FEDERAL COURT OF AUSTRALIA

MZAGE v Minister for Immigration and Border Protection [2016] FCA 630

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| Appeal from: | *MZAGE v Minister for Immigration & Anor* [2015] FCCA 2720 |
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| File number: | VID 572 of 2015 |
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| Judges: | **MORTIMER J** |
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| Date of judgment: | 1 June 2016 |
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| Catchwords: | **MIGRATION** – appeal from Federal Circuit Court – whether the Federal Circuit Court erred in failing to adjourn the hearing ­– whether the Tribunal decision was affected by jurisdictional error in that it failed to consider a claim or an integer of a claim – no error by Federal Circuit Court in dismissing application for review |
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| Legislation: | *Migration Act 1958* (Cth) s 430  *Federal Circuit Court of Australia Act 1999* (Cth) |
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| Cases cited: | *Contreras v Minister for Immigration and Border Protection* [2015] FCAFC 47  *Gregory v Qantas Airways Ltd* [2016] FCAFC 7  *Koulaxazov v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 75; 129 FCR 79  *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332  *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11; 209 CLR 597  *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; 197 CLR 611  *MZAGE v Minister for Immigration & Anor* [2015] FCCA 2720  *MZAIB v Minister for Immigration and Border Protection* [2015] FCA 1392  *NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No 2)* [2004] FCAFC 263; 144 FCR 1  *Salahuddin v Minister for Immigration and Border Protection* [2013] FCAFC 141; 229 FCR 290  *Scott v Handley* [1999] FCA 404; 58 ALD 373  *Stead v State Government Insurance Commission* [1986] HCA 54; 161 CLR 141  *SZKGF v Minister for Immigration & Citizenship* [2008] FCAFC 84  *WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 184; 236 FCR 593  *Wyman v Queensland* [2015] FCAFC 108; 235 FCR 464 |
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| Date of hearing: | 26 May 2016 |
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| Registry: | Victoria |
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| Division: | General Division |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | Catchwords |
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| Number of paragraphs: | 61 |
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| Counsel for the Appellant: | Dr A McBeth |
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| Solicitor for the Appellant: | Altius Partners Lawyers |
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| Counsel for the First Respondent: | Mr G Hill |
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| Solicitor for the First Respondent: | Sparke Helmore Lawyers |
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| Counsel for the Second Respondent: | The Second Respondent submits to any order the Court may make save as to costs |

ORDERS

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|  | | VID 572 of 2015 |
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| BETWEEN: | MZAGE  Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | MORTIMER J |
| DATE OF ORDER: | 1 June 2016 |

THE COURT ORDERS THAT:

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

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

REASONS FOR JUDGMENT

MORTIMER J:

1. This is an appeal from the judgment and orders of the Federal Circuit Court of Australia, given and made on 3 September 2015 and published as *MZAGE v Minister for Immigration & Anor* [2015] FCCA 2720, which dismissed the applicant’s application for judicial review with costs. The decision under review in the Federal Circuit Court was a decision of the Administrative Appeals Tribunal (then known as the Refugee Review Tribunal) affirming the decision of a delegate of the first respondent, the Minister for Immigration and Border Protection, not to grant the applicant a Protection (Class XA) visa. I shall refer to the visa applicant as the appellant in these reasons.
2. For the reasons that follow, the appeal will be dismissed.

# BACKGROUND

1. The appellant is a citizen of Pakistan and is of Punjabi ethnicity. He arrived in Australia on 5 July 2006 on a student visa, which was valid until 30 September 2008. On 29 September 2008, he applied for a further student visa, and that application was refused on 19 February 2010. The appellant did not have a visa after 30 March 2010 and, consequently, was detained on 29 September 2010.
2. On 30 September 2010, the appellant applied for a Protection visa on the basis that he feared persecution and was at risk of serious harm upon his return to Pakistan on the basis of his religious beliefs (as a convert from the Sunni Muslim faith to the Ahmadiyya Muslim faith), his political opinion – namely his opposition to the Taliban – and his membership of a particular social group, namely western educated people who possess highly valued skills and who are likely to be targets of the Taliban. His application was refused by a delegate of the Minister on 17 November 2010.
3. On 28 October 2011, the then Refugee Review Tribunal affirmed that decision. However, that decision was later set aside by the Federal Circuit Court (then the Federal Magistrates’ Court) due to a finding of apprehended bias and the matter was remitted to a reconstituted Tribunal for a further hearing on 20 March 2013. On 27 May 2014, the second Tribunal again affirmed the delegate’s decision.
4. The appellant applied for judicial review in the Federal Circuit Court and appeared before that Court on 3 September 2015. He was not legally represented at the hearing and made oral submissions to support his application. The Federal Circuit Court delivered an ex tempore judgment dismissing the appellant’s application.
5. On 22 September 2015, the appellant filed a notice of appeal in this Court.
6. The matter was originally listed to be heard on 2 March 2016. The appellant did not file his written submissions 10 business days before this hearing date as required by orders made on 13 October 2015. On 1 March 2016, Dr Adam McBeth of counsel requested – by email – an adjournment of the matter on the basis that he had only been briefed by the appellant late the day before to represent him on a direct access basis. He said he required an adjournment so that submissions for the appellant could be prepared, to provide the appellant an opportunity to engage solicitors to assist with the appeal rather than relying on counsel alone, and to allow the respondents an opportunity to meet the case as it would be put by the appellant’s counsel. The Minister consented to the adjournment, and the hearing on 2 March was vacated.
7. The matter was then listed for 23 May 2016. Notwithstanding what had been communicated to the Court in March, the appellant remained unrepresented and no written submissions were filed in accordance with the Court’s practice note. On 20 May 2016, Mr Francis Cahill of Altius Partners Lawyers filed a notice of address for service and sought an adjournment on behalf of the appellant, on the basis that he had been retained by the appellant the day before and counsel (Dr McBeth) had also just been retained. Despite the terms of Dr McBeth’s email of 1 March 2016, Mr Cahill now informed the Court that Dr McBeth had only been briefed in March 2016 to seek an adjournment on the appellant’s behalf and not to act for the appellant in the substantive matter.
8. A short adjournment was granted until 26 May 2016, and the appeal hearing was conducted on that day. The appellant was given leave to rely on a new notice of appeal raising two grounds, and the Minister was granted leave to rely on a new set of written submissions addressing those grounds.

# THE SECOND TRIBUNAL DECISION

1. The Tribunal had before it the material that the appellant submitted to the first tribunal, including a copy of an Ahmadiyya Muslim Jama’at initiation certificate signed by the appellant on 23 March 2010 and with a registration number written at the top. This material also included a letter from the president of the Victorian branch of the Ahmadiyya Muslim Association of Australia (AMAA), to the first Tribunal, which stated that:
2. [The appellant] has never lodged any Declaration of initiation with Ahmadiyya Muslim Association Australia.
3. A number of people contact the organization through e:mail and telephone finding the contact address from the web site of organization (www.Ahmadiyya.org.au). This individual also contacted us and a courtesy response to the inquiry was provided accordingly.
4. [The appellant] met us few times giving different excuses and reasoning. He always assured and showed that he has no intention for applying a protection visa as he told us that he is a permanent resident of Australia living here since long time while running his own real estate business in a partnership.
5. [The appellant] was never converted to Ahmadiyya faith and submitted Initiation document is not a genuine. In fact Ahmadiyya Muslim Association does not issue any as such document to anybody.

In my opinion, it is sad to say that unfortunately this individual has tried to use the religion for convenience of getting the Australian protection Visa while misleading and lying to everybody.

1. I have reproduced the text of this communication to the Tribunal because it features as a key component of the Tribunal’s ultimate decision that it did not believe the appellant’s claims, and indeed did not believe at all that the appellant was an adherent to the Ahmadiyya faith. The Tribunal also had before it a response submitted by the appellant’s representative to the first Tribunal in relation to the AMAA President’s letter which, among other things, stated that the appellant had not claimed that the AMAA issued the initiation certificate to him, but rather that he handed it to the AMAA. The submission did include, however, an admission that the appellant had written the registration number at the top of the initiation certificate himself and an apology from the appellant for his misleading behaviour in this regard. The appellant also admitted in this submission that he had misled the AMAA as to his visa and employment statuses.
2. The AMAA President gave oral evidence at the Tribunal hearing to the effect that the appellant was not part of the Ahmadi community at that time and was not, in his opinion, a genuine convert to the faith.
3. The Tribunal found that the false document was provided as “a calculated attempt to represent the applicant as a convert to the Ahmadi faith.” It decided that, based on the appellant’s misrepresentations to the Ahmadi community and his provision of the initiation certificate, the appellant was not credible and was not a witness of truth. It found that the appellant was not a genuine convert to the Ahmadi faith, would not behave in a way that would lead to him being imputed with the Ahmadi faith, and would not become part of this faith or community in Pakistan. Accordingly, the Tribunal did not accept that the appellant faced a real chance of persecution on the basis of his real or imputed Ahmadi faith.
4. The Tribunal considered the appellant’s claims that his mental health issues had affected his ability to give evidence and present his case. After considering the evidence before it, including reports produced during the time the appellant was in detention, the Tribunal stated that it accepted that the appellant was anxious and may have been depressed while he was in detention and that he may have been stressed and anxious during the Tribunal hearing. However, given the appellant’s sophisticated ability to argue about matters related to his claimed faith during the hearing and the fact that the Tribunal had no evidence before it that the appellant was experiencing any mental health issues at the time of or after the hearing, it found that the appellant had not been experiencing any mental health issues at the time of the hearing which would have impacted his ability to give evidence or put his case.
5. In relation to the appellant’s claim based on his membership of a particular social group, the Tribunal stated that, given its credibility findings and the evidence before it, it did not accept that the appellant was a member of a group of western educated people who possess highly valuable skills and who might be at threat from the Taliban. Nor did it accept that the appellant had a political opinion, including a political opinion against the Taliban and its fundamentalist practices.
6. Further, on the basis of its credibility and other findings, the Tribunal did not accept that the appellant faced harm in Pakistan for any reason that would satisfy the complementary protection criteria for a Protection visa.
7. It is fair to say the Tribunal’s findings against the appellant were comprehensive and emphatic. There was no aspect of his claims which it accepted.

# THE APPLICATION TO THE FEDERAL CIRCUIT COURT

1. The appellant filed an application for judicial review with the Federal Circuit Court on 23 June 2014, seeking an order that the second Tribunal decision be quashed. He sought review on the following three grounds:
2. The conduct of the Tribunal Member demonstrated bias against the Applicant resulting in the Tribunal Member not according appropriate weight to the claims of the applicant.
3. The Tribunal Member denied the Applicant procedural fairness by failing to take into account evidence as to the mental health of the Applicant.
4. The Tribunal Member denied natural justice to the Applicant by failing to properly apply an assessment as to the credibility of the Applicant.
5. Although the appellant was assisted by a lawyer, the grounds for review in his application were not particularised. He did, however, submit to the Court an affidavit affirmed by him on 22 June 2014, which provided some additional details about his claims. It also appears from the reasons of the Federal Circuit Court that, at the hearing, the appellant explained the bias claim by reference to the fact that the Tribunal member referred to his own faith during the course of the hearing and compared it, in some way, to the appellant’s faith. This was, in substance, the same contention he put to the Federal Circuit Court on the third ground of review: namely, the Tribunal member’s comparison of his faith with the appellant’s faith involved a denial of natural justice.
6. The second ground of review is not one upon which any ground of appeal turns. The Federal Circuit Court rejected this ground of review for reasons which need not be rehearsed here.

# THE DECISION OF THE FEDERAL CIRCUIT COURT

1. In relation to the first ground of review, the Federal Circuit Court found that there was no reference in the Tribunal’s reasons for decision to the Tribunal member’s own faith. The key reasoning of the Federal Circuit Court is contained in the following paragraphs:

21. The applicant told the court that he had a transcript of the tribunal hearing. He said that it was on an email sent to him by his then migration agent. When invited to send that email to the court so that my associate could print it out, the applicant examined his emails. He eventually told the court that the email which he thought had a transcript attached to it did not. He maintained that he had the transcript at home.

22. However, in view of what the applicant has said about this ground, I do not consider that a transcript would assist. Even if the transcript did indicate that the tribunal member did refer to his own faith during the course of the tribunal hearing, that would not, in my view, lead to a reasonable apprehension that the tribunal member might not bring an impartial mind to the determination of this application. The allegation as it was described by the applicant merely appears to have been a statement *in passing* in relation to the nature of religious belief. It does not seem to me that that, in itself, is indicative of a reasonable apprehension of bias.

(Emphasis added.)

1. The Federal Circuit Court added at [31], addressing the appellant’s contention about denial of procedural fairness, that it could see “nothing untoward in the tribunal member referring to his faith in the course of the hearing”. I note this statement must be read in the context of the Court’s observation that there was nothing in the Tribunal’s reasons about this matter, bearing in mind the Tribunal’s obligation under s 430 of the *Migration Act 1958* (Cth) to set out its material findings of fact and the evidence on which they are based. That is not to suggest, as I note below, that a case of apprehended bias can never be successfully mounted solely on what is said by a Tribunal member during the hearing, rather than in the reasons. Such a case clearly could be made, but these matters are heavily fact and circumstance dependent.

# THE APPEAL TO THIS COURT

1. As I noted above, the appellant’s newly retained solicitors forwarded to the Court a proposed amended notice of appeal on 24 May 2016. The document was not accepted for filing because leave was required, however it was served on the Minister’s representatives and was addressed by the Minister’s counsel in supplementary written submissions on which the Minister was granted leave to rely. The notice set out the following grounds of appeal:

1. The Federal Circuit Court erred in failing to adjourn the hearing to enable the appellant to introduce evidence of the recording and/or transcript of the Tribunal hearing in support of his bias claim, thereby denying him procedural fairness;

2. The Federal Circuit Court erred in failing to find that the decision of the second respondent was affected by jurisdictional error, in that it failed to consider an integer of the appellant’s claim, namely his claim to have a well-founded fear of persecution on the basis of his actual or imputed political opinion as an opponent of Taliban ideology.

1. On the first ground, the appellant seeks orders remitting the matter to the Federal Circuit Court for determination according to law. On the second ground, the appellant seeks orders remitting the matter to the Tribunal. No order is sought setting aside the second Tribunal’s decision, but if the appellant is successful on this second ground that would be a necessary order and, correctly, no point was taken by the Minister on the appeal about its omission.

# THE PARTIES’ SUBMISSIONS

1. The appellant submitted that the first ground set out in his amended notice of appeal was not a new ground, but rather a clearer articulation of the ground that was set out as ground 1 in the appellant’s initial notice of appeal (that is, “was not given procedural fairness”). He submitted that:

22. With respect to Her Honour, in the absence of a transcript or an audio recording, the findings as to the possible content of the Tribunal Member’s comments can be no more than speculation.

23. The Federal Circuit Court has a broad discretion as to the manner in which proceedings before it are conducted. It has a statutory duty to exercise its judicial power as informally as possible.

24. In circumstances where the appellant appeared unrepresented, was making a claim for apprehended bias based on what the Tribunal Member said in the hearing, and said that he had a transcript of the hearing at home, *the appropriate course for the Federal Circuit Court was to exercise its discretion to adjourn the matter briefly to enable the material to be put before the Court so that the claim of apprehended bias could be adjudicated clearly either way.*

25. In the absence of a brief adjournment, and therefore in the absence of direct evidence of what was said in the Tribunal hearing, the Federal Circuit Court was left to adjudicate the bias claim on the basis of assumptions on what may or may not have been said.

26. The appellant submits that the failure to adjourn so he could provide the transcript and/or recording effectively deprived him of an opportunity to present his case, or alternatively, was an unreasonable exercise of the Court’s discretion.

(Emphasis added.)

1. As developed in oral submissions at the hearing, the appellant contended the Federal Circuit Court should itself have apprehended that he needed an adjournment to secure the copy of the transcript he said he had at home, and her Honour should have understood that, in substance, the appellant was asking for more time and an opportunity to put the transcript before the Court.
2. In relation to his second ground of appeal, the appellant submitted that he had clearly made – both before the delegate and the first and second Tribunals – a “distinct” claim to have a well-founded fear of persecution on the basis of his actual or imputed political opinion as an opponent of Taliban ideology. The appellant contended the Tribunal never considered his claim to fear persecution on the basis of his actual or imputed political opinion as a claim in its own right, as opposed to a claim based on his religion or membership of a particular social group. He submitted that, at all points in the Tribunal’s reasons where it dealt with any risk of persecution based on actual or imputed political opinion, it did so only in the context of the appellant’s other claims. In particular, the appellant contended that the passage where the political opinion claim is rejected is properly characterised as wholly concerned with the appellant’s social group claim.
3. The appellant’s counsel at hearing accepted this contention could either be put as a failure by the Tribunal to deal with an integer of a claim, or as a failure to deal with a claim. The Minister’s counsel also accepted that, for the purposes of assessing whether jurisdictional error had occurred, and for considering the relevant authorities, the characterisation adopted does not affect the analysis.
4. In his supplementary submissions, the Minister submitted (in relation to the first ground of appeal) that, as the appellant did not request an adjournment in the Court below, the appellant bore a heavy onus to demonstrate that the Court’s discretion had miscarried. He submitted that courts are not required to attempt to make out applicants’ cases for them and that the Federal Circuit Court’s conclusion that the Tribunal member’s statement – based on the appellant’s account – could not give rise to an apprehension of bias was open to the Court in light of the principles that apply to a claim of apprehended bias, including that an allegation of apprehended bias must be “firmly established”.
5. In relation to the appellant’s second ground of appeal, the Minister submitted that the Tribunal had considered and rejected the relevant claim at [89] of its decision, which is extracted below at [54] of these reasons. He submitted that the appellant’s contention that [89] of the Tribunal decision is properly characterised as wholly concerned with the appellant’s social group claim involves an “unduly technical” reading of the passage.

# RESOLUTION

## First ground of appeal

1. As the Minister correctly submits, the Federal Circuit Court’s obligation was to give the appellant a **reasonable** opportunity to be heard: see *Wyman v Queensland* [2015] FCAFC 108; 235 FCR 464 at [43], citing *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11; 209 CLR 597 at [40]; *Scott v Handley* [1999] FCA 404; 58 ALD 373 at [30]. The nature of that obligation is not altered because a person is not represented by a lawyer, although its content may change in a given case. Where a person is self-represented, the Court has an obligation to ensure that the person suffers no meaningful disadvantage in the conduct of her or his case because she or he does not have the skills or knowledge of a lawyer. However, the Court must remain impartial and cannot conduct the case for the self-represented person. Nor does the fact of being self-represented relieve a party from having to prove what is necessary to be proved in order to make out a claim. I have set out my opinion on how these responsibilities should be balanced, accepting that is a difficult task, in *MZAIB v Minister for Immigration and Border Protection* [2015] FCA 1392 at [59]-[77].
2. I accept, as the appellant submitted, that in the absence of proof about what a Tribunal member in fact said during a hearing it is not necessarily possible to conclude that whatever was said was incapable of giving rise to a reasonable apprehension of bias. However, in my opinion that is not what the learned Federal Circuit Court judge meant at [22] of her reasons. In that passage she took at face value the description given by the appellant of what the Tribunal member had said. From that description, she gave consideration to the likelihood that what was said met the legal test for an apprehension of bias. She was in my opinion entitled to do that: this was a contention being put by the appellant, he had been present at the hearing, and he was complaining about what the Tribunal member had said. It is, indeed, likely to be a more favourable position to him for the Court to simply take at face value his description of what the Tribunal member had said, without requiring proof of the exact words. Her Honour was not shutting the appellant out from putting the bias argument and, taking his allegation about what the Tribunal member said without requiring formal proof, gave him an opportunity to be heard on that argument.
3. It may also be the case, as the Minister submitted, that the most accurate way to see what occurred in the Federal Circuit Court is that the appellant himself did not oppose the Court proceeding on the basis of what he had told the Court. The matters to which I refer at [36] below support this assessment.
4. Not all self-represented litigants have the same kind or level of disadvantage. They are not a single category of people, with common characteristics. A host of features – level of education, health, familiarity with the legal system, competency in English, personality, access to support or assistance from others – combine to require individual assessment by the court in each case of what level of assistance and information a self-represented litigant requires, and what level of compliance with court processes and rules can be expected. So it is also with an assessment of what constitutes, in the circumstances of a particular case, a reasonable opportunity to be heard for the purposes of ensuring procedural fairness is afforded.
5. The present appellant has competent English; the evidence establishes this fact. He made a long and detailed statement to the Tribunal in English. In that statement he spoke about his study (through reading) of various religions and he described his considered decision to learn and adhere to the Ahmadiyya faith. Although ultimately the Tribunal did not accept he was an adherent of that faith, it was apparent through the review that the appellant was an educated man and the Tribunal did not suggest otherwise. Indeed, it found him to be a “very well educated and clearly intelligent person”. During the course of his proceeding in the Federal Circuit Court, he had, through his then lawyer, sought an adjournment of the review hearing so as to have his case properly presented by a lawyer. Indeed, he had twice been represented and twice his legal practitioners had filed notices of ceasing to act. The simple point is that, in determining whether he was given a reasonable opportunity to be heard by the Federal Circuit Court, it can readily be inferred he knew what an adjournment was and he knew he was able to seek one, but he did not. Twice on this appeal, adjournments have also been sought on his behalf. Whether or not he was aware of what the term “adjournment” meant (and I draw no inference one way or the other), in my opinion he was capable of asking the Federal Circuit Court for more time to produce the transcript, or a chance to send it to the Court. He did neither of those things, and for the Federal Circuit Court to proceed to determine his application for judicial review in those circumstances involved no denial of procedural fairness.
6. Further, even if I had been persuaded that the Federal Circuit Court did not give the appellant a reasonable opportunity to be heard, there is in my opinion a further obstacle to this ground of appeal succeeding. Despite this appeal having been on foot since September 2015, and having been listed for hearing in March 2016, the appellant has made no effort to produce the transcript to this Court on appeal, so as to establish exactly what was said by the Tribunal member and why it gave rise to a reasonable apprehension of bias. His counsel frankly admitted in oral argument it would have been desirable to have the transcript, but conceded he had not been supplied with it. The appellant clearly stated to the Federal Circuit Court that he had a copy at home. He has not given evidence that statement was wrong. His failure to produce the transcript has several consequences.
7. First, it supports the drawing of an inference (which appears, reasonably, to have been drawn by the Federal Circuit Court) that what the appellant described to the Federal Circuit Court is what occurred at the Tribunal hearing. If that is the case, the Federal Circuit Court dealt with that contention on its merits, it was open to it to find the threshold for apprehension of bias was not met, and no denial of procedural fairness was involved.
8. Second, the failure to produce the transcript on the appeal means the Court cannot be satisfied that, had an adjournment been granted and the transcript produced, it “could” have made a difference to the conclusion reached by the Federal Circuit Court: see *Stead v State Government Insurance Commission* [1986] HCA 54; 161 CLR 141 at 145.
9. Third, even if those hurdles had been overcome, in an exercise of my discretion I would have refused relief on this ground: see, for example, *SZKGF v Minister for Immigration & Citizenship* [2008] FCAFC 84 at [13]-[15]. Without evidence that the transcript exists in the appellant’s possession and without evidence of what the Tribunal member actually said, the Court cannot be satisfied there is any utility in setting aside the Federal Circuit Court’s decision and remitting the matter for further determination.
10. I do not consider that the appellant’s reliance on s 42 of the *Federal Circuit Court of Australia Act 1999* (Cth) affects this conclusion. That provision has objectives which can, in a given circumstance, be somewhat in tension with one another. No attempt was made to advance any argument about what kind of duty this imposed, or even to address whether it was an enforceable one: cf *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; 197 CLR 611 at [48]-[51] (Gleeson CJ and McHugh J) and at [108]-[109] (Gummow J); *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332 at [45] (Hayne, Kiefel and Bell JJ) and [96] (Gageler J).
11. The first ground of appeal must fail.

## Second ground of appeal

1. The parties’ submissions both accepted that, in order to determine this ground (whether classed as a failure to consider an integer of a claim, or a failure to consider a whole claim), it is necessary to examine how the claim was put by or on behalf of the appellant. This is not a situation where the Court is dealing with a claim not expressly made but which can be fairly said to arise on the material: see *NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No 2)* [2004] FCAFC 263; 144 FCR 1 at [55]-[58].
2. Rather, the appellant submitted the claim was expressly put in the following terms. First, by the appellant’s first migration agent:

His fears stem from his religious beliefs and political opinion against the fundamentalist Taliban who enforce intolerance and persecution of the Ahamadiyya religious followers to which my client belongs. Indeed the Ahamadiyya face officially sanctioned and institutionalized state persecution because of their religious beliefs.

Furthermore my client states that he is totally against the fundamentalist practices and extreme political, social, gender and religious positions of the Taliban. Moreover my client claims the Taliban are in control of Pakistan especially the regions of Pakistan from where he hails.

1. Second, by the appellant’s lawyers and migration agents in written submissions to the first Tribunal:

(b) The applicant fears that if he is returned to Pakistan, he will suffer serious physical harm including assault, torture and/or death at the hands of non-Ahmadi Muslims and Islamic extremists, on account of either cumulatively or separately:

…

iv) His profile as a liberal Muslim (religious belief and actual/imputed political opinion against Islamic extremism).

1. I was also taken to the way the claim was made before the first Tribunal, which was:

Relevantly, it was submitted that the applicant fears persecution in Pakistan from the state and the Taliban because of his religious beliefs, that is being of the Ahmadiyya faith and his conversion to this faith while living in Australia, and his political opinion against Islamic fundamentalism.

…

In addition to the increase in violent attacks perpetrated by extremist groups, it is true that there has been an increase in the influence of conservative Islamists in parts of the country but their influence over what happens in the major cities such as Lahore, Islamabad, or the applicant’s city of [redacted] is more limited. The applicant will be among many who object to the actions of militant fundamentalists and who oppose those who advocate for the imposition of strict Islamic rules.

1. However, I note also in the first decision at [137], the Tribunal states:

I have considered the applicant’s claims carefully. I will first address the question of whether he has had a fair hearing and then the elements of his claims, involving overlapping Convention reasons, which it has been submitted form the basis of his fear of persecution if he were to return to Pakistan:

* his adoption of the Ahmadiyya faith and conversion to that faith from Sunni Islam (involving the Convention reasons of religion as well as his membership of a particular social group of people who have converted from Sunni Islam);
* his questioning and rejection of Sunni Islam and his profile as a liberal Muslim opposed to fundamentalist Islam (involving the Convention reasons of religion, his membership of a particular social group and his actual or imputed political opinion);
* his conflict with members of his family (involving the Convention reason of religion); and
* him being western educated (involving the Convention reasons of actual or imputed political opinion and his membership of a particular social group).

1. Both parties submitted these were simply different ways of expressing the same claim.
2. Whichever form of expression is examined, I do not accept the appellant’s submissions that he had made a distinct claim to fear harm based on his actual or imputed political opinion. In my opinion, his claims were not binary. Even putting his claims based on his religion to one side, the remainder of his claims relied on many features at work together – his western education, his antipathy to the Taliban, his Western ‘ways’, and his abhorrence of violence. Some of these were encompassed in the way he expressed the social group: “Western educated people who possess highly valuable skills”. His asserted political opinion seemed either to flow from, or be part of, these other characteristics.
3. The appellant’s claims were set out by the second Tribunal at the start of its reasons:

Attached to the application was a cover letter from the applicant’s then representative claiming the applicant feared persecution on return to Pakistan on the basis of his religious beliefs and political opinion against the fundamentalist Taliban who enforce intolerance and persecution of the Ahamadiyya to which the applicant belongs. The cover letter also claims that the applicant claimed to be totally against the fundamentalist practices of the Taliban, which he claimed were in control of Pakistan. He also claimed to fear harm on the basis of belonging to a social group of western educated people who possess highly valued skills and who are likely to be targets of fundamentalists such as the Taliban.

1. They were summarised again at [73]:

The applicant claims he cannot return to Pakistan as he has converted to the Ahmaddiyya faith, and/or is agnostic or irreligious or not interested in Sunni Islam and/or because he would be considered an apostate, and/or because he has adopted western mannerisms and behaviours.

1. The appellant’s counsel did not criticise either of these passages.
2. The structure of the Tribunal’s reasons is important. This is a decision which rested almost entirely on the Tribunal’s finding that it did not believe the appellant. The Tribunal spent a considerable part of the active reasoning section of its decision explaining why it did not believe the appellant and concluded that he had, for example, “deliberately and wilfully misrepresented himself to the extent he believed he could get away with it”. Then, in considering the appellant’s claims under three headings, the Tribunal proceeded under each heading to base what it said on its former, and serious, credibility findings against the appellant. It was not suggested by the appellant there was any jurisdictional error in the way the Tribunal approached, and made, its credibility findings.
3. The appellant submitted that the following passage at paragraph [89] of the Tribunal’s reasons demonstrated it had not considered his claim to fear persecution by reason of his actual or imputed political opinion (being, the appellant submitted, a liberal opinion contrary to the views of the Taliban):

I find that the applicant will not be harmed on return due to his Western mannerisms. I do not accept on my credibility findings and the evidence before me that the applicant forms part of a group of western educated people who possess highly valuable skills who may be at threat from the Taliban. I find on my credibility and earlier findings that the applicant does not have a political opinion, and therefore does not have a political opinion against the Taliban. On this basis I also do not accept that the applicant is totally against the fundamentalist practices of the Taliban and fears harm on the basis of this political opinion. I also do not accept that there is any information before me that there is a real chance or real risk he would be harmed on these bases, even if he did belong to this group.

1. The Minister contended this passage dealt adequately with the political opinion claims, relying in part on what was said by Madgwick J in *Koulaxazov v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 75; 129 FCR 79 at [5] to the effect that if a Tribunal deals with a claim “merely by addressing it in a less formal or less elegantly structured manner than the decision-maker had indicated an intention to do”, there will be no jurisdictional error. I do not accept this authority deals with the same situation as that facing the Court in the present case. That was a case where there was a heading in the Tribunal’s reasons and the Tribunal had not followed through on what it had foreshadowed it would deal with, but the Court was satisfied the Tribunal had dealt elsewhere with the integers of the claim.
2. Rather, the appellant’s contention turns on the sufficiency of the reasoning in paragraph [89] of the Tribunal decision, read with the Tribunal’s reasons as a whole, and taking into account how the appellant’s claims had been put.
3. In that context, no error is disclosed, let alone an error of a jurisdictional kind. The political opinion aspect of the appellant’s claims was not the one emphasised by him in his evidence, or by his representatives in their submissions. The focus was much more on his claim to be an adherent to the Ahmadiyya faith, and what flowed from that. The fact of that emphasis explains why most of the Tribunal’s reasoning is devoted to the religious persecution claim. However, what appears in [89] is sufficient to disclose the basis for the Tribunal’s conclusion on the rest of his claims. As with the other claims, it did not believe the appellant.
4. The finding that “the applicant does not have a political opinion, and therefore does not have a political opinion against the Taliban” is a finding which is not dependent on the appellant’s asserted membership of any social group. In these passages, the Tribunal is making emphatically clear that it does not believe the appellant holds any of the political opinions he claims to hold. Self-evidently, the Tribunal saw no basis that any such opinion would be imputed to him because the Tribunal did not believe the appellant would engage in any conduct likely to give rise to such an imputation if he were returned to Pakistan.
5. There is, as the Minister submitted, some parallel with what was said by the Court in *WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 184; 236 FCR 593 at [47]; see also *Contreras v Minister for Immigration and Border Protection* [2015] FCAFC 47 at [47]; *Salahuddin v Minister for Immigration and Border Protection* [2013] FCAFC 141; 229 FCR 290 at [19]; *Gregory v Qantas Airways Ltd* [2016] FCAFC 7 at [34]. The appellant’s claims to fear harm by reason of political opinion proceed on a factual premise which was rejected by the Tribunal. The premise which has been rejected is that the appellant in truth holds such political opinions, or would behave so as to have them imputed to him. The Tribunal found the appellant wholly without credibility as to what he said about himself and his beliefs. In those circumstances, the Tribunal made the findings it needed to make in [89], and not just in relation to the social group claim.
6. The second ground of appeal must fail.

## Conclusion

1. The appeal must be dismissed. There is no basis in the evidence for anything but the usual order as to costs.

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| I certify that the preceding sixty-one (61) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mortimer. |

Associate:

Dated: 1 June 2016