FEDERAL COURT OF AUSTRALIA

SZVVB v Minister for Immigration and Border Protection [2017] FCA 207

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| Appeal from: | *SZVVB v Minister for Immigration and Anor* [2016] FCCA 2245  |
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| File number: | NSD 1758 of 2016 |
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| Judge: | **BROMBERG J** |
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| Date of judgment: | 2 March 2017 |
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| Catchwords: | **MIGRATION** – Protection (Class XA) visa – appeal from the Federal Circuit Court of Australia (“FCC”) – whether the FCC erred by failing to find jurisdictional error in the Tribunal’s finding that the appellant, a citizen of Syria, had a right to return to Lebanon for the purposes of s 36(3) of the *Migration Act 1958* (Cth) – where the appellant claimed that the law in Lebanon had changed since the Tribunal’s decision such that he no longer had a right to enter and reside in Lebanon – where the primary judge found that the law change post-dating the Tribunal’s decision could not support an argument of jurisdictional error – no error in the primary judge’s approach – appeal dismissed  |
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| Legislation: | *Migration Act 1958* (Cth) ss 36(3), 36(4), 36(5), 36(5A), 474  |
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| Cases cited: | *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476*SLMB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 129*SZVVB v Minister for Immigration and Anor* [2016] FCCA 2245 |
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| Date of hearing: | 2 March 2017 |
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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: | The Appellant appeared in person assisted by an interpreter |
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| Counsel for the First Respondent: | Mr T Reilly  |
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| Solicitor for the First Respondent: | Mills Oakley Lawyers |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice, save as to costs |

ORDERS

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|  | NSD 1758 of 2016 |
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| BETWEEN: | SZVVBAppellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION First RespondentADMINISTRATIVE APPEALS TRIBUNAL Second Respondent |

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| JUDGE: | BROMBERG J |
| DATE OF ORDER: | 2 MARCH 2017 |

THE COURT ORDERS THAT:

1. The appeal is dismissed.
2. The appellant pay the costs of the first respondent as agreed or as taxed.

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

REASONS FOR JUDGMENT

BROMBERG J:

1. The appellant is a citizen of Syria but has lived most of his life in Lebanon. He arrived in Australia on 10 August 2012. On 18 September 2012, the appellant lodged an application for a Protection (Class XA) visa (“**visa**”). On 15 February 2013, a delegate of the first respondent (“**Minister**”) refused the appellant’s application. On 20 March 2014, the Refugee Review Tribunal, a predecessor of the second respondent (“**Tribunal**”) affirmed the delegate’s decision. The appellant sought judicial review of the Tribunal’s decision in the Federal Circuit Court of Australia. The subject of this appeal is the primary judge’s dismissal of that application on 29 September 2016. The primary judge’s judgment is published as *SZVVB v Minister for Immigration and Anor* [2016] FCCA 2245.
2. The task of the primary judge was to determine whether the Tribunal’s decision was affected by jurisdictional error: s 474 of the *Migration Act 1958* (Cth) (“**Migration Act**”) and *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476. The task of this Court is to determine whether the primary judge’s judgment is affected by appellable error: *SLMB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 129 at [11] (Branson, Finn and Finkelstein JJ).
3. The appellant claimed to have a well-founded fear of persecution for reason of his political opinion if he was returned to Syria. He also raised fears about returning to Lebanon because harm would be inflicted upon him by agents of Syria by reason of his political opinion and because of the general situation of violence in Tripoli. The Tribunal addressed those claims. In dealing with the appellant’s claims in relation to Lebanon, it was necessary for the Tribunal to consider subsections (3), (4), (5) and (5A) of s 36 of the Migration Act. An understanding of the Tribunal’s decision requires reference to those provisions and it is convenient that I set them out now:

…

(3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.

(4) However, subsection (3) does not apply in relation to a country in respect of which:

(a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or

(b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.

(5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:

(a) the country will return the non-citizen to another country; and

(b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.

(5A) Also, subsection (3) does not apply in relation to a country if:

(a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and

(b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

…

1. The reasons given by the primary judge provide a sufficient summary of the Tribunal’s decision and it is convenient that I set out the relevant paragraphs here (footnotes omitted):

[9] The Tribunal expressed significant concerns about the applicant’s credibility and found that he had fabricated and changed his evidence in order to strengthen his protection claims.

[10] Despite this view, the Tribunal was prepared to accept that the applicant had previously been involved in the Iraqi Baath Party (IBP), and that he had travelled to Iraq in the in the late 1970s to avoid military service. The Tribunal also accepted that the applicant had been imprisoned in Syria between 1986 and 1995 because he had deserted from the Army and because of his “imputed political opinions as a result of his former connection with the IBP”.

[11] The Tribunal found, however, that the applicant’s claims of ongoing political involvement since his release from prison were inconsistent and not believable. Specifically, the Tribunal rejected the applicant’s claim that he had been involved in anti-Syrian demonstrations in Lebanon in 2011 or 2012, or that his wife had been threatened by representatives of the Syrian regime since he arrived in Australia.

[12] The Tribunal accepted that, in light of the current “dire situation in Syria”, there was a real chance that the applicant would suffer significant harm on account of his imputed political opinion if he were to be returned to Syria.

[13] The Tribunal, however, found that s.36(3) of the *Migration Act 1958* (Cth) (Migration Act) applied to the applicant’s claims in respect of the risk of harm upon return to Syria. That section provides:

*Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.*

[14] In this regard, the Tribunal found that the applicant was the holder of a permanent residence visa in Lebanon. It further found that, although this visa way due to expire on 20 November 2014, the applicant had a right to re-enter Lebanon and be granted a further six-month visa. The Tribunal found, therefore, that the applicant had not availed himself of the right to enter and reside in Lebanon on his permanent residence visa.

[15] The Tribunal further found that s.36(4) did not apply to the applicant’s case. Specifically, the Tribunal rejected the applicant’s claims that he would suffer harm in Lebanon. It found that he had a “very low, if non-existent, political profile in Lebanon” and the prospect of him being harmed on account of his political opinion would be remote. The Tribunal, after considering relevant country information, also found that the applicant would not face a risk of harm because of his Syrian nationality or Sunni religion.

[16] The Tribunal also found that there was not a real chance that the applicant would be returned by Lebanon to Syria. As such, the Tribunal found that s.36(5) and s.36(5A) were not applicable to the applicant’s case.

1. Before the Federal Circuit Court, the appellant raised two grounds. The first ground was that the Tribunal misunderstood the appellant’s fear of persecution and made a decision based on an assumption. The primary judge dealt with that ground at [23] of his Honour’s reasons for judgment. There, the primary judge said, “Absent further particularisation, the first ground of review does not identify jurisdictional error”. The reasons of the primary judge reveal that no particularisation of that ground was given despite the appellant having made oral submissions to the primary judge.
2. The second ground raised before the Federal Circuit Court was as follows (errors in original):

The Tribunal ignored the current situation in Tripoli, North Lebanon and the dangerous situation especially the harm I will face at the hand of Syrian Intelligence who continue to control our area under cover and my well founded fear of persecution is because of my political views.

1. The primary judge dealt with the second ground before him at [24] of his Honour’s reasons for judgment as follows (footnotes omitted):

The complaint articulated in the second ground of review is unfounded. The Tribunal considered the situation in Lebanon by reference to country information, including two reports prepared by the Department of Foreign Affairs and Trade less than twelve months prior to the Tribunal’s decision. This information included material specifically addressing the situation in Tripoli. The selection of country information, and the weight to be attributed to it, was a matter for the Tribunal.

1. There were other matters addressed by the primary judge which are relevant, and I will return to them shortly.
2. By his Notice of Appeal before this Court, the appellant raised two grounds. The first ground is in the following terms:

His Honour accepted my circumstances and the prospects for me in Lebanon raise humanitarian concern yet failed to find that the Tribunal committed an error of law.

1. That ground appears to be a reference to a sentence contained in the primary judge’s reasons at [1] as follows:

The applicant’s circumstances, and the prospects for him in Lebanon raise humanitarian concerns but the issue before the Court is whether the decision of the former Refugee Review Tribunal, now the Administrative Appeals Tribunal (Tribunal) made on 14 November 2014 is affected by any jurisdictional error.

1. The appellant appeared before me today unrepresented, but assisted by an interpreter. One of the submissions made by the appellant was that the primary judge had “felt with him” but found no legal error. That submission seems consistent with what the appellant, I think, seeks to raise by ground 1. Ground 1 seems to be based upon a misconception of the function of the primary judge. That function was to assess, by reference to the grounds relied upon by the appellant, whether the decision of the Tribunal was affected by jurisdictional error. The acceptance by the primary judge that the appellant’s circumstances raise humanitarian concerns does not evince a failure by the primary judge to find jurisdictional error in the Tribunal’s decision. I reject the appellant’s first ground of appeal.
2. The second ground is in the following terms:

I do ask the Honourable Court to accept my review as I believe that the Tribunal fell into an error of law by ignoring that I cannot go back to Lebanon as a Syrian without having a sponsor and that I do not have a sponsor and that I will be persecuted in Lebanon and that I have a well-founded fear of harm should I be compelled to return to Lebanon.

1. It seems to me that there are two parts to that second ground. *First*, that the Tribunal fell into error by ignoring that the appellant, as a Syrian, cannot go back to Lebanon without having a sponsor and, *second*, by ignoring that the appellant has a well-founded fear of being persecuted in Lebanon. I will address the second aspect of that ground first.
2. The task of the primary judge was not to assess whether the appellant had a well-founded fear of persecution in Lebanon but to assess whether there was jurisdictional error in the determination made by the Tribunal that the appellant did not have a well-founded fear of that kind. Insofar as that matter was pressed by the appellant before the primary judge, it was dealt with by the primary judge under grounds 1 and 2. There is no basis for any suggestion that, in doing so, the primary judge erred.
3. As to the first aspect of ground 2, neither the Tribunal nor the primary judge ignored the matter there raised. The primary judge dealt with the matter at [20] of the primary judge’s reasons as follows:

The applicant was unable to advance his grounds of review, other than to touch upon two issues having a bearing upon the Tribunal decision. The first concerns the critical Tribunal finding that the applicant has a right to enter and reside in Lebanon. The applicant submits that since the Tribunal decision the law has changed in Lebanon and Syrian nationals are now required to have a sponsor who is able to support them in Lebanon, who cannot be another Syrian national. The applicant submits that his daughters would be ineligible to be sponsors and he knows no one else in Lebanon who could sponsor him. The applicant conceded that the change in the law to which he refers post dates the Tribunal decision. Hence, it could not support an argument of jurisdictional error by the Tribunal. The submission would, however, be pertinent to any re-consideration of the case by the Minister.

1. As that paragraph reveals, the matter raised by the appellant was not ignored by the Tribunal. It was a matter that was never put to the Tribunal. I see no error in the approach taken by the primary judge to that matter. I reject the appellant’s second ground. For completeness, I should add that in submissions before me today, the appellant urged me to accede to his application on the basis that he cannot go back to Syria or Lebanon because he will be persecuted there again. He asserted that the “Immigration Department” did not understand his claim. He made a number of other contentions which go only to the merits of his claim and are not matters which relevantly address whether any appellable error affects the decision made by the primary judge.
2. For all of those reasons, the appeal must be dismissed.

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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 Justice Bromberg.  |

Associate:

Dated: 21 March 2017