FEDERAL COURT OF AUSTRALIA

AAX15 v Minister for Immigration and Border Protection [2015] FCA 1206

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| Citation: | AAX15 v Minister for Immigration and Border Protection [2015] FCA 1206 |
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| Appeal from: | AAX15 v Minister for Immigration & Anor [2015] FCCA 2089 |
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| Parties: | **AAX15 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION and ADMINISTRATIVE APPEALS TRIBUNAL** |
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| File number(s): | NSD 1010 of 2015 |
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| Judge(s): | **GRIFFITHS J** |
|  |  |
| Date of judgment: | 9 November 2015 |
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| Catchwords: | **MIGRATION** – appeal from a decision of the Federal Circuit Court of Australia (‘FCCA’) dismissing an application for review of a decision of the Refugee Review Tribunal (‘Tribunal’) to affirm the first respondent’s refusal to grant the appellant’s protection visa application – where the appellant claims the FCCA failed to consider if the Tribunal acted in a ‘manifestly unreasonable way’ and failed to consider the appellant’s circumstances  |
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| Legislation: | *Migration Act 1958* (Cth) ss 91R(1), 424AA, 424A, 424A(3)(b)  |
|  |  |
| Date of hearing: | 9 November 2015 |
|  |  |
| Place: | Sydney |
|  |  |
| Division: | GENERAL DIVISION |
|  |  |
| Category: | Catchwords  |
|  |  |
| Number of paragraphs: | 20 |
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| Counsel for the Appellant: | The appellant appeared in person |
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| Solicitor for the First Respondent: | Ms R Krishnan, Australian Government Solicitor |
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| Counsel for the Second Respondent: | The second respondent submitted to any order the Court might make in the proceeding |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 1010 of 2015 |

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| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

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| BETWEEN: | AAX15Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| JUDGE: | GRIFFITHS J |
| DATE OF ORDER: | 9 November 2015 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent’s costs as agreed or assessed.

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 |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 1010 of 2015 |

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| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

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| BETWEEN: | AAX15Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| JUDGE: | GRIFFITHS J |
| DATE: | 9 November 2015 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

1. This is an appeal from a judgment of the Federal Circuit Court of Australia (**FCCA**) delivered on 7 August 2015 in which the FCCA dismissed an application for judicial review of a decision of the Refugee Review Tribunal (now the Administrative Appeals Tribunal: the **Tribunal**). The Tribunal affirmed a decision of the Minister’s delegate to refuse to grant the appellant a Protection (Class XA) visa (**protection visa**).

## Summary of background facts

1. The appellant is a 28 year old citizen of Pakistan who arrived in Australia on a student visa in March 2009. His student visa was extended in July 2010 but he was unsuccessful in obtaining a third student visa.
2. On 5 July 2013, the appellant’s father shot and killed his mother in Pakistan. On 30 August 2013 the appellant applied for a protection visa. He claimed to fear harm from his father and his father’s associates for reasons including his membership of a particular social group (his family), religion and political opinion. The delegate refused his protection visa application on 3 March 2014. He applied to the Tribunal for a review of that decision on 1 April 2014. At the Tribunal hearing, the Tribunal heard evidence from the appellant and also obtained oral evidence from his uncle by telephone.
3. The Tribunal affirmed the decision of the delegate on 2 February 2015. It accepted that the appellant’s father had killed his mother in July 2013 and that the father had possibly been violent towards the appellant and his brother. It concluded, however, that the appellant had fabricated the other aspects of his claims for a protection visa in order to remain in Australia after he had failed to obtain a further student visa. At [21] of its reasons for decision, the Tribunal stated:

However, the Tribunal does not accept any of the applicant’s other claims in relation to his father’s connection to extremist groups; he killed the applicant’s mother because of this or because of his “atheist” beliefs; or that the applicant’s brother is in hiding in Karachi. The Tribunal considers that the applicant has manufactured aspects of his claims in an attempt to provide a basis for protection due to his desire to remain in Australia where he has resided for some time following the cessation of his studies…

1. The Tribunal then provided a more detailed explanation for reaching those conclusions. They included a finding that the appellant’s father would not seek him out if he were to return to Pakistan and attempt to harm him, particularly given that the appellant is in his late twenties and has lived apart from his father for some years. The Tribunal did not accept that there was evidence which supported the claim that his father wished to harm the appellant.
2. The Tribunal then considered and rejected the appellant’s claim under s 36(2)(aa) of the *Act*.

## The FCCA proceedings

1. On 25 February 2015 the appellant sought judicial review of the Tribunal’s decision in the FCCA. His amended application dated 12 May 2015 contained the following five grounds of review (errors in original):

1. The Second Respondent committed jurisdictional error by failing to address the applicant’s claims in the way it was made;

a. The applicant stated in his protection visa that his father has links with terrorist groups.

b. The applicant’s father has murdered his mother.

c. The Tribunal did not consider the way that applicant’s father controlling behaviour prevent him from studying.

d. The Tribunal did not consider that the applicant is genuinely fearful that his father will seek him out upon his return to Pakistan.

2. The second respondent 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 part of the reason 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.

3. The Tribunal constructively failed to exercise its jurisdiction;

Particular:

The applicant provided documents to the Tribunal to corroborate his claims. The Tribunal failed to engage in an active intellectual process of thee documents. The Tribunal ultimately gave the documents no weight on the basis of credit findings. It was an error for the Tribunal to place no weight on the documents without engaging to the contents of these documents. It was an error for the Tribunal to assess the applicant’s credit without first assessing whether the substance of the documents corroborated his claims.

[4.] The Tribunal failed to consider properly the test whether the applicant would suffer serious harm as per s91R(2)(a) of the Migration Act.

[5.] The Tribunal had no jurisdiction to make the said decision because its “reasonable satisfaction” was not arrived in accordance with the provisions of the Migration Act.

1. The primary judge’s reasons for rejecting each of these grounds of review may be summarised as follows.
2. As to ground 1, the primary judge found that the Tribunal had in fact considered all of his claims.
3. As to ground 2, the primary judge noted that the appellant had not particularised the relevant information for the purposes of his argument concerning s 424A of the *Migration Act 1958* (Cth) (***Act****).* Moreover, his Honour found that the only information which might arguably be caught by that provision fell within the exception in s 424A(3)(b). This was because the appellant’s migration history, including the refusal to grant him a third student visa and his unsuccessful appeal therefrom, was set out in the delegate’s decision record which had been provided to him.
4. The primary judge approached ground 3 on a bifurcated basis. First, on the basis that it was contended that the Tribunal had erred by placing no weight on documents without engaging with their contents. Secondly, that it allegedly erred by assessing the appellant’s credit without first assessing whether the substance of the documents corroborated his claims. Both contentions were rejected by the primary judge by reference to the Tribunal’s consideration and analysis of the relevant documents.
5. As to ground 4, the primary judge found that the Tribunal was not obliged to consider whether the harm the appellant claimed to fear amounted to serious harm under s 91R(1) of the *Act* because it had already found that there was no real chance of harm were he to return to Pakistan and also that the appellant did not have any genuine fear of such harm.
6. As to ground 5, the primary judge held that the appellant had failed to establish any basis for challenging the Tribunal’s statement that it was not satisfied that he met the criteria for a protection visa.

## The appeal

1. The two grounds raised in the notice of appeal are (errors in original):

1. The FM failed to consider that the Tribunal acted in a manifestly unreasonable way when dealing with the applicant claim and ignoring the aspect of persecution and harm in terms of Sec.91R of the Act. The Tribunal failed to observe the obligations amounted to a breach of Statutory Obligation.

2. The Federal Circuit Court failed to take into consideration that the Tribunal’s decision was unjust and was made without taking into account the full gravity of my circumstances and consequences of the claim.

1. Notwithstanding the directions which were made on 27 August 2015, the appellant failed to provide any written submissions in support of his appeal. At the hearing of the appeal, the appellant represented himself. He was invited to make oral submissions in respect of his appeal. In broad terms, the appellant’s oral submissions were as follows:
	1. he was not satisfied with the decision of the Tribunal or the FCCA;
	2. he has lived in Australia for the past eight years; and
	3. he feared losing his life if he were to return to Pakistan.
2. None of these matters raised by the appellant constitutes an appellable error which would justify this Court interfering with the orders made by the FCCA below.
3. I accept the Minister’s submissions that, even if the appellant were permitted to raise these grounds (which were not run below) they are without foundation.
4. The FCCA cannot be criticised for failing to consider whether the Tribunal acted in a “manifestly unreasonable way” when no such contention was advanced before it to that effect by the appellant. In any event, it is evident from [25] of the FCCA’s reasons for judgment that the primary judge correctly understood and applied s 91R of the *Act*.
5. As to ground 2, in substance this ground invites the Court to step into the shoes of the FCCA and conduct a merits review of the Tribunal’s decision. That is plainly not the function of the FCCA in conducting a judicial review, nor is it the function of this Court in hearing an appeal from a decision of the FCCA. To the extent that this ground purports to reagitate ground 1 of the amended application for judicial review in the FCCA (i.e. a failure to address the appellant’s claims), no appellable error has been established in respect of the primary judge’s explanation for rejecting that ground.

## Conclusion

1. For these reasons, the appeal must be dismissed and the appellant ordered to pay the Minister’s costs.

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| I certify that the preceding twenty (20) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Griffiths. |

Associate:

Dated: 9 November 2015