FEDERAL COURT OF AUSTRALIA

ARP15 v Minister for Immigration and Border Protection [2015] FCA 1220

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| Citation: | ARP15 v Minister for Immigration and Border Protection [2015] FCA 1220 |
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| Appeal from: | ARP15 and Ors v Minister for Immigration and Border Protection & Anor [2015] FCCA 2376 |
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| Parties: | **ARP15, ARQ15 and ARR15 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION and ADMINISTRATIVE APPEALS TRIBUNAL** |
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| File number: | QUD 824 of 2015 |
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| Judge: | **EDELMAN J** |
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| Date of judgment: | 11 November 2015 |
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| Catchwords: | **MIGRATION** – grounds of appeal raising new matters which were not in issue in the Federal Circuit Court – credibility findings by Tribunal – whether Tribunal acted in a manifestly unreasonable way – whether Tribunal made legal and factual errors |
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| Legislation: | *Commonwealth of Australia Constitution Act 1901* (Cth) s 75(v)*Convention relating to the Status of Refugees done at Geneva on 28 July 1951* Art 1A(2)*Migration Act 1958* (Cth) ss 36, 91R, 424AA, 476, 474 |
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| Cases cited: | *Bhullar v Minister for Immigration and Citizenship* [2010] FCA 1337*BZAHB v Minister for Immigration and Border Protection* [2015] FCA 1205*Federal Commissioner of Taxation v Futuris Corporation Ltd* [2008] HCA 32; (2008) 237 CLR 146*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24*Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332*Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118*Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; (2003) 211 CLR 476*SZGIZ v Minister for Immigration and Citizenship* [2013] FCAFC 71; (2013) 212 FCR 235*The Pilbara Infrastructure Pty Ltd v Economic Regulation Authority* [2014] WASC 346 |
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| Date of hearing: | 11 November 2015 |
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| Place: |  |
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| Division: | GENERAL DIVISION |
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| Category: | Catchwords |
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| Number of paragraphs: | 47 |
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| Counsel for the First Appellant: | The Second Appellant, appeared on behalf of the First Appellant |
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| Counsel for the Second Appellant: | The Second Appellant appeared in person |
|  |  |
| Counsel for the Third Appellant: | The Third Appellant did not appear |
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| Solicitor for the First Respondent: | Mr B Dube of Sparke Helmore |
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| Counsel for the Second Respondent: | The Second Respondent entered a submitting notice |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 824 of 2015 |

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| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

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| BETWEEN: | ARP15First AppellantARQ15Second AppellantARR15Third Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| JUDGE: | EDELMAN J |
| DATE OF ORDER: | 11 NOVEMBER 2015 |
| WHERE MADE: | BRISBANE |

THE COURT ORDERS THAT:

1. The appeal is dismissed.
2. The appellants pay the costs of the appeal of the first respondent to be taxed if not agreed.

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

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 824 of 2015 |

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| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

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| BETWEEN: | ARP15First AppellantARQ15Second AppellantARR15Third Appellant |
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| JUDGE: | EDELMAN J |
| DATE: | 11 NOVEMBER 2015 |
| PLACE: | BRISBANE |

**REASONS FOR JUDGMENT**

## Introduction

1. This is an appeal from a decision of the Federal Circuit Court which considered the refusals to grant Protection (Class XA) visas (the **protection visas**) to each of the appellants. I will describe each of the second and third appellants as the **parents** and the first appellant as the **child** (who was 6 years old at the time of this appeal).
2. The parents arrived in Australia in 2008. They applied to a delegate of the Minister for Immigration and Border Protection (the **Minister**) for protection visas on 24 September 2008. Those applications were refused. That decision was affirmed by the Refugee Review Tribunal. An application for judicial review to the (then) Federal Magistrates Court was unsuccessful. An appeal to the Federal Court from that decision was unsuccessful. An application for special leave to appeal to the High Court was dismissed. A request for ministerial intervention was refused.
3. In 2009, during the legal processes described above, the child was born. On 6 December 2012, the parents made an application for a protection visa on the child’s behalf. Initially the parents were notified that the application on behalf of their child was invalid. But, following the decision of the Full Federal Court in *SZGIZ v Minister for Immigration and Citizenship* [2013] FCAFC 71; (2013) 212 FCR 235, the parents were notified on 13 January 2014 that the application was valid.
4. The child’s application was refused by the Minister. Before the Refugee Review Tribunal (now the Administrative Appeals Tribunal) (the **Tribunal**) the parents confirmed that the only basis for the child’s application was an alleged threat to him from his maternal grandfather due to the grandfather’s objection to the relationship between the child’s parents. The Tribunal rejected the child’s application largely for reasons concerned with the credibility and reliability of the parents’ evidence.
5. The parents applied to the Federal Circuit Court for review of the Tribunal’s decision. The Federal Circuit Court upheld the decision of the Tribunal. The parents have now appealed to this Court raising two grounds of appeal that were not grounds of review before the Tribunal. Neither of those grounds has merit. The appeal must be dismissed.

## The child’s application to the Minister and application for review by the Tribunal

1. As I have explained in the introduction to these reasons, the child was born in 2009 during the legal processes concerning the parents’ applications for protection visas.
2. On 6 December 2012, the parents applied for a protection visa on the child’s behalf. After the child’s application was found to be valid, the Minister wrote to the child and invited him to an interview on 4 December 2013. He attended with his parents.
3. The parents essentially made claims on behalf of the child in his application as set out below, with minor grammatical corrections:

I was born in Australia. My parents left India fearful of persecution. My family is originally from Pakistan and belongs to a lower caste. The higher caste Hindus attacked my parents. They tried to seize my parents’ land by force, severely injuring them.

If we go back to India we will face persecution. The upper caste and INLD [Indian National Lok Dal] will try to harm us. My family originated from Pakistan and belonged to a lower caste. They migrated to India and the higher caste Hindus commenced discriminating against new migrants such as my family. The higher caste Hindus have attacked my parents while they worked their land.

The political movements of Indian National Lok Dal and BJP began agitating to have migrant farmers expelled.

The persecution will continue if we go back to India. My mother’s family will kill my parents.

Despite my parents’ approaches to police their representations were corruptly rejected.

1. A delegate of the Minister refused the application. The child, by his parents, applied to the Tribunal for review of the Minister’s decision.
2. The Tribunal heard evidence from the parents with the assistance of an interpreter. The parents confirmed that the only person with a claim for protection was the child and that they claimed visas only as members of the child’s family. The parents explained to the Tribunal that despite all the matters described in the child’s application, the only concerns and fears for the child returning to India related to the threats to him from his maternal grandfather due to his maternal grandfather’s objection to the relationship between the parents.
3. On 15 April 2015 the Tribunal affirmed the decision of the Minister’s delegate. The Tribunal’s reasons were as follows.
4. The Tribunal set out the relevant law in an attachment to the reasons. In particular, the Tribunal described the terms of s 36(2) of the *Migration Act*, and the terms of Article 1A(2) of the *Convention relating to the Status of Refugees done at Geneva on 28 July 1951* as amended by the 1967 Protocol to that Convention. The Tribunal also explained four key elements of the definition in Article 1A(2), including the fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion.
5. Amongst other matters of law, the Tribunal described, relevantly to the grounds of appeal in this case, the effect of s 91R (which was repealed on 18 April 2015 but applied to the Tribunal’s decision). The Tribunal described the following:
6. section 91R(1) of the *Migration Act* provides for additional requirements to Article 1A(2) including that the persecution which a person fears must involve “serious harm” to the person and “systematic and discriminatory conduct”;
7. section 91R(1) of the *Migration Act* also provides that Article 1A(2) does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless “that reason is the essential or significant reason, or those reasons are the essential and significant reasons, for the persecution”; and
8. section 91R(2) provides that “serious harm” includes a reference to any of the following: (i) a threat to the person’s life or liberty; (ii) significant physical harassment of the person; (iii) significant physical ill-treatment of the person; (iv) significant economic hardship that threatens the person’s capacity to subsist; (v) denial of access to basic services, where the denial threatens the person’s capacity to subsist; and (vi) denial of capacity to earn a livelihood of any kind, where the denial threatens the person’s capacity to subsist.
9. The Tribunal’s essential reason for rejecting the child’s claims for protection under the refugee criterion in s 36(2)(a) of the *Migration Act* or under the complementary protection criterion in s 36(2)(aa) of the *Migration Act* was the credibility and reliability of the parents in relation to critical parts of their claim. The Tribunal gave three reasons for its credibility and reliability concerns.
10. First, the Tribunal questioned the parents’ evidence that they were married in the mother’s village despite the mother’s father having opposed the marriage and refused permission. The father said that they had waited for an opportunity when the mother’s parents were not there. He said that the relationship was conducted by telephone. The Tribunal raised concerns about the plausibility of that claim. The Tribunal also raised concern about the plausibility of the claim that the parents would be married in a temple in the mother’s village due to a lack of time. The Tribunal pointed out that there were other temples and options further away from the village.
11. Secondly, in accordance with s 424AA of the *Migration Act*, the Tribunal pointed out to the husband the fact that the parents’ marriage certificate records that it was solemnised in the presence of relatives of both parties. The Tribunal observed that the husband had told the Tribunal that no-one from the wife’s family had attended the ceremony. The husband said that a friend had helped them get married and that this was a standard way that certificates were written. The husband said that the friend had obtained the certificate by bribery. The Tribunal did not accept this.
12. Thirdly, the Tribunal raised concerns with the parents about their delay in leaving India from the time of their marriage in January 2008 until their departure in August 2008. The Tribunal asked why this delay occurred despite the discovery of the parents’ marriage almost immediately after the marriage by the mother’s father, and despite the alleged harassment from the police, and threats to kill. Although the Tribunal accepted that the parents took some time to leave India while living with a friend who could support them and who paid for their travel, the Tribunal considered that the delay undermined their claims that they feared for their safety.
13. Ultimately, the Tribunal found that neither of the parents was a witness of truth.
14. The Tribunal concluded that it was not satisfied that there is a real chance that the child will suffer serious harm, or any kind of harm, from his maternal grandfather or anyone else if he were returned to India, now or in the foreseeable future. The Tribunal therefore concluded that the child does not have a well-founded fear of persecution and that the criteria in s 36(2)(a) of the *Migration Act* were not satisfied. The Tribunal also concluded that it was not satisfied that the child did not meet the alternative complementary protection criterion in s 36(2)(aa).

## The child’s application to the Federal Circuit Court

1. The child then brought an application in the Federal Circuit Court on 8 May 2015 to review the decision of the Tribunal. The Federal Circuit Court made an order that the mother be the litigation guardian of the child so that she could appear on behalf of the child.
2. The child’s grounds of judicial review (as amended) before the Federal Circuit Court were as follows:
3. The Tribunal misconstrued the risk and fear of significant harm as set out in s 36(2A) of *the Migration Act 1958*. The Tribunal construed narrowly the existence of risk to life and fear of significant harm to the applicants upon their return to India.
4. The second respondent [Tribunal] 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 party of the reasons 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.

1. In finding that it was not satisfied that applicant was a person to whom Australia owed protection obligation, the Tribunal engaged in a press of reasoning that was irrational, illogical and not based upon findings or inference of fact supported by logical ground.
2. As to the first ground of review, the Federal Circuit Court held that the Tribunal had correctly construed the requirements of the *Migration Act*.
3. As to the second ground of review, the Federal Circuit Court held that the Tribunal had articulated to the child and the parents the three matters of evidence that would support the decision of the delegate of the Minister. The Federal Circuit Court held that this was not information about which it was practical to give written notice and the Tribunal had complied with s 424AA.
4. As to the third ground of review, the Federal Circuit Court said that the review application was not an opportunity for the court to substitute its judgment for one that it considered that the Tribunal ought to have made. The judge explained that the Tribunal had looked at what the parents had said but that the Tribunal had not accepted that those statements were true. His Honour correctly observed that the question on a judicial review application was not whether the conclusion was correct. The question was whether there was a jurisdictional error.
5. The Federal Circuit Court dismissed the application on 26 August 2015.

## The child’s grounds of appeal in this Court

1. The appellants rely on two grounds of appeal (as set out in the notice of appeal):
2. The FM failed to consider that the Tribunal acted in a manifestly unreasonable way when dealing with the applicants 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.
3. The learned Federal Judge has dismissed the case without considering the legal and factual errors contained in the decision of the AAT.

## The grounds of appeal raise matters that were not before the Federal Circuit Court

1. The Minister correctly submits that the child’s pro-forma grounds of appeal do not involve matters raised as grounds for judicial review in the Federal Circuit Court. The grounds of appeal were not supplemented by written submissions, despite directions having been made for the appellants to file written submissions. The Minister’s written submissions therefore addressed the circumstances of the case in the context only of the broad terms of the grounds of appeal.
2. The oral submissions on behalf of the child this morning were made by the father, with some assistance from an interpreter. Leave for the father to make those submissions was properly not opposed. The father made three points in oral submissions. First, he said that the Tribunal had not made any enquiries in India before reaching its decision. Secondly, he said that there are now a lot of riots in India against Sikh people. Thirdly, he said that he had spent a lot of time in Australia now and he requested permission to live here.
3. In *BZAHB v Minister for Immigration and Border Protection* [2015] FCA 1205 [31] – [34], I explained the authorities in relation to a ground of appeal that does not raise matters considered in the court below.
4. In this case, the Minister did not submit that any prejudice would be caused by allowing any of the new matters in the appellants’ grounds of appeal or oral submissions to be agitated. I also proceed to consider the grounds of appeal on that basis.

## Ground 1: The Tribunal acted in a manifestly unreasonable way in relation to s 91R

1. This ground of appeal does not specify any particular unreasonableness in the Tribunal’s decision about which complaint is made other than the reference to ignoring the aspect of persecution and harm in s 91R of the *Migration Act*.
2. As I have explained above, the Tribunal considered the terms of s 91R in its discussion of the law, and those terms were applied to the facts in the conclusion reached by the Tribunal.
3. To the extent that this ground of appeal relies upon unreasonableness in the Tribunal’s decision other than in relation to s 91R, there is no apparent unreasonableness in either sense in which that term is used, as the High Court explained in *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332.
4. The first sense in which the term is used is sometimes used is in a compendious sense to describe the variety of different possible errors in decision making including where the decision maker has committed “a particular error in reasoning, given disproportionate weight to some factor or reasoned illogically or irrationally, the final conclusion will in each case be that the decision-maker has been unreasonable in a legal sense”: *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332, 366 [72] (Hayne, Kiefel and Bell JJ); see also at 350 [27] (French CJ).
5. There is no apparent unreasonableness in the Tribunal’s decision in this first sense.
6. The second sense in which the term “unreasonableness” is sometimes used is where “‘upon the facts [the result] is unreasonable or plainly unjust’ … [for] the review of the exercise of a statutory discretion, where unreasonableness is an inference drawn from the facts and from the matters falling for consideration in the exercise of the statutory power”: *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332, 367 [76] (Hayne, Kiefel and Bell JJ); see also at 350-351 [28] (French CJ). In the same case, Gageler J explained that the “stringency of the test” was such that a judicial determination of reasonableness in Australia has in practice been rare: at 377 [113].
7. The conclusions of the Tribunal in this case were ultimately dependent upon the Tribunal’s rejection of the parents’ credibility and reliability. That assessment was based, in part, upon the evidence I have described above. It was also made with the advantage of seeing and hearing from the appellant: see *Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118, 127-129 [26]-[31] (Gleeson CJ, Gummow and Kirby JJ).
8. It was also not unreasonable for the Tribunal to reach its conclusions based upon an assessment of the credibility and reliability of the parents without making enquiries in India. The possible existence of riots in India against Sikh people is also not a matter that was raised before the Tribunal in relation to the child’s application. Even if there had been fresh evidence to that effect before the Federal Circuit Court, or even before this Court, it is difficult to see how that evidence could have created a jurisdictional error. The same point applies to the fact, which I accept, that the appellants have now spent a lot of time in Australia.
9. The first ground of appeal must be dismissed.

## Ground 2: the Federal Circuit Court dismissed the case without considering the legal and factual errors contained in the decision of the Tribunal

1. The appellants do not point to any particular factual or legal errors in the decision of the Tribunal apart from those matters that I have discussed above in relation to the unreasonableness ground. None is apparent.
2. It must be emphasised that this appeal is concerned with whether an error was committed by the Federal Circuit Court. And the jurisdiction exercised by the Federal Circuit Court, from which this appeal is brought, involved a limited jurisdiction. It did not have a jurisdiction to rehear the application. The effect of s 476 of the *Migration Act* is that the Federal Circuit Court only had the power to review for jurisdictional error.
3. This conclusion does not derive solely from s 476(1) which gives the Federal Circuit Court the same original jurisdiction in relation to migration decisions as the High Court has under s 75(v) of the *Constitution*. The High Court’s jurisdiction under s 75(v) is not confined to review for jurisdictional error (see, for instance, *Federal Commissioner of Taxation v Futuris Corporation Ltd* [2008] HCA 32; (2008) 237 CLR 146, 162 [47] (Gummow, Hayne, Heydon and Crennan JJ).
4. The conclusion that s 476(1) permits only review for jurisdictional error arises because the jurisdiction under s 476(1) is excluded in relation to a review of a “privative clause decision” involving protection visa applications under Part 7 of the *Migration Act* (see s 476(2)(a) and the definition of “primary decision”). Section 474 provides for a restrictive definition of “privative clause decision” which has been construed by the High Court as one which does not exclude review for jurisdictional error of “decisions which involve neither a failure to exercise jurisdiction nor an excess of the jurisdiction conferred by the Act”: *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; (2003) 211 CLR 476, 506 [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). Hence, s 476(1) permits only judicial review for jurisdictional error in relation to applications to the Federal Circuit Court concerning protection visas: see also, in a different context, *Bhullar v Minister for Immigration and Citizenship* [2010] FCA 1337 [5] (Perram J).
5. It is not necessary to consider here whether a factual error, as opposed to an exercise of discretion, can amount to a jurisdictional error other than where the factual error concerns a jurisdictional fact (as to which, see *The Pilbara Infrastructure Pty Ltd v Economic Regulation Authority* [2014] WASC 346 [141]-[194]). It suffices to say that no particular factual or legal error in the Tribunal’s decision was identified and none is apparent. As I have explained, the Tribunal described the relevant law, heard the evidence and assessed the facts, and decided the application based upon an adverse assessment of the parents’ credibility.
6. The second ground of appeal must also be dismissed.

## Conclusion

1. The two grounds of appeal did not involve matters which were raised before the Federal Circuit Court. In any event, they cannot succeed. The appeal must be dismissed.
2. The new matters which were raised by the father on this appeal, in the form that they were presented, cannot form the basis for judicial intervention under the *Migration Act*, particularly by an appeal court. Issues such as the length of time by which the family has remained in Australia, including for the period during which the child’s application for a protection visa had been mistakenly classified as invalid, are matters that could only be considered (subject to s 417(7)) under s 417 of the *Migration Act.*

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| I certify that the preceding forty-seven (47) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Edelman. |

Associate:

Dated: 11 November 2015