FEDERAL COURT OF AUSTRALIA

AJH19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 821

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| Appeal from: | *AJH19 v Minister for Immigration & Anor* [2019] FCCA 2599  |
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| File number(s): |  |
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| Judge(s): | **THAWLEY J** |
|  |  |
| Date of judgment: | 11 June 2020 |
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| Legislation: | *Migration Act 1958* (Cth) s 473DD  |
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| Cases cited: | *AJH19 v Minister For Immigration & Anor* [2019] FCCA 2599*Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593  |
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| Date of hearing: | 11 June 2020 |
|  |  |
| Registry: | New South Wales |
|  |  |
| Division: | General Division |
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| National Practice Area: |  |
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| Category: | No Catchwords |
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| Number of paragraphs: | 28 |
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| Counsel for the Appellant: | The appellant appeared in person |
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| Counsel for the Respondents: | Mr Johnson |
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| Solicitor for the Respondents: | HWL Ebsworth Lawyers |

ORDERS

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|  | NSD 1807 of 2019 |
|   |
| BETWEEN: | AJH19Appellant |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRSFirst RespondentIMMIGRATION ASSESSMENT AUTHORITYSecond Respondent |

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| JUDGE: | THAWLEY J |
| DATE OF ORDER: | 11 June 2020 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the respondents costs.

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

REASONS FOR JUDGMENT

(revised from transcript)

THAWLEY J:

# Introduction

1. This is an appeal from orders of the **Federal Circuit Court** of Australia made on 18 October 2019, dismissing an application for judicial review of a decision of the Immigration Assessment **Authority** made on 15 January 2019: *AJH19 v Minister For Immigration & Anor* [2019] FCCA 2599 (***AJH19* *(No1)***).
2. The Authority had affirmed a decision of a delegate of the first respondent (**Minister**) refusing to grant the appellant a Safe Haven Enterprise (subclass 790) visa (**SHEV**).
3. The Federal Circuit Court dismissed the two grounds of review advanced, holding that the Authority had not failed to consider: (a) the appellant’s claim in the ways asserted; or (b) “new information” provided to the Authority by the appellant. For the reasons which follow, the Federal Circuit Court has not been shown to have erred.

# Background

1. The background facts were summarised in the decision of the Federal Circuit Court in its reasons (hereafter “**J**”) as follows (footnotes omitted):

[3] The applicant is a citizen of Bangladesh who arrived in Australia in June 2013 and on 16 November 2016 made an application for a Safe Haven Enterprise Visa (SHEV). He claimed to fear harm in his home country on the basis of his political opinion. In particular he claimed that he had been in Bangladesh, and continued in Australia to be, a member of the Bangladesh National Party (BNP). He claimed to have been threatened in the past by members of the Sarbohara Party and the Awami League. He claimed that his uncle was a local BNP politician and that his uncle’s home had been attacked. From 2006 to 2013 (when he left for Australia) the applicant was less involved in BNP activities and travelled regularly to Dhaka where his brother had a shop. He had participated in meetings and demonstrations of the BNP since coming to Australia.

[4] On 1 November 2018 the delegate refused to grant the applicant a SHEV. The applicant’s matter was referred to the Authority. On 27 November 2018 the applicant, through his representative, sent to the Authority a written submission (Authority submission).

[5] On 15 January 2019 the Authority affirmed the decision under review.

[6] The Authority had regard to the applicant’s submission and took it into account observing that it restated the applicant’s claims that were before the delegate, addressing the delegate’s decision and issues arising from the decision.

[7] The Authority detailed the applicant’s evidence given in his interview with the delegate concerning his political affiliations and history with the BNP in Bangladesh. The Authority referred to relevant country information concerning political unrest in Bangladesh at [16]. By reference to the evidence, the Authority accepted the applicant’s uncle was a local BNP politician in Barisal and that the applicant was a member of the BNP from 2002. It accepted that the applicant may have received threatening phone calls while he was politically active with the BNP. However the Authority did not accept that the applicant was a committed BNP activist or held a position of significance in the party. The Authority considered the paucity of the applicant’s understanding of any specific policies of the BNP undermined his claim. It found that his political involvement was linked to his uncle holding an influential local position.

[8] The Authority accepted the applicant’s claims concerning attacks on his uncle. However it found that it was the uncle, and not the applicant, who was the target of the attacks and that the applicant was of little or no interest to the opposition parties. The Authority referred expressly to the applicant’s evidence that he moved “more permanently” to Dhaka after the BNP lost power in 2006 and that he was only infrequently involved with the party during this period. The Authority considered it implausible that the applicant was of continued interest to the opposition parties after 2006 but that his uncle continued his involvement with the party without apparent difficulty. The Authority did not accept the applicant was continually threatened by the Sarbohara Party or the Awami League, or that he was of any interest to the police or Bangladeshi authorities at any point.

[9] In relation to the applicant’s participation in BNP activities since coming to Australia, the Authority accepted that the applicant had participated in some activities, including attending a demonstration against the Bangladesh Prime Minister in 2018. It did not accept however that the applicant had been involved in the BNP in Australia for as long as he had indicated, and found that his involvement in the events was low-level. The Authority was not satisfied that the applicant would actively participate in BNP activities in the future if he returned to Bangladesh.

# the appeal

1. The notice of appeal filed on 5 November 2019, as amended on 12 November 2019, contained two grounds of appeal, namely that the Authority failed to consider:
2. certain integers of the appellant’s claim relating to police brutality; and
3. new information provided by the appellant pursuant to s 473DD of the *Migration* ***Act*** *1958* (Cth).
4. These grounds of appeal mirrored the grounds of judicial review relied upon before the Federal Circuit Court.
5. The grounds of appeal do not identify any error in the decision of the Federal Circuit Court but I proceed on the basis that the appellant contends that the Federal Circuit Court erred in not accepting the grounds of judicial review which had been put to that court.
6. No written submissions were filed by the appellant for the purposes of the appeal. However, the appellant was represented by counsel before the Federal Circuit Court and the submissions made on the appellant’s behalf in that Court were summarised by the primary judge in his Honour’s reasons for judgment. I have had regard to those submissions. The appellant also made oral submissions on the appeal.

## Ground one

1. The particulars of the claim that the Authority failed to consider certain integers of the appellant’s claim relating to police brutality, before the Federal Circuit Court and on appeal, were as follows:

a) Politics in Bangladesh especially against the Awami League is unsafe and Police Brutality has escalated.

b) The power of the police is such that no one can do anything about their brutality.

c) If I was returned I fear being tracked down by the Awami League members who threatened me previously.

1. The primary judge concluded that the Authority had regard to the police brutality claims and referred to the Authority’s reasons (hereafter “**A**”) at A[11] and A[15]: J[15], J[25]. That conclusion was correct.
2. The primary judge also concluded that the police brutality claims were dealt with because they were subsumed in broader findings: J[25]. The primary judge’s conclusion in this respect was also correct. The appellant’s claim was that the police targeted BNP supporters. The Authority concluded that the appellant had only been a low level supporter of the BNP in the past and would not participate in BNP activities if he were to return to Bangladesh. It is implicit in the Authority’s reasons that it concluded that the appellant would not be the subject of police brutality for those reasons. As the Full Court explained in *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593:

[46] ... The Tribunal is not a court. It is an administrative body operating in an environment which requires the expeditious determination of a high volume of applications. Each of the applications it decides is, of course, of great importance. Some of its decisions may literally be life and death decisions for the applicant. Nevertheless, it is an administrative body and not a court and its reasons are not to be scrutinised “with an eye keenly attuned to error”. Nor is it necessarily required to provide reasons of the kind that might be expected of a court of law.

[47] The inference that the Tribunal has failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons. But that is an inference not too readily to be drawn where the reasons are otherwise comprehensive and the issue has at least been identified at some point. It may be that it is unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected. Where however there is an issue raised by the evidence advanced on behalf of an applicant and contentions made by the applicant and that issue, if resolved one way, would be dispositive of the Tribunal’s review of the delegate’s decision, a failure to deal with it in the published reasons may raise a strong inference that it has been overlooked.

## Ground two

1. Ground two of the appeal was expressed as follows:

The Authority fell into jurisdictional error by failure to consider New Information provided by the Applicant pursuant to s 473DD; in that it failed to consider the new information advanced by the Applicant in accordance with the law, failed to consider explanations and reasons advanced by the Applicant. In doing so, it constructively failed to exercise its jurisdiction under s 473DD.

1. No particulars accompanied this ground of appeal. However, in the grounds of review in the Federal Circuit Court, the appellant particularised this ground as follows:

(i) [The applicant] says that his name was on the voter list, something the case officer did not acknowledge, but that he did not vote as voting has to occur in one’s home area and he was in Dhaka and unable to return home because of insecurity. [“voting information”][CB 142]

(ii) Moving to Dhaka was not permanent and that is why the dates vary. He went to help (not work for) his brother in 2002 and did so on and off throughout the following 8 years. The case officer has concluded that [the applicant] was in Dhaka primarily to work for his brother. I am instructed that he did not say this…. [“Dhaka information”] [CB 142]

(iii) The list of names did not include his own because they were the list of the Rockdale branch of the BNP Australia group. I am told there are 3 groups and [the applicant] is a member of the Lakemba branch. [Protest Information] [CB 143]

(iv) Political affiliation is a critical, survival tool in daily life in Bangladesh. Party membership provides a social network, protection and identity. Support for a political group is part of the Bengali culture. [“political Information”] [CB 143]

1. The appellant had, by his solicitor, sent a submission to the Authority. The submission was expressed to be a submission and did not state that it purported to contain “new information”. On the other hand, it did assert that the delegate “fail[ed] to recognise important facts”.
2. The Authority stated of the submission:

The applicant’s representative provided a submission to the IAA on 27 November 2018 (the IAA submission). Apart from the issue discussed below, the IAA submission restates some of the applicant’s claims that were before the delegate, addresses the delegate’s decision and issues arising and to that extent I regard it as argument rather than information and have considered it. The IAA submission also cites extracts from the February 2018 DFAT Country Information Report on Bangladesh, the 2016 International Crisis Group report on “Political Conflict, Extremism and Criminal Justice in Bangladesh”, and the January 2018 report by the Bangladeshi Human Rights organization Odhikar. These reports were before the Minister when the Minister made the decision under s 65 and are not new information.

1. The “voting information” was said to be contained in the following passage of the submission:

The case officer stated that his not having obtained a National ID card and not voting in the 2008 elections was an indication of limited support in that period. [The appellant] says that his name was on the voter list, something the case officer did not acknowledge but that he did not vote as voting HAS to occur in one’s home area and he was in Dhaka and unable to return home because of insecurity.

1. The “Dhaka information” was:

This negates the main claim of [the appellant], that with his uncle he was attacked by the AL thugs in 2006. Moving to Dhaka was not permanent and that is why the dates vary. He first went to help (not work for) his brother in 2002 and did so on and off throughout the following 8 years. The case officer has concluded that [the appellant] was in Dhaka primarily to work for his brother. I am instructed he did not say this and said he went to help his brother and that it was something to do in Dhaka, not the reason for moving to Dhaka.

1. The “protest information” was:

On p.7, [the appellant] disputes the conclusion that he was not present at the protest against the PM. He clearly was there because of the photographic evidence and the list of names which did not include his own were because they were the list of the Rockdale branch of the BNP Australia group. I am told there are 3 groups and [the appellant] is a member of the Lakemba branch. Prior to her decision, no further explanation was sought from [the appellant], and obviously no further information was given by him as he was unaware of her concerns.

1. The “political information” was:

Further, it is proposed, political affiliation is a critical, survival tool in daily life in Bangladesh. Party membership provides a social network, protection and identity. Support for a political group is part of the Bengali culture and for the case officer to reject this activity and the danger that can follow from opposition involvement is not understanding life in current day Bangladesh.

1. The primary judge concluded that the information advanced by the applicant was not new and had been before the delegate; his Honour concluded that the appellant “was simply engaging in argument over the way in which the delegate dealt with the information”: J[53].
2. As to the “voting information”, the delegate had concluded that the appellant did not register to vote in the 2008 elections when he was eligible to do so. This finding was made at the end of the first paragraph set out below (footnotes omitted):

During the SHEV interview, the applicant was questioned about his level of knowledge and involvement in the BNP. The applicant claimed that he was a Press Secretary for the local union in the BNP from 2003 – 2006. He stated that he obtained the position through his involvement and activities at a local club in his home area. He stated that, as a Press Secretary, he was responsible for maintaining and nurturing the club, communicating party policies to the general public and preparing mails, posters and documents. He also stated that he attended rallies and meetings however did not have any particular issues with the Bangladesh police or authorities during these rallies. The applicant further claimed at the SHEV interview that he did not have a specific role in the BNP after 2006 and was not much involved in the party after this period due to his work in Dhaka. I note that the applicant did not obtain a National ID card or register to vote in the 2008 elections when he was eligible to do so.

Having considered the applicant’s circumstances and evidence provided, as discussed above, I accept as plausible that the applicant was a Press Secretary for the BNP from 2003 – 2006 in his home district. However, given that the applicant did not have a specific role or involvement in the BNP from 2006 until the time he left Bangladesh in 2013, I find that it is plausible he was a low level member and supporter of the BNP during this period. However, I do not accept this level of political activity ever drew the attention of the AL or its active members/supporters or any other actor. I therefore find that the applicant was a low level supporter of the BNP and was not of interest and was not targeted by the AL or any other actor.

1. The appellant’s submission to the Authority was to the effect that he had registered to vote and that the delegate had failed to acknowledge that fact. It was open to the primary judge to conclude that the appellant’s submission was argument as to the findings of fact which ought to have been made by the delegate, on the basis of the information before her, rather than the provision of new information. The structure of the delegate’s reasons suggest that her conclusion that the appellant did not register to vote was made on the basis of what the appellant had said at his SHEV interview. The appellant, who as I have said was represented before the Federal Circuit Court by counsel, did not establish that the voter information was “new” in that it had not been before the delegate.
2. As to the “Dhaka information”, this was again in the nature of argument about the findings which ought to have been made by the delegate having regard to the material which was before the delegate including the SHEV interview. The appellant did not establish before the Federal Circuit Court that the information was “new information”. Nor did the appellant establish that any failure to consider the information was material to the outcome.
3. As to the “protest information”, the delegate had concluded that the appellant was not at the protest and reached that conclusion in part on the basis that the appellant was not on a list which had been published. The Authority, on the other hand, concluded that the appellant was at the protest. Accordingly, any failure to consider whether or not the appellant was on a list of names was immaterial as was any failure to consider the appellant’s explanation as to why he was not on the list.
4. As to the “political information”, this was in the nature of argument or submission. The appellant did not establish that this part of the submission contained any “new information”.
5. At the hearing of this appeal, the appellant made lengthy submissions addressing a range of matters, in particular his difficulties obtaining documents in Bangladesh and otherwise and the difficulties he faced in speaking with his lawyer during the course of the administrative decision making process. The Court accepts that the appellant faced these difficulties. As I explained to the appellant, the role of this Court is confined to identifying error on the part of the Court below which might be demonstrated, for example, by showing jurisdictional error on the part of the Authority.

# Conclusion

1. No error has been shown in the decision of the Federal Circuit Court.
2. The appeal must be dismissed with costs.

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| I certify that the preceding twenty-eight (28) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Thawley. |

Associate:

Dated: 11 June 2020