Federal Court of Australia

Bibawi v Australian Human Rights Commission [2022] FCA 607

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| Appeal from: | *Bibawi v Australian Human Rights Commission* [2021] FCA 1476 |
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| File number: | QUD 413 of 2021 | |
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| Judgment of: | **RANGIAH J** | |
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| Date of judgment: | 24 May 2022 | |
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| Catchwords: | **HUMAN RIGHTS –** Application for summary dismissal of appeal against dismissal of application for judicial review of decision by Australian Human Rights Commission – where appellant’s “complaint” did not satisfy requirements of s 46P(1A) of the *Australian Human Rights Commission Act 1986* (Cth)  **PRACTICE AND PROCEDURE -** Application for summary judgment – where appeal has no reasonable prospects of success – appeal dismissed | |
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| Legislation: | *Administrative Decisions (Judicial Review) Act 1977* (Cth)  *Australian Human Rights Commission Act 1986* (Cth) s 46P(1A)  *Disability Discrimination Act* *1992* (Cth) s 42  *Federal Court of Australia Act 1976* (Cth) ss 24, 25, 26, 31, 31A and 32  *Racial Discrimination Act 1975* (Cth) ss 11 and 27  *Federal Court Rules 2011* (Cth) r 26.01 | |
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| Cases cited: | *Allesch v Maunz* (2000) 203 CLR 172  *Bibawi v Australian Human Rights Commission* [2021] FCA 1476  *Penhall-Jones v New South Wales* [2007] FCA 925  *Spencer v Commonwealth* (2010) 241 CLR 118 | |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: |  |
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| Number of paragraphs: | 40 | |
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| Date of last submissions: | 11 February 2022 (Second Respondent)  14 February 2022 (Appellant) | |
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| Date of hearing: | Determined on the papers | |
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| Counsel for the Appellant: | The appellant appeared in person via telephone | |
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| Counsel for the First Respondent: | The First Respondent filed a submitting notice | |
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| Counsel for the Second Respondent: | Mr T Eteuati appeared via MS Teams | |
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| Solicitor for the Second Respondent: | Australian Government Solicitor appeared via MS Teams | |

ORDERS

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|  | | QUD 413 of 2021 |
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| BETWEEN: | MAGDY BIBAWI  Appellant | |
| AND: | AUSTRALIAN HUMAN RIGHTS COMMISSION  First Respondent  COMMONWEALTH ATTORNEY GENERAL  Second Respondent | |

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| order made by: | RANGIAH J |
| DATE OF ORDER: | 24 MAY 2022 |

THE COURT ORDERS THAT:

1. The appeal is dismissed.

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

REASONS FOR JUDGMENT

RANGIAH J:

1. On 9 October 2021, the first respondent (the **Commission**) decided that the appellant’s “complaint” did not satisfy the requirement of s 46P(1A) of the *Australian Human Rights Commission Act 1986* (Cth) (the **Act**) that it be, “reasonably arguable that the alleged acts, omissions or practices are unlawful discrimination”.
2. On 24 November 2021, Greenwood J (the **primary judge**) dismissed the appellant’s application for judicial review of the Commission’s decision: *Bibawi v Australian Human Rights Commission* [2021] FCA 1476. The appellant has appealed against that judgment.
3. On 11 February 2022, the second respondent filed an interlocutory application seeking summary judgment on the basis that, relevantly, the appellant has no reasonable prospects of successfully prosecuting the appeal. On 2 February 2022, Mr Bibawi filed an interlocutory application seeking, relevantly, leave to adduce new evidence in the appeal in the form of three affidavits.
4. The parties consented to the determination of the second respondent’s interlocutory application on the papers. These reasons deal with that interlocutory application.
5. Both parties have filed written submissions. Mr Bibawi has filed some 19 affidavits, which I take to contain evidence intended to be responsive to the second respondent’s application and additional evidence he would seek to adduce in the appeal.
6. It is necessary to describe the complaint made to the Commission and the judgment of Greenwood J in order to give context to the interlocutory applications presently before the Court.
7. On 1 May 2020, Mr Bibawi made a complaint to the Commission naming two respondents, the Premier of Queensland and Ms Valerie Kellett (his neighbour). The complaint was to the effect that Mr Bibawi had been victimised and forced to stop working as a teacher; that he would be admitted to hospital against his will; and that he was being intimidated and threatened. The appellant then sent numerous emails to the Commission making complaints against a variety of other persons, including tenants in his housing complex, Education Queensland, the Department of Housing and Public Works, Queensland Police Service and Flight Centre. The Commission understood Mr Bibawi’s complaint of unlawful discrimination to primarily be that he was being victimised in contravention of s 42 of the *Disability Discrimination Act* *1992* (Cth) as a result of having made previous complaints to the Commission in 2011, 2018 and 2019.
8. Section 46P(1) of the Act provides, relevantly, that a written complaint may be lodged with the Commission alleging that one or more acts have been done and those acts are unlawful discrimination. Section 46P(1A) provides that, “It must be reasonably arguable that the alleged acts, omissions or practices are unlawful discrimination.”
9. In a letter to Mr Bibawi dated 9 October 2020, the Commissioner stated:

On the information you have provided I consider that you have not met the requirements for lodging a complaint with the Commission, as you have not met the requirement that it is reasonably arguable that the acts or practices you have alleged constitute unlawful discrimination.

1. The Commission observed:

However, having considered the extensive documents you have provided to the Commission, there does not appear any information to support a reasonably arguable claim that you were subjected to a detriment *because* of your complaints of unlawful discrimination to this Commission, or that your past complaints could reasonably arguably be considered *a ‘substantial and operative factor’* in any detriment you say you have experienced.

1. In finding there was a requirement that Mr Bibawi demonstrate a reasonably arguable case that his past complaints were a “substantial and operative factor”, the Commission cited the judgment of Buchanan J in *Penhall-Jones v New South Wales* [2007] FCA 925.
2. The Commission also addressed any claims of discrimination that Mr Bibawi was making:

In addition to your claim of victimisation, you also make reference to discrimination and racial profiling in relation to the activities that you witness of individuals who are both known to you and strangers (at least some of whom you claim the undercover police watching you). I appreciate that you have genuine concerns about individuals you encounter in your daily life, however the information you have provided to the Commission does not support a reasonably arguable claim of discrimination under the federal discrimination laws administered by the Commission.

1. The Commission concluded:

For the above reasons, I consider that you have not met the requirements for making a valid complaint of unlawful discrimination under section 46P of the AHRCA. Therefore, the Investigation and Conciliation Service of the Commission will not be taking any action in relation to your correspondence.

1. Mr Bibawi’s application for judicial review of the Commission’s decision was made under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The primary judge observed that Mr Bibawi’s two main propositions appeared to be: there was reviewable error on the ground that the Commission ought to have examined his complaint not only under s 42 of the *Disability Discrimination Act 1992* (Cth), but also under s 26 and s 32 of the Act; and, there was confusion in the decision about what was properly under examination, giving rise to error.
2. Before the primary judge, Mr Bibawi relied upon a mass of material that was not before the Commission. The primary judge held that the new material that post-dated the decision was not relevant in an application for judicial review of the Commission’s decision. In addition, his Honour was not satisfied that the new material which pre-dated the decision was relevant to any ground of judicial review. That material was not before the Commission and it was not demonstrated to have any logical connection in advancing the contention that the decision was not supported by evidence.
3. Turning to consider what appeared to be Mr Bibawi’s grounds, the primary judge held that the appellant’s general complaint that there was no evidence to support the decision could not succeed.
4. His Honour considered it was clear the Commission had identified and summarised each of the claims made by Mr Bibawi and was not satisfied that they were not considered by the Commission.
5. His Honour held that Mr Bibawi had failed to identify any basis whatsoever for his allegation of bad faith on the part of the decision-maker.
6. The appellant’s next ground was that the Commission had lied and had made a number of factual errors. His Honour held that the appellant was simply expressing emphatic disagreement of conclusions made by the decision-maker. His Honour held that Mr Bibawi had been unable to identify any basis upon which it could be said that there was no justification for the making of the decision.
7. His Honour considered the appellant’s contention that the Commission erred by failing to appreciate that his complaint was being made under s 26 and s 31 of the Act, s 42 of the *Disability Discrimination Act 1992* (Cth) and s 11 and s 27(2) of the *Racial Discrimination Act 1975* (Cth). His Honour considered that the notion that the complaint was made pursuant to s 26 and s 31 of the Act and s 11 and s 27(2) of the *Racial Discrimination Act* *1975* (Cth) made no sense because, in summary, those provisions could not possibly be engaged in the circumstances alleged by Mr Bibawi. His Honour concluded that the Commission did not err in dealing with the complaint as anything other than a complaint under s 42 of the *Disability Discrimination Act*.
8. The primary judge rejected the argument that that the Commission erred by failing to consider the consequences of its decision, Mr Bibawi having asserted those consequences to be that he would be evicted and his mental health would be affected. His Honour held that these were not mandatory relevant considerations and that the only relevant consequence arising from the decision was that the appellant’s complaint would not then be subject to investigation.
9. The primary judge concluded that the Commission had not fallen into error in any manner alleged by Mr Bibawi. Accordingly, his Honour dismissed the application.
10. Mr Bibawi was self-represented before the primary judge and remains self-represented in the appeal. Without intending any disrespect to Mr Bibawi, it is an inescapable fact that substantial parts of his Notice of Appeal, his written submissions and his affidavits are unintelligible.
11. Mr Bibawi’s Notice of Appeal commences by alleging legal errors, abuse of power, failures to take into account relevant considerations and fraud on the part of the Commission. It goes on to assert that the material he provided to the Commission demonstrated a reasonably arguable claim of discrimination.
12. The Notice of Appeal appears, so far as I can understand it, to raise the following particular allegations in respect of the judgment of the primary judge:

* The primary judge ignored over 1,000 documents concerning, “operations of physically terminating me by shooting, strangling and kidnapping of continuation of operations started while AHRC, looking at my complaints…”.
* His Honour ignored a court order from the Queensland Civil and Administrative Tribunal against a person who had, “not only prejudice me but also tried to kill me”.
* His Honour ignored that, “they cancel my registration as a teacher, they cancel my employment as a supply teacher and they cancel my registration as a justice of the peace, they took everything from me and they are trying to take my own life”.
* His Honour continued this discrimination against Mr Bibawi by writing an inaccurate and misleading judgment relying on a fabricated decision of the Commission and an unethical and fraudulent submission.
* His Honour said that Mr Bibawi had submitted documents consisting of about 1,000 pages when in fact there were about 2,000 pages.
* The judgment is wrong, fraudulent, has been fabricated and is an abuse of power.

1. Mr Bibawi’s written submission are very difficult to follow. They make allegations of police and criminals attempting to kidnap and murder him. They refer to racial discrimination and prejudice, victimisation and racial profiling. They allege that the Commission and the primary judge engaged in lies and fraud. They allege wrongdoing by a doctor, a university, the Mormon Church, the Deputy Premier of Queensland, Queensland Health and Stepping Stone Clubhouse. He complains that Education Queensland suspended his teacher’s registration, saying that he had a significant mental illness and was a threat to the safety of children. He alleges that there is a link between the police, Queensland Health and senior citizens in his housing complex.
2. Mr Bibawi’s written submissions allege that the primary judge did not read the complaint or his affidavits and threw an affidavit in the rubbish bin. They seem to assert that his Honour did not provide reasons for dismissing the application. They allege that there has been a deliberate attempt from a racist, corrupt government to kill him, and a deliberate attempt from the Commission and the primary judge to cover-up their criminal activities against humanity. They seem to make a complaint against doctors at the Princess Alexandra Hospital who diagnosed him with schizophrenia and paranoia and then allegedly injected, handcuffed and tried to strangle him. They make allegations of wrongdoing against the Commission’s legal representatives.
3. The numerous affidavits filed by Mr Bibawi do not advance his case. Their primary theme seems to be that police, criminals and neighbours wish to kill him. At one point he seems to complain about an order made for his mental assessment by the Magistrates Court at Holland Park.
4. Section 31A(2) of the *Federal Court of Australia Act 1976* (Cth) (the **FCA Act**) provides:

(2) The Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:

(a) the first party is defending the proceeding or that part of the proceeding; and

(b) the Court is satisfied that the other party has no reasonable prospect of successfully prosecuting the proceeding or that part of the proceeding.

1. Rule 26.01(1) of the *Federal Court Rules 2011* (Cth) provides:

**26.01 Summary judgment**

(1) A party may apply to the Court for an order that judgment be given against another party because:

(a) the applicant has no reasonable prospect of successfully prosecuting the proceeding or part of the proceeding; or

(b) the proceeding is frivolous or vexatious; or

(c) no reasonable cause of action is disclosed; or

(d) the proceeding is an abuse of the process of the Court; or

(e) the respondent has no reasonable prospect of successfully defending the proceeding or part of the proceeding.

1. The word “proceeding” is defined in s 4 of the FCA Act to include an appeal.
2. In *Spencer v Commonwealth* (2010) 241 CLR 118, Hayne, Crennan, Kiefel and Bell JJ held:

59 In many cases where a plaintiff has no reasonable prospect of prosecuting a proceeding, the proceeding could be described (with or without the addition of intensifying epithets like “clearly”, “manifestly” or “obviously”) as “frivolous”, “untenable”, “groundless” or “faulty”. But none of those expressions (alone or in combination) should be understood as providing a sufficient chart of the metes and bounds of the power given by s 31A. Nor can the content of the word “reasonable”, in the phrase “no reasonable prospect”, be sufficiently, let alone completely, illuminated by drawing some contrast with what would be a “frivolous”, “untenable”, “groundless” or “faulty” claim.

60 Rather, full weight must be given to the expression as a whole. The Federal Court may exercise power under s 31A if, and only if, satisfied that there is “no reasonable prospect” of success. Of course, it may readily be accepted that the power to dismiss an action summarily is not to be exercised lightly. …

1. Under s 24(1)(a) of the FCA Act, the Court has jurisdiction to hear and determine appeals from a judgment of a single judge of the Court exercising the original jurisdiction of the Court. Section 25(1) provides that in such an appeal, the appellate jurisdiction of the Court shall be exercised by a Full Court. However, s 25(2B)(aa) allows a single judge to determine an application for summary judgment.
2. In order to succeed in the appeal, it is necessary for Mr Bibawi to demonstrate that the order dismissing his application is the result of some legal, factual or discretionary error: see, for example, *Allesch v Maunz* (2000) 203 CLR 172 at [23].
3. The allegations made by Mr Bibawi consist primarily of allegations of improper and fraudulent conduct by the primary judge and the Commission. These are bare allegations unsupported by any particulars and have no prospects of success.
4. Mr Bibawi asserts that his Honour failed to provide reasons for the judgment. That allegation is patently wrong. To the extent that the assertion may be that the reasons are inadequate, Mr Bibawi has not identified in what way they are inadequate, and no such inadequacy is apparent.
5. Mr Bibawi alleges that the primary judge ignored numerous documents that he had submitted. His Honour gave comprehensive reasons which indicate that he considered Mr Bibawi’s arguments and material. His Honour found that much of that material was irrelevant. There is nothing to indicate that his Honour ignored any material.
6. Mr Bibawi has not demonstrated any ground of appeal upon which he could possibly succeed, even taking into account the further evidence he seeks to rely upon. That further evidence is simply irrelevant to the application for judicial review and to the appeal.
7. Mr Bibawi’s appeal does not have reasonable prospects of success. The appeal must be dismissed.
8. The second respondent has not sought any order for costs.

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| I certify that the preceding forty (40) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Rangiah. |

Associate:

Dated: 24 May 2022