FEDERAL COURT OF AUSTRALIA

BMK18 v Minister for Home Affairs [2019] FCA 189

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| Appeal from: | *BMK18 v Minister for Home Affairs & Anor* [2018] FCCA 2092 |
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| File number: | NSD 1497 of 2018 |
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| Judge: | **DERRINGTON J** |
|  |  |
| Date of judgment: | 27 February 2019 |
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| Catchwords: | **MIGRATION** – appeal from application to quash decision of Administrative Appeals Tribunal – bogus document provided with application – true birth date provided in application – whether bogus document provided “as evidence of identity, nationality or citizenship” – refusal by Tribunal to hear oral evidence – where no jurisdictional error established – appeal dismissed |
|  |  |
| Legislation: | *Migration Act 1958* (Cth) s 91WA  |
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| Cases cited: | *AYX17 v Minister for Immigration and Border Protection* [2018] FCAFC 103*Bermingham v Corrective Services Commission of New South Wales* (1988) 15 NSWLR 292*BGM16 v Minister for Immigration and Border Protection* (2017) 252 FCR 97*DAO16 v Minister for Immigration and Border Protection* (2018) 353 ALR 641*Minister for Immigration and Multicultural and Indigenous Affairs v Maltsin* (2005) 88 ALD 304*NAQS v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 77 ALD 424*R v Young* (1999) 46 NSWLR 681*Taylor v Owners—Strata Plan No 11564* (2014) 253 CLR 531 |
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| Date of hearing: | 20 February 2019 |
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| Registry: | New South Wales |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | Catchwords |
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| Solicitor for the Appellant: | Mr M Jones of Parish Patience Immigration Lawyers |
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| Counsel for the First Respondent: | Mr T Reilly |
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| Solicitor for the First Respondent: | Australian Government Solicitor |

ORDERS

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|  | NSD 1497 of 2018 |
|   |
| BETWEEN: | BMK18Appellant |
| AND: | MINISTER FOR HOME AFFAIRSFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| JUDGE: | DERRINGTON J |
| DATE OF ORDER: | 27 February 2019 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent’s costs of the appeal.

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

REASONS FOR JUDGMENT

DERRINGTON J:

## Introduction

1. The appellant appeals from a decision of the Federal Circuit Court of Australia (FCC): *BMK18 v Minister for Home Affairs* [2018] FCCA 2092 wherein his application for review of a decision of the Administrative Appeals Tribunal (the Tribunal) made on 28 February 2018 was refused. The Tribunal had affirmed the decision of the delegate of the Minister for Home Affairs (the Minister) to refuse him a protection visa.
2. The issues in this case are two-fold. First, the appellant claims that the primary judge incorrectly applied s 91WA of the *Migration Act 1958* (Cth) (the Act). Secondly, he claims that the primary judge ought to have considered grounds two and three of the application for review. Those grounds were founded on unreasonableness and a denial of procedural fairness.

## Background

1. The appellant was a citizen of Bangladesh who arrived in Australia on 20 May 2014.
2. On 20 June 2014 he applied for a protection visa. He claimed that he was a supporter of the Bangladeshi National Party (BNP) and had been falsely identified as a member of Jamaat-e-Islaami (JI). He claimed he feared harm from members of the ruling Awami League. He claimed he had fled from Bangladesh to Malaysia.
3. In his application he indicated that his date of birth was 10 June 1990. That was in contrast to his passport which stated that his date of birth was 1 January 1977. He provided a copy of his passport with the application which shows a number of entry visas into Malaysia along with evidence that he had travelled to other countries such as Indonesia, Singapore and Thailand. In his written application form he claimed that his passport was his current passport and that he had used it to obtain a visa to travel to Australia. In the form he also answered “Yes” to the question of whether he had a different date of birth to the one previously provided, however, he did not provide any explanation for the discrepancy.
4. On 25 February 2015, he attended at an interview with the Department of Immigration and Border Protection (the Department). There he provided the interviewing officer with an uncertified copy of a birth certificate which recorded his date of birth as 10 June 1990. He claimed that the date of 1 January 1977 in his passport was entered by the mistake of the Bangladeshi Government. Importantly, he subsequently abandoned that explanation in favour of a different one. That is discussed below.
5. On 27 February 2015 the delegate refused to grant BMK18 a protection visa. He sought review of that decision by the Tribunal on 31 March 2015.
6. The process before the Tribunal was lengthy and extended over four hearings:
	1. The first hearing occurred on 28 September 2016 although it was adjourned due to the absence of some of the materials from the file. On the day prior to that hearing, BMK18 had requested that oral evidence be taken from three persons.
	2. The second hearing occurred on 7 November 2016. However, it was adjourned because BMK18 raised concerns which he had about the veracity of the interpreter. Nevertheless, the Tribunal received evidence from one of BMK18’s witnesses on that occasion.
	3. On 27 November 2016, BMK18 requested that two of his witnesses give evidence by telephone at a hearing which was listed for 1 December 2016. As it was, only one of those witnesses and the appellant himself gave evidence at that hearing.
	4. On 17 October 2017, BMK18 requested that oral evidence be taken from two further persons and on 22 October 2017, he advised that he would like one further person to give evidence.
	5. The final hearing occurred on 23 October 2017 but only the appellant gave evidence on that occasion.
7. On 20 January 2017, BMK18 was invited to comment on a wide range of inconsistencies in the evidence which had been given by himself and one of his witnesses, Mr K. In response to that invitation further materials and submissions were provided by the solicitors representing BMK18 on 21 occasions from 6 February 2017 to 26 February 2018.
8. The Tribunal affirmed the delegate’s decision on 1 March 2018. It did so on two bases. First it found that the grant of the visa was prevented by s 91WA of the Act. Secondly it concluded that the appellant was not a person in respect of whom Australia owed protection obligations.

## The Tribunal’s decision

### Section 91WA of the Act

1. Section 91WA of the Act provides as follows:

**91WA Providing bogus documents or destroying identity documents**

(1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:

(a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or

(b) the Minister is satisfied that the applicant:

(i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or

(ii) has caused such documentary evidence to be destroyed or disposed of.

(2) Subsection (1) does not apply if the Minister is satisfied that the applicant:

(a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and

(b) either:

(i) provides documentary evidence of his or her identity, nationality or citizenship; or

(ii) has taken reasonable steps to provide such evidence.

(3) For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented.

1. The expression “bogus documents” is defined in s 5 of the Act as being:

***bogus document***, in relation to a person, means a document that the Minister reasonably suspects is a document that:

(a) purports to have been, but was not, issued in respect of the person; or

(b) is counterfeit or has been altered by a person who does not have authority to do so; or

(c) was obtained because of a false or misleading statement, whether or not made knowingly.

1. The Tribunal found that the date of birth in the passport of the appellant of 1 January 1977 was false. It found that the passport was a “bogus document” within the meaning of s 5(1) of the Act because it was either counterfeit or obtained by a false or misleading statement (at [63] and [64]). Consequently, the Tribunal found that BMK18 had provided the bogus document during or in connection with his application for a visa (at [66]) and it did not matter that, at that time, he disclosed his correct date of birth in the protection visa application (at [65]).
2. The Tribunal also concluded that BMK18 did not have a reasonable explanation for providing the bogus document (at [88]). He had given a number of reasons as to why the date of birth in his passport was incorrect, however, the Tribunal disbelieved them and found that he had acquired the passport with a false birth date so that he could obtain a visa to work in Malaysia. It rejected his claim that it was due to a mistake by the Bangladeshi Government. Importantly, it disbelieved his excuse that he had obtained it via BNP officials so that he could flee Bangladesh on account of his fears of persecution. The Tribunal considered his explanations were inconsistent with his evidence, his claims were made late in the process and they were highly improbable (see [72]-[76]). The evidence in his passport of travel to and from Malaysia as well as to other countries indicated that he did not flee Bangladesh because of fear of persecution. The Tribunal found that BMK18 had acquired the passport with the false birth date in it so that it would be easier for him to demonstrate that he had five years of work experience which would allow him to obtain an employment pass to Malaysia (at [76]). The Tribunal expressed concern that BMK18 had used the false passport to enter Malaysia and, further, to travel to Indonesia, Thailand and Singapore for tourist purposes.
3. The Tribunal was concerned with BMK18’s return to Bangladesh. He had claimed that it was because his mother was almost dying and he wished to visit her. That was not accepted as being credible and the claim that his mother was dying was not supported by the medical evidence. The Tribunal was also concerned that the appellant stayed in Bangladesh for over a month which was not consistent with his claimed fear of being targeted on his return.
4. The Tribunal also found that BMK18 lacked credibility by reason of his inconsistent statements about his intentions when he arrived in Australia (at [79]). His oral explanation was that he had come to Australia for a one month holiday, but, whilst in Australia was told that his employment visa to Malaysia had not been renewed so that he decided to seek asylum here. However, in the statutory declaration submitted to the Tribunal he claimed that he came to Australia to seek protection. The Tribunal’s conclusions in this regard bolstered its determination that he had obtained the passport for work purposes and not because he feared persecution.
5. The Tribunal concluded that BMK18 had provided a bogus document, being the passport, in connection with his protection visa application as evidence of his identity, nationality and citizenship. It also concluded that it was not satisfied that he had a reasonable explanation for providing the bogus document to the Department (at [86]-[89]).
6. Although the appellant had sought to have various witnesses appear by telephone and provide information, the Tribunal only heard from two witnesses, including Mr K. His evidence was, however, unconvincing and based on his hearsay. It did not overcome the concerns which the Tribunal had in relation to the appellant’s credibility. The Tribunal did not take oral evidence from a number of other witnesses put forward by BMK18. It reasoned that even if those persons confirmed the evidence which they had put in written statements, it would not overcome the deficiencies in the appellant’s credit concerning the circumstances in which he obtained his passport.
7. In the result, the Tribunal reached the determination that s 91WA of the Act was engaged and it was required to affirm the decision to refuse the grant of the protection visa.

### Tribunal’s alternative finding

1. Although the Tribunal considered that it was prevented from granting the protection visa, it nevertheless considered the substantive claim which BMK18 had advanced. In this respect it found that his claims to fear harm from the Awami League were implausible and it did not accept them. It did not accept that he held any position which gave him a political profile or that he was any kind of political activist. It noted that his claims were inconsistent and had evolved over time and his return from Malaysia to Bangladesh at a time when he claimed to have been persecuted was not indicative of him having any real fear. The Tribunal concluded that he did not have any genuine interest in political activism in support of the BNP and, further, that he would not have any imputed political opinion as a supporter of JI. It also found his claims to be at risk of harm because of his alleged activity on the internet to be contrived and unconvincing and would not give rise to a real chance that he would be at risk of serious or significant harm. In reaching this conclusion the Tribunal considered the several witness statements advanced by the appellant. It considered that, even if such witnesses gave the evidence which is set out in their oral statements, it would not overcome its credibility concerns.

## Application to review to the Federal Circuit Court

1. Before the FCC the appellant agitated two main grounds. The first was that the Tribunal had misapplied s 91WA of the Act. The second concerned the Tribunal’s failure to take oral evidence from witnesses in order to establish the circumstances under which the false passport had been obtained. That second matter gave rise to an allegation that the Tribunal had acted unreasonably in refusing BMK18’s request to take oral evidence. A third matter raised was that BMK18 was denied procedural fairness. The primary judge records in his reasons that Mr Jones for the appellant conceded that if he lost on the first ground the second and third grounds were no longer tenable. As it transpired, the primary judge did not deal with the second and third grounds.

## Appeal to this Court

1. In the appeal to this Court the appellant cavils with the findings in respect of s 91WA and says that the primary judge ought to have considered grounds two and three of the application for review.

### Ground 1

1. The appellant’s argument on the construction of s 91WA(1)(a) of the Act is that subs (1)(a) was not engaged because BMK18 did not provide the passport “as evidence” of his identity, nationality or citizenship. It is to be recalled that sub-section provides:

 (1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:

(a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship;

1. The appellant did not dispute the finding that the appellant’s passport was a “bogus document”. It was also not in contest that the appellant provided a copy of that passport to the Department. That is consistent with s 91WA(3) which creates a wide definition of “provides” for the purposes of the section.
2. Here the bogus passport was provided to the Department by the appellant in support of his visa application. It was specifically referred to in the visa application form which was submitted to the Department and copies of its relevant pages were included with that application. It was referred to as the appellant’s “travel document” and identified as being his passport. Although he accurately stated his actual date of birth in the application form and not the date in the passport, he did identify that he acquired his citizenship on 1 January 1977 being the date shown in the passport as his date of birth.
3. The submission that the bogus passport was not provided to the Department “as evidence” of his identity, nationality or citizenship cannot be accepted in its widest form. It is clear, as the Tribunal found, the passport was provided to verify that he was who he claimed he was and that he was a citizen and national of Bangladesh.
4. The substance of the argument advanced by BMK18 is that s 91WA(1)(a) should be read as only applying where some falsity in the bogus document is propounded in relation to a claimed identity, nationality or citizenship. It was submitted that BMK18 did not propound any falsity contained in the bogus document in relation to those matters. It was argued that, on the visa application form he gave his date of birth as being 10 June 1990 which, effectively, disavowed the date identified in the passport. He says that he never disputed that such was the date of his birth or that his passport was incorrect. That submission is not entirely accurate, as the circumstances of the false passport did not become clear until well after the application was made and once the issue was raised with him at the protection visa interview. He certainly did not identify in his application that the document was false.
5. It should be mentioned that even if the appellant did not seek to rely upon the passport as evidence of his date of birth, it is apparent that he did so in relation to his citizenship. On the application form he gave the date on which he acquired citizenship as being 1 January 1977 being the date of birth in his passport. The provision of copies of the pages from that passport were provided and seem to evidence his assertion of when citizenship was acquired.
6. The effect of the appellant’s submission is that the Court ought to read into or imply into s 91WA(1)(a) words of limitation. Initially, Mr Jones for the appellant said that the section should be read as if the words “but only to the extent that the document is used to provide false information” were inserted at the end of 91WA(1)(a). In effect, this would limit its operation to those circumstances where a bogus document is provided as evidence of the applicant’s identity, nationality or citizenship but only when some false or misleading particular is relied upon. When it was put to Mr Jones that, in order to read words into the section the Court would need to be satisfied that it was appropriate to do so in accordance with the authorities, he made the alternative submission that the section should be construed as meaning that it only applies where the falsity in the bogus document is relied upon.
7. The circumstances where a court is entitled to read missing words into a statutory provision or imply the same has been the subject of much judicial consideration. In *Bermingham v Corrective Services Commission of New South Wales* (1988) 15 NSWLR 292, McHugh JA held that it was legitimate to give words used inadvertently a “strained construction” to produce an interpretation consistent with the purpose of the legislation (at 302):

[I]t is not only when Parliament has used words inadvertently that a court is entitled to give legislation a strained construction. To give effect to the purpose of the legislation, a court may read words into a legislative provision if by inadvertence Parliament has failed to deal with an eventuality required to be dealt with if the purpose of the Act is to be achieved.

Subsequently his Honour identified the conditions which must met before it is legitimate to read words into an enactment (at 302):

First, the court must know the mischief with which the Act was dealing. Secondly, the court must be satisfied that by inadvertence Parliament has overlooked an eventuality which must be dealt with if the purpose of the Act is to be achieved. Thirdly, the court must be able to state with certainty what words Parliament would have used to overcome the omission if its attention had been drawn to the defect.

1. Some limits to the operation of that approach were identified by Spigelman CJ in *R v Young* (1999) 46 NSWLR 681 at 687-8:

The three conditions set out by Lord Diplock [in *Wentworth Securities Ltd v Jones* [1980] AC 74 at 105-6] should not be misunderstood. His Lordship did not say, nor do I take any of their Honours who have adopted the passage to suggest, that whenever the three conditions are satisfied, a court is at liberty to supply the omission of the legislature. Rather, his Lordship was saying that in the absence of any one of the three conditions, the court cannot construe a statute with the effect that certain words appear in the statute.

… The court may construe words in the statute to apply to a particular situation or to operate in a particular way, even if the words used would not, on a literal construction, so apply or operate. However, the words which actually appear in the statute must be reasonably open to such a construction. Construction must be text based.

… If a court can construe the words actually used by the parliament to carry into effect the parliamentary intention, it will do so notwithstanding that the specific construction is not the literal construction and even if it is a strained construction. The process of construction will, for example, sometimes cause the court to read down general words, or to give the words used an ambulatory operation. So long as the court confines itself to the range of possible meanings or of operation of the text — using consequences to determine which meaning should be selected — then the process remains one of construction.

The construction reached in this way will often be more clearly expressed by way of the addition of words to the words actually used in the legislation. The references in the authorities to the court “supplying omitted words” should be understood as a means of expressing the court’s conclusion with clarity, rather than as a description of the actual reasoning process which the court has conducted.

See also the discussion in *Statutory Interpretation in Australia* (8th ed) 2014, paragraphs [2.31]-[2.37].

1. However, in *Taylor v Owners—Strata Plan No 11564* (2014) 253 CLR 531, a majority of the High Court (French CJ, Crennan and Bell JJ) held that the implication of words into a provision was merely the consequence of a purposive construction rather than the more formalistic or rigid approach referred to in *Young*. Their Honours said:

37 Consistently with this Court’s rejection of the adoption of rigid rules in statutory construction, it should not be accepted that purposive construction may never allow of reading a provision as if it contained additional words (or omitted words) with the effect of expanding its field of operation. As the review of the authorities in *Leys* demonstrates, it is possible to point to decisions in which courts have adopted a purposive construction having that effect. And as their Honours observed by reference to the legislation considered in *Carr v Western Australia*, the question of whether a construction “reads up” a provision, giving it an extended operation, or “reads down” a provision, confining its operation, may be moot.

38 The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills “gaps disclosed in legislation” or makes an insertion which is “too big, or too much at variance with the language in fact used by the legislature”.

39 … However, it is unnecessary to decide whether Lord Diplock’s three conditions are always, or even usually, necessary and sufficient. This is because the task remains the construction of the words the legislature has enacted. In this respect it may not be sufficient that “the modified construction is reasonably open having regard to the statutory scheme” because any modified meaning must be consistent with the language in fact used by the legislature. (footnotes omitted)

1. The difficulty for the appellant here is that the words of s 91WA are concerned with and expressly apply to the provision of a document which is bogus. They are not expressed to be concerned with the provision of false information and nor are they limited to that. That is emphasised by sub-section (3). Moreover, the definition of “bogus document” shows that it includes a document which has been altered so the section could apply to a legitimate document which has been altered in some relatively minor way. The obvious concern of the section is the propounding of bogus documents and not necessarily the amount of false information contained in them.
2. The appellant sought to rely on the observations of Siopis J in *BGM16 v Minister for Immigration and Border Protection* (2017) 252 FCR 97 (*BGM16*) as giving some indication of the purpose of the Act. There his Honour said (at [7]):

Each of these two circumstances describes conduct by an applicant for a protection visa which is inimical to the effective implementation of the premises which underlie s 91WA. This is because such conduct by a protection visa applicant would prevent or hinder the Minister from determining, in the course of considering the protection visa application, the true identity, nationality and citizenship of the applicant; and so would undermine the integrity of the protection visa application process and any resulting decision in respect of that application.

1. However, that passage must be read in context. Immediately prior to it, his Honour considered the rationale for the existence of s 91WA and the strict obligations of the Minister imposed by the legislature where either of the requirements are met. His Honour said (at [4]-[6]):

[4] It is apparent from the terms of ss 91W and 91WA that there are two premises which underlie s 91WA of the *Migration Act*. These are that the ascertainment of the identity, nationality or citizenship of an applicant for a protection visa is of fundamental importance to the grant of a protection visa; and related, thereto, that the Minister is to have regard to those issues in the course of considering the applicant’s protection visa application.

[5] Consistent with those premises, s 91WA(1) mandates that the Minister is to refuse to grant an application for a protection visa in two circumstances.

[6] The first of the nominated circumstances, is “if the applicant provides a bogus document as evidence of the applicant’s identity, nationality or citizenship” (s 91WA(1)(a)). The other circumstance is, if the Minister is satisfied that “the applicant has destroyed or disposed of documentary evidence of the applicant’s identity, nationality or citizenship; or has caused such documentary evidence to be destroyed or disposed of” (s 91WA(1)(b)).

1. It can be seen that his Honour was emphasising that the protection of the process of ascertaining the identity of an applicant for a visa was fundamental. In that context, the Act mandated the refusal of a visa in certain circumstances, including the provision of bogus documents.
2. Mr Jones, for the appellant, sought to rely upon the observations of Mortimer and Wigney JJ in *BGM16* as indicating that the purpose of s 91WA is only to prevent false information being used in the ascertainment of an applicant’s identity, nationality or citizenship. He relied upon the observations at [60] where their Honours said:

In our opinion, the purpose of these provisions is to ensure the identity, nationality and citizenship of applicants for protection visas is accurately ascertained, by creating a disincentive for applicants to persist, through the protection visa process, with concealing their true identities. That is the purpose of subss 91V(1) to (3) which deals with verification of applicants for protection visas, and of s 91W, which deals with requests for documentary evidence of identity, nationality or citizenship, and of s 91WA. The disincentive in s 91V is that reasonable adverse inferences can be drawn about the applicant’s credibility from non-compliance, or the manner of compliance with, a request for information. The disincentive in s 91W is refusal of a protection visa if there is non-compliance with a request to provide documentary evidence or the production of a bogus document in response to the request. And the disincentive in s 91WA is refusal of a protection visa without consideration of the merits of the claim if “bogus” identity documents are provided, or identity documents are destroyed, without reasonable explanation and provision of a person’s accurate identity information.

1. Reliance was also placed upon their Honours’ observations at [64]-[66] where it was said:

[64] Ascertainment of true identity and nationality as a purpose is confirmed by several aspects of s 91WA itself. The two limbs of subs (1) deal with the two ways in which a person’s true identity may be concealed: the giving of “bogus documents”, or the destruction of identity documents so a person has none. Both kinds of conduct are apt to frustrate the need to be able to establish who a protection visa applicant really is in order properly to process and assess her or his claims.

[65] The terms of s 91WA(2)(b) also confirm this purpose because, to secure the benefit of the exculpatory provision, a person must prove to the satisfaction of the Minister her or his true identity, or at least attempt to prove her or his true identity.

[66] Finally, the use of the phrase “as evidence of” in s 91WA(1) (“the applicant provides bogus documents *as evidence of* the applicant’s identity”) is consistent with the purpose we have outlined above. It ties the provision of such documents to the need for an applicant to prove her or his identity as part of the protection visa assessment process.

1. Mr Jones submitted that at [67] their Honours rejected the proposition that the section had some punitive operation:

[67] The Minister’s construction would give s 91WA an entirely different purpose. Although there may be no doubt about a person’s true identity, nationality or citizenship for the purposes of her or his protection visa application, the Minister’s construction would give s 91WA a punitive purpose by imposing a consequence for earlier acts of dishonesty, disconnected with the person’s protection visa application. … However, the point we seek to make here is that the Minister’s construction suggests s 91WA is intended to visit upon a protection visa applicant a legal consequence for earlier acts of dishonesty, including (the Minister’s senior counsel conceded) acts of dishonesty about identity (such as providing a false driver’s licence to gain employment) that are disconnected in time and circumstance with the processes of the *Migration Act*.

1. These comments were made in the context of the Minister’s argument in that case that the use of the bogus document by the applicant, otherwise than for the purposes of the application for a protection visa, would activate the section. That was rejected. That is entirely different to the circumstances of this case.
2. Here, the appellant used the documents for the purposes of establishing his identity, nationality and citizenship, and he did so for the purposes of his application for a protection visa. Even if the statutory purpose is advanced by limiting the operation of the section to where the bogus documents are used in a protection visa application, the words of the section do not tolerate limiting their operation to those cases where some falsely stated fact in the bogus document is relied upon. The overall objective of the section may well be ensuring that the identities of visa applicants are capable of accurate verification, however, the means of achieving that end is to dissuade applicants from using bogus documents in support of the application. The words used by the section are concerned with, *inter alia*, the use of bogus documents. It is not only concerned with the use of false information. Were that to have been the criteria for disqualification it would have been easy for the legislation to so provide. That was not said and the focus is on the use of bogus documents themselves. The limitation on the operation of the section which the appellant seeks to impose is not a construction which is reasonably open having regard to the statutory scheme because it is not consistent with the words which the statute uses.
3. On the appellant’s construction, an applicant for a protection visa would be entitled to proffer a bogus document in support of their identity or citizenship and the decision-maker, on apprehending that the document is bogus, would be required to undertake an analysis of the manner in which the document was proffered and relied upon in order to ascertain whether s 91WA operated. The decision-maker would be required to ascertain that information in the bogus document which is false and that which is accurate. The circumstances in which the operation of the section might then be undermined are myriad. Moreover, it would involve the decision-maker in a difficult task of ascertaining the intention with which a document is propounded; that is, was it advanced as evidence of all the information in it, or only some. It is unlikely that the legislature intended to open up that most difficult line of inquiry.
4. The section and its obvious intent is promoted by giving the words used by the Parliament their ordinary and natural meaning. If bogus documents are provided as evidence of the applicant’s identity, nationality or citizenship, subject to sub-section (2), the Minister is obliged to refuse the protection visa. This gives effect to the “disincentive” to use bogus documents which is referred to by Mortimer and Wigney JJ. Whilst this construction may be seen to give the section some punitive element, if such exists it is ameliorated by s 91WA(2) which provides an exculpatory avenue where there exists a reasonable explanation for the provision of the bogus document.
5. It follows that the use of the bogus document by BMK18, which was provided in support of the appellant’s identity, nationality and citizenship, gives operative effect to subs (1)(a) and the Minister was required to refuse to grant the protection visa unless the ameliorating effect of subs (2) applied. That was so regardless of whether the appellant can be taken to have only relied upon those parts of the document which were accurate.

### Grounds 2 and 3

1. As mentioned, it was conceded before the primary judge that if the first ground was successful the second and third need not be determined. The reason for that appears to be because the second and third grounds went to the merits of the application for review which, given the operation of s 91WA, could never prevail. On that basis the concession was correct. Nevertheless, in the usual course it would have been appropriate to determine those grounds lest the appeal should succeed on the first.
2. In any event, the Minister submits that the second and third grounds were unmeritorious. They related to the Tribunal determining not to take oral evidence from certain witnesses. However, as the Minister submits, the Tribunal did take oral evidence from some of the appellant’s witnesses. One was heard on 7 November 2016 and another heard on 1 December 2016. The appellant sought to call further witnesses and to recall Mr K who had given evidence at the hearing on 7 November 2016. The Tribunal was sceptical of Mr K’s evidence as it had raised issues which were referred to the appellant for comment. Ultimately, given its concerns about Mr K’s evidence, the Tribunal concluded it would not rely upon it to draw adverse inferences about the appellant’s credibility. It is apt to keep in mind that the Tribunal had been advised by the appellant that Mr K was elderly, prone to confusion, hard of hearing and to a degree reliant upon information provided by his personal secretary to recall details. That being so, the Tribunal concluded there would have been little utility in requiring him to give oral evidence and it would consider that he would give evidence in accordance with his written statement. It concluded that, had he done so, it would not overcome the concerns it had about the credibility of the appellant’s evidence and the circumstances in which he obtained his passport and left Bangladesh (at [84]).
3. At [85] of its reasons the Tribunal considered other witnesses which the appellant sought to have give oral evidence. The Tribunal noted that it had acceded to the initial request to take oral evidence and did so from a number of witnesses. After the second hearing further requests were made to take oral evidence of additional witnesses. Each of those witnesses had given written statements. However, it concluded that the appellant’s credibility had been so damaged that even if these persons were who they said they were and gave evidence consistent with their statements that would not overcome the appellant’s credibility difficulties. It said at [85]:

The Tribunal has had regard to the letters submitted from BNP officials in the Bancharampur area in Bangladesh, the applicant’s father and Mr Haque. However, in this case, even if it is assumed that the authors of these letters are who they say they are and that they would, if contacted by telephone, testify that the contents of the statements they have made in the letters presented to the Tribunal are true, this would add nothing to the statements conveyed in these letters. It would also not overcome the Tribunal’s concerns about the credibility of the applicant’s explanation as to why he provided a passport containing false information about his date of birth to the Department in 2014 or, more generally, the credibility of his claims that he fled Bangladesh to escape political persecution.

1. The power of the Tribunal in relation to persons named by the applicant as being witnesses is contained in s 426 of the Act. That section provides:

**426 Applicant may request Tribunal to call witnesses**

(1) In the notice under section 425A, the Tribunal must notify the applicant:

(a) that he or she is invited to appear before the Tribunal to give evidence; and

(b) of the effect of subsection (2) of this section.

(2) The applicant may, within 7 days after being notified under subsection (1), give the Tribunal written notice that the applicant wants the Tribunal to obtain oral evidence from a person or persons named in the notice.

(3) If the Tribunal is notified by an applicant under subsection (2), the Tribunal must have regard to the applicant’s wishes but is not required to obtain evidence (orally or otherwise) from a person named in the applicant’s notice.

1. Mr Jones for the appellant relied upon the observations of Hill J in *NAQS v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 77 ALD 424 at 429 [27]-[29] to the effect that the above section had no relevance to the right of an applicant before the Tribunal to call witnesses relevant to the inquiry. His Honour considered that it would take clear words to exclude the right of an applicant to put evidence before the decision-maker. His Honour said:

[29] In my view, it is implied in Div 4 of Pt 7 of the Act and indeed from the very obligation imposed on the tribunal to entertain a “review” that an applicant is entitled to require the tribunal to have regard to oral evidence of a witness called by the applicant, although only if that evidence is relevant to the issues before the tribunal. In the present case, evidence from witnesses as to the applicant’s practice of Falun Gong in Australia and nothing else would be irrelevant because it would cast no light on whether the applicant was a person who had a well-founded fear of persecution within the meaning of the Convention if returned to China once the tribunal accepted that the applicant was a practitioner of Falun Gong. The tribunal could thus properly refuse to hear that evidence.

1. A difficulty for the appellant is that the above decision was not followed by the Full Court in *Minister for Immigration and Multicultural and Indigenous Affairs v Maltsin* (2005) 88 ALD 304. There the Court, in dealing with the cognate provision of s 361(3), identified that it was in keeping with the inquisitorial nature of the Tribunal’s function that it does not err if it determines not to obtain evidence from a person whom the applicant nominates. Pursuant to the procedural fairness rules contained in the Act it is only obliged to take oral evidence from the applicant. That said, it must consider any request made to take evidence. In *Maltsin* the Court said at [38]:

By virtue of s 361(3), the tribunal is obliged to have regard to any notice given by an applicant under s 361(2) or (2A) of the Act. This means that the tribunal must genuinely apply its mind to the contents of the notice and, in particular, to the question whether it should take the oral evidence of the nominated individuals in accordance with the applicant’s wishes. The tribunal must not merely go through the motions of considering the applicant’s wishes as expressed in the notice. As the respondents’ counsel said, the authorities establish that the invitation to appear before the tribunal must be “real and meaningful and not just an empty gesture”: *NALQ* at [30]; *SCAR* at [37]; and *Mazhar* at [31]. It follows that the consideration that the tribunal gives to the wishes of the applicant concerning the evidence to be taken at the hearing must also be genuine. The tribunal must not decline to comply with the applicant’s wishes capriciously, but must take account of such relevant matters as the relevance and potential importance to the outcome of the review of the evidence that could be given by a nominated witness (cf *W360/01A v Minister for Immigration and Multicultural Affairs* (2002) 124 FCR 449; [2002] FCAFC 211 (*W360/01A*) at [2] per Lee and Finkelstein JJ and [30]–[32] per Carr J), the sufficiency of any written evidence that has already been given by a witness, and the length of time that would afford the applicant a fair opportunity to put his or her case before the tribunal. These considerations flow from the nature of the tribunal’s overarching objective, which is to provide a review that is “fair, just, economical, informal and quick”: see s 353(1). The Tribunal must bear in mind this statutory objective when considering the weight to be given these matters.

1. The identification of the above obligations of the Tribunal are antithetical to the observations of Hill J in *NAQS* and the Full Court’s decision must be taken as overruling it. Further, in *AYX17 v Minister for Immigration and Border Protection* [2018] FCAFC 103, a subsequent Full Court approved the decision in *Maltsin* and acknowledged that it applied to the operation of s 426. There the Court held that s 426(3) made it clear that the Tribunal had a discretion as to whether it would obtain evidence from a nominated party. Their Honours (Tracey and Mortimer JJ) said (at [48]):

The work to be done by the second aspect of s 426(3) (namely that the Tribunal is “not required” to obtain evidence from a person named in the notice) is, in our opinion, to make clear that the Tribunal has a discretion whether or not to take evidence from a nominated person. It emphasises the nature of the power in s 427(1)(a). The only express control or condition on that discretion is that the Tribunal must “have regard to” an applicant’s wishes. In our opinion this means the Tribunal must, through inquiries of the applicant, understand why the applicant wants the Tribunal to take evidence from the nominated person, and how that person’s evidence is said by an applicant to relate to the Tribunal’s review. It is to these matters the Tribunal must give real and genuine consideration, in the way explained by Kenny and Lander JJ in *Maltsin* at [38] (Spender J agreeing).

1. This makes it clear that the appellant’s reliance on the observations of Hill in *NAQS* was misplaced. The Tribunal did have a discretion whether to take oral evidence from the witnesses which BMK18 nominated and it exercised it accordingly.
2. It is not possible to conclude that the Tribunal did not properly consider the request to take oral evidence from a number of the appellant’s witnesses in the manner identified in *Maltsin*. It took the appellant’s wishes into consideration and it identified the reason why the appellant wanted the witnesses to give evidence. It gave a real and meaningful consideration to whether it should hear from them. The decision to accept the written statements but not hear from those witnesses was considered in light of the findings it had made on the oral evidence given by BMK18 and other witnesses. It concluded that the oral testimony of those witnesses would not have assisted it in overcoming the credibility concerns arising from the appellant’s evidence and, in particular, the concerns with respect to the several reasons which the appellant had given for leaving Bangladesh. It is to be remembered that the appellant had given three different reasons as to why he obtained a bogus passport. It is also to be recalled that the Tribunal found his claims of a fear of persecution to be lacking credibility and inconsistent.
3. There is nothing which suggests that the Tribunal failed to properly consider the request to take oral evidence from the several witnesses propounded by the appellant. It gave a genuine consideration to the request and took into account its relevance and potential importance to the questions of the review. It also had the benefit of the written statements.
4. During the course of the argument the appellant relied upon the decision in *DAO16 v Minister for Immigration and Border Protection* (2018) 353 ALR 641. However, that case concerned a rather unique situation where four independent witnesses were prepared to testify to corroborate the appellant’s claim which the Tribunal had disbelieved. The evidence of the witnesses had been received and the illogicality or irrationality was the Tribunal’s rejection of it without any basis. Here, the Tribunal was prepared to accept the witnesses would give evidence in line with their written statements, however, it explained that assuming they did, that would not overcome the concerns it had about the appellant’s evidence and it is not said that this finding was in some way unreasonable.
5. The Tribunal gave extensive reasons as to why it considered it would not further take oral evidence from additional witnesses. That was open in the circumstances and it was not unreasonable or procedurally unfair for it to do so.
6. It follows that this ground of complaint also fails. That being so, there is an independent basis on which the application for review would have failed, being that the appellant was unable to establish that Australia owed him protection obligations.

## Conclusion

1. It follows that neither ground of appeal succeeds and the appeal must be dismissed with costs.

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| I certify that the preceding fifty-eight (58) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Derrington. |

Associate:

Dated: 27 February 2019