FEDERAL COURT OF AUSTRALIA

BML16 v Minister for Home Affairs [2018] FCA 1791

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| Appeal from: | *BML16 v Minister for Immigration and Anor* [2018] FCCA 1750 |
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| File number: | NSD 1139 of 2018 |
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| Judge: | **LOGAN J** |
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| Date of judgment: | 8 November 2018 |
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| Catchwords: | **MIGRATION** - appeal from Federal Circuit Court – absence of engagement of grounds of appeal with any error by Federal Circuit Court – even if grounds beneficially construed so as to allege apprehended bias or unreasonableness on the part of the AAT – absence of merit in either ground. **Held** – appeal dismissed. |
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| Legislation: | *Constitution* s 75(5)  *Migration Act 1958* (Cth) |
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| Cases cited: | *Minister for Immigration and Citizenship v SZIAI* (2009) 83 AJLR 1123  *Re Minister for Immigration and Multicultural Affairs; Ex Parte S154/2002* (2003) 77 ALJR 1909  *SZGIZ v Minister for Immigration and Citizenship* [2013] 212 FCR 235 |
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| Date of hearing: | 8 November 2018 |
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| Date of last submissions: | 8 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: | 15 |
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| Counsel for the Appellant: | The Appellant appeared on his own behalf with the assistance of an interpreter |
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| Solicitor for the Respondents: | Ms B Rayment of Sparke Helmore |

ORDERS

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|  | | NSD 1139 of 2018 |
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| BETWEEN: | BML16  Appellant | |
| AND: | MINISTER FOR HOME AFFAIRS  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | LOGAN J |
| DATE OF ORDER: | 8 NOVEMBER 2018 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent’s costs, of and incidental to the appeal, to be taxed if not agreed.

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

REASONS FOR JUDGMENT

(Revised From Transcript)

LOGAN J:

1. The appellant is a citizen of the People’s Republic of China. He arrived in Australia in February 2007. His entry at that time was lawful, in that, he then held a student visa issued under the *Migration Act 1958* (Cth) (**Act**). His student visa was cancelled in December 2007. In May 2008, he applied under the Act for that type of visa known as a Protection visa (**visa**). A delegate of the ministerial predecessor to the respondent the Minister for Home Affairs (**Minister**) refused that visa application in June 2008. The appellant then sought the review of that decision by the then Refugee Review Tribunal (**Tribunal**). That Tribunal decided to affirm the Minister’s delegate’s decision in March 2009. That was a sequel to a remission of the appellant’s case to that Tribunal as the result of the setting aside in December 2008 of an earlier decision of that Tribunal made in August 2008.
2. In April 2014, the appellant made a further application for a visa under the Act. In *SZGIZ v Minister for Immigration and Citizenship* [2013] 212 FCR 235, the Full Court held that s 48A of the Act did not prevent Ministerial consideration of such a further application on complementary protection grounds. On 5 December 2014, a delegate of the Minister refused the second application under the Act made by the appellant for a visa. He sought a review of that decision by the Refugee Review Tribunal. The successor to that Tribunal, the Administrative Appeals Tribunal (**AAT**) came to undertake that review on 1 June 2016. The AAT decided to affirm the Minister’s delegate’s decision not to grant the appellant the visa which he had sought on the second occasion.
3. The appellant sought the judicial review of the AAT decision by the Federal Circuit Court. On 20 June 2018, for reasons for judgment delivered orally that day, that court dismissed with costs the judicial review application. The appellant has now appealed to this Court against that order of dismissal. The grounds of appeal are these:
4. The Tribunal was not professional, which caused that I could not provide enough evidence.
5. AAT denied all the evidences I provided without any consideration.
6. The staff’s attitude was so bad, which caused me so nervous and state not to the point.

[sic]

1. The appellant appeared today on his own behalf with the assistance of an interpreter. When called on to make submissions in relation to his grounds of appeal, he decided not to make any supporting submissions. That was so even after I took him through each of his grounds of appeal and asked him whether he wished to elaborate on those grounds.
2. I then called on the Minister to make submissions as to those grounds. In so doing, I put particular propositions as to what might be a beneficial construction of the appellant’s grounds of appeal, the nature of which I shall shortly relate, and sought submissions from the Minister in relation to those grounds as so construed. The appellant was then offered an opportunity reply to the Minister’s submissions, but chose not to make any submission in reply. He had not earlier filed, as the Court’s directions permitted, a submission in writing.
3. However trite the proposition may be, it is necessary to recall that the jurisdiction being exercised by the Court is appellate, not original. The focus of the Court’s attention is on the order made by the Federal Circuit Court and whether that order is attended with legal error, or whether in the conduct of the exercise of judicial power by the Federal Circuit Court, there was some other miscarriage of justice. The Court does not exercise, in a matter of this kind, an original judicial review jurisdiction. That jurisdiction has been consigned by Parliament to the Federal Circuit Court in addition to that entrenched in The Constitution in s 75(5) and exercisable by the High Court of Australia. Exceptionally, it is possible to raise on appeal, a ground not taken as a ground of review in the Federal Circuit Court.
4. As a general statement, having regard to what I have just observed of the nature of the jurisdiction being exercised today, none of the grounds of appeal allege error on the part of the Federal Circuit Court. That would be one reason, sufficient in itself, to dismiss the appeal, but I do not consider, particularly in a case concerning or having, as its foundation, a claim for a visa of this type that the interests of justice would be well-served just by dismissing the appeal on that basis. The Minister, while very conscious in submissions of the nature of the jurisdiction being exercised by the Court and the inadequacy of the grounds of appeal on their face, very fairly adopted the position of responding to the grounds even if they were raising new issues and for that purpose, beneficially construing the grounds.
5. Ground 1 might conceivably, as it is authored by a person untrained in law and whose first language is not English, be regarded as an allegation of bias or, at least, apprehended bias on the part of the Tribunal. That was not an issue raised in the Federal Circuit Court. Putting that aside, the only evidence which might support such a ground is found in the reasons of the Tribunal if it is found at all. That is because there is not, as there was not before the Federal Circuit Court, a transcript of the hearing conducted by the Tribunal. It would be for the appellant to introduce such a transcript in evidence.
6. The claim for a visa in this instance, as was the original one, was grounded on the alleged adherence to the Christian faith by the appellant and adverse consequences which would attend him in the practice of that religion or religious belief if returned to China. It is theoretically possible that the questioning by a Tribunal member of an applicant for review in relation to a particular belief, might progress beyond the permissible and reveal a disposition on the part of the Tribunal that nothing an applicant could say or do would dissuade the Tribunal member from rejecting that the applicant had a professed belief. In other words, the transcript of a hearing might disclose questioning akin to an advanced post-graduate examination in theology and an expectation of accuracy in all answers with inaccuracy being attended with adverse credit findings about sincerity of religious belief. But the reasons of this Tribunal member reveal no such course of conduct. So there is no evidentiary foundation either for a claim of actual bias or even apprehended bias.
7. The Tribunal’s core function was that of review, not conducting its own inquiries: see *Minister for Immigration and Citizenship v SZIAI* (2009) 83 AJLR 1123. It was for the appellant, before the Tribunal, to introduce such material as he was able which was persuasive of the claim for a visa which he made: see *Re Minister for Immigration and Multicultural Affairs; Ex Parte S154/2002* (2003) 77 ALJR 1909 at [57] per Gummow and Hayden JJ:

57. Accordingly, the rule in *Browne v Dunn* has no application to proceedings in the Tribunal. Those proceedings are not adversarial, but inquisitorial, the Tribunal is not in the position of a contradictor of the case being advanced by the applicant. The Tribunal Member conducting the inquiry is not an adversarial cross-examiner, but an inquisitor obliged to be fair. The Tribunal Member has no “client”, and has no “case” to put against the applicant. Cross-examiners must not only comply with *Browne v Dunn* by putting their client’s cases to the witnesses; if they want to be as sure as possible of success, they have to damage the testimony of the witnesses by means which are sometimes confrontational and aggressive, namely means of a kind which an inquisitorial Tribunal Member could not employ without running a risk of bias being inferred. Here, on the other hand, it was for the prosecutrix to advance whatever evidence or argument she wished to advance, and for the Tribunal to decide whether her claim had been made out, it was not part of the function of the Tribunal to seek to damage the credibility of the prosecutrix’s story in the manner a cross-examiner might seek to damage the credibility of a witness being cross-examined in adversarial litigation.

1. Exceptionally, the Tribunal might come under an obligation in very particular circumstances where an obvious inquiry readily answered was apparent to make an inquiry of its own motion, but this is not such a case.
2. So, however one approaches Ground 1, and even if I were disposed to regard it as a permissible ground, given that it was not a ground of review, it has no merit.
3. As to Ground 2, it could be regarded, beneficially construed, as another way of alleging actual or apprehended bias. I have already dealt with that particular subject. Equally, it could be regarded as an allegation that the Tribunal had not considered the merits of the claim as made for a visa. That was a subject expressly addressed in the Federal Circuit Court. The Tribunal’s reasons disclose a comprehensive engagement with the claim as made against the complementary protection criteria and the reaching of credibility value judgments by the Tribunal. As the Federal Circuit Court correctly observed, such credit findings are not unexaminable, but if they form part of reasons, logically and rationally expressed, leading to conclusions reasonably open on the material before the Tribunal, decisions based on such credibility findings are not to be overturned by overzealous judicial review. There was no error made by the Federal Circuit Court in concluding that the Tribunal had permissibly reached factual conclusions, including findings as to credit, on the material before the Tribunal. Ground 2 in the notice of appeal, therefore, does not have any merit.
4. Ground 3 is not, in terms, capable even of being read as an allegation of bias, be that actual or apprehended on the part of the Tribunal. Rather, in that ground, the appellant voices a complaint about the way with which he was dealt by members of the Tribunal’s staff. It is not for me as, for that matter, it was not for the Federal Circuit Court, to act as a public administration supervisor. It is, in theory, possible that particular behaviours by Tribunal staff members, if proved and if they had the consequence, for example, of causing an applicant to be denied an opportunity for a hearing could be productive of a jurisdictional error, but the testing of that theory would require very singular evidence, and no such evidence is present. All that there is on the face of the Tribunal’s reasons is that the appellant took up an opportunity, necessarily extended to him of a hearing before the Tribunal.
5. The necessary consequence of what I have stated is that the appeal is without merit. It must, therefore, be dismissed with costs.

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| I certify that the preceding fifteen (15) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Logan. |

Associate:

Dated: 22 November 2018