Federal Court of Australia

AWO21 v Minister for Immigration, Citizenship and Multicultural Affairs [2022] FCA 1387

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| Appeal from: | *AWO21 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* |
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| File number(s): |  |
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| Judgment of: | **COLLIER J** |
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| Date of judgment: | 22 November 2022 |
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| Catchwords: | **APPEAL** – appeal from a decision of the Federal Circuit Court dismissing the appellant’s application for judicial review – appellant sought judicial review of a decision of the Administrative Appeals Tribunal affirming the decision of the first respondent not to grant a protection visa – whereas the appellant contends he was not afforded procedural fairness and failure of the primary Judge to deal with all submissions – appellant was afforded procedural fairness– primary Judge addressed all the appellant’s oral submissions – appeal dismissed |
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| Cases cited: | *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24  *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429  *Minister for Immigration and Citizenship v SZNVW and Anor* (2010) 183 FCR 575  *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17 |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Number of paragraphs: | 26 |
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| Date of hearing: | 21 November 2022 |
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| Solicitor for the Appellant: | The appellant appeared in-person |
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| Solicitor for the First Respondent: | Minter Ellison Lawyers |

ORDERS

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|  | | ACD 97 of 2021 |
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| BETWEEN: | AWO21  Appellant | |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| order made by: | COLLIER J |
| DATE OF ORDER: | 22 NOVEMBER 2022 |

THE COURT ORDERS THAT:

1. The name of the first respondent be changed to “Minister for Immigration, Citizenship and Multicultural Affairs”.
2. The appeal be dismissed.
3. The appellant pay the costs of the first respondent, such costs to be taxed if not otherwise agreed.

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

REASONS FOR JUDGMENT

COLLIER J

1. Before the Court is an appeal from a decision of a Judge of the Federal Circuit and Family Court of Australia (**primary Judge**) dated 21 October 2021. In that decision the primary Judge dismissed the appellant’s application for judicial review of a decision of the Administrative Appeals Tribunal (**Tribunal**) to affirm the first respondent’s decision to refuse the appellant a protection visa (**primary decision**).
2. In his Notice of Appeal filed on 21 November 2021, the appellant articulated the following grounds of appeal and relief sought as follows:

**Details of relief sought**

1. Decision according to law.

2. Tribunal should be questioned for unfair decision.

**Grounds of application**

1. Making choices without following a fair procedure

2. Making Judgment without taking into account the issues that have been raised.

# background

1. At [1]–[2] of the primary decision, the primary Judge outlined the factual background referable to the appellant’s application as follows:
2. The applicant is a citizen of Pakistan. The applicant arrived in Australia in July 2013 as the holder of a Student visa. That Student visa was subsequently cancelled. The applicant then applied for a Protection visa on 26 April 2016.
3. On 16 December 2016, a delegate of the Minister for Immigration ("the delegate") refused to grant the applicant a Protection visa. The applicant sought merits review at the Administrative Appeals Tribunal ("the Tribunal"). In a decision dated 10 March 2021, the Tribunal affirmed the delegate's decision not to grant the applicant a Protection visa.
4. I understand this summary of the factual background is uncontentious.
5. In the primary proceeding, the appellant relied on three grounds of judicial review, namely:

1. Member declared documents fraudulent

2. Member neglected the existence or organization

3. Member ignored the enquiries made by TTP in Nov 2019.

(expression in original)

1. The documents referred to by the appellant in his grounds of review in the primary proceeding relate to threats he alleged were made against him in or around April 2013 by the Tehrik-e-Taliban (**TTP**) in Pakistan. The Tribunal found that these documents were likely fabricated by the appellant.
2. Similarly, the reference to “existence or organisation” referred to the appellant’s alleged membership of Shi'a-Sunni Ittehad (**SSI**), “an organisation seeking to reconcile Shia and Sunni Muslims”, and the threats that members of this organisation purportedly face from TTP.
3. The reference to “enquiries made by TTP” appeared to refer to further threats the appellant alleges were made to him by that organisation in or around November 2019.
4. Central to the primary Judge’s reasoning in dismissing the primary proceeding were the following observations:

* The Tribunal noted the appellant only applied for a protection visa after his student visa had been cancelled, at [4];
* The appellant’s grounds in support of his application for a protection visa “can be summarised as claims of fear from the Tehrik-e-Taliban as a result of the applicant's membership of the Shi'a-Sunni Ittehad, an organisation seeking to reconcile Shia and Sunni Muslims”, at [5];
* The appellant referred to threats made in correspondence to him in or around April 2013, but was unable to provide any such correspondence to the delegate of the first respondent, or initially to the Tribunal, at [7];
* The Tribunal noted, referable to the appellant’s claims that TTP had “made enquires” in or around November 2019, that there were inconsistencies in the evidence given by the appellant at the two hearings in the Tribunal, at [27];
* The Tribunal was not convinced that the correspondence eventually produced by the appellant as evidence of threats made to him was genuine, at [9]; and
* The Tribunal found the appellant’s evidence to be vague and unconvincing, at [10].

# appellant’s submissions

1. The appellant handed up written submissions at the hearing which had earlier been emailed to my Chambers and the first respondent. Those submissions were as follows:

1. The tribunal acknowledged my Sunni Muslim faith but rejected my claim that it was TTP who wrote me the letters. There is no evidence or report from the tribunal indicating the pleasures were phoney, and if tribunal had done some investigation, they would have learned that SSI and TTP have many philosophical differences, making them their worst adversaries.

2. Without conducting any research, the tribunal simply assumed that the letters were false without providing any proof.

3. Since I informed the tribunal that all of my friends had been killed by TTP, Tribunal is assuming that I cannot suffer substantia substantial harms due to the tribunal's lack of investigation and absence of any solid evidence.

4. I provided the tribunal with in-depth details and informed them that I may obtain severe harm through TTP. The Pakistani Army is indirectly involved in the TTP and are responsible for their creation. As such, they use them to kill innocent people to demonstrate to the rest of the world that Pakistan is home to terrorist organisations like the TTP.

5. In my instance, neither the tribunal nor immigration performed any study into the TTP's condition in Pakistan or how the Pakistan Army controls it. They would have known that the TTP and Pakistan Army are collaborating to murder innocent citizens of Pakistan in order to convince the outside world that they are combating terrorism when in fact they are the ones who have instigated it in the first place.

Lastly I appeal to court to evaluate mycase and ask for your honor's justice.

(errors in original)

1. I granted leave for those submissions to be filed.
2. The appellant also articulated what would appear to be submissions in his affidavit in support of his appeal, sworn on 15 November 2021. In that affidavit, the appellant deposed as follows:
3. Without any proof or examination, a tribunal member ruled the submitted documents to be false. Despite the fact that the documents I presented were authentic.
4. In regard to the documents, I was in frequent contact with my mother. Because she is unable to read or write, she has provided me a variety of documents that are unrelated to my issue. Then, because it took so long to find these letters, I made her send me images of every single document she found. When I received the invitation letter from the tribunal, I did not take any step to get those documents or question my mother, as the member pointed out. This assertion is inaccurate because of my bad English or because she misinterpreted the interpreter. Following the offer, I attempted to contact my mum.
5. The organisation (SSI) was set to start in my region, which is why they were recruiting new workers. When TTP found out, they repressed the organisation by threatening or executing its members. Many of the organization's members departed the country.
6. The member mentioned that my two friends were murdered, and the stories were not reported in the media. I want to clarify that not all the events of that time were reported in the media, and the two incidents were reported to the police.
7. In the aftermath of these incidents, my third friend Abid Hussain lost contact with me because his phone stopped working. I tried to contact him several times.
8. From these submissions, it would appear that the appellant sought to challenge, in this Court, the correctness of:

* The Tribunal’s finding that the correspondence the appellant provided as evidence of threats made against him was genuine; and
* The Tribunal’s finding that the appellant, as a member of SSI, was at risk of significant harm by the TTP should he return to Pakistan.

1. At the hearing yesterday, the appellant reiterated his written submissions, in particular contending that the threats made in correspondence to him by the TTP were genuine, and that he did not fabricate relevant correspondence because he had no need to do so in light of the authenticity of the written threats to him. He also submitted that the delay on his part in providing evidence (including relevant correspondence) was a direct result of the need to obtain that correspondence from his mother in Pakistan (who he submitted is illiterate), as well as the paucity of his own resources.

# first respondent’s submissions

1. The first respondent submitted that the appellant’s ground of appeal relating to “fair procedure” was unparticularised, and therefore could not make substantive submissions on this point.
2. Nevertheless, the first respondent submitted that insofar as this ground was to suggest that the Tribunal failed to afford the appellant procedural fairness, and that the primary Judge erred in not identifying this failure, such submissions were without merit. In relation to the hearing before the primary Judge, the first respondent submitted that the appellant was afforded procedural fairness by the primary Judge at all times in the primary proceeding, as was demonstrated by the facts that an interpreter and a copy of the transcript of the Tribunal proceedings were made available to the appellant.
3. In the context of the ground referable to “taking into account the issues that have been raised”, the first respondent submitted it was erroneous for the appellant to contend that the primary Judge had failed to address all the issues before his Honour. The first respondent further contended that the three grounds of review before the primary Judge were clearly addressed in the primary decision.

# consideration

1. It is trite law that a court cannot engage in merits review of the decision of a delegate of the first respondent not to grant a particular visa to an individual. The Court’s role in reviewing an administrative decision such as that in this proceeding is a limited one: *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17 at [26] (per Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ). This limited role of a court in reviewing the exercise of an administrative discretion must constantly be borne in mind: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40 (per Mason J).
2. It is for an appellant to present evidence in support of their submissions and claims, rather than the role of the Tribunal to engage in an inquisitorial process to obtain evidence on which the appellant can rely: *Minister for Immigration and Citizenship v SZNVW and Anor* (2010) 183 FCR 575 at 586 per Keane CJ, 588 per Emmett J; [2010] FCAFC 41 at [36] and [49]; *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429 at 436; [2009] HCA 39 at [25].
3. For the reasons that follow the appellant’s appeal should be dismissed.
4. First, and as in the Court below, the appellant in his submissions appears to conflate judicial review and merits review. It is not open to this Court to examine the validity of the documents on which the appellant relied before the Tribunal to establish that he was at risk of harm in the event that he returned to Pakistan. To do so would be to engage in a merits review of the appellant’s protection visa application, which is entirely impermissible.
5. Second, the appellant has failed to substantiate his claims that he was not afforded procedural fairness by the primary Judge and/or the Tribunal. The appellant has not provided any cogent or convincing evidence in support of this submissions. Indeed, having read the primary decision in full, as well as the reasons of the Tribunal, I can identify no factor that suggests that the appellant was, at any point, denied procedural fairness.
6. Third, the appellant’s contention that the primary Judge delivered his Honour’s judgment without taking into account the “issues raised” by the appellant is not persuasive. Despite the appellant not filing written submissions in the primary proceeding, the primary Judge outlined the appellant’s oral submissions at [19]-[23] of the primary decision. Each and every one of those submissions was then addressed in turn at [22]-[24] of the primary decision. It follows that these submissions were adequately addressed by the primary Judge.
7. Fourth, it was for the appellant to provide evidence in support of his submissions before the Tribunal and the primary Judge. It was for the appellant to substantiate his claims referable to his membership of SSI, and any risk of harm this would pose from the TTP should the appellant return to Pakistan. It was not for the Tribunal to make enquiries to ascertain the threat of harm the appellant may face if he returns to Pakistan.

# conclusion

1. For the reasons I have outlined I would dismiss the appeal.
2. It is appropriate that the appellant pay the first respondent’s costs of and incidental to the appeal, such costs to be taxed if not otherwise agreed.

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| I certify that the preceding twenty-six (26) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Collier. |

Associate:

Dated: 22 November 2022