Federal Court of Australia

CGN17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCA 494

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| Appeal from: | *CGN17 & Ors v Minister for Immigration & Anor* [2019] FCCA 2931 |
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| File number: | VID 1181 of 2019 |
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| Judgment of: | **ANDERSON J** |
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| Date of judgment: | 5 May 2022 |
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| Catchwords: | **MIGRATION**– appeal from an order made by the Federal Circuit Court of Australia dismissing the Appellant’s application for judicial review of a decision of Administrative Appeals Tribunal – whether the Federal Circuit Court was correct to conclude that the decision of the Tribunal was not affected by jurisdictional error – where the decision exhibits no jurisdictional error – appeal dismissed |
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| Legislation: | *Migration* *Act* *1958* (Cth) |
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| Cases cited: | *AVQ15 v Minister for Immigration and Border Protection* (2018) 266 FCR 83  *BZB16 v Minister for Immigration and Border Protection* [2019] FCA 1253  *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421  *MZXLD v Minister for Immigration and Citizenship* [2007] FCA 1912 |
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| Division: | General 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: | 43 |
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| Date of hearing: | 20 April 2022 |
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| Counsel for the Appellants: | The Appellants were self-represented and appeared with the assistance of an interpreter |
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| Counsel for the First Respondent: | Mr C McDermott |
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| Solicitor for the First Respondent: | Clayton Utz |
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ORDERS

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|  | | VID 1181 of 2019 |
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| BETWEEN: | CGN17 (and others named in the schedule)  First Appellant | |
| AND: | MINISTER FOR IMMIGRATION & BORDER PROTECTION  First Respondent  **ADMINISTRATIVE APPEALS TRIBUNAL**  Second Respondent | |

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| order made by: | ANDERSON J |
| DATE OF ORDER: | 5 May 2022 |

THE COURT ORDERS THAT:

1. The appeal be dismissed with costs.

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

REASONS FOR JUDGMENT

ANDERSON J:

1. This is an appeal from the decision of the primary judge in the Federal Circuit Court (now the Federal Circuit and Family Court of Australia) dismissing the First Appellant’s application for judicial review of a decision of the Administrative Appeals Tribunal (**Tribunal**) to affirm the decision of the Minister’s delegate to refuse to grant the First Appellant a protection visa.
2. CGN17 (**First Appellant**) is the wife of the CGO17 (**Second** **Appellant**) and the mother of CGP17 (**Third** **Appellant**), collectively (**the Appellants**).
3. The Appellants were self-represented at the hearing and were assisted by an interpreter.

# Background

1. On 3 January 2006, the First Appellant applied for a Skilled Independent Regional (Provisional) Visa, which was refused on 21 December 2006.
2. In November 2008, the Second Appellant was granted a Subclass 572 Vocational Education and Training Student Visa, and he then arrived in Australia on 21 January 2009.
3. On 20 November 2009, the First Appellant arrived in Australia as a dependent spouse on the Second Appellant's Student Visa. The Second Appellant's Student Visa was cancelled in December 2009, as he was found to have breached a limitation on the number of hours he could work per week.
4. The Appellants first applied for Protection Visas on 31 October 2011.
5. On 23 January 2012, a delegate of the Minister refused to grant the Appellants’ Protection Visas. The delegate ultimately found the First Appellant's claim not to be credible, and concluded, in the alternative, that it would be possible for the Appellants to relocate within India.
6. On 23 January 2012, under s 438(1)(b) of the *Migration Act 1958* (Cth) (**Act**), a delegate of the Minister (**delegate**) notified the Refugee Review Tribunal that certain folios on the Departmental File should not be disclosed to the Appellants because disclosure of the documents would reveal personal information of third parties. The delegate also considered that certain folios on the Departmental File should not be disclosed as it “would be contrary to the public interest because it contains internal working documents”.
7. On 9 February 2012, the Appellants sought merits review of the delegate's decision to the Refugee Review Tribunal.
8. On 1 May 2012, the Refugee Review Tribunal affirmed the delegate's decision (**first** **Tribunal** **decision**).
9. On 23 January 2014, the Court below set aside the first Tribunal decision: *MZZYF & Ors v Minister for Immigration & Anor* [2014] FCCA 75 (on the grounds of an apprehension of bias, at [35]).
10. On 11 June 2014, the Refugee Review Tribunal affirmed the delegate's decision (**second** **Tribunal** **decision**).
11. On 19 February 2016, the Court below, set aside the second Tribunal decision: *MZAHC & Ors v Minister for Immigration & Anor* [2016] FCCA 340 (on grounds that the Tribunal had unreasonably refused the Appellants an adjournment of a hearing, at [74]).
12. On 8 September 2016, and then on 6 February 2017, the Appellants appeared at a hearing before the Tribunal to give evidence and present arguments.
13. On 8 May 2017, the Tribunal affirmed the delegate's decision (**Tribunal Reasons**).

## THE TRIBUNAL'S DECISION

1. At Tribunal Reasons [25] to [31], the Tribunal set out the Appellants’ claims as contained in the application for the Protection Visas. In essence, the Appellants’ claims to engage Australia's protection obligations stemmed from the First Appellant’s high profile as a prominent member and leader of the Telangana Rashtra Samithi (**TRS**). Because of this affiliation with the TRS, the First Appellant's family had purportedly been subjected to harm by different political factions within Provincial and Federal Governments in Telangana. State protection would, on the Appellants' claim, be denied to them. The Appellants also claimed to fear harm from a gangster, “N”, and his criminal network.
2. The Tribunal accepted that the First Appellant's mother was, and is, a prominent member of TRS, and that she, and her family (including the Second and Third Appellants), had been threatened and harassed, before Telangana became a separate State in 2014: Tribunal Reasons at [49] to [50]. The Tribunal accepted the level of prominence of the First Appellant's mother within political circles: Tribunal Reasons at [51] to [52]. The Tribunal also concluded that there was less than a remote chance that the Appellants would be threatened or harmed or suffer serious harm based on the political tensions arising from the Telangana Separatist Movement: Tribunal Reasons at [55], [67]. In essence, the rise of Telangana as a separate State was a significant change in circumstances more favourable to the Appellants' position.
3. At Tribunal Reasons [57], the Tribunal did not accept that there was a real chance that the Appellants would suffer serious harm on the basis of being from a lower caste if they were to return to India.
4. The Tribunal then went on to consider the experience of the Appellants arising from their fear of “N”, and his criminal network. The Tribunal accepted that the Second Appellant's father's farm had been burnt down in 2008, and that the Appellants had experienced threats over many years, including threats to the Third Appellant: Tribunal Reasons at [66]. The Tribunal also found that the First Appellant's mother had continued to be threatened and harassed in her home village after she had been elected to office, and that the First Appellant's siblings had experienced minor incidents when they returned to their mother’s village: Tribunal Reasons at [68].
5. At Tribunal Reasons [69], based on information presented to it, the Tribunal concluded that “N” had been killed in August 2016, and that the police had arrested many members of “N's” criminal network. At Tribunal Reasons [70] and [71], the Tribunal found:

While the Tribunal has considerable doubts that the remnants of [N's] network would be interested and able to pursue the [Appellants] if they returned to India, the Tribunal also accepts the [First Appellant's and Second Appellant's] oral evidence that the [First Appellant's] mother continues to be harassed and threatened about holding meetings in her home village, and that the [First Appellant's] siblings have experienced minor incidents when visiting their mother's village.

Therefore, and not without some doubt, the Tribunal accepts there is a real chance the [Appellants] would be threatened and harassed and possibly suffer serious harm, if they returned to the [First Appellant's] village in India, from local remnants of [N's] network, due to the [First Appellant's] mother's political opinion.

1. At Tribunal Reasons [72] to [103], the Tribunal considered whether the Appellants would face a real chance of serious harm in India. The Tribunal:
   1. did not accept that “N's” network and associates existed throughout India, or would continue to operate in a coordinated manner to find and harm the Appellants: Tribunal Reasons at [96];
   2. found while there was a risk of serious harm that the Appellants might face in the First Appellant's mother's home village, that risk was "localised and opportunistic, rather than co-ordinated and planned and far-reaching": Tribunal Reasons at [98]. There was no one looking for the Appellants in India outside of the First Appellant's mother's village in any event: Tribunal Reasons at [98];
   3. was satisfied that, having regard to the First Appellant's and the Second Appellant's qualifications, work experience and language skills, the First Appellant and the Second Appellant could find employment and provide for their family on return to India: Tribunal Reasons at [100];
   4. found that, having regard to the First Appellant's particular circumstances, the Appellants could return to India, and "reasonably, as in practically, relocate away from the risk of harm in the [First Appellant's] mother's home village, such as to New Delhi or Chennai or Mumbai": Tribunal Reasons at [101].
2. The Tribunal concluded that the Appellants would not face a well-founded fear of persecution, and were ineligible for Protection Visas under s 36(2)(a) of the Act: Tribunal Reasons at [102], [103], and [117].
3. The Tribunal then considered whether the Appellants were eligible for Protection Visas under s 36(2)(aa) of the Act. For similar reasons, the Tribunal concluded that the Appellants would face a real risk of being threatened and harassed and might possibly suffer significant harm if they returned to the Appellant's mother's village in India from the local remnants of “N's” network due to the First Appellant's mother's political opinion: Tribunal Reasons at [107] to [110]. However, the Tribunal similarly concluded that the Appellants would not face a real risk of significant harm if they were to relocate away from the identified risk of harm in the First Appellant's mother's village (Tribunal Reasons at [113]). The Tribunal concluded that the significant risk was deemed not to be a real risk under s 36(2B)(a) of the Act: Tribunal Reasons at [114].
4. The Tribunal concluded that the Appellants were ineligible for Protection Visas (Tribunal Reasons at [115] to [118]), and affirmed the delegate's decision at Tribunal Reasons at [119].

# PRIMARY JUDGMENT

1. In the Primary Judgment, the primary judge made the following observations:
   1. The primary judge had regard to one of the documents that had been subject to s 438(1) of the Act, namely the "Community Status Resolution Part 1 - Client Case Plan", which the Appellants asserted gave rise to a denial of procedural fairness because they did not have the opportunity before the Tribunal to comment upon the content therein: Primary Judgment at [82]-[83], [100]. In essence, the Appellants contended that this information undermined their claim to face any risk of harm upon return.
   2. The primary judge concluded that the specific document at [28(a)] could not have led to any realistic possibility of a different outcome if the Appellants had been given the opportunity to comment upon the content: Primary Judgment at [107]-[112]. This was because the document had to be viewed in proper factual context (pre-dating the Protection Visa application) and went only to a discrete factual issue (the ability of the Appellants to seek financial assistance to return to India at a particular point in time). In any event, the Court below considered that the Tribunal's Reasons could not fairly be construed as having taken this discrete information into account in its dispositive reasoning. On that footing, there could not possibly have been a different outcome if procedural fairness had been properly afforded before the Tribunal as to the document.
   3. The primary judge also considered that none of the other documents could have had any material impact or affect upon the Tribunal's review: Primary Judgment at [103]-[106].

# Grounds of appeal

1. The Appellants’ amended notice of appeal, filed 22 November 2019, lists eight grounds of appeal. These are:

1. That the learned Judge erred in dismissing the review and not according substantial justice to the applicants.

2. That the learned Judge erred in dismissing the appellants’ review application at hearing without considering the merits of the case.

3. That the learned Judge erred in dismissing the appellants' application filed on 26 May 2017 without hearing the applicant's arguments on documents subject to s 438(1) of the Act

4. The learned Judge erred in not considering Invalid notification will result in jurisdictional error if and only if, the notification is material. Judge erred in not applying High court recent decision CQZ15 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR;

5. The learned Judge erred in finding that the notification is not material, where the relevance of Notification is to be determined by Tribunal not by court.

6. The learned judge erred in finding that the notification is not material relied on the Immigration Department's policy and policy is not law.

7. The appellants' application clearly raises an arguable case.

8. The learned Judge erred in not remitting the application to Tribunal to decide notification relevance, it failed to accord to the Applicants procedural fairness and natural justice.

1. The Appellants also filed an outline of written submissions dated 7 April 2022. The outline is disconnected from the grounds of appeal.
2. A sole ground of “review” is found at [19] of the Appellants’ written submission which states: “Failed to consider relevant considerations and misconstrued and misapplied s 91R(1) and S(5) of the [Act and] did not comply with Section 414 of [the Act]”.
3. Thereafter, the written submissions make the following generic statements:
4. The Tribunal has to give “proper, genuine and realistic” consideration to the Appellants’ case (see, [20], [23], [24], and [26]). References are then made to *Minister for Home Affairs v Omar* (2019) 272 FCR 589, *Hindi v Minister for Immigration & Ethnic Affairs* (1988) 20 FCR 1, and *Khatri & Anor v Minister for Immigration & Anor* [2015] FCCA 407.
5. The Tribunal has to afford procedural fairnessby identifying the critical issue not apparent from the decision (see, [21]). Reference is then made to *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594.
6. Reference is then made to *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173 (“considering limited refugee visa number was regarded as relevant and not irrelevant consideration”) (see, [22]), *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 (“The Court held that a minister had to consider a third-party mining company’s interest in a native title decision”) (see, [24]), and *AVQ15 v Minister for Immigration and Border Protection* (2018) 266 FCR 83 (“The Tribunal was, with appropriate caution, entitled to rely upon inconsistency in assessing the applicant’s credibility”) (see, [25]).
7. These cases also appear to have no relevant connection to the facts or circumstances that arise in this appeal.
8. The Appellants have also referred to additional cases in their accompanying list of authorities but the cases appear to have no relevant connection to the facts or circumstances of this appeal.

# Minister’s response to the grounds of appeal

1. The Minister submits that grounds 1, 2 and 7 are no more than generic complaints as to the merits of the Primary Judgment, and do not demonstrate appellable error.
2. As to items 3-6, the Minister contends:
3. The Appellants were clearly heard and afforded procedural fairness in the Court below as to the arguments they raised about the effect of the invalid notification/certificate under s 438(1) of the Act (see Primary Judgment at [81]-[83], [110]). That the Court below did not accept their submission does not mean that they were denied procedural fairness.
4. The Court below clearly had regard to the applicable High Court authority, *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 (see Primary Judgment at [89]-[98]).
5. It was clearly the task of the Court to determine, for itself, whether or not jurisdictional error was manifest by the Tribunal not disclosing the materials subject to the invalid notification/certificate under s 438(1) of the Act.
6. The Appellants do not identify (and cannot identify) the Court having applied any “Immigration Policy” erroneously.
7. For the reasons given by the Court below, it was entirely correct to conclude that there was no “materiality” to the non-disclosure of the materials subject to the invalid notification/certificate under s 438(1) of the Act. The Appellants bore the onus of establishing that there was a material error, and failed to discharge that onus in the Court below.
8. As to the written submissions, the Minister’s principal response is that each matter referred to above is no more than an impermissible attempt at merits review of the Tribunal’s decision.
9. The Appellants make no attempt to identify how there is any jurisdictional error in the process of reasoning, or in the process of hearing, of the Appellants’ claims to engage Australia’s protection obligations. The Tribunal correctly applied the relevant law to the facts, did not deny the Appellants a meaningful opportunity to be heard on the dispositive issues; and did not make findings which give rise to any conclusion of irrationality, illogicality or unreasonableness: se, generally, *AVQ15 v Minister for Immigration and Border Protection* (2018) 266 FCR 83. The specific cases cited by the Appellants at [30] above, either have no direct bearing on the facts and circumstances of this appeal, or are entirely distinguishable in the circumstances.

# Consideration

1. I am not persuaded that the grounds of appeal demonstrate an appellable error.
2. Grounds of appeal 1, 2 and 7 are no more than general complaints and do not articulate any error by the primary judge.
3. In relation to grounds of appeal 3 - 6 the Court below did not accept the Appellants’ submissions. This, of course, does not mean that they were denied procedural fairness.
4. The Court below clearly had regard to the applicable High Court authority, including *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421: Primary Judgment at [89]-[98].
5. The primary judge was entirely correct to conclude that there was no “materiality” to the non-disclosure of the materials subject to the invalid notification/certificate under s 438(1) of the Act. The Appellants bore the onus of establishing that there was a material error, and failed to discharge that onus in the Court below.
6. During oral submissions, the First Appellant made reference to a public statement from a current member of parliament in India which he said amounted to a threat. The Second Appellant also made reference to a threatening phone call that was made to the Second Appellant’s father. The Minister, in oral submissions, submitted that these matters were not before the Tribunal in 2017, and indeed only occurred some five years later. The Minister submitted that I cannot consider fresh evidence of this kind on an appeal from judicial review proceedings in the Federal Circuit Court citing: *BZB16 v Minister for Immigration and Border Protection* [2019] FCA 1253 per Steward J at [17] and *MZXLD v Minister for Immigration and Citizenship* [2007] FCA 1912 at [10]-[11] per Gordon J. I agree with the Minister’s submission and I will not consider these matters, which amount to fresh evidence, further.

# Disposition

1. For the reasons outlined above, the appeal will be dismissed with costs.

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| I certify that the preceding forty-three (43) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Anderson. |

Associate:

Dated: 5 May 2022

SCHEDULE OF PARTIES

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|  | VID 1181 of 2019 |
| Second Appellant | CGO17 |
|  |  |
| Third Appellant | CGP17 |
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