FEDERAL COURT OF AUSTRALIA

SZRJN v Minister for Immigration and Border Protection [2017] FCA 1025

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| Appeal from: | *SZRJN v Minister for Immigration and Border Protection* [2017] FCCA 520  |
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| File number(s): | NSD 434 of 2017 |
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| Judge(s): | **GILMOUR J** |
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| Date of judgment: | 1 September 2017 |
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| Catchwords: | **MIGRATION** – application to review decision of Administrative Appeals Tribunal – application for protection visa on the basis of ss 36(2)(aa) and 36(2)(c) of the *Migration Act 1958* (Cth) after a previous unsuccessful application on the basis of s 36(2)(a) – no jurisdictional error |
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| Legislation: | *Migration Act 1958* (Cth) ss 36(2), 36(2)(a), 36(2)(aa), 36(2)(c), 91R, 417, 424A, 424A(1), 424AA*Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) sch 5 part 2 item 12  |
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| Cases cited: | *AVO15 v Minister for Immigration and Border Protection* [2017] FCA 566*CJA16 v Minister for Immigration and Border Protection* [2017] FCA 568*Décor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397*Minister for Immigration and Citizenship v Li* (2013) 249 CLR 33; [2013] HCA 18*Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437; [2014] FCAFC 1*Murad v Assistant Minister for Immigration and Border Protection* [2017] FCAFC 73*SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609; [2007] HCA 26*SZGIZ v Minister for Immigration and Citizenship* (2013) 212 FCR 235; [2013] FCAFC 71*SZMCD v Minister for Immigration and Citizenship* (2009) 174 FCR 415; [2009] FCAFC 46*SZRJN v Minister for Immigration and Citizenship* [2013] FCA 222*SZRJN v Minister for Immigration and Citizenship* [2012] FMCA 978*SZRJN v Minister for Immigration and Citizenship* [2013] HCASL 114*SZVGF v Minister for Immigration and Border Protection* [2016] FCA 882*SZVGG v Minister for Immigration and Border Protection* [2015] FCA 859*SZVUO v Minister for Immigration and Border Protection* [2016] FCA 1019*SZVYS v Minister for Immigration and Border Protection* [2017] FCA 667 *VUAX v Minister for Immigration & Multicultural & Indigenous Affairs* [20015] FCAFC 158  |
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| Date of hearing: | 18 August 2017 |
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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: | Catchwords |
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| Number of paragraphs: | 39 |
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| Counsel for the Appellant: | The Appellant appeared in person with the assistance of an interpreter |
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| Solicitor for the First Respondent: | Mr J Pinder of Minter Ellison |
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| Counsel for the Second Respondent: | The Second Respondent did not appear |
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ORDERS

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|  | NSD 434 of 2017 |
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| BETWEEN: | SZRJNAppellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| JUDGE: | GILMOUR J |
| DATE OF ORDER: | 18 AUGUST 2017 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the costs of the first respondent, to be taxed or agreed.

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

REASONS FOR JUDGMENT

GILMOUR J:

1. The appellant appeals from a judgment of the Federal Circuit Court dismissing his application for judicial review of a decision of the second respondent (the Tribunal) made on 11 August 2015 in *SZRJN v Minister for Immigration and Border Protection* [2017] FCCA 520 (Judgment).
2. The appeal was heard by me on 18 August 2017. I delivered judgment dismissing the appeal and provided brief reasons ex tempore during the hearing, noting that I would provide more detailed reasons in due course. These reasons consist of the reasons delivered ex tempore supplemented by more detailed reasons.
3. The following background, which is uncontroversial, is drawn from the written submissions of the first respondent (Minister).

## Background

1. The appellant is a citizen of India, who first applied for a protection visa on 14 July 2011. A delegate of the first respondent (delegate) refused that application on 11 October 2011. The appellant sought review of the delegate's decision before the then Refugee Review Tribunal (RRT) by application dated 8 November 2011. However, on 21 March 2012 the RRT affirmed the delegate's decision. The appellant unsuccessfully sought review of the RRT's decision before the Federal Magistrates Court of Australia: *SZRJN v Minister for Immigration and Citizenship* [2012] FMCA 978 at [30]. The appellant unsuccessfully appealed the Federal Magistrates Court's decision before the Federal Court of Australia: *SZRJN v Minister for Immigration and Citizenship* [2013] FCA 222 at [16]. The appellant unsuccessfully applied for special leave to appeal from the decision of the Federal Court to the High Court of Australia: *SZRJN v Minister for Immigration and Citizenship* [2013] HCASL 114. The appellant also unsuccessfully sought Ministerial intervention pursuant to s 417 of the *Migration Act 1958* (Cth) (the Act).
2. Following the decision of *SZGIZ v Minister for Immigration and Citizenship* (2013) 212 FCR 235; [2013] FCAFC 71, the appellant lodged a second application for a protection visa on 3 January 2014.
3. The appellant claimed to fear harm in India on the basis of his political opinion, being a member of the All India Sikh Student Federation (AISSF).
4. On 26 May 2014, a delegate refused to grant the appellant a protection visa.
5. On 17 June 2014 the appellant applied for review of the delegate's decision before the RRT. The appellant appeared by video-link at a hearing before the RRT on 20 May 2015.
6. A decision was handed down on 11 August 2015 by the Tribunal, following its amalgamation with the RRT. The Tribunal affirmed the decision not to grant the appellant a protection visa.

## Tribunal decision

1. The appellant’s first application for a protection visa was made, and assessed, on the basis of s 36(2)(a) of the Act, which contains the refugee protection criterion. The Tribunal noted that the effect of the *SZGIZ* decision was that a person who had previously unsuccessfully applied for a protection visa on the basis of one of the s 36(2) criteria was eligible to make a further application for a protection visa on the basis of one of the other s 36(2) criteria.
2. In accordance with the Full Court’s reasons in *SZGIZ*, the Tribunal confined its consideration to the criteria relied upon by the appellant in its new application. That is, the Tribunal considered only whether the appellant satisfied the complementary protection criterion by reference to s 36(2)(aa) of the Act or the family unit criterion by reference to s 36(2)(c) of the Act, as his claims had already been assessed under the refugee criterion by reference to s 36(2)(a) of the Act.
3. The appellant’s claims made under his current protection visa application together with his evidence given at the Tribunal hearing were considered by the Tribunal.
4. The Tribunal observed that no independent substantiation for his claims was provided by the appellant. Moreover it found that he was an unsatisfactory witness for a number of reasons including that:
* his evidence was vague, evasive and contradictory;
* there were significant inconsistencies arose as between the claims in the appellant's protection visa application and those in his oral evidence to the Tribunal, and his evidence as to which political party or parties he belonged to was contradictory;
* his evidence seemed confused and imperfectly memorised; and
* he was able to travel to Australia on his passport despite his allegation that false criminal charges had been laid against him.
1. As a result, the Tribunal rejected the entirety of the appellant's material protection claims. Accordingly the Tribunal concluded that the appellant did not satisfy the complementary protection criterion in s 36(2)(aa).
2. Further, the Tribunal observed that there was no basis to find that the appellant was a member of the same family unit as another person who satisfied either s 36(2)(a) or s 36(2)(aa). Thus the Tribunal found that the appellant did not satisfy s 36(2)(c).

## Proceedings in the Federal Circuit Court

1. Before the Federal Circuit Court, the appellant pleaded two grounds of review:

1. The second respondent failed to comply with the mandatory requirement under section 424A (read with section 424AA) of the *Migration Act* to give the applicant clear particulars of information it considered would be part of the reason for affirming the decision under review, to ensure the applicant understood why that information was relevant to the review and the consequence of its being relied upon, and to invite the applicant to comment upon or respond to that information.

Particular:

The Tribunal did not issue any written invitation under section 424A of the Act and, made no attempt to, and did not comply with the requirements set out in section 424AA of the Act.

2. The Tribunal had no jurisdiction to make the said decision because its 'reasonable satisfaction' was not arrived in accordance with the requirements of the *Migration Act*.

### Ground 1

1. The primary judge found that the appellant had not particularised any information that attracted obligations under ss 424A(1) of the Act: Judgment at [21]. Section 424A relevantly provides that:

(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;

1. The primary judge further found that the Tribunal's decision was based on inconsistencies between the written account presented by the appellant in his protection visa application and his oral evidence at the Tribunal hearing together with other deficiencies in the appellant's evidence as identified by the Tribunal: Judgment at [22]. As the primary judge noted at [23], inconsistencies and the Tribunal's thought processes are not 'information' for the purpose of s 424A: *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609; [2007] HCA 26 at [18].
2. The primary judge also noted that written information which the appellant gave during the process that led to the decision under review, such as his protection visa application, was outside the operation of s 424A(1) of the Act.
3. Further, to the extent that the second ground alleged a breach of s 424AA of the Act, the primary judge noted that s 424AA ~~which~~ provides an alternative means by which the Tribunal may discharge any obligations arising under subsection section 424A(1): Judgment at [23] citing *SZMCD v Minister for Immigration and Citizenship* (2009) 174 FCR 415; [2009] FCAFC 46. His Honour found that this alternative was not enlivened given that no obligations under subsection 424A(1) arose and, accordingly, correctly concluded, in my opinion, that the Tribunal could not have breached s 424AA.

### Ground 2

1. The primary judge found the second ground was a generalised, unparticularised ‘template’ ground that did not disclose any jurisdictional error: Judgment at [25]–[26].

## Appeal to this Court

1. The notice of appeal sets out the following grounds:

1. The Hon Judge failed to consider that the Tribunal acted in a manifestly unreasonable way when dealing with the applicant claim and ignoring the aspect of persecution and harm in terms of Sec 91R of the Act. The Tribunal failed to observe the obligation amounted to a breach of Statutory Obligation.

2. The learned Federal Judge has dismissed the case without considering the legal and factual errors contained in the decision of the AAT.

### The appellant’s submissions

1. The appellant did not file written submissions. He appeared before me in person with the assistance of an interpreter. At the hearing, I explained to the appellant the difficulties that the Court faced because he had not particularised either of his grounds, as well as the fact that he had made no written submissions in support of his grounds. Despite this, the appellant still did not expand on his grounds of appeal through oral submissions.

### The Minister’s submissions

1. The Minister submits that the pleaded grounds of appeal are template grounds in the sense that they are very generalised grounds that have cropped up in other cases in near identical terms: see, eg, *SZVYS v Minister for Immigration and Border Protection* [2017] FCA 667; *CJA16 v Minister for Immigration and Border Protection* [2017] FCA 568; *AVO15 v Minister for Immigration and Border Protection* [2017] FCA 566; *SZVUO v Minister for Immigration and Border Protection* [2016] FCA 1019; *SZVGF v Minister for Immigration and Border Protection* [2016] FCA 882. More particularly, however, the problem is that they do not correspond to the facts of the present case.
2. A similar difficulty arose in *SZVGG v Minister for Immigration and Border Protection* [2015] FCA 859 where Barker J at [50] accepted ‘…the Minister’s point that the proposed grounds are in the nature of proforma or template grounds’ and observed that ‘[t]hey do not appear particularly designed to respond to the circumstances of the applicant as found in the Tribunal or considered by the primary judge’.
3. The Minister further submits that the pleaded grounds of appeal are general and unparticularised grounds that fail to identify any appealable error on the part of the primary judge, or any jurisdictional error on the part of the Tribunal.

#### Ground 1

1. The Minister submits that the first ground of appeal raises allegations that were not the subject of complaint before the Federal Circuit Court. The appellant consequently requires leave to raise the new allegations on appeal.
2. The appropriate considerations to be applied in relation to whether leave should be granted to a party who wishes to raise new grounds propounded for the first time on appeal are set out in *VUAX v Minister for Immigration & Multicultural & Indigenous Affairs* [20015] FCAFC 158 at [46]–[48] as recently adopted in *Murad v Assistant Minister for Immigration and Border Protection* [2017] FCAFC 73 at [19]–[20].
3. As the Full Court in *VUAX* stated at [48]:

The Court may grant leave if some point that was not taken below, but which clearly has merit, is advanced, and there is no real prejudice to the respondent in permitting it to be agitated. Where, however, there is no adequate explanation for the failure to take the point, and it seems to be of doubtful merit, leave should generally be refused.

1. In the present case, the Minister submits that such leave should be refused because there are insufficient prospects of the newly pleaded allegations succeeding to warrant the grant of leave.
2. Section 91R of the Act has between repealed by item 12 of part 2 of sch 5 of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (the Amending Act), with effect on and from 16 December 2014 (being the day after the Amending Act received royal assent, on 15 December 2014). However, s 91R was in force at the time that the appellant made his second application for a protection visa on 3 January 2014.
3. Nonetheless I accept the Minister’s submission that s 91R is irrelevant because it is addressed only to the concept of ‘persecution’ for the purposes of the refugee criterion under s 36(2)(a) of the Act. As I have noted at [11] of these reasons, the current protection visa application, which is the appellant’s second visa application, did not concern the refugee criterion. It follows, based on the Court’s finding in *SZGIZ* that the Tribunal did not have jurisdiction to assess the appellant under the refugee criterion.
4. The current visa application was made under the complementary protection criterion, under s 36(2)(aa) of the Act and the family unit criterion under s 36(2)(c) of the Act did not relate to s 91R.
5. As to the assertion that the judgment below was manifestly unreasonable the appellant has not articulated this aspect of ground 1 with any specificity whatsoever. It is a mere general assertion which fails to demonstrate any jurisdictional error on the part of the Tribunal. In any event the Minister submits that there is no basis upon which the Court could conclude that the Tribunal acted in a way that is legally unreasonable so as to constitute jurisdictional error: see *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 33; [2013] HCA 18 at [22]. As the plurality held in *Li* at [76], ‘[u]nreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification’. Where, as is the case here, reasons are provided for a decision, the Court is required to assess the reasoning process of the decision-maker and identify the factors of legal unreasonableness: *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437; [2014] FCAFC 1 at [45]. Those factors are fact dependant: *Singh* at [48].
6. In this case, I accept the Minister’s submission that the appellant has not demonstrated that the Tribunal’s reasons were legally unreasonable, in the sense that the reasons did not have an evident and intelligible justification.

#### Ground 2

1. The second ground makes a general allegation of error on the part of the primary judge in failing to consider errors in the Tribunal’s decision. No particulars of these errors are given.
2. I have considered the entirety of the reasons of the primary judge. His Honour, in my respectful opinion was correct to dismiss each of the grounds before him for the reasons he gave.
3. No jurisdictional error is established under this ground 2.

## Orders

1. Accordingly the appeal will be dismissed. The appellant must pay the Minister’s costs.

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| I certify that the preceding thirty-nine (39) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gilmour. |

Associate:

Dated: 1 September 2017