Federal Court of Australia

BHG20 v Minister for Immigration, Citizenship and Multicultural Affairs [2023] FCA 391

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| Appeal from: | *BHG20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FedCFamC2G 324 |
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| File number(s): | VID 271 of 2022 |
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| Judgment of: | **ANDERSON J** |
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| Date of judgment: | 2 May 2023 |
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| Catchwords: | **MIGRATION** – Administrative Appeals Tribunal’s affirmation of a decision of delegate of the first respondent to refuse to grant the appellant a Subclass XA-866 Permanent Protection visa – Appeal from decision of the Federal Circuit and Family Court of Australia (Division 2) dismissing appellant’s application for judicial review of Tribunal’s decision – Whether Tribunal failed to consider allegedly corroborative evidence relevant to Appellant’s claim – Where it is improbable that Tribunal failed to consider allegedly corroborative evidence – Where Tribunal not required to separately give reasons for dismissing allegedly corroborative evidence – Where allegedly corroborative evidence was not capable of addressing the Tribunal’s concerns about the appellant’s claim – Appeal dismissed |
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| Legislation: | *Migration Act 1958* (Cth) |
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| Cases cited: | *Applicant WAEE v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 256 FCR 593  *BNB17 v Minister for Immigration and Border Protection* [2020] FCA 304  *ETA067 v Republic of Nauru* (2018) 92 ALJR 1003 360 ALR 228  *Khalil v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 26  *Minister for Home Affairs v Buadromo* (2018) 267 FCR 320  *Minister for Immigration and Border Protection v MZYTS* (2013) 230 FCR 431  *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421  *Pearson v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 22 |
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| Division: |  |
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| Registry: | Victoria |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Number of paragraphs: | 38 |
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| Date of hearing: | 20 April 2023 |
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| Counsel for the Appellant: | Ms E Nadon (Pro Bono) |
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| Counsel for the First Respondent | Ms K McKinnes |
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| Solicitor for the First Respondent | Sparke Helmore |
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| Counsel for the Second Respondent | The Second Respondent did not appear |

ORDERS

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|  | | VID 271 of 2022 |
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| BETWEEN: | BHG20  Appellant | |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| order made by: | ANDERSON J |
| DATE OF ORDER: | 2 MAY 2023 |

THE COURT ORDERS THAT:

1. The name of the first respondent be amended to “Minister for Immigration, Citizenship and Multicultural Affairs’.
2. The appeal be dismissed.
3. The appellant pay the first respondent’s costs of the appeal, to be fixed by way of an agreed lump sum or, in default of agreement, by way of a lump sum fixed by a Registrar.

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

REASONS FOR JUDGMENT

ANDERSON J

# INTRODUCTION

1. This is an appeal from the whole of the decision of the Federal Circuit and Family Court of Australia (Division 2) (**FCFCA**), dismissing the appellant’s application for judicial review of a decision of the second respondent, the Administrative Appeals Tribunal (**Tribunal**). The Tribunal affirmed a decision of a delegate of the first respondent, the then Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (**Minister**) to refuse to grant a Subclass XA-866 Permanent Protection visa to the appellant pursuant to s 65 of the *Migration Act 1958* (Cth) (**Act**): *BHG20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FedCFamC2G 324 (**Primary Decision**).
2. The appellant presses one ground of appeal: that the FCFCA erred in its construction of the reasons recorded in the Tribunal’s Decision Record (**Tribunal’s Reasons**) in dismissing ground two of the appellant’s application for judicial review (ground two). Relevantly, ground two was stated by the FCFCA in these terms:

The Tribunal’s reasons at [75] failed to grapple with critical corroborative evidence from the appellant’s wife, being that she always accompanied the appellant in public in Sri Lanka.

1. For the reasons below, I dismiss the appellant’s appeal.

# PROCEDURAL HISTORY

1. The appellant was in Australia most recently on a skilled independent visa, which was cancelled on 31 August 2016 pursuant to s 501(3A) of the Act following his conviction for certain offences on 30 October 2013: Primary Decision [7]-[9].
2. The appellant’s request for revocation of that cancellation decision, pursuant to s 501C of the Act, was refused on 21 January 2019 by a delegate of the Minister. That decision was affirmed on review by the Tribunal on 24 April 2019: Primary Decision [10]-[11].
3. On 23 May 2019, the appellant lodged an application for a protection visa, pursuant to ss 36(2)(aa) or (4)(a) of the Act, on the basis of his Catholic faith, his intersex status, his close Australian ties, and the hardship he would face in Sri Lanka (due to, for example, his criminal history and chronic kidney illness). That application was refused by a delegate of the Minister on 2 July 2019. The Tribunal affirmed that decision on 25 February 2020: Primary Decision [13]-[20].
4. One of the issues before the Tribunal was the appellant’s fear of significant harm due to his intersex status. Within that context, the Tribunal considered how it was that the appellant had managed to avoid being harmed during the periods in which he lived in Sri Lanka for “extended periods of time as an intersex person”: Tribunal’s Reasons [73]. The appellant attributed this to his being “constantly accompanied” by either his mother or wife, who would go “everywhere with him”: Tribunal’s Reasons [74]. In particular, in a statement supporting his claim for protection, the appellant stated that having his wife “always by [his] side in Sri Lanka helped to deter the constant abuse and harassment”. He also stated that he could not “safely return to Sri Lanka without protection or the support of [his] family”, that he “would not survive on [his] own”, and that his mother was no longer able to “protect” him given her elderly age.
5. The appellant’s wife deposed that when they arrived in Australia the appellant “could go out in public and be safe without me”, that the appellant would “not survive on his own in Sri Lanka”, that “[i]t was very hard to try and protect him from people with bad intentions in Sri Lanka”, and that the appellant’s mother was “very old” and could not “help him or hide and protect him in her situation”. The appellant’s wife also gave oral evidence during the hearing that the appellant did not have problems in public because “when he goes out or anything I am always with him” (transcript, answer 86), and that before they married “most of the time his friends is with him, mother is always there” (transcript, answer 56). The appellant’s wife also gave evidence that “I’m always with him so he didn’t get any issues from anyone” (transcript, answer 78). The appellant’s wife later stated “most of the time we are with him” and “I am with him and sometimes mother is always with him” (transcript, answer 106).
6. The Tribunal did not accept that the appellant was constantly accompanied, including at work and to lectures at university, by his wife or his mother. The Tribunal found the appellant’s denial that there were any exceptions to being constantly accompanied by his wife or his mother unrealistic: Tribunal’s Reasons [75]. In rejecting this aspect of the appellant’s claim, the Tribunal’s Reasons at [75] did not refer to the evidence given by the appellant’s wife. Nor did the Tribunal’s Reasons in the immediately preceding paragraphs refer to the appellant’s wife’s evidence that she always accompanied the appellant, or that his mother was “always there”.
7. In a later paragraph, the Tribunal referred to the appellant’s wife’s evidence that “she always goes out with him in Sri Lanka”: Tribunal’s Reasons [81].
8. The Tribunal subsequently re-stated its finding that it did not accept that the appellant was accompanied at all times by his mother or his wife to protect him, in the context of assessing his claim that he would be perceived as homosexual, transgender or a sex worker: Tribunal’s Reasons [115], [120].

# THE PRIMARY JUDGE’S REASONS

1. On 27 March 2020, the appellant filed an application for judicial review of the Tribunal’s decision. The appellant pressed two grounds, one of which was ground two.
2. With respect to ground two, the primary judge, in the Primary Decision at [57], noted that:
3. a contention that a witness’s evidence was overlooked is undermined where a decision-maker has expressly referred to the fact of evidence having been adduced from a particular witness: *BNB17 v Minister for Immigration and Border Protection* [2020] FCA 304 per Anderson J at [107];
4. a decision-maker need not refer to every piece of evidence in providing its reasons for its decision: *ETA067 v Republic of Nauru* (2018) 360 ALR 228 per Bell, Keane and Gordon JJ at 231 [13]; and
5. a decision-maker is not required to engage in a line-by-line repudiation of all of the evidence that is adduced before it: *Minister for Home Affairs v Buadromo* (2018) 267 FCR 320 per Besanko, Barker and Bromwich JJ at 333 [48].
6. The primary judge did not accept that the Tribunal overlooked the evidence of the appellant’s wife when consideration was given to the Tribunal’s Reasons as a whole: Primary Decision [60]-[61]. This ground of review was undermined by the repeated reference to the presence of the appellant’s wife in the Tribunal’s Reasons.
7. The primary judge considered the appellant’s wife’s oral evidence to the Tribunal and found that it did not support the broad claim that the appellant was constantly accompanied by his wife at all times: Primary Decision [58]-[60].
8. The primary judge accepted the Minister’s submission that the appellant’s wife’s evidence “lacked cogency and did not inform in a material way the question whether the [appellant] was constantly accompanied by his wife at all times when in public, at work or at University”: Primary Decision [60].
9. For these reasons, the primary judge rejected ground two: Primary Decision at [61].

# APPELLANT’S SUBMISSIONS

1. The appellant submits that the primary judge erred in rejecting ground two and that the primary judge should have found that the Tribunal failed to consider critical corroborative evidence given by the appellant’s wife before refusing to accept the appellant’s claim that he was always accompanied by his wife or mother in Sri Lanka. The appellant submits that, to the extent the primary judge rejected ground 2 on the basis that the Tribunal had expressly referred to the wife’s evidence throughout its reasons, this was incorrect. The appellant submits that the relevant question before the primary judge was what the Tribunal’s Reasons revealed about the Tribunal’s performance of its statutory task; that is, whether it had formed the requisite state of satisfaction under s 65 of the *Migration Act 1958* (Cth) in respect of the criterion for a visa in issue before it.
2. The appellant notes that, in its dispositive paragraph (Tribunal’s Reasons [75]), the Tribunal did not advert to the appellant’s wife’s evidence, which the appellant submits corroborated his claim that he was constantly accompanied by his wife or mother. The appellant submits that his wife’s evidence was favourable evidence capable of overcoming the Tribunal’s concern about the appellant being constantly accompanied by his wife or mother when in public in Sri Lanka. The appellant submits that contrary to the primary judge’s conclusion, his wife’s evidence did “inform in a material way the question whether the [appellant] was constantly accompanied”: contra Primary Decision [60]. The appellant submits that, if the Tribunal was to dismiss his wife’s evidence, the Tribunal was required to provide a reason for doing so. The appellant submits this is particularly so given that the Tribunal accepted his wife’s evidence as credible in some respects and relied upon it in various parts of its reasons: see Tribunal’s Reasons [76], [81], [99], [118], [120].
3. The appellant accepts that his wife’s evidence before the Tribunal was not developed in a florid way. However, the appellant submits that this was because the appellant’s wife was giving evidence of her “normal”. The appellant further submits that his wife’s evidence was not required to rise higher than it did, having regard to the Tribunal’s processes, the fact that the appellant was not represented, and the fact that his wife was not pressed on her evidence.
4. Finally, the appellant submits that it was not for the primary judge to consider the merits of his wife’s evidence. The Tribunal was only required to consider whether, if accepted as true, the appellant’s wife’s evidence was capable of supporting the appellant’s case.

# CONSIDERATION

1. The Court’s inquiry in the case of an allegation that the Tribunal failed to consider material relevant to a factual finding is set out in *Khalil v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 26 per Katzmann, Banks-Smith and Rofe JJ at [69]-[70]:

Of course, ignoring material relevant only to fact-finding does not of itself give rise to jurisdictional error: *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 at [97]. As we have already observed, it was not necessary for the Tribunal to refer to every piece of evidence. Moreover, there is a distinction between a failure by the Tribunal to advert to evidence which, if accepted, might have caused it to come to a different finding of fact and a failure by the Tribunal to address a contention which, if accepted, might establish the elements of a statutory claim: *WAEE* at [44]–[46].

In determining whether it is a jurisdictional error to fail to consider certain evidence, “the fundamental question must be the importance of the [evidence] to the exercise of the Tribunal’s function and thus the seriousness of any error”: *SZRKT* at [111] (Robertson J), endorsed by the Full Court in M*inister for Immigration and Border Protection v MZYTS* (2013) 230 FCR 431 at [70] (Kenny, Griffiths and Mortimer JJ). Moreover, “it is important not to reason that because a failure to deal with some (insubstantial or inconsequential) evidence will, in some circumstances, not establish jurisdictional error, then a failure to deal with any (substantial and consequential) evidence will also not establish jurisdictional error”: *SZRTK* at [111].

1. Further, as stated by the Full Court in *Applicant WAEE v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 256 FCR 593 per French, Sackville and Hely J at 604 [46] about the then Refugee Review Tribunal:

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

1. The above statement has been quoted with approval by the Full Court in the context of an appeal from a decision of the Administrative Appeal Tribunal in *Pearson v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 22 per Perry, Downes and McElwaine JJ at [41].
2. A review of the Tribunal’s Reasons at [73]-[76] discloses that the Tribunal addressed the appellant’s claim that he had not experienced problems in Sri Lanka in the past as an intersex person because he had been constantly accompanied by either his mother or wife. Therefore, contrary to the appellant’s submissions, this is not a case about whether the Tribunal failed to perform its statutory task by failing to consider the appellant’s claim: cf *Minister for Immigration and Border Protection v MZYTS* (2013) 230 FCR 431 per Kenny, Griffiths and Mortimer JJ at 448-449, [57]. The question for the primary judge was whether, in undertaking its statutory task, the Tribunal had failed to consider the appellant’s wife’s evidence.
3. As to this question, the primary judge was correct to approach the question of whether the Tribunal considered the appellant’s wife’s evidence by considering what inferences can be drawn from its Reasons.
4. The primary judge at Primary Decision [60] found that it was inherently improbable that the Tribunal had overlooked the appellant’s wife’s evidence. The primary judge found that such a conclusion was undermined by the reference to the appellant’s wife in the Tribunal’s Reasons at [1], [6], [34], [38]-[39], [42], [70], [74]-[76], [99], [115], [118], [120], [124]-[126] and [142]. In these circumstances, the primary judge was not prepared to infer that the appellant’s wife’s evidence was overlooked or that the Tribunal failed to engage in an active intellectual way with the wife’s evidence as given at the hearing.
5. Whilst the Tribunal’s Reasons at [75] did not expressly refer to the wife’s evidence, the Tribunal’s Reasons at [81] did refer to the wife’s evidence, noting that the wife “always goes out with him in Sri Lanka”. This reference appears only six paragraphs after the Tribunal’s Reasons at [75] rejecting the appellant’s claim that he was always accompanied by his wife or mother. Given this reference to the appellant’s wife’s evidence, I consider it improbable that the Tribunal did not consider that evidence in reaching its conclusion at [75].
6. I do not accept the appellant’s submission that the Tribunal was required to give separate reasons for dismissing the appellant’s wife’s evidence, and that a lack of such reasons indicates that the evidence was overlooked. This Court has previously stated that an obligation to give reasons does not require a “line-by-line refutation” of evidence that is contrary to findings of material fact made by the Tribunal. The Tribunal must give reasons for its decision. It is not required to specify the sub-set of reasons why it accepted or rejected individual pieces of evidence: *Minister for Home Affairs v Buadromo* (2018) 267 FCR 320 at 333 [48].
7. The appellant’s wife’s evidence must be understood in context. The Tribunal’s concern, as expressed at [72]-[73] of its Reasons, was that the appellant’s claim to fear harm on the basis of his intersex status was inconsistent with his education and employment history in Sri Lanka, and the fact that he had not been arrested or been without employment or in education other than for a two week period despite living in Sri Lanka for extended periods of time. The appellant attributed this to being constantly accompanied by his mother or his wife.
8. The primary judge was correct to consider whether the appellant’s wife’s evidence assisted this claim. Three observations can be made about the appellant’s wife’s evidence. First, his wife could not give any direct evidence of whether the appellant was always accompanied by his mother; his wife could only give direct evidence about whether she constantly accompanied the appellant. No evidence was provided by the appellant’s mother in support of his claim. Secondly, a review of the transcript of the wife’s evidence and the answers given by his wife at answers 56, 78 and 86 demonstrate that his wife’s evidence was vague, general and imprecise. Thirdly, the appellant’s wife’s response at answer 106 was, at best, unclear – she stated that “most of the time we are with him” and “sometimes mother is always with him”. Overall, the appellant’s evidence was not capable of addressing the Tribunal’s concern about whether the appellant was accompanied by either his wife or mother at all times.
9. I detect no error in the primary judge’s approach in reviewing the whole of the transcript of the wife’s evidence before the Tribunal and concluding that it lacked cogency and did not inform in a material way the question whether the appellant was consistently accompanied by his wife at all times in public, at work or university.
10. I also detect no error in the primary judge’s consideration of the appellant’s wife’s evidence at the Tribunal hearing and the primary judge’s finding that it did not support the appellant’s claim that he had been constantly accompanied by either his mother or wife in Sri Lanka.
11. I accept the Minister’s submission that the Tribunal’s rejection of the wife’s evidence that she always accompanied him was wrapped up in the rejection, in the Tribunal’s Reasons at [75], of the appellant’s claim that he was constantly accompanied at all times by his wife as being “unrealistic”.
12. Finally, I accept the Minister’s submission that, if (contrary to my conclusion), the Tribunal failed to consider the appellant’s wife evidence that she always accompanied him, its failure to do so was not material; that is, there is no realistic possibility the outcome could have been different had the Tribunal taken the evidence into account: *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 per Bell, Gageler and Keane JJ at [45]. The appellant’s wife’s evidence, as the primary judge found at Primary Decision [60], was so imprecise and general that it could not have made any difference to the finding in the Tribunal’s Reasons at [75].

# DISPOSITION

1. The name of the first respondent will be amended to “Minister for Immigration, Citizenship and Multicultural Affairs”.
2. The appeal will be dismissed with costs.
3. The Court recognises the important work of pro bono counsel and wishes to acknowledge the assistance it has received from Ms Elodie Nadon who appeared as pro bono counsel for the appellant.

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| I certify that the preceding thirty-eight (38) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Anderson. |

Associate:

Dated: 2 May 2023