FEDERAL COURT OF AUSTRALIA

AQP16 v Minister for Immigration and Border Protection [2018] FCA 1880

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| Appeal from: | *AQP16 v Minister for Immigration & Anor* [2018] FCCA 1225 |
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| File number: | NSD 859 of 2018 |
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| Judge: | **BROMWICH J** |
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| Date of judgment: | 30 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 ground of appeal regarding purported error of the Tribunal not raised in the Court below – **held**: appeal dismissed |
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| Legislation: | *Migration Act 1958* (Cth) ss 424A, 424A(1), 424A(3)(b), 424(3)(ba) |
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| Cases cited: | *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833; 117 FCR 424  *CQG15 v Minister for Immigration and Border Protection* [2016] FCAFC 146; 253 FCR 496  *H v Minister for Immigration and Multicultural Affairs* [2000] FCA 1348; 63 ALD 43  *O’Brien v Komesaroff* (1982) 150 CLR 310  *Minister for Immigration & Citizenship v SZGUR* [2011] HCA 1; 241 CLR 594  *Minister for Immigration v Jia Legeng* [2001] HCA 17; 205 CLR 507  *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26; 235 ALR 609  *SZVCZ v Minister for Immigration and Border Protection* [2017] FCAFC 130; 252 FCR 540  *VAAC v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 74; 129 FCR 168  *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 158; 238 FCR 588 |
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| Date of hearing: | 21 November 2018 |
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| Registry: | New South Wales |
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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: | 29 |
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| Counsel for the Appellant: | The Appellant appeared in person |
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| Solicitor for the First Respondent: | Mr J McGovern of Clayton Utz |
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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 859 of 2018 |
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| BETWEEN: | AQP16  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: | 30 NOVEMBER 2018 |

THE COURT ORDERS THAT:

1. Leave to rely upon ground 1 in the undated notice of appeal filed on 24 May 2018 be refused.
2. The appeal be dismissed.
3. The appellant pay the first respondent’s costs fixed in the sum of $3,500.

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

REASONS FOR JUDGMENT

BROMWICH J:

1. This is an appeal from orders of a judge of the Federal Circuit Court of Australia made on 18 May 2018, by which a judicial review challenge to a decision of the Administrative Appeals **Tribunal** was dismissed. 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 [8]-[15], omitting application book references):

The applicant is a citizen of Lebanon. She arrived in Australia on 12 November 2013 on a visitor visa. She applied for a protection visa which was received by the Minister’s department on 28 November 2013.

The applicant set out her claims to fear harm in her protection visa application. She claimed to fear harm on the basis of an incident that occurred in her home village in Lebanon. She claimed that she had allowed a family of refugees from Syria to stay with her at her home, and that the “husband” in the family had “attacked” her and raped her on multiple occasions. She claimed that the Syrian family now occupied her house and that she was fearful that the “Syrian family”, especially “the husband”, would harm her if she returned to Lebanon.

The applicant also claimed to have initially come to Australia for the purpose of visiting her mother, who had a “serious medical condition”. She was initially refused a visitor visa but one was ultimately granted after a bond was paid.

The applicant had previously applied, and been refused, a carer visa and a prospective spouse visa to come to Australia.

The applicant was invited to, and attended, an interview with the delegate on 19 March 2014. The delegate refused the application for a protection visa on 2 April 2014.

On 22 April 2014, the applicant applied to the Tribunal for review of the delegate’s decision. On 21 July 2014 the applicant provided the Tribunal with a copy of a psychological evaluation in relation to herself.

The applicant was invited to, and attended, a hearing before the Tribunal on 9 February 2016. She provided the Tribunal with a letter from a registered psychologist dated 1 February 2016.

The Tribunal affirmed the decision not to grant the applicant a protection visa on 1 March 2016.

1. The primary judge accepted the Minister’s written summary of the Tribunal’s analysis and findings as fair and therefore adopted them verbatim, excluding the footnotes. There is no suggestion that there was anything wrong with either that summary or his Honour’s adoption of them. A part of that summary may conveniently be further reproduced as follows (drawn from the primary judge’s reasons at [16], emphasis in original):

The Tribunal found that the applicant was not a credible witness and ‘had fabricated accounts of events, as well as claimed fears, upon which she based her protection claims.’ In coming to this conclusion, the Tribunal expressed concerns about:

1. **inconsistent evidence concerning her previous relationship**, which had formed the basis of an earlier application to come to and remain in Australia. The applicant repeatedly denied that she had had a relationship since her divorce, despite this being inconsistent with her application which noted that the Department had refused her a prospective spouse visa. The Tribunal indicated that this undermined her credibility and indicated that she was prepared to make a false application to the Department in order to come to Australia;
2. **evidence given at an interview in November 2012 in support of her prospective spouse application**. The applicant was unaware of basic information about her sponsor who was her prospective spouse, and the sponsor’s evidence was contradictory to [the] applicant’s evidence. The Tribunal did not find the applicant’s response to this information to be persuasive, and considered the contradictory evidence to undermine the applicant’s credibility;
3. **the claim that she was living alone in her home in Lebanon**.The applicant’s claim that she had not lived with her son since November 2011 was inconsistent with the Departmental notes of the interview held on 27 November 2012 for the purposes of her prospective spouse application. Those notes recorded that the applicant stated that she was currently residing with her son in Majdala, Lebanon. Further, before the Tribunal, the applicant changed her evidence about receiving the house from her husband in the divorce settlement. The Tribunal indicated that this, cumulatively, undermined the applicant’s credibility, as well as the credibility of her assertion that she was living alone and vulnerable nine months later, when she took the Syrian refugee family into her home. This, in turn, undermined her claims about the harm she suffered in Lebanon because she was living alone;
4. **the applicant’s changing evidence about the Syrian refugees**. The applicant claimed in her application to have heard from the family about what had happened to them. However, in the Tribunal interview, she was only able to give first names and ages of the children and the area they came from. Further, the applicant gave changing evidence as to the date the family moved in and also regarding the sexual assaults perpetrated by the male Syrian refugee. The Tribunal found that [t]his undermined her claims that she allowed a Syrian refugee family into her home and that she suffered harm as a result;
5. **the applicant’s evidence concerning her lack of action to stop the sexual assaults and to remove the Syrian family from her home**. The applicant stated that she avoided being further assaulted by the Syrian man in the two months prior to coming to Australia by going out when the man’s wife was out. The Tribunal found it difficult to accept the applicant’s claim that in the periods before the alleged second and third assaults, it did not occur to her to avoid further assaults by deciding to go out when the Syrian man’s wife left the house. The Tribunal put to the applicant its concerns that she took no steps to have the Syrian family removed from her house while she was there, and even after she had left. It did not accept her purported explanations for not approaching the authorities for state protection, and was further concerned that the applicant raised new claims about violence perpetrated by Syrian refugees against her father and his neighbour, and contradictory evidence about the availability of the authorities to assist a person in her position. The Tribunal considered that her ‘changing evidence, depending on the claim she was making to the Tribunal, undermines her credibility’;
6. **evidence that the applicant planned to return to Lebanon, despite the Syrian family still living in her home**. On the basis of the adverse credibility finding, the Tribunal rejected the applicant’s claims regarding her living arrangements in Lebanon. It did not accept that the applicant lived alone and invited a Syrian family into her home, nor that she was sexually assaulted by the Syrian refugee in her home, nor that the Syrian family have continued to reside in her home, nor that any of the associated claims were true.

On the evidence before it, the Tribunal considered that the applicant made the prospective spouse visa application in an attempt to remain in Australia, and that the Protection visa application claims were ‘fabricated ... as a continuation of her attempts to remain in Australia ...’

The Tribunal found that the applicant will return to live with her son and his family in Madjala. It found that even if she was not to work in the future in Lebanon, she has had and will continue to have sufficient financial support from her extensive family in the future.

Although the applicant gave evidence that she only feared harm from the one Syrian man, the Tribunal considered the risk of violence or other harm facing her upon return. On the basis of country information and the applicant’s evidence, it found that the applicant does not face a real risk of harm from Syrian refugees, cross-border attacks by Syrian authorities or for any other reason.

The Tribunal considered the two psychologists reports and was prepared to accept the diagnosis that in 2014, the applicant suffered from major depressive disorder and that in 2016 she continues to have ‘psychological difficulties’. However, it was not prepared to give weight to the psychologist’s assertion that the applicant suffered trauma in Lebanon (including that she had been sexually assaulted) given that the reports appeared to be based on self-reporting, and given inconsistencies between the reports and the applicant’s claims. The Tribunal noted that the applicant would be able to access healthcare in Lebanon.”

1. The appellant’s original application for judicial review contained six grounds, which were reproduced in full in his Honour’s reasons. Those grounds as pleaded were as follows (verbatim):

1. The Tribunal misunderstood my case and had no basis not to accept my claim concerning the rape by Syrian man.

2. The Tribunal also has no basis to make a finding that I am not a credible witness.

3. The Tribunal while accepted the Psychologist Report its conclusion is wrong because I see my Psychologist as a result of the trauma and rape I suffered in Lebanon.

4. The Tribunal had reports and based on those reports and the significant influx of Syrian refugees since 2011 yet failed to accept that rape took place and as a result of that I have been seeing a Psychologist.

5. The Tribunal must accept my evidence that I am prepared to return back home as soon as the Government can return refugees to Syria because my fear and harm is the result of the Syrian who harmed me and as long as he continues to occupy my home my life continues to be at risk if I return.

6. I am therefore a credible witness and the Member was bias and made a finding contrary to the facts presented.

1. A further and additional ground of review, contained in a proposed amended application, was as follows (as reproduced in the primary judge’s reasons at [18]):

The Tribunal failed to comply with s 424A of the Migration Act

Particulars

(1) The Tribunal used as part of a reason for affirming the decision under review the fact that the applicant had previously made an application for a prospective spouse visa. This application was material evidence that, in combination with other evidence the Tribunal accepted, led to the making of a finding of fact that by itself contradicted or undermined an essential element of the applicant’s claim.

1. All seven grounds of review were pressed before the primary judge.
2. The primary judge detailed the oral submissions made by the appellant in relation to the original six grounds of review, including the appellant reading a prepared statement that repeated her claims to fear harm from the Syrian man whom she said had sexually assaulted her. The appellant also asserted that she had not lied before the Tribunal. However, his Honour characterised the Tribunal’s ultimate adverse conclusions as to the appellant’s credibility as being based on factual findings that were reasonably open and for which there were intelligible and cogent reasons, citing well-established authority on that topic, culminating in *CQG15 v Minister for Immigration and Border Protection* [2016] FCAFC 146; 253 FCR 496.
3. Dealing first with the seventh (further and additional) ground concerning an alleged breach of s 424A of the *Migration Act 1958* (Cth), the primary judge characterised the information in question about the appellant’s prospective spouse visa as having been provided in her protection visa application, and having also been provided to the Tribunal for the purpose of its merits review. His Honour concluded that this information therefore fell within the exceptions in s 424A(3)(ba) and (3)(b) respectively. His Honour also found that the inconsistency between the information provided by the appellant and her evidence at the Tribunal hearing was not “*information*” for the purposes of s 424A(1), citing *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26; 235 ALR 609; see also *Minister for Immigration & Citizenship v SZGUR* [2011] HCA 1; 241 CLR 594 at [9] (French CJ and Kiefel J); *SZVCZ v Minister for Immigration and Border Protection* [2017] FCAFC 130; 252 FCR 540. His Honour therefore refused leave to rely upon that ground of review.
4. The primary judge then turned to the six original grounds of review. His Honour characterised grounds 1 and 2 as mere general assertions, without particulars, which was of itself a sufficient reason to dismiss them. However, his Honour went further and considered the grounds, noting that there was nothing in the evidence to indicate that the Tribunal misunderstood the appellant’s claim to fear harm from a Syrian man who had previously assaulted her, which was confirmed as the only basis for this feared harm. His Honour found that the Tribunal had a basis for rejecting that claim, it being her own evidence which led to an adverse credibility finding. That finding in turn was based on a series of factual findings that were open for it to make. Thus, his Honour concluded, the appellant’s case rose no higher than an assertion that she had told the truth and that it was not open to the Tribunal to find otherwise. This was nothing more than impermissible merits review.
5. The primary judge similarly characterised grounds 3, 4 and 5 as being no more than expressions of disagreement with the Tribunal’s findings. His Honour said that the appellant’s complaint appeared to be that the Tribunal should have accepted her claim to fear harm from the Syrian man because she had provided reports from a psychologist which arose from the asserted trauma of events in Lebanon and her having been raped. However, his Honour noted that the Tribunal had specifically and extensively considered those psychological reports, the appellant’s evidence about those reports and her evidence about the events to which they were said to relate. His Honour observed that the Tribunal’s reasons refer to putting inconsistencies to the appellant, part of which resulted in her saying that a part of one of the reports was incorrect, and that the Tribunal had accepted aspects of those reports, but that this was not enough to overcome its adverse findings as to the appellant’s credibility and the consequential rejection of her claim of having been sexually assaulted by the Syrian man. The primary judge concluded that these three grounds of review also sought impermissible merits review.
6. The primary judge described bias, raised by ground 6, as a serious allegation which was required to be clearly alleged and distinctly proven, citing the leading authority of *Minister for Immigration v Jia Legeng* [2001] HCA 17; 205 CLR 507. His Honour noted that it is rare that such an allegation can be established by reference only to the reasons for the decision, citing numerous authorities to that effect. His Honour referred to the transcript of the Tribunal hearing provided and relied upon by the appellant. His Honour found nothing in that transcript to support the assertion of bias, noting also that the appellant had not identified any particular aspect of the Tribunal’s reasons that indicated or revealed any pre-judgment. His Honour was not satisfied that any allegation of bias had been established.
7. The appellant’s judicial review application was therefore dismissed as no jurisdictional error had been revealed.
8. By an undated notice of appeal filed on 24 May 2018, the appellant raises two grounds of appeal, which are reproduced in turn below.
9. The appellant did not provide any further grounds of appeal. Nor did she provide any written submissions as ordered by a registrar of the Court. However, at the hearing of the appeal, she read from a prepared statement. As the Minister correctly observed, that statement did not rise above an appeal to the merits of her case, and made only passing reference to the primary judge having dismissed her judicial review application.

## Ground 1

1. This ground is as follows (verbatim):

The Tribunal failed to understand my circumstances and undermined my credibility based on the issue that I failed to mention my prospective spouse even though I did mention in my application CB p.7 that I applied to come to Australia under prospective spouse and my application was refused.

1. The Minister submits that this ground of appeal is not within the same ambit as any ground agitated before the primary judge. That submission must be accepted, as the above consideration of the primary judge’s reasons demonstrates.
2. The Minister further submits that this ground of appeal misconstrues the Tribunal’s reasons and is without merit. That is because the Tribunal did not make an adverse credibility finding based upon any failure by the appellant to mention her prospective spouse visa. Rather, the Tribunal noted that she had recorded the refusal of that visa in her protection visa application and made an overall adverse credibility finding based on a number of factors, as summarised by the Minister and reproduced above at [3]. That included a finding that she gave inconsistent evidence about her previous relationship, repeatedly denying that she had been in a relationship since her divorce, which was inconsistent with her protection visa application, in which it was noted that she had been refused a prospective spouse visa. Further, evidence that the appellant gave at an interview in November 2012 in support of her prospective spouse visa application was deficient and contradictory to the evidence given by her visa sponsor. Those submissions must also be accepted as a correct characterisation of what transpired before the Tribunal.
3. The Minister submits that leave should not be granted to rely upon a new ground for the first time on appeal, having regard to the lack of merit and the fact that the appellant had legal assistance in formulating a proposed amended application in the Court below (see ground 2 below). The Minister relies upon *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 158; 238 FCR 588 at [46], in which it was said that leave to argue a ground of appeal not raised before a primary judge should only be granted if it is “*expedient in the interests of justice to do so*”, in turn citing *O’Brien v Komesaroff* (1982) 150 CLR 310, ***H v Minister*** *for Immigration and Multicultural Affairs* [2000] FCA 1348 (Full Court); 63 ALD 43 (endorsed in *VAAC v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 74; 129 FCR 168 at [24]); and *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833 (Full Court); 117 FCR 424 at [20]-[24] and [38].
4. The key passages in *H v Minister* (at [7]-[8]) bear repeating:

As Gibbs CJ, Wilson, Brennan and Dawson JJ observed in *Coulton v Holcombe* [(1986) 162 CLR 1 at 7]:

It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish.

In our view, the readiness with which appeal courts have in the past been satisfied that it is expedient in the interests of justice to allow a fresh point to be argued and determined on appeal is unlikely to continue into the future. The volume and complexity of the cases presently required to be heard and determined by the intermediate appellate courts of Australia is such that it is increasingly important that such courts are able to devote their time to the genuine review of first instance decisions. It is becoming increasingly difficult, in our view, to establish that it is expedient in the interests of justice that the time of three or more judges should be spent giving original consideration to issues that ought to have been raised before the primary judge. The interests of justice in this sense extend beyond the interests of the parties to the appeal to encompass the interests of other litigants whose appeals require hearing and determination, and the broad public interest in efficient judicial administration.

1. There is no proper basis for the subject matter of this ground of appeal to be entertained for the first time in this Court, not having been raised in the Court below, especially, but not only, because it is devoid of merit. Leave to rely upon this ground should therefore be refused.

## Ground 2

1. This ground is as follows (verbatim):

His Honour failed to consider the submission by mr David Godwin because it was lodged late. It was my mistake and my financial hardship that made me fail to engage the services of legal representative earlier.

1. The Minister submits that this ground of appeal is also misconceived and does not reveal any error on the part of the primary judge. The Minister points out that, contrary to the assertion made in this ground, his Honour did not fail to consider the submissions prepared by her then counsel. His Honour said the following (at [5]-[6]):

On 7 March 2018, less than 14 days prior to the final hearing, the applicant filed written submissions. The written submissions were filed by counsel on the applicant’s behalf. They attached an amended application for which the applicant’s counsel indicated he would seek leave on which to rely (at the final hearing). …

On 19 March 2018, at the final hearing, counsel who had filed written submissions on behalf of the applicant did not attend. Enquiries were made, and it was confirmed that counsel was no longer retained in the matter. The hearing was adjourned to ensure that the applicant, who was now appearing in person, had the assistance of an interpreter.

1. Further, as noted above at [5], the primary judge reproduced the proposed ground of review that was attached to counsel’s submissions. I therefore infer that his Honour considered that ground in the context of those submissions, but decided that it lacked sufficient merit for leave to be granted to allow it to be relied upon.
2. The Minister submits that the primary judge correctly addressed the question of whether leave should be granted to rely on the proposed new ground by reference to the well‑established factors of assessing the merit of the proposed ground, length of the delay and any explanation for the delay. The Minister submits that his Honour was correct to find that the proposed new ground had no merit. As noted above at [8], the substance of the proposed new ground before his Honour was that the Tribunal had breached its obligations under s 424A of the *Migration Act* by not putting to the appellant, and inviting comment on the fact, that she had made a prospective spouse visa application. However, as his Honour explained at some length (at [26]-[35]), the “*information*” in question was given by the appellant during the process that led to the Tribunal decision for the purposes of the review, and as such was exempt pursuant to s 424A(3)(ba) and (b). Thus the s 424A(l) obligations were not engaged.
3. The Minister submits that the primary judge was correct to conclude (at [35]) that the delay in raising the proposed new ground was “*significant*”. The original application was filed on 23 March 2016, orders were made for the conduct of the hearing on 5 May 2016, and further orders were made on 6 October 2016 for the matter to be set down for a final hearing on 19 March 2018. The appellant had therefore been on notice of the final hearing for over 17 months. Moreover, as his Honour observed (at [35]-[36]), the appellant did not provide any evidence to explain the delay.
4. In the text of this ground of appeal, the appellant seeks to explain the significant delay by reference to a mistake on her part, and financial hardship that precluded her from obtaining legal advice. However, it is reasonably clear that this explanation was not put to the primary judge, and therefore cannot be said to have affected his consideration. The Minister submits that even if that had been put to the primary judge, it would have made no difference, as the decisive factor for his Honour in refusing to grant leave to rely on the proposed new ground was a complete lack of merit.
5. Each of the submissions by the Minister must be accepted. There was no failure on the part of the primary judge to consider the written submissions prepared by the appellant’s counsel. This ground of appeal must therefore fail.

## Conclusion

1. The appeal must be dismissed. There is no reason why costs should not follow the event. The appellant must pay the Minister’s costs.
2. The Minister sought a fixed sum costs order, relying upon an affidavit of an employed solicitor of his legal representative. The sum sought was in a recoverable range of 65% to 75% of the costs incurred, being between about $3,326 and $3,838, with the midpoint being $3,580. I am satisfied that this is a reasonable approach to take, that the costs incurred are reasonable, and that the range of costs sought and the midpoint referred to is appropriate. Accordingly, the appellant should be ordered to pay the Minister’s costs in the rounded down sum of $3,500.

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

Associate:

Dated: 30 November 2018