FEDERAL COURT OF AUSTRALIA

CRC16 v Minister for Home Affairs [2019] FCA 663

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| Appeal from: | *CRC16 v Minister for Immigration & Anor* [2018] FCCA 2875  |
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| File number: |  |
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| Judge: | **STEWARD J** |
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| Date of judgment: | 10 May 2019 |
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| Catchwords: | **MIGRATION** – appeal from a decision of the Federal Circuit Court of Australia – whether primary judge erred in dismissing an application for judicial review of a decision of the Administrative Appeals Tribunal affirming a refusal of a protection visa application – whether Tribunal made findings without a logical and probative basis – whether Tribunal made a finding which was illogical or irrational – whether adverse credibility findings involved jurisdictional error  |
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| Legislation: | *Migration Act 1958* (Cth) s 36  |
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| Cases cited: | *BZD17 v Minister for Immigration and Border Protection* [2018] FCAFC 94 *CQG15 v Minister for Immigration and Border Protection* (2016) 253 FCR 496 *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; (2018) 92 ALJR 713  |
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| Date of hearing: | 10 May 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: | 25 |
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| Counsel for the Appellant: | Mr I Warraich |
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| Solicitor for the Appellant: | Huk Legal |
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| Counsel for the First Respondent: | Mr A Cunynghame |
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| Solicitor for the First Respondent: | Sparke Helmore Lawyers |
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| Solicitor for the Second Respondent: | The second respondent filed a submitting notice |

ORDERS

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|  | VID 1357 of 2018 |
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| BETWEEN: | CRC16Appellant |
| AND: | MINISTER FOR HOME AFFAIRSFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| JUDGE: | STEWARD J |
| DATE OF ORDER: | 10 MAY 2019 |

THE COURT ORDERS THAT:

1. The appeal be dismissed with costs as agreed or assessed.
2. The Administrative Appeals Tribunal be added as the second respondent.
3. The name of the first respondent be changed to “Minister for Home Affairs”.

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

REASONS FOR JUDGMENT

STEWARD J:

## Introduction

1. The appellant is a citizen of the Republic of India who arrived in Australia on 24 April 2009 as a dependent of his wife who held a vocational education and training sector visa. Just under five years later, he applied on 8 April 2014 for a Protection (Class XA) visa (the “visa”) on the grounds that he satisfied the requirements of either s 36(2)(a) or (aa) of the *Migration Act 1958* (Cth) (the “Act”). A delegate of the first respondent refused that application on 23 October 2014. Merits review was then sought in the Administrative Appeals Tribunal (the “Tribunal”). By a decision dated 31 August 2016, the decision of the delegate was affirmed. Judicial review of that decision was sought in the Federal Circuit Court by an application filed on 20 September 2016. The appellant had legal representation for that purpose. Over two years later, on 1 October 2018, that application was dismissed with costs. Before me is the appeal from that decision.

## Background

1. The essence of the appellant’s claim for protection is his conversion to Christianity and his marriage to a Sikh woman in India. He came from a strongly religious Hindu family. He believed that it was not safe for him to return to India. In essence, the Tribunal accepted some of the appellant’s claims but rejected others which were dispositive of his claims pursuant to s 36(2)(a) and (aa). In particular, available country information was said to show that it would not, generally speaking, be unsafe for him to return to India as a Christian or, in particular, as a Mormon.
2. His original claims for protection, as set out in the delegate’s decision record, were as follows:
* The [appellant] claims to fear harm from his family and Hindu extremists for reason of his religion, as a Hindu who has converted to Christianity.
* The [appellant] claims he was attacked twice by Hindu extremists.
* The [appellant] claims that he returned to India in 2010 for his father’s funeral but his family did not allow him to attend. Instead, he was beaten by his family.
* The [appellant] claims that his family have paid bribes to the police to put false cases against him and he is now a wanted criminal.
1. The Tribunal accepted the following:
* The [appellant] was born … in the Indian state of Punjab …;
* The [appellant] was brought up in [Tarn] Taran where his family currently resides;
* The [appellant’s] father, [redacted], had passed away and his funeral was in 2010 which the [appellant] attended;
* The [appellant’s] mother, [redacted], lives in Tarn Taran in Punjab;
* The [appellant’s] siblings include no brothers and four sisters, including one the [appellant] claimed to be a [policewoman];
* The [appellant] married a Sikh woman … from Punjab [on] 10 August 2007 and with whom he travelled to Australia in 2009;
* The [appellant] lawfully divorced while in Australia in 2011 and only remains in contact with her through *facebook*;
* The [appellant] has not remarried and has no children;
* That the [appellant’s] family belongs to the Hindu faith tradition and that his mother is [a] pious Hindu woman;
* The [appellant] completed a Masters in Economics in India; and
* The [appellant] speaks, reads and writes Punjabi, Hindi, Urdu, English and some Rajasthani …
1. As to the appellant’s conversion to Christianity and Mormonism, the Tribunal accepted the following:
* The [appellant’s] baptism certificate in 2008 is a genuine document and that he was formally baptised into an evangelical church … in the Indian state of Punjab prior to departure from India to Australia;
* The [appellant] joined the Church of Latter-Day Saints [“LDS”] … around the middle of 2014 following a visit by missionaries in Mildura where he was residing at the time;
* The [appellant] was baptised into the Mormon or LDS Church;
* The [appellant] regularly attends Sunday services [in Mildura];
* The [appellant] was accepted into the Aaronic and Melchizedek Priesthoods of the Church; that accompanying certificates are genuine documents; that the [appellant] is accepted as ‘an elder’;
* The [appellant] has attended the Adelaide temple for the Church of Latter-Day Saints and witnessed Mormon ceremonies including a wedding;
* The [appellant] is personally known to the Bishop of the Mildura Ward and assists missionaries in the Mormon Church in their evangelical duties, particularly among Indian nationals or migrants living in the north; and
* The [appellant] paid $720 … to the Mildura Ward of the LDS Church as a tithe.
1. However, after a detailed consideration of the material before it, the Tribunal made the following findings as well:
* The [appellant] [formally] and genuinely left the Hindu faith tradition to become an evangelical Christian while in India …;
* The [appellant’s] knowledge of Christianity in general and in Pentecostal Christianity is superficial and lacking in sustained sincerity;
* The [appellant] did not practiced [sic] Christianity by attending church but through private prayers, reading the bible and alms giving as claimed, for at least three years since arriving in Australia because the [appellant’s] knowledge and commitment to Christianity was lacking in sustained sincerity or interest;
* The [appellant] nominated ‘Anglican’ as his Christian faith in his application was not due to advice from friends or he found it difficult to write it but because, as was claimed, that he did not know the difference between Christian denominations because his knowledge was so superficial and shallow;
* Although the [appellant] has engaged in local missionary work, the [appellant’s] knowledge of the history and beliefs of the Church of Latter-Day Saints was shallow and superficial;
* The [appellant’s] awareness of the distinctiveness of the Mormon faith tradition from other Christian traditions was shallow and superficial because the [appellant] does not have a sustained interest in that faith tradition; and
* The [appellant] joined the local ward of the Church of Latter-Day Saints not because the [appellant] had any sustained interest in their faith tradition but to exaggerate his claims to facing a well-founded fear of persecution as a Christian convert from Hinduism, if he returned to India.
1. The Tribunal also accepted that the appellant had been disinherited by his mother, but noted that, on the evidence before it, it did not appear that this had been because of his conversion to the Christian religion. It also accepted that the appellant had been accused whilst in India of an offence relating to cheating and dishonestly inducing delivery of property and that a warrant had been issued for his arrest in 2011. The Tribunal found that for this, the appellant would only face a fine or imprisonment if ever convicted in India.
2. However, the Tribunal rejected many of the appellant’s claims on credit grounds even though it was mindful of the need to adopt a cautious approach to this issue. It said at [75] of its reasons for decision:

When assessing claims made by applicants the Tribunal needs to make findings of fact in relation to those claims. This usually involves an assessment of the credibility of the applicants. When doing so it is important to bear in mind the difficulties often faced by asylum seekers. The benefit of the doubt should be given to asylum seekers who are generally credible but unable to substantiate all of their claims.

1. Nonetheless, the Tribunal rejected the following claims made by the appellant:
* [A First Information Report] was lodged in 2008 to specifically investigate the [appellant] for financial fraud by relative as claimed;
* The [appellant] was threatened by his uncle sometime in 2008 prior to his departure from India in 2009 to revert his religious allegiance back to Hinduism …;
* The [appellant] was not permitted to attend his father’s funeral as claimed;
* The [appellant’s] uncle threatened, then incited the [appellant’s] cousins to beat the [appellant] and then did beat the [appellant] in order for the [appellant] to revert … his religious allegiance back to Hinduism from Christianity as claimed;
* The [appellant] was forced to flee his home area by hiding at a friend’s place before prematurely departing for Australia as claimed for the reasons claimed;
* That the [appellant] was threatened by his uncle over the phone three months after returning to Australia in 2010 in order for the [appellant] to revert his religious allegiance back to Hinduism from Christianity as claimed; and
* Subsequently, the [appellant] ignored other threatening calls from his uncle in order for the [appellant] to revert … his religious allegiance back to Hinduism from Christianity as claimed.

(Errors in the original.)

The Tribunal also did not accept that “the [appellant’s] cousins are employed with a local Punjabi or any other police force within India and finds that the specific claim was generated to augment the [appellant’s] other claims about past and foreseeable harm”.

1. The Tribunal considered the available country information concerning the risk of harm Christians face living in India, including the most recent DFAT report, in the context of its finding that the appellant’s commitment to and knowledge of Christianity was superficial and that he was not a high-profile Mormon as claimed. It concluded at [121]-[122] as follows.

Overall, the Tribunal places considerable weight on the overall country information that most Christians in India carry on with their lives without incident and some weight on its findings the [appellant] will not attract adverse attention based on his religion in making the following finding: The Tribunal is not satisfied the [appellant] will face a real chance of serious harm, including systematic discrimination, based on the [appellant’s] religion, actual or imputed, by Hindu extremists, Hindu nationalists or any similarly inclined persons or organisations in his home state of Punjab or India more generally.

Having assessed all the claims both individually and cumulatively regarding the [appellant’s] claimed and accepted religion, the Tribunal finds the [appellant] will not face a real chance of serious harm, including through systematic discrimination, based on the [appellant’s] religion, actual or otherwise, whether it be Hindu extremists, any immediate or extended family member or anyone else either in the [appellant’s] home state of Punjab or throughout India.

1. The Tribunal also found, amongst other things:
	1. that the marriage was a contrivance for migration purposes;
	2. that a second offence and court order arising out of an alleged land dispute was a fabrication; and
	3. that the explanation given for the delay in seeking his protection visa was not acceptable, and that the actual reason for submitting the visa application was because his options for legally staying in Australia had “considerably narrowed”.
2. After considering all of the evidence, both individually and cumulatively, the Tribunal concluded as follows at [148]-[151]:

148. Accordingly, the Tribunal has considered whether there are any credible or actual reasons the [appellant] may face a real chance of serious harm if he is returned to Punjab specifically or India more generally. In this regard, the Tribunal has considered its findings both individually and cumulatively. On the basis of its individual adverse credibility findings above and in their totality, the Tribunal does not accept the [appellant] is a person who have a real chance or a real risk from the family who threatens to seriously or significantly harm him because of any claimed land dispute or based on his claimed conversion from Hinduism to any Christian religion or any denomination, for any related reason to do with past relationships or familial disputes or a combination of those reasons or any other Convention or non-Convention reason, imputed or otherwise, now or into the foreseeable future.

149. Accordingly, the Tribunal does not find it credible that the state protection was not available to the [appellant].

150. Accordingly, the Tribunal is not satisfied that the [appellant] is a person in respect of whom Australia has protection obligations under the Refugee Convention and the [appellant] does not have a well-founded fear of persecution.

151. Therefore the [appellant] does not satisfy the criterion set out in s. 36(2)(a).

(Errors in the original.)

1. As for the availability of complementary protection, the Tribunal concluded as follows at [162]:

Having considered the [appellant’s] claims individually and cumulatively, for the reasons given above, the Tribunal finds there are no substantial grounds for believing that, as a necessary and foreseeable consequence of the [appellant] being removed from Australia to India there is a real risk the [appellant] will suffer harm, by way of being arbitrary [sic] deprived of his life; that the death penalty will be carried out on him; that he will be subjected to torture; be subjected to cruel or inhuman treatment or punishment, or be subjected to degrading treatment or punishment.

## The Federal Circuit Court

1. The amended grounds of review before the Federal Circuit Court were as follows:

 (1) The Tribunal erred by making findings that were not based on probative evidence; and which were legally unreasonable.

Particulars

(a) Applicant’s uncle threatened him to revert to Hinduism prior to the Applicant’s departure from India in 2009.

(b) Applicant will not face a real chance of serious harm, including systemic discrimination, due to his religious membership and beliefs.

(c) Disinheritance by the mother is because of property dispute within the family.

(d) Incidences of violence towards Christians represent a moderate risk of social discrimination and violence, although most Christians can go about their lives without incident.

(e) Commitment to and knowledge of Christianity is superficial, his attendance in local missionary work and church attendance has not been constant and it is not marked by a deep sense of mission or purpose.

(2) The Tribunal erred by misapprehending the evidence and then use its erroneous findings about the evidence to make negative credibility findings.

Particulars

(a) The Tribunal misapprehended evidence of the Appellant conversion to Christianity in relation to his subjective belief, and then used its erroneous findings about the conversion to make negative credibility findings against him.

(b) The Tribunal erred by misapprehending evidence of the Appellant’s marriage and the genuineness of the marriage and his fear his return to India based on broke up of the said marriage and then used those findings to make negative credibility findings against them.

(c) The Tribunal erred by misapprehending the evidence of the appellant’s mother regarding disinheritance and using those findings to make negative credibility findings against him to the extent it placed no weight on his evidence.

(Errors in the original.)

1. The learned primary judge extensively described both the appellant’s claims and the findings made by the Tribunal. Her Honour decided that each of those findings was the product of a conscientious evaluation of all of the claims made over two hearings. They were open to the Tribunal to make. The reasoning in support of them was not illogical but, rather, was the product of a “thoughtful reasoning process”. It followed that the application could not succeed. It was dismissed with costs.

## Appeal

1. Before me, the grounds of appeal were as follows:

1. The Federal Circuit Court failed to find that the Tribunal fell into jurisdictional error in determining without a logical and probative basis that all of the appellant’s evidence upon which his claim was based was false.

Particulars

a) Applicant’s uncle threatened him to revert to Hinduism prior to the Applicant’s departure from India in 2009.

b) Applicant will not face a real chance of serious harm, including systemic discrimination, due to his religious membership and beliefs.

c) Disinheritance by the mother is because of property dispute within the family.

d) Incidences of violence towards Christians represent a moderate risk of social discrimination and violence, although most Christians can go about their lives without incident.

e) Commitment to and knowledge of Christianity is superficial, his attendance in local missionary work and church attendance has not been constant and it is not marked by a deep sense of mission or purpose.

2. The Federal Circuit Court failed to find that the Tribunal fell into jurisdictional error in determining that all of the appellant’s evidence upon which his claim was based was false. When such a finding was illogical and/or irrational.

3. The Federal Circuit Court failed to find that the Tribunal fell into jurisdictional error in misapprehending the evidence and then use its erroneous findings about the evidence to make negative credibility findings.

Particulars

a) The Tribunal misapprehended evidence of the Appellant conversion to Christianity in relation to his subjective belief, and then used its erroneous findings about the conversion to make negative credibility findings against him.

b) The Tribunal erred by misapprehending evidence of the Appellant’s marriage and the genuineness of the marriage and his fear his return to India based on broke up of the said marriage and then used those findings to make negative credibility findings against them.

c) The Tribunal erred by misapprehending the evidence of the appellant’s mother regarding disinheritance and using those findings to make negative credibility findings against him to the extent it placed no weight on his evidence.

(Errors in the original.)

1. Before me, the appellant was represented by Mr Warraich, a solicitor. He made an oral application for an adjournment on the ground that his client was suffering from a psychological disorder. That application was refused. Leaving aside the fact that no formal application backed by evidence in the form of a supporting affidavit had been made, I was not satisfied that the unspecified condition would inhibit the appellant’s legal representative from making submissions about alleged errors of law in the reasons of the Tribunal.

### Ground One

1. The first ground of appeal is in the same form that it took below. I agree with the learned primary judge’s conclusion that the findings of fact made by the Tribunal were not made without “intelligible justification” to use the language endorsed, again, by the High Court in *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; (2018) 92 ALJR 713. As to the particulars of ground one, I find as follows:
	1. the claim that the appellant had been threatened by his uncle was expressly considered by the Tribunal but rejected because the appellant’s testimony about past harm in India was found to be generally inconsistent, fabricated and confusing;
	2. the Tribunal’s conclusion about the risk of harm proceeded rationally from its rejection of so many of the appellant’s claims and its acceptance of country information;
	3. the Tribunal accepted that the appellant’s mother had disinherited him, but was not satisfied that this arose from a change in his religion;
	4. the Tribunal’s conclusion that incidents of harm towards Christians in India amount to a moderate risk of social discrimination and violence was based on country information which confirmed this to be so; and
	5. the findings that the appellant’s commitment to Christianity was superficial was a result of the Tribunal’s consideration of his testimony over two hearings.

For these reasons, I am not satisfied that ground one is made out.

### Ground Two

1. The second ground is new. I gave leave for the appellant to rely on it over the objections of the Minister, who submitted that it disclosed no meaningful ground of review. Before me, the appellant’s representative made a series of submissions which, in substance, invited me to reconsider the merits of the findings made by the Tribunal. The findings concerning the appellant’s conversion to Christianity were the subject of criticism. It was said that in India, it was unacceptable for a Hindu to convert to Christianity especially in the State of Punjab. It was pointed out that in the 1980s, Sikhs had been attacked and persecuted and that this was an indicator as to how the appellant would be treated if he were ever to return to India. It was said he will be threatened by Hindu society and by his religious family. It was noted that the current prime minister of the Republic of India, Mr Modi, is a conservative Hindu. It was said that the reliance by the Tribunal on country reports was misconceived because they contained political content. It was said that the Tribunal should have preferred the direct testimony of the appellant and his reliance upon various news reports. It was said that he will face financial hardship because he has been disinherited. It was said that I should infer from what was described as strong evidence of the practice of his Christianity in Mildura that the appellant would be in “imminent danger” if returned to India. Plainly, all of this went to the merits of the facts found below. I invited the appellant to identify which particular findings were made with no “intelligible justification”. This, with respect, was never done. I agree with the learned primary judge that the findings made by the Tribunal were open to it to make. Ground two is rejected.

### Ground Three

1. The third ground of appeal is the same as the second ground of review below. The particulars of that ground make complaints about the findings reached about the appellant’s adherence to the Christian faith, the reasons for his marriage, and the reasons for his disinheritance. With respect, I cannot agree that any of the complaints establish a jurisdictional error. I find they rose no higher than attempted merits review.
2. Before me, it was said that this ground really attacked the conclusions made by the Tribunal about the appellant’s credit. The appellant referred me to a decision of the Full Federal Court in *BZD17 v Minister for Immigration and Border Protection* [2018] FCAFC 94 where the Court said at [33]:

Without derogating from the case specific nature of the inquiry, adverse credibility findings may involve jurisdictional error on recognised grounds such as: legal unreasonableness or reaching a finding without a logical, rational or probative basis (*ARG15 v Minister for Immigration and Border Protection* [2016] FCAFC 174; (2016) 250 FCR 109 (*ARG15*) at [83](d)); or a failure to give a proper, genuine and realistic consideration to the issues and material before the decision-maker.

1. To similar effect, as referred to by the learned primary judge below, in *CQG15 v Minister for Immigration and Border Protection* (2016) 253 FCR 496, the Full Federal Court said at [38]:

… Recitation of the expression that credibility is a matter *par excellence* should not be understood as precluding challenges to credibility or, indeed, other findings of fact on any basis. While there is no suggestion in this case that this is what has occurred, the frequency of adoption of the expression should not obscure the availability of challenges on recognised grounds such as:

(a) failure to afford procedural fairness;

(b) reaching a finding without any logical or probative basis;

(c) unreasonableness; and/or

(d) jurisdictional error as discussed by Flick J in *SZVAP v Minister for Immigration and Border Protection* (2015) 233 FCR 451.

1. It was submitted that the findings made by the Tribunal about the appellant’s practice of the Mormon faith as being superficial and lacking in sincerity failed to appreciate that he was new to the religion and was suffering from a psychological disorder. That disorder explained the inconsistencies in his testimony. I note, however, that there was no evidence of any such disorder before the Tribunal. It was said that the appellant was drawn to Christianity in India because he was not a superstitious person unlike, it was said, so many in India. It was also said that the Tribunal misapprehended the evidence given about his marriage and about his disinheritance. It was stressed that the misapprehension arose from the failure to accept his conversion to Christianity.
2. Once again, these submissions, with respect, went to the merits of the findings made below. They fell well short of identifying a lack of procedural fairness, or the identification of findings made without a logical or probative basis, or that there had been legal unreasonableness. For these reasons, ground three is dismissed.
3. The order of the Court is that the appeal be dismissed with costs as assessed or agreed. I will also make orders that the Administrative Appeals Tribunal be added as a second respondent and for the name of the first respondent to be changed to “Minister for Home Affairs”.

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| I certify that the preceding twenty-five (25) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Steward. |

Associate:

Dated: 4 June 2019