FEDERAL COURT OF AUSTRALIA

SZVSW v Minister for Immigration and Border Protection [2018] FCA 165

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| Appeal from: | *SZVSW v Minister for Immigration and Border Protection* [2017] FCCA 2095 |
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| File number: | NSD 1685 of 2017 |
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| Judge: | **PERRY J** |
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| Date of judgment: | 27 February 2018 |
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| Catchwords: | **MIGRATION** – appeal from decision of Federal Circuit Court dismissing an application for judicial review of a decision of the Refugee Review Tribunal – where no jurisdictional error identified – appeal dismissed |
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| Legislation: | *Migration Act 1958* (Cth) |
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| Cases cited: | *Craig v South Australia* (1995) 184 CLR 163  *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24  *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39; (2009) 83 ALJR 1123  *Minister for Immigration and Multicultural Affairs v Rajalingam* [1999] FCA 719;(1999) 93 FCR 220  *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323  *Re Minister for Immigration and Multicultural Affairs; ex parte Applicant S20/2002* [2003] HCA 30; (2003) 77 ALJR 1165 |
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| Date of hearing: | 19 February 2018 |
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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: | 29 |
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| Counsel for the First Appellant: | The First Appellant appeared in person and on behalf of the Second Appellant |
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| Solicitor for the Respondents: | Mr L Leerdam of DLA Piper |
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ORDERS

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|  | | NSD 1685 of 2017 |
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| BETWEEN: | SZVSW  First Appellant  SZVSX  Second Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | PERRY J |
| DATE OF ORDER: | 27 FebRUARY 2018 |

THE COURT ORDERS THAT:

1. The appeal is dismissed.
2. The appellants are to pay the costs of the first respondent as agreed or assessed.

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

REASONS FOR JUDGMENT

PERRY J:

##### INTRODUCTION

1. The first and second appellants, who are citizens of Mauritius, are husband and wife respectively. They claimed to fear persecution or significant harm if returned to Mauritius on the ground that the husband belonged to a caste which was lower than that of his wife.
2. The appellants appeal from the decision of the Federal Circuit Court (the **FCC**) dismissing their application for judicial review of a decision by the then Refugee Review Tribunal (the **Tribunal**) given on 3 November 2014. By that decision, the Tribunal affirmed a decision by a delegate of the Minister for Immigration and Border Protection (the **Minister**) to refuse to grant the appellants Protection (Class XA) visas (**protection visas**) under s 65 of the *Migration Act 1958* (Cth) (the **Act**).
3. The Minister filed written submissions in advance of the hearing. While the appellants did not file submissions in advance (by which no criticism is implied), the first appellant appeared at the hearing and put submissions on his own behalf and on behalf of the second appellant.
4. For the reasons set out below, the appeal must be dismissed.

##### BACKGROUND

###### The decision of the delegate

1. The first appellant arrived in Australia in 2008 on a Class TU subclass 572 Visa (**student visa**). The second appellant also arrived in 2008 as the holder of a student visa. The appellants claimed that they commenced a relationship in December 2008, lived together as a de facto couple in mid-2009, and married in 2010. The appellants returned briefly to Mauritius in 2009.
2. In mid-2010 the husband’s student visa was cancelled after his educational provider certified that he had failed to maintain satisfactory course progress. The decision to cancel his visa was affirmed by the (then) Migration Review Tribunal in September 2010. The second appellant’s student visa also expired that month. The appellants thereafter remained in Australia unlawfully.
3. The first appellant applied for a protection visa on 2 April 2013 claiming to fear persecution if returned to Mauritius because of his relationship with his wife. The second appellant was included in the application as a member of the family unit but also made her own specific claims. On 31 January 2014, a delegate of the Minister refused the application for protection visas.

###### The Tribunal’s decision

1. The delegate’s decision was affirmed by the Tribunal on 2 October 2014. The Tribunal summarised the appellant’s claims in its reasons as follows:

226. The applicants claim that the first named applicant belongs to a lower caste and the second named applicant belongs to a higher caste. They claim to have commenced a relationship in December 2008, started living together as a de facto couple in July 2009 and were married in … 2010. They claim that the first named applicant travelled to Mauritius in … 2009 to seek the support of the second named applicant's family for them to marry. They claim that the first named applicant was badly treated by the family of the second named applicant, beaten, threatened with death, his family and property damaged and his family threatened and harassed. They claim that when the second named applicant returned to Mauritius one week after the first named applicant, she was held against her will in the family home, her passport and mobile phone were confiscated, she was not allowed to leave the home or see the first named applicant and she was beaten, tortured and threatened. They claim that the second named applicant escaped from the house … with the assistance of her younger sister, including the recovery of her confiscated passport, went to the airport, [was] followed to the airport by family members but they could not get to her because she was in a secure area of the airport and left the country. They claim that the first named applicant’s family has continued to be harassed and threatened. They claim that only the second named applicant’s younger sister knows about their marriage. They claim that the second named applicant’s uncle is a member of the management committee of a Hindu religious organisation, his [sic] close links to another Hindu organisation, and is a powerful figure within the Hindu community who can harm the applicants. They claim that the second named applicant’s uncle has, in the past, bribed the police and that the police in Mauritius is [sic] corrupt and cannot protect them. The first named applicant claims he will be subject to serious harm and significant harm by higher caste groups or individuals because of his status as a member of a lower caste. They claim that if they returned to Mauritius, the second named applicant will be forced to divorce and marry a man against her will and this man will treat her badly because of her history of residence in Australia with the first named applicant and the circumstances of their relationship. The first named applicant will suffer serious harm and significant harm from his family having married someone from a higher caste. They also claimed to fear torture and death because of their inter-caste marriage and age difference in that the first named applicant is … younger than the second named applicant and they were living together without being married in a religious ceremony or anyone’s knowledge, which is claimed to be culturally unacceptable.

1. The Tribunal found that it was not satisfied that the appellants were persons to whom Australia owed protection obligations under the *1951 Convention Relating to the Status of Refugees.* opened for signature 28 July 1951. 189 UNTS 137 (entered into force 22 April 1954, as amended by the *1967 Protocol Relating to the Status of Refugees.* opened for signature 31 January 1967. 606 UNTS 267 (entered into force 4 October 1967) (the **Refugees Convention**), or complementary protection obligations, so as to satisfy the criteria in s 36(2)(a) or s 36(2)(aa) of the Act respectively.
2. In so finding, the Tribunal accepted that the appellants were in a genuine spousal relationship having married into 2010, that they belong to different Hindu castes, and that the second appellant was older than the first appellant. However, the Tribunal found that the appellants had fabricated their claims for protection and were not credible witnesses. For this reason, the Tribunal did not accept their account of events either when they returned briefly to Mauritius in 2009 or subsequently upon their return to Australia.

###### The decision of the Federal Circuit Court

1. In the application for judicial review in the Federal Circuit Court, the appellants’ alleged that:

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

(a) I stated in my protection visa application that I was born in a lower caste Hindu family also known as untouchable.

(b) I met my wife in Sydney who is from a higher caste Brahmin family and this drew lot of criticism in my community. I received death threats from her family and higher caste people when I went to Mauritius to get permission from her parents to get married.

(c) We were married on … 2010 without their consent and the community leader has declared my punishment to be death.

(d) I have witnessed upper caste people have perpetuated atrocious human rights violations on lower caste members who were involved like me.

2. The Tribunal constructively failed to exercise its jurisdiction;

Particulars

I provided documents to the Tribunal to corroborate my claim. The Tribunal failed to engage in an active intellectual process of these 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 my claim.

1. At the hearing before the primary judge, the appellants’ also made the following oral claims (FCC reasons at [8]):
2. the Tribunal had not considered all the evidence before it;
3. the Tribunal failed to call the second appellant’s sister to give evidence; and
4. the Tribunal had not believed the appellants’ claims.
5. The Federal Circuit Court dismissed the application for judicial review, finding that:
6. the Tribunal did not fail to address the appellant’s claims (FCC reasons at [10]);
7. the Tribunal did not err in giving no weight to two letters ostensibly signed by the second appellant’s sister because “*the decision to give the letters no weight did not arise out of the Tribunal’s opinion of the applicants’ credibility but out of matters particular to the documents themselves.*” (FCC reasons at [11]);
8. to the extent to which the appellants complained of a failure to consider other documents, those documents were not identified (FCC reasons at [12]);
9. the Tribunal did consider the two letters from the second appellant’s sister (FCC reasons at [14]);
10. the Tribunal was under no obligation to call the second appellant’s sister as a witness, but only to consider whether to do so, which duty it in fact discharged (FCC reasons at [15]); and
11. no jurisdictional error was established with respect to the Tribunal’s factual conclusion that the first appellant was not a witness of truth (FCC reasons at [16]).

##### RELEVANT PRINCIPLES

1. The jurisdiction of the Federal Circuit Court was limited to deciding whether the Tribunal’s decision was made lawfully under the Act, that is, whether the Tribunal’s decision is invalid by reason of a jurisdictional error.  This Court in turn must decide whether the Federal Circuit Court wrongly decided that there was no jurisdictional error.  The Tribunal would make a jurisdictional error if, for example, it misunderstood the criteria by which the appellants’ visa application must be assessed under the Act, or if it failed to hear and determine their application in accordance with the requirements of procedural fairness: *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323 at [82] (McHugh, Gummow and Hayne JJ)*; Craig v South Australia* (1995) 184 CLR 163 at 179 (the Court).  However, neither this Court nor the Federal Circuit Court has jurisdiction to grant the appellants a visa, to consider whether the appellants satisfy the criteria for the grant of a protection visa, or to correct mistaken findings of fact by the Tribunal: *Minister for Immigration and Multicultural Affairs v Rajalingam* [1999] FCA 719;(1999) 93 FCR 220 at [65] (Sackville J), [146] (Kenny J); *Re Minister for Immigration and Multicultural Affairs; ex parte Applicant S20/2002* [2003] HCA 30; (2003) 77 ALJR 1165 at [114] (Kirby J). The question of whether or not this Court or the Federal Circuit Court agrees with the Tribunal’s decision is not, therefore, a basis for finding that decision invalid, even if another decision-maker might have taken a different view of the evidence and reached a different decision.

##### SHOULD THE APPEAL BE ALLOWED?

###### The issues

1. The appellants rely upon the following grounds of appeal:
2. 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 obligation amounted to a breach of Statutory Obligation.
3. The learned Federal Judge has dismissed the case without considering the legal and factual errors contained in the decision of the [Tribunal].

(Errors in the original)

1. In oral submissions, the first appellant clarified the grounds on which the Federal Circuit Court’s decision is challenged, namely, that the primary judge ought to have held that the Tribunal:
2. gave insufficient weight to two letters said to be to the second appellant from her sister in Mauritius;
3. did not call the second appellant’s sister despite the request that she give evidence as a witness; and
4. failed to investigate the appellants’ case.

###### Relevant findings by the Tribunal

1. The letters from the second appellant’s sister in 2009 were enclosed with the second appellant’s application made on 18 July 2013 for a bridging visa pending determination of the protection visa application. The same letters were also attached to a post-hearing submission emailed to the Tribunal by the appellants on 17 October 2014.
2. In their completed Response to Hearing Invitation from the Tribunal dated 20 August 2014, the appellants requested that the second appellant’s sister be called as a witness and provided the sister’s telephone number. The Response to Hearing Invitation form explained in this regard that:

You may request that the Tribunal take oral evidence from a person or persons. If you make such a request, the Tribunal will consider your request carefully but may decide that it is not necessary to take oral evidence from a person you nominate.

Unless you advise the Tribunal otherwise we will assume that you will make arrangements for any witness to be available to give evidence.

1. At the hearing on 2 October 2014 attended by the appellants and their representative, the Tribunal asked about the second appellant’s sister in Mauritius and the letters allegedly sent by her to the second appellant. In response to questions from the Tribunal, the second appellant confirmed that her sister was still living at home and that she had not kept the envelopes in which the letters were received. The Tribunal put to the second appellant the proposition that “*normally people kept letters which contained a postage stamp and address*” (Tribunal reasons at [132]). While this proposition is somewhat questionable, it does not indicate an error of a jurisdictional kind. The second appellant also said that she had not brought the original letters to the hearing but that she could provide them (Tribunal reasons at [132] and [136]).
2. The Tribunal also questioned the second appellant about certain aspects of her sister’s letters which troubled the Tribunal, including that part of the text of the letters was cut off in the photocopies provided and that the letters were signed “*your sister [X]*”, and asked whether the second appellant had other letters with matching envelopes to show that this is how her sister always signed her letters. With respect to contact with her sister, the second appellant said:

360. … After this letter, [the second appellant’s sister] started telephoning and did not write letters. She did not write emails or send messages. [The second appellant’s] sister started calling after the [sic] she came back from Mauritius, so that would be at the end of 2009. She did not call her regularly after she returned, because of all the tensions at home, but only from later that year. The Tribunal stated that the last letter was on 17 September 2009. She stated it was from around the end of the year. She did not want to call and talk because of all what was going on at home. The Tribunal asked if she could not leave the house and ring from somewhere else with a mobile phone. She stated that her sister did not do that.

1. The Tribunal found that the letters had been fabricated and gave them no weight (Tribunal reasons at [231]). In reaching this view, the Tribunal:
2. expressed concern that the letters ended as “*your sister [X]*” when it would have been obvious who had written the letters to the second appellant;
3. expressed concern that the letters made certain claims which did not appear in the second appellant’s written claims, despite their relevance to her claims to fear persecution or significant harm if returned to Mauritius; and
4. did not accept the second appellant’s explanations in response to the Tribunal’s concerns for the following reasons (Tribunal reasons at [233]):

First, the Tribunal finds there is inconsistent evidence in the contents of the letters as to whether the second named applicant’s sister assisted the second named applicant to leave Mauritius by getting the confiscated passport back from their mother. Secondly, one of the letters claimed that the second named applicant’s uncle burnt all her clothes, but this claim does not appear in any of the written claims lodged with the application or statements lodged before the delegate’s interview and the Tribunal considers this to be a significant claim because it indicates a level of animosity which would be relevant to any fear of future harm. Thirdly, the applicants in the written claims did not refer to a group of … men coming to the second named applicant’s house after she had left Mauritius who then went to the applicant’s family’s residence. Fourthly, there was no reference in the written claims of the applicants that the second named applicant’s uncle had indicated he was planning on travelling to Australia in order to find her.

1. The Tribunal concluded at [233] that “*[t]he inconsistent evidence and failure to make significant claims at an earlier opportunity leads the Tribunal to find that these letters have been fabricated to enhance the visa application and gives them no weight*.”

###### The appeal must be dismissed

1. In my view, the appellants have not established that the Court below erred in dismissing the application for judicial review.
2. First, at the time that the Tribunal made its decision, s 426 of the Act provided that:

(1) In the notice under section 425A [inviting the applicant to attend a hearing], the Tribunal must notify the applicant:

(a) that he or she is invited to appear before the Tribunal to give evidence; and

(b) of the effect of subsection (2) of this section.

(2) The applicant may, within 7 days after being notified under subsection (1), give the Tribunal written notice that the applicant wants the Tribunal to obtain oral evidence from a person or persons named in the notice.

(3) If the Tribunal is notified by an applicant under subsection (2), the Tribunal must have regard to the applicant’s wishes but is not required to obtain evidence (orally or otherwise) from a person named in the applicant’s notice.

1. As such, it is apparent from s 426(3) that the Tribunal is not under an obligation to obtain evidence from a person, even though a visa applicant has requested that that person give evidence. The Tribunal is required only to “*have regard to*”, that is, to consider, the request.
2. Secondly, as the Minister submits, it is apparent that the Tribunal did in fact have regard to the appellants’ request that evidence be taken from the second appellant’s sister and rejected that request for cogent reasons. In its reasons, the Tribunal explained its concerns about contacting the second appellant’s sister, namely, that: the Tribunal would not know to whom it was speaking; given the evidence that the appellant’s sister continued to live at home, any inquiries by the Tribunal could place her at risk of harm; it was not clear that the appellant’s sister had access to a telephone; and if the second appellant called and talked about the case, this may create a further claim for protection (Tribunal reasons at [171]). To some extent, these concerns were based upon the evidence of the second appellant who indicated during questioning by the Tribunal that there were logistical difficulties in communicating with her sister and confirmed that her sister continued to live at home: see Tribunal’s reasons at [136] (quoted above at [20]) and at [132]. Furthermore, the Tribunal noted that the appellant could provide further evidence in writing and indicated that it would consider a statement from the second appellant’s sister (Tribunal reasons at [171]). No more was required of the Tribunal in order to discharge its duty under s 426 of the Act, as s 426(3) makes clear.
3. Thirdly, the finding that the letters were fabricated and should be afforded no weight is supported by clear and logical reasons founded in the evidence. That being so, it is not open to this Court or to the Court below to decide whether or not it agrees with that finding for the reasons earlier explained at [14]. Absent a jurisdictional error, it is for the Tribunal in the exercise of its jurisdiction to decide what weight should be afforded to particular evidence: *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 at 41 (Mason J).
4. Finally, to the extent to which the appellants alleged that the Tribunal failed to undertake broader inquiries with respect to the appellants’ claims, the Tribunal considered country information as to their claims to fear persecution because of their inter-caste marriage and because the second appellant is older than the first appellant. That information was discussed by the Tribunal with the appellants and they were given an opportunity to comment on it. However, the Tribunal found that the appellants’ claims were not supported by credible country information (Tribunal’s reasons at [229]). Nor is this a case where it is alleged that there was a failure to make an obvious inquiry about a critical fact, the existence of which could be easily ascertained, which can in some circumstances give rise to a jurisdictional error: *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39; (2009) 83 ALJR 1123 at [19]-[25] (Heydon J). No circumstances are identified in the context of this case which suggest that any such duty to inquire arose.

##### CONCLUSION

1. It follows that the appeal must be dismissed. As the first respondent has been wholly successful in defending the appeal, the appellants should pay the first respondent’s legal costs.

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| I certify that the preceding twenty-nine (29) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perry. |

Associate:

Dated: 27 February 2018