Federal Court of Australia

BUB18 v Minister for Immigration, Citizenship and Multicultural Affairs [2023] FCA 212

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| Appeal from: | *BUB18 and Anor v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs and Anor* [2020] FCCA 395 |
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| File number: |  |
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| Judgment of: | **NICHOLAS J** |
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| Date of judgment: | 13 March 2023 |
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| Legislation: | *Migration Act 1958* (Cth) s 424A |
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| Cases cited: | *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609 |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: |  |
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| Number of paragraphs: | 27 |
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| Date of hearing: | 13 March 2023 |
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| Counsel for the Appellants: | The first appellant appeared in person with the assistance of an interpreter and on behalf of the second appellant |
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| Solicitor for the First Respondent: | Ms A Wong of Mills Oakley |
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| Counsel for the Second Respondent: | The second respondent submitted save as to costs |

ORDERS

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|  | | NSD 344 of 2020 |
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| BETWEEN: | BUB18  First Appellant  BUC18  Second Appellant | |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| order made by: | NICHOLAS J |
| DATE OF ORDER: | 13 March 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 appellants pay the first respondent’s costs of the appeal as taxed or agreed.

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

REASONS FOR JUDGMENT

NICHOLAS J:

1. Before the Court is an appeal from a judgment of a judge of the Federal Circuit Court of Australia (as it then was) delivered on 9 March 2020. By her judgment the primary judge dismissed the appellants’ application for judicial review of a decision of the second respondent (“the Tribunal”) affirming the delegate’s decision of 21 October 2015 refusing to grant the appellants protection visas. The decision of the Tribunal was given on 16 March 2018.
2. The second appellant is the first appellant’s wife. She did not make any claims of her own at the time of lodging her application for a protection visa. Her claims were, at least originally, wholly dependent on those of the first appellant.
3. Before the Tribunal the appellants were represented by a registered migration agent.
4. The appellants both appeared at the hearing before the primary judge although it appears that submissions made to her Honour on their behalf were made by the first appellant only. On the hearing of the appeal, I gave the first appellant leave to make submissions on both his own behalf and the second appellant. I was informed that the second appellant was indisposed and unable to attend the hearing of the appeal due to a medical condition but that she was content for the first appellant to represent her.
5. The appellants arrived in Australia from China on 12 May 2014 as holders of Subclass 600 Visitor visas that were valid until 12 August 2014. On 11 August 2014 the appellants applied for protection visas. The claims made in support of their application for protection visas were based on allegations that the first appellant had been mistreated and tortured by police in China in early 2014, after he provided assistance to another person who, together with her husband, had been involved in collecting evidence of government corruption.
6. The first appellant claimed he was taken into custody where he was mistreated and tortured by the police before being transferred to a detention centre from which he was released only after the second appellant arranged for a bribe to be paid. The first appellant alleged that, following his release, he was threatened and beaten by the “black society” who were employed by corrupt officials or their families. He claimed that it would be impossible for him to survive in China and that he therefore decided to go overseas. It was only during the course of his interview by the delegate that the first appellant suggested – towards the very end of the interview – that he was now attending Church and that it was possible that he may get baptised in August 2015.
7. The Tribunal summarised the first appellant’s claims in detail. In its reasons the Tribunal referred to aspects of the first appellant’s evidence which it regarded as implausible including, in particular, his claim that the Chinese authorities continued to harass him after his release from detention because they suspected that important information relating to corruption had been left with him. Similarly, the Tribunal found evidence given by the first appellant in relation to the police having visited and searched his house while he was in detention as implausible. In its reasons the Tribunal referred to various inconsistencies in the appellants’ evidence in relation to these matters.
8. The Tribunal also referred to evidence given by the first appellant concerning injuries suffered by him whilst detained. He referred in his evidence to injuries to his fingers and stomach pain. When asked whether he suffered any other injuries he informed the Tribunal that he had suffered a broken left leg. The Tribunal asked the second appellant what injuries her husband had suffered as a result of being detained. She referred to injuries to his hands, fingers and nails and that “the skin on his leg was broken”. The Tribunal considered that evidence given by the first appellant as to a broken left leg was implausible.
9. The Tribunal also drew attention to evidence the first appellant gave at the hearing in which he alleged he was “beaten by gangs”. He asserted that these beatings occurred on five or six occasions, that when he contacted the police they asserted that he was the “bad guy”, and that they took him to the police station and beat him. The Tribunal’s reasons record that the first appellant could not explain why he did not raise these claims in his protection visa application.
10. The first appellant also gave evidence to the Tribunal that the gangs would hang around near his son’s school and threaten his son. According to the Tribunal’s reasons, it asked the first appellant why, in those circumstances, he and his wife left his children in China, without either their mother or father to protect them. He told the Tribunal that when the gangs were beating him they told him that if did not escape they would kill him first. The Tribunal’s reasons record that it found this evidence implausible and did not accept it.
11. There are other matters relied on by the Tribunal which, according to its reasons, negatively affected its assessment of the appellants’ credibility. These include matters relating to a delay in the first appellant’s departure from China (following the grant of the visitor visas), the appellants’ delay in applying for a protection visa, and the circumstances surrounding his departure from China. The Tribunal also referred to the appellants’ failure to make any claims in relation to their religion in their application for protection visas. The Tribunal noted that they were represented at the time those applications were lodged by the migration agent who acted for them at the hearing before the Tribunal.
12. The Tribunal also referred to various documents submitted by the appellants in support of their application. These documents included letters of support from members of a Congregational Church and Certificates of Baptism and Church Membership. With regard to these documents the Tribunal said in its reasons at [85]:

The Tribunal has had regard to the letters of support from members of the Padstow Chinese Congregational Church and the Certificates of Baptism and Church Membership. The Tribunal accepts that the authors of these letters are well-meaning and wish to be of support to the applicants. However, there are inconsistencies in their evidence in relation to when the first named applicant started attending Church in Australia. The evidence in relation to the Church studies, training course and Bible study classes the first named applicant attended is inconsistent with his knowledge of the Bible. Their evidence has not been tested and the Tribunal places little weight on this evidence.

1. The Tribunal accepted that the first appellant was born in China, that he was married to the second appellant, and that they have two children who remain in China. It did not accept the first appellant’s claims concerning their involvement with persons engaged in exposing corruption, or that the first appellant provided refuge or assistance to those persons. Nor did it accept that the first appellant “left China for any of the reasons claimed or that he is of adverse interest to the Chinese authorities or any gangs”. The Tribunal said that it did not accept that the first appellant fears returning to China for any of the reasons claimed.
2. The Tribunal accepted that the appellants had attended services and church related activities at a church in Sydney and that they have been baptised. However, the Tribunal did not accept they were genuine converts to Christianity or that they will seek to practice Christianity upon their return to China. The Tribunal did not accept that either of the appellants would be at risk of serious harm or significant harm for reasons of their religion if they were returned to China now or in the foreseeable future.
3. The grounds relied on by the appellants before the primary judge were set out by her Honour in her reasons at [34]:

The first applicant confirmed that he relied on the grounds contained in an Application filed on 9 April 2018 as follows:

1. The Tribunal failed to give me a fair chance to comment on the information that the Tribunal used as a part of reasons to affirm the Department’s decision. For example, the Tribunal failed to give genuine opportunity to common on the information obtained from the Department interview. Although the Tribunal did mention it at the hearing. I indicated the Tribunal clearly that I did not understand the question. I believe that the Tribunal should provide such information to me in writing if she really intended to give me a fair chance.

2. The Tribunal made her finding significantly based on her own assumption or imagination. For example, the Tribunal made its finding regarding XZ’s trip to me. The Tribunal obviously has tong bias against me. She has never ever taken genuine attempts to consider my evidence given at the Tribunal as well as my post hearing submission. Furthermore, the Tribunal repeatedly used the words of “the Tribunal is of the view” or “the Tribunal would expect” in her decision. I believe that it is the evidence that the Tribunal made its finding solely based on her own prejudice against me.

3. The Tribunal fairly consider that my wife and I are Christians. Particularly, my wife is a genuine and very devout Christian. She has played an active role at Padstow Chinese Congregation Church. Particularly, our application has widely supported by our church members. Unfortunately, the Tribunal failed to consider the written evidence by the Church and the Church members.

(Errors in original)

1. The primary judge dealt with each of these grounds.
2. As to ground 1, the primary judge found that s 424A(1) of the *Migration Act 1958* (Cth) (“the Act”) was not enlivened but that, in any event, the information referred to in ground 1 was merely the Tribunal’s views as to the implausibility of the first appellant’s evidence, inconsistencies in his evidence, doubts about the veracity of the first appellant’s evidence, and the absence of evidence. Section 424A of the Act did not apply to such information: *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609. As the plurality said in that case at [18]:

Thirdly and conversely, if the reason why the tribunal affirmed the decision under review was the tribunal’s disbelief of the appellants’ evidence arising from inconsistencies therein, it is difficult to see how such disbelief could be characterised as constituting “information” within the meaning of para (a) of s 424A(1). Again, if the tribunal affirmed the decision because even the best view of the appellants’ evidence failed to disclose a Convention nexus, it is hard to see how such a failure can constitute “information”. Finn and Stone JJ correctly observed in *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* [(2004) 206 ALR 471 at 477] that the word “information”:

… does not encompass the tribunal’s subjective appraisals, thought processes or determinations … nor does it extend to identified gaps, defects or lack of detail or specificity in evidence or to conclusions arrived at by the tribunal in weighing up the evidence by reference to those gaps, etc …

If the contrary were true, s 424A would in effect oblige the tribunal to give advance written notice not merely of its reasons but of each step in its prospective reasoning process. However broadly “information” be defined, its meaning in this context is related to the existence of evidentiary material or documentation, not the existence of doubts, inconsistencies or the absence of evidence. The appellants were thus correct to concede that the relevant “information” was not to be found in inconsistencies or disbelief, as opposed to the text of the statutory declaration itself.

(Footnote omitted)

1. As to ground 2, the primary judge drew attention to the absence of any material which would support the appellants’ allegation that the Tribunal was biased against them. There was no evidence before her Honour (eg. a transcript of the hearing) which would support the allegation of bias and, as her Honour stated in her reasons, it is a rare and exceptional case where bias can be demonstrated solely from the published reasons for decision. In particular, the mere fact that the Tribunal makes adverse findings in respect of the first appellant did not give rise to an inference of bias or, by itself, suggest that the Tribunal approached its task other than with a mind open to persuasion. Nor did the language used by the Tribunal as identified in ground 2 support any such conclusion. Her Honour found that there was nothing in the reasons of the Tribunal to demonstrate bias on its part.
2. With regard to ground 3, the primary judge noted that the Tribunal considered the documentary material relied upon by the appellants and noted that the Tribunal was not under any obligation to make its own enquiries with respect to the appellants’ claims including in relation to that material. Her Honour therefore rejected ground 3.
3. With regard to the Tribunal’s consideration of the appellants’ claims that they were Christians, the Tribunal dealt with this in some detail at [60]-[82] of its reasons. There were many issues raised by the Tribunal arising out of the first appellant’s evidence with respect to this matter and its rejection of the first appellant’s claim that he was a genuine convert to Christianity was based on much more than his lack of familiarity with the Bible. In any event, the Tribunal’s evaluation of the first appellant’s understanding of the Bible was based on more than just “a few questions” put to him at the hearing: see esp. [74] of the Tribunal’s reasons which suggest he was asked at least six questions most of which might reasonably be regarded as elementary. The Tribunal’s conclusion that he had very little knowledge of the Bible was plainly open.
4. At the hearing before me the appellants relied on a notice of appeal that was essentially directed to the same matters relied on by the primary judge. There was no attempt to identify any error on the primary judge’s part. Moreover, the oral submissions made by the first appellant in support of the appeal (no written submissions were filed) were directed to the merits of the appellants’ protection visa applications and did no more than contest the correctness of the Tribunal’s findings and, in particular, the Tribunal’s conclusion that the first appellant had fabricated his claims.
5. The primary judge drew the following conclusions at [72]-[75]:

[72] A fair reading of the Tribunal’s decision record makes clear that the Tribunal understood the claims being made by the applicants; explored those claims with the applicants at a hearing; and, had regard to all material provided in support. The Tribunal put to the applicants matters of concern it had about their evidence and noted their responses. The Tribunal identified independent country information to which it had regard. The Tribunal also put to the first applicant independent country information before it and invited the first applicant to comment upon it.

[73] The Tribunal then made findings based on the evidence and material before it. Those findings of fact were open to the Tribunal on the evidence and material before it and for the reasons it gave. A fair reading of the Tribunal’s decision record makes clear that the Tribunal reached conclusions based on the findings made by it and to which it applied the correct law.

[74] In the circumstances, the Tribunal complied with its obligations under the statutory regime in the making of its decision, including the conduct of its review.

[75] The Tribunal’s decision is not affected by jurisdictional error and is therefore a privative clause decision. Accordingly, pursuant to s.474 of the Act, this Court has no power to interfere.

1. Her Honour reached those conclusions after what was in my view a careful and detailed analysis of the appellants’ grounds of review. Her Honour’s conclusions were open and, in my view, correct.
2. In the course of his submissions in reply, the first appellant suggested the appellants had been denied a fair hearing before the primary judge. In effect he contended that the appellants were not given any reasonable opportunity to make submissions to her Honour. There is no evidence to support that allegation and it is not one that is raised in the appellants’ notice of appeal. In circumstances where it would have been open to the Minister to call evidence concerning the hearing before the primary judge, it would not be appropriate to permit the appellants to rely on any ground of appeal based on any alleged unfairness of the kind to which he referred.
3. In any event, I should make clear that there is nothing in the material before me that would lend any support to the appellants’ complaint. In particular, it is apparent from the primary judge’s own reasons that her Honour gave careful attention to the matters relied on by the appellants in support of their application for review. The first appellant did not identify anything in his submissions which would suggest that there was anything relevant to their application for review that her Honour overlooked or failed to consider.
4. In my opinion the primary judge’s judgment was correct. Accordingly, the appeal must be dismissed. The appellants must pay the first respondent’s costs of the appeal as taxed or agreed.
5. Orders accordingly.

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| I certify that the preceding twenty-seven (27) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Nicholas. |

Associate:

Dated: 13 March 2023