FEDERAL COURT OF AUSTRALIA

SZVDK v Minister for Immigration and Border Protection [2017] FCA 934

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| Appeal from: | *SZVDK v Minister for Immigration and Border Protection* [2017] FCCA 747 |
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| File number: |  |
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| Judge: | **PERRAM J** |
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| Date of judgment: | 14 August 2017 |
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| Catchwords: | **MIGRATION** – appeal from Federal Circuit Court – whether denial of procedural fairness – whether failure to provide adequate reasons – whether Tribunal failed to discharge statutory functions by not providing adequate translator – whether leave granted to argue grounds not raised before Federal Circuit Court |
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| Date of hearing: | 14 August 2017 |
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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: | Catchwords |
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| Number of paragraphs: | 13 |
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| Counsel for the Appellant: | The Appellant appeared in person |
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| Counsel for the Respondents: | Mr G Johnson |
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| Solicitor for the Respondents: | Australian Government Solicitor |

ORDERS

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|  | | NSD 493 of 2017 |
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| BETWEEN: | SZVDK  Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | PERRAM J |
| DATE OF ORDER: | 14 AUGUST 2017 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The Appellant pay the First Respondent’s costs as taxed or agreed.

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

REASONS FOR JUDGMENT

PERRAM J:

1. The Appellant seeks the issue to her of a protection visa. She is a citizen of the People's Republic of China. In order to be eligible for such a visa, she needs to demonstrate to the satisfaction of the Minister for Immigration and Border Protection or his delegate that she has a well-founded fear of persecution, as that expression is used in the Refugee Conventions. Her claim for a protection visa was initially rejected by the Minister's delegate, but she sought a review of that refusal before the Refugee Review Tribunal (as it was then known).
2. In that Tribunal, she gave evidence to support her claim to suffer from a well-founded fear of persecution. Her case, both before the delegate and on review in the Tribunal, was that she was likely to suffer persecution for a Convention reason because she was a member of Falun Gong and also that her husband was a member of Falun Gong. The Tribunal concluded that it should affirm the delegate's anterior refusal of the protection visa because it did not accept either that the Appellant's husband was a member of Falun Gong or that she herself was a member of Falun Gong.
3. Of course, the Appellant had given evidence to that effect before the Tribunal, but the Tribunal had rejected this evidence, finding instead that the Appellant was not a reliable witness. The Tribunal articulated three reasons why it did not accept the Appellant's evidence on these matters. The first was that it observed that, although she had initially arrived in Australia on a tourist visa, there had been a delay of about three months before the Appellant decided to apply for a protection visa and this, the Tribunal thought, was not very plausible.
4. The second reason the Tribunal disbelieved the Appellant was because it did not accept as plausible the account she had given of what had happened with her husband. The point here was that the Appellant's evidence to the Tribunal had been that, although the husband was aware that his practice of Falun Gong in China could expose his family to risk, he continued to practise Falun Gong. The Tribunal did not think it likely that a husband would behave that way, because that would imperil his family.
5. Thirdly, the Tribunal was impressed with the fact that the Appellant herself did not actually perform any of the practices or exercises associated with Falun Gong. The Tribunal thought that made it unlikely that she was, in fact, a practitioner of Falun Gong. Having found that the Appellant was an unreliable witness because of those three matters, it concluded that it had not been demonstrated to its satisfaction that she did suffer from a well-founded fear of persecution for a Convention reason and it rejected her claim for a protection visa on that basis. It also considered the Appellant’s corresponding claim for complementary protection and, largely for the same reasons, rejected it.
6. The Appellant then sought judicial review of that determination in the Federal Circuit Court. In that court, two grounds were advanced. The first was that she had failed to apply for the Protection visa promptly because she did not speak English and did not trust anyone and, more generally, felt herself culturally at a disadvantage in pursuing these matters. Secondly, she contended that her husband had good reason to continue to practise Falun Gong and that the adverse inference that the Tribunal drew about that matter was not warranted. Judge Smith in the Court below rejected both of these arguments on the basis that they did not disclose the existence of a jurisdictional error. It seems to me that, in that regard, his Honour was unquestionably correct. The grounds which were pursued before the Federal Circuit Court were not grounds which that Court could have accepted as reasons for granting relief against the Tribunal.
7. In this Court, the following grounds were pursued:
8. the Tribunal was not conscientiousness, which led to my lack of evidence;
9. AAT has denied me procedural fairness by failing to provide adequate reasons for the finding of fact; and
10. the translator's explanation was not clear and the patient was not patient.
11. It will be seen that there are some comprehension issues in the drafting of these grounds of appeal. During the course of the hearing, in which the Appellant was assisted by a Mandarin translator, some light was thrown on them. It was clarified that ground 1 was a complaint that the Tribunal had not accepted the Appellant's evidence. In relation to ground 3, the words ‘and the patient was not patient’ were clarified as not having been intended. The main point to be pursued in ground 3 was, as I eventually understood it, that the Appellant had not understood everything which was going on at the hearing and that there was a lack of consistency, in some cases, between what she had intended to put to the Tribunal and what was, in fact, put to the Tribunal.
12. I do not think that I should accede to these grounds. This is because, first, they were not raised in the court below and, therefore, should only be entertained by me if I am satisfied, at least, that they have some substance. Secondly, I am not satisfied that any of these arguments has substance. As to the first ground, without further explanation, the fact that the Tribunal did not accept the Appellant's evidence does not disclose a jurisdictional error which it would be within the power of the Federal Circuit Court to redress.
13. As to the second ground, it of course leaves open the question of what the finding of fact under complaint is and what the alleged inadequacy of reasons might be. The ground of appeal itself does not identify the fact in dispute, so I sought during the course of the hearing to have the Appellant identify which fact she had in mind in ground 2. Unfortunately, however, she was unable to assist me in that regard. In the absence of an identified finding of fact which is being challenged, it is impossible to assess the correctness or otherwise of ground 2, and I must reject it.
14. So far as the third ground was concerned, I raised with the Appellant that I needed to know a little bit more about what the translation difficulties were. In that regard, I asked her if she could point to any part of the reasons of the Tribunal where the translation difficulties could be seen to have had an effect. I also asked her what kind of difficulties she had in mind about the lack of consistency between what she intended to put to the Tribunal and what the translator had said. But, unfortunately for the Appellant, she was not able to help very much in that regard.
15. In those circumstances, and leaving aside the fact that these matters were not raised in the Court below, it does not seem to me that any of them has any real prospect of success and this, therefore, is one of those cases in which I will not grant the Appellant the right to put these matters. However, for the reasons I have already given, it will be apparent I would have rejected them even if I had permitted that.
16. I make the following orders:
17. The appeal be dismissed.
18. The Appellant pay the First Respondent’s costs as taxed or agreed.

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| I certify that the preceding thirteen (13) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perram. |

Associate:

Dated: 15 August 2017