FEDERAL COURT OF AUSTRALIA

CZD18 v Minister for Home Affairs [2019] FCA 1442

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| Appeal from: | *CZD18 v Minister for Home Affairs & Anor* [2019] FCCA 462  |
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| File number: | NSD 317 of 2019 |
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| Judge: | **KATZMANN J** |
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| Date of judgment: | 29 August 2019 |
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| Legislation: | *Migration Act 1958* (Cth) ss 425, 426A, 474 and 476 of the Migration Act |
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| Cases cited: | *Applicant NAHF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 140*Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30*Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332*Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* (2003) 128 FCR 553 |
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| Date of hearing: | 29 August 2019 |
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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: | No Catchwords |
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| Number of paragraphs: | 40 |
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| Counsel for the Appellant: | The Appellant appeared in person |
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| Solicitor for the First Respondent: | Ms A Zinn of Mills Oakley |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice save as to costs |
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ORDERS

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|  | NSD 317 of 2019 |
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| BETWEEN: | CZD18Appellant |
| AND: | MINISTER FOR HOME AFFAIRSFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| JUDGE: | KATZMANN J |
| DATE OF ORDER: | 29 AUGUST 2019 |

THE COURT ORDERS THAT:

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

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

REASONS FOR JUDGMENT

(Revised from transcript)

1. An applicant for a protection visa whose application is not granted by the Minister (whether directly or through his delegate) may apply to the Administrative Appeals Tribunal for merits review. If an applicant is invited under s 425 of the *Migration Act 1958* (Cth) to appear before the Tribunal to give evidence and present arguments but fails to appear on the day on which, or at the time and place at which, he or she is scheduled to appear, s 426A relevantly provides that, by written statement under s 426B, the Tribunal may dismiss the application without further considering it or the information before the Tribunal. If the Tribunal dismisses the application, s 426A(1B) permits the applicant to apply to the Tribunal for reinstatement within 14 days of receiving notice of the decision under s 426B.
2. This case involves the application of these provisions. It comes to the Court as an appeal from a judgment of the Federal Circuit Court dismissing applications for judicial review from two decisions of the Tribunal made after the appellant failed to appear on the scheduled date, at the scheduled place and time, and then failed to seek reinstatement of his application.
3. The appellant is a Taiwanese national who applied to the Minister for a protection visa and whose application was not granted by a delegate of the Minister. The appellant applied to the Tribunal for a review of the delegate’s decision and on 27 April 2018 he was invited by letter to appear before the Tribunal to give evidence and present arguments at a date, time and place particularised in the letter. The letter advised that, if he was not able to attend the hearing, he should notify the Tribunal as soon as possible but that the date would only be changed if there was “a very good reason” for an adjournment. It also advised that:

If you do not attend the scheduled hearing, we may make a decision on the review without taking any further action to allow or enable you to appear before us or may dismiss your application for review without any further consideration of the application or the information before us. A dismissed case can be reinstated if the Member considers it appropriate to do so and the application is made within 14 days of receiving notice of the dismissal. If the Member confirms the dismissal, the decision under review is taken to be affirmed.

1. The letter was addressed to the appellant, but supplied under cover of another letter addressed to Mrs Xuan Zuo at an email address. For the purpose of the Tribunal hearing, the appellant had appointed Ms Zuo to be his authorised recipient of all correspondence from the Tribunal. The form in which the appointment was made appears in the appeal book, and the email address to which the invitation was sent corresponds to the email address provided in that form.
2. The appellant did not appear on the scheduled hearing date at the appointed hour and place and there is no evidence to suggest that the appellant notified the Tribunal that he was unable to attend. Consequently, the Tribunal decided to dismiss his application for review, without further considering it or the information that was before the Tribunal. The Tribunal provided brief reasons for doing so. The crux of its reasons appears in [2] of its decision:

The review applicant did not appear before the Tribunal on the day and at the scheduled time and place. Having reviewed the Tribunal file, the Tribunal is satisfied that the review applicant was properly invited to a hearing in accordance with section 441A(5). The invitation has not been returned to sender, and no satisfactory reason for the non-appearance has been given.

1. The Tribunal notified the appellant of its decision by letter the same day, once again under cover of a letter to his authorised recipient at the email address he had provided the Tribunal. In that letter, the Tribunal emphasised that the appellant “may apply to us in writing for reinstatement of the application by 29 May 2018”. The letter also contained information to assist the appellant to understand the consequences of both the dismissal and an application for reinstatement.
2. No application for reinstatement was made and on 4 June 2018 the Tribunal notified the appellant that it had confirmed the decision to dismiss his application for review.
3. Three days later, the appellant filed an application in the Federal Circuit Court seeking an order that the decision of the Tribunal be quashed and that a writ of mandamus be issued to the Tribunal requiring it to determine his application according to law. The application was accompanied by an affidavit sworn by the appellant in which he deposed to his date and place of birth, the fact that he had lodged the application, and his fear of returning to Taiwan.
4. The grounds of the application read (without alteration):

I did not attended the AAT's interview because my body's was very poor. During that time, I confined to a bed and my friend take care of me. I spent the whole day in a trance, so my friend send me to the hospital and see a doctor. I did not know what happened, under that circumstance, I did not remember the hearing of AAT and also unable to inform the AAT why I could not attend the hearing.

AAT did not give me a chance and then refused my application, it is unfair for me. AAT should examine fully my actual situation, instead of an arbitrary decision. AAT neither giving another opportunity nor due diligence, the tribunal’s decision breached my right to natural justice.

I believe that Australia is a country which will protect the interests of vulnerable groups, so I fled to Australia to seek help. However, AAT's attitude was too apathetic and subjective think I can attend the hearing. AAT did not consider my practical situation, which is really not human.

1. The primary judge took the grounds of the application to mean that the appellant was complaining that both the Tribunal’s decision to dismiss the application without further consideration and its subsequent decision to confirm the original decision were legally unreasonable, referring to *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.
2. The primary judge found that the Tribunal’s invitation to hearing letter of 27 April 2018 was a valid invitation under s 425 in that it complied with all the relevant statutory requirements.
3. His Honour noted that the Tribunal had the power to adjourn a review from time to time and is required to carry out its functions in a way that is “fair, just, economical, informal and quick” and that these discretionary powers must be exercised reasonably and not arbitrarily, capriciously or without common sense. Nevertheless, he determined that the Tribunal’s decision to dismiss the application was not legally unreasonable, did not lack an intelligible justification, and was neither irrational nor illogical. His Honour held that this was particularly so since the appellant had had 14 days in which to apply to have his application reinstated. His Honour noted that there was no medical evidence about the appellant’s alleged medical condition and that the nature of the condition was not identified. In those circumstances, his Honour considered that there was no evidence indicating that the appellant could not meaningfully participate in the Tribunal hearing, either in person or over the telephone. His Honour observed that there was no probative evidence explaining why the appellant had not contacted the Tribunal to seek an adjournment or arranged for his friend to do so.
4. In any case, the primary judge observed that no explanation was given for the appellant’s failure to seek reinstatement. His Honour noted that the appellant did not claim to have been sick during the 14 day period when it was open to him to ask the Tribunal to reinstate his review application.
5. His Honour concluded that the Tribunal had complied with its obligations and the appellant had failed to establish that either decision was affected by jurisdictional error. Consequently, his Honour dismissed the application.
6. The notice of appeal contains three grounds. They read, without alteration, as follows:
7. The mandarin interpreter can not translate my words correctly because I am from Taiwan there is huge culture difference between China mainland and Taiwan.
8. I was unable to attend AAT hearing due to my health issue. The Federal Circuit Court did not provide a chance to show my medicare certificate.
9. AAT and court did not consider my situation in TAIWAN and the risk if I go back to TAIWAN.
10. The appellant filed no submissions in support of the grounds.
11. At the hearing of the appeal he was assisted by a Mandarin interpreter who confirmed to the Court that he was Taiwanese.
12. When invited to speak, the appellant had nothing to say in support of ground 1 or 3. As for ground 2, he told the Court that on the day of the Tribunal hearing he was resting at home. He said that his back hurt but that, since this was only an occasional problem and because he had no money to pay for a doctor, he did not see a doctor or have a “medicare” certificate. He made no other submission apart from pleading with the Court to give him the opportunity to stay in Australia.
13. Each of the grounds of appeal must be dismissed.
14. I begin with **the first ground**, the question of the interpreter.
15. This ground must be dismissed for the following reasons.
16. First, in his application for judicial review the appellant requested an interpreter in the Mandarin language. That was consistent with his conduct throughout the visa application process. To the question in his visa application about which languages he spoke, read or wrote, he nominated Mandarin only and indicated that he spoke, read, and wrote Mandarin. To the question whether he would need an interpreter if called for an interview he replied “Yes”, indicating Mandarin. Nowhere in either document did he indicate that he required a Taiwanese Mandarin speaker. In his application to the Tribunal he identified Mandarin as the “language/dialect required”.
17. Second, the appellant did not identify what words were apparently interpreted incorrectly, let alone the character and frequency of the alleged misinterpretation.
18. Third, no evidence was adduced to support the claim, such as a transcript of the hearing and an affidavit from a suitably qualified expert.
19. Fourth*,* there is no suggestion that the appellant raised any question of the suitability or otherwise of the interpreter before the primary judge.
20. I now turn to **ground 2**, the appellant’s alleged inability to attend the hearing due to a “health issue” and his lack of opportunity to produce a “medicare” certificate.
21. An invitation to participate in an oral hearing must be a “real and meaningful” one: *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* (2003) 128 FCR 553 at [37]. There is authority for the proposition that the obligations imposed by s 425 can be breached where an invitation is given but the applicant is unable to attend because of ill health: see, for example, *Applicant NAHF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 140. The Minister accepted that the invitation might not be real and meaningful where an applicant was unable to participate because of a mental or physical ailment, even when the Tribunal is unaware of the ailment. Since compliance with s 425 is a precondition to the valid exercise of the Tribunal’s jurisdiction, failure of the Tribunal to comply with its requirements involves jurisdictional error: *SCAR* at [38].
22. Nevertheless, the appellant has not demonstrated that the invitation issued to him by the Tribunal to give evidence and present arguments was not real or meaningful.
23. First, although the appellant asserted that the court below did not give him a chance to “show [his] medicare certificate”, he told this Court that he did not have any such certificate.
24. Second*,* the obligation was upon him to prove that he was unable to appear before the Tribunal because he was unwell. To that end, it was incumbent on him to draw his condition to the attention of the primary judge and tender medical evidence. At the very least, he needed to inform the primary judge that he wanted his Honour to see the evidence or seek an adjournment to enable him to present the evidence to the Court. Yet, there is no evidence to indicate that he made any such application. If he did, the transcript of the hearing would bear him out. But neither the appellant nor the Minister saw fit to include the transcript in the appeal book or to provide a copy to the Court.
25. That said, at the hearing an affidavit was read from Arielle Bianca Zinn, a solicitor employed by Mills Oakley, the Minister’s lawyers, who appeared for the Minister at the hearing in the court below. Based on her recollection, her contemporaneous notes and her report to the Minister sent about half an hour after the hearing concluded, Ms Zinn deposed that “the appellant did not make any request to the primary judge to tender, produce or provide any medical certificate, medical report or any other document” and did not ask for further time to do so. This account was not disputed. No objection was taken to the affidavit and the appellant elected not to cross-examine Ms Zinn.
26. Third, the evidence given by Ms Zinn tends to confirm the observation of the primary judge at [22] of his Honour’s reasons that the appellant provided no evidence to the court, either lay or medical, to corroborate his claim that he was unable to attend the Tribunal hearing on 15 May 2018. His Honour said that there was no report from a hospital or doctor about his alleged medical condition although the appellant claimed to have attended a hospital and to have seen a doctor. His Honour also observed that the appellant did not identify any specific medical condition from which he was allegedly suffering on the day of the hearing. It follows that there was no evidence to indicate that he could not meaningfully participate in the Tribunal hearing, either in person or by telephone.
27. Fourth, despite the appellant’s statements to this Court, on the assumption that the appellant had a medical certificate which he drew or wanted to draw to the primary judge’s attention, the certificate is not before the Court so it is impossible to know whether it said anything relevant either about his “health issue” or his alleged inability to attend the Tribunal hearing. The appellant did not apply to adduce evidence on the appeal.
28. The appellant has had ample opportunity to establish that his inability to attend the hearing was due to his state of health, but has failed to do so.
29. As the Minister submitted, **ground 3** is misconceived.
30. First, in the circumstances as they presented themselves the Tribunal was not obliged to consider the merits of the appellant’s claim.
31. Where the preconditions for the exercise of the power conferred by s 426A are satisfied, the Tribunal is entitled to proceed to dismiss a review application without further consideration of either the application or the information before it. The primary judge identified those preconditions in his reasons at [11] and found that they had all been satisfied. It was not suggested that his Honour erred in coming to this conclusion. As Kiefel CJ pointed out in *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30 at [7], the intention of the legislative scheme is that the Tribunal be permitted to consider the exercise of its powers under s 426A if those preconditions are met. What is more, once the appellant failed to apply for reinstatement within 14 days of being notified of the decision under s 426A(1B), the Tribunal was bound by s 426A(1E) to confirm its decision to dismiss the application by providing, as the Tribunal did, a written statement in accordance with s 430. It had no power to do otherwise. The obligation under s 426A(1E) is contingent upon the Tribunal having notified the applicant of the decision to dismiss the application by giving him a copy of the written statement within 14 days of the decision by one of the methods listed in s 441A. Those methods include email: s 441A(5)(b). In the present case, it was not in dispute that the Tribunal emailed a copy of the decision to the email address of the appellant’s authorised recipient.
32. Second, the court had no power to inquire into the merits of the appellant’s claim. The effect of ss 474 and 476 of the Migration Act is that the court could only set aside the Tribunal’s decisions if it was satisfied that they were affected by jurisdictional error.
33. For these reasons the appeal must be dismissed. Costs should follow the event.
34. There will be orders accordingly.

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| I certify that the preceding forty (40) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Katzmann. |

Associate:

Dated: 3 September 2019