FEDERAL COURT OF AUSTRALIA

BPW16 v Minister for Immigration and Border Protection [2018] FCA 414

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| Appeal from: | *BPW16 v Minister for Immigration & Anor* [2017] FCCA 1395  |
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| File number: | QUD 338 of 2017 |
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| Judge: | **COLLIER J** |
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| Date of judgment: | 28 March 2018 |
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| Catchwords: | **MIGRATION** – protection (class XA) visa – appellant cavilling with factual findings – credibility findings matters for the Tribunal – no appellable error |
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| Legislation: | *Migration Act 1958* (Cth) ss 36(2)(aa), 424A |
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| Cases cited: | *BPW16 v Minister for Immigration* [2017] FCCA 1395*S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71; (2003) 216 CLR 473 |
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| Date of hearing: | 27 March 2018 |
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| Registry: | Queensland |
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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: | Catchwords |
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| Number of paragraphs: | 25 |
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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: | Ms L Helsdon of Sparke Helmore |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice, save as to costs |
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ORDERS

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|  | QUD 338 of 2017 |
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| BETWEEN: | BPW16Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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

THE COURT ORDERS THAT:

1. The appeal be dismissed with costs.

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

REASONS FOR JUDGMENT

COLLIER J:

1. This is an appeal from a decision of the Federal Circuit Court of Australia in which the primary Judge dismissed an application for review of a decision of the Refugee Review Tribunal, now the Administrative Appeals Tribunal (**Tribunal**). The Tribunal had, in turn, dismissed an application for review of a decision of a delegate of the Minister for Immigration and Border Protection (**Minister**) not to grant the appellant a Protection (Class XA) visa pursuant to the *Migration Act 1958* (Cth) (**Migration Act**).
2. In my view the appeal has no merit and should be dismissed.

## Background

1. Material background facts are set out in the decision of the primary Judge (*BPW16 v Minister for Immigration* [2017] FCCA 1395). In summary, the appellant is a citizen of Bangladesh who arrived in Australia as an unauthorised maritime arrival on 6 May 2013 and subsequently applied for a Protection (Class XA) visa on 2 September 2013. A delegate of the Minister refused the grant of the visa on 24 October 2014, and the appellant lodged an application for review of the delegate’s decision to the Tribunal. It appears that, in total, the Tribunal conducted three separate hearings. The appellant was represented at the Tribunal hearings by a lawyer, with an interpreter also present.

### Tribunal hearing

1. In summary, in the Tribunal, the appellant claimed fear of returning to Bangladesh for the following reasons:
* He was a supporter and member of the Awami League political party, as were his father and brothers. This involved arranging rallies.
* The appellant had been involved with the Bangladesh Student League (**Student League**) in his student days.
* His father, who had passed away, had a high profile in the Awami League.
* A member of the BNP party stole an electrical transformer from the house of the appellant’s friend. The appellant’s friend got his transformer back, but the alleged thief went to the police and accused nine people (including the appellant and his father) of attacking him. The appellant was required to attend Court in September 2007 with the other accused, however the hearing was adjourned. The appellant did not attend Court on the return date, but instead went overseas, claiming his belief that the case against him had been dismissed.
* As a supporter of the Awami League he would continue to be in danger because he had many enemies and because of increased aggression due to forthcoming elections. The police in his area of Bangladesh were weak and would be unable to protect him.
* His brother had been assaulted in January 2014, however the police had instead charged the appellant’s father, brother and cousin on false allegations.
* His financial position was not strong and it was not safe for him to return to Bangladesh.
* There was a co-existence of politics and violence in Bangladesh.
* Bangladesh is a dangerous place for a young man from a family with political affiliations.
* The fear of persecution was not localised.
1. The appellant produced documentation to the Tribunal including newspaper articles, police reports concerning the appellant’s brother and father, a letter purportedly signed by a member of Parliament referring to the appellant as an active worker for the Awami League and medical evidence.
2. In its reasons for decision the Tribunal accepted that the appellant was a *supporter* of the Awami League, but did not accept that he was ever a *member* of the Awami League, or the Student League, or that he was involved in any political activity for them. This was because:
* The appellant had not mentioned his claim of being a joint secretary of the Student League in his initial claims for a protection visa. The fact that he had not initially done so cast doubt on the credibility of his claims.
* On the material provided by the appellant to the Tribunal he would have been only 13 years old at the time he was allegedly joint secretary of the Student League.
* The appellant’s evidence in relation to his activities in the role of joint secretary was extremely vague.
* Despite the appellant’s claims of being engaged in Awami League activities he was unable to identify the four fundamental principles associated with the Awami League
* Although the appellant had produced documentation purportedly from the Student League attesting as to his involvement in the Student League, country information indicated that fraudulent documents were readily available in Bangladesh.
* The Tribunal had difficulty accepting that, over five years after his departure from Bangladesh, the appellant continued to be a member of the Student League.
* The Tribunal did not accept that a false case had been brought against him in court proceedings in Bangladesh. In so finding, the Tribunal noted that the appellant had not maintained a consistent account in relation to the court proceedings or his actions surrounding them, and the documents submitted by the appellant were at odds with his own evidence.
* The Tribunal did not consider the police documentation to be genuine and reliable in respect of either the appellant or his family members.
* The appellant’s claims in respect of his family members, including their political involvement, lacked credibility, although the Tribunal was prepared to accept that the appellant’s father and brothers were members and supporters of the Awami League.
* While the Tribunal accepted that the appellant’s father may have been a freedom fighter, this did not give rise to a real chance of persecution of the appellant.
* The appellant’s claims concerning his brother-in-law’s death in 2011 lacked credibility. In particular, the appellant claimed that his brother-in-law was most likely murdered; however such a claim had never been reported to the Bangladeshi police and the appellant conceded that he could not be sure whether the death was caused by murder or an accident.
* The Tribunal did not accept that being a supporter of the Awami League gave rise to a real chance that the appellant would be persecuted as a result of his political opinion.
* The Tribunal did not accept that the death of the appellant’s father made the appellant or his family vulnerable to being targeted for harm for any political or other reason.
* There was no reason to suppose that the appellant would face a real risk of persecution from the Islamic State in the foreseeable future.
* There was nothing to suggest that problems with the appellant’s visa while he was in Malaysia would give rise to a real chance of persecution or serious harm in Bangladesh.
* The Tribunal did not accept that the appellant was suffering mental health issues prior to, or at, the hearings.
* The appellant’s claim that someone gave him a pistol while he was in Bangladesh did not, of itself, give rise to any real chance of persecution of the appellant.
* The Tribunal did not accept on the evidence before it that the appellant’s workplace injury would prevent him from gaining employment.
* Although the appellant also claimed risk of harm under the complementary protection provisions under s 36(2)(aa) of the Migration Act the Tribunal was not satisfied that it had substantial grounds for believing that, as a necessary and foreseeable consequence of the appellant being removed to Bangladesh, there was a real risk that he would suffer significant harm.

### Federal Circuit Court proceedings

1. In an amended application for review of the Tribunal decision in the Federal Circuit Court, the appellant relied on the following three grounds:

1. That the decision of the Second Respondent, the AAT, was affected by legal error as set out below.

2. The Tribunal failed to discharge its core function to review the decision.

Particulars

(i) In the Tribunal’s decision, the Tribunal considered the claims and evidence from [53].

(ii) It considered the claims under the following headings, inter alia:

(a) claims about [the Applicant’s] political involvement;

(b) claims about court case;

(c) claims about cases affecting family members;

(d) claimed harm against other members of the applicant’s family;

(e) claimed political involvement of other family members.

(iii) In the Tribunal’s decision, at [73], it stated that:

*In all the circumstances, the Tribunal does not final credible the applicant’s evidence about his political involvement and activities. While he claims to have been joint secretary of the Student League, he made no mention of this in his initial statement, instead stating that he was a member of the Awami League. He claims to have been joint secretary of the Student League since about age 13 but was able to provide only very limited detail about the nature of his activities. He displayed a lack of familiarity with the fundamental principles of the Awami League. The Tribunal has not accepted as reliable the information from the Bochaganj Upazila Student League. It has difficulty reconciling the information in the letter from Mr Chowdhury with the applicant’s own evidence about the nature of his involvement in, and connection with, the Awami League and does not accept it as providing a reliable indication that the applicant has been in any way actively involved in political activities. The Tribunal is willing to accept that the applicant displayed some awareness of the Awami League, for instance at the Departmental interview. It is willing to accept that he may be a supporter of the Awami League. However, it does not accept that he was ever a member of the Awami League or the Student League, that he was ever joint secretary or an office holder of the Student League, or that he was involved in any political activity for either the Awami League or the Student League. As set out below, the applicant has also failed to provide a consistent and credible account of the false case which he claims was connected with his political opinion and activity. This reinforces the Tribunal in its conclusion that his claims and evidence in relation to these matters are lacking in credibility.*

(iv) At the hearing(s), the last of which was on 5 February 2015, that at least one of the bases that the Applicant was relying on was membership of the student league, a wing of the Awami League.

(v) The Minister’s delegate in the reasons for his decision of 24 October 2014 (**Delegate’s decision**) noted that “it is primarily the youth and student wings of the [Awami League] who are involved in the intra-party violence”.

(vi) The Delegate’s decision was before the Tribunal.

(vii) In the Tribunal’s letter dated 12 May 2016 gave particulars of information, pursuant to s.359A(1) of the *Migration Act 1958* (**Migration Act**), under the following headings:

(a) The evidence about false case in 2007;

(b) information concerning instances of harm;

(c) information concerning claimed cases against other members of your family;

(d) information concerning political involvement of father and brothers.

(viii) The Tribunal’s letter dated 12 May 2016 did not seek information about the Applicant’s political involvement as required by s. 359A(1).

(ix) The Tribunal did not act in a way that was fair or just.

3. The Tribunal constructively failed to consider the Applicant’s claims.

Particulars

(i) All of the particulars in Ground 1 are repeated.

(Original emphasis.)

1. The primary Judge rejected the appellant’s claims.
2. First, in submissions the appellant contended that the letter sent by the Tribunal on 12 May 2016 pursuant to s 424A of the Migration Act did not set out the particulars of information relating to the claims about the appellant’s political involvement that would be a reason, or part of the reason, for affirming the decision under review. However his Honour noted that the information the appellant submitted ought to have been included in the s 424A letter was information about the appellant’s political involvement provided by him to the Tribunal as part of his case. His Honour observed:

[30] … that information, to the extent that it is constituted by information from the applicant, was information that was exempted from the operation of s.424A(1) by s.424A(3)(b) and (ba) of the Act. The information considered by the Tribunal was documentary evidence given to the Department and documentary given to the Tribunal. It also consisted of oral evidence provided to the Tribunal.

1. Further, his Honour found that the Tribunal’s reasons for decision were lengthy, detailed and considered, and the Tribunal carefully explained how it came to the conclusions it reached (at [32]). His Honour concluded:

[33] Even assuming the correctness of the applicant’s proposition that all of the information which the applicant provided about his political involvement was “information” that might otherwise come within s.424A(1) (something which is not likely correct) it was clearly information which was within s.424A(3) of the Act. The Tribunal was not obliged to include any reference to that information in its letter of 12 May, 2016.

## Grounds of appeal

1. In this Court the appellant relies on the following grounds of appeal:

1. The Federal Circuit Court Judge erred in low to come to a decision dismissing my Application not Finding that the tribunal did not consider that I was a victim of persecution for my political belief as an activist of Bangladesh.

2. The Honourable Federal Circuit Court of Australia Judge did not find that there was a lack of procedural fairness in the decision of the Refugee Review Tribunal as the Tribunal failed to consider that I was physically abused for my political belief and my life was at risk which forced me to leave Bangladesh for safety of my life. I was not accepted by the tribunal as a credible witness and refused my application.

3. The Honourable Federal Circuit of Australia Judge made errors of jurisdiction not considering the Tribunal’s failure to give me a reasonable opportunity to respond to independent evidence in possession of the Tribunal which suggests that shall not be a victim of harassment of my political belief if returned to Bangladesh.

4. The Honourable Federal Circuit Court of Australia Judge made to find that the Tribunal failed to accept that the persecutions I experienced in Bangladesh and I shall not be imprisoned and tortured if returned to Bangladesh. The Tribunal refused my claim on the ground that I am not credible witness for my claims before the Tribunal prior to hearing.

5. The Honourable Federal Circuit Court of Australia Judge erred in not finding that the Tribunal erred in law amounting to jurisdictional error in finding that I do not genuine fear of persecution for convention reason and I do not meet the criteria set our in s 36(2) of protection visa.

6. The Federal Circuit Court of Australia Judge erred in not finding that the Tribunal refused my application on the ground that I would face punishment would be completely politically motivated.

7. The Federal Circuit Court of Australia Judge erred in not finding that the Tribunal failed to consider that I was discriminated for my political belief if returned to Bangladesh not or in the foreseeable future and my persecution is convention related.

(Errors in original.)

1. The appellant and the Minister both filed written submissions for consideration by the Court. In his first set of written submissions the appellant alleges:
* the decision of the Tribunal was manifestly illogical, irrational or unreasonable because the Tribunal failed to find that he would be persecuted because of his low-level involvement in politics;
* the Tribunal was required, pursuant to Ministerial Direction 56, to take into account country information prepared by the Department of Foreign Affairs and Trade. However in this case, the Tribunal failed to consider specific relevant examples of violence in Bangladesh and the culture of impunity in Bangladesh; and
* the Tribunal failed to distinguish between genuine and false documents, and should have verified the documents if it had any doubt as to the authenticity of documents.
1. In his second set of written submissions the appellant alleges:
* he was active in the Awami League including organising and attending meetings, and delivering speeches;
* as a result he became famous in his local area in Bangladesh; and
* he was threatened with death by opposition members.
1. In his reply submissions filed on 9 February 2018, the appellant also appeared to raise a second set of grounds of appeal referable to the failure of the Tribunal to take into account relevant considerations. Specifically, the appellant claimed:

1. The AAT unreasonably raised doubt over my political activities and the membership of the party. And the credible witness without any investigation.

2. The Tribunal’s doubts over my membership of political party was based on unreasonable assumption.

3. I categorically and truthfully said to the Tribunal that in the early stage I was active member but after some stage I did sincere efforts to build up the organisation of my area.

4. When I was involved in protests I said that I had attended numerous political meetings organised by my party members and supporters. Tribunal discarded all the oral and written evidence without giving any sound reasons for that.

5. I claim that the Tribunal made a jurisdictional error when intentionally asked several irrelevant questions to undermine, political activities and my role within the Party Organisation.

6 I submitted to the Tribunal fears persecution because of having the membership of a particular social group. I can be considered a member of a particular social group, namely a member of my party.

7. All the member of my party are easily identified by a characteristic or attribute that is common to all members, that being their political affiliation with the party. This characteristic leads to members being distinguished from, the community at large. Accordingly, the party can be regarded as being a social group and the active member of that party. I never claimed that I was a big leader of the party and having very high political profile. I was a truthful witness and whatever and said to the Tribunal was correct.

8. I claim that the test of fear of persecution applied whether the victim has a low profile or high profile. It is fact that high profile leaders are targeted easily but it does not mean that low profile political activists are not killed in any attacks. In reality the low profile political activists are killed first before the big political leaders in the name of security.

9. I claim that information collected by the Delegate is biased and limited. My claims that the Delegate and the Tribunal made decision on the Limited information not the whole information’s available on the media.

10. The Tribunal failed to apply the correct test in relation to the complementary Protection Provision contained in section 36(2) (aa) of the Migration Act 1958.

11. I have a legitimate expectation from the Tribunal that it would assess my claim according to required procedural fairness.

12. I left Bangladesh because of fear from the Government Authority. I believe that there is a real risk that would suffer significant harm on return Bangladesh.

13. The harm or the mistreatment feared by the authority on return is for reason of one or more of five grounds of recognised in the Refugee Convention.

14. My claims that I fear of harm or mistreatment is for the Convention reasons of political opinion and membership of the particular social group.

15. My fear of harm is well-founded and that there is a real chance that he will suffer persecution if he returned to Bangladesh.

16. I agree with the tribunal that I am not credible because in the tribunal hearing I feel sick and I mention at the middle of hearing for adjourned the hearing. But honourable member did not give the adjourned.

17. Regarding the document fraud in Bangladesh. I agree with the tribunal, but my all the documents are genuine without any investigation tribunal made a common observation.

18. My appeal to the Hon Court to set aside the decision of the Federal Circuit Court and Tribunal and give order for a fresh hearing according to law.

(Errors in original. Particulars omitted.)

1. After informing the Registry that he was outside Brisbane, that his car had had mechanical problems and that he was unable to be in Court by 10.15 am when the hearing was scheduled to commence, the appellant appeared at the hearing by telephone. An interpreter was present during the hearing to assist the appellant.
2. By way of oral submissions, the appellant contended as follows:
* He sought to submit additional social media/video evidence referable to events following the Tribunal decision.
* He was given inadequate time at the Tribunal hearing, and wanted to say many things, but was not given an opportunity to do so.
* He thought that at one point during the Tribunal hearings his lawyer, who was on the telephone, was out of contact for approximately 20 to 25 minutes.
* He has medical issues with his hand and sought a fresh opportunity to re-state his case to the Tribunal.

## Consideration

1. Examining both sets of the grounds of appeal and the submissions of the parties I now make the following findings.
2. Insofar as the appellant seeks to raise arguments not advanced below he requires leave of the Court to do so. An important factor for the Court to take into account in determining whether to grant leave is whether the proposed grounds have merit.
3. In my view none of the grounds of appeal on which the appellant seeks to rely are meritorious.
4. Grounds of appeal 1, 2, 4, 5, 6 and 7 in the appellant’s notice of appeal have no merit because they merely cavil with the decision of the primary Judge and the factual findings of the Tribunal, and ultimately identify no appellable error. Ground of appeal 3 clearly relates to the issue raised below concerning the Tribunal’s alleged failure to comply with s 424A of the Migration Act. This issue was addressed comprehensively by his Honour, and I can identify no error in his Honour’s reasoning.
5. In relation to the second set of grounds of appeal:
* Although in grounds 1 and 2 the appellant claims that the Tribunal had acted unreasonably, he simply cavils with the factual findings of the Tribunal. The refusal of the Tribunal to accept the evidence or submissions of the appellant does not mean that the Tribunal has acted unreasonably.
* In grounds 3 and 4 the appellant merely cavils with the Tribunal’s factual findings.
* In ground 5 the appellant appears to accuse the Tribunal of bad faith in respect of questions the Tribunal member asked the appellant concerning Bangladesh politics. However, given that the appellant claimed protection on the basis of his alleged political affiliations and activities, it can scarcely be said that questions of the Tribunal relating to politics were irrelevant.
* In ground 6 the appellant claims that the Tribunal hearing was conducted in a manner which was procedurally unfair. However I note that this issue was not raised before the primary Judge, and in any event appears based simply on the fact that the Tribunal rejected the appellant’s arguments. The refusal of the Tribunal to accept the evidence or submissions of the appellant does not mean that the Tribunal has acted without procedural fairness.
* In grounds 6 and 7 the appellant claims that he is a member of a social group, namely those who have a political affiliation with the Awami League. As Gleeson CJ explained in *S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71; (2003) 216 CLR 473 at [31]:

In a case like the present, defining the particular social group and the type of harm feared is fundamental in determining whether a member of that group has a well-founded fear of persecution. Only by defining the group and its characteristics or attributes, actual or imputed, can a tribunal of fact determine whether the harm feared is well-founded and is causally related to the particular social group …

While I doubt that being a supporter of a political party means membership of a “social group” with other supporters, in any event I consider the appellant’s claims add nothing to his claims before the Tribunal relating to his political opinion. Those claims concerning his political opinion were dealt with, in detail, by the Tribunal.

* In ground 8 the appellant merely cavils with the Tribunal’s factual findings
* In ground 9 the appellant claims bias on the part of the Tribunal, in addition to failure by the Tribunal to take into account relevant considerations. The appellant’s claims concerning bias lack merit – they are unparticularised, and appear to merely constitute a complaint about the Tribunal’s disinclination to accept the appellant’s evidence and submissions. I also consider that the appellant’s claim that the Tribunal ignored “all other independent information” is not substantiated.
* In ground 10 the appellant claims that the Tribunal failed to apply the “correct test” in s 36(2)(aa) of the Migration Act. In my view the Tribunal did apply the correct test, and this ground has no merit.
* Ground 11 constitutes a broad claim that the Tribunal failed to apply the rules of procedural fairness. This claim lacks merit.
* Grounds 12, 13, 14 and 15 are mere assertions and do not identify appellable errors.
* The appellant’s claim in ground 16 that he sought an adjournment “at the middle of hearing”, which was refused, has not been raised prior to this appeal. There is no material before the Court to substantiate this allegation.
* Ground 17 raises the issue of the obligation of the Tribunal to verify the authenticity of documentation before it. I note, however, that:
* the appellant was represented before the Tribunal, and to that extent was in a position to provide evidence;
* there were matters other than the documentary evidence which cast doubt on the appellant’s claims, including unexplained provision of material late in the process and inconsistencies in the evidence; and
* in light of inconsistencies in the evidence, there was nothing in the Tribunal’s reasons to indicate that any further inquiry by the Tribunal would have yielded a useful result.
* Ground 18 simply sets out the order sought by the appellant.
1. In any event, none of these grounds of appeal identify error in the decision of the primary Judge.
2. In relation to the issues raised by the appellant in his written submissions:
* I do not accept that the findings of the Tribunal were manifestly illogical, irrational or unreasonable. On the contrary – the decision of the Tribunal was clearly thorough, well considered and logical. The disinclination of the Tribunal to accept the appellant’s claims does not mean that the Tribunal’s reasoning was flawed as alleged by the appellant.
* The appellant’s contentions concerning the Tribunal’s views of relevant country information are not substantiated. The Tribunal accepted that there was a co-existence of politics and violence in Bangladesh. Further, as the finder of fact, it is for the Tribunal to consider the weight it gives to evidence, including country information.
1. In relation to the issues raised by the appellant in his oral submissions at the hearing:
* The nature of the additional social media/video evidence to which the appellant referred was not identified by him, other than it allegedly related to events which took place after the Tribunal’s decision. The appellant was clearly not in a position to tender this material at the hearing, and did not explain its relevance to issues in the appeal.
* In light of the fact that the appellant had three hearings before the Tribunal and was represented by a lawyer, I do not accept that he was denied a fair hearing by the Tribunal.
* Although the appellant’s lawyer apparently appeared by telephone at the Tribunal hearing, there is nothing before me to support a finding that the lawyer at any time informed the Tribunal that he had temporarily lost contact with the Tribunal, or that the Tribunal was aware of any loss of contact. I do not accept that there was any such loss of contact by the appellant’s lawyer at the Tribunal hearing.
* Notwithstanding the appellant’s reference to the injury to his hand, it is clear that the Tribunal considered the appellant’s claim of injury to his hand in its reasons for decision, as well as his claims of mental ill-health.
1. In my view the appropriate order is to dismiss the appeal with costs.

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| I certify that the preceding twenty-five (25) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Collier. |

Associate:

Dated: 28 March 2018