FEDERAL COURT OF AUSTRALIA

ACZ16 v Minister for Immigration and Border Protection [2019] FCA 2208

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| Appeal from: | *ACZ16 v Minister for Immigration & Anor* [2018] FCCA 1498  |
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| File number: | VID 558 of 2019 |
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| Judge: | **MURPHY J** |
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| Date of judgment: | 18 December 2019 |
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| Date of publication of reasons: | 14 January 2020 |
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| Catchwords: | **MIGRATION** – applicationfor an extension of time to appeal and appeal from orders of the Federal Circuit Court– extension of time to appeal granted – appeal dismissed  |
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| Legislation: | *Migration Act 1958* (Cth)*Federal Court Rules 2011* |
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| Cases cited: | *Guo v Minister for Immigration and Border Protection* [2018] FCAFC 34*Hunter Valley Developments Pty Ltd v Cohen* [1984] FCA 186; (1984) 3 FCR 344 *Jackamarra (an Infant) v Krakouer* [1998] HCA 27; (1998) 195 CLR 516*Mentink v Minister for Home Affairs* [2013] FCAFC 113*Minister for Immigration and Citizenship v SZRMA* [2013] FCAFC 161; (2013) 219 FCR 287*MZABP v Minister for Immigration and Border Protection* [2015] FCA 1391; (2015) 242 FCR 585*MZABP v Minister for Immigration and Border Protection* [2016] FCAFC 110; (2016) 152 ALD 478*NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* [2004] FCAFC 263; (2004) 144 FCR 1*NAVK v Minister for Immigration and Multicultural Affairs* [2004] FCA 1695 |
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| Date of hearing: | 15 November 2019, 18 December 2019 |
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| Registry: | Victoria |
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| Division: | General Division |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | Catchwords |
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| Number of paragraphs: | 40 |
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| Counsel for the Applicant: | Ms P Kerdo of Kerdo Legal (15 November 2019)The Applicant appeared in person (18 December 2019) |
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| Counsel for the First Respondent: | Mr N Wood |
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| Solicitor for the First Respondent: | Sparke Helmore |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice |

ORDERS

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|  | VID 558 of 2019 |
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| BETWEEN: | ACZ16Applicant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| JUDGE: | MURPHY J |
| DATE OF ORDER: | 18 DECEMBER 2019 |

THE COURT ORDERS THAT:

1. The application for an extension of time within which to bring an appeal is allowed.
2. The appeal be dismissed.
3. The Applicant pay the First Respondent’s party-party costs of the appeal, but not the costs of the application for an extension of time.
4. Clothier Anderson Immigration Lawyers pay the Applicant’s solicitor-client costs of the extension of time application, but not the costs of the hearing on 15 November 2019.

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

REASONS FOR JUDGMENT

MURPHY J:

1. In this matter the applicant, a 37 year old male citizen of Iran, sought an extension of time within which to file an appeal against orders of the Federal Circuit Court made 27 June 2018, which dismissed his application for judicial review of a decision of the Administrative Appeals **Tribunal** made 10 December 2015. The Tribunal affirmed the decision of a delegate of the first respondent, the **Minister** for Immigration and Border Protection, to refuse to grant the applicant a protection visa. The application for an extension of time was listed to be heard at the same time as the substantive appeal.
2. For the reasons I explain below, I granted the extension of time but dismissed the appeal.

# The background facts and procedural history

1. The applicant is an Iranian national who came to Australia by boat, without a visa, on 23 July 2012. On 11 January 2013 he applied for a protection visa.

## The applicant’s claims

1. The primary judge summarised the applicant’s claims as follows (at [6]-[8]):

The applicant claimed to fear that he would ‘*be subjected to ongoing physical and psychological abuse, tortured and killed’* if he returned to Iran. He also claimed to fear harm from the Iranian authorities and particularly SEPAH (“Army of the Guardians of the Islamic Revolution”).

The applicant further stated in his statutory declaration that he feared he would be harmed or mistreated because of:

(a) his imputed and actual political opinion, as being opposed to the government; and

(b) his membership of a particular social group, namely ‘*failed Iranian asylum seekers*’.

In particular, the applicant claimed that:

(a) in late 2009, he inadvertently participated in a demonstration in Azadi Square in Tehran, which related to the outcome of the presidential election that had occurred a week or so prior;

(b) he tried to escape by motorbike but fell and was grabbed and beaten by Basij;

(c) he was taken to the police station by Basij, blindfolded and some hours later transported to a couple of other locations, interrogated and beaten;

(d) he was then left by the side of the road and although he could barely walk, he managed to go home and then to the doctor;

(e) some two or three days later, some SEPAH members took him from his home in the early morning and accused him and his family of being anti-government and of collaborating with the Mujahedeen. He claimed that he was then beaten and psychologically tortured;

(f) he was told that if he wanted to live he had to work for them as an informer and was asked to monitor Facebook and to tell them if he knew of anyone who had participated in the protests;

(g) he was also asked to inform on anyone who insulted the leader, was anti-revolution, watched satellite TV about politics or discussed political views;

(h) he was also told to monitor SMS messages used to organise protests;

(i) although he hated himself for doing so, he in fact did pass on whatever information he had as he felt he had no choice as the authorities pressured and threatened him;

(j) he said that the authorities threatened that if he did not provide the information they asked for, they would do a lot of things to him including leaving drugs in his car or sending him to a terrible place; and

(k) the applicant was frightened and ultimately fled to Nashtarod, a town in the north for some time and then ultimately fled Iran and sought asylum.

1. The applicant attended an interview with a **delegate** of the Minister on 14 October 2013. In the course of the interview the applicant claimed as follows:

Since being in Australia, he has been posting things on Facebook and on news agencies. He stated “*the subject I mention in my posts on Facebook, are about people who I knew, and about their actions. Sometimes I talk about my political opinion, and religion in Iran.*”

(Emphasis in original.)

1. Subsequently the applicant’s representative provided the delegate with copies of some of the applicant’s comments on Facebook together with information which, it was submitted, supported the contention that Iranian authorities maintain surveillance of dissidents on Facebook and threatened them. The applicant’s representative contended that the material before the delegate demonstrated that:

(a) the applicant has an anti-regime political opinion;

(b) the applicant has posted anti-regime commentary on Facebook (and other social media platforms); and

(c) the Iranian authorities monitor social media platforms to identity (sic) dissidents.

1. On 26 March 2014 the delegate decided to refuse to grant the applicant a protection visa. It is unnecessary to set out the delegate’s reasons for decision as that decision has been superseded by the Tribunal’s decision, but the outcome was that the delegate was not satisfied that the applicant was a person in respect of whom Australia had protection obligations under s 36 of the *Migration Act 1958* (Cth).

## The application to the Administrative Appeals Tribunal

1. On 30 April 2014 the applicant’s representative lodged an application for review of the delegate’s decision with the Tribunal. By letter dated 3 September 2015 to the applicant’s representative the Tribunal invited the applicant to attend a hearing on 21 October 2015. On 26 October 2015 the applicant’s representative wrote to the Tribunal to advise that the representative had been unable to contact the applicant in relation to the hearing but would continue to try. The hearing was subsequently rescheduled to 9 December 2015.
2. Prior to the 9 December 2015 hearing, the Tribunal sent two SMS reminders to the applicant but neither the applicant nor his representative appeared at the hearing. The Tribunal proceeded to determine the application on the material before it, and on 10 December 2015 it decided to affirm the delegate’s decision not to grant the applicant a protection visa.

## The application for judicial review to the Federal Circuit Court

1. On 14 January 2016 the applicant filed an application for judicial review of the Tribunal’s decision in the Federal Circuit Court. He was legally represented in the application by Ms Sanmati Verma of **Clothier Anderson** Immigration Lawyers. The application was heard on 12 February 2018. Mr Angel Aleksov of counsel appeared for the applicant.
2. On 27 June 2018 the primary judge delivered judgment dismissing the application for judicial review.

## The appeal to this Court

1. If the applicant wished to file an appeal to this Court from the judgment of the Federal Circuit Courthe was required to do so by 18 July 2018, in accordance with r 36.03 of the *Federal Court Rules 2011* (the **Rules)**. The applicant did not file an appeal within the time limit under the Rules. On 27 May 2019 he filed an application for an extension of time within which to bring the appeal pursuant to r 36.05 of the Rules, at which point the proposed appeal was more than 10 months out of time.
2. Ms Verma made an affidavit in support of the application for extension of time. She deposed that by reason of a clerical error within the offices of Clothier Anderson she did not receive the email from the Federal Circuit Court advising of the date when judgment would be delivered. She also said that she did not receive a copy of the judgment by post or email. She said that she did not discover that judgment had been delivered until she was undertaking a review of dormant files on 2 May 2019, and that upon making that discovery she immediately informed the applicant.
3. Then, presumably because Clothier Anderson had a conflict of interest which prevented it from continuing to act for the applicant, Ms Verma referred the applicant to Ms Paghona Kerdo of Kerdo Legal for the further conduct of the matter.
4. On 27 May 2019 Ms Kerdo filed an application for an extension of time to appeal, and subsequently a draft notice of appeal.
5. The application for an extension of time was listed for hearing before me on 15 November 2019. On the morning of the hearing Ms Kerdo sought to file a notice of intention to cease acting for the applicant. I took the view that the notice of intention to cease acting was filed too late and my chambers so informed Ms Kerdo. Ms Kerdo appeared for the applicant when the matter was called on for hearing.
6. Ms Kerdo informed me that she had obtained counsel’s advice regarding the application and had, on 7 or 8 November 2019, informed the applicant of that advice. Having regard to counsel’s advice and the applicant’s inability to pay counsel’s fees, she said that she had then informed the applicant that she would cease acting for him.
7. Although Ms Kerdo remained the solicitor on the record it became apparent during the course of the hearing that neither she nor or the applicant were in a position to properly advance the application. In Ms Kerdo’s case that was because she had intended to retain counsel to appear if she continued to act in the matter, and because she had filed a notice of intention to cease acting she had not done so. She said that she was not in a position to make submissions regarding the prospects of success of the appeal and therefore could not properly represent the applicant in the application for an extension of time. In the applicant’s case it was because, until about a week earlier, he had understood that he would be legally represented and he was not ready or able to advance appropriate submissions himself. During the hearing it also became apparent that the applicant did not speak English well enough to appear without an interpreter.
8. I decided the appropriate course was to adjourn the application to 18 December 2019. I took the view that doing so should provide the applicant with sufficient time to instruct new solicitors if he wished to do so, or to prepare to represent himself in the hearing. I also ordered that the application for an extension of time be listed at the same time as the substantive appeal. I made an order for Kerdo Legal to pay the Minister’s costs thrown away by reason of the adjournment.
9. Further, having reached a preliminary view that the application for any extension of time only became necessary because of an error within Clothier Anderson’s office, I also made an order directing Clothier Anderson to file and serve submissions within seven days as to why an order should not be made requiring that firm to pay the applicant’s solicitor-client costs of the application for an extension of time, and to pay the Minister’s party-party costs of the application in the event the application is unsuccessful.

# The application for an extension of time

1. The draft notice of appeal alleged that the learned primary judge erred by failing to find that the Tribunal decision was affected by the following jurisdictional error:

The Tribunal failed to perform its statutory task in not assessing whether the applicant had a well-founded fear of persecution in the reasonably foreseeable future if returned to Iran by reason of the potential for him to further engage in anti-regime activities there.

1. The relevant principles in deciding whether to allow an application for an extension of time within which to bring an appeal are well-established. The Court must decide whether it is an interest of justice to do so having regard to considerations including the length of the delay, the explanation for the delay, the prejudice to the applicant if an extension of time is not granted, the prejudice to the respondent if an extension is time is granted, the prospects of success or merits of the proposed appeal and any relevant public interest considerations: *Hunter Valley Developments Pty Ltd v Cohen* [1984] FCA 186; (1984) 3 FCR 344 at 348-349 (Wilcox J); *Jackamarra (an Infant) v Krakouer* [1998] HCA 27; (1998) 195 CLR 516 at [5] and [66] (Brennan CJ and McHugh J, and Kirby J, respectively). Such considerations are not though exhaustive, and the outcome of an application for an extension of time will depend upon the particular circumstances of the case: *Mentink v Minister for Home Affairs* [2013] FCAFC 113 at [32]-[38] (Griffiths J, with Edmonds J agreeing).

### The length of and explanation for the delay

1. The applicant was more than 10 months late in filing a notice of appeal and the Minister argued that an extension of time should therefore not be granted. The appeal is obviously well out of time but in my view the applicant has provided an adequate explanation for the delay. Ms Verma’s affidavit shows that the applicant was not told until 2 May 2019 that his application for judicial review had been dismissed by the Federal Circuit Court. The appeal was out of time because of an error within Clothier Anderson and not through any fault on the applicant’s part. Once the applicant was told that his application had been dismissed by the Federal Circuit Court he moved expeditiously to instruct other solicitors and to file an application for an extension of time to appeal. This consideration weighs strongly in favour of allowing an extension of time.

### Prejudice

1. The Minister did not contend that he will suffer any prejudice if an extension of time is granted, whereas the applicant deposed that he fears being killed or unlawfully detained if returned to Iran and that he has nowhere else to go. This consideration too weighs strongly in favour of allowing an extension of time.

### Whether the proposed appeal has reasonable prospects of success

1. A decision as to whether an application has reasonable prospects of success does not require the Court to decide whether the application would succeed. What is required is an examination of the proposed grounds at “a reasonably impressionistic level” and the Court should not descend into a full consideration of the arguments for and against each ground. The correct approach may be expressed by the use of language such as whether a ground is “arguable”, “reasonably arguable”, “sufficiently arguable” or has “reasonable prospects of success”: *MZABP v Minister for Immigration and Border Protection* [2015] FCA 1391; (2015) 242 FCR 585 at [62]-[63] (Mortimer J); *MZABP v Minister for Immigration and Border Protection* [2016] FCAFC 110; (2016) 152 ALD 478 at [38] (Tracey, Perry and Charlesworth JJ); *Guo v Minister for Immigration and Border Protection* [2018] FCAFC 34 at [27] (Siopis, White and Perry JJ).
2. I will deal in detail with the question of merits when dealing with the substantive appeal and for the present it suffices to note that, notwithstanding that I have dismissed the appeal, I consider it to be sufficiently arguable for an extension of time to be allowed.
3. Weighing the considerations together I am satisfied that it is appropriate to allow an extension of time within which to file an appeal.

# The appeal

1. The sole ground in the draft notice of appeal was as noted above (at [21]). The applicant did not file written submissions as directed but the materials show that he claims to have a well-founded fear that, if returned to Iran, he faces a real chance of serious harm at the hands of Iranian authorities because of an imputed or actual anti-Iranian regime political opinion. He claims that imputed or actual anti-regime opinion arose generally from the matters noted above (at [4]-[6]), and that his Facebook posts after leaving Iran show that he continued to hold anti-regime political beliefs. He claimed that the Iranian authorities would be aware of his continuing political beliefs because they monitor social media platforms to identify dissidents.
2. Before the Federal Circuit Court the applicant conceded that the Tribunal dealt with his express claim that he would be at risk of serious harm from the Iranian authorities on the basis of his social media activity whilst in Australia. The Tribunal did so by having regard to the nature of the applicant’s Facebook posts about which the applicant had provided evidence, and by considering relevant country information. It found that the applicant’s Facebook comments were “reasonably moderate” and “relatively innocuous” in nature and made in response to posted articles that had attracted hundreds or thousands of other responses. The Tribunal was not satisfied that the Facebook posts would attract adverse attention from Iranian authorities.
3. Before the Federal Circuit Court:
	1. the applicant accepted that it was open to the Tribunal to conclude, as it did, that the applicant’s Facebook comments would not be sufficient to give rise to an adverse profile with the Iranian authorities; and
	2. did not expressly state that if he was sent back to Iran he would or may continue to post comments online along the lines of his earlier Facebook posts

: see primary judgment at [26] and [43].

1. The applicant however submitted that it was obvious that a person who had made anti-regime social media posts may continue to do so in the future and therefore the claim now framed by the applicant was raised on the material before the Tribunal, and required to be considered and addressed. The applicant argued that the Tribunal had fallen into jurisdictional error by failing to evaluate whether he might continue to make anti-regime statements upon return to Iran, and failing to consider whether as a result there was a real chance that he might suffer serious harm at the hands of Iranian authorities if so returned.
2. It was common ground before the primary judge that the applicant did not expressly articulate a claim that he might, on return to Iran, engage in anti-regime political activities and would as a result face a real chance of serious harm at the hands of Iranian authorities. The Tribunal’s review function was however inquisitorial rather than adversarial. If evidence and material which the Tribunal accepted raised a case that was not expressly articulated the Tribunal was required to deal with that case rather than limit its determination just to the case which was expressly raised: ***NABE*** *v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* [2004] FCAFC 263; (2004) 144 FCR 1 at [58] (Black CJ, French and Selway JJ).
3. In *NAVK v Minister for Immigration and Multicultural Affairs* [2004] FCA 1695 at [15] Allsop J (as his Honour then was) referred to the decision in *NABE.* His Honour said that the decision:

…dealt with the question of what claims must be dealt with by the Tribunal to complete its statutorily required task (its jurisdiction) even though they may not be expressly articulated... From *NABE* I take it that **the Tribunal is not required to consider a claim that is not expressly made or does not arise clearly on the materials before** it... As the Full Court said at [63] much depends on the circumstances. Whatever adverb or adverbial phrase is used to describe the apparentness of the unarticulated claim, **it must, it seems to me, either in fact be appreciated by the Tribunal or, if it is not, arise sufficiently from the material as to require a reasonably competent Tribunal in the circumstances to appreciate its existence.** A practical and common sense approach to everyday decision-making requires the unarticulated claim to arise tolerably clearly from the material itself, since the statutory task of the Tribunal is to assess the claims by reference to all the material, not to undertake an independent analytical exercise of the material for the discovery of potential claims which might be made, but which have not been, and then subjecting them to further analysis to assess their legitimacy.

(Emphasis added.)

His Honour’s observations were approved in *Minister for Immigration and Citizenship v SZRMA* [2013] FCAFC 161; (2013) 219 FCR 287 at [70] (Mansfield, Gilmour and Foster JJ).

1. The primary judge found (at [47]-[49]) that while the Tribunal was required to be “future focused” when assessing whether the applicant will face a real chance of serious harm on account of his anti-regime political beliefs, that did not extend to a requirement to speculate about what the applicant may or may not do at some point in the future. Her Honour held that the claim the applicant contended had been raised on the material before the Tribunal did not emerge clearly from the material, and the Tribunal was not obliged to consider it. Her Honour therefore dismissed the application.
2. A difficulty with deciding this appeal was that the applicant did not file written submissions in relation to the appeal and he appeared for himself, without legal representation, at the resumed hearing. While he had an interpreter for the hearing, his oral submissions in relation to the question of jurisdictional error were, understandably enough, of limited assistance. Even so, and having taken those matters into account, I discerned no jurisdictional error in the Tribunal’s decision nor appealable error in the reasons of the primary judge.
3. *First*, the applicant failed to attend the Tribunal hearing, notwithstanding that his representative was advised of the hearing and the Tribunal sent SMS messages directly to him informing him the hearing. Other than to complain about the quality of the representation he received he has not offered an explanation for this failure. The Tribunal therefore considered his visa application on the materials before it, which materials did not include any evidence that he might engage in anti-regime political statements or activities if he was returned to Iran. The Tribunal observed that, had the applicant attended the hearing, it would have queried him further about his social media activities, and because he did not do so the Tribunal could only assess the evidence and submissions before it.
4. *Second*, the Tribunal noted that the applicant did not claim to have previously been involved in any anti-regime political activities in Iran. The applicant made it clear that neither he nor his family had ever been involved in political activities or protests or spoken out publicly against the Iranian government, which also pointed away from the Tribunal being required to consider whether he might express anti-regime political beliefs in the future.
5. *Third*, the only expression by the applicant of any anti-regime opinion was in some Facebook posts while the applicant was in Australia. The Tribunal described them as “likely to be considered as anti-government” but that they were “relatively innocuous” and “reasonably moderate”. There was no evidence from which the Tribunal could have concluded that, upon return to Iran, the applicant might engage in anti-regime political activities which were more likely to attract adverse attention from the Iranian authorities. In the circumstances the Tribunal was not required to speculate on the potential that the applicant might engage in such political activities. That is particularly so in circumstances where the applicant was represented throughout both the visa application and judicial review process.

# Conclusion

1. Accordingly I dismissed the appeal and ordered the applicant to pay the Minister’s costs of the appeal.
2. The applicant was successful in the application for an extension of time but unsuccessful in the appeal. Having heard submissions from counsel for Clothier Anderson I made an order that the firm should pay the applicant’s solicitor-client costs of the application for an extension of time, but not in relation to costs thrown away by the adjournment of the hearing on 15 November 2019. Those costs are to be met by Kerdo Legal pursuant to the order of that date. The applicant must pay the Minister’s costs of the substantive appeal, but is not required to pay the Minister’s cost of the application for an extension of time. That is so both because the applicant was successful in the application for an extension of time and because, notwithstanding my view that an order for those costs should be made against Clothier Anderson, the Minister did not seek a costs order against that firm.

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| I certify that the preceding forty (40) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Murphy. |

Associate:

Dated: 14 January 2020