FEDERAL COURT OF AUSTRALIA

DDG16 v Minister for Immigration and Border Protection [2018] FCA 1874

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| Appeal from: | *DDG16 v Minister for Immigration & Anor* [2018] FCCA 1160 |
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| File number: |  |
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| Judge: | **MOSHINSKY J** |
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| Date of judgment: | 28 November 2018 |
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| Catchwords: | **MIGRATION** – appeal from the Federal Circuit Court of Australia – protection visa – where Tribunal made adverse credibility findings against the appellant – whether findings were open to the Tribunal – appeal dismissed |
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| Legislation: | *Migration Act 1958* (Cth), s 36 |
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| Cases cited: | *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429 |
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| Date of hearing: | 13 August 2018 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 23 |
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| Counsel for the Appellant: | The Appellant appeared in person with the assistance of an interpreter |
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| Counsel for the First Respondent: | Ms NJ Campbell |
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| Solicitor for the First Respondent: | Sparke Helmore Lawyers |
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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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|  | | VID 185 of 2018 |
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| BETWEEN: | DDG16  Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | MOSHINSKY J |
| DATE OF ORDER: | 28 NOVEMBER 2018 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent’s costs, to be fixed by way of a lump sum.
3. Within 14 days, the parties file any agreed proposed minute of orders fixing a lump sum in relation to the first respondent’s costs.
4. In the absence of any agreement pursuant to paragraph 3 of these orders, within 21 days the first respondent file and serve an affidavit constituting a Costs Summary in accordance with paragraphs 4.10 to 4.12 of the Court’s *Costs Practice Note* (GPN-COSTS).
5. Within a further 14 days, the appellant file and serve any Costs Response in accordance with paragraphs 4.13 to 4.14 of the *Costs Practice Note* (GPN-COSTS).
6. In the absence of any agreement having been reached within a further 14 days, the matter of an appropriate lump sum figure for the first respondent’s costs be referred to a Registrar for determination.

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

REASONS FOR JUDGMENT

MOSHINSKY J:

## Introduction

1. The appellant, a citizen of Bangladesh, arrived in Australia by boat in December 2012. He applied for a protection visa in April 2013. A delegate of the first respondent (the **Minister**) refused the application for a protection visa. The appellant applied to the Administrative Appeals Tribunal (the **Tribunal**) for review of the delegate’s decision. On 21 September 2016, the Tribunal decided to affirm the decision of the delegate not to grant the appellant a protection visa. The appellant applied to the Federal Circuit Court of Australia for judicial review of the Tribunal’s decision. On 5 February 2018, the Federal Circuit Court dismissed the application. The appellant appeals to this Court from the judgment of the Federal Circuit Court.
2. For the reasons that follow, no error is shown in the judgment of the Federal Circuit Court. Accordingly, the appeal is to be dismissed.

## Background facts

1. The appellant’s claims, as set out in his visa application, were summarised by the Tribunal at [11] of its statement of decision and reasons (the **Tribunal decision**).

The applicant’s claims in his visa application are summarised as follows:

* He is a citizen of Bangladesh. He is a Muslim.
* He was born on [details omitted] in the village of [details omitted] in the district of [details omitted]. He lived at home with his parents and brother. [details omitted].
* He completed school in 2004. He thereafter worked in a printing business on an irregular basis. He did not have a secure job since leaving school.
* For the past 18 months he was involved in politics with the Awami League (AL). They paid him some money when he did political work in his village and the local area. The AL paid for the repair of roads and basic infrastructure and provided funds to people who had problems. He liked the work for the first 7 or 8 months but did not like the work thereafter. Only one tenth of the money went to the community and the rest was taken dishonestly to enrich local members of the AL.
* Members of the AL were also involved in the rape of local girls, alcohol, drug trafficking and kidnapping. There were about 16 members of the AL in his Police Station area and they seemed to be involved in criminal activities including murder.
* In July 2012, a person named [P1], who was not involved in politics, was murdered by a person named [P2]. He did not say anything because he could have been murdered as well. From October 2012, he decided to leave the AL and join the Bangladesh Nationalist Party (BNP).
* On 19 October 2012, four members of the AL approached him when he was on the street and beat him on the head with a large wooden stick. He went to hospital to receive treatment. His father wanted him to go to the Police but he was afraid to do so. He knew the Police could not do anything and he could have a bigger problem.
* On the night of 1 November 2012, he and his brother were in their room, which was separated from the rest of the house, when five people knocked on the door. His brother looked through a peephole in the door and saw people standing there with a big knife. He escaped through a small window at the back of the room and went to a village named [details omitted] which was two or three villages away from his own. He stayed there with a friend for five days.
* When his younger brother opened the door, the men hit him and asked him where he had gone. He returned to his village after five days and had no problems for the next two days. The group of men then returned and knocked on his parents’ room and asked them where he had gone. He was in his room at the time and was able to leave and go to [details omitted].
* He telephoned his father the following morning and his father asked him to return home. His father told him it was too dangerous for him to remain in their village and he should go to [details omitted] to the house of a friend-of his older brother. After he left, his father went to the Police but the Police refused to accept his report as they were involved with the AL.
* He stayed in [details omitted] for eight days from 11 November 2012. His father told him it was not safe for him to stay there and he needed to leave Bangladesh. His father paid an agent in [details omitted] for him to leave Bangladesh and travel to Australia.
* He fears returning to Bangladesh because he fears serious harm from the members of the AL in his area because he has knowledge of the crimes they commit. They would want to silence him and he believes they will carry out the threats they have already made towards him. He has already been injured by them and he believes they came to his house to kill him.
* He does not believe the Police will help him. They are corrupt and are paid off by the AL.
* At the end of February 2013, his father told him that the shop belonging to the younger brother of one of the sixteen AL members was damaged and the Police went to his house asking about his whereabouts. He is being blamed for the damage to the shop and a Warrant has been issued against him.
* He does not believe he can safely relocate anywhere in Bangladesh. The AL is very powerful and they can find him anywhere in the country.

1. The appellant attended an interview with the Department of Immigration and Border Protection (the **Department**) in October 2014. During the interview he re-iterated and expanded on his written claims and made new claims, as described in [13] of the Tribunal decision.

… [The appellant] stated that he worked for the AL from some time in the first half of 2010 to October 2012. In July 2012, one of his associates named [P2] murdered another associate named [P1] over a gambling debt. He did not witness the murder but gambled with the murderer and the victim before the murder and knew the motive for the murder. He left the AL in October 2012 and joined the BNP in the same month. He has been falsely implicated in two crimes since his departure from Bangladesh; the vandalism of a shop and the later disappearance of the owner of that shop. His brother is also implicated in the disappearance of the shop owner. His brother is now missing.

1. On 1 December 2014, the delegate decided to refuse the appellant’s application for a protection visa.
2. The appellant applied to the Tribunal for review of the delegate’s decision. On 30 May 2016, the appellant’s migration agent lodged with the Tribunal a statutory declaration of the appellant, pre-hearing submissions on behalf of the appellant and certain country information. A hearing before the Tribunal took place on 31 May 2016. At the hearing, the Tribunal raised five specific concerns in respect of the appellant’s evidence. The appellant sought and was granted an opportunity to provide post-hearing submissions addressing these matters. On 14 June 2016, the appellant’s migration agent provided a post-hearing submission to the Tribunal addressing these matters.
3. On 21 September 2016, the Tribunal decided to affirm the decision of the delegate. As set out at [18] of its decision, the Tribunal found aspects of the appellant’s evidence to be “vague, implausible, inconsistent and unconvincing”. The Tribunal then set out, in some detail, the concerns it had in relation to the appellant’s credibility and the veracity of his claims: see [19]-[60] of the Tribunal decision. I observe that the Tribunal’s reasons in these paragraphs are clearly expressed and logical. Specific reasons are given for doubting significant aspects of the appellant’s evidence.
4. The Tribunal stated, at [61], that having considered the appellant’s claims, the evidence and the submissions, the Tribunal found that the appellant was “not a reliable or credible witness” and that “he fabricated his material claims for the purpose of obtaining a Protection visa”. In particular, the Tribunal stated at [64] that: the Tribunal did not accept that the appellant was a supporter or a member of the Jubo League (**JL**) or the Awami League (**AL**) or that he was involved in politics with the AL; it followed that the Tribunal did not accept any of his claims that flowed from that; the Tribunal did not accept that he was a member or supporter of the Bangladesh Nationalist Party (**BNP**); the Tribunal did not accept that ‘P1’ was murdered by ‘P2’ in July 2012; and it followed that the Tribunal did not accept any of the appellant’s claims that flowed from that.
5. Further, the Tribunal stated at [65]-[66] that: it did not accept that the appellant had been implicated in any criminal offences, been the subject of criminal investigations, been charged with criminal offences, had cases against him go before the court and warrants issued against him; it did not accept that the charge sheets provided by the appellant to the Department and the Tribunal were authentic documents; and it did not accept that the appellant was of adverse interest to the JL or the AL.
6. Accordingly, the Tribunal concluded at [69] that: there was no real chance that the appellant would suffer persecution on the grounds of his actual or imputed political opinion or any other Refugee Convention reason if he returned to Bangladesh at that time or in the reasonably foreseeable future; therefore, the appellant did not have a well-founded fear of persecution for a Refugee Convention reason; and, accordingly, the appellant did not satisfy the criterion in s 36(2)(a) of the *Migration Act 1958* (Cth).
7. The Tribunal also rejected the appellant’s complementary protection claims, at [70]-[73].

## The proceeding in the Federal Circuit Court

1. The appellant applied to the Federal Circuit Court for judicial review of the Tribunal’s decision. The appellant appeared in person at the hearing before the primary judge. The primary judge gave ex tempore reasons for decision (the **Reasons**), dismissing the application.
2. The grounds set out in the appellant’s application in the Federal Circuit Court were:
   1. the decision of the Tribunal was affected by an error of law; and
   2. the Tribunal denied the appellant procedural fairness.
3. There were no particulars in respect of these grounds and the appellant did not provide an outline of submissions. At the hearing before the primary judge, the appellant was unable to identify any error that appeared to be an error of law or a failure to afford procedural fairness: see the Reasons, [11].
4. The appellant raised four additional matters at the hearing before the primary judge:
   1. the appellant took issue with the Tribunal’s reasoning in rejecting his claim that ‘P1’ had been murdered;
   2. the appellant challenged the Tribunal’s findings of fact concerning an incident that allegedly occurred on the night of 1 November 2012 (involving five people coming to the appellant’s house);
   3. the appellant challenged the Tribunal’s finding that he had given inconsistent evidence relating to pending criminal charges; and
   4. the appellant challenged the Tribunal’s finding with respect to the authenticity of two charge-sheet documents.
5. The primary judge considered each of these contentions, concluding in respect of each of them that no error of law or failure to accord procedural fairness was shown in the approach taken by the Tribunal: see the Reasons, [12]-[23]. The primary judge observed, at [23], that it is open to the Tribunal to make findings as to credibility and, in this case, the Tribunal had provided detailed reasons for its credibility findings. The primary judge stated that the issues raised by the appellant were in effect an attempt to engage in merits review, and that the findings of the Tribunal appeared to have been open on the material before the Tribunal.

## The appeal to this Court

1. The appellant has filed a notice of appeal raising the following grounds:

1. I gave evidence but it was not believed although evidence was 100% truth. It was unfair.

2. Murder of [P1] happend but FCC said it did not happend, without inspection.

3. Appeal my FCC decision.

(Errors in original.)

1. The appellant appeared in person (with the assistance of an interpreter) at the hearing of the appeal. The appellant made some brief oral submissions. The appellant did not file any written submissions.
2. The appellant’s grounds of appeal are unparticularised. The appellant does not raise any specific contentions that suggest any error of law by the Tribunal or by the primary judge.
3. The appellant’s first ground of appeal may be taken to challenge the Tribunal’s adverse credibility findings. Having reviewed the reasons of the Tribunal, there does not appear to be any error in the approach taken by the Tribunal. The Tribunal provided detailed, clear and logical reasons for making the findings that it did concerning the appellant’s credibility. If and to the extent that ground 1 may raise a procedural fairness issue (in relation to the Tribunal decision), the material does not indicate any denial of procedural fairness by the Tribunal.
4. The appellant’s second ground of appeal challenges the findings of the Tribunal relating to the alleged murder of ‘P1’. The Tribunal considered the relevant allegations in detail at [31]-[36]. As set out in these paragraphs, the appellant did not refer to the murder in his interview with the Department on 19 December 2012. The Tribunal raised this issue with the appellant during the hearing and the appellant provided an explanation in the post-hearing submissions. The Tribunal did not accept the explanation provided. It was open to the Tribunal to reason in the way that it did. Insofar as this ground may be taken to contend that there is a duty to inquire or investigate, as the majority of the High Court explained in *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429 at [25]: “The duty imposed upon the tribunal by the Migration Act is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review.” In the present case, there was no such obvious inquiry to be made. It was open to the Tribunal to make the finding that it did in relation to the alleged murder.
5. The third ground in the notice of appeal does not raise any additional issue.
6. It follows that the appeal is to be dismissed. There is no apparent reason why costs should not follow the event. Accordingly, there will be an order that the appellant pay the Minister’s costs of the appeal. I will also make orders for the costs to be fixed by way of a lump sum.

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| I certify that the preceding twenty-three (23) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Moshinsky. |

Associate:

Dated: 28 November 2018