FEDERAL COURT OF AUSTRALIA

AIG15 v Minister for Immigration and Border Protection [2016] FCA 1257

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| Appeal from: | *AIG15 & Anor v Minister for Immigration & Anor* [2016] FCCA 891  |
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| File number: |  |
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| Judge: | **MARKOVIC J** |
|  |  |
| Date of judgment: | 24 October 2016 |
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| Cases cited: | *Minister for Immigration and Citizenship v SZNVW* (2010)183 FCR 575*Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* (2003) 128 FCR 553*Re Minister for Immigration & Multicultural Affairs; Ex Parte Durairajasingham* (2000) 168 ALR 407*SLMB v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 129*SZSGA v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCA 774*SZSHK v Minister for Immigration and Border Protection* [2013] FCAFC 125  |
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| Date of hearing: | 24 October 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: | 26  |
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| Counsel for the Appellants: | The appellants appeared in person |
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| Counsel for the First Respondent: | Mr K Eskerie |
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| Solicitor for the First Respondent: | Sparke Helmore |
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| Counsel for the Second Respondent: | The second respondent entered a submitting appearance save as to costs |

ORDERS

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|  | NSD 704 of 2016 |
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| BETWEEN: | AIG15First AppellantAIH15Second Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| JUDGE: | MARKOVIC J |
| DATE OF ORDER: | 24 October 2016 |

THE COURT ORDERS THAT:

1. The appeal be dismissed
2. The appellants pay the first respondent’s costs as agreed or taxed.

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

REASONS FOR JUDGMENT

(REVISED FROM TRANSCRIPT)

MARKOVIC J:

1. The appellants, who are husband and wife, appeal from orders made and judgment given in the Federal Circuit Court of Australia (**Federal Circuit Court**) on 27 April 2016 dismissing their application for judicial review of a decision of the Refugee Review Tribunal (now the Administrative Appeals Tribunal) (**the Tribunal**): *AIG15 & Anor v Minister for Immigration & Anor* [2016] FCCA 891 (***AIG15***). The Tribunal had affirmed a decision of a delegate of the first respondent, the Minister for Immigration and Border Protection (**the Minister**), not to grant the appellants Protection (Class XA) visas.

# background

1. The appellants, who are citizens of Pakistan, arrived in Australia on 14 August 2013 travelling on Visitor (Subclass 600) visas. On 3 October 2013 the appellants applied for Protection (Class XA) visas. The first appellant, the wife, made claims in her visa application while the second appellant made no separate claims of his own.
2. The first appellant claimed to fear harm in Pakistan from the son of a politician who lived in the area of her father’s village, Haripur. The first appellant said that while they had moved to another area, they would visit the village from time to time. The first appellant claimed that:
3. the politician’s son made advances which she rejected. Despite that rejection, the politician’s son announced to the village that he was engaged to the first appellant and would be married in the future so that no one else would marry her. She said that, as a result of her rejection of the politician’s son, her friends and cousins in the village were angry with her and that banners and pamphlets had been placed around the village to disgrace her and her family;
4. the politician’s son attempted to locate the first appellant at her college and went there with his guards in an attempt to kidnap her and take her back to the village. However, the first appellant informed her parents and they changed her accommodation. The first appellant said she also informed the police and tried to register a first information report about the event but the police refused to do so as they feared the politician’s son because of his status;
5. the first appellant then married her husband and fell pregnant. In October 2011 she was going to the market when the politician’s son and his guards kidnapped her and took her to an unknown location where she alleges the politician’s son tried to rape her knowing she was pregnant. She next woke in a hospital where she delivered her baby prematurely. The baby died soon after birth. As a result of this event the second appellant went to the police to register a first information report but again, the police, in fear of the politician’s son, did not register that report;
6. the first appellant claims that people in her area have denounced her saying she is a woman of bad character and that the politician’s son has lodged a first information report against her alleging she is a corrupt woman, that she had an illegitimate child and that she married her husband against religious and social laws and that both she and her husband were offenders of Zina. She claims that she and her husband cannot get police assistance.
7. The first appellant’s claims were comprehensively rejected by a delegate of the Minister on 28 March 2014.
8. The appellants applied to the Tribunal for review of the delegate’s decision. They were invited to a hearing which took place, and which they attended on 19 February 2015. The Tribunal hearing was conducted with the assistance of an interpreter. The appellants were represented by their registered migration agent.
9. At the hearing the second appellant informed the Tribunal that although he fears harm in Pakistan as a result of his wife’s experiences, he did not wish to give evidence to the Tribunal. The first appellant provided the Tribunal with a letter from a psychologist, a letter from a general practitioner and a letter from the New South Wales service for the treatment and rehabilitation of torture and trauma survivors. In summary, she claimed to be suffering from depression and post traumatic stress disorder as a result of her experiences prior to leaving Pakistan.
10. On 9 March 2015 the Tribunal made its decision affirming the delegate’s decision not to grant the appellants Protection (Class XA) visas.

# the Tribunal decision

1. While the Tribunal had some concerns about the first appellant’s claim that she had a child in Pakistan in October 2011 who died at birth, it accepted, on the basis of antenatal documentation in relation to her most recent pregnancy, that this had occurred. However, the Tribunal did not accept any of the first appellant’s other claims. The Tribunal found that the first appellant was not a credible witness and considered that she manufactured the totality of her claims to fear harm in Pakistan. This was because:
2. the Tribunal did not accept the first appellant’s evidence in relation to her claims that she was being pursued by the same man, the politician’s son, for a number of years. It found it was not credible that a powerful person would spend five years pursuing the first appellant, first because he wanted to marry her and then take revenge against the first appellant for not marrying him;
3. it considered that the first appellant’s travel history was not indicative of someone who feared harm in her own country. It noted that, despite the first appellant having travelled to the United Kingdom, she did not claim protection there when the events complained of had occurred the year before her travel. It did not accept the first appellant’s explanation for her failure to remain in the United Kingdom for longer than 10 days or to seek protection there. The Tribunal considered that the first appellant’s evidence did not indicate that she was fearful of anyone in Pakistan or that she had previously been assaulted or harmed or lost a baby as a result of an attack but rather indicated that she and her husband travelled to the United Kingdom for a holiday and returned to their home in Pakistan after a short period because they had no fear of harm in Pakistan;
4. it found that the first appellant had added a significant claim during the departmental interview. That was that the politician’s son, who had been pursuing her, had fired on her home. The Tribunal noted that the first appellant claimed during the hearing that she had not remembered this incident when she wrote her initial claims because she had experienced significant trauma. However, the Tribunal did not accept that the first appellant would forget that her home had been fired on in 2008 by the politician’s son or his associates and considered that this was further indicative of the fact that the first appellant’s claims had been fabricated.
5. In making its findings the Tribunal had regard to the psychological and medical reports provided in relation to the first appellant. The Tribunal accepted that the first appellant had suffered a traumatic experience but did not accept that those experiences had affected her ability to provide evidence or that the loss of her child and miscarriage occurred for the reasons she claimed. Further the Tribunal did not accept that the psychologists had any personal knowledge of the first appellant’s circumstances in Pakistan and considered that their reports were based only on what the first appellant had told them. The Tribunal did not accept that the psychologists’, counsellors’ and medical practitioner’s reports overcame the problematic nature of the first appellant’s evidence nor was it satisfied that they established that the first appellant’s claims were truthful.
6. Having rejected all of the first appellant’s claims, the Tribunal found that there was no real chance the appellants would suffer significant harm if they returned to Pakistan. For the same reasons the Tribunal was not satisfied that there were substantial grounds for believing that, as a necessary and foreseeable consequence of the appellants being removed from Australia to Pakistan, there was a real risk that they would suffer significant harm.

# Proceedings before Federal Circuit Court

1. Before the Federal Circuit Court the appellants raised three grounds of review which were, as written:

1. The Tribunal Member erred in law when she asserted that I had fabricated the entirety of my claims.

2. The Tribunal Member erred in law when she disregarded the psychological evidence that I submitted,

3. That the Tribunal Member failed to consider my and my husbands claims under complementary protection.

First in para 32 the Member finds that my husband and I will not suffer harm for a convention related issue, then says Accordingly the Tribunal finds that we do not have a well founded fear if returned to Pakistan.

In paragraph 33 the Tribunal Member says that for the same reasons as above the Tribunal is not satisfied that there are not substantial grounds for believing that we face persecution if returned.

In para 34 again the Member says that we are not owed protection obligations, therefore we do not satisfy the criterion set out in 36(2) a or (aa) and it follows that we don’t satisfy the criterion for 36(2)(b) or (c). This is circular and we have not been considered under complementary protection.

1. In relation to the first ground the primary judge noted that, as might be expected from an unrepresented litigant, the first appellant did not explain how the rejection of her factual claims amounted to an error of law. Rather her submissions amounted to an assertion that her claims were true, a question that the primary judge noted was beyond the court’s jurisdiction to determine. The primary judge held that the Tribunal’s rejection of the first appellant’s credibility was part of its fact finding “integral to the Tribunal’s obligation to review the decision of the delegate”. The primary judge found that the Tribunal gave reasons which revealed that there were logical bases for its rejection of her credibility and that there was no error of law: *AIG15* at [12]-[13].
2. The primary judge rejected the second ground holding that the it was unsustainable as it was clear from the Tribunal’s decision record at [31] that it did consider the relevant psychological evidence: *AIG15* at [14]-[15].
3. In relation to the third ground, the primary judge observed that the fact that the Tribunal applied the factual conclusions made in relation to one criterion to its consideration of a second criterion did not necessarily mean that it failed to consider the second criterion. His Honour held that there was no jurisdictional error in the Tribunal referring to previous findings of fact when considering the complementary protection criterion, particularly in circumstances where the Tribunal had rejected all of the factual elements of an applicant’s claims that might have supported satisfaction of one or both of the relevant criteria. The primary judge rejected the third ground: *AIG15* at [17]-[18].

# the appeal

1. In their notice of appeal filed on 16 May 2016 the appellants raise three grounds of appeal which are identical to the grounds raised in the court below and considered by the primary judge. The appellants have not filed any written submissions.
2. The first appellant appeared at the hearing on behalf of both appellants. She made the following oral submissions on their behalf:
3. first, she explained that she did not have a lawyer so she represented herself. Then she submitted that she was not satisfied with the decisions made by the Tribunal and the Federal Circuit Court. She submitted that her story had not been accepted by the Tribunal, but that it was not fabricated and that whatever she said happened to her in Pakistan was the truth. The first appellant does not agree with the Tribunal’s decision;
4. in relation to the second ground of appeal, concerning the psychological evidence, the first appellant submitted that she had been treated by the psychologists and that if she had fabricated her story she could not have been treated for her psychological condition. In summary, she does not understand how the Tribunal could not accept her evidence;
5. in relation to the third ground, concerning the findings relating to complementary protection, the first appellant submitted that she does not know what that means or whether she and her husband meet the criteria, but the real issue is that they fear for their lives in Pakistan and that they left Pakistan in a hurry because of that fear; and
6. finally, the first appellant submitted that whatever she told the Tribunal was true and that she seeks another opportunity to prove her credibility before the Tribunal.
7. As I explained to the first appellant, the task of this Court on appeal is to determine whether the judgment of the primary judge is affected by appealable error: see *SLMB v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 129 at [11]. The grounds of appeal raised by the appellants do not allege any error in the judgment of the primary judge. Rather they seek to challenge the decision of the Tribunal in the same way as that decision was challenged in the court below.
8. By ground 1 of the notice of appeal the appellants seek to challenge the Tribunal’s rejection of the first appellant’s credibility. By that ground and the submissions made by the first appellant on their behalf, the appellants invite this Court to engage in impermissible merits review. As the primary judge held at [13] of his judgment the Tribunal rejected the first appellant’s credibility as part of its fact finding integral to its obligation to review the decision of the delegate. The Tribunal’s conclusion that the first appellant was not a “credible witness” and that she had “fabricated the entirety of her claims to fear harm in Pakistan” are findings of fact par excellence: see *Re Minister for Immigration & Multicultural Affairs; Ex Parte Durairajasingham* (2000) 168 ALR 407 at [67] per McHugh J. The Tribunal gave reasons for its findings about the first appellant’s credibility. Those findings were open to it for the reasons it gave. Neither this Court nor the court below has power to review the merits of the Tribunal’s decision. There is no error in the approach of the primary judge in his rejection of this ground. Ground 1 should be rejected.
9. By ground 2 the appellants allege that the Tribunal failed to consider the psychological evidence. This ground cannot, in my opinion, succeed. It is plain that the Tribunal had regard to that evidence. It referred to and summarised that evidence at [13]-[14], [17]-[19] of its decision record. As pointed out by the primary judge the Tribunal considered that evidence at [31] of its decision record where it found:

In reaching the above conclusions, the Tribunal has had regard to the psychological reports and medical reports in relation to the applicant. The Tribunal has accepted that the applicant has suffered a traumatic experience through the loss of her first child, and a subsequent miscarriage. The Tribunal does not accept these experiences have affected the applicant’s ability to provide evidence or that the loss of her child and miscarriage occurred because of the reasons she has claimed. The Tribunal accepts that the applicant has seen psychologists in Australia and has sought and received counselling. The Tribunal does not accept that it was because she was attacked or assaulted or sought by [the politician’s son] and his associates. The Tribunal does not accept that the psychologists have any personal knowledge of the applicant’s circumstances in Pakistan and considers that their reports are based only on what has been told to them by the applicant. The Tribunal does not accept that the reports by the medical practitioner or the psychologists and counsellors overcome the problematic nature of the applicant’s own evidence. Nor is the Tribunal satisfied that they establish that the applicant’s claims are truthful. The Tribunal considers that the applicant has fabricated the entirety of her claims to fear harm in Pakistan.

1. There was no failure to consider the psychological evidence as alleged. The Tribunal accepted that the first appellant had suffered a traumatic experience but the Tribunal found that those reports were based only on what the first appellant had told the psychologists and did not overcome the problematic nature of her own evidence. The Tribunal did not accept that the first appellant’s traumatic experiences affected her ability to provide evidence, findings which, as submitted by the Minister, were open to the Tribunal based on the evidence before it.
2. While not raised by ground 2 of the notice of appeal and thus not addressed by the primary judge, for the sake of completeness, the Minister submitted that the evidence that was before the Tribunal did not demonstrate that the traumatic experiences rendered the first appellant “entirely unfit” to give evidence, present arguments and answer questions at the Tribunal hearing. The Minister submitted that the first appellant could not be said to have been denied a “real and meaningful” opportunity to participate in the Tribunal hearing. The Minister relied on *Minister for Immigration and Citizenship v SZNVW* (2010) 183 FCR 575 (***SZNVW***) and *Minister for Immigration and* *Multicultural and Indigenous Affairs v SCAR* (2003) 128 FCR 553 at [37]. I accept the Minister’s submission. The Tribunal did not accept that the experiences recounted in the reports provided to it affected the first appellant’s ability to give evidence. As in *SZNVW* there was no evidence before the Tribunal that the first appellant was unfit to give evidence. That was not the effect of the reports relied on by the Tribunal
3. There is no error in the approach of the primary judge in rejecting this ground as raised before him. Ground 2 should be rejected.
4. By ground 3 the appellants contend that the Tribunal did not consider their claims “under complementary protection” and that the reasoning for its protection finding is circular. At [33] of its decision record the Tribunal said:

For the same reasons as those set out above, the Tribunal is not satisfied that there are substantial grounds for believing that as a necessary and foreseeable consequence the applicants being removed from Australia to Pakistan that there is a real risk that the applicants will suffer significant harm which includes arbitrary depravation of life, the death penalty, torture, cruel or inhumane treatment or degrading treatment and punishment.

1. There is no jurisdictional error in the Tribunal referring to previous findings of fact in considering the complementary protection criterion. In *SZSHK v Minister for Immigration and Border Protection* [2013] FCAFC 125 at [32] a Full Court of this Court (Robertson, Griffiths and Perry JJ) held that:

… However, where there is a finding that no harm as claimed was suffered, that finding is relevant to a complementary protection claim, that is, to whether the Minister has substantial grounds for believing there is a real risk of significant harm for the purposes of s 36(2)(aa) of the Act.

See also *SZSGA v Minister for Immigration, Multicultural Affairs & Citizenship* [2013] FCA 774 at [56]-[57] per Robertson J.

1. The primary judge rejected this ground for the same reason. There is no error in the approach of the primary judge. Ground 3 is not made out.

# Conclusion

1. For the reasons set out above the appellants have failed to make out any of their grounds of appeal, nor can I discern any error in the approach of the primary judge. Accordingly, I will make orders dismissing the appeal and that the appellants pay the first respondent’s costs as agreed or taxed.

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| I certify that the preceding twenty-six (26) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Markovic. |

Associate:

Dated: 3 November 2016