FEDERAL COURT OF AUSTRALIA

DTS16 v Minister for Immigration and Border Protection [2018] FCA 1845

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| Appeal from: | *DTS16 v Minister for Immigration & Anor* [2018] FCCA 2069 |
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| File number: |  |
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| Judge: | **BROMWICH J** |
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| Date of judgment: | 20 November 2018 |
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| Date of publication of reasons: | 23 November 2018 |
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| Catchwords: | **MIGRATION** – appeal from orders of the Federal Circuit Court dismissing an application for judicial review of a decision of the Administrative Appeals Tribunal – where no grounds of appealidentified – held: appeal dismissed |
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| Legislation: | *Migration Act 1958* (Cth) s 424A(3)(a) |
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| Cases cited: | *DTS16 v Minister for Immigration & Anor* [2018] FCCA 2069  *SZTOG v Minister for Immigration and Border Protection* [2018] FCA 112 |
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| Date of hearing: | 20 November 2018 |
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| Registry: | New South Wales |
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| Division: | General |
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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: | 19 |
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| Counsel for the Appellant: | The Appellant appeared in person |
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| Counsel for the First Respondent: | Mr T Reilly |
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| Solicitor for the First Respondent: | Mills Oakley |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice save as to costs |

ORDERS

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|  | | NSD 1280 of 2018 |
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| BETWEEN: | DTS16  Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | BROMWICH J |
| DATE OF ORDER: | 20 NOVEMBER 2018 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent’s costs as assessed or agreed.

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

REASONS FOR JUDGMENT

Revised from transcript

BROMWICH J:

1. This is an appeal from orders of a judge of the Federal Circuit Court of Australia by which a judicial review challenge to a decision of the Administrative Appeals Tribunal was dismissed on 5 July 2018. The Tribunal had affirmed a decision of a delegate of the Minister for Immigration and Border Protection, now the Minister for Home Affairs. The delegate had refused the grant of a protection visa.
2. The background facts were summarised by the primary judge as follows (at [1]-[3]):

… The applicant is a citizen of Egypt who first arrived in Australia as a student in January 2008 and subsequently obtained further student visas, which entitled him to remain in Australia until December 2015. In August 2008, he returned to Egypt coming back to Australia in October of that year.

The applicant made subsequent return trips to Egypt between August 2010 and November 2010, August 2012 and November 2012, and finally, 16 November 2013 to 28 March 2014. He went to Egypt in 2010 to visit his ill father and on the latest of his visits to Egypt, he married and now has one child to that marriage. Upon return from his last trip the applicant made an application for a protection visa, which was lodged on 12 May 2014. The applicant claimed, in support of that application, that while he remains a Muslim, he believes the Koran is the word of God and rejects the authority of the Hadiths.

Hadiths are a collection of traditions containing sayings attributed to Muhammad with accounts of his daily practices, also known as the Sunna from which the title Sunni Muslim derives and together constitute the major source of guidance for Muslims apart from the Koran. The applicant claimed that he no longer considered himself a Sunni and did not follow the traditional practices of Sunni Islam. He claims that the Koran requires him to speak out about his views and that he would do that if he returned to Egypt. He said that doing so would place him at risk of being arrested or killed if he returned to Egypt.

1. The appellant’s application for judicial review in the Federal Circuit Court raised six grounds as follows (verbatim):

l. At point 23 the RRT compared my views to that of Koranists. I clearly explained that I was not part of this group but the RRT continued at point 51 to use independent information about Koranists to make adverse findings about my situation.

2. At point 43 the RRT found that my return to Egypt in 2013 indicated that I did not fear harm. I had on a number of occasions clarified to the RRT that at that time I was developing my beliefs and became committed to my beliefs after my return. The RRT finding was not consistent with my evidence.

3. At point 45 the RRT accepted that “..insulting or defaming Islam could be charged with an offence.” But continued to find that I would not face serious harm because the RRT “..,not aware of any evidence …to be killed..” The RRT assumed that only being killed is serious harm and did not investigate that I may be charged.

4. At point 45 the RRT used information about Egyptians identifying as “just Muslim” as opposed to “Sunni Muslim” and found that I would not experience harm if I did not identify as Sunni Muslim. My claims related not to the name I use to identify my self but to the difference in my beliefs. This finding was based on facts irrelevant to my claims.

5. At point 50 the RRT accepts that “..Sisi has continued to enforce measures to counter atheism, blasphemy and dissent..” The RRT is not ask or consider if my beliefs would be viewed any of these.

6. At point 60 the RRT gave no weight to my witness statements claiming that they contain claims which the RRT has rejected. The RRT did not state or discuss with me the claims that it rejected.

1. It should be noted that despite the references in the above grounds to the “*RRT*”, the decision was not made by the Refugee Review Tribunal, but rather by the Administrative Appeals **Tribunal**. Additional issues were also raised in an affidavit from the appellant filed in the Federal Circuit Court.
2. The primary judge considered the Tribunal’s reasons in some detail, noting that the Tribunal did not accept any of the appellant’s claims. His Honour described the Tribunal as having, in essence, three reasons for not accepting those claims, quoting or referring to the Tribunal’s reasons as follows (at [10]-[14]):

The first was at [54] and [55], which I set out below:

54. At [the] hearing… [the] applicant said that he had ceased attending the Mosque about 8 or 9 months before he travelled to Egypt in 2013 and that he was convinced in his mind and his thoughts that his new beliefs on religion were correct prior to this trip. However, he attended Sunni Mosques, married a Sunni woman according to Sunni traditions and spoke to nobody but his wife about his new beliefs. If the applicant had genuinely abandoned Sunni Islam and felt obliged to speak out about his beliefs then he would surely have done so during this trip. However, he failed to do so and I do not accept that he has abandoned his Sunni faith or that he would criticise traditional Sunni beliefs and encourage others to change their religious beliefs and practises if he returned to Egypt.

55. In reaching this conclusion I have noted the applicant’s claim that while he was convinced in his mind and thoughts that he was no longer a Sunni and had to try and convince others to adopt his new religious beliefs in November 2013 he was not ready for a complete break from his old religion in his heart and his spirit – I do not accept this explanation. When his 2013 visit to Egypt was discussed at the hearing he said that he had attended a Sunni mosque, married according to Sunni traditions and refrained from speaking to anyone about his new beliefs not because he had any doubts about his new beliefs, but because he did not want to upset his mother or cause her problems and because he did not want his wife to divorce him.

The second was at [56] and [57] which, in effect, was that the Tribunal found that the applicant had given differing accounts of his experiences during visits to Egypt.

Finally, at [58], was the Tribunal’s concern arising from the applicant’s prolonged stay in Australia as a student, during which he failed to complete more than four low-level courses. That history suggested to the Tribunal that the applicant was merely seeking to find a way to remain in Australia; in other words, that the applicant’s claims were not based upon a genuine fear of harm.

At [59], the Tribunal stated again that it did not accept the applicant’s claims. It found that he had concocted such claims to support his application for protection in Australia. At [60], it referred to the statements provided to it by the applicant at the hearing and gave them little weight, both because they were written by the applicant’s personal friends and because they related to claims which the Tribunal had rejected. Finally, at [61], the Tribunal referred to another claim that the applicant had been viewed with suspicion prior to his departure from Egypt in 2008, but stated that it rejected that because of his willingness to concoct his claims for the reasons that he had already given.

On the basis of all of those findings, the Tribunal was not satisfied the applicant met the criteria for the grant of a visa and so affirmed the decision of the delegate.

1. The primary judge dealt with the appellant’s six grounds of review and the additional matters in the appellant’s affidavit succinctly as follows (at [16]-[26]):

There are six grounds in his application, which the applicant addressed individually in oral submissions at the hearing. The first five of these grounds can be conveniently dealt with together. There are two problems with all of the grounds. The first, is that they each relate to a part of the Tribunal’s statement of reasons which did not, in fact, contain any findings upon which the Tribunal based its decision, but rather were a summary of either the questions it asked or evidence given at the hearing or the country information before it.

As such, nothing said in those reasons formed the basis of the reasoning process of the decision and so did not, on any view, even if accepted as erroneous, constitute jurisdictional error. The second problem with grounds 1 to 5 is that they are premised on the acceptance of the truth of the applicant’s claims. For the reasons that I have given already, the Tribunal rejected each of those claims. For that reason, the premise in each of the grounds has not been established and each of the grounds must be rejected.

The sixth ground concerns the finding at [60] in respect of the witness statements provided by the applicant. The applicant says two things about these witness statements. First of all, he complains that they were rejected in the first place. Secondly, he argues that the Tribunal erred by not discussing those statements with him and the possibility that they might be rejected in the manner found by the Tribunal. The applicant argued that the Tribunal should have discussed those with him and given him the chance to get different witness statements. On one reading, the second part of ground 6 also suggests that the Tribunal failed to discuss any of the claims which it rejected.

On that understanding, that part of the ground must be rejected. As I have noted above in [27] through to [46] of its statement of reasons, the Tribunal set out a summary of what occurred at the Tribunal hearing. That summary makes it clear that, contrary to the implied assertion in ground 6 of his application, the Tribunal did discuss with the applicant his evidence and did suggest to him ways or reasons for which that evidence might not be accepted. See for example, [35], [43], [45] and [46].

Returning to the other two ways in which ground 6 could be understood, the Tribunal gave little weight to the corroborating evidence for two reasons, the second of which was essentially because of its rejection of the applicant’s credibility. In *Minister for Immigration & Citizenship v SZNSP* (2010) 184 FCR 485, North and Lander JJ referred to the decision of the High Court in *Re Minister for Immigration & Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 and said at [33] that:

... it was open to the RRT to assess the credit of the first respondent and then, in the light of that assessment, consider what weight should be given to the witness statement. ...

See also Katzmann J at [50].

Those principles, which have been applied consistently since the decision in *SZNSP*, and indeed well prior to that time, apply with only one caveat to this case. The caveat which is ordinarily applied in respect of the dealing with corroborative evidence is that a finding of credit does not mean that it is open to the Tribunal simply to ignore corroborating evidence altogether. The question, as Gleeson CJ said in *Applicant S20/2002*, is often simply one of timing. For those reasons, I find that there was no error in the Tribunal giving no weight to the witness statements.

Insofar as the applicant asserts that the Tribunal erred by failing to discuss the witness statements with him at the hearing, there are two problems. The first is that the applicant has not established, to my satisfaction, that the Tribunal failed to do so. Secondly, even if he had established that, there would have been no error because the Tribunal is under no obligation to give the applicant, in advance, any opportunity to address its thought processes. It was clear from the Tribunal’s summary of what occurred at the hearing that the applicant’s credit in general was in issue before the Tribunal and in that way the Tribunal gave the applicant the opportunity it was required to give under s.425 of the Act.

For those reasons, each of the grounds in the application will be rejected.

In his affidavit, the applicant makes a number of submissions about the Tribunal’s decision. The first is that the Tribunal did not consider whether the applicant would be accused of defaming Islam and did not consider that being charged with an offence could be serious harm: [3]. That ground cannot stand in light of the Tribunal’s rejection of all of the applicant’s claims.

Paragraph 4 has two sentences. The first sentence is “[t]he RRT did not take into consideration my witnesses because it rejected my claims but did not explain why”. Ignoring the internal inconsistency in that sentence, it is plain that the Tribunal did give two reasons for giving no weight to the witnesses put forward by the applicant: see [60].

The second sentence in [4] is “[m]y witnesses confirmed by religious beliefs and the RRT did not say it did not accept my beliefs”. Contrary to the assertion in that sentence, the Tribunal stated in the plainest of terms that it did not accept the applicant’s claimed beliefs. It said, for instance at [59], that he had “concocted” his claims.

1. By a notice of appeal dated 13 July 2018 and filed on 18 July 2018, the appellant raises the following two grounds of appeal (verbatim):

His Honour Judge Smith failed to take into consideration the grounds of my Application under Migration Act filed in Court in December 2016.

His Honour Judge Smith did not provide copy of his judgment. He only dismissed my case on 5 July 2018 and I will provide further grounds when I receive the judgment.

1. The appellant did not provide any further grounds of appeal. Nor did he provide any written submissions as ordered by a registrar of the Court. The Minister submits, and I accept, the following (omitting appeal book references, and with additional comments in parentheses):

Before his Honour the appellant relied upon an Application containing six grounds. His Honour dismissed all of the grounds. His Honour also dismissed other complaints made in the appellant’s affidavit. …

The Notice of Appeal contains two grounds of appeal. The first claims his Honour failed to take into account the grounds of the Application, but as already stated his Honour did so and dismissed them. The second ground claims his Honour did not provide a copy of the judgment and the appellant will provide further grounds when he receives the judgment. His Honour gave an *ex tempore* [oral] judgment in the appellant’s presence on 5 July 2018, and a written version of his Honour’s judgment was available on Austlii by at least 24 August 2018 [referring to AustLII publication details added to the footer of the judgment]. There is no substance in either ground of appeal.

1. The appellant appeared at the hearing of his appeal. He complained about not having received a copy of the primary judge’s reasons, which he said he had been told would be sent to him, but admitted that he had taken no steps at all to obtain a copy. He said that he had received the Minister’s submissions a few days ago. The appellant also referred to passages from the appeal book, which contained a copy of the primary judgment.
2. The appellant said in support of his appeal that he would like to focus on what his witnesses had to say, directing the Court’s attention to statements of three witnesses in the appeal book at pages 102, 103 and 104. Two of those statements are from people the appellant met through mutual friends, and appear to be, as a result, friends of his as well. A third statement comes from someone he met on a train and also appears to be a friend. Each statement goes to the merits of his claim in terms of his religious beliefs. As the Minister pointed out, the Tribunal did not believe the appellant and in particular did not believe that he had abandoned his Sunni beliefs. In those circumstances, the Minister submitted, it was open to the Tribunal to give no weight to what had been provided in support of the appellant’s claims. That submission by the Minister must be accepted.
3. The appellant also said, more generally, that the Minister had no right to refuse his request, which I infer as a reference to be granted a protection visa, and that he was in real danger in Egypt due to his “*different thoughts*”, an apparent reference to his claim to have departed from the mainstream Sunni branch of Islam. The appellant said that, despite the Tribunal member having thought that he was not trustworthy, he had been completely honest and all the statements he made before the Tribunal were correct. It may be observed that this was no more than an appeal to the merits of the appellant’s case and did not identify, much less establish, any error, let alone jurisdictional error, on the part of the Tribunal.
4. The appellant also referred to parts of the delegate’s adverse credit findings. However, as I pointed out to the appellant, the delegate’s decision had been overtaken by the Tribunal’s decision.
5. The appellant made a more sweeping and unparticularised assertion that the Tribunal had relied upon information drawn from the internet and had not considered the essence of his case. While reliance was placed on country information, and information sourced from the internet, there is nothing inherently wrong with that. More importantly, the assertion that the essence of the appellant’s case was not considered is not correct. It was considered, but it was not accepted, as a careful reading of the Tribunal’s reasons reveals.
6. At no point in the appellant’s oral submissions did he refer to the content of the primary judge’s reasons, let alone assert, much less establish, any error by his Honour.
7. In ***SZTOG*** *v Minister for Immigration and Border Protection* [2018] FCA 112, Flick J considered the position when dealing with a notice of appeal that disclosed no grounds of appeal. His Honour relevantly observed (at [24]-[30]):

The jurisdiction being presently exercised by this Court is the jurisdiction conferred by s 24(1)(d) of the *Federal Court of Australia Act 1976* (Cth) to hear “*appeals from judgments of the Federal Circuit Court exercising original jurisdiction under a law of the Commonwealth*”.

This Court has no jurisdiction to conduct some general supervisory review of decisions of the Federal Circuit Court. It has no jurisdiction to give any advisory opinion as to what it perceives to be the legal or factual merits of a decision made by a Judge of that Court.

The form and content requirements of a *Notice of Appeal* are provided for in Pt 36 of the *Federal Court Rules* *2011* (Cth). Rule 36.01(2) provides as follows:

The notice of appeal must state:

(a) whether the whole judgment or all of the orders, or only part of the judgment or some of the orders, are appealed from; and

(b) if only part of the judgment, or some of the orders, is appealed from—the part of the judgment or the particular orders appealed from; and

(c) briefly but specifically, the grounds relied on in support of the appeal; and

(d) the judgment or orders the appellant wants instead of the judgment or orders appealed from.

Notwithstanding the width of the discretionary power conferred by r 1.34 to dispense with compliance with any of the *Rules* (cf. *Lazar v Taito (Australia) Pty Ltd* (1985) 5 FCR 395 at 414 per Neaves J), it would be difficult to envisage circumstances in which an order would be made dispensing with compliance with r 36.01(2)(c) so as to permit a *Notice of Appeal* to be filed without the specification of any *Grounds of Appeal* or without any attempt to formulate a *Ground* or *Grounds of Appeal*. In the absence of any specification of the *Grounds of Appeal* sought to be advanced by an appellant, the prospects of injustice to a respondent would remain very real (cf. *Lazar v Taito (Australia) Pty Ltd* (1985) 5 FCR 395 at 403 to 404 per McGregor J).

Although a failure to comply with all of the requirements imposed by r 36.01(2) may not render an appeal “*incompetent*” (cf. *Zegarac v Dellios* [2007] FCAFC 58 at [7] per North J (Weinberg and Jessup JJ agreeing); *Singh v Owners Strata Plan No 11723 (No 3)* [2012] FCA 1121 at [29], (2012) 207 FCR 390 at 396 per Griffiths J), a failure to specify any *Grounds of Appeal* (it is respectfully concluded) does render the appeal incompetent.

It is difficult to envisage a requirement more fundamental to the proper administration of justice when resolving an appeal than the requirement to specify the *Ground* or *Grounds of Appeal*. Those *Grounds* form the very “*basis upon which the appellant will contend that the judgment, or a part of the judgment, should be set aside or varied*” and should “*provide a sensible framework for … submissions*”: *Commonwealth of Australia v Evans* [2004] FCA 654 at [35], (2004) 81 ALD 402 at 411 to 412 per Branson J citing *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* [2002] FCAFC 157 at [4] to [5], (2002) 234 FCR 549 at 551 per Branson J .

In the absence of any *Grounds of Appeal* being provided, and where the lawyer for the Appellants (at the time the *Notice of Appeal* was filed) has expressly stated that *Grounds* “*will be prepared*”, this Court should not proceed upon the basis that the *Grounds* to “*be prepared*” will necessarily be *Grounds* which assert that the primary Judge erred in rejecting the *Grounds* previously advanced before the Federal Circuit Court. It is simply a matter of speculation as to what the *Grounds of Appeal* would provide. Nor should an order be made in the present proceeding dispensing with compliance with r 36.01(2)(c) where the Appellants have previously had the assistance of a lawyer and where it has been recognised that *Grounds of Appeal* would be provided.

In the absence of the specification of *Grounds of Appeal* which focus the attention of this Court upon perceived appellable error committed by a primary judge, a *Notice of Appeal* should normally be struck out. Although this Court may in some circumstances attempt to redraft or construe otherwise ill drafted *Grounds of Appeal* in an effort to identify appellable error, it is no part of the function of this Court to review the reasons for decision of a primary judge, draft what may be arguable *Grounds of Appeal* and then proceed to resolve those *Grounds*. Even judicial attempts to revise ill-drafted *Grounds of Appeal* run the very real risk of prejudicing the impartial administration of justice: cf. *Arifin v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2014] FCAFC 61 at [30] per North, Flick and Jagot JJ. For the Court to itself draft its own *Grounds of Appeal* and then resolve those *Grounds* is, with respect, a step too far.

1. Flick J in *SZTOG* then concluded (at [32]):

In the absence of the *Notice of Appeal* setting forth any *Grounds of Appeal*, and in the absence of *Grounds of Appeal* being identified, the proceeding is to be dismissed.

1. I wholeheartedly agree with Flick J’s observations and conclusions in *SZTOG*. This appeal should be dealt with in the same manner, with the additional observation that I could not detect any error in the primary judge’s reasons.
2. Upon the basis that there are no proper grounds of appeal, let alone any viable grounds of appeal, there is no foundation for finding the necessary error on the part of the primary judge. In those circumstances, the appeal must be dismissed.
3. There is no reason why costs should not follow the event. The appellant must pay the Minister’s costs as assessed or agreed.

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| I certify that the preceding nineteen (19) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromwich. |

Associate:

Dated: 23 November 2018