FEDERAL COURT OF AUSTRALIA

SZVIP v Minister for Immigration and Border Protection [2018] FCA 1730

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| Appeal from: | *SZVIP v Minister for Immigration & Anor* [2018] FCCA 1393  |
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| File number: |  |
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| Judge: | **ROBERTSON J** |
|  |  |
| Date of judgment: | 12 November 2018 |
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| Catchwords: | **MIGRATION** – appeal from Federal Circuit Court of Australia, dismissing application for judicial review of decision of the Refugee Review Tribunal – citizen of Nepal claiming a protection visa on the basis of her Nepalese inter-caste marriage and her husband’s subsequent estrangement from her in Australia  |
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| Legislation: | *Migration Act 1958* (Cth)  |
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| Date of hearing: | 12 November 2018 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 31 |
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| Counsel for the Appellant: | The Appellant appeared in person with the aid of an interpreter |
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| Counsel for the First Respondent: | Mr MJ Smith |
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| Solicitor for the Respondents: | DLA Piper Australia |
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| Counsel for the Second Respondent: | The Second Respondent submitted save as to costs |

ORDERS

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|  | NSD 1072 of 2018 |
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| BETWEEN: | SZVIPAppellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| JUDGE: | ROBERTSON J |
| DATE OF ORDER: | 12 NOVEMBER 2018 |

THE COURT ORDERS THAT:

1. The appeal is dismissed.
2. The appellant is to 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

ROBERTSON J:

## Introduction

1. This appeal is from the judgment and orders of the Federal Circuit Court of Australia given and made on 1 June 2018 dismissing the application for judicial review of the decision of what is now the Administrative Appeals Tribunal, filed in that court on 23 October 2014.
2. The Tribunal, on 30 September 2014, affirmed the decision of the delegate of the Minister not to grant the appellant a Protection (Class XA) visa because she was not a person in respect of whom Australia owed protection obligations.
3. The appellant is a citizen of Nepal. She arrived in Australia on 6 July 2009 with her husband. They both held student visas.
4. The appellant applied for a protection visa on 7 June 2013. In that application the appellant said she feared that her (former) husband’s family members may harm her. She feared harm from their society for being married to her husband, that marriage being an inter-caste marriage. She said she did not think the authorities would be able to protect her. Her family and her (former) husband’s family could do whatever they liked. She said that many women like her were killed in Nepal. They did not have protection from authorities. Therefore, she said, she will not be safe if she returned to Nepal. She claimed that her parents-in-law may blame her for their son’s apparent disappearance and she would be harmed by them if she were to return to Nepal. The appellant said that her own parents had not accepted her inter-caste marriage.

## The decision of the Tribunal

1. As I have said, the Tribunal affirmed the decision not to grant the appellant a Protection (Class XA) visa on 30 September 2014. The Tribunal found that, contrary to her claim, the appellant’s parents-in-law were supportive of her marriage. The Tribunal gave a number of reasons for this conclusion. Having regard to all those reasons, the Tribunal said it was not satisfied that the appellant’s marriage to her husband led to her being threatened or harmed by his parents or siblings before she left Nepal. The Tribunal accepted that the marriage had broken down. Unfortunately it appeared that her husband had chosen to leave the marriage and that this was the reason he had not been in contact with the appellant since 2011. However, the Tribunal was not satisfied that the appellant’s husband’s family held the appellant responsible for his disappearance.
2. Having found that her husband’s family did not disapprove of the marriage and that they did not hold the appellant responsible for her husband’s disappearance, the Tribunal could see no reason why they would be making threats towards her. The Tribunal did not consider plausible, and did not accept, that anyone had been passing on messages to the appellant about ongoing threats. Therefore the Tribunal did not accept that the appellant’s husband’s family members intended to harm the appellant at all. On that basis the Tribunal found that the appellant did not have a well-founded fear of being persecuted by them for a Convention reason. The Tribunal also found that there were no substantial grounds for believing that, as a necessary and foreseeable consequence of her being removed from Australia to Nepal, there was a real risk that the appellant would suffer significant harm at the hands of her husband’s family.
3. The Tribunal then considered what the attitude of the appellant’s father and stepmother was towards her now. The Tribunal accepted as plausible that the appellant’s father and stepmother were very unhappy about the appellant’s marriage. The Tribunal also considered plausible that the appellant’s stepmother may have considered it improper and perhaps scandalous for the appellant as a young woman to go and work in Kuwait for two years. However the appellant had had no contact with her father and stepmother for several years. They had never threatened to harm her. The Tribunal was satisfied from the appellant’s evidence that they simply wanted no further contact with her. The Tribunal said it seemed very unlikely that they would even know that the appellant was in Nepal, but even if they did hear of her return the chance appeared remote they would contact her. Under those circumstances the Tribunal found there was no real chance that the appellant’s father or stepmother would seriously harm the appellant if she returned to Nepal.
4. The Tribunal then turned to consider the attitude of neighbours and society to the appellant because she claimed she would suffer “mental torture” having been in an inter-caste marriage and her husband having left. The Tribunal said it was satisfied that the appellant would live in Kathmandu if she returned to Nepal. The Tribunal accepted there may be occasional gossip about her by some members of the community and that she may understandably find this distressing and demeaning. However the Tribunal relied on evidence that Kathmandu was the most westernised part of Nepal and concluded this urban environment was not one in which neighbours or other members of the community might want to seriously or significantly harm the appellant because of her background or history. The Tribunal found there was no real chance that neighbours or other community members in Kathmandu would seriously harm the appellant if she returned to Nepal.

## Proceedings in the Federal Circuit Court

1. The appellant applied for judicial review of the Tribunal’s decision. The first ground alleged that the Tribunal did not comply with the requirements of ss 424A and 424AA of the *Migration Act*. This first ground of review was abandoned at the hearing before the primary judge when the appellant was represented by solicitors and counsel. The second ground alleged that the Tribunal adopted the findings of the delegate without conducting its own review. The third ground alleged that the Tribunal relied on country information in a manner which was too narrow. The fourth and fifth grounds complained that the Tribunal erred by treating claims that her in-laws held her responsible for the disappearance of her husband as answered by the finding that her husband was still alive; and that the Tribunal failed to consider cumulatively the possible attitude of the appellant’s own family or in-laws for making an inter-caste marriage and working in Kuwait for two years. The sixth ground was to the effect that the Tribunal failed to comply with its obligations under s 425 of the *Migration Act* in respect of where the appellant would live if she returned to Nepal.
2. The primary judge rejected the second ground, saying that the appellant had failed to establish that the Tribunal failed independently to review the delegate’s decision and come to its own judgment on the evidence before it. The primary judge concluded that there was nothing that had a tendency to indicate the Tribunal failed to comply with s 414 of the *Migration Act*.
3. The primary judge rejected the third ground, saying it was clear law that the choice and selection of country information and the weight given to such information was a factual matter for the Tribunal and was not an issue for review in the Federal Circuit Court. Further, the primary judge said, [72]-[74] of the Tribunal’s decision record must be regarded cumulatively and it did not establish illogicality or irrationality or lack of any intelligible justification such as would constitute jurisdictional error.
4. The primary judge rejected the fourth ground as the Tribunal recorded the appellant as saying that she thought her husband was still alive and there was no other evidence indicating that he had died. The primary judge held there was nothing legally unreasonable, illogical or irrational in the Tribunal’s findings in relation to [79] and [80] of its reasons.
5. The primary judge rejected the fifth ground because the Tribunal was clearly aware of and meaningfully considered the appellant’s claims that her father and stepmother disapproved of her marriage and at least her stepmother did not approve of her having worked in Kuwait. The Tribunal considered both claims to be plausible but found, for the reasons it expressed at [85]-[87], that there was no real chance or real risk that she would be persecuted or would suffer significant harm from her father or stepmother if she returned to Nepal.
6. The primary judge rejected ground six, holding that the Tribunal did not commit jurisdictional error in finding that it was satisfied that the appellant would live in Kathmandu if she returned to Nepal. The primary judge held that the Tribunal’s reasoning at [88]-[92] did not lack an intelligible justification or was otherwise illogical or unreasonable. In light of the appellant’s failure to identify where she was likely to live if she returned to Nepal, the Tribunal was legally entitled to reason that she would live in Kathmandu because she had lived there for between 12 and 14 months before she came to Australia and it was the most westernised part of Nepal.

## The appeal to this Court

1. The notice of appeal to this Court contained five grounds, as follows (as written, with some information redacted to preserve anonymity):
2. His Honour failed to consider jurisdictional error at the Tribunal hearing and at [44] of its reasons by failing to comply with the requirements of sections 424A and 424AA of the Migration Act 1958 in relation to evidence allegedly provided to the Department by [the appellant’s husband].
3. His Honour failed to consider jurisdictional error by failing to review the decision by the Tribunal of the delegate but adopting it and further finding that the parents-in-law gave the undertaking to provide financial support “knowingly”.
4. His Honour failed to consider fear of persecution based on the Appellant’s inter-caste marriage and the fear that the appellant has from her in-laws or the general society in Nepal.
5. His Honour apprehended that if the Appellants in-laws were providing financial support to the Appellant and her husband then they were not opposing the marriage, in addition falsification of signatures in financial documents proposed are unnecessary to be proven.
6. His Honour failed to consider violence and/or social ostracism in Nepal and the fact that if the Appellant was to return to Nepal she would be harmed.

## The parties’ submissions

1. The appellant filed no written submissions. The appellant’s oral submissions were largely directed to the merits of the decision-making as she saw them. She said she was not satisfied with the outcome. She said that she was interrupted in what she was saying to the Court but she later clarified this submission by saying that it was in her dealings with the Department. There was no oral evidence before the Federal Circuit Court and she was then legally represented. The appellant submitted she had always told only the truth and reality and she had been repeating it. She submitted that her husband’s family will harass her if she returns to Nepal as they will say that what has happened was all her fault. She said they will kill her if she goes to Nepal. The appellant submitted it is unsafe in Nepal and she was not safe in Kathmandu when she was there for 12 to 14 months. She asked what evidence she could have given as she did not have proof for legal documents. She said you could not record mistreatment.
2. The respondent Minister submitted that the first ground of appeal related to a contention that was abandoned before the primary judge. In any event, the Minister submitted, in the absence of a transcript the ground could not succeed.
3. The Minister submitted that the second ground of appeal was in essence a challenge to the primary judge’s treatment of the second ground of review that was raised. The Minister adopted the primary judge’s reasons for rejecting that ground. Otherwise the second ground of appeal rose no higher than an expression of dissatisfaction with a factual finding made by the Tribunal.
4. The Minister submitted that the third ground of appeal constituted an impermissible request for merits review.
5. The Minister submitted that the fourth ground of appeal was predicated on a misunderstanding of the primary judge’s reasons. Insofar as the Tribunal made a finding, at [71], that if the appellant’s in-laws were providing financial support to the appellant and her husband it followed that they were not opposing the marriage, that finding was open to it on the evidence. In addition, the primary judge was correct to conclude, the Minister submitted, that it was open to the Tribunal to reject the appellant’s explanation that her husband had somehow managed to add her name to documentation relating to a student visa application without the knowledge of the husband’s parents.
6. The Minister submitted in relation to the fifth ground of appeal that, again, this ground constituted an impermissible request for merits review.

## Consideration

1. I reject ground 1, that the primary judge failed to consider jurisdictional error at the Tribunal hearing and at [44] of its reasons by failing to comply with the requirements of ss 424A and 424AA of the *Migration Act* in relation to evidence allegedly provided to the Department by the appellant’s husband. The relevant paragraphs of the Tribunal’s reasons record an invitation from the Tribunal to the appellant to comment on or respond to evidence provided to the Department by her husband that his parents had sponsored both the appellant and her husband to come to Australia. Since this ground was abandoned by counsel appearing for the appellant before the primary judge there would need to be a persuasive basis for allowing the point to be revived.
2. Ground 2 is difficult to follow but seems to involve a misunderstanding of the role of the Federal Circuit Court on judicial review. It was not for the Federal Circuit Court to “adopt” the decision of the Tribunal but to review it for jurisdictional error. Furthermore, no basis has been established for concluding that the Tribunal merely accepted the findings of the delegate. I reject ground 2.
3. Ground 3 again appears to mistake the role of the Federal Circuit Court on judicial review. It was not for the Federal Circuit Court to conduct a merits review and it is not for this Court to do so either. The primary judge self-evidently did consider whether there was jurisdictional error on the part of the Tribunal in its consideration of what the appellant said was her fear of persecution based on her inter-caste marriage and her fear from her in-laws or the general society in Nepal. I reject ground 3.
4. Ground 4 appears to relate to the conclusion of the Tribunal that the appellant’s parents-in-law were supportive of the marriage. In that respect, the Tribunal referred to a finding by the delegate that the appellant’s parents-in-law signed a document undertaking to provide financial support to both the appellant and her husband in Australia. The Tribunal said that if they did this knowingly that would cast very serious doubt on the claim that her parents-in-law were hostile towards the appellant before her departure. Then the appellant claimed that her husband somehow managed to add her name to documentation without his parents’ knowledge. In that context the Tribunal said that the most obvious inference of the appellant’s parents-in-law signing the document was that they were willing to support the appellant and her husband and were supportive of the marriage. The Tribunal was deciding whether the appellant’s husband’s parents had threatened or harmed her. One of the factors the Tribunal took into account in not being so satisfied was that the parents had signed a document undertaking to provide financial support to both her and her husband in Australia.
5. As written, the first part of ground 4 raises no error on the part of the primary judge. The second part of ground 4 is impossible to understand. As noted by the primary judge at [31], the appellant gave no actual evidence about how and in what way her husband’s parents’ signatures had been obtained. In her statutory declaration in response to one of the issues raised under s 424AA, the appellant herself said she was not sure about the further details of how her husband arranged for his parents’ signature.
6. I reject ground 4.
7. Ground 5 appears to proceed on the same mistaken basis as ground 3. The primary judge self-evidently considered what the Tribunal had found about violence and/or social ostracism in Nepal and the appellant’s claim that if she was to return to Nepal she would be harmed. It was not for the primary judge to consider the merits of the appellant’s claim. I reject ground 5.
8. In summary, none of the grounds of appeal succeeds.
9. If there was a misinterpretation by reason of an interruption of the appellant at an earlier stage of decision-making, it did not persist and was clarified by the appellant’s 11 March 2014 statutory declaration.

## Conclusion and orders

1. For these reasons, the appeal is dismissed, with costs.

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| I certify that the preceding thirty-one (31) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Robertson. |

Associate:

Dated: 12 November 2018