FEDERAL COURT OF AUSTRALIA

AUN17 v Minister for Home Affairs [2019] FCA 1576

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| Appeal from: | *AUN17 v Minister for Immigration & Anor* [2019] FCCA  826 |
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| File number: | VID 398 of 2019 |
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| Judge: | **BEACH J** |
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| Date of judgment: | 23 September 2019 |
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| Catchwords: | **MIGRATION** – relevance of Tribunal delay in delivering decision – whether delay unreasonable – failure to accord procedural fairness – no jurisdictional error – appeal dismissed |
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| Legislation: | *Migration Act 1958* (Cth) ss 36(2)(aa), 414, 424AA, 424A, 425 |
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| Cases cited: | *Minister for Immigration and Border Protection v SZVCH* (2016) 244 FCR 366  *NAIS v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 228 CLR 470 |
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| Date of hearing: | 23 September 2019 |
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| Registry: | Victoria |
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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: | 34 |
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| Counsel for the Appellant: | The Appellant appeared in person with the assistance of an interpreter |
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| Counsel for the First Respondent: | Mr JWG Grant |
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| Solicitor for the First Respondent: | Sparke Helmore Lawyers |
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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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|  | | VID 398 of 2019 |
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| BETWEEN: | AUN17  Appellant | |
| AND: | MINISTER FOR HOME AFFAIRS  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | BEACH J |
| DATE OF ORDER: | 23 SEPTEMBER 2019 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent’s costs of and incidental to the appeal to be taxed in default of agreement.

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

REASONS FOR JUDGMENT

BEACH J:

1. The appellant, who is a citizen of India and is a Sikh, appeals from a decision of a judge of the Federal Circuit Court delivered on 1 April 2019. The primary judge dismissed an application for judicial review of a decision of the second respondent (the Tribunal) made on 20 January 2017 affirming a decision of a delegate of the Minister not to grant the appellant a protection visa (the visa).
2. For the reasons that follow I would dismiss this appeal.

## Background

1. On 19 August 2013, the appellant applied for the visa. An earlier protection visa application had been unsuccessful. The appellant claimed to face a real risk of significant harm in India in relation to inter-alia matters arising from the forced acquisition of his family farm by the State Government of Uttaranchal, India in 2006 and issues arising from his support of Sikh rights and in particular the views espoused by Simranjit Singh Mann and the Shiromani Akali Dal party.
2. On 25 September 2014, the delegate refused to grant the appellant the visa.
3. On 14 October 2014, the appellant applied to the then Refugee Review Tribunal (now the Tribunal) for review of the delegate’s decision.
4. On 20 October 2015, the appellant was invited to attend a hearing before the Tribunal on 17 November 2015. Following a request for a postponement from the appellant’s representative, on 2 November 2015 the appellant was invited to attend a hearing before the Tribunal on 26 November 2015 and did so. But the hearing was adjourned as the interpreter had to depart for a reason that is not presently relevant. On 22 December 2015, the appellant’s representative requested that the further hearing not be listed until at least 13 January 2016. On 22 January 2016, the appellant was invited to attend a further hearing on 11 February 2016, and again did so.
5. On 25 February 2016, the appellant’s representative wrote to the Tribunal requesting that it delay its decision pending the outcome of appeals to the Federal Court in other matters not directly involving the appellant. On 2 August 2016, the Tribunal wrote to the appellant advising that it would proceed to make a decision, and enquired whether the appellant wished to make any further submissions. On multiple occasions during August to October 2016, the appellant’s representative sought extensions to provide further submissions or evidence. The appellant’s representative then provided further submissions and evidence during that period with the last tranche of supporting material submitted to the Tribunal on 2 November 2016.
6. On 20 January 2017, the Tribunal affirmed the delegate’s decision.
7. The Tribunal only considered the appellant’s claims under s 36(2)(aa) of the *Migration Act 1958* (Cth) by reason of the operation of s 48A of the Act. Neither before me nor the primary judge was that narrower approach challenged.
8. The Tribunal accepted that the appellant’s family had farmed a plot of land in the State of Uttarakhand (formally Uttaranchal), which had been appropriated by the State of Uttarakhand. It accepted that the appellant had not received any compensation and was unlikely to.
9. The Tribunal accepted that the appellant had joined the Bahujan Samaj Party (BSP), and may have been hit and arrested whilst protesting. The Tribunal had doubts that the appellant had been detained by police for a number of days on three separate occasions, but gave him the benefit of the doubt. The Tribunal did not accept that the appellant would be of any interest to the police should he return to India given his evidence that he was released without charge in January 2006, he had not indicated that he had been subsequently charged or detained before his departure from India in July 2006, and the protests which he said gave rise to his being detained and mistreated were not ongoing. The Tribunal found that the appellant did not face a real risk of significant harm from the Uttarakhand police.
10. The Tribunal gave weight to the appellant’s skills as a welder and turner and experience in manufacturing and repairing agricultural equipment, which it considered would be in demand in India. The Tribunal accepted that it was plausible that the appellant had taken out a loan from the Bhartiya State Bank, but did not accept that the appellant was sought in relation to the loan and might be arrested upon his return to India. Whilst the Tribunal accepted that the appellant might suffer some financial hardship, it considered that he had the skills to obtain paid employment in India. On the basis of country information, the Tribunal did not accept that the appellant would be unable to gain employment because he is a Sikh. The Tribunal consequently did not accept that there was a real risk that the appellant would suffer significant harm in the form of dire economic hardship and destitution resulting in severe pain and suffering, as a consequence of the loss of his father’s land and the failure of the State of Uttarakhand to pay him compensation.
11. The Tribunal accepted that the appellant publicly supported Sikh rights and would do so if he returned to India, although it did not consider that he was prominent or active in his support. On the basis of country information, the Tribunal found that Sikhs who are engaged in peaceful political activity do not face a real risk of significant harm in India, and did not accept that the appellant faced a real risk of significant harm on this basis.
12. The Tribunal consequently found that the appellant did not meet the complementary protection criterion for the grant of the visa under s 36(2)(aa) of the Act.
13. On 23 February 2017, the appellant applied to the Federal Circuit Court for judicial review of the Tribunal’s decision. By an amended application filed 18 January 2019, the appellant advanced a single ground of review:

The Tribunal did not afford the [appellant] a fair hearing as required by s 425(1) in circumstances where there was nearly 12 month [sic] between the hearing and decision and the Tribunal made adverse credibility findings.

1. The application was heard by the primary judge on 15 February 2019. It was dismissed on 1 April 2019.
2. In summary, the primary judge correctly had regard to *NAIS v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 228 CLR 470 (*NAIS*), and observed that the relevant issue was not the precise period of delay but rather the likely effect on the decision maker’s capacity to make a proper assessment of the sincerity and reliability of witnesses. The primary judge found that it was relevant that the Tribunal was ready to make a decision by 2 August 2016, with the balance of the delay resulting from the appellant’s representative’s extension requests. His Honour found that the delay attributable to the Tribunal was not out of the ordinary in a case with a large volume of documents and where the outcome was of such significance to the appellant. Further, the primary judge found that the Tribunal’s findings were not predominately based upon the appellant’s *demeanour* as a witness or mere assertions of implausibility without more, but rather that the Tribunal had made a careful analysis of the plausibility and cogency of the appellant’s evidence. Moreover, the primary judge found that delays caused by a party seeking time to provide further material, even if they have adverse consequences, must be taken to be accepted by the party seeking further time. The primary judge was not satisfied that the appellant had established his ground of review, and accordingly dismissed the application. At this point I need not elaborate further on his Honour’s reasons.

## The present appeal

1. In terms of the appeal before me, the notice of appeal contains the following three grounds:

1. The Federal Circuit Court erred in not concluding that the delay of 14 months by the Tribunal in coming to its decision has resulted in [the appellant] no longer having a real and meaningful hearing [per *NAIS*].

…

2. That [the primary judge] erred in not holding that the Tribunal made jurisdictional error as it failed to comply with Section 414 of the *Migration Act 1958* (the Act).

…

3. The [appellant’s] application clearly raises an arguable case.

1. Let me deal with grounds one and two in some detail, albeit that ground two does not appear to have been raised in terms before the primary judge, although I will give the appellant leave to raise it. Ground three is meaninglessly expressed and goes nowhere; the appellant before me was given the opportunity to provide meaningful detail but did not do so.

#### Ground one

1. In *NAIS* a majority of the High Court held that a delay of 4.5 years between the Tribunal’s hearing and its decision was likely to have prevented the Tribunal from satisfactorily and fairly weighing up oral evidence given at the hearing, particularly where witness demeanour was of some significance. Where the Tribunal’s decision was significantly predicated on demeanour assessment, there can be a denial of a right to a fair hearing based upon undue delay (see particularly Gleeson CJ at [7] to [11]).
2. In my view the primary judge did not err in finding that there was no such denial in the present case. The substantial bulk of the period between the Tribunal’s hearings and its decision was explicable by the appellant’s own requests for time, and was not unreasonable. Further, any delay did not deny the Tribunal an opportunity to properly consider the appellant’s case because the Tribunal’s findings were not substantially predicated on demeanour. In *NAIS* Gleeson CJ held that the overriding question was the fairness of the procedure followed. But the case he was considering was as he described at [7] and [8]:

There may be some circumstances in which delay has had a direct and demonstrable effect on the outcome of administrative proceedings…On the other hand…, there may be cases where it is difficult, or even impossible, to know the consequences of delay. The problem has been discussed, in a different context, in connection with appellate scrutiny of findings of fact by trial judges where it is argued that delay has resulted either in specific error or in an unsafe outcome. In the present context, which is not one of appellate scrutiny, but of judicial review of an administrative decision for jurisdictional error, the question is one of fairness of procedure. What is said to be unfair is that the Tribunal made demeanour-based findings against the appellants in circumstances where four and a half years elapsed between the observation of the demeanour and the making of the findings. Finkelstein J pointed out that the second hearing, of 19 December 2001, was convened for only a limited purpose, and commented that, had it not been for the second hearing, it was doubtful if the Tribunal member who made the decision would have recognised the appellants if he had seen them again in late 2002 or early 2003.

Some of the findings of the Tribunal adverse to the credit of the appellants were based, not on demeanour, but on their own admissions. That people who claim to fear for their lives admit to having told lies in an attempt to advance their claims for protection does not necessarily destroy their credibility. It might simply demonstrate their fear. On the other hand, there were a number of examples of findings by the Tribunal, adverse to the appellants, that turned on an assessment of their credibility in circumstances that must have been influenced by the Tribunal’s observation of their demeanour. Evidence that was not inherently improbable, or contradicted by objective facts, was rejected as “implausible”. The fact that the third appellant (then aged twelve) “displayed no signs of trauma or concern” in her evidence at the second hearing (more than a year before the decision) was treated as indicating that her account of an attack, in which her mother intervened, was fabricated.

(Citations omitted.)

1. But the scenario he was dealing with was far removed from the present case. In the case that he was considering the delay was much greater, being 4.5 years, the delay was caused by the Tribunal and the Tribunal’s assessment was based in significant aspects on demeanour assessment. Now contrast this with the case I am dealing with.
2. First, most of the delay was caused by the appellant or his representative, not the Tribunal.
3. The first hearing held on 26 November 2015 was adjourned when the interpreter had to depart. The appellant’s representative requested that the second hearing not be listed until at least 13 January 2016. On 22 January 2016, the Tribunal invited the appellant to the second hearing on 11 February 2016. Fourteen days later, the appellant’s agent requested that the Tribunal delay determining the matter indefinitely pending the outcome of appeals to the Federal Court in other matters. On 2 August 2016, the Tribunal advised that it would proceed to make a decision on the then current law, and enquired whether the appellant wished to make further submissions. Indeed, as the primary judge found, it may be inferred from this email that the Tribunal was in a position to finalise its decision on 2 August 2016. The Tribunal was subsequently delayed in finalising the matter until 2 November 2016 by a further seven requests for extensions of time, all of which were granted. Its decision followed a little over two and a half months later, which bridged the Christmas period. Of the 344 days between the second hearing and the Tribunal’s decision, only three months or so in total were in the Tribunal’s hands. The remaining substantial delay arose from the appellant’s requests. Further, the delay between the appellant’s final submission on 2 November 2016 and the Tribunal’s decision on 20 January 2017 is also partly explicable by the Tribunal’s analysis of the volume of subsequently provided submissions, evidence, and country information.
4. In my view the delay was explicable, not unreasonable, and did not arise by reason of some substantial default on the part of the Tribunal.
5. Second and as I have said, what was significant in *NAIS* was that the Tribunal’s rejection of the applicants’ claims was significantly based on adverse credibility findings arising from the Tribunal’s assessment of demeanour. Contrastingly, in the present case the Tribunal’s decision was comprehensive, detailed, and cogently reasoned based on inconsistencies, contradictions and other matters not related to witness demeanour. That is, the Tribunal’s adverse credibility findings were premised on the *substantive* content rather than demeanour assessment of the appellant’s own evidence, which was for the most part accepted and which the Tribunal in effect considered undermined his overlying claims to fear harm, certain substantial aspects of the appellant’s evidence which the Tribunal in effect considered implausible with the basis of that view explained, and country information.
6. In my view this is not one of those unusual cases in which inordinate delay has vitiated the Tribunal’s proceedings or its determination. There was no substantial delay that could be laid at the feet of the Tribunal. Moreover, the nature of the Tribunal’s consideration and determination was not relevantly affected by any such delay to the level required to establish jurisdictional error. The primary judge correctly analysed the matter. The first ground of appeal must be rejected.

#### Ground two

1. This ground was not raised at first instance but it was expedient to grant leave to raise it this morning for the purposes of readily disposing of it. This ground alleges a failure to comply with s 414 of the Act, that is, the statutory imperative for the Tribunal to review a Part 7 reviewable decision if a valid application for review is made. The particulars allege that:

(a) The delegate (reviewer) was under a duty to accord the applicants procedural fairness when determining whether to recommend the applicant are or are not entitled to protection.

(b) The duty to accord procedural fairness required the delegate to notify the applicant that one of the issues the delegate intended to consider was whether the applicant met the criterion specified in s. 36(2) (aa) of the Act.

(c) The delegate failed to properly notify the applicants whether the application will be considered as a *refugee under the 1951 Refugees Convention or under the complementary protection*

(d) The delegate failed to invite the applicants to comment and present evidence before refusing the protection visa. See *SZSRX v Minister for Immigration & Anor [2014] FCCA 2447*

1. These contentions have no substance.
2. First, the primary judge did not have jurisdiction to hear an application for judicial review of the *delegate’s* decision as a “primary decision”. Further, if there is no otherwise jurisdictional error in the Tribunal’s decision, that decision would have “cured” any defects and irregularities in the delegate’s decision in any event.
3. Second, the Tribunal complied with its exhaustive procedural fairness obligations. By written invitation made on 20 October 2015, the Tribunal invited the appellant to attend a hearing before the Tribunal. The Tribunal acceded to a request to reschedule the hearing. The appellant attended the hearing and was assisted by a Punjabi interpreter and his representative. The Tribunal adjourned the hearing when the interpreter had to leave early, and accommodated a request as to the reconvened date. The Tribunal subsequently delayed making its decision to accommodate a number of requests to put on further submissions and evidence. Relevantly, and although not required, the Tribunal advised the appellant at the resumed hearing that it would only consider the appellant’s claims under s 36(2)(aa) of the Act. In summary the appellant was on notice of the determinative issues on review. Further, to the extent that there was adverse information which the Tribunal was required to put to the appellant pursuant to s 424A(1) of the Act, it did so. In any event, with one exception, the Tribunal’s decision was predicated on matters which were neither “information” for the purposes of s 424A(1), or which fell within the exceptions at s 424A(3). The apparent exception was information contained in an earlier invalid protection visa application lodged by the appellant. The Tribunal’s decision regarding the appellant’s evidence at the 26 November 2015 hearing records that it put that information to the appellant in accordance with s 424A. It also reports the responses given by the appellant and his agent at the hearing.
4. Third, although the delegate considered the appellant’s claims against the criteria of both ss 36(2)(a) and 36(2)(aa), by virtue of s 48A the Tribunal did not have jurisdiction to consider the visa application against s 36(2)(a) (*Minister for Immigration and Border Protection v SZVCH* (2016) 244 FCR 366 at [33] per Kenny, Siopis and Besanko JJ). Accordingly, the Tribunal was not bound to consider those aspects of the delegate’s decision which were beyond jurisdiction, and it correctly apprehended the narrower scope of its jurisdiction. The Tribunal’s narrower perspective, which was justified by s 48A, was not the subject of challenge before the primary judge nor before me. And it was also clear that the appellant was aware in proceedings before the Tribunal that the s 36(2)(aa) criterion was what was being dealt with.
5. Ground two is not made out.

## Conclusion

1. For the above reasons, none of the appeal grounds have been made out and the appeal must be dismissed with costs.

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| I certify that the preceding thirty-four (34) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Beach. |

Associate:

Dated: 23 September 2019