FEDERAL COURT OF AUSTRALIA

AHB15 v Minister for Immigration and Border Protection [2015] FCA 937

|  |  |
| --- | --- |
| Citation: | AHB15 v Minister for Immigration and Border Protection [2015] FCA 937 |
|  |  |
| Appeal from: | AHB15 v Minister for Immigration & Anor [2015] FCCA 1321 |
|  |  |
| Parties: | **AHB15 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION and REFUGEE REVIEW TRIBUNAL** |
|  |  |
| File number: | NSD 587 of 2015 |
|  |  |
| Judge: | **NICHOLAS J** |
|  |  |
| Date of judgment: | 11 August 2015 |
|  |  |
| Legislation: | *Migration Act 1958* (Cth) ss 36(2), 425  |
|  |  |
| Cases cited: | *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609*Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594*Minister for Immigration, Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12  |
|  |  |
| Date of hearing: | 11 August 2015 |
|  |  |
| Place: | Sydney |
|  |  |
| Division: | GENERAL DIVISION |
|  |  |
| Category: | No Catchwords |
|  |  |
| Number of paragraphs: | 28 |
|  |  |
| Counsel for the Appellant: | The appellant appeared in person with the assistance of an interpreter |
|  |  |
| Counsel for the First Respondent: | R Graycar |
|  |  |
| Solicitor for the First Respondent: | Sparke Helmore |
|  |  |
| Counsel for the Second Respondent: | The second respondent submitted save as to costs |

|  |  |
| --- | --- |
| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 587 of 2015 |

|  |
| --- |
| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

|  |  |
| --- | --- |
| BETWEEN: | AHB15Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentREFUGEE REVIEW TRIBUNALSecond Respondent |

|  |  |
| --- | --- |
| JUDGE: | NICHOLAS J |
| DATE OF ORDER: | 11 August 2015 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant is to pay the first respondent’s costs of the appeal.
3. The name of the second respondent be amended to Administrative Appeals Tribunal.

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

|  |  |
| --- | --- |
| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 587 of 2015 |

|  |
| --- |
| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

|  |  |
| --- | --- |
| BETWEEN: | AHB15Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentREFUGEE REVIEW TRIBUNALSecond Respondent |

|  |  |
| --- | --- |
| JUDGE: | NICHOLAS J |
| DATE: | 11 august 2015 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

**(Revised from Transcript)**

1. This is an appeal from a judgment of the Federal Circuit Court dismissing an application for judicial review of a decision of the Refugee Review Tribunal affirming a decision of a delegate of the first respondent to reject the appellant’s application for a protection visa.
2. The appellant is a citizen of Fiji who arrived in Australia on 16 December 2009. She departed Australia on 18 February 2010 and returned on 23 September 2010. On both occasions she was the holder of a visitor visa. She lodged her first application for a protection visa on 4 March 2011, relying on section 36(2)(a) of the *Migration Act 1958* (Cth) (“the Act”). Her application was refused by a delegate of the first respondent on 27 May 2011.
3. The appellant’s second application for a protection visa was made on 22 March 2013 solely on the basis of the criterion referred to in s 36(2)(aa) of the Act. It was refused by a delegate of the first respondent on 8 May 2014. The appellant applied to the Tribunal for a review of that decision. The hearing of the appellant’s application for review took place on 2 March 2015. The appellant and several of her relatives gave evidence.
4. The Tribunal summarised the claims made by the appellant in relation to her first visa application and her second visa application. It also summarised various additional claims made by the appellant in a written statement and also referred to a subsequent interview. During the course of that interview the appellant expanded on some of the claims made by her.
5. In summary, the appellant claimed that if she returned to Fiji the Fijian Army would torture her and may kill her. She claimed this was because the Army had confiscated her unregistered carrier truck and had captured the driver and were now looking for her as the owner of the vehicle.
6. The Tribunal made a finding that it did not have power to consider the appellant’s claims based on s 36(2)(a) and proceeded on the basis it could only consider her claims by reference to s 36(2)(aa) of the Act.
7. The appellant claimed that she had suffered mental harm as a result of receiving threatening text messages and phone calls from the Army. The appellant also claimed to fear significant harm on the basis that her husband, an Army officer, would torture or kill her or subject her to degrading or inhumane treatment.
8. In accordance with s 499 of the Act the Tribunal was required to take account of Ministerial Direction No 56 when considering the appellant’s application. There is no suggestion the Tribunal failed to do so.
9. In its reasons for decision the Tribunal expressed serious concerns in relation to the credibility of the applicant and the veracity of her claims. It observed that the appellant’s claims changed over time and that they contained various inconsistencies and contradictions. Ultimately, the Tribunal found that the appellant was not a credible witness and that she had fabricated most of the claims for the purpose of obtaining a protection visa. The Tribunal was not satisfied there were substantial grounds for believing that as a necessary and foreseeable consequence of the appellant being removed from Australia to Fiji there was a real risk that she would suffer significant harm as defined in s 36(2)(aa) of the Act. On that basis the Tribunal was satisfied the appellant did not satisfy the criterion in s 36(2)(aa) of the Act.
10. The appellant’s application for judicial review was heard by the primary judge, Judge Street, on 15 May 2015 and his Honour delivered judgment the same day. The grounds of review relied upon by the appellant before the primary judge, as set out in her amended application for review, were as follows:

1. The decision of the Refugee Review Tribunal is Legally Unreasonable in that:

2. The Tribunal gave great weight to matters of little importance

3. The Tribunal gave little weight to matters of great importance

4. A particular error was committed in reasoning.

5. The reasoning of the Tribunal is illogical and irrational.

6. The decision of the Refugee Review Tribunal is void and affected by a reasonable apprehension of bias. The Tribunal did not bring an impartial mind to the resolution of the review of my application for protection.

7. The Tribunal already made up its mind to affirm the decision under review before the hearing.

1. The appellant also raised a number of other grounds in her submissions to the primary judge that were not referred to in the amended application. In particular, the appellant submitted in a written submission filed on 13 May 2015 that the Tribunal failed to give proper, realistic and genuine consideration to her claims, and that it had failed to make its own inquiries relating to the appellant’s medical condition.
2. The primary judge rejected each of the six grounds of review relied upon by the appellant. His Honour noted that the Tribunal’s decision was based upon a rejection of the appellant’s evidence and a finding that she was not a credible witness. His Honour held that the findings of the Tribunal in relation to the appellant’s credit were clearly open to it, and it could not be said to lack any evident or intelligible justification. His Honour also rejected arguments that the Tribunal’s decision was unreasonable, and that it had failed to conduct a proper hearing.
3. With regard to grounds 2 and 3 in the amended application, the primary judge noted that the weight to be given to the evidence was a matter for the Tribunal. As to the other grounds set out in the amended application, the primary judge described them as generalised assertions that did not identify any jurisdictional error.
4. The primary judge dealt with the matters raised in the appellant’s written submission quite briefly. His Honour said at [18]-[19]:

[18] To the extent the applicant’s written outline of submissions go beyond the grounds identified in the application, they fail to identify any jurisdictional error. I am satisfied that the Tribunal complied with its obligations under s.424 and 424A of the *Migration Act*.

[19] Further, I am satisfied this was not a case where the Tribunal failed to properly conduct its review and there was no obligation on the Tribunal to make further inquiry in relation to the medical state of the application. That was not a matter of a kind in which there was a sufficient link to impose a duty upon the Tribunal to take any such step.

1. There were two matters raised in the appellant’s written submissions that his Honour may be taken to be referring to in these paragraphs. The first matter was the appellant’s complaint that the Tribunal failed to give her claims proper consideration. It was suggested in her written submission that the failure to refer to her medical condition (which she referred to as brain disability) gave rise to a strong inference that the Tribunal did not discharge its obligations under s 425 of the Act. The second matter was the appellant’s complaint that the Tribunal failed to make proper inquiries in relation to the state of the appellant’s medical condition.
2. The grounds of appeal that were relied upon by the appellant in this Court may be summarised as follows:
3. The primary judge erred in failing to find that the Tribunal denied the appellant procedural fairness in that it failed to provide her with notice of the matters that it considered would be the reason, or part of the reasons for affirming the decision under review. The appellant says that this failure occurred against a background of her having advised the Tribunal that she was suffering from a brain disability.
4. The primary judge erred in failing to find that the Tribunal denied the appellant procedural fairness by failing to make relevant inquiries regarding her brain disability.
5. His Honour erred in failing to find that the Tribunal’s decision was legally unreasonable, or that it was irrational, unfair or plainly unjust.
6. His Honour erred in failing to find that the Tribunal’s decision was vitiated by bias.

I have not sought to reproduce the grounds of appeal in the precise terms in which they appear in the appellant’s notice of appeal, and have instead sought to capture what I understand to be the substance of the various points that the appellant sought to raise during the hearing of her appeal.

1. I will deal with each of the four matters raised by the appellant in turn. The first matter focuses on correspondence that occurred after the conclusion of the oral hearing in which the Tribunal invited the appellant to provide a response to a number of matters that were put to her by the Tribunal during the oral hearing. However, the appellant’s submissions did not identify any specific matter that she says the Tribunal failed to put to her (orally or in writing) during the course of the review.
2. In any event, the Tribunal’s decision was based on its findings as to the various inconsistencies and gaps in the appellant’s own evidence, and the unfavourable impression it formed of the appellant as a witness. Section 424A of the Act does not apply to such matters. The meaning of “information” in the context of s 424A is related to the existence of evidentiary material or documentation, not the existence of doubts, inconsistencies or the absence of evidence: *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609 at [18].
3. In relation to the appellant’s disability, the Tribunal noted in its reasons that a hearing scheduled to take place on 19 February 2015 had to be postponed. It was in this context that the appellant provided the Tribunal with a medical certificate indicating that she suffered from lethargy and fatigue due to an iron deficiency and anaemia which rendered her unfit to attend an interview until 25 February 2015. There was no reference in the medical certificate to the appellant suffering from any other medical condition. Nor was any medical evidence adduced by the appellant at the hearing to suggest that she suffered from a disability.
4. In any event, as the primary judge noted, the Tribunal had regard to the appellant’s disability. At [26] of its reasons, the Tribunal said:

This is the first time that the applicant has raised any issue in relation to a disability or that she gets confused or stressed despite having filed 2 visa applications and gone through the process. She has not provided any medical evidence in relation to these claims. She consulted a medical practitioner for the purpose of obtaining a Medical Certificate to provide the Tribunal but the Medical Certificate makes no mention of these claims. The Tribunal accepts that the applicant may have found it stressful to attend an interview with the Department or a hearing before the Tribunal. However, the Tribunal does not accept that this explains the inconsistencies and contradictions in her evidence. For the above reasons, the Tribunal has serious doubts as to the truthfulness of the applicant’s claim that she has a disability. Even if the Tribunal were to accept that she has a disability, it does not explain the inconsistencies and contradictions in her evidence. The Tribunal does not accept the explanation provided by the applicant.

1. It can be seen that the Tribunal did not accept that any disability suffered by the appellant explained the inconsistencies and contradictions in her evidence. Even if the Tribunal accepted that the appellant had a disability, it is evident that this would not have affected the Tribunal’s assessment of her evidence.
2. This is not a case where it can be said that the Tribunal was under a duty to make its own inquiries about the appellant’s medical condition. Although the Tribunal has wide powers to investigate an applicant’s claims, it is not under a general duty to make inquiries, including in relation to any medical condition an applicant may claim to be suffering: *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at [20] citing *Minister for Immigration, Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12 at 21.
3. The other grounds of appeal that are raised by the appellant can be dealt with quite briefly. The suggestion that the Tribunal’s decision was unreasonable in the legal sense of that term, or that it was irrational or plainly unjust, must be rejected.
4. The Tribunal’s reasons for decision reflect a thorough and logical assessment of the appellant’s claims and, in particular, the various inconsistencies in her evidence. Significantly, that assessment was based upon various matters including, in particular, the record of the appellant’s movements between Australia and Fiji in 2009 and 2010 to which I have previously referred. The Tribunal observed that if the appellant feared returning to Fiji for the reasons she gave, it would have expected her to have sought advice and to have lodged a protection visa during the course of her first visit to Australia.
5. As far as the allegation of bias is concerned, it is not entirely apparent whether the appellant’s allegation was one of actual bias or apprehended bias. In any event, the primary judge was correct in rejecting this aspect of the appellant’s case because there is no support for it in the evidence or the Tribunal’s reasons.
6. In other submissions first made in this Court, the appellant expanded on her argument that the Tribunal failed to make inquiries in relation to her medical condition. She referred in her oral submissions to her high blood pressure, something which she suggested the Tribunal ought to have inquired into. This is not a matter that appears to have been raised before the Tribunal or before the primary judge. In any event, for reasons previously stated, there is no substance to this complaint.
7. As to the appellant’s contention that her claims were not given genuine, proper and realistic consideration, it became clear as she developed her argument in this Court that the substance of that complaint is that the Tribunal was wrong to disbelieve her evidence. The material before me indicates that the Tribunal gave the appellant ample opportunity to present her case both at the oral hearing and in subsequent correspondence. This included providing the appellant with a recording of the oral hearing to assist her in preparing any additional written response that she wished to provide in relation to issues raised with her during the oral hearing.

# Disposition

1. For the above reasons, I am satisfied the appellant has failed to demonstrate any error on the part of the primary judge or any other reason why his Honour’s decision should be set aside. The appeal will be dismissed with costs.

|  |
| --- |
| I certify that the preceding twenty-eight (28) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Nicholas. |

Associate:

Dated: 25 August 2015