FEDERAL COURT OF AUSTRALIA

SZTQZ v Minister for Immigration and Border Protection [2017] FCA 282

|  |  |
| --- | --- |
| Appeal from: | *SZTQZ v Minister for Immigration and Border Protection & Anor* [2016] FCCA 2057 |
|  |  |
| File number: |  |
|  |  |
| Judge: | **JESSUP J** |
|  |  |
| Date of judgment: | 23 March 2017 |
|  |  |
| Catchwords: | **MIGRATION** – interlocutory application to amend notice of appeal – where Tribunal affirmed delegate’s decision not to grant protection visa – where proposed ground of appeal focussed on Tribunal’s alleged failure to consider letters said to corroborate appellant’s claim – application of VUAX principles for considering interlocutory applications with fresh grounds of appeal. |
|  |  |
| Legislation: | *Migration Act 1958* (Cth) |
|  |  |
| Cases cited: | *Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175*  *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332  *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611  *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99  *SZMRQ v Minister for Immigration and Border* Protection (2013) 219 FCR 212  *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 238 FCR 588  *WAIJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 80 ALD 568 |
|  |  |
| Date of hearing: | 22 February 2017 |
|  |  |
| Registry: | New South Wales |
|  |  |
| Division: | General Division |
|  |  |
| National Practice Area: |  |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 49 |
|  |  |
| Counsel for the Appellant: | Mr S Ower SC |
|  |  |
| Solicitor for the Appellant: | MSM Legal |
|  |  |
| Counsel for the First Respondent: | Ms R Francois |
|  |  |
| Solicitor for the First Respondent: | Clayton Utz |
|  |  |
| Counsel for the Second Respondent: | The second respondent filed a submitting notice |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | NSD 1538 of 2016 |
|  | | |
| BETWEEN: | SZTQZ  Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

|  |  |
| --- | --- |
| JUDGE: | JESSUP J |
| DATE OF ORDER: | 23 MARCH 2017 |

THE COURT ORDERS THAT:

1. The appellant’s Interlocutory Application lodged on 17 February 2017 be dismissed.
2. The appeal be dismissed.
3. The appellant pay the costs of the respondent Minister.

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

REASONS FOR JUDGMENT

JESSUP J:

1. This is an appeal from a judgment of the Federal Circuit Court of Australia given on 11 August 2016, in which the appellant’s application for judicial review of a decision made by the Refugee Review Tribunal on 15 November 2013 was dismissed. In that decision, the Tribunal affirmed an earlier decision of a delegate of the respondent Minister not to grant the appellant a Protection (Class XA) visa under the Migration Act 1958 (Cth) (“the Act”).
2. In his Notice of Appeal lodged on 1 September 2016, the appellant relied upon two grounds, neither of which is now pursued. In place of those grounds, on 17 February 2017 the appellant lodged an Interlocutory Application for leave to amend his Notice of Appeal by the introduction of a single new ground, to the terms of which I shall refer in due course. When the appeal came on for hearing on 22 February 2017, it was this interlocutory application which was argued. Should that application be unsuccessful, the appellant accepts that the appeal itself must be dismissed. Should that application be successful, the appellant accepts that the leave which he seeks should be given on terms reflective of the fact that he sought and obtained an indulgence.
3. For reasons which will appear, the procedural history of the present matter needs to be outlined at the outset. As I have said, the Tribunal’s decision was made on 15 November 2013. The appellant’s application for judicial review was filed in the Federal Circuit Court on 12 December 2013. It was set down for hearing on 26 August 2014, and commenced to be heard on that day. However, the primary Judge adjourned the hearing for three reasons. His Honour’s second reason related to the adequacy of the interpretation services which were available to the appellant, and his third reason related to the degree of attention which had been given in the Minister’s submissions to the Full Court judgment in SZMRQ v Minister for Immigration and Border Protection (2013) 219 FCR 212. Nothing further requires to be said about those reasons now.
4. His Honour’s first reason for adjourning the matter on 26 August 2014 was stated in his reasons of 11 August 2016 as follows:

[W]hen given the opportunity to make his submissions it was clear that the applicant had little, if any, idea of what was asserted in the grounds of the amended application, and the written submissions. He explained that these documents were drafted by an “Indian lawyer”. On its own, this would not have been sufficient reason to adjourn. However, in light of the other two reasons below, the adjournment allowed the applicant the opportunity to obtain some understanding of his grounds and submissions, or even to engage, in the applicant’s words, “a good lawyer”.

1. It was not until 6 July 2016 that the matter again came before the Federal Circuit Court. The reason, if there were one, for this lengthy interregnum does not appear. However, it is apparent that the appellant did not use the available time to engage a good lawyer, or any lawyer. In his reasons of 11 August 2016, the primary Judge said:

25. At the resumption of the hearing, the applicant again appeared in person….

26. Despite the lengthy opportunity available to him, the applicant appeared to have done little to advance the understanding of his case. He stated that after the last hearing he had “gone back” to the “Indian lawyer” who did not “explain anything” to him. The “Indian lawyer” had then left Australia. He did not seek out any other legal advice.

27. When given the opportunity to address the Court about his grounds and written submissions the applicant said he had nothing to say other than that he did not receive a fair hearing before the Tribunal because of interpretation difficulties….

1. In his affidavit affirmed or sworn on 14 February 2017, the appellant said that, after the Federal Circuit Court had handed down its decision, he engaged Jane McGrath of MSM Legal to act for him. The Notice of Appeal lodged on 1 September 2016 had been prepared by Ms McGrath. However, according to the appellant’s affidavit, Ms McGrath told him that, for her to act for him, he would have to pay money into her trust account by early January 2017. He did not do that, but placed $2,000 into Ms McGrath’s trust account on 9 February 2017. That was not sufficient, but Ms McGrath, and counsel whom she engaged, agreed to represent the appellant nonetheless.
2. The appellant’s proposed new ground of appeal is as follows:

The learned primary judge:

1.1 erred in finding that Tribunal’s determination was that “the two certificates were so inconsistent with the applicant’s own evidence as to his grandfather’s and father’s claimed activities, the Tribunal gave them little weight”.

1.2 ought to have found that the Tribunal gave the two certificates “little weight” on the bases that:

1.2.1 the appellant’s oral evidence was “vague” as to the activities of his grandfather as an active member of the BNP;

1.2.2 the appellant had given an “ambiguous description” of the position allegedly held by his father that was inconsistent with the certificates;

1.2.3 the appellant had limited awareness of what his father did;

1.2.4 the appellant had described his father and grandfather as “simply” supporters of the BNP in his statutory declaration in support of his application; and

1.2.5 during the protection visa interview, the appellant had stated that his father was just a supporter and did not have an official role;

and

1.3 should have held, on the basis of that finding, that the Tribunal committed jurisdictional error by failing to consider the two certificates as corroborative evidence.

1. This ground of appeal would constitute both an amendment to the Notice of Appeal in its existing terms and the introduction of a ground for challenging the jurisdictional sufficiency of the Tribunal’s decision which was not taken in the Federal Circuit Court. At both levels, an important question is whether the appellant has provided an adequate explanation for not having acted in a more timely way. The explanation provided by the appellant is that he had been legally aided in his application before the Tribunal, but that that situation no longer obtained once the Tribunal had made its decision adverse to him. Not having sufficient funds to engage a lawyer in the conventional way, he managed to raise the sum of $400 to pay for the services of the “Indian lawyer” referred to in the above extract from the reasons of the primary Judge to prepare his documentation for the application in the Federal Circuit Court, but neither that lawyer nor counsel engaged by him (if any) appeared on behalf of the appellant in that court.
2. Whether this was an adequate explanation for the appellant’s failure to take his proposed new ground in the Federal Circuit Court is a question to which I shall come. What is abundantly clear, however, is that the appellant cannot rely on the absence of competent advice at that stage to explain the omission of that ground from his Notice of Appeal lodged on 1 September 2016. That notice was prepared by the appellant’s now solicitor. It is a strong inference that the new ground was developed only after the appellant had put Ms McGrath in funds to the tune of $2,000 and counsel agreed to act.
3. It is a regrettable commonplace that the engagement of counsel leads to the emergence of the real case which a party desires to run. Normally the court will be anxious to hear everything that can be said in favour of the party’s case, the silent view being that it would be unrealistic, and contrary to the interests of justice, to expect counsel to advance arguments which he or she believes to be second-rate ones. Thus it is often said that, so long as the other party may be compensated by an appropriate costs order, amendments should generally be allowed.
4. But there are limitations to that approach, especially since the judgment of the High Court in Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175. Generally, a factor which will weigh against allowing an amendment will be any lateness in the proposal being brought forward by the party seeking to amend. It will not always be an answer to say that an adjournment – to allow the other party time to come to grips with the new point – on terms as to costs, and in relation to any other matters of inconvenience, may be granted. Further, when the legality of administrative action with respect to the entitlement of a party to a visa under the Act is at stake, there is a strong public interest in the expeditious finalisation of the litigation.
5. In appeals, additional considerations come into play. Matters of timing will usually be of greater significance, the assumption being that if a party has been through a contested proceeding he or she will have sufficient focus upon the legal and factual questions at stake to formulate grounds of appeal which will stand the test of time. There is, of course, always the facility to seek an extension of the time allowed for the lodging of the appeal (eg in order to give more thorough attention to that task of formulation). Another circumstance which occasionally arises is a proposal which involves not only an amendment to the existing grounds of appeal, but the introduction of a ground which does not correspond with any element of the party’s case at first instance. That is, of course, the situation now before the court.
6. Such a situation is to be approached conformably with the judgment of the Full Court in VUAX v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 238 FCR 588, 598-599 [46]-[48]:

46 In our view, the application for leave to rely upon the sole ground of appeal now raised should be refused. Leave to argue a ground of appeal not raised before the primary judge should only be granted if it is expedient in the interests of justice to do so: *O’Brien v Komesaroff* (1982) 150 CLR 310; *H v Minister for Immigration and Multicultural Affairs*; and *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 at [20]-[24] and [38].

47 In *Coulton v Holcombe* (1986) 162 CLR 1, Gibbs CJ, Wilson, Brennan and Dawson JJ observed, in their joint judgment, at 7:

It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish.

48 The practice of raising arguments for the first time before the Full Court has been particularly prevalent in appeals relating to migration matters. The Court may grant leave if some point that was not taken below, but which clearly has merit, is advanced, and there is no real prejudice to the respondent in permitting it to be agitated. Where, however, there is no adequate explanation for the failure to take the point, and it seems to be of doubtful merit, leave should generally be refused. In our view, the proposed ground of appeal has no merit. There is no justification, therefore, for permitting it to be raised for the first time before this Court.

I propose to take the approach indicated by their Honours, commencing with the question whether the appellant has an adequate explanation for his failure to take his proposed new point in the proceeding before the Federal Circuit Court.

1. The appellant’s only explanation for that failure was that he was not in receipt of competent legal representation at the time. In his affidavit read on the appeal, the appellant said that he did not have enough money to pay for a lawyer to take his case to court. But, ultimately, he engaged his now solicitors and, by one means or another, has secured competent representation in this court. What I cannot understand, and what is not explained in the appellant’s affidavit, is why the steps which he ultimately took to secure this representation were not taken in the period of almost three years during which the Federal Circuit Court was adjourned.
2. To the extent that the appellant’s Interlocutory Application requires there to have been an adequate explanation for his failure to have run below the kind of case which he now seeks to run, I am not satisfied that he has done so.
3. The apparent prospects of the new case which the appellant now seeks to advance are also relevant on the application which he makes. A consideration of that aspect requires me to lay out briefly the facts of the case, and the reasons given by the Tribunal for the decision which it made.
4. The appellant is a citizen of Bangladesh, having being born there on 15 October 1990. His parents and his five older brothers live there. He claimed to fear persecution in Bangladesh by reason of his political opinion as a supporter of the Bangladesh National Party (“the BNP”). He would be persecuted, he claimed, by supporters of a rival political entity, the Awami League. He claimed that his father and his grandfather (in the case of the latter, until his death in 2004) were supporters of the BNP, and put forward his familial association with them as a basis for his fears. It was the way the Tribunal dealt with that aspect of the appellant’s claims, and its treatment of two documents on which he relied, that lay at the centre of the new ground of appeal which he sought to introduce.
5. In the statutory declaration attached to his visa application, the appellant said:

As long as l can remember my family have been supporters of the Bangladesh National Party (BNP). The BNP is currently in opposition in Bangladesh. Bangladesh is currently ruled by the Awami League. My father is a strong of the BNP. My paternal grandfather was also a supporter of the BNP.

The fact that a noun, or nouns, was or were missing after the word “strong” in this passage was not adverted to either by the Tribunal or by the Federal Circuit Court. Neither was the omission explained in the appellant’s evidence.

1. In the same statutory declaration, the appellant mentioned that his father had passed on to him information about events in 2002 or 2003 when there was significant political unrest in Bangladesh. He (the father) and his father (the appellant’s grandfather) were taken away by supporters of the Awami League, brutalised and tortured. The appellant also mentioned a time (when he himself was of high-school age) when there was conflict between his father and his (the appellant’s) brothers because of the father’s political involvement. In advancing his claim for a protection visa, the appellant said that he was scared that, if he returned to Bangladesh, he would be caught up in the political problems that his father had. He said that his family were known supporters of the BNP, and that he would be identified as one also. All of these passages in the appellant’s statutory declaration were relied on by counsel for the appellant as indicating that, before the delegate, his case in relation to his father was that the latter was more than a mere supporter of the BNP.
2. But the details of the appellant’s father’s involvement in the BNP were explored by the delegate when the appellant attended for his interview. How the appellant responded in relevant respects was the subject of the following passage in the written record of the delegate’s decision, dated 15 July 2013:

The applicant did not claim he had been involved in any political activities or personally targeted on the basis of his actual or imputed political opinion. Therefore, based on the evidence before me I am satisfied that the applicant has no political profile in Bangladesh.

When asked about his father’s political association, the applicant responded that his father was a BNP supporter. He did not have any official role and he only *‘voted for BNP and supported them’*. The applicant claims that his father and his grandfather were taken away by the AL supporters about 10 or 11 years ago. They were kept for several hours and beaten. The applicant’s family paid money to secure their release. When asked whether the incident was reported to the police given that the BNP was a ruling party at the time, the applicant responded that *‘the police in Bangladesh would not do anything if they are not paid’*.

When asked whether his father experienced any harm following his detention in 2002/2003, the applicant responded that he did not but he lived in hiding following the AL’s return into power in 2008. When pressed to provide detail about his father’s whereabouts over a period of five years, the applicant was unable to substantiate his claim with any level of detail. He was also unable to specify as to who and why would target his father in such long period of time given that his father was only a BNP supporter with no role in the party.

1. Subsequent to his interview with the delegate, the appellant forwarded a “certificate” relating to his father. The certificate was ostensibly on BNP letterhead, and its substantive terms were as follows:

This is to certify that Md. Abdul Aziz Shah, father: late Daliluddin Shah, mother: Chhabiran Neha, village : Baroihuda, Post: Kamanna, Police station: Shailakupa, District: Jhinaidaha is known to us personally. To our knowledge he and his family and relatives are actively associated with Bangladesh Nationalist Party (B.N.P) since this party’s inception. He holds the chair of Vice President of Executive Committee of No. 10 Bagura Union (B.N.P). After the national election of 2008 as soon as the political scenario had changed this person and his family and relatives became victims of assaults and police cases. To our knowledge this person and his family and relatives are not involved in any anti party activities or sedition.

We wish him for his all wellbeing and success.

|  |  |
| --- | --- |
| Signed  05/04/2013  Alhajwa M.A. Wahab  Former Member of Parliament  Member of National Executive  Committee, Dhaka  Organisational Secretary,  Jhinaidaha District and  President of Nationalist Party(B.N.P),  Shailakupa Sub District | Signed  05/04/2013  Md. Raquibul Hasan Dipu  General Secretary  Nationalist Party(B.N.P)  Shailakupa Sub District Branch |

1. At the same time, the appellant forwarded a “certificate” which related to his grandfather, in the following terms:

I am certifying that I knew personally late Daliluddin Shah, father: late Agaruddin Shah, Village: Baroihuda, Post: Kamanna, Subdistrict: Shailakupa, District: Jhinaidaha. As far as I know, he fought twice for U.P. Membership Election in this Union. To my knowledge he participated in U.P Membership Election in 1991 and 1995.

I pray Magfirat for his departed soul.

Signed

11/04/2013

Chairmen

Md. Nazrul islam

No. 10 Bagura Union Council

Shallakupa, Jhinaidaha

1. The delegate did not mention the certificate which related to the appellant’s grandfather, but made the following observations about the certificate which related to his father:

Following his PV interview the applicant provided a Certificate purported to be from the BNP stating that the applicant’s father ‘*holds the chair of Vice President of executive committee of No. 10 Bagura union (B.N.P.)’* (5.1, folios 88-89). The Certificate was dated on 5 Apri12013, two days after his PV interview. I note that the applicant never claimed in the past that his father had any role in the BNP. It is reasonable to expect that the applicant would know that his father was a Vice President of the local BNP as claimed in the letter. Canadian and the UK sources note that forged or fraudulently obtained documents were readily available in Bangladesh.

It is common for political party membership confirmation letters to be issued to facilitate verification procedures, even if the information in them was incorrect With regard to forged and fraudulently obtained official documents in Bangladesh country information provides:

*‘... The content of genuine documents is often questionable. The rampant corruption in various levels of the government weakens the integrity and the credibility of officially issued documents ... We often hear people saying that it is normal to provide incorrect information for a third party, because it is considered a duty to help ‘co-nationals/brothers’ to immigrate to a so-called ‘rich’ country …’*

Based on the above information, I consider this letter to be self-serving, and therefore I cannot accept it as a genuine document attesting to genuine facts. I am also unable to reconcile the shifts and changes in the applicant’s evidence and I do not accept that his father had any prominent role in the BNP. I consider that the evidence provided in the form of supporting letter from Bangladesh obtained after his PV interview demonstrates the applicant’s readiness to fabricate documents and expand his claims throughout the process for the purpose of enhancing his prospects of a successful outcome.

1. In the reasons of the Tribunal, the appellant’s reliance on the political involvement which his father and grandfather were claimed to have had was dealt with as follows:

The Tribunal accepts that the applicant’s family maybe supporters of the Bangladesh National Party (BNP). However, the Tribunal does not accept that the applicant’s father or grandfather were members of the party or that the applicant’s father is a politician, as he claimed in the hearing.

The Tribunal found the applicant’s evidence regarding his father and grandfather’s membership of the BNP and the activities they engaged in vague and lacking in detail. While the applicant was able to identify the years in which his grandfather allegedly contested elections as a BNP candidate, consistent with the letter he provided from the Chairman of the No.10 Bagura Union Council, the applicant was unable to articulate what other activities his grandfather engaged in, in support [of] the BNP. When asked how his grandfather was involved with the BNP other than the two elections he contested, the applicant stated he could not give a clear picture but many people liked his grandfather and he worked for the BNP. When the Tribunal asked the applicant to explain what his grandfather did when he worked for the BNP, he stated his grandfather advised many people and gave very good advice. In response to the Tribunal’s question about what sort of issues his grandfather gave people advice on, the applicant stated if someone was in danger his grandfather advised them to do something positively and then they will progress in life. The applicant was unable to tell the Tribunal anything else about what his grandfather did for the BNP or how he supported them. The Tribunal does not accept on the applicant’s limited evidence regarding his grandfather’s political activities in support of the BNP, that his grandfather was an active member of the party.

Similarly, the Tribunal finds the applicant’s evidence in the hearing regarding his father’s position as Vice-President vague and lacking in detail. When asked what his father was Vice President of, the applicant stated that there were many leaders and his father held one of these positions. In response to the Tribunal’s further queries as to which organisation his father held the position of Vice President, the applicant stated that his father worked as a leader of the local village and had held this position since his grandfather died in 2004. The Tribunal finds the applicant’s ambiguous description of his father’s alleged official position inconsistent with the certificate from the BNP he submitted to the Department, in which it stated that his father was Vice President of the Executive Committee of No.10 Bagura Union (BNP). While the applicant claimed that Union and village is the same thing, when the Tribunal expressed its concern that he was unable to explain with any clarity what his father was Vice President of, the Tribunal does not accept that a political committee is the same as a village committee. The Tribunal also finds the applicant’s evidence regarding his father’s responsibilities as Vice President not reflective of a political position. He claimed his father would take decisions at the local level and when asked what his father would make decisions about, he stated that his father did the same as his grandfather, ask people to do good things. Given the applicant’s father had allegedly held this position for four years prior to the applicant’s departure from the country, even taking into consideration the applicant’s age, limited education and little involvement in politics as submitted by the applicant’s adviser, it does not accept he would not have some awareness of what his father did for the BNP and particularly as Vice President.

The Tribunal has also taken into consideration the fact the applicant claimed in his statutory declaration attached to his protection visa application that his father and grandfather were supporters of the BNP and according to the delegate’s decision, when asked about his father’s political association he responded he was a supporter, he did not have any official role and he only voted for the BNP and supported them. However the applicant subsequently provided documents which suggested both his father and grandfather were members of the party, his father held the official position of Vice President of the Executive Committee of No.10 Bagura Union (BNP) and his grandfather had contested two elections as a BNP candidate. As the Tribunal put to the applicant in the hearing, it has difficulty accepting that if his father held this official position, he would not have mentioned this when asked specifically about his father’s political association. It does not accept the applicant’s explanation that he did not know at that time he should tell everything, for the protection visa, he does not have enough education and did not understand that he should say everything. As the Tribunal put to the applicant in the hearing, he had an adviser who assisted him with preparation of his protection visa application. The Tribunal finds it implausible that if the applicant’s father and grandfather were members of the BNP and had played an active role in an official capacity such as Vice President of a Committee or running as a candidate in two elections, that the applicant would have described his father and grandfather as simply supporters of the party. As the Tribunal put to the applicant in the hearing, his failure to mention in his statutory declaration attached to his protection visa application, anything about his father and grandfather playing an active role in the party in these capacities raises serious doubts about the credibility of his claims regarding his father and grandfather’s membership and association with the BNP. The Tribunal therefore places little weight on the two certificates from the BNP that were provided by the applicant.

1. Returning to the appellant’s interlocutory application in this court, it was submitted on his behalf that the Tribunal fell into jurisdictional error by not treating the two certificates forwarded to the delegate after the interview as corroborative of his assertion that his father and grandfather were active as members of and, for a time at least, office-holders in, the BNP. It was, it was said, an error of that kind for the Tribunal to have placed little weight on the certificates by reason of the timing of their introduction into the appellant’s claims and his failure previously to have gone any further than to assert that his father supported the BNP in the sense of voting for it.
2. The most obvious difficulty with this submission is that, unless the certificates were credible, they could not be corroborative. While the Tribunal did not go to the length of finding that the certificates were fabricated or fraudulent, the tenor of its reasons, relevantly, was that the certificates were suspect, to say the least. This conclusion was based not so much on the Tribunal’s view about the authenticity of the source of the certificates as on the circumstances and timing of their introduction into the appellant’s case before the delegate, and the unlikelihood (if the certificates were to be taken at face value) of the appellant not having mentioned the real extent of his father’s and grandfather’s involvement in the BNP at some earlier stage. While there may be some argument about the strength of the contribution which these matters ought to have played in undermining the appellant’s factual case, any such argument could never be part of the discourse of jurisdictional error.
3. It was submitted on behalf of the appellant, however, that a tribunal’s failure to consider corroborative evidence at all might constitute jurisdictional error, counsel relying in this regard on Minister for Immigration and Citizenship v SZRKT (2013) 212 FCR 99. So much may be accepted. Indeed, the evidence available from the certificates in the present case was not merely corroborative: it was relevant at the substantive level too (unlike the evidence in SZKRT, from what appears). Conventionally, a decision-maker’s failure to consider, “at all”, relevant evidence which had been brought to attention in a timely way by the person standing to be adversely affected by the proposed decision would amount to a breach of the rules of natural justice, and therefore to jurisdictional error. Had the Tribunal failed to consider the certificates at all, the appellant’s case would have been complete.
4. However, the Tribunal did not fail to consider the certificates at all. To the contrary, it gave careful attention to their utility in resolving the appellant’s claims. Having done so, it ultimately gave them little weight.
5. It was next submitted on behalf of the appellant that, in order to give little or no weight to evidence claimed to have been corroborative, “there must be a sufficient degree of consideration of the document such that there is a logical and rational basis for linking its rejection to the finding of credit”. For that proposition, counsel relied on WAIJ v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 80 ALD 568.
6. In WAIJ, untranslated documents supporting the applicant’s claims had originally not been referred to by the Tribunal in its decision and, on an application for judicial review, the matter was returned to the Tribunal by consent with an order requiring the Tribunal to give due consideration to the them. After the rehearing, the Tribunal again affirmed the Minister’s rejection of the visa application, dealing with the contentious documents in the following terms (80 ALD at 571 [12]):

I note also the letters provided by the applicant in support of her claims. In relation to the letter purportedly from the applicant’s sister, I am of the view that it would have been a straightforward matter for the applicant to either write the letter herself, or to ask her sister to write the letter for her. I am also of the view that the letter of dismissal would have been an easy letter to manufacture, particularly by someone who had access either to a blank hospital letterhead or to another letter containing the letterhead. In relation to this particular letter, I note that at the hearing the applicant said the letter was on the hospital noticeboard and that her sister had gone to the hospital office to obtain the letter. However, in submissions provided after the hearing, the applicant’s adviser asserts that the letter provided to the Tribunal was taken from the hospital noticeboard. In my view, these letters do not overcome the problems I have with the applicant’s evidence and I place no weight on them as proof of the credibility of the applicant’s claims.

The applicant’s application for judicial review in the Federal Magistrates Court was unsuccessful. Her appeal in the Federal Court succeeded (Lee and Moore JJ, RD Nicholson J dissenting).

1. Their Honours in the majority said (80 ALD at 574-575 [26]-[27]):

The Tribunal determined the matter adversely to the appellant by disregarding the documents it had been directed to consider by the order made by consent in this court, stating that the documents “do not overcome the problems I have with the applicant’s evidence”.

Such a circumstance may arise where an applicant’s claims have been discredited by comprehensive findings of dishonesty or untruthfulness. Necessarily, such findings are likely to negate allegedly corroborative material: see [*Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59, 70] at [49] per McHugh and Gummow JJ. Obviously to come within that exception there will need to be cogent material to support a conclusion that the appellant has lied. Alternatively, if the purportedly corroborative material itself is found, on probative grounds, to be worthless it will be excluded from consideration by the Tribunal in assessing the credibility of an applicant’s claims. However, it will not be open to the Tribunal to state that it is unnecessary for it to consider material corroborative of an applicant’s claims merely because it considers it unlikely that the events described by an applicant occurred. In such a circumstance the Tribunal would be bound to have regard to the corroborative material before attempting to reach a conclusion on the applicant’s credibility. Failure to do so would provide a determination not carried out according to law and the decision would be affected by jurisdictional error: see *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 351-2 at [82]–[85] per McHugh, Gummow and Hayne JJ.

1. In this passage, nothing was said, in relation to the rejection of corroborative evidence, of a requirement that there be “a logical and rational basis for linking its rejection to the finding of credit”, as proposed on behalf of the appellant. In an earlier passage, not dealing directly with the facts of the matter before them, Lee and Moore JJ had, however, said (80 ALD at 574 [22]):

The Tribunal only obtains power to make a determination under the Act where the determination is based on findings or inferences of fact that are grounded upon probative material and logical grounds: see *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 656-7 at [145] per Gummow J; *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 150 at [34] per Gleeson CJ, Gummow, Kirby and Hayne JJ; *Hill v Green* (1999) 48 NSWLR 161, 174-5 at [72] per Spigelman CJ. A determination based on illogical or irrational findings or inferences of fact will be shown to be a decision not supported by reason and to have no better foundation than an arbitrary selection of a result.

As to the first sentence in this passage, I do not understand their Honours to have suggested that the rejection of a visa application because it was supported neither by probative material nor by logical grounds would necessarily involve jurisdictional error. In this respect it must, in my respectful view, always be remembered that it is the applicant who, at least as a generality, is required to place before the Tribunal material and grounds sufficient to support the grant of a visa to him or her. As to the last sentence in the passage, in his written submission in support of the appeal, counsel for the appellant said:

However, in the absence of such a logical and rational basis for the rejection of the evidence, the Tribunal must have regard to the material and take it into account. A failure to do [so] constitutes jurisdiction error, as was recognised in *WAIJ*. In light of the decision in *Minister for Immigration v Li*, the jurisdictional error is best described as a species of legal unreasonableness.

To this submission, the following footnote was appended:

The Judgments in *WAIJ* predates that in *Li*, but the language used by the majority in *WAIJ* is similar to that accepted in that case and the earlier decision of the High Court in *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [135].

1. I do not accept that the judgment of Lee and Moore JJ in WAIJ is to be understood as an anticipation of what Hayne, Kieffel and Bell JJ later said in Minister for Immigration and Citizenship v Li (2013) 249 CLR 332. Li was concerned with the exercise of a statutory discretion on a procedural aspect (the granting of an adjournment), whereas the controversy in WAIJ related to the obligation to give consideration to material upon which the then applicant relied. Closer to the facts of the present case is Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611, in which the applicant’s claim was disbelieved by the Tribunal because of his own conduct in the period before he came to Australia. Crennan and Bell JJ said (240 CLR at 647-648 [130]):

In the context of the Tribunal’s decision here, “illogicality” or “irrationality” sufficient to give rise to jurisdictional error must mean the decision to which the Tribunal came, in relation to the state of satisfaction required under s 65, is one at which no rational or logical decision maker could arrive on the same evidence. In other words, accepting, for the sake of argument, that an allegation of illogicality or irrationality provides some distinct basis for seeking judicial review of a decision as to a jurisdictional fact, it is nevertheless an allegation of the same order as a complaint that a decision is “clearly unjust” or “arbitrary” or “capricious” or “unreasonable” in the sense that the state of satisfaction mandated by the statute imports a requirement that the opinion as to the state of satisfaction must be one that could be formed by a reasonable person. The same applies in the case of an opinion that a mandated state of satisfaction has not been reached. Not every lapse in logic will give rise to jurisdictional error. A court should be slow, although not unwilling, to interfere in an appropriate case.

1. In the present case, counsel for the appellant attacked the Tribunal’s treatment of the certificates relating to his father and his grandfather on five bases. First, it was said that there were no comprehensive findings of dishonesty or untruthfulness by the appellant “based on other cogent material”. It depends, I suppose, on what is meant by “comprehensive” and “cogent” in the present context. Aside from these certificates, the Tribunal rejected the appellant’s evidence about his father’s and grandfather’s political involvement. From my reading of the Tribunal’s detailed reasons, that rejection was both logical and rational. It is true that, at this point, there is a risk of the argument becoming circular, in the sense that the very point of the certificates was to buttress evidence which might otherwise have been of doubtful veracity. That is a matter to which I shall return. The starting point, however, is that the Tribunal was not otherwise satisfied of the truthfulness of the appellant’s evidence.
2. Secondly, it was said that the Tribunal did not make a finding that the documents were forgeries or that there was some positive evidence to reject them. That is so, but it must be remembered that a document need not be a forgery for it to be wrong or unreliable. If the Tribunal has doubts as to the accuracy of a document, it is not as though it is incumbent on the Tribunal to prove, from other material, that the document has been forged. The Tribunal was not in the position of a party to contested litigation. It was the appellant who produced these certificates, he not having previously done so or articulated a factual basis for the grant of a visa which corresponded with what was stated in them. It was for the Tribunal to assess the contribution, if any, that they made to his case.
3. Thirdly, it was said that the documents were allegedly independent, having been produced by third parties. That is not entirely accurate. The certificates were ostensibly over the hand of third parties, but had been produced to the delegate by the appellant himself.
4. Fourthly, it was said that there was nothing on the face of the documents that suggested that they should be given no or little weight. That is so, but neither was it the basis upon which the Tribunal did give them little weight.
5. Fifthly, it was said that the documents were corroborative, and that there would be inconsistency between a finding that the appellant was not a credible witness and the material in the documents. This, of course, goes no further than to state the problem. It might just as easily have been said that the documents were corroborative only if they were credible and that the other reservations which the Tribunal held as to the credibility of the appellant’s case, together with those that arose out of the timing and circumstances of the production of the documents, substantially undermined their utility as corroborative material.
6. Counsel for the appellant then moved to what were four “indicia” of the Tribunal’s failure to articulate a rational and logical basis for giving the documents “little weight”. First, he submitted that the Tribunal’s observation about the vagueness of the appellant’s evidence about his grandfather’s circumstances failed to account for the fact that he (the appellant) was only a child when the grandfather stood for election. That was, in my view, no reasonable ground of criticism of the Tribunal’s reasons. It was the appellant who relied on his grandfather’s circumstances as a basis for his own fear of persecution, and the Tribunal was entitled to test the depth of his knowledge of them. Not every Tribunal member need have taken the same approach, but it could not be said that this Tribunal member was irrational or illogical in relevant respects.
7. Counsel’s second indicium related to so much of the Tribunal’s reasons as proposed that there was an inconsistency between the appellant’s own evidence that his father “worked as a leader of the local village” and the terms of the relevant certificate that his father was “Vice President of the Executive Committee of No 10 Bagura Union”. Counsel foreshadowed a factual case on appeal – ie one which would require the leading of new evidence – to the effect that the “union” is “the smallest rural administrative and local government unit in Bangladesh” and was, in the appellant’s father’s case, co-extensive with the village. How a ground of appeal framed around this proposition could ever support a case of jurisdictional error, either on the basis of irrationality/illogicality or on some other basis, is not apparent. It is sufficient, however, to say that the single piece of evidence put before the court on the present application as indicative of the kind of factual case which the appellant would seek to run was diametrically opposed to such a case.
8. Thirdly, counsel submitted that the Tribunal’s findings as to the appellant’s inability to explain what it was of which his father was Vice President were not an accurate record of what was said at the hearing before the Tribunal. Here the court has the benefit of two transcriptions of that hearing. Having read the passages in both versions upon which counsel relied, I can well understand why the Tribunal said that the appellant “was unable to explain with any clarity what his father was Vice President of ….” To the extent that the appellant’s case depends upon the court forming the view that this characterisation was irrational or illogical, I would regard that case as weak at best.
9. Fourthly, counsel submitted that the Tribunal’s characterisation of the appellant’s statutory declaration as involving the proposition that his father and his grandfather were “simply” supporters of the BNP was wrong, in that he had, in that declaration, said that his father was “a strong …” and that his father had “political involvement”. I would not accept that criticism of the Tribunal’s reasoning. In para 19 of its reasons (set out at para 24 above), when it referred to the statutory declaration as such, the Tribunal noted that the appellant had claimed that his father and grandfather were supporters of the BNP. That was a high-level, broadly accurate, summary of what was there claimed. The Tribunal then adverted to what the appellant had said when pressed on the point by the delegate, namely, that his father did not have any official role. It was after the interview with the delegate that the two certificates were produced. It was by way of contrast with what was contained in them that the statements originally made in the statutory declaration were seen as claims that the father and the grandfather were “simply” supporters. The meticulous dissection of the text of the Tribunal’s reasons which the appellant’s case would involve in this area is not, in my view, likely to find favour with a court of judicial review.
10. Counsel for the appellant then turned to what were said to be two omissions by the Tribunal. The first was its failure to “summarise the corroborative evidence” or to “make specific findings regarding what the documents actually purported to say”. All I need to say about this submission is that the Tribunal said enough to satisfy the requirement that it state the reasons for its decision. In my view, this point raised on behalf of the appellant would go no distance towards establishing jurisdictional error.
11. The second omission was that the Tribunal did not consider the provenance of the documents contained in an undated statement by the appellant sent to the Tribunal by his solicitor under cover of an email on 4 October 2013. The statement was one of two attachments to the email, the other being the solicitor’s submission on behalf of the appellant. The passages in the statement to which counsel referred were the following:

The case officer also commented that given that it is common in Bangladesh to forge or obtain documents fraudulent, or the party membership confirmation letters to be issued to facilitate verification procedure, the letters I provided are not genuine. The documents I provided were both genuine documents. My father had a close relationship with a Former MP, Mr Alhajwa Wahab and the chairman Mr Md. Raquibul Hasan Dipu. He asked them to provide a letter personally and my brother went to get the letter from them.

The letter I provided to DIAC in relation to my grandfather’s involvement was written by the former chairman at that time in 1991 when my grandfather first stood up for election. My father asked him to write a letter because he knew our grandfather personally.

The “case officer” referred to by the appellant was, of course, the delegate, and the passage from the delegate’s reasons to which the appellant here referred was that set out in para 23 above.

1. In the 30-page submission attached to the email of 4 October 2013, the appellant’s solicitor made no reference to this aspect of his statement. In my view, it would be ambitious for the appellant to advance on appeal the contention that the Tribunal fell into jurisdictional error by not considering something which had not been relied on in the detailed submission made on his behalf. I note also that the appellant’s solicitor was present with him when he appeared at the hearing before the Tribunal on 10 October 2013, and my attention was not drawn to any reference, by him or the solicitor, to this aspect of his statement at that hearing.
2. It was submitted on behalf of the appellant that the flaws in the reasoning of the Tribunal left only one “strand” supporting the course which it took of placing little weight on the certificates: the inconsistency between the appellant’s alleged failure to state the matter at the protection visa interview and the subsequent production of the certificates. Counsel said that the Tribunal “did not have a transcript of the protection visa interview, and did not apparently even have the delegate’s decision record.” As to the latter, the decision was before the Federal Circuit Court, and is again before this court. Whether or not the Tribunal had it, the fact is that so much of the Tribunal’s own reasons as are sought to be made the subject of the proposed ground of appeal are unambiguously consistent with it. As a matter of inference, that the Tribunal was working from the delegate’s decision record does seem a very natural, and strong, likelihood. As to the former, the evidence before the Federal Circuit Court did not include such a transcript, but counsel for the Minister submitted that the appellant’s submission raised a question of fact which those instructing her would wish to investigate. There were, she submitted, references to file folios in the Tribunal’s reasons which may well have been the transcript, but, in the short time available, it had not been possible to clarify the matter. The need to carry out further work at the evidentiary level was, it was submitted on behalf of the Minister, a reason not to grant the appellant leave to introduce the new ground of appeal.
3. There is some force in the Minister’s response to this submission, but the appellant’s point may be dealt with at a more fundamental level. The difficulty with the point is that the appellant himself has not gone on affidavit to state that the course of the interview with the delegate was not as the Tribunal held it to have been. There is, therefore, no factual basis upon which I could hold it to be likely, or even fairly in prospect, that the appellant would succeed in demonstrating that the Tribunal erred, whether in point of jurisdiction or otherwise.
4. Returning to the approach recommended by the Full Court in VUAX, for the reasons stated above, I am not satisfied that the appellant’s proposed new ground of appeal “clearly has merit”. Indeed, again using the Full Court’s descriptor, I regard the point as of doubtful merit at best.
5. In those circumstances, and given also the absence of an adequate explanation for the appellant’s failure to advance a corresponding ground before the Federal Circuit Court, I have reached the conclusion that the Interlocutory Application should be dismissed. As noted above, it follows that the appeal itself should also be dismissed. Counsel for the appellant accepted that, in the event of such an outcome, he could not resist the Minister’s application for costs.

|  |
| --- |
| I certify that the preceding forty-nine (49) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jessup. |

Associate:

Dated: 23 March 2017