FEDERAL COURT OF AUSTRALIA

AEC15 v Minister for Immigration and Border Protection [2016] FCA 1182

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| Appeal from: | *AEC15 v Minister for Immigration & Anor* [2015] FCCA 3428 |
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| File number: |  |
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| Judge: | **MOSHINSKY J** |
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| Date of judgment: | 5 October 2016 |
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| Catchwords: | **MIGRATION** – appeal from Federal Circuit Court of Australia – whether denial of procedural fairness by Tribunal – whether Tribunal failed to have regard to appellant’s evidence  |
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| Legislation: | *Migration Act 1958* (Cth), s 36*Migration Regulations 1994* (Cth), Sch 2, cl 866.221  |
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| Cases cited: | *Mann v Carnell* (1999) 201 CLR 1*Muin v Refugee Review Tribunal* (2002) 190 ALR 601*SZHWY v Minister for Immigration and Citizenship* (2007) 159 FCR 1 |
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| Date of hearing: | 10 June 2016 |
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| Date of last submissions: | 14 June 2016 |
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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 |
|  |  |
| Number of paragraphs: | 23 |
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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 P Blackadder, Sparke Helmore |
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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 1686 of 2015 |
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| BETWEEN: | AEC15Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| JUDGE: | MOSHINSKY J |
| DATE OF ORDER: | 5 OCTOBER 2016 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent’s costs of the appeal, including reserved costs, to be taxed if not agreed.
3. If any party seeks a variation of the costs order, the party may give written notice to the Court and the other party within three business days.

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

REASONS FOR JUDGMENT

MOSHINSKY J:

1. The appellant is a citizen of Bangladesh. He came to Australia in April 2013 on a temporary business visa. Shortly afterwards, he applied for a protection visa. He claimed, in essence, that he was a leader of, or involved in, the Bangladesh National Party (**BNP**) and feared harm from political opponents in the Awami League (**AL**), as well as from the police. The appellant appeals from a decision of the Federal Circuit Court of Australia, dismissing an application for judicial review of a decision of the then Refugee Review Tribunal (the **Tribunal**).

## Background facts

1. On 10 April 2013, the appellant arrived in Australia on a temporary business visa.
2. On 22 April 2013, the appellant applied for a Protection (Class XA) visa (**protection visa**).
3. On 25 September 2013, a delegate of the first respondent (the **Minister**) refused the application for a protection visa. The delegate was not satisfied that the appellant was a person to whom Australia had protection obligations under s 36 of the *Migration Act 1958* (Cth) (**Migration Act**) and clause 866.221 of Sch 2 to the *Migration Regulations 1994* (Cth). The decision of the delegate was made following an interview with the appellant on 10 September 2013.
4. The appellant applied to the Tribunal for review of the delegate’s decision.
5. On 30 October 2014 and 21 January 2015, the appellant appeared before the Tribunal to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Bengali and English languages.
6. On 11 February 2015, the Tribunal decided to affirm the decision of the delegate not to grant the appellant a protection visa. In relation to the Tribunal’s decision, I note the following:
	1. The Tribunal summarised the appellant’s claims at [11]-[15]. The appellant claimed to be a BNP leader and that he had donated “huge money” to the party. He claimed that because of his activities for the BNP he became an “eyesore” to the AL and was targeted as a result. He claimed that on 17 August 2012 he was beaten and received treatment in a clinic; that his family went to the police to lodge a complaint against the AL but the police refused to accept the complaint and instead came to arrest him; and that family members and party leaders advised him to go to Australia.
	2. As recorded in the Tribunal’s reasons at [18], the appellant claimed in his departmental interview that he had no problems before August 2011, when he began to organise rallies; and that in 2012 he made a negative remark about the AL which was broadcast nationally on commercial television, and this led to his being targeted.
	3. The Tribunal noted that the delegate found the appellant not to be a credible witness. The Tribunal explained the delegate’s reasons for this at [24]-[25].
	4. The Tribunal dealt with the first hearing before the Tribunal at [27]-[38]. In the course of this part of its reasons, the Tribunal stated at [28]:

The applicant delayed lodging his protection visa application until 22 April 2013 because someone, that being the person being a lawyer practicing [sic] migration law named Abdul Latif who helped him complete his visa application, advised him that he had a valid visa for two weeks and that he should apply after this. He was not a qualified migration agent and just gave him advice.

* 1. The Tribunal dealt with the second hearing before the Tribunal at [39]-[69] of its reasons. This section of the reasons contains a detailed description of the evidence given by the appellant at the hearing, including questions he was asked by the Tribunal and his responses.
	2. The Tribunal described country information it had reviewed at [70]-[168]. At [169], the Tribunal referred to additional information provided by the appellant after the second hearing, which the Tribunal had considered. The Tribunal noted that the applicant claimed to have participated in a protest against human rights violations in Bangladesh in front of Admiralty House in Kirribilli and that photographs of this protest were published in Bangladesh.
	3. The Tribunal’s analysis and assessment of the appellant’s claims was set out at [170]-[199] of its reasons. At [174], after noting that the appellant did not apply for a protection visa upon arrival in Australia, the Tribunal stated:

The applicant did not lodge a protection visa at an earlier opportunity being advised by a lawyer to apply when his business visa was due to expire.

* 1. At [175], the Tribunal found that the appellant’s multiple entries and exits from Bangladesh were not consistent with a subjective fear of persecution in Bangladesh; nor was his delay in lodging a protection visa application.
	2. At [184], the Tribunal stated that the appellant claimed to have been a supporter of the BNP yet was unable to articulate the manifesto, principles, policies and platforms of the party in various campaigns except in the simplest terms. At [185], the Tribunal found that the appellant was not affiliated with the BNP as claimed, for reasons there set out.
	3. At [191], the Tribunal found that, given the country information, the appellant did not face a real chance of persecution in Bangladesh for reasons of political opinion. The Tribunal also stated at [192]:

[The Tribunal] repeats its findings in relation to the applicant’s delay in lodging his protection visa [application] and multiple returns to Bangladesh and finds that his actions and inaction are inconsistent with a subjective fear of persecution and further seriously undermine his overall credibility. He does not have a subjective fear of persecution.

* 1. The Tribunal, at [193], dealt with the appellant’s claims relating to having been interviewed on national television making negative remarks about the AL; and his claimed involvement in political activity in Australia. The Tribunal stated at [193]:

The Tribunal further considered the applicant’s additional claims including his having claimed to have been interviewed on national television making negative remarks about the Awami League government, a matter he did not mention in his protection visa application, his human rights involvement claims that when questioned on he conceded involved attending two meetings, and his claims that he was arrested and detained overnight four times in Bangladesh. Given the findings above, the Tribunal finds these claims to be embellishments, not to be credible, and gives them no weight. It would further find, give[n] the applicant’s conduct that any conduct engaged in [by] him relied on in support of his claims would have been solely for the purpose of strengthening his claim. It does not accept any claimed involvement in any human rights organisations or political activity of any description in Australia that would draw the applicant to the adverse attention of any potential agents of harm whether or not they occurred and whatever motivation the applicant may have had if he has engaged in such activity. It further finds that these activities claimed to have occurred in Australia would be of no interest to any potential agents of harm in Bangladesh even had they taken place.

## The proceeding in the Federal Circuit Court

1. The appellant applied to the Federal Circuit Court for judicial review of the Tribunal’s decision. The appellant filed an amended application, prepared by a lawyer, which raised the following two grounds:
2. The Tribunal failed to properly exercise its jurisdiction and misapplied the law.

Particulars:

(a) In considering the applicant’s claims for the purpose of Section 36(2)(aa) of the Migration Act the Tribunal either failed to have regard to the applicant’s evidence in relation to his political activity in support of the BNP in Australia or inappropriately rejected this evidence under Section 91R(3) of the Act.

1. The Tribunal fell into jurisdictional error because it failed to observe an inviolable limitation or restraint on its authority or power in the manner in which it conducted the hearing.

*Particulars*

At the hearing the Tribunal questioned the Applicant about why he had waited until his first visa expired before applying for a protection visa. The Applicant replied that he had been advised to do so. The Tribunal then asked who had advised him and was told it was a lawyer. The Tribunal should have set this information aside as it was subject to legal professional privilege. Instead, it used the information as part of its reasons for affirming the decision under review.

1. On 1 December 2015, the hearing of the appellant’s application for judicial review took place in the Federal Circuit Court. The appellant was represented at the hearing. The application was dismissed, with the primary judge delivering ex tempore reasons for judgment (the **Reasons**). In relation to the Reasons, I note the following:
	1. The primary judge dealt with ground 1 at [4]-[12] of the Reasons. The primary judge set out [193] of the Tribunal’s reasons (set out above). At [6], the primary judge noted that the applicant’s lawyer accepted that, in light of (what was then) s 91R(3) of the *Migration Act*, the Tribunal’s findings insofar as they addressed the issues raised by s 36(2)(a) of the Act and, in particular, whether the appellant was a refugee within the meaning of the Refugee Convention, properly dealt with that issue. The primary judge noted that the appellant’s lawyer argued that the Tribunal did not properly deal with the claims insofar as they related to the complementary protection criterion in s 36(2)(aa) of the Act. In particular, the appellant’s lawyer argued that [193] and the balance of the Tribunal’s reasons did not show any active intellectual engagement with those claims and relied particularly on the last sentence of [193].
	2. The primary judge expressed the view that the Tribunal did properly deal with the claims made by the appellant concerning his involvement in politics in Australia (Reasons, [8]-12]). The primary judge considered that the findings of the Tribunal at [170]-[192] of its reasons supported the findings and conclusions expressed in [193].
	3. The primary judge dealt with the appellant’s second ground at [13]-[25] of the Reasons. This ground concerned an exchange that took place during the first hearing before the Tribunal. The relevant part of the transcript was set out at [13] of the Reasons. It is as follows:

Q. So you arrived here on 10 April and you lodged your protection visa application on 22 April. Why did you wait for 12 days before you lodged your application, given that you fear serious harm in Bangladesh?

A. INTERPRETER: Somebody advised me that you have not (sic) got visa for two weeks. After the visa expires, then you can apply for protection.

Q. Who advised you of this?

A. INTERPRETER: The man who helped me … (not transcribable) … He advised me, “You have now visa … (not transcribable) … apply now. After it expires, then you can apply for protection visa to stay in Australia.

Q. What was the man’s expertise that you would rely on and follow his advice in relation to your migration status?

A. INTERPRETER: … (Not transcribable) … He was practicing [sic] migration law.

Q. What was his name?

A. INTERPRETER: [Name omitted].

Q. Did you ever retain [name omitted] as your representative?

A. INTERPRETER: He gave me that advice.

* 1. As set out in the Reasons at [14], the appellant’s lawyer submitted that what the appellant said in respect of the advice given to him was subject to legal professional privilege and the Tribunal had no right to use the information, relying on *SZHWY v Minister for Immigration and Citizenship* (2007) 159 FCR 1 (***SZHWY***).
	2. The primary judge held that the second ground failed at a number of levels. The primary judge considered that, assuming that privilege attached to what was said by the appellant at the hearing, two issues arose: first, whether the Tribunal used the information; secondly, whether the appellant waived any privilege. In relation to the first issue, the primary judge concluded that the Tribunal did not use the information but rather the underlying fact that the appellant had delayed in lodging his application for a protection visa. The primary judge noted that the delay was not significant, being only 12 days and added: “In any event, no attack is made on the use by the Tribunal of that amount of … delay, but rather on whether or not the Tribunal relied upon the privileged information.”
	3. In relation to the second issue, the primary judge held that the appellant waived the privilege, referring to *Mann v Carnell* (1999) 201 CLR 1 at [28]-[29] and other cases. The primary judge distinguished *SZHWY*, noting that in that case, unlike the present case, the Tribunal member asked the applicant specific questions about what he had said to his lawyer, and that was what was found to have been beyond the scope of the Tribunal’s power.

## The appeal

1. The appellant is no longer represented by a lawyer. His notice of appeal, evidently prepared without legal assistance, contains the following three grounds:
2. I am not satisfied with the judgement of Federal Circuit Court.
3. The decision deprived me of the natural justice.
4. I will provide more ground later.

(Errors in original.)

1. On 14 April 2016, the appellant filed an outline of submissions in which he relied on the following grounds:

(a) The Administrative Appeals tribunal did not follow the proper procedure as required by the migration act 1958. Thus, the procedure that were required by the act or regulations to be observed in connection with the making of the decision were not observed (Muin, Lee’s case).

(b) The AAT decision was effected by an “Error of law” and “jurisdictional error”.

(c) There was no evidence or other material to justify the making of decision.

(Errors in original.)

1. The hearing of the appeal was adjourned on three occasions on the application of the appellant. It was originally set down for hearing on 2 May 2016. It was next set down for 18 May 2016, and then set down for 26 May 2016. Ultimately, on 10 June 2016, I refused an application for a further adjournment and the appeal hearing proceeded. The appellant appeared in person, with the assistance of an interpreter. Subsequently, on 14 June 2016, the appellant filed an affidavit attaching a letter from a consultant psychiatrist to the appellant’s GP (which had been relied on as part of the unsuccessful adjournment application), and attaching a letter regarding the appellant’s community work. A letter from the appellant with (in effect) further submissions was also received by the registry on 14 June 2016. Although filed or submitted without leave, I have read these materials and have had regard to them to the extent relevant to the issues on the appeal.

## Consideration of the appeal

1. I will first refer to the grounds in the notice of appeal, and then refer to the additional matters raised in the appellant’s outline of submissions and in his oral submissions.
2. So far as the notice of appeal is concerned, the first and third grounds of appeal do not raise any particular error in the decision of the primary judge (or the reasons of the Tribunal).
3. The second ground of appeal is that the appellant was denied natural justice. It appears that this ground relates to the hearings before the Tribunal rather than the hearing before the primary judge. In his outline of submissions, the appellant makes the following submissions which appear to relate to his denial of natural justice ground:
	1. The Tribunal did not give proper consideration to the appellant’s application. By letter dated 14 July 2014, the Tribunal stated that the Tribunal had considered the material before it but was unable to make a favourable decision on this information; it therefore invited the appellant to appear before the Tribunal to give evidence and present arguments.
	2. The letter from the Tribunal was misleading because the Tribunal had not read all the documents on which the delegate had relied in making the original decision, including country information documents and documents relating to the appellant’s claim as a refugee.
	3. The documents before the delegate established the appellant’s claim as a refugee. The Tribunal did not take into account all relevant information. The Tribunal did not read all of the materials which supported the appellant’s claims. The situation is the same as or similar to that considered in *Muin v Refugee Review Tribunal* (2002) 190 ALR 601 (***Muin***). In that case, Mr Muin relied on the assurance in the tribunal’s letter (sent to him before the hearing) to the effect that it had read all of the material relating to his application. Mr Muin was misled into thinking that he did not need to put information before the tribunal.
	4. Similarly, in the present case, the letter dated 14 July 2014 misled the appellant. Had he been told that the Tribunal had not been provided with documents, he would have taken steps to provide them.
	5. Further, the Tribunal relied on adverse material, but it was not explained to the appellant how these documents might be referred to by the Tribunal.
	6. The Tribunal member must have known of his error, but did nothing to correct it, and therefore acted in bad faith.
4. Attached to the appellant’s outline of submissions were a medical certificate dated 2 April 2016 and a document with a handwritten heading, “Bangladesh Country Information”.
5. The appellant’s oral submissions were to similar effect as his outline of submissions. It seems that the document headed “Bangladesh Country Information”, attached to the outline of submissions, is the document (or an example of the documents) which the appellant contends the Tribunal failed to take into account.
6. In my view, the appellant has not established any denial of natural justice or procedural fairness in relation to the hearings before the Tribunal. There is no basis to infer that the Tribunal did not have before it all relevant material, including the documents that were before the delegate. The Tribunal’s reasons include extensive consideration of country information at [70]-[168]. This is the type of material that the appellant contended had been before the delegate but had not been passed on to the Tribunal. The Tribunal’s reasons also demonstrate a thorough examination of all material provided by the appellant – see the Tribunal’s reasons at [23], [26], [61], [62], [63], [64], [65], [66], [67], [69] and [169]. The Tribunal referred to documentation on file at [170]. Taking the above into account, the circumstances are not comparable to those pertaining to Mr Muin as considered by the High Court: cf, eg, *Muin* at [59]-[62] per Gaudron J; at [250] per Hayne J.
7. Insofar as the appellant contends that the documents before the delegate established his claim as a refugee, this was not accepted by the Tribunal. The Tribunal set out its reasons for rejecting the appellant’s claims in detail in its reasons. This contention seeks to engage the Court in impermissible merits review.
8. Insofar as the appellant contends that the Tribunal failed to raise adverse material with him, the Tribunal’s reasons at [39]-[69] (the section dealing with the second hearing) record many questions asked by the Tribunal in the course of the second hearing. It is apparent from these questions that the Tribunal was testing the appellant’s account and thus raising with him material which may be adverse to his claim.
9. For these reasons, the matters raised by the appellant in his outline of submissions and oral submissions do not establish a denial of natural justice or procedural fairness by the Tribunal. Nor do they support the proposition, raised in the appellant’s outline of submissions, that the Tribunal member acted in bad faith.
10. The appellant did not seek to re-agitate the matters raised before the primary judge. I note for completeness that there does not appear to be error in the primary judge’s disposition of the grounds raised in the Federal Circuit Court.

## Conclusion

1. It follows that the appeal is to be dismissed. There is no apparent reason why the costs of the appeal should not follow the event. There is also no apparent reason why these should not include reserved costs, including the costs of the adjourned hearings. I will therefore order that the appellant pay the Minister’s costs of the appeal, including reserved costs. However, as the matter of costs was not directly addressed in submissions, if either party wishes to seek a variation of the costs order the party may give written notice to the Court and the other party within three business days. In that event, directions will be made for the provision of written submissions on costs, and the issue of costs will then be determined ‘on the papers’.

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| I certify that the preceding twenty-three (23) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Moshinsky. |

Associate:

Dated: 5 October 2016