FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Border Protection v DZU16 (No 2) [2018]

FCAFC 48

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| Appeal from: | *DZU16 v Minister for Immigration & Anor* [2017] FCCA 851 |
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| File number: | NSD 1160 of 2017 |
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| Judges: | **ROBERTSON, MURPHY AND KERR JJ** |
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| Date of judgment: | 28 March 2018 |
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| Catchwords: | **COSTS –** where appeal dismissed in circumstances where appellant Minister succeeded on one ground – notice of contention grounds either failed or were unnecessary to decide – appropriate costs orders both in the Full Court and in the Federal Circuit Court of Australia |
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| Legislation: | *Migration Act 1958* (Cth) s 36(2B)(a), Pt 7AA |
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| Cases cited: | *Minister for Immigration and Border Protection v CRY16* [2017] FCAFC 210  *Minister for Immigration and Border Protection v DZU16* [2018] FCAFC 32 |
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| Date of hearing: | Determined on the papers |
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| Date of last submissions: | 26 March 2018 (Appellant)  26 March 2018 (First Respondent) |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 17 |
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| Counsel for the Appellant: | Mr GR Kennett SC with Mr BD Kaplan |
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| Solicitor for the Appellant: | HWL Ebsworth Lawyers |
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| Counsel for the Respondents: | Mr L Karp with Ms T Baw |
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| Solicitor for the Respondents: | Kinslor Prince Lawyers |
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| Counsel for the Second Respondent: | The Second Respondent did not file a submission |

ORDERS

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|  | | NSD 1160 of 2017 |
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| BETWEEN: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  Appellant | |
| AND: | DZU16  First Respondent  IMMIGRATION ASSESSMENT AUTHORITY  Second Respondent | |

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| JUDGES: | ROBERTSON, MURPHY AND KERR JJ |
| DATE OF ORDER: | 28 MARCH 2018 |

THE COURT ORDERS THAT:

1. The appellant pay 85% of the costs of the first respondent, as agreed or assessed.
2. Order 3 of the orders made by the primary judge on 22 June 2017 are set aside and in its place order that the first respondent in that Court pay 85% of the applicant’s costs of those proceedings, as agreed or assessed and if necessary taxed in accordance with the *Federal Circuit Court Rules 2001* (Cth).

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

REASONS FOR JUDGMENT

THE COURT:

## Introduction

1. These reasons concern the appropriate costs orders to be made in light of the judgment of the Court in *Minister for Immigration and Border Protection v DZU16* [2018] FCAFC 32, delivered on 12 March 2018.
2. By orders made on that day, the appeal of the Minister for Immigration and Border Protection (the **Minister**) was dismissed and the Court directed that the parties were to file, within 14 days, either agreed orders as to the costs at first instance and on appeal or, failing agreement, short minutes of the costs orders for which they contended and written submissions, limited to 3 pages on each side, in support of those proposed orders.
3. Agreement was not reached and short written submissions were filed on behalf of the Minister and on behalf of the first respondent (**DZU16**) on 26 March 2018.
4. The orders made by the primary judge were constitutional writs quashing the decision of the Immigration Assessment Authority (the **Authority**) made on 15 November 2016 and requiring the Authority to redetermine the review application referred to it, according to law. The primary judge also ordered that the Minister pay DZU16’s costs and disbursements of and incidental to the application.

## Submissions

1. The Minister submitted that the appropriate order for the proceedings at first instance was that he pay 50% of DZU16’s costs. As to the appeal, the Minister submitted that he should pay 50% of DZU16’s costs of the appeal and that DZU16 should pay the Minister’s costs of the notice of contention, save for ground 3 of the notice of contention, as to which the parties should bear their own costs.
2. The Minister submitted that his appeal raised two issues and each party achieved a measure of success. The Minister was unsuccessful in relation to the issue whether the primary judge erred in holding that it was unreasonable for the Authority not to have considered exercising its power in s 473DC(3) of the *Migration Act 1958* (Cth) but was successful in relation to the holding by the primary judge that the Authority failed to apply the relocation test in s 36(2B)(a).
3. The Minister submitted that the notice of contention raised discrete questions of law that were the subject of detailed submissions and DZU16 was unsuccessful save in respect of ground 3, which the Court did not consider it necessary to determine.
4. As to the costs before the primary judge, the Minister submitted that he was successful in challenging the findings and conclusions of the primary judge in relation to the Authority’s application of the relocation test and DZU16 was successful in the appeal on the question of legal unreasonableness but for reasons different from those given by the primary judge. In those circumstances, the Minister submitted, it would not be appropriate for him to bear all of DZU16’s costs below.
5. DZU16 submitted that the Minister should pay either 85% or 75% of DZU16’s costs of the appeal, including DZU16’s costs of the notice of contention and that there should be no variation in the costs order made by the primary judge.
6. DZU16 submitted that he was overwhelmingly successful and such success as was enjoyed by the Minister represented at best a Pyrrhic victory. The Minister’s success did not affect the substantive outcome, that being that the appeal was dismissed. The vast majority of the time and effort spent on written and oral submissions was on the construction of Pt 7AA of the *Migration Act* and the application thereof to the facts of the case. That was the primary issue. The time spent on the law as to internal relocation, the issue on which the Minister succeeded, was minor, clearly separate to the larger issue and took up a relatively small amount of time both in the Full Court and before the primary judge.
7. DZU16 submitted that this case was a test case, as was *Minister for Immigration and Border Protection v CRY16* [2017] FCAFC 210 heard on the same day by the same Full Court, and the raising of issues in his notice of contention was necessary to explore considerations which weighed upon the construction and application of the provisions of Pt 7AA as relevant to the facts of the case. A significant percentage of his outline of submissions on his notice of contention was also relevant to the facts of the case and the construction of Pt 7AA so that the notice of contention formed part of a coherent whole. He submitted that an order that he pay the Minister’s costs of his notice of contention would be to punish him for raising clearly arguable issues relevant to statutory construction in a test case.
8. Before the primary judge, DZU16 submitted, again the vast majority of preparation, written content and oral address was concerned with the construction and application of Pt 7AA. Relocation was very much a side issue. Had he, DZU16, been unsuccessful on the issue of relocation before the primary judge it was most unlikely that the costs order in that Court would have differed from that which was made. There was no call to vary the costs order made below.

## Consideration

1. The question is the familiar one of mixed success and whether a successful party’s failure on one issue should affect the overall costs order.
2. We do not consider that DZU16’s notice of contention should affect the costs order so far as concerns the Pt 7AA aspect of the appeal. In our opinion, the issues raised by the notice of contention were sufficiently closely related to the Minister’s appeal as not to warrant any apportionment. Also, we do not consider that the difference in reasoning between the Full Court and the primary judge should affect the costs question. All the issues were before the Full Court and in relation to a Part of the *Migration Act* in respect of which there is, so far, little authority in this Court. Thus if the Pt 7AA aspect of the case had stood alone then DZU16 should have had his costs.
3. The more complex question is the effect of the relocation issue on which DZU16 succeeded before the primary judge but failed in the Full Court.
4. In our opinion, without descending into an arithmetical analysis, the appropriate order is that the Minister pay 85% of DZU16’s costs of the appeal, as agreed or taxed. The issue of relocation was both short and minor in comparison to the Pt 7AA issues but there should be some recognition of the Minister’s success on that issue even though, in order to have his appeal allowed, he needed to succeed on both issues. The relocation issue was, although minor, not insubstantial.
5. As to the costs before the primary judge, without purporting to limit the exercise of discretion in relation to apportionment of costs by a judge of the Federal Circuit Court, in the particular circumstances of this case we consider that the same result should apply. Order 3 of the orders made by the primary judge on 22 June 2017 should be set aside and in its place we would order that the Minister pay 85% of DZU16’s costs of those proceedings, as agreed or assessed and if necessary taxed in accordance with the *Federal Circuit Court Rules 2001* (Cth).

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| I certify that the preceding seventeen (17) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Robertson, Murphy and Kerr. |

Associate:

Dated: 28 March 2018