Federal Court of Australia

 DSL16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 1141

|  |  |
| --- | --- |
| Appeal from: |  |
|  |  |
| File number: | NSD 1907 of 2019 |
|  |  |
| Judgment of: | **LEE J** |
|  |  |
| Date of judgment: | 11 August 2020 |
|  |  |
| Catchwords: | **MIGRATION** – application for temporary protection visa – appellant claiming fear of harm in Malaysia based on his Chinese ethnicity – adverse credibility findings – ample opportunity to supplement facts in application – no bias – Tribunal reasoning did not lack an evident and intelligible justification – appeal dismissed |
|  |  |
| Legislation: | *Migration Act 1958* (Cth) s 425  |
|  |  |
| Cases cited: | *ARG15 v Minister for Immigration and Border Protection* [2016] FCAFC 174; (2016) 250 FCR 109*BJB16 v Minister for Immigration and Border Protection* [2018] FCAFC 49; (2018) 260 FCR 116 *DAO16 v Minister for Immigration and Border Protection* [2018] FCAFC 2; (2018) 258 FCR 175 *DSL16 v Minister for Immigration* [2020] FCCA 3207*Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; (2018) 264 CLR 541*Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332 *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611*Minister for Immigration and Citizenship v SZNVW* (2010) 183 FCR 575; [2010] FCAFC 41*Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; (2001) 205 CLR 507*Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32; (2004) 78 ALJR 992 *NAHI v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 10 *Randhawa v Minister for Local Government and Ethnic Affairs* [1994] FCA 1253; (1994) 52 FCR 437*SCAA v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 668 *SZMSA v Minister for Immigration & Citizenship* [2010] FCA 345 |
|  |  |
| Division: |  |
|  |  |
| Registry: |  |
|  |  |
| National Practice Area: |  |
|  |  |
| Number of paragraphs: | 29 |
|  |  |
| Date of last submissions: | 28 July 2020 |
|  |  |
| Date of hearing: | Determined on the papers  |
|  |  |
| Solicitor for the Appellant: | Appellant was self-represented |
|  |  |
| Solicitor for the First Respondent: | MinterEllison |

ORDERS

|  |  |
| --- | --- |
|  | NSD 1907 of 2019 |
|   |
| BETWEEN: | DSL16Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

|  |  |
| --- | --- |
| order made by: | LEE J |
| DATE OF ORDER: | 11 August 2020 |

THE COURT ORDERS THAT:

1. The name of the first respondent be amended to “Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs”.
2. The appeal be dismissed.
3. The appellant pay the first respondent’s costs of the appeal.

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

REASONS FOR JUDGMENT

LEE J

# A Introduction

1. This is an appeal from the Federal Circuit Court in *DSL16 v Minister for Immigration* [2020] FCCA 3207 (**Primary Judgment**) concerning an application for a temporary protection visa.
2. There is no need to set out the procedural background or circumstances leading up to the decision of the primary judge. These are summarised in the Primary Judgment (at [1]–[10]). However, in order to understand the Administrative Appeal Tribunal’s (**Tribunal**) decision and reasons (**Tribunal Decision**), it is necessary to note that the appellant is a Chinese Malay who claims that: he was a self-employed business owner who was beaten by Malay people in his shop and continuously followed, including to his home, because he refused to pay “protection fees”; he reported the incident to police, but to no avail; he moved multiple times throughout Malaysia because the Malays knew he had reported them to the police and; he fears harm if he was to return to Malaysia because as an ethic Chinese Malaysian he would be subject to discrimination and persecution from both the Malaysian authorities and local people.
3. It is also necessary to comment briefly on the procedure leading up to the current hearing. The parties communicated to the Court that they were content for the matter to be determined on the papers, although it was the preference of the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (**Minister**) for the matter to proceed to an oral hearing. To that end, the matter was listed for a tentative hearing date on 31 July 2020, so orders could be programmed for the filing of submissions. As no email address was initially provided for the appellant, the Court sent all correspondence by express post to the appellant’s designated postal address. Phone contact was also made with the appellant notifying him of the hearing date and confirming that he knew that correspondence was being sent via mail.
4. The appellant is unrepresented, is an elderly man and speaks minimal English. With these factors in mind and following a hand written communication from the appellant stating that he is an “old man and very hard to use mobile apps [sic]”, I indicated to the parties that if after receipt of submissions I was of the opinion that an oral hearing was necessary, then, due to the current climate and the reality that the hearing would be conducted remotely via video conference (including with an interpreter in a different location to the appellant), I proposed to adjourn the hearing to a date to be fixed at a time when the parties were able to attend an oral hearing in person.
5. The appellant did not file submissions on the date required. This is despite orders made by a Registrar on 20 November 2019 requiring him to do so, and a variation of these orders made on 10 July 2020 reiterating such a requirement. Nevertheless, after receiving the Minister’s submissions, considering these alongside the notice of appeal and given the express consent of the parties, I have formed the view that the matter is suitable to be determined on the papers. This was communicated to the parties and there was no objection to this course.

# B The Grounds of Appeal

1. The three grounds of appeal advanced by the appellant are, in effect, identical to those relied upon in the proceeding below (without their particulars). Given that each ground of appeal is proceeded by the proposition that “[t]he Federal Circuit court [sic] didn’t correct the mistake”, in addressing each ground, I will draw assistance from the way in which each ground was particularised before the primary judge: see Primary Judgment (at [11]).

## B.1 Ground 1

1. The first ground of appeal is in the following terms:

The AAT is wrong about the facts I stated during the interview. The Federal Circuit court [sic] didn’t correct the mistake.

1. Although it is not entirely clear what the alleged jurisdictional error is on this ground of appeal, given that there was no interview with a delegate of the Minister (see Primary Judgment (at [31])), it appears that the reference to the “facts” misapplied by the Tribunal relate primarily to the evidence given by the appellant at the hearing regarding being beaten and followed by the Malay people. Hence, doing the best that I can, this ground of appeal can be expressed by the following propositions: (1) the Tribunal misunderstood (or failed to take into account) the appellant’s evidence regarding being beaten and followed by the Malay people; (2) the Tribunal unreasonably made adverse credibility findings because of the conflicting evidence provided at the Tribunal hearing regarding being beaten and followed; and (3) the Tribunal did not afford the appellant with the opportunity to clarify the facts concerning being beaten and followed. I will deal with each of these propositions in turn.
2. *First*, I do not accept that the Tribunal misunderstood (or failed to take into account) the appellant’s evidence regarding being beaten and followed. The Tribunal had regard to the appellant’s claim that the Malay people who came to his shop demanding “protection money” returned several days later and took goods out of his store, engaged in a physical argument with him which allegedly resulted in him being cut with a knife and having to go to hospital and that the threats continued after he refused to pay them. This accurately captures the nature of the appellant’s contention and in these circumstances, the appellant’s complaint that the Tribunal was “wrong about the facts [he] stated during the interview” is misconceived and goes no higher than raising mere disagreement with the fact that the Tribunal did not accept these events occurred as claimed. Without more, such disagreement cannot disclose jurisdictional error: see *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611 (at 645–6 [124] per Crennan and Bell JJ).
3. *Secondly*, I do not accept that the Tribunal fell into jurisdictional error by reason of the adverse credibility findings made regarding the appellant’s evidence about being beaten and followed. There is nothing in the material before the Court to suggest the appellant disclosed that he had been cut with a knife prior to the Tribunal hearing. Hence, the Tribunal’s finding that he had not made this claim prior to the hearing does not disclose error and, further, the fact that the “applicant’s answers in relation to what the people allegedly did to the goods in his shop, what they did to him and whether they returned” had changed, coupled with other evidence (see [15] below), provided a logical and intelligible basis for the ultimate finding that the appellant’s complaint was fabricated in order to found a claim for protection: see *Minister v SZMDS* (at [135] 649–50 per Crennan and Bell JJ); *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; (2018) 264 CLR 541 (at 550–1 [10] per Kiefel CJ and at 573 [82] per Nettle and Gordon JJ).
4. *Thirdly*, to the extent that this ground of appeal relates to the appellant not being afforded the opportunity to clarify the facts relied on by the Tribunal, it is also misconceived. This is because the appellant was invited to, and attended, a hearing before the Tribunal to give evidence and present arguments in relation to the issues arising in his review. Indeed, at the commencement of the hearing, the appellant confirmed that he had nothing to add to what had been set out in his protection visa application: Primary Judgment (at [30]). The cognate ground of appeal advanced before the primary judge was particularised in that the appellant “imagine[d] that it is reasonable to provide more specifics during the interview”. That was exactly the case. However, it was not an opportunity for the appellant to craft a more compelling story to aid his chances of obtaining a protection visa; an exercise which the Tribunal ultimately found had occurred. Furthermore, no evidence was given before the Federal Circuit Court, or is given now, to support the explanation that the appellant did not raise matters in his application because of the expectation of raising them later: see Primary Judgement (at [28]–[30]).
5. Accordingly, this ground is not made out.

## B.2 Ground 2

1. The second ground of appeal is in the following terms:

The AAT has been unreasonable and harsh on me. The Federal Circuit court [sic] didn't correct the unreasonableness.

1. Again, this ground is unparticularised on appeal. However, I infer, with assistance from the way in which the ground was put before the primary judge, that the allegations that the Tribunal “has been unreasonable and harsh” can be dealt with by reference to the following propositions: (1) the Tribunal unreasonably found the appellant not to be a credible witness; (2) the Tribunal did not provide the appellant with an opportunity, as allegedly requested, to refresh his memory regarding the address at which he lived from documents in his bag; (3) the Tribunal exhibited bias (either actual or apprehended) toward the appellant; (4) the Tribunal otherwise did not comply with its procedural fairness obligations; and (5) overall, the Tribunal was “harsh” toward the appellant. I will deal with each of these arguments in turn.
2. *First*, the Tribunal’s conclusion that the appellant was not a credible witness was based on multiple inconsistencies identified in the evidence he presented in his visa application and before the Tribunal, including, *inter alia*: where he lived and when he lived there; the nature of the business he owned and operated; and the recounting of his altercation with the Malay people who came to his shop. In these circumstances, the Tribunal’s conclusion (at [13]) that the “applicant has fabricated his claims in order to found a claim for protection” was logical, rational and had a probative basis. As such, it cannot be viewed as legally unreasonable: see *ARG15 v Minister for Immigration and Border Protection* [2016] FCAFC 174; (2016) 250 FCR 109 (at 130–1 [83] per Griffiths, Perry and Bromwich JJ) cited with approval by in *DAO16 v Minister for Immigration and Border Protection* [2018] FCAFC 2; (2018) 258 FCR 175 (at 183–4 [30] per Kenny, Kerr and Perry JJ). Further, to the extent that the appellant complains of the Tribunal’s decision to test his claims, it was open to the Tribunal to do so and it was not required to accept his evidence uncritically: *Randhawa v Minister for Local Government and Ethnic Affairs* [1994] FCA 1253; (1994) 52 FCR 437 (at 451 per Beaumont J).
3. *Secondly*,while the Tribunal decision (at [10]) does reveal that the Tribunal asked the appellant questions about where he had lived in Malaysia, to which he is reported as responding, after some time, that he lived in Petang Jaya for 4–5 years prior to coming to Australia but did not remember the address, there is nothing to indicate that the appellant asked the Tribunal for the opportunity, and the Tribunal denied him the opportunity, to refresh his memory from documents in his bag. In any event, the appellant did not specifically raise with the Tribunal that he had a poor memory. Nor did he advance any evidence in support of this assertion. Without further particulars, this allegation does not disclose that he was deprived of a meaningful opportunity to participate in the hearing as required by s 425 of the *Migration Act 1958* (Cth) (**Act**). Indeed, as was stated by the Full Court (Kenny, McKerracher and White JJ) in *BJB16 v Minister for Immigration and Border Protection* [2018] FCAFC 49; (2018) 260 FCR 116 (at 125 [43]):

Applicants who assert that their psychological condition deprived them of the “meaningful opportunity” required by s 425 of the *Migration Act* must establish more than the fact of the condition. They must also establish that their condition is such as to deny them the capacity to give an account of their experiences, to present argument in support of their claims, and to understand and respond to the questions put to them. Further, even when psychological evidence may, had it been available to the Tribunal, have led it to take a different view of the credibility of an applicant’s account, the absence of that evidence does not, of itself, establish that the hearing before the Tribunal proceeded on a false assumption about the applicant’s ability to give evidence and to present arguments relating to the issues arising in relation to the decision under review. Generally, it is insufficient for applicants to show no more than that a medical condition may have deprived them of the ability to put their case to best advantage.

(citations omitted)

1. See also *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32; (2004) 78 ALJR 992 (at 995–6 [19] per Gleeson CJ); *Minister for Immigration and Citizenship v SZNVW* (2010) 183 FCR 575; [2010] FCAFC 41 (at 582 [20] per Keane CJ); *SZMSA v Minister for Immigration & Citizenship* [2010] FCA 345 (at [20]–[25] per Gilmour J). Accordingly, I agree with the primary judge that any allegation that the appellant was denied a meaningful opportunity to give evidence and fully participate in the hearing is not made out.
2. *Thirdly*, an allegation of bias (actual or apprehended) is one which must be distinctly made and clearly proved: *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; (2001) 205 CLR 507 (at 531 [69] per Gleeson CJ and Gummow J and at 546 [127] per Kirby J). Indeed, an inference of bias or prejudgment should not be drawn from the mere fact of adverse findings and will rarely be made out by mere reference to the published reasons for a decision: *SCAA v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 668 (at [38] per von Doussa J). The appellant has not provided any particulars as to an allegation of bias, nor filed any evidence to support such allegation. In these circumstances, any such assertion is incapable of establishing jurisdictional error in the Tribunal’s decision.
3. *Fourthly*, for the reasons outlined by the primary judge (at [39]–[43]), I am not satisfied that the Tribunal otherwise did not comply with its procedural fairness obligations pursuant to the Act.
4. *Fifthly*, and as the primary judge noted (at [37]), the assertion that the Tribunal’s decision was “harsh”, without more, is simply an expression of grievance with the Tribunal’s decision, the giving effect to which would be to drift impermissibly into merits review.
5. Accordingly, this ground is not made out.

## B.3 Ground 3

1. The third ground of appeal is in the following terms:

AAT is wrong to conclude that Chinese Malays will not experience discrimination or violence on a day to day basis. The Federal Circuit court [sic] didn’t correct that conclusion.

1. There are two reasons why this ground of appeal must fail.
2. *First*, as the primary judge noted (at [55]), this ground misrepresents the relevant finding made by the Tribunal, which did not find that ethnic Chinese in Malaysia will not face discrimination, but rather that “Chinese Malaysians generally do not experience discrimination or violence on a day-to-day basis and may face low levels of discrimination when attempting to gain entry into the state tertiary system or the civil service”: Tribunal Decision (at [16]).
3. *Secondly*, and in any event, the Tribunal was entitled to reach this conclusion. In accepting that the applicant is a Chinese Malay, the Tribunal (at [17]) noted that:

… [b]ased on the available evidence including the recent July 2016 DFAT report, the Tribunal finds the applicant may face low levels of discrimination only. The Tribunal has considered the applicant’s accepted claims both singularly and cumulatively is not satisfied, on the available evidence including the DFAT report, that there is a real chance that the applicant will face serious harm as defined in s 5J(4) and s 5J(5) because he is Chinese Malay.

1. It is uncontroversial that the selection and weight to be afforded to information, such to country information, forms part of the fact-finding function of the authority: see *NAHI v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 10 (at [11] and [13] per Gray, Tamberlin and Lander JJ). Therefore, by reaching the above conclusion on the basis of the country information before the Tribunal, it cannot be said that its decision and reasons “lack an evident and intelligible justification”: see *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332 (at 367 [76] per Hayne, Kiefel and Bell JJ); *Minister v SZVFW* (at 550–1 [10] per Kiefel CJ and at 573 [82] per Nettle and Gordon JJ). Properly viewed, this ground goes no higher than raising the assertion that different conclusions could and therefore should have been made.
2. Accordingly, this ground is not made out.
3. For completeness, given the somewhat unstructured nature of the appeal and the fact the appellant is unrepresented, it is worth noting that in relation to those aspects of the reasoning of the primary judge which have not been addressed throughout the course of these reasons, I can discern nothing which gives rise to any arguable error in the way the matter was dealt with below.

# C Conclusion and orders

1. It was open to the primary judge to conclude that the Tribunal’s decision, and the findings that informed it, were reasonably open to the Tribunal, and for which it gave cogent and intelligible reasons. The appeal must therefore be dismissed with costs.

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

Associate:

Dated: 11 August 2020