FEDERAL COURT OF AUSTRALIA

AAO15 v Minister for Immigration and Border Protection [2015] FCA 1291

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| Citation: | AAO15 v Minister for Immigration and Border Protection [2015] FCA 1291 |
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| Appeal from: | AAO15 v Minister for Immigration & Anor [2015] FCCA 2365 |
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| Parties: | **AAO15 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION and ADMINISTRATIVE APPEALS TRIBUNAL** |
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| File number(s): | NSD 1003 of 2015 |
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| Judge(s): | **KERR J** |
|  |  |
| Date of judgment: | 20 November 2015 |
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| Catchwords: | **MIGRATION** – appeal from decision of the Federal Circuit Court of Australia dismissing application for judicial review of Refugee Review Tribunal decision – Protection (Class XA) visa – no error of law – appeal dismissed  **PRACTICE AND PROCEDURE** – proposed new ‘grounds’ raised by self-represented appellant without notice in written submissions – proposed grounds lacking any prospects of success – leave to amend refused. |
| Legislation: | *Federal Court Rules 2011* (Cth), r 36.10  *Migration Act 1958* (Cth) ss 36, 65, 474, 476 |
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| Cases cited: | *Craig v South Australia* (1995) 184 CLR 163  *Minister for Immigration & Citizenship v SZIAI* (2009) 259 ALR 429  *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476  *Re The Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* [2000] HCA 1  *SLMB v Minister for Immigration Multicultural & Indigenous Affairs* [2004] FCAFC 129  *SZQBN v Minister for Immigration and Citizenship* [2013] FCA 276 |
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| Date of hearing: | 3 November 2015 |
|  |  |
| Place: | Hobart (heard in Sydney) |
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| Division: | GENERAL DIVISION |
|  |  |
| Category: | Catchwords |
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| Number of paragraphs: | 79 |
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| Counsel for the Appellant: | The appellant appeared in person with the assistance of an interpreter |
|  |  |
| Solicitor for the First Respondent: | T Galvin of Minter Ellison |
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| Counsel for the Second Respondent: | The Second Respondent entered a submitting appearance, save as to costs |
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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 1003 of 2015 |

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| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

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| BETWEEN: | AAO15  Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent |

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| JUDGE: | KERR J |
| DATE OF ORDER: | 3 NOVEMBER 2015 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent’s costs as agreed or taxed.

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

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 1003 of 2015 |

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| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

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| BETWEEN: | AAO15  Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent |

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| JUDGE: | KERR J |
| DATE: | 20 NOVEMBER 2015 |
| PLACE: | HOBART (HEARD IN SYDNEY) |

**REASONS FOR JUDGMENT**

1. This is an appeal against a decision of the Federal Circuit Court of Australia delivered on 6 August 2015 with revised ex tempore reasons dated 31 August 2015 (*AAO15 v Minister for Immigration* [2015] FCCA 2365) (“the FCCA Judgment”). Judge Smith of the Federal Circuit Court of Australia dismissed an application for review of a decision of the then Refugee Review Tribunal (“Tribunal”). The Tribunal, by its written statement of decision and reasons dated 30 January 2015 (“the Tribunal’s reasons”), affirmed a decision made by a delegate of the Minister for Immigration and Citizenship (as the first respondent was then known) (“Minister”) on 1 August 2013 to refuse to grant the appellant a Protection (Class XA) visa under s 65 of the *Migration Act 1958* (Cth) (“Migration Act”).
2. The Minister’s delegate (“delegate”) had refused to grant the visa because he was not satisfied that the appellant was a person to whom Australia owed protection obligations under s 36 of the Migration Act. In undertaking its task of review, the Tribunal set out the appellant’s claims at [10] to [21] of the Tribunal’s reasons. There is no dispute regarding the sufficiency or adequacy of the manner in which those claims were there set out.
3. Without canvassing those claims in complete detail, I outline them as follows:
4. The appellant claims to come from Feni in Bangladesh. He arrived in Australia on a visitor’s visa on 26 November 2012. He lived in Feni until December 2005 and then moved to Mirpur in Dhaka, living there until his departure from Bangladesh. He claims to have been born into a politically oriented family and that his father was a freedom fighter in the liberation war being an organiser thereof becoming a best friend of Major Zia (at [10]-[11] of the Tribunal’s reasons).
5. The appellant claimed for the 12 June 1996 election he worked for the Bangladesh Nationalist Party (“BNP”) candidate against the Awami League (“AL”) candidate. He claimed to have done tremendous work in the election, but that the AL had won the seat and the election. He claimed that in the lead up to the October 2001 election he had worked for his candidate Joynal Abedin against Joynal Hazari for the AL. He claimed that he made speeches with his candidate and that his candidate was successful, however the BNP was victorious in a landslide (at [13] and [15] of the Tribunal’s reasons).
6. The appellant claims he was elected as an executive member of Donghuiya Thana BNP in 2003. He claimed he made a huge contribution to development work in the area and that he became very well known. He asserted that in 2005 he went to Dhaka. He claimed that although his job was in Dhaka, his political roots remained in Feni. He had gone to Feni off and on to continue his political activities (at [16]-[17] of the Tribunal’s reasons).
7. The appellant explained that there had been a transfer of power to a caretaker government and the appointment of a second caretaker government on 11 January 2007. He claimed he was arrested and tortured on 28 January 2007 and that three days later he had been dumped off blindfolded in the Cantonment area. He claimed that in advance of the 29 December 2008 election he had worked for Abedin against Gias Kamal Chowdhury. Abedin won once again but the AL that time formed government (at [18]-[20] of the Tribunal’s reasons).
8. The appellant claims that the AL took revenge against the BNP. He claims that on 15 January 2009 his house was ransacked and looted and that his family members were insulted. In 2011, the appellant claimed that he became an executive member of the Feni District committee of BNP and that he was targeted. He claimed that false cases were lodged against him and that his home in Feni and Dhaka were raided. He contacted his sister in Australia seeking sponsorship to visit Australia (at [21] of the Tribunal’s reasons).
9. For those reasons the appellant claimed he was entitled to refugee status.
10. Had the appellant’s claims been believed, doubtless he would have established a proper basis for making a claim for a protection visa. However he was not believed and the Tribunal affirmed the decision not to grant him a Protection (Class XA) visa. The Tribunal rejected the appellant’s claim on the basis of its findings of his want of credibility, his lack of knowledge of the BNP’s manifesto and policies, and its rejection of the veracity of the documents submitted by the appellant as corroborating his account, including an arrest warrant purportedly issued before the offences said to be related to it took place. The appellant sought review of the Tribunal’s decision in the Federal Circuit Court of Australia. In the FCCA Judgment, Judge Smith, as primary judge, rejected the challenges the appellant made to the decision of the Tribunal.
11. In that regard, the task of the primary judge was to determine whether the Tribunal decision had been affected by jurisdictional error (see s 474 of the Migration Act and *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476) (“*Plaintiff S157/2002*”). Jurisdictional error can occur in a multiplicity of circumstances including where an administrative decision-maker identifies a wrong issue, asks the wrong question, ignores relevant materials, relies on irrelevant materials or applies an incorrect interpretation and/or application of the facts to the applicable law.
12. The task of this Court on an appeal is not to review the original decision afresh or to substitute its view of the preferable decision. The task of this Court is to determine whether the primary judge’s decision rejecting the appellant’s contentions in that regard is affected by appealable error: *SLMB v Minister for Immigration Multicultural & Indigenous Affairs* [2004] FCAFC 129 per Branson, Finn and Finkelstein JJ at [11].
13. The appellant states in his notice of appeal that he “appeals from the whole judgment from the Federal Circuit Court” and that he relies on three grounds, reproduced as follows:
14. The Federal Circuit Court Judge Smith dismissed appellant’s application for Judicial Review File NO: (P) SYG438//2015 without giving a good reason.
15. There were arguable grounds to review the application, when making decision.
16. The Federal Circuit Court Judge Smith failed to identify the error done by the AAT.
17. In addition to the formal grounds in the notice of appeal as set out above, on 2 November 2015, the day immediately prior to the hearing, the appellant filed written submissions in which he raised additional ‘grounds’ that had not been previously notified either to the Court or the Minister (“appellant’s written submissions”). Notwithstanding that those submissions had been filed significantly out of time, Mr Galvin who appeared for the Minister objected to neither my taking the appellant’s written submissions into account, nor to the Court having regard to the additional issues raised in the ‘grounds’ therein disclosed; no doubt on the generous premise that the appellant was unrepresented.
18. Mr Galvin indicated that he did not require an adjournment. The Minister was content to rely upon his written submissions in respect of the initially asserted grounds of appeal and, in respect of the issues raised as putative ‘grounds’ in the appellant’s written submissions, Mr Galvin submitted that, even if the Court were to have regard to the new ‘grounds’, none had any merit.
19. I therefore traverse the grounds as set out in the notice of appeal and then address each of the further matters raised by the appellant in his written submissions and orally.

# Ground 1

1. The first ground set out in the appellant’s formal notice of appeal asserts that the primary judge dismissed the appellant’s application for judicial review without giving a good reason.
2. I assume for the benefit of the unrepresented appellant that this ground encompasses both a complaint that the primary judge failed to consider the adequacy or genuineness of the reasoning processes of the Tribunal and/or that that the primary judge failed to give adequate and genuine reasons sufficient to justify his conclusions. It is therefore necessary to set out what the appellant had claimed as the basis for review of the Tribunal’s decision and how his Honour dealt with those matters.

## The issues before the primary judge and his Honour’s reasons

1. At [11] of the FCCA Judgment, the primary judge set out the three bases upon which the appellant had sought judicial review of the Tribunal’s decision. There is no complaint that the primary judge misstated those matters or had ignored any further submissions made by the appellant. The issues before the primary judge as put by the appellant were first, that he submitted documents but the Tribunal did not believe them, secondly that he is sick and he cannot go back to Bangladesh, and thirdly, that the documents had telephone numbers on them and the Tribunal could have checked whether they were genuine or fraudulent documents.
2. His Honour set out, at [6] of the FCCA Judgment, the duty of the Federal Circuit Court of Australia in exercising its jurisdiction under s 476 of the Migration Act. His Honour correctly concluded that its power was the same as that of the High Court under s 75(v) of the Constitution, and “… that orders affecting the Tribunal may only be exercised in circumstances where there is a jurisdictional error affecting the decision of the Tribunal.” His Honour noted that “… any decision that is not affected by jurisdictional error is a privative clause and, by virtue of s 474 of the [Migration Act], is final and conclusive,” referring to *Plaintiff S157/2002*.
3. His Honour said, at [7] of the FCCA Judgment:

A jurisdictional error is, in effect, one which affects the exercise of the power the Tribunal. It either means that there is some precondition to the exercise of power that has not been met, such as a procedural fairness, or that by asking itself the wrong question, the Tribunal has not, in fact, done what it was supposed to do and so may be said to have constructively failed to exercise its jurisdiction. Making a wrong finding of fact in and of itself does not constitute a jurisdictional error. That is particularly the case where a finding of fact has a rational basis in the evidence.

1. In the FCCA Judgment, his Honour summarised the Tribunal’s reasons at [12]-[17] and then dealt with each of the three complaints that had been addressed to him at [18]-[23].
2. The first of the appellant’s arguments concerned the Tribunal’s rejection of belief in the documents that he had relied on. His Honour dealt with that issue at [18] of the FCCA Judgment as follows:

The first argument raised at the hearing by the applicant concerned the rejection by the Tribunal of the documents relied upon by him. As I have noted [see [12], [15]-[16] of the FCCA Judgment], there were two bases upon which the Tribunal gave no weight to those documents. In respect of the court documents, on their face they had inconsistent dates. In respect of both sets of documents there was information from independent sources as to the prevalence of fraudulent documents from Bangladesh. I consider that those are both rational bases for the application of no weight to those documents, and it was open therefore for the Tribunal to give no weight to them.

1. In respect of the submission regarding the appellant’s illness, his Honour accepted, at [19] of the FCCA Judgment, that the appellant “… has renal issues which have required him to undergo dialysis treatment”. His Honour acknowledged that, while his ill-health might cause the appellant “… some difficulty if he were to return to Bangladesh” his illness was not something that related to the Tribunal’s decision. His Honour noted the Tribunal had taken into account the appellant’s illness and necessary treatment in organising the hearing and it had “… ensured through discussions with the [appellant’s] treating specialist that the hearing could take place without any risk to the [appellant]”.
2. In respect of the third issue before the primary judge, that the Tribunal could have checked whether the documents the appellant relied on were fraudulent, his Honour referred to the role and duty of the Tribunal to make enquiries, concluding that although it had power to make such enquiries there is no general duty to do so. What mattered was whether the Tribunal had acted reasonably in not making the enquiry. His Honour concluded, at [21] of the FCCA Judgment, that one reason for it to have been reasonable not to make the enquiry sought by the appellant, which was sufficient in the circumstance was, that there was “… no obvious inquiry that would be of any utility” referring to *Minister for Immigration & Citizenship v SZIAI* (2009) 259 ALR 429 (“*SZIAI*”).
3. His Honour said at [20] of the FCCA Judgment:

The difficulty with [the] proposition [that the Tribunal could have called a telephone number which the appellant had supplied to check whether the documents relied upon were fraudulent] is that it is difficult to understand what utility a phone call by the Tribunal to that number could have served. It is unlikely that the person who answered the telephone call, who had prepared a fraudulent document, would be prepared to say one way or the other whether what he had said or she had said was false.

1. His Honour accepted that circumstances could arise which might make it unreasonable for a Tribunal not to enquire. However, in the present case there were not any such further circumstances. The primary judge noted at [23] of the FCCA Judgment that on the material it appeared that the appellant had “… produced a document purporting to be from somebody who the [appellant] had told the delegate was in prison” and other documents had been produced “… which, on their face, were at least questionable”. The Tribunal had information before it “… from respectable sources” that fraudulent documents in Bangladesh were prevalent. His Honour concluded that in all of those circumstances, he did not think it unreasonable for the Tribunal not to have made any enquiry of the purported author of the letter and for that reason there was no jurisdictional error in respect of it.

## Discussion

1. The duty of the primary judge was to ensure that the law governing the conduct of the Tribunal had been complied with. His Honour was correct in his conclusion that it was entirely in the hands of the Tribunal to make findings of fact, providing that the relevant law had been properly considered and taken into account.
2. In respect of the appellant’s complaint as to how the three issues he had agitated in the Federal Circuit Court of Australia had been addressed by the primary judge, I see no reason to doubt the sufficiency of the primary judge’s reasons. They were brief but legally compelling. They adequately explained the primary judge’s reasoning. Nor do I discern error, much less, jurisdictional error, in the actual reasoning of the primary judge with respect to each of the issues then before him.
3. I read what the primary judge stated at [7] of the FCCA Judgment as a short-hand way of parsing what the plurality of the High Court had decided in *Craig v South Australia* (1995) 184 CLR 163 (“*Craig*”) in which Brennan, Deane, Toohey, Gaudron and McHugh JJ said, at 179:

If … an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.

1. Notwithstanding the passage at [7] of the FCCA Judgment (reproduced at [11] above), which might, if read out of context, suggest that the primary judge proceeded on the premise that a wrong finding of fact could never constitute jurisdictional error, it is plain that his Honour did not proceeded on that basis. For example, the primary judge expressly referred to the evidence before the Tribunal as having established two rational grounds for the Tribunal to have rejected giving any weight to the documents the appellant had submitted in purported corroboration of his claims.
2. The task of finding facts was exclusively for the Tribunal subject to the proper supervisory role of the court as is explained in *Craig*. There was no error in the primary judge finding that it was within the jurisdiction of the Tribunal to have given no weight to those documents.
3. Nor, self-evidently, was there error in the primary judge concluding that the appellant’s accepted ill health was not relevant to whether or not the appellant had established an entitlement to a Protection (Class XA) visa under s 65 of the Migration Act.
4. Finally, there was no error in the primary judge’s careful reasoning in his rejection of the appellant’s claim that the Tribunal had fallen into jurisdictional error by declining to call the telephone number that the appellant had provided to check whether the documents the appellant had proffered were genuine. His Honour’s reasoning, at [21]-[23] of the FCCA Judgment and therein citing *SZIAI*, in relation to the specific circumstances faced by the Tribunal, and its duty in those circumstances, is entirely consistent with identical reasoning undertaken by French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ in directly analogous circumstances in *SZIAI* at [26].
5. For those reasons, Ground 1 is not made out.

# Ground 2

1. In the appellant’s notice of appeal, the appellant’s second ground of appeal is that “there were arguable grounds to review the application, when making decision.”
2. Mr Galvin for the Minister, submits that this is merely an invitation for this Court to impermissibly exercise merits review. I accept that there is much in favour of that submission. But even accepting that the ground should be read down to the proposition that the primary judge had ignored some obvious but unidentified flaw in the processes of the Tribunal there is no underlying merit in that proposition and the ground can be dismissed on that basis.
3. The Tribunal identified the claims submitted by the appellant at [10]-[21] of the Tribunal’s reasons. It undertook a hearing (a summary of which appears at [30]-[52] of the Tribunal’s reasons). The Tribunal detailed the extensive country information before it at [53]-[151] of the Tribunal’s reasons. Matters adverse to the appellant were put to him.
4. At [152]-[176] of the Tribunal’s reasons, the Tribunal undertook a careful analysis of the appellant’s evidence. There is nothing in the record before the primary judge which should or could have put the Federal Circuit Court of Australia in a position where it was an error for that court not to have given consideration to some hypothetical jurisdictional error not identified or contended for by the appellant.
5. For those reasons, Ground 2 is not made out.

# Ground 3

1. The appellant’s third ground of appeal is that the Federal Circuit Court of Australia “failed to identify the error done by AAT”.
2. Unless jurisdictional error was committed by the Tribunal it cannot be an error for the primary judge to have failed to identify the non-existent error. Ground 3 impermissibly assumes rather than establishes the existence of such error.
3. For that reason, Ground 3 is not made out.

# The further ‘grounds’ raised by the appellant’s written submissions of 2 November 2015

1. The appellant’s written submissions filed on 2 November 2015 were not confined to arguments in support of grounds contained in the appellant’s notice of appeal. In a series of paragraphs commencing at the top of page 2 to the foot of page 4 of those submissions the appellant raised what the Court has identified as 17 new issues as additional bases for his appeal. The issues raised in those new ‘grounds’ were not argued before the primary judge of the Federal Circuit Court of Australia and leave would be required to raise them in this forum (see r 36.10 of the *Federal Court Rules 2011* (Cth) and *SZQBN v Minister for Immigration and Citizenship* [2013] FCA 276 at [16]-[20]). I will return to that procedural issue in due course.
2. I accept, notwithstanding their many deficiencies in precision, their argumentative character and their non-sequential numbering, that what appears at pages 2-4 of the appellant’s written submissions were propositions intended to be construed as giving rise to 17 additional new ‘grounds’ of appeal. Given that the appellant was unrepresented and clearly lacked fluency in English I have paraphrased them in the discussion that follows to identify their substance rather than to allow any inadequacy of form to become a distraction.
3. The first new ‘ground’ that the appellant seeks leave to raise is his contention that the Tribunal applied an incorrect test in relation to the complementary protection provisions contained in s 36(2)(aa) of the Migration Act.
4. At [4]-[8] of the Tribunal’s reasons, the Tribunal sets out its understanding of the law with respect to complementary protection. The appellant did not articulate a basis for this Court to find error in those statements. I reject the appellant’s contention that they misstate the law.
5. Nor did the appellant identify any relevant considerations which the Tribunal failed to take into account in reaching its conclusions in respect of the application of that law to his individual circumstances. At [176] of the Tribunal’s reasons, the Tribunal stated:

The Tribunal does not accept that there are substantial grounds for believing that there is a real risk the applicant will be arbitrarily deprived of his life, or the death penalty will be carried out on him, or that he will subjected to torture or to cruel or inhuman treatment, or to degrading treatment or punishment in Bangladesh. On the evidence before it, the Tribunal does not accept that there is a real risk the applicant will suffer significant harm in Bangladesh.

1. That conclusion flowed from its earlier rejection of the appellant’s evidence relating to his claimed affiliation and involvement with the BNP.
2. Those findings were open to the Tribunal. It is not a jurisdictional error for a decision to be based on adverse credibility findings where a decision-maker disbelieves an applicant’s account, rejects an applicant’s evidence and finds the applicant’s claims are implausible: *Re The Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* [2000] HCA 1.
3. The second new ‘ground’ the appellant seeks leave to raise is that the Tribunal had doubted the appellant’s membership of the BNP based on unreasonable assumptions.
4. In support of that assertion the appellant referred to questions he was asked about his affiliation with the BNP and to the written and oral answers he had provided. However, the Tribunal was not bound to accept those answers. As an inquisitorial body the Tribunal was entitled to test the appellant’s evidence. It was not on the basis of assumptions but rather on an explained basis of internal inconsistency and rejection of the documentary evidence the appellant tendered, that the Tribunal disbelieved his claims. It was entitled to do so. Such fact-finding must inevitably be the core of the Tribunal’s task. It is not jurisdictional error for the Tribunal to have reached its conclusions following it testing and rejecting critical aspects of the appellant’s evidence.
5. The third new ‘ground’ the appellant seeks leave to raise involves the appellant’s contention that he had truthfully given testimony in respect of his engagement with the BNP and that as a result he became the target of the AL party workers and leaders. The appellant asserted that the Tribunal had raised several ‘irrelevant issues’ to discredit the claims he had made. However, as Mr Galvin correctly submitted, the Tribunal had a duty to test the claims made by the appellant and the Tribunal’s assessment of whether his claims regarding his political activity in Bangladesh were plausible went to the heart of that responsibility. Mr Galvin correctly submitted that the appellant had not particularised any irrelevant issue that he claimed had been put to him.
6. In those circumstances I conclude that there was no error in the Tribunal proceeding as it did. There is nothing in the record before the Court to suggest its questioning of the appellant was in relation to anything but relevant matters.
7. The fourth new ‘ground’ the appellant seeks leave to raise involves the appellant’s assertion of truthfulness coupled with his contention that the Tribunal had disregarded all the oral and written evidence that the appellant had provided without giving sound reasons.
8. That proposition must also be rejected. The appellant did not identify any evidence which the Tribunal had wrongfully disregarded. In the Tribunal’s reasons at [152]-[176], under the heading ‘Analysis and Assessment’, the Tribunal gave extensive reasons explaining the conclusion it reached at [177]. The Tribunal’s reasons explained why it made adverse credit findings and had rejected giving any weight to documents tendered by the appellant.
9. The fifth new ‘ground’ the appellant seeks leave to raise is that the Tribunal made a jurisdictional error when it intentionally asked several irrelevant questions to undermine his political activities and his role within the BNP, and the assertion it had misconstrued the facts to conclude that there was no evidence he was involved in BNP politics.
10. A ground based on that proposition must also be rejected. What was involved was quintessentially a fact-finding exercise. The Tribunal disbelieved the contentions made by the appellant. The function of the Tribunal was to assess the appellant’s claims. As Mr Galvin for the Minister submitted, the appellant did not take the occasion to seek to have the transcript of the proceedings before the Court. Nothing has been put by the appellant beyond assertion to suggest that the Tribunal’s questioning extended to irrelevant matters.
11. The sixth new ‘ground’ the appellant seeks leave to raise is that the appellant should have been considered a member of a particular social group, namely, a member of the BNP and that he was ‘denied procedural fairness and natural justice when his argument was considered (sic) properly in a judicial matter’. The asserted ground was not particularised and there is nothing before the Court to suggest there was any want of procedural fairness and natural justice in the manner in which the Tribunal proceeded.
12. The seventh new ‘ground’ the appellant seeks leave to raise relates to the appellant’s claim that both the delegate and the Tribunal made their decisions with closed minds.
13. As Mr Galvin submitted, whatever the delegate might have done was irrelevant in judicial review proceedings in the Federal Circuit Court of Australia. It is equally irrelevant in this Court. The Tribunal reviewed the decision de novo. The appellant asserted but did not identify any basis for his asserting that the Tribunal approached the decision-making with a closed mind. No allegation of bias was made before the Tribunal and none appears validly open to be contended for in this Court.
14. The eighth new ‘ground’ the appellant seeks leave to raise is a contention that he was a truthful witness but that at the time of the hearing before the Tribunal his health was not good and he was confused and misunderstood many questions. This proposition must also be rejected. As the primary judge noted the health of the appellant was of concern to the Tribunal. The Tribunal arranged the hearing for the convenience of the appellant and asked him whether he was well enough to proceed. The appellant told the Tribunal that he was well enough to proceed. That was recorded in the Tribunal’s reasons at [30]. It could not be an error for the Tribunal to proceed in those circumstances.
15. The ninth new ‘ground’ the appellant seeks leave to raise concerns questions that the appellant was asked about identity documents.
16. There is nothing in the proposition that questions of this nature asked of the appellant resulted in jurisdictional error. It was plainly open to the Tribunal to test the appellant’s history as against his claims.
17. The tenth new ‘ground’ the appellant seeks leave to raise is that the Tribunal erred by not taking into account that low profile political BNP activists are just as at risk, if not more so, in Bangladesh than those with a high profile. It may or may not be the case that low profile BNP activists are at an equal or greater risk but it is simply irrelevant to the task of judicial review in this particular instance because, although the appellant’s claim was advanced on the basis that he had a high profile, in the Tribunal’s reasons at [168], the Tribunal totally rejected all of his claims to have **any** affiliation with the BNP. That finding was open to the Tribunal on the evidence before it and neither the Federal Circuit Court of Australia nor this Court has a mandate to conduct merits review.
18. The eleventh new ‘ground’ the appellant seeks leave to raise involves, inter-alia, a claim that the information collected by the delegate who made the initial decision to be later reviewed by the Tribunal was biased. As noted previously (at [56] above) in respect of the proceedings before the Federal Circuit Court of Australia and this Court, whatever was done by the delegate is irrelevant. The Tribunal undertook merits review de novo and its decision was the decision that was the subject of review by the Federal Circuit Court of Australia.
19. The eleventh new ‘ground’ further contends that the Tribunal ignored information (presumably regarding the political situation in Bangladesh) publically available through the media. The proposition that that might involve jurisdictional error must be rejected. The appellant faced no constraints on the materials (including media reports) he could put forward to establish the basis of his claims. There was no particularisation of any material that the Tribunal was bound to have regard to that the Tribunal failed to take into account. To the extent that the appellant further contends in reference to this eleventh ‘ground’, that the Tribunal acted unreasonably in doubting his documents, that issue was before the primary judge and, as discussed earlier, his Honour was correct in rejecting the proposition.
20. The twelfth new ‘ground’ the appellant seeks leave to raise is based on the assertion that the Tribunal failed to apply the correct test in relation to the complementary protection provisions contained in s 36(2)(aa) of the Migration Act. I have set out my reasons at [41]-[45] for rejecting that proposition and need not repeat them.
21. The thirteenth new ‘ground’ the appellant seeks leave to raise is based on the appellant’s assertion that the Tribunal is a judicial body and that he had a legitimate expectation that it would assess his claims according to required procedural fairness.
22. As expressed that ‘ground’ must be rejected. The Tribunal is not a judicial body.
23. Moreover, accepting that the Tribunal is subject to similar obligations, there is nothing beyond a bland assertion of the duty advanced in the thirteenth new ‘ground’. In the absence of any particulars of an asserted breach of those rules there is simply no basis for the Court to conclude that Tribunal’s decision was affected by jurisdictional error.
24. The fourteenth new ‘ground’ the appellant seeks leave to raise involves the appellant’s contention that he left Bangladesh because of a fear of the new government authority and that he believes there is a real risk, if he was to return, that he would suffer significant harm.
25. To make that contention good would require the Federal Circuit Court of Australia, and this Court on appeal, to undertake merits review beyond their duty to supervise the lawfulness of the conduct of the Tribunal. For that reason it must be rejected.
26. The fifteenth new ‘ground’ the appellant seeks leave to raise is based on the appellant’s assertion that he fears harm or mistreatment on return for “one or more of the five grounds recognised in the Refugee Convention”. That assertion cannot stand as a ground of appeal.
27. The difficulty the appellant faces in that regard is that the Tribunal found that he was not a person in respect of whom Australia has protection obligations. In the absence of jurisdictional error being established on the Tribunal’s part, that decision cannot be gainsaid.
28. The sixteenth new ‘ground’ the appellant seeks leave to raise is based on the assertion that the appellant fears harm or mistreatment for the Convention reasons of political opinion and membership of a particular social group. For the same reasons as apply to the fifteenth new ‘ground’ that assertion cannot stand as a ground of appeal.
29. The seventeenth new ‘ground’ the appellant seeks leave to raise is based on the assertions that the appellant’s fear of harm is well-founded, that there is a real chance he will suffer persecution if returned to Bangladesh, and that the Tribunal failed to consider his claim for complementary protection. For the same reasons as apply to the fifteenth new ‘ground’ the first element of that proposition cannot stand as a ground of appeal and as to the second element the Court has given its reasons previously for rejecting the proposition that there was jurisdictional error in the way in which the Tribunal dealt with issue of complementary protection.
30. In consequence of the above discussion it is now necessary to return to the procedural point the Court left to be determined at [39] above. At the hearing the appellant was unrepresented and the approach taken by Mr Galvin on behalf of the Minister was one which I would wish to commend as being in the best traditions of the Commonwealth as a model litigant. In those circumstances, had I formed the view that one or more of the propositions underlying the new ‘grounds’ had merit, then despite their not having been advanced before the primary judge, I would have been disposed to grant leave to permit the appellant to rely on any such grounds as might have arguable merit on condition that the Minister be granted an adjournment, if sought, in order to more fully consider his position.
31. However, because I have reached the firm conclusion that there is no arguable merit to any of those new ‘grounds’, consistent with the principle that it is only in exceptional circumstances that a Court hearing an appeal will permit a party to rely on a ground not in issue in the court below, I would refuse the appellant leave to rely on any of the new ‘grounds’ as referred to above.
32. Finally, I need to address two matters that were raised by the appellant in oral argument that have not otherwise been taken into account in these reasons. The first is that in his reply, the appellant appeared to concede that the Tribunal may have been correct in giving no weight to the arrest warrant which he had filed, because its issuance had post-dated the court appearance for which it purported to require the appellant’s attendance. However, the appellant maintained that the letter from the member of parliament he had submitted to the Tribunal was genuine and true.
33. Notwithstanding that late concession, for the reasons that the primary judge gave at [20]-[23] of the FCCA Judgment, there was neither jurisdictional error in the Tribunal’s assessment of the weight it was prepared to place on the appellant’s documents as a whole nor in its failing to make the enquiry of its supposed maker where to do so would have been of no utility: *SZIAI*.
34. Furthermore, the appellant reiterated his concerns about the state of his health. He stated that he would die if returned to Bangladesh where there were no medical facilities to permit him to continue to receive dialysis treatment.
35. The Court has some natural human sympathy for the appellant given his ill health and his rejected claim for refugee status; assuming what he has stated is an accurate account of the health system in Bangladesh and his medical condition. However, as a matter of law the appellant’s health status was irrelevant to any available ground of judicial review in the Federal Circuit Court of Australia and is similarly irrelevant in this Court. It is possible it may be considered by other authorities, but that will be a matter for the Minister and his Department.
36. The appeal is dismissed. The appellant is to pay the first respondent’s costs as agreed or taxed.

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| I certify that the preceding seventy-nine (79) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Kerr. |

Associate:

Dated: 20 November 2015