FEDERAL COURT OF AUSTRALIA

Singh v Minister for Immigration and Border Protection [2018] FCA 1231

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| Appeal from: | *Singh v Minister for Immigration and Border Protection* [2018] FCCA 235 |
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| File number: |  |
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| Judge: | **GRIFFITHS J** |
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| Date of judgment: | 21 August 2018 |
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| Catchwords: | **MIGRATION** – appeal from a judgment of the Federal Circuit Court of Australia – where neither the appellant nor his representative attended a hearing of the Administrative Appeals Tribunal (**AAT**) in respect of the appellant’s application for a review a decision of the Minister’s delegate not to grant the appellant a partner (Residence) (Class BS) Subclass 801 visa – whether the appellant was afforded procedural fairness by the AAT – whether the primary judge erred in finding the AAT did not fall into jurisdictional error – **Held:** appeal dismissed, with costs |
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| Legislation: | *Migration Act 1958* (Cth)  *Migration Regulations 1994* (Cth), s 362B, ; Sch 2, cls 820.211, 820.221; Sch 3, criterion 3001 |
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| Cases cited: | *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30  *MZALO v Minister for Immigration and Border Protection* [2016] FCA 1339  *Singh v Minister for Immigration and Border Protection* [2017] FCCA 1961 |
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| Date of hearing: | 15 August 2018 |
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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: | 41 |
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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 A Roe |
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| Solicitor for the First Respondent: | The Australian Government Solicitor |
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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 137 of 2018 |
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| BETWEEN: | PARMVIR SINGH  Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | GRIFFITHS J |
| DATE OF ORDER: | 21 August 2018 |

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*.

REASONS FOR JUDGMENT

GRIFFITHS J:

1. This appeal is from a judgment dated 30 January 2018 by the Federal Circuit Court of Australia (**FCCA**). The judgment is reported as *Singh v Minister for Immigration and Border Protection* [2018] FCCA 235. The FCCA dismissed the appellant’s application for judicial review of a decision dated 21 December 2015 of the Administrative Appeals Tribunal (**AAT**). The AAT affirmed a decision dated 10 July 2015 by a delegate of the Minister for Immigration and Border Protection not to grant the appellant a Subclass 801 permanent partner visa.

## Summary of background matters

1. The appellant is a citizen of India. He was born in 1983. He came to Australia in 2008. Both he and his then wife held a student visa to study in Australia. He and his wife separated and divorced when they were in Australia.
2. On 29 June 2010, the appellant’s student visa was cancelled.
3. On 17 March 2011, the appellant lodged a protection visa application which was deemed invalid because he did not submit the required personal identifiers. On 14 October 2011, the appellant lodged another protection visa application with the same deficiency. On 20 December 2011, the appellant lodged a third protection visa application, which was refused on 6 February 2012.
4. On 2 March 2012, the appellant applied for a Subclass 820 temporary partner visa and a Subclass 801 permanent partner visa. The appellant married his sponsor on 25 February 2012, about 3 months after the relationship started in November 2011 as claimed by the appellant, and 7 days after his divorce from his former spouse.
5. On 8 July 2013, the then Department of Immigration and Citizenship informed the appellant that, because at the time he lodged his application for a Subclass 820 and 801 partner visa, he was not the holder of a substantive visa for a period exceeding 28 days (his student visa having been cancelled on 29 June 2010), he needed to demonstrate that he was in a genuine relationship with his sponsor and met the Sch 3 criteria as set out in the letter, or that there were compelling reasons to waive the Sch 3 criteria.
6. On 15 July 2013, the appellant’s representative informed the Department of Immigration and Citizenship that, due to domestic violence against him, the appellant’s relationship with his sponsor had ended.
7. On 14 August 2013, the appellant’s representative provided submissions to the Department of Immigration and Citizenship as to why there were compelling reasons to waive the Sch 3 criteria in respect of the appellant. Those reasons were said to relate to the breakdown of his first marriage, which led to the cancellation of his student visa. The appellant also claimed that he had been subjected to abuse and threats from his sponsor and he attached a psychological report dated 9 August 2013.
8. Also on 14 August 2013, a delegate of the Minister refused the appellant’s Subclass 820 temporary partner visa application, because the appellant had not made that application within 28 days of holding a substantive visa, and therefore had not satisfied cl 820.211(2)(d)(ii) of Sch 2 and criterion 3001 of Sch 3 to the *Migration Regulations 1994* (Cth) (***Regulations***). The delegate further found that the appellant had failed to provide any information or evidence on the issue of waiver and thus there were no sufficiently compelling reasons to waive criterion 3001. As the Subclass 820 temporary partner visa was refused, the delegate also refused to grant the appellant a Subclass 801 permanent partner visa, on the basis that a criterion of the grant of the latter visa was that the appellant must hold the former visa.
9. The appellant asked the delegate to reconsider her decision and to take into account the submissions and supporting material on waiver sent on 14 August 2013, which was the date of the decision. The delegate declined to do so as the material was not sent within time.
10. On around 30 August 2013, the appellant applied to the then Migration Review Tribunal (**MRT**) for a review of the delegate’s decision, but not the decision to refuse to grant him the Subclass 801 permanent partner visa.
11. The appellant raised the issue of waiver in a letter dated 8 May 2014 and set out why there were compelling reasons for a waiver in his case, reiterating the matters he had put to the delegate. He provided a lengthy and detailed statutory declaration (39 pages) dated 5 July 2013.
12. On 19 May 2014, the MRT affirmed the delegate’s decision not to grant the appellant a Subclass 820 partner visa. The MRT explained why it was not satisfied that there were compelling reasons to waive the criteria. The appellant did not seek judicial review of that decision.
13. It later transpired that the appellant had not been properly notified of the delegate’s decision in respect of his Subclass 801 permanent partner visa. On 10 July 2015, the Department of Immigration and Border Protection sent the appellant’s representative a letter which contained the following information:

The Department of Immigration and Border Protection has reviewed the decision to refuse [the appellant] a partner (Residence) (class BS) (Subclass 801) visa made on 14 August 2013, and identified an error. Please note this has not changed the outcome of the application, as the requirements to meet for grant remain the same. However, [the appellant] is entitled to be provided with a new notification/decision record which will explain the decision and his eligibility to seek review.

1. The letter attached a decision dated 10 July 2015 of a delegate of the Minister for Immigration and Border Protection which refused to grant the appellant a Subclass 801 permanent partner visa on the basis that he failed to satisfy the criterion of holding a Subclass 820 visa.
2. On 23 July 2015, the appellant applied to the Administrative Appeals Tribunal (**AAT**) for a review of the delegate’s decision dated 10 July 2015 regarding the Subclass 801 visa.
3. On 13 October 2015, the AAT invited the appellant to attend a hearing on 4 December 2015 to give evidence and present arguments relating to the issues arising in the review. On 1 December 2015, the appellant’s representative emailed the AAT requesting an adjournment of the hearing due to “medical reasons”. The email attached a medical certificate which stated that the appellant was unable to attend work/school for 13 days from 28 November to 10 December 2015 by reason of an unspecified medical condition. The AAT accepted the adjournment request and invited the appellant to attend a hearing on 18 December 2015. The letter of invitation dated 3 December 2015 for the hearing on 18 December 2015 specified that if the appellant was unable to attend the hearing, he should advise the AAT, and that if the appellant did not obtain an adjournment and did not attend the hearing the application may be dismissed in his absence. The AAT also asked the appellant to provide evidence that he had been granted a Subclass 820 temporary partner visa, and stated that this was a key criterion for the grant of a Subclass 801 permanent partner visa.
4. Neither the appellant nor his representative attended the hearing on 18 December 2015. No application was made for a second adjournment. There was also no response to the AAT’s request that evidence of the grant of a Subclass 820 temporary partner visa be provided. Evidence before the FCCA showed that there were two text reminders sent to the appellant about the hearing, one sent at 11am on 11 December 2015 and another at 11am on 17 December 2015.
5. In its decision dated 21 December 2015, the AAT considered it was appropriate to proceed without giving the appellant a further opportunity to be heard, as it was “satisfied that several measures were put in place to ensure adequate notice of the hearing had been given to the [appellant]”, including by reason of the notification letter it sent to the appellant on 3 December 2015 and the fact that the appellant was represented by a migration agent. The AAT considered that as there was no evidence before it that the appellant held a Subclass 820 temporary partner visa, he did not satisfy the criteria for the Subclass 801 permanent partner visa, and it affirmed the delegate’s decision. The AAT stated that it would have liked to have asked the appellant at the hearing on what basis he considered he could be granted a Subclass 801 visa given that he did not hold a Subclass 820 visa.

## The FCCA proceeding

1. On 6 January 2016, the appellant filed a judicial review application in the FCCA which contained the following grounds (without alteration):

1. I have applied to the department of information and border protection for a Subclass 801 (partner) visa on 02 March 2012, delegate decided to refuse to grant the visa on the basis of cl.801.221 because they said I never held a Subclass 820.

2. I applied to the Tribunal for review of the delegates decision, and honourable Tribunal refused to grant visa, and informed that the decision of the delegate of the minister for Immigration and Border Protection remains in force and my application to have that decision changed has been unsuccessful.

3. request honourable minister to please reconsider my following points,

I have applied my partner visa, and I wasn't sure what was the difference of 820 visa and 801 visa, and my visa was refused on the ground that I didn't hold 820 visa, but as I had applied for visa I was under assumption that it was partner visa as I am not very good in visa and their Subclass, when my visa refused then I come to know that I have to apply for 820visa and not 801 visa, but by the time I understood this it was too let.

4. I request to honourable minister to please reconsider my application and give me some time so that I can produce the documents and can submit the same at earliest.

1. The appellant appeared at the FCCA hearing on 30 January 2018 without legal assistance.
2. The primary judge summarised the appellant’s oral submissions at [13]. The appellant said that his lawyers advised him to go for a domestic violence case, and he said other lawyers told him they could not submit what he described as a “schedule 3” as the AAT’s decision had already been made. The appellant told the Court he wanted another year and a half, or another year, to be able to lodge another visa application. He said his lawyers did not guide him well.
3. The primary judge found that the application filed by the appellant did not contain anything which could amount to jurisdictional error (at [12]). Further, the appellant did not raise anything that would amount to a fraud on the AAT, and his complaints about his lawyers were very vague and, at most, might suggest some negligence on their part but this did not amount to jurisdictional error (at [14]). The primary judge considered it was not appropriate to delay a decision being made in this matter by another year or year and a half, when the matter had already been in the FCCA for over two years (at [14]).
4. Finally, it is expedient to set out [15]-[19] of the primary judge’s decision in full:

15. I have read the Tribunal’s reasons for decision and looked at relevant parts of the court book. I have been unable to discern any jurisdictional error in the Tribunal’s decision or decision making process.

16. The Tribunal was permitted, by the *Migration Act 1958*, to proceed in the applicant’s absence, where the applicant did not attend the hearing. The Tribunal gave the applicant proper notice of the hearing. The Tribunal had previously granted the applicant an adjournment on his request. The Tribunal asked the applicant to provide evidence that he had a Subclass 820 temporary partner visa. The Tribunal advised the applicant that if he did not attend the hearing, the decision may be affirmed in his absence.

17. The Tribunal sent the applicant two SMS reminders about the hearing. However, there was no appearance at the hearing, no contact with the Tribunal seeking another adjournment and no provision of evidence indicating that the applicant did, in fact, have a Subclass 820 temporary partner visa. In the circumstances, it seems to me that it was open to the Tribunal to proceed to determine the matter in the applicant's absence.

18. As there was no evidence before the Tribunal that the applicant had a Subclass 820 temporary partner visa, the applicant was unable to satisfy the criteria for the Subclass 80 I permanent partner visa. The applicant was unable, therefore, to satisfy the relevant criteria and the Tribunal had no option but to affirm the delegate's decision.

19. Consequently, the application will be dismissed.

## The appeal

1. The appellant filed a notice of appeal on 13 February 2018, in which he sought to appeal from the whole of the judgment of the primary judge. The notice of appeal contained the following material under the heading “Grounds of appeal” (without alteration):

**Grounds of appeal**

The applicant is from Punjab, INDIA. The delegate has refused his spouse visa on the basis of he has not met the criterion of 820/801 Subclass which is under Marriage grounds onshore in Australia. He has got huge threat from his assailants in Punjab where he can’t go, He has strong reason why he can’t go to INDIA, he has properties back in India where these properties can be taken illegally and forcibly by assailants, all these information has been provided to DHA when he has applied for protection visa which is 866 Subclass made before he lodged the 820 visa application onshore. As there are exceptional circumstances beyond his control he could not go to India, also his wife (Now they divorced) has stopped him to go to India. Then application has been made validly in Australia. However after the visa (820 Subclass) refusal he went to tribunal (AAT) for further review.

He was invited to attend a hearing for 820 visa and in the same letter was also invited to provide evidence of his claims of spouse relationship & evidence to meet the requirements for schedule 3 criterion as applicant doesn't have valid visa at the time of 820 visa application, as he wasn’t known of tribunal process and also he was sick during that day, gradually he could not attend the hearing where he got the MRT (Now AAT) decision which is negative. But he had all evidence in his hand but he could not submit the evidence because of his illness. He claims that he lost the opportunity to submit all documents at tribunal stage.

Anyhow once he has received the decision from the Tribunal he has applied for Judicial Review as there was Jurisdictional Error in the Tribunal and Delegate Decision. He could not attended the AAT hearing because of his health issues. He wanted to get these things reviewed by FCCA judge so that he brought the AAT decision and Delegate Decision to court. He could not understand of proceeding of FCCA application and also at the court hearing he could not express and submitted evidence because of his lack of knowledge on the law. However honourable Judge has taken the decision as to dismiss his case. He wants bring the honourable JUDGE RILEY decision to FCA as applicant feels the decision was unjust according his situation where all issues have not been addresses and discussed at the hearing conducted on 30th January 2018.

Applicant has not understood what to do, at last after he has some knowledge by meeting the legal representatives, and also he has spoken with FCCA registrar, he came to know properly how to go- a- head that is the reason he is bringing the review application (Leave to appeal) with JUDGE RILEY decision.. Also he wishes to submit the further submissions according to Judicial Review Outcome.

He has not had any control of his own situations in Australia which became very bad in Australia to provide reasons at court, but court has dismissed his case on 30th January 2018. Arguments which were to be discussed at FCCA have not been discussed, these arguments can be heard at higher court possibly .Does the Court below have power to re-open the original appeal pursuant to either a common law power or pursuant to statute?

Federal circuit court has court hasn't even looked at applicant claims and he lost the opportunity at tribunal hearing to submit the evidence, as there was miscommunication caused by respondents, applicant has felt unjust and he feels that it is not natural justice. And also he has exceptional circumstance beyond his control, reasons he has submitted and also documents can be submitted to the Federal Court of Australia at later stage.

## Key legislative provisions

1. Clause 801.221 of Sch 2 to the *Regulations* contained the criteria to be satisfied at the time of making a decision whether or not to grant a Subclass 801 permanent partner visa. An essential criterion was that the visa applicant must continue to meet the criteria of a Subclass 820 temporary partner visa, unless the visa applicant falls within certain exceptions which are not relevant in these proceedings.
2. Section 360 of the *Act* provides that the AAT must invite the review applicant to appear before the AAT to give evidence and present arguments relating to the issues arising in relation to the decision under review (subject to certain exceptions not relevant for present purposes).
3. Section 362B of the *Act* provides for the procedures available to the AAT when a review applicant is invited to appear before it under s 360, but does not appear at the time and place at which the applicant was scheduled to appear. Where this occurs, s 362B(1A)(a) provides that the AAT may:
4. by written statement under s 368, make a decision on the review without taking any further action to allow or enable the applicant to appear before it; or
5. by written statement under s 362C, dismiss the application without any further consideration of the application or information before the AAT.

## The appellant’s submissions summarised

1. The appellant did not file and serve a written outline of submissions. In response to the Court’s invitation for him to make oral submissions in support of his appeal, the appellant said that he had been in Australia for ten years now and that he had been let down by both his first and second wives. He said that he felt depressed and did not want to return to India because there was no point in doing so. He said that he wanted to apply for a fresh visa here in Australia rather than having to make an application offshore.
2. I explained the nature of the appeal to the appellant and the need for him to identify an error in the primary judge’s reasons or orders. I explained that it was a matter for the Minister and his Department to decide whether or not to grant him another visa.
3. The appellant said that there was nothing further that he wished to say in support of his appeal.

## Adjournment refused

1. The appellant represented himself, with the assistance of an interpreter. During the course of his oral address he asked for the hearing to be adjourned for four or six months. He said that he had been sick and “unable to get everything together”. He said that he had had stomach problems recently and back problems before then. He provided no medical evidence in support of his statements from the Bar table. The Minister opposed the adjournment.
2. The adjournment was refused. The appellant filed his notice of appeal in February this year. Orders were made on 6 July 2018 listing the appeal for hearing on 15 August 2018. The appellant was also ordered to file an outline of written submissions, which he failed to do.
3. The appellant has advanced no adequate basis for deferring the hearing of his appeal, nor provided any evidence in support of his adjournment request.

## The Minister’s submissions summarised

1. The Minister submitted that the appellant’s grounds of appeal can be grouped into the following five categories:
2. The appellant did not understand the proceedings in the FCCA and could not express and submit evidence because of his lack of knowledge of the law (**Ground 1**).
3. Arguments which the appellant intended on making at the FCCA were not made (**Ground 2**).
4. The FCCA did not consider the appellant’s “claims” (**Ground 3**).
5. The appellant “lost the opportunity” to submit evidence at the AAT hearing because of a miscommunication caused by the respondents (**Ground 4**).
6. The appellant feels that the decision is unjust and is not natural justice (**Ground 5**).
7. The Minister submitted that there was no basis for appellate intervention for the following reasons.
8. First, the AAT correctly identified and determined the relevant issue, which was whether the appellant had ever held a Subclass 820 visa*.* As the appellant did not provide any evidence that he had ever held such a visa, the AAT was bound to find that the appellant was unable to satisfy the criteria to be granted the Subclass 801 visa.
9. Secondly, the necessary conditions for the AAT to exercise its discretion to determine the matter on the papers under s 362B(1A)(a) were satisfied, namely, the AAT invited the appellant to appear before it in accordance with s 360 of the *Act* and the appellant did not appear on the scheduled date and time. The AAT acted reasonably in exercising that discretion and provided an “intelligible justification” for exercising the discretion, citing *Singh v Minister for Immigration and Border Protection* [2017] FCCA 1961 at [63]-[64] and *MZALO v Minister for Immigration and Border Protection* [2016] FCA 1339 at [24].
10. Thirdly, as to the grounds of appeal, with respect to Ground 1 as formulated by the Minister, the appellant was advised by the AAT as to what evidence he needed to submit, namely, evidence that he had been granted a Subclass 820 visa, and he should have submitted such evidence then. As to Ground 2, the appellant was given an opportunity to make oral submissions in the FCCA and he took up that opportunity, and there is no appealable error where the appellant intended to make additional arguments but failed to do so. As to Ground 3, the primary judge’s reasons for judgment show that both the appellant’s oral and written claims were appropriately considered. The primary judge reviewed the AAT’s reasons for decision and the relevant parts of the Court Book to discern whether a jurisdictional error had been made. As to Ground 4, to the extent the appellant lost any opportunity to submit evidence, this was caused by the appellant’s decisions not to take up the AAT’s invitation to provide relevant evidence and not to attend the hearing. The appellant has not demonstrated any basis to support Ground 5.

## Consideration and determination

1. First, it is important to note that the letter from the AAT to the appellant dated 3 December 2015, which notified the appellant that the AAT hearing had been postponed to 18 December 2015 following the appellant’s adjournment request, contained the following information:

**A key criterion for the Subclass 801 visa that you were refused is that you have been granted a Subclass 820 visa. You should provide evidence that you have been granted a Subclass 820 visa because the Tribunal will give particular consideration to that.** (emphasis in original)

…

If you are not able to attend the hearing you should advise us as soon as possible. Please note that we will only change this date if satisfied that you have a very good reason for being granted an adjournment. If we do not advise you that has been granted, you must assume that the hearing will go ahead. **If you do not attend the scheduled hearing, we may make a decision on the review without taking any further action to allow or enable you to appear before us or may dismiss your application for review without any further consideration of the application or the information before us**. (emphasis added)

1. It was reasonable for the AAT to proceed to determine on the papers that the appellant did not meet the requirements for a Subclass 801 visa, where neither the appellant nor his authorised representative attended the AAT hearing on 18 December 2015 or provided evidence that he held a Subclass 820 visa, and where:
2. the appellant’s previous request for an adjournment had been accommodated by the AAT;
3. no adjournment had been requested and no explanation provided for the non-attendance on 18 December 2015;
4. the hearing invitation sent to the appellant on 3 December 2015 specified that the appellant should provide the AAT with evidence that the appellant had been granted a Subclass 820 visa, which the appellant was told was a “key criterion” for the delegate’s refusal to grant the appellant the Subclass 801 visa;
5. the hearing invitation dated 3 December 2015 also specified that if the appellant did not attend the hearing, the AAT may make a decision without taking further action to enable the appellant to appear before it or it may dismiss the review application without further consideration;
6. the AAT’s Case Notes for the appellant’s file show that an “SMS hearing reminder” was sent to the appellant’s mobile on 11 December 2015 at 11am, and on 17 December 2015 at 11am; and
7. the appellant was represented by a migration agent.
8. Secondly, the FCCA correctly concluded that there was no jurisdictional error in the AAT’s decision or decision-making process, for the reasons given primarily at [16] to [17] of the primary judge’s reasons for judgment. The AAT did not act unreasonably in a legal sense (see *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30), nor was he denied procedural fairness in either the AAT or the FCCA.
9. I would add with respect to Ground 4 as formulated by the Minister regarding the appellant’s contention that he lost the opportunity to submit documents in the AAT process, that there is no explanation why, if the appellant “had all evidence in his hand” as he claimed, he did not submit that evidence to the AAT before the hearing, or after the date of the hearing and before the AAT made its decision. It is also evident from the judicial review application in the FCCA that the appellant did not raise any issue of waiver of Sch 3 criteria. This is presumably because, unlike the position with a Subclass 820 visa, there was no similar waiver provision in respect of a Subclass 801 visa.
10. Accordingly, the appeal must be dismissed, with costs.

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| I certify that the preceding forty-one (41) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Griffiths. |

Associate:

Dated: 21 August 2018