FEDERAL COURT OF AUSTRALIA

SZSCU v Minister for Immigration, Citizenship, Migrant Services and Multicultural Services [2020] FCA 232

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| Appeal from: | *SZSCU v Minister for Immigration and Border Protection* [2019] FCCA 2542  |
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| File number(s): |  |
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| Judge(s): | **FARRELL J** |
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| Date of judgment: | 28 February 2020 |
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| Catchwords: | **MIGRATION** – appeal from the Federal Circuit Court of Australia – where the primary judge dismissed an application for judicial review of a decision of the Administrative Appeals Tribunal to affirm a decision of a delegate of the Minister to refuse the appellant a Protection (subclass 866) visa – where notice of appeal contained grounds reiterating judicial review grounds advanced before the Federal Circuit Court of Australia without identifying error in the decision below – where appellant seeks leave to rely on new grounds not advanced before the Federal Circuit Court of Australia – appeal dismissed  |
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| Legislation: | *Migration Act 1958* (Cth) ss 26(2B)(c), 36(2)(aa)*Bangladesh Merchant Shipping Ordinance 1983* s 196  |
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| Cases cited: | *SZGIZ v Minister for Immigration and Citizenship* [2013] FCAFC 71; 212 FCR 235*SZSCU v Minister for Immigration and Border Protection* [2019] FCCA 2542*VUAX v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 158; 238 FCR 588 |
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| Date of hearing: | 19 February 2020 |
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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: | 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: | Ms N Laing |
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| Solicitor for the First Respondent: | Clayton Utz |
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| Counsel for the Second Respondent: | The Second Respondent submitted to any order of the Court, save as to costs |

ORDERS

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|  | NSD 1621 of 2019 |
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| BETWEEN: | SZSCUAppellant |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL SERVICESRespondent |

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| JUDGE: | FARRELL J |
| DATE OF ORDER: | 28 fEBRUARY 2020 |

THE COURT ORDERS THAT:

1. The appellant is refused leave to rely on grounds 3 and 4 set out in the notice of appeal at [5] and [6].
2. The appeal is dismissed.
3. The appellant must pay the respondent’s costs as agreed or taxed.

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

REASONS FOR JUDGMENT

FARRELL J:

# Introduction

1. This an appeal from a decision of the Federal Circuit Court of Australia (**FCCA**) to dismiss an application for judicial review of a decision by the Administrative Appeals **Tribunal** to affirm the decision by a **delegate** of the Minister for Immigration and Border Protection (as the responsible **Minister** was then named) made on 7 November 2014 to refuse the **appellant** (or **SZSCU**) a Protection (Class XA) (Subclass 866) visa (**protection visa**). The appellant also seeks leave to raise grounds not advanced before the FCCA Judge.

# Background

1. The appellant is a national of Bangladesh.
2. While holding a Maritime Crew (Class ZM)(subclass 988) visa, in April 2011, SZSCU deserted a ship in Australia and applied for a protection visa on 12 May 2011 (**first application**). As noted by the FCCA Judge at J[5], the substance of SZSCU’s claims for protection in that application were that he had become an adherent of Sufism and the Sufi sect Maizbhandari, that his father kicked him out of the family home because he took up Sufism, that he left Bangladesh to escape persecution for his religious beliefs, and that he feared that he would be discriminated against and harassed and his life would be at risk if he returned to Bangladesh. A delegate of the Minister refused to grant SZSCU a protection visa on 9 March 2012.
3. In a statutory declaration sworn by SZSCU on 23 July 2012 (the **July 2012 statutory declaration**), he admitted that he had “made a non-genuine claim” in his first application due to the insistence of his previous migration agent. That was two days before a hearing before the Refugee Review Tribunal in relation to the first application. The Refugee Review Tribunal affirmed the delegate’s decision on 4 October 2012 and his application for judicial review was dismissed by a FCCA Judge on 23 December 2013.
4. In *SZGIZ v Minister for Immigration and Citizenship* [2013] FCAFC 71; 212 FCR 235, on 3 July 2013, the Full Court of the Federal Court of Australia held that s 48A of the *Migration Act 1958* (Cth) as then drafted did not prevent a person from making another protection visa application when the earlier application had been determined only on Refugee Convention grounds.
5. On 19 May 2014, through his solicitor and registered migration agent, SZSCU lodged a **second application** for a protection visa for consideration under the complementary protection criterion. On 7 November 2014, a delegate of the Minister refused to grant SZSCU a protection visa on the basis of his second application. On 29 June 2016, the Tribunal affirmed the delegate’s decision.

# FCCA Judgment

1. At J[1]-[9], the FCCA Judge summarised the matters set out above.
2. At J[10], the FCCA Judge summarised the claims made by SZSCU in the July 2012 statutory declaration. At J[11], the FCCA Judge summarised further claims referred to in the delegate’s decision record dated 7 November 2014.
3. At J[12], the FCCA Judge set out a summary of the grounds and criteria for grant of a protection visa as found by Charlesworth J in *AWA15 v Minister for Immigration and Border Protection*  [2018] FCA 604 at [5]-[7].
4. At J[13], the FCCA Judge noted that the delegate only had jurisdiction to consider SZSCU’s application under the complementary protection criterion, but in the result the delegate had considered the application under both the Refugee Convention and complementary protection criteria. At J[14]-[15], the FCCA Judge noted that, after an interview with SZSCU on 5 November 2014, the delegate did not accept that SZSCU had history as an activist for Jamaat-e-Islami (**JI**) in Bangladesh, substantially on the basis of his admitted false claims in relation to Sufism and his limited knowledge about JI’s charter. The delegate was not satisfied that SZSCU was a refugee or that, on the basis of independent country information, there was a real risk that he would be subject to significant harm in Bangladesh so that the delegate was not satisfied that SZSCU was a person to whom Australia had protection obligations.
5. The FCCA Judge summarised the procedural history of the application before the Tribunal and the Tribunal’s decision at J[16]-[20]. At J[19], the FCCA Judge said:

In the result the Tribunal affirmed the decision of the Delegate to refuse to grant the Protection visa to the Applicant. As the Grounds of the Applicant in asserting jurisdictional error are confined to a charge of actual bias or apprehension of bias against the Tribunal member, it suffices for present purposes to note that the Tribunal:

a) did not accept that the Applicant had been involved in the JI in Bangladesh or that he ever had any problems as a result of his political opinion in Bangladesh and there was no evidence to suggest that the authorities in Bangladesh had any interest in him at all;

b) found that the Applicant does not in fact fear the authorities in Bangladesh;

c) found that the Applicant would not suffer harm because he deserted his ship in Australia if he were to return to Bangladesh and that independent country information suggested that any penalties in Bangladesh for desertion from a ship have never been enforced;

d) found that the Applicant would not suffer harm as a failed asylum seeker if he were to return to Bangladesh; and

e) found that no problems the Applicant may have because of his claimed mental health issues amounted to “persecution” for the purposes of the Refugees Convention criterion.

1. At J[21], the FCCA Judge set out the grounds of SZSCU’s judicial review application as follows (as written):

1. I submit that the Second Respondent's decision is effected by apprehended bias because the member at the AAT has given more weight on the Department of lmmigrations findings of the matter and the formulations of the DIPB case.

2. I submit that there is a real possibility of prejudgment in this case for a number of reasons,

A) The member at the AAT obtained and relied on the information from the DIBP’s findings as to my claim rather than an independent research, does demonstrate relevant prejudgment.

B) The fact the member has expressed prior opinion based on the findings from the DIBP demonstrates relevant prejudgment in the matter.

1. At J[22] the FCCA Judge noted that:

At the hearing in this Court the Applicant made no submissions in support of these Grounds complaining of bias. Rather, he complained of the Tribunal’s rejection of his claim that he would suffer harm in Bangladesh because he had deserted his ship. However, the Tribunal had recognised this claim and comprehensively dealt with and rejected it at [19], [25], [26], [32], [34], [35], [37] – [38], [60] – [62], [67], [77] – [83] and [86] – [88] of its Decision Record and no jurisdictional error is established in connection with the Tribunal’s findings or reasoning in this regard.

1. The FCCA Judge took SZSCU’s judicial review grounds as alleging breach of procedural fairness in that the decision of the Tribunal was affected by different forms of bias: J[23]
2. As to the state of evidence before the FCCA Judge, his Honour notes at J[24]-[25] that:
3. SZSCU did not tender a transcript of the hearing before the Tribunal on 26 May 2016, despite having consented at (the first return date of his judicial review application in the FCCA on 16 September 2016) to an order which placed the onus upon him to obtain the transcript.
4. The evidence before the FCCA Judge establishes that on 26 May 2016, the day of the Tribunal hearing, the Tribunal sent an audio CD recording of the hearing to the solicitor for SZSCU.
5. At J[26]-[30] the FCCA Judge summarised the principles in relation to allegations of actual or apprehended bias of a decision maker relevant to this matter. No ground of appeal challenges the correctness of that summary.
6. The FCCA Judge held that:
7. There is no basis for any claim by SZSCU that he has suffered from actual bias or that there could be any reasonable apprehension of bias in connection with the decision of the Tribunal: J[31]
8. The Tribunal’s decision record did not, on its written face, indicate or demonstrate any prejudgment, actual bias or give rise to any reasonable apprehension of bias on the part of the Tribunal member. Rather, it appears to be a reasoned, detailed, comprehensive and meaningful consideration of SZSCU’s claims: J[32]
9. There is no evidence to suggest the Tribunal member was unduly or improperly influenced or affected by the delegate’s decision on 7 November 2014 which the Tribunal member was reviewing, or indeed any earlier findings made during the processing of the SZSCU’s first application. The hearing before the Tribunal was a hearing *de novo* in which the Tribunal was required to consider the [second] application for a protection visa afresh, standing in the shoes of the delegate: J[33]
10. It was entirely conventional and legally reasonable for the Tribunal, in considering SZSCU’s second application, to have regard to the nature of the claims made and the evidence given by him in support of his first application because it is common for the purposes of criminal and civil litigation for there to be a consideration and comparison of any prior inconsistent statement or evidence of a party (or witness) in the course of the assessment of trustworthiness and veracity of that party. His Honour relied on *AAJ17 v Minister for Immigration and Border Protection* [2018] FCA 205 at [24] (Perry J): J[35]
11. The claim of bias asserted by SZSCU in his judicial review grounds is not made out: J[36]

# Appeal

1. The appeal was heard on 19 February 2020. SZSCU appeared in person. The Court was assisted by an interpreter. The Minister was represented by counsel. The Minister provided written submissions which were translated to SZSCU as was his notice of appeal. SZSCU did not provide any written submissions.
2. On 8 October 2019 the appellant filed a notice of appeal containing the following **grounds** (as written):

**Grounds of appeal**

1. The Court below erred in finding that the Administrative Appeals Tribunal (AAT) had failed to properly consider the Applicant's claims under s36 (2) (aa) of the Migration Act 1958 (“the Act”).

2. The Applicant seeks leave to rely on Ground 3 and 4 being an additional ground raised. It is submitted that the grounds as presented have merit and no prejudice to the Respondent is evident. In these circumstances it is submitted leave can be granted consistence with the principles developed in SZSFS v Minster for Immigration and Border Protection [2015] FCA 534.

3. The Court below erred in not finding that the AAT's decision is affected by apprehended bias because the AAT gave more weight on the Department of Immigration· findings of the matter and the formulations of the DIBP case.

4. The Court below erred in not finding that the AAT made a legal error due to prejudgement in this case, namely

a. The AAT obtained and relied on ·the information from the DIBP's findings as to applicant's claim rather than an independent research or active intellectual engagement.

b. The face the member has expressed prior opinion based on the findings from the DIBP demonstrate relevant pre-judgement in the matter.

5. Ground 3

The Tribunal failed to mention that it has to take note **under Section 499** that the DFAT report and the Police guidelines of the department.

It should be noted that In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of PAM3 Refugee and humanitarian- - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.

It is respectfully submitted that the Tribunal was obliged to comply with any relevant direction made under s.499 of the Act and a failure to do so constitutes jurisdictional error

[see *Uelese v Minister for Immigration & Border Protection* (2015) 256 CLR 203; [2015] HCA 15 at [19]]

6. Ground 4

The Tribunal failed adequately assess applicant's claim of Ship desertion and the issues he would face under the Complementary protection. The Tribunal failed to adequately consider the effect of Section 196 of the Bangladesh Merchant Shipping 1983 which says that the applicant would face fine. (CB 94). The Tribunal failed to consider whether the applicant has the means to pay the fine and whether the imposing fine would amount to economic hardship which would amount to degrading treatment or punishment.

1. Both the appellant and the Minister accept that the ground set out at [1] of the notice of appeal is subsumed in the later grounds.

## First and second grounds of appeal – apprehended and actual bias

1. The Court understands paragraphs [3] and [4] of the notice of appeal to reflect SZSCU’s first and second grounds on which he relied in the FCCA.
2. SZSCU’s first ground of appeal concerns whether the Tribunal’s decision was affected by apprehended bias and the Court understands the second ground to concern whether the Tribunal’s decision was affected by actual bias.
3. When he was asked to explain the first ground, SZSCU said that he just wanted to say one thing: “that we heard and we know that Australia respects and protects people on humanitarian grounds. And if one suffers in one country and can’t go back because of persecution, that is why we come here”. When the Court enquired whether he meant by that ground that a lay observer might apprehend that the Tribunal might not bring an impartial mind to its decision because it took into account proceedings that related to his first application, SCSZU responded: “No. I just said that because I was scared and I was unsure why they gave that decision, because I know that I have come from the ship, and if I have to go back, I will face persecution in my country, and I don’t know why they are saying that”. These submissions do not engage with the ground as set out in the notice of appeal.
4. The second ground is identical to the judicial review ground 2 relied upon before the FCCA, save that subparagraph (a) in the second ground before this Court also contains (as the Court understands it) an allegation that the Tribunal did not actively and intellectually engage in the review of delegate’s decision by reason of relying on the “DIBP’s findings”. When asked to make submissions in relation to this ground, SCSZU said that he did not want to say anything. Again, this submission does not engage with the second ground in the notice of appeal.
5. The Court accepts the Minister’s submission that these grounds should be dismissed. The appellant has not identified any error in the FCCA Judge’s approach to the issues of whether the Tribunal’s reasons demonstrate apprehended or actual bias on its part. As found by the FCCA Judge, it was entirely conventional for the Tribunal to consider material which related to the first application and which was before the delegate on the second application, as well as the delegate’s reasons for refusing to grant a protection visa the subject of the second application and there is nothing in the Tribunal’s decision record which indicates that its decision should be set aside on the basis of actual or apprehended bias. Further, as found by the FCCA Judge, the Tribunal’s decision record discloses a reasoned, detailed, comprehensive and meaningful consideration of SZSCU’s claims such that the contention that the Tribunal failed to give active and intellectual engagement with the appellant’s claims cannot be accepted.
6. The first and second grounds are not made out for the reasons given by the FCCA Judge.

## Third and fourth grounds

1. The Court understands the notice of appeal at [5] and [6] to be SZSCU’s proposed third and fourth grounds. In the notice of appeal at [2], SZSCU seeks leave to rely on those grounds on this appeal as they were not raised in the FCCA.
2. The general principles guiding the decision whether or not to permit a ground to be raised on appeal which was not run below are reflected in the observations of the Full Court of the Federal Court of Australia in *VUAX v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 158; 238 FCR 588 at [48]:

The practice of raising arguments for the first time before the Full Court has been particularly prevalent in appeals relating to migration matters. The Court may grant leave if some point that was not taken below, but which clearly has merit, is advanced, and there is no real prejudice to the respondent in permitting it to be agitated. Where, however, there is no adequate explanation for the failure to take the point, and it seems to be of doubtful merit, leave should generally be refused. In our view, the proposed ground of appeal has no merit. There is no justification, therefore, for permitting it to be raised for the first time before this Court.

1. At the hearing, the appellant said that he did not raise these grounds in the FCCA because “it did not come to my mind at the time”. That is not an adequate explanation.

### Third ground

1. The appellant did not particularise which parts of PAM3 Guidelines or country information that he claims was not considered. At the hearing, the appellant declined to make any submissions in relation to this ground.
2. As submitted by the Minister, the Tribunal expressly stated at DR[3]:

I have taken the policy guidelines prepared by the Department of Immigration and the country information assessments prepared by the Department of Foreign Affairs and Trade into account to the extent that they are relevant.

and in Attachment A at [11] to its decision record the Tribunal said:

**Ministerial direction**

11. In accordance with Ministerial Direction-No. 56, made under section 499 of the [Migration] Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration and Citizenship – ‘PAM3: Refugee and humanitarian – Complementary Protection Guidelines’ and ‘PAM3: Refugee and humanitarian - Refugee Law Guidelines’ - and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.

1. Accordingly, the Tribunal was clearly aware of the requirement to act in accordance with Ministerial Direction-No. 56 and to take account of PAM3 guidelines. In *AJW15 v Minister for Immigration and Border Protection* [2016] FCA 197, Barker J stated at [46]:

The Court agrees that the Tribunal’s statement that it was required to take account of the guidelines should in itself, on a fair reading of the Tribunal’s reasons in accordance with *Minister for Immigration and Ethnic Affairs v Wu Shan Liang and Others* (1996) 185 CLR 259 at 271-272; [1996] HCA 6, be sufficient to conclude the Tribunal has done so. See *SZTCV v Minister for Immigration and Border Protection* [2015] FCA 1309 at [14].

1. The Court accepts the Minister’s submission that there is nothing in the Tribunal’s reasoning to indicate non-compliance with Direction 56 or a failure to take into account the PAM3 guidelines. To the contrary, the Tribunal’s reasoning indicates compliance with the Direction; for example, the Tribunal considered relevant reports of the Department of Foreign Affairs and Trade in various parts of its decision record.
2. The proposed ground lacks sufficient merit to warrant the grant of leave to rely upon it on appeal.

### Fourth ground

1. By the fourth ground, SCSZU contends that the Tribunal failed to consider whether the applicant has the means to pay any fine payable under s 196 of the *Bangladesh Merchant Shipping Ordinance 1983* and whether imposing such a fine would amount to economic hardship amounting to degrading treatment or punishment.
2. At the hearing, the appellant declined to make any submissions in relation to this ground.
3. As noted by the FCCA Judge at J[22], the Tribunal recognised the appellant’s claim to fear harm if he was returned to Bangladesh because he had deserted his ship and comprehensively dealt with it at DR[19], [25], [26], [32], [34], [35], [37], [38], [60]-[62], [67], [77]-[83] and [86]-[88] of its decision record.
4. In summary, in the decision record at [86]-[88], the Tribunal:
5. Recognised that, under s 196 of the *Bangladesh Merchant Shipping Ordinance 1983*, desertion is punishable by imprisonment for a maximum of five years and a fine of up to one million taka, and a shipping master may also cancel the Continuous Discharge Certificate (**CDC**)of any deserting seaman and ban the deserting seaman from the seafaring profession and from government service in Bangladesh. The State may also forfeit properties of the deserting seaman excluding inherited properties. The Tribunal referred to submissions made by SCSZU’s representative in relation to these matters.
6. The Tribunal noted that, as put to the appellant, neither he nor his representative had adduced any evidence to suggest that there is a real risk that he will be imprisoned. Information available to the Tribunal suggested that penalties under that law were not enforced; deserting seamen who returned to Bangladesh were released on bail and they were never imprisoned. The government shipping office would take action to cancel a CDC and forfeit guarantee money held by the shipping office.
7. The Tribunal did not accept that, if he were returned to Bangladesh, there was a real risk that SZSCU would be imprisoned or be subjected to torture, or cruel, human or degrading treatment. The Tribunal did not accept that a fine of one million taka, not being able to work as a seaman or forfeiting guarantee moneys would amount to “significant harm” as defined.
8. The appellant has not identified any error in this reasoning. As the Minister submitted, there is no evidence that SZSCU made any claim to the Tribunal that he could not afford these consequences. Further, the Tribunal found that the penalties imposed would be the result of non-discriminatory enforcement of a law of general application and this risk fell within s 26(2B)(c) of the *Migration Act*. As the Minister submitted, this is an independent basis for the Tribunal’s decision which the appellant did not seek to impugn.
9. This ground lacks sufficient merit to warrant its consideration on appeal.

# Conclusion

1. Leave is refused for the appellant to rely on grounds 3 and 4. The appeal should 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 Farrell. |

Associate:

Dated: 28 February 2020