FEDERAL COURT OF AUSTRALIA

BMZ15 v Minister for Immigration and Border Protection [2017] FCA 740

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| Appeal from: | *BMZ15 v Minister for Immigration & Anor* [2016] FCCA 2835  |
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| File number: |  |
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| Judge: | **LOGAN J** |
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| Date of judgment: | 10 May 2017 |
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| Catchwords: | **MIGRATION** – application for protection visa – repeat visa applications – complementary protection – decision of Refugee Review Tribunal refusing protection visa – decision of primary judge affirming decision of Tribunal – unreasonableness – refusal by Refugee Review Tribunal to grant extension of time pending preparation of psychologist report – whether refusal unreasonable – appeal dismissed  |
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| Legislation: | *Migration Act 1958* (Cth) s 48A  |
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| Cases cited: | *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088*Minister for Immigration v Li* (2013) 249 CLR 332 *SZGIZ v Minister for Immigration and Citizenship* (2013) 212 FCR 235  |
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| Date of hearing: | 10 May 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: | 18 |
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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 Respondents: | Clayton Utz |

ORDERS

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|  | NSD 2083 of 2016 |
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| BETWEEN: | BMZ15Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| JUDGE: | LOGAN J |
| DATE OF ORDER: | 10 MAY 2017 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant is to pay the costs of the first respondent, which are fixed in the sum of $3,439.

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

REASONS FOR JUDGMENT

(REVISED FROM TRANSCRIPT)

LOGAN J:

1. The appellant is a citizen of Nepal. He came to Australia on 18 December 2004 pursuant to that class of visa under the *Migration Act 1958* (Cth) (the Act) known as a Sponsored Family Visitor Visa. That visa permitted him to remain in Australia up to and including 18 March 2005. On 21 January 2005, while in Australia, the appellant applied for that class of visa under the Act known as a Protection Visa. That particular application was not successful, a result finally determined in the High Court on 2 February 2010. That same day he lodged a second Protection Visa application.
2. It is that second application which forms the foundation of the present proceedings. There was quite some lapse of time between the making of the second Protection Visa application and a decision of the then Refugee Review Tribunal (Tribunal) on 29 June 2015 to affirm a decision of a delegate of the present first respondent, the Minister for Immigration and Border Protection, not to grant to the appellant a Protection Visa. The occasion for that lapse of time is set out in the Tribunal’s reasons. It is not necessary to refer to particular events subsequent to the lodging of the second Protection Visa application on 2 February 2010 in detail, only to some material which consequentially came to be before the Tribunal prior to the making of the decision on 29 June 2015.
3. That decision was preceded by a hearing before the Tribunal on 28 October 2014. The appellant had the benefit of representation at that hearing. Part of the material before the Tribunal at that hearing was a report from a Ms Amanda Gordon, a principal clinical psychologist in private practice, dated 9 September 2014. That report recited, amongst other things, that the appellant had been seeing a psychiatrist for some time, was being treated for depression and had been on antidepressants for the last four months and used sleeping tablets. This psychologist, as the Tribunal recorded accurately at [8], described the appellant as:

… a reasonably healthy looking man of 43 who presented with an anxious mood. He completed an Outcome Questionnaire endorsing items of distress mood. The applicant was very sincere in his distress when he described his political activities in Nepal, and severely mourns the death of his brother-in-law. He misses his wife and described elements of Post-Traumatic Stress Disorder and is currently affected by depression.

[sic]

1. The Tribunal’s reasons elsewhere disclose that the appellant's wife and a son remain in Nepal and that he speaks to them by telephone two to three times a week. At the time when that psychologist gave her report the appellant was living with his two university-aged children, who were studying in Australia, and another female relative. The Tribunal approached the determination of the appellant’s request for review on the basis that it was affected by the Full Court's judgment in *SZGIZ v Minister for Immigration and Citizenship* (2013) 212 FCR 235 at [38] (*SZGIZ*) and s 48A of the Act as it stood at the time of the Protection Visa application. On the Tribunal’s understanding of the effect of *SZGIZ* the Tribunal concluded that it did not have power to consider the claim by reference to the Refugee Convention criterion in s 36(2)(a) of the Act. Accordingly, the Tribunal proceeded to determine the review on the basis that it could permissibly consider the appellant’s claims only under the complementary protection provisions in s 36(2)(aa) of the Act.
2. There was no complaint pressed in the subsequent judicial review application alleging error in this regard by the Tribunal, nor did it feature as a ground of appeal.
3. Another feature of the Tribunal’s approach to the determination of the review was that the Tribunal regarded it as affected by s 416 of the Act. That explains why the Tribunal, in making findings in respect of the second Protection Visa application, chose to adopt particular findings made by the Tribunal as earlier and differently constituted. Once again, a transgression of, or failure to correctly construe and apply, s 416 of the Act did not feature either as a ground of review before the Federal Circuit Court or as a ground of appeal in the appeal to this Court.
4. As originally made, the Protection Visa application was based upon the appellant’s asserted support and sympathy for the Maoists in Nepal (see the claim specification, appeal book, p 23). By the time when the Tribunal came to consider the second Protection Visa application, the appellant’s asserted basis for his claim had undergone something of an evolution in that his claim was that he no longer supports the Maoists or the Maoist Government in Nepal and that, although he continues to support the Maoists’ ideologies, he will become the target of Maoists in Nepal/India. The Tribunal reasons (appeal book, p 221 at [50]) rely on earlier findings which rejected, on credibility grounds, the appellant’s claims of previous involvements with Maoists or Maoist-related groups. The Tribunal was not satisfied that the appellant would be of any interest to any group or anyone in Nepal due to an alleged change in alliance.
5. The Tribunal took into account the psychological assessment mentioned. The Tribunal observed of this:

… that the applicant attended the assessment after the Departmental Interview, and was assessed on only two occasions over a relatively short period of time. As noted above, the applicant has been found to lack credibility, and, based on the limited assessment undertaken by the psychologist, the applicant’s lack of credibility and the lack of credible evidence in support of the applicant’s broader claims regarding his involvement with Maoists, the Tribunal has given the evidence from the psychologist limited weight –

[appeal book p 221, Reasons at [47]]

1. The Tribunal expressly considered, as the appellant had put forward, whether his previously non-accepted evidence might be explained by reference to anxiousness, fear, exhaustion, depression, distress and lethargy, resulting in mistakes in the provision of the evidence. The Tribunal was not persuaded, for the reason given, that the psychologist’s evidence was explanatory of this. On 29 June 2015, before the Tribunal came to hand down its reasons, an email was received from the appellant’s then representatives. That email stated:

The applicant request us to inform the RRT that he is seeing a psychologist Ms Payal Parmer … and will provide a report from the psychologist. He advised us that the Psychologist will provide a report in 3 – 4 weeks and request the Tribunal not to take any decision until he provides the report from his psychologist.

[sic]

1. A prompt response to this request was made by the Tribunal on 29 June 2015. Materially, that response stated:

The presiding Member has advised that after consideration, delay in decision is not granted on the basis of:

(1) the Review Applicant has already provided a psychologist report;

(2) no explanation was given as to why a second report was required;

(3) no firm time limit was requested. 3 – 4 weeks is a vague request.

1. In the subsequently published reasons, the Tribunal took up these points (at [18]). The Tribunal added:

The Tribunal also finds that the applicant has already provided evidence regarding a psychological assessment (noted elsewhere) and due to this, and concerns regarding the applicant’s credibility (noted elsewhere), the Tribunal has made the decision to proceed to final decision.

1. The appellant subsequently sought the judicial review by the Federal Circuit Court of the Tribunal’s decision. There were two grounds of review specified in the judicial review application. One concerned the correctness or otherwise of the approach taken to the effect of s 48A of the Act. The other alleged that the Tribunal had acted unreasonably in refusing to the appellant additional time within which to submit further documents, which were particularised as the report of a psychologist. Only the second of these came to be pressed on the hearing of the judicial review application: see [13] of the Federal Circuit Court’s reasons for judgment. As to the remaining ground, the Federal Circuit Court considered that to lack merit. On 21 November 2016, that court dismissed with costs the appellant’s judicial review application. The appellant had the benefit of legal representation in respect of that judicial review application.
2. It is from that order of dismissal that the appellant now appeals to this Court. On the appeal, he appeared on his own behalf. The grounds of appeal are stated in a way all too common in cases where appellants act on their own behalf and without any particular legal training. By that, and I mean no disrespect to the appellant in making that observation, I mean that the grounds of appeal do not, as they should, engage with the reasons for judgment of the Federal Circuit Court, as opposed to the reasons of the Tribunal.
3. Even so, it is possible, albeit benignly, to read the notice of appeal on the basis that it alleges that the Federal Circuit Court ought to have found jurisdictional error on the bases asserted as grounds of appeal. What is stated as the grounds of appeal is as follows:

Decision made without considering my health status, failure to identify past and present circumstances, decision taken harshly without considering my situation.

1. In part, this stated challenge, read benignly, appears to me to raise for consideration whether the Federal Circuit Court ought to have found that the Tribunal’s refusal to grant extra time in order to lodge with it a further psychologist’s report was unreasonable in the sense described in the joint judgment in *Minister for Immigration v Li* (2013) 249 CLR 332 (*Li*). As I observed to the appellant, so read, the ground does raise a point of principle known to law. The question is whether or not in the circumstances it was an error for the Federal Circuit Court judge to conclude, as his Honour did, that no unreasonableness affected the Tribunal’s refusal?
2. This is not a case where there was an obvious answer to an obvious inquiry which would entail no delay of any moment in the final determination of the review. It was not made explicit in the request to the Tribunal on the appellant’s behalf to exactly what subject or, more particularly, what new subject the further psychologist’s report would go. The Tribunal was correct in apprehending that there was already a basis put forward said to be explanatory, by reference to the appellant’s condition, of earlier regarded inaccuracies in his account in support of his claim. It behoves those who after hearing seek further time within which to lodge further evidentiary material to make out in proper detail a case as to why further time ought to be allowed.
3. The Tribunal’s reasons for declining to allow further time are certainly intelligible. Moreover, when one looks to the sparseness of specified reason in the request and the lapse of time after the hearing, it was not unreasonable for the reasons given by the Tribunal to decline to allow further time. There is no analogy to be drawn between the circumstances of the present case and those of *Li*.
4. It is also possible to read the specified grounds of appeal as raising for consideration whether all of the integers of the claim as made for a Protection Visa were considered by the Tribunal. Not to do so would entail a jurisdictional error of the kind described by the High Court in *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088. An immediate difficulty about reading the grounds of appeal as embracing such a claim is that the point was not taken on judicial review before the Federal Circuit Court, and that at a time when the appellant had the benefit of legal representation. This aside, a study of the Tribunal’s reasons, in conjunction with the claim, both as made and as it evolved over time, discloses no failure on the part of the Tribunal to consider the integers of the Protection Visa claim. The Tribunal’s ultimate conclusion that a claim for a Protection Visa based on the complementary ground was not made out was one reasonably open to the Tribunal. More particularly, the credibility findings, both as adopted and as the Tribunal made itself, were reasonably open. It necessarily follows from the foregoing that the appeal must be dismissed.

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| I certify that the preceding eighteen (18) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Logan. |

Associate:

Dated: 5 July 2017