FEDERAL COURT OF AUSTRALIA

CNU16 v Minister for Home Affairs [2018] FCA 1662

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| Appeal from: | *CNU16 v Minister for Immigration & Anor* [2018] FCCA 864  |
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| File number: | QUD 147 of 2018 |
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| Judge: | **REEVES J** |
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| Date of judgment: | 2 November 2018 |
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| Catchwords: | **MIGRATION** – review of a migration decision  |
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| Legislation: | *Judiciary Act 1903* (Cth)*Migration Act 1958* (Cth)*Federal Court Rules 2011* (Cth)  |
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| Cases cited: | *Ahmed v Minister for Immigration and Border Protection* [2016] FCA 751*AZAFJ v Minister for Immigration and Border Protection* [2016] FCA 291*CNU16 v Minister for Immigration & Anor* [2018] FCCA 864*House v The King* (1936) 55 CLR 499*MZZTY v Minister for Immigration and Border Protection* [2013] FCA 1289*Tang v Minister for Migration and Citizenship* (2013) 217 FCR 55; [2013] FCAFC 139  |
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| Date of hearing: | 10 August 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: | 11 |
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| Counsel for the Appellant: | The Appellant appeared in person assisted by an interpreter |
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| Solicitor for the First Respondent: | Mr G King of Minter Ellison |
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| Counsel for the Second Respondent: | The Second Respondent filed a Submitting Notice |

ORDERS

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|  | QUD 147 of 2018 |
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| BETWEEN: | CNU16Appellant |
| AND: | MINISTER FOR HOME AFFAIRSFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| JUDGE: | REEVES J |
| DATE OF ORDER: | 2 November 2018 |

THE COURT ORDERS THAT:

1. The appeal filed 16 March 2018 is dismissed.
2. The appellant is to pay the first respondent’s costs, to be taxed or agreed.

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

REASONS FOR JUDGMENT

REEVES J:

1. The appellant is a citizen of Bangladesh who arrived in Australia on 6 May 2013 as an unauthorised maritime arrival. On 13 August 2013, he applied for a protection (class XA) visa, which was refused by a delegate of the then Minister for Immigration and Border Protection on 17 November 2014. On 19 November 2014, the appellant sought review of that decision before the Refugee Review Tribunal, now the Administrative Appeals Tribunal (the Tribunal). The appellant’s application was listed for hearing before the Tribunal on 25 November 2015. When he failed to appear, the application was dismissed. On 17 December 2015, the Tribunal refused the appellant’s subsequent reinstatement application and re-affirmed its original decision to dismiss his application.
2. On 9 September 2016, approximately nine months later, the appellant filed an application in the Federal Circuit Court (which he amended on 21 November 2016) seeking an extension of time under s 477(2) of the *Migration Act 1958* (Cth) (the Act) to file an application for a review of the Tribunal’s decision. The primary judge dismissed that application on 12 February 2018 (see *CNU16 v Minister for Immigration & Anor* [2018] FCCA 864 (the primary reasons)).
3. On 16 March 2018, the appellant filed an unusual application in this Court. It purported to rely on r 31.23 of the *Federal Court Rules 2011* (Cth) (the Rules) to seek an extension of time in which to file an appeal against the decision of the primary judge. As the Minister correctly contended, that application was defective. That is so primarily because s 476A(3)(a) of the Act prevents an appeal being brought from a judgment of the Federal Circuit Court comprising an order made under s 477(2) of the Act (see *MZZTY v Minister for Immigration and Border Protection* [2013] FCA 1289 at [11]–[12] per Tracey J). It may also be noted that r 31.23 does not relate to an application for extension of time to file an appeal, but rather to file an application for review of a migration decision under s 477A(2) of the Act. Notwithstanding these defects, at the hearing of this matter, the Minister intimated that he was content for the Court to treat the appellant’s application as though it were an originating application brought in the Court’s original jurisdiction under s 39B of the *Judiciary Act 1903* (Cth) (Judiciary Act) and r 31.11 of the Rules as has occurred in similar circumstances in the past (see, for example, *AZAFJ v Minister for Immigration and Border Protection* [2016] FCA 291 at [1]–[4] per Bromwich J). I therefore proceeded to deal with the present application on that footing.
4. In the draft notice of appeal attached to his application, the appellant (for convenience this descriptor will be retained in these reasons) set out the following proposed grounds of appeal:

2. I believe that the Federal Circuit Court Judge did not make a correct decision in deciding my application in the Federal Circuit Court because Honourable Judge failed to find that I was denied procedural fairness by the Administrative Appeals Tribunal not giving me the opportunities to address all issues identified in my application for a protection visa in a hearing and refused my application.

3. The Federal Circuit Court did the mistake not finding that the Tribunal failed to consider that I was not a victim of persecutions for our political belief prior to my departure from Bangladesh as an activist of Bangladesh Nationalist Party (BNP) and I was also persecuted for my political belief.

4. I believe that Honourable Judge made mistake as he failed to consider that the Tribunal failed to give me an opportunity to respond to independent evidences in the possession of the Tribunal which suggests that I shall not be a victim of harassment for my political belief if returned to Bangladesh.

5. It is believed that Honourable Judge made mistake not finding the Tribunal’s failure to accept the evidences I submitted relevant to my protection visa application and failure to consider the harm I suffered in Bangladesh which were genuine and well-founded and refused my claims for a protection visa without giving me an opportunity to defend my claims.

6. It is believed that Honourable Judge did mistake not finding that the Tribunal made mistake in finding that I do not have genuine fear of persecution for a convention reason and I do not meet the criteria set out in s.36(2) of the Act of Protection visa.

(Errors and omissions in original)

1. With respect to these grounds of appeal, the Minister submitted they largely “agitate issues relevant only to the merits of the [appellant’s] protection claims” before the Tribunal. As for the appellant’s reconstituted application, the Minister submitted that:

(a) the primary judge clearly considered the factors relevant to exercising the discretion under subsection 477(2) of the Act to determine whether to grant the extension of time application: *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344; [1984] FCA 186 at 348-349;

(b) no error is exposed in the primary judge's reasons nor in the outcome of the exercise of the discretionary power under subsection 477(2) of the Act; and

(c) the primary judge was correct to find the Tribunal did not fall into error in making the non-appearance and confirmation decisions …

1. The appellant did not file any written submissions in support of his appeal. However, he did attend at the hearing, unrepresented, and made some oral submissions. Those submissions were largely directed to why it was that he failed to attend the original hearing before the Tribunal in 2015 and why he waited so long to bring his application in the Federal Circuit Court. He did not identify any relevant errors made by the primary judge in rejecting his application for an extension of time.
2. This Court has the jurisdiction under s 39B of the Judiciary Act to review the primary judge’s decision (see *Tang v Minister for Migration and Citizenship* (2013) 217 FCR 55; [2013] FCAFC 139 at [11] per Rares, Perram and Wigney JJ). However, that review is confined to the existence of jurisdictional error in the decision of the primary judge and is not concerned with the existence of jurisdictional error in the decision of the Tribunal (see *Ahmed v Minister for Immigration and Border Protection* [2016] FCA 751 at [3] per Bromberg J).
3. Section 477(2) of the Act provides a discretion to the Federal Circuit Court to grant an extension of time in which to file an application for review of the Tribunal’s decision. In deciding not to grant the appellant’s application under that provision, the primary judge: was satisfied that the Tribunal had properly invited the appellant to attend the hearing before it (at [21]–[23] of the primary reasons); noted that the appellant had filed his application for review of the Tribunal’s decision “232 days” late and described this period as a “significant” delay (at [9] of the primary reasons); and found that the appellant’s explanation for this delay was “completely unsatisfactory” (at [12] of the primary reasons).
4. Since the primary judge’s decision was discretionary in nature, the principles in *House v The King* (1936) 55 CLR 499 at 504–505 per Dixon, Evatt and McTiernan JJ apply. In summary, they require the appellant to show the primary judge: acted upon a wrong principle; allowed extraneous or irrelevant matters to guide or affect him; mistook the facts; or did not take into account some material consideration. They also allow intervention “if upon the facts [the result embodied in the order] is unreasonable or plainly unjust”.
5. Having read the primary judge’s reasons in this matter, I am not satisfied that any relevant error was committed by him in exercising his discretion under s 477(2) of the Act. There is no indication that his Honour acted contrary to any of the principles outlined above. There is, therefore, no basis upon which to review the exercise of his discretion to refuse the appellant’s application nor, more importantly, is any jurisdictional error apparent.
6. For these reasons, the appellant’s application has no merit and must be dismissed. The appellant should be ordered to pay the first respondent’s costs of the appeal to be taxed, or agreed.

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| I certify that the preceding eleven (11) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Reeves. |

Associate:

Dated: 2 November 2018