FEDERAL COURT OF AUSTRALIA

AUX16 v Minister for Immigration and Border Protection [2018] FCA 416

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| Appeal from: | *AUX16 v Minister for Immigration & Anor* [2017] FCCA 1356 |
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| File number: |  |
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| Judge: | **COLLIER J** |
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| Date of judgment: | 28 March 2018 |
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| Catchwords: | **MIGRATION** – appeal from a dismissal of a judicial review application by the Federal Circuit Court of Australia of a decision refusing to grant a protection visa under the *Migration Act 1958* (Cth) – leave to rely on grounds of appeal not in issue before the primary Judge |
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| Legislation: | *Migration Act 1958* (Cth) ss 36(2)(a), 36(2)(aa), 424AA, 425, 425(1) |
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| Date of hearing: | 8 March 2018 |
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| Registry: |  |
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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: | 15 |
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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 Donald of Sparke Helmore |
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| Counsel for the Second Respondent: | The Second Respondent did not appear |
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ORDERS

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|  | | QUD 339 of 2017 |
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| BETWEEN: | AUX16  Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second 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:

## The appeal

1. This is an appeal from a decision of the Federal Circuit Court of 22 June 2017 in which the primary Judge dismissed the appellant’s application for judicial review of the decision of the Administrative Appeals Tribunal (formerly the Refugee Review Tribunal) (the **Tribunal**) to affirm the refusal to grant the appellant a protection visa.
2. The Minister for Immigration and Border Protection (the **Minister**) filed submissions on 8 November 2017 and the appellant filed submissions on 13 November 2017.
3. The Minister submits that the appellant requires leave to rely on the grounds of appeal as stated in the notice of appeal as these were not argued before the Federal Circuit Court.

## Background

1. The appellant arrived in Australia from Bangladesh as an unauthorised maritime arrival on 20 March 2013 and lodged an application for a protection visa on 20 June 2013. The appellant claimed protection on the basis that he was a member of the Bangladesh Islami Chhatra Shibir and Jamaar-e-Islami and had been attacked by members of the Awami League. He claimed further that, following these events, he made arrangements to risk his life and flee Bangladesh by boat.
2. The application for the protection visa was refused by the Minister’s delegate on 20 October 2014. The appellant then filed an application for review of the decision to the Tribunal. The appellant was represented in the Tribunal. His representative provided written submissions and assisted him at the Tribunal hearing on 19 November 2015.
3. The Tribunal accepted that the appellant was a member of the political groups he had claimed, and that he was unlikely to resume any political activity. However, the Tribunal found that there were inconsistencies in the information that the appellant had provided to the Tribunal in response to an invitation under s 424AA of the *Migration Act 1958* (Cth) (the **Act**) and therefore considered that his claims were not credible. The Tribunal also considered that the appellant’s evidence in relation to being targeted and sought by the Awami League was vague and inconsistent. The Tribunal preferred the DFAT country information and considered that there was only a remote chance that the appellant would face serious harm if he returned to Bangladesh, largely because it was accepted that he would not resume being politically active. The Tribunal was therefore not satisfied that the appellant met the criteria in ss 36(2)(a) or (aa) of the Act.

## Federal Circuit Court proceedings

1. The appellant filed an application to show cause on 8 April 2016, which was amended to an application for review on 28 June 2016. The appellant’s ground of review was:

1. The learned Tribunal member committed a jurisdictional error by affirming the Minister’s decision on different grounds to the Minister without providing the Appellant with any, or alternatively any sufficient, opportunity to response to those grounds and thereby (1) denied the Appellant procedural fairness; and (2) did not properly invited the Appellant to be heard, in breach of section 425 of the *Migration Act 1958* (Cth).

1. The primary Judge noted that a critical part of the Tribunal’s reasoning was that it was not satisfied that the appellant would face persecution because the appellant had given evidence that he would not engage in political activity if he returned to Bangladesh. The primary Judge considered that the appellant had been given ample opportunity to demonstrate that he would suffer from harm even if he did not return to political activity and also that the Tribunal was aware of, and had discharged, its obligation under s 425(1) of the Act.

## The grounds of appeal

1. The appellant has raised the following grounds of appeal:

1. The Judge of the Federal Circuit Court in his honourable judgment delivered on the 22 June 2017 failed error of law and relief under the Judiciary Act. The Judge failed to find that the Administrative Appeals Tribunal (AAT) has not found any evidence in relation to my claims and thus its decision influenced by sufficient doubt.

2. Honourable Judge failed to hold the Tribunal made an error of law when it did not take up and separately deal with the factual issues. The Tribunal failed to find low profile political activists are mostly persecuted because of their role for the party like Jamaat-e-lslami. The Tribunal failed to understand the persecution until political killing in Bangladesh under present dictatorial role in Bangladesh. The Tribunal member concluded that I will not suffer from any harm if I go to Bangladesh, which is not feasible.

3. I was denied procedural fairness, when the Tribunal member made opinion based on assumption and possibilities without any proper investigation. The Tribunal failed to assess the current situation in Bangladesh where thousands of my party leader all the level Jamaat-e-lslami workers are arrested and killed by so called crossfire and harassed by autocratic present Awami League Government & the Authority. My party leaders are Hang by so called trial. It is well established independent report like Amnesty International Country Reports. Present circumstances very danger to me, the Tribunal undermined the danger, I will face if I am compelled to return Bangladesh as returned asylum seeker. And also, I came by boat in Australia only protect my life.

4. Besides, the Administrative Appeals Tribunal did not follow the proper procedure as required by the Act in arriving its decision dated 18 March 2016 in deciding my protection visa merit review application. Thus, the procedures that were required by the act or regulations to be observed, in connection with the making of the decision were not observed.

1. It is not in dispute that, at the very least, grounds of appeal 1-3 on which the appellant wishes to rely were not argued below, and to that extent the appellant needs leave to do so. The Minister objects to such leave being granted as the grounds have insufficient prospects of success to warrant the exercise of the Court’s discretion, in that the grounds only indicate disagreement with the Tribunal’s findings of fact and are an attempt to engage the Court in merits review. In my view, the submissions of the Minister in relation to grounds of appeal 1, 2 and 3 are correct, and I refuse the appellant leave to rely on them.
2. In relation to ground 4, the Minister argues that it is similar to the ground of review raised in the Federal Circuit Court, but that the primary Judge was correct to find that the Tribunal had discharged its obligations under s 425 of the Act, especially in circumstances where the appellant was assisted by a representative and an interpreter at the Tribunal hearing. Section 425 of the Act provides that the Tribunal must invite the applicant to appear before it to give evidence and present arguments relating to the issues arising in relation to the decision under review. No circumstances have been either particularised or demonstrated by the appellant to support this ground of appeal.
3. The appellant’s written submissions are generic submissions which have appeared with concerning frequency in recent migration appeals before this Court. They bear no relationship to the grounds of appeal, being referable to allegations of irrationality and unreasonableness.
4. In oral submissions at the hearing, the appellant particularly took issue with the finding of the Tribunal that if he returned to Bangladesh he would not resume involvement in politics. This finding, however, was based on the appellant’s own submissions. In any event, the Tribunal also found that because of his low political profile, there was only a remote chance (and therefore not a real chance) that he would face serious harm if he returned to Bangladesh. These findings were open to the Tribunal.
5. Ultimately I am not prepared to grant leave to the appellant to rely on grounds of appeal 1, 2 or 3. Ground 4 is not substantiated.
6. The appropriate order is to dismiss the appeal with costs.

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| I certify that the preceding fifteen (15) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Collier. |

Associate:

Dated: 28 March 2018