mobile phone. The Tribunal was prepared to accept that an email did appear to have been sent. The primary judge observed that the Tribunal explained to the appellant that its concern was that this claim was not mentioned in the Visa application or at the interview and that there was a delay of some six days after the interview before the appellant sent the email to the department. In those circumstances the Tribunal found that:
9. there was no satisfactory explanation as to why this “highly significant piece of information” would not have been mentioned either in writing in the Visa application or at the departmental interview; and
10. the claim contradicted the claim in the Visa application that the extortionists had tried to look for the appellant, but he hid at home: *SZVRM* at [43].
11. The primary judge noted that the appellant’s concerns raised a claim that there was a failure by the Tribunal to make an obvious enquiry about a critical fact the existence of which was easily ascertained and referred to the judgment in *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429 (***SZIAI***). However, the primary judge held that such a claim was not made out in circumstances where “whether or not the email was in fact sent was not a critical fact in terms of the disposition of the review”: *SZVRM* at [44].
12. The primary judge also considered whether the Tribunal ought to have exercised a discretion to make further enquiries but held that she was not satisfied that the Tribunal’s failure to make a further enquiry about whether the email was sent or received was such as to lack “an intelligible or evident justification or such as to amount to an unreasonable exercise of the Tribunal’s discretion” in the sense considered in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 (***Li***) or *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 (***Singh***). Her Honour held that in circumstances where such an investigation would not have gone to a critical fact there was an intelligible justification for the Tribunal exercising its discretion not to make any further inquiries about the actual sending or receipt of the email: *SZVRM* at [50].
13. The final submission addressed by the primary judge was the appellant’s contention that the Tribunal made its decision on the same day as the hearing and that he had no time to put in writing a request to the Tribunal that it check whether he had sent the email to the department. The primary judge referred to her earlier conclusion that she was not satisfied that the Tribunal fell into error in failing to make such an enquiry: *SZVRM* at [52].
14. Insofar as the appellant contended that he should have had further time to provide information, make inquiries or ask the Tribunal to conduct inquiries, the primary judge found that there was nothing in the transcript of the Tribunal hearing to indicate that he had asked for extra time after the hearing, the Tribunal had given the appellant the opportunity to comment on or respond to information put to him, the appellant responded immediately and the Tribunal told the appellant that it would not make its decision immediately but would probably make a decision on that day after considering everything that had been provided to it.
15. The primary judge held that there was no obligation on the Tribunal to provide additional time after a hearing to allow an applicant to make additional comments or provide additional evidence to the Tribunal and that there was no evidence to suggest that the Tribunal failed to raise dispositive issues with the appellant at the hearing. The primary judge noted that the Tribunal informed the appellant that he could seek additional time to comment on the “photographs issue” but that he did not do so and that there was no obligation on the Tribunal to ensure that additional time was available after the hearing. The primary judge was not satisfied that the Tribunal fell into jurisdictional error in proceeding in the way it did and making its decision on the day of the hearing: *SZVRM* at [52] to [58].
16. The primary judge concluded that no jurisdictional error was established either as alleged in the application filed with the court or as raised by the appellant in his oral submissions.

# the notice of appeal

1. The appellant commenced these proceedings by the filing of a notice of appeal on 30 March 2016. In his notice of appeal the appellant raises a single ground of appeal in which he simply contends that there is jurisdictional error. He also includes the following in the notice of appeal:

Check again on the juridictional (sic) error made by Federal Circuit Court.

1. The appellant has not filed any written submissions in support of his notice of appeal. At the hearing the appellant made submissions about two issues. First he submitted that he was unable to play the disk he received from the department recording his interview with the delegate and that the Tribunal hearing was a year and a half earlier and he could not recall what he told the delegate. Secondly he submitted that he was nervous at the Tribunal hearing and when the Tribunal member asked him whether there was anything else he wished to say and he said “no” he really did not know what he was saying. This was not because of language difficulty but because he was nervous.

# consideration

1. The role of this Court on appeal is to consider whether there is any appealable error in the decision of the primary judge. No such error is identified in the notice of appeal. The sole ground of appeal is a bare assertion of error which is not particularised and, given the way it is framed, seems to suggest error on the part of the Tribunal rather than the primary judge. Nor do the appellant’s oral submissions assist in identifying any appealable error on the part of the primary judge.
2. I have reviewed the judgment of the primary judge and cannot discern any appealable error in that judgment. The primary judge considered each of the appellant’s grounds raised before her and found that they did not reveal any jurisdictional error in the decision of the Tribunal. The primary judge addressed each of the grounds raised by the appellant in turn and, where relevant, considered the transcript of the Tribunal hearing which had been tendered by the appellant. As to:

(1) the first ground the primary judge found that in considering the inconsistent evidence in relation to the parents’ movements between homes the Tribunal was relying on the delegate’s decision record which was available to the appellant and not the recording of the interview with the delegate. The appellant’s submission that he could not play the disk recording the interview does not take the matter any further given the Tribunal’s reliance on the delegate’s written record of the appellant’s evidence. The recording of the interview with the delegate had no role to play and the appellant had not suggested that the delegate’s written record of his evidence was inaccurate. In those circumstances the primary judge held that it was open to the Tribunal to find that the appellant had not given a satisfactory explanation for the inconsistency in his evidence on this issue as between what was recorded in the delegate’s decision record and what he told the Tribunal. In my opinion, there is no error in the primary judge’s approach to this claim;

(2) the second ground the primary judge held that, contrary to the ground raised in the application, no photographs had been provided to the delegate. This was evident from the appellant’s evidence to the Tribunal as recorded in the transcript and from the terms of the email to the delegate on the issue. The primary judge dismissed the ground on that basis as the ground could not be made out. Once again there is no error in the approach of the primary judge;

(3) the third ground, which raised whether there was an obligation on the part of the Tribunal to inquire about whether the email about the photographs was sent by the appellant to the delegate, the primary judge:

(a) first considered whether the Tribunal failed to make an inquiry about a critical fact the existence of which was easily ascertained and considered the application of *SZIAI*. In that case a majority of the High Court (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) held at [25] that:

The duty imposed upon the tribunal by the Migration Act is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction. It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error. It is not necessary to explore these questions of principle in this case.

(citations omitted)

The primary judge held that whether or not the email was sent, the inquiry which the appellant alleged ought to have been made, was not a critical fact in terms of the disposition of the review. Despite the Tribunal’s doubts about the issue it proceeded on the basis that the email had been sent. Having regard to the nature of the information this was not a case where the Tribunal was under a duty to inquire. As the primary judge held the critical issue was not whether the email was sent but rather the timing of raising the claim about the photographs. There is no error disclosed in the primary judge’s reasons in relation to this issue. She correctly identified the critical issue and concluded that in light of that there was no obligation on the Tribunal to make the inquiry as alleged;

(b) then considered the ground in terms of whether the Tribunal ought to have exercised a discretion to make further inquiries. For the same reasons, that is because the inquiry would not have gone to a critical fact, her Honour was not satisfied that the Tribunal’s failure to make a further inquiry about whether the email was sent was such as to lack an intelligible or evident justification or such as to amount to an unreasonable exercise of the Tribunal’s discretion in the sense considered in *Li* or *Singh*. The primary judge noted that the Tribunal’s reasons proceeded on the basis that the email had been sent and that the issue was the appellant’s lack of explanation for why he had not mentioned the claim in his Visa application or at the interview with the delegate as well as the inconsistency with the Visa application. There is no error disclosed in the reasoning of the primary judge;

(4) the fourth ground, which concerned the fact that the Tribunal made its decision on the same day as the hearing and that the appellant had no time to put in writing a request that the Tribunal check whether he had sent the email to the department, the primary judge repeated her finding that the Tribunal did not fall into error by failing to make such an inquiry. Further, after considering the transcript of the hearing before the Tribunal, the primary judge held that the Tribunal had not fallen into jurisdictional error in proceeding to make its decision - there was no failure to afford the appellant the hearing required under the Act or in meeting the requirements of s 424AA of the Act nor was there was any denial of procedural fairness by the Tribunal. It is clear from a review of the transcript of the hearing before the Tribunal that was the case. The Tribunal put to the appellant information that it considered would be the reason or part of the reason for affirming the decision under review as it was required to do pursuant to s 424AA of the Act and invited the appellant to comment on that information, which he did orally at the hearing. The appellant did not seek further time to respond. The appellant’s submission that his negative response to the Tribunal’s inquiry of whether he had anything further to say being caused by nerves does not disclose any error in the approach of the primary judge nor in the Tribunal’s decision. In my opinion, there is no error in the reasoning of the primary judge.

# conclusion

1. The appellant has not demonstrated that there is any appealable error in the judgment of the primary judge nor am I able to discern any such error. It follows that the appeal should be dismissed and that the appellant should be ordered to pay the Minister’s costs.

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| I certify that the preceding thirty-six (36) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Markovic. |

Associate:

Dated: 11 August 2016