FEDERAL CIRCUIT COURT OF AUSTRALIA

AMA16 v Minister for Immigration and Border Protection and Others

[2017] FCCA 303

Judge Riley

17 November, 2 December 2016, 23 February 2017

Administrative Law — Jurisdictional error — Immigration Assessment Authority — Whether common law principles of procedural fairness apply to Immigration Assessment Authority — Whether common law natural justice hearing rule applies to Immigration Assessment Authority.

Immigration — Immigration Assessment Authority — Fast track reviewable decision — Where material provided by Secretary to Immigration Assessment Authority — Whether Secretary required to provide material — Whether material relevant to review — Whether material prejudicial to applicant — Whether decision by Immigration Assessment Authority affected by apprehended bias — Migration Act 1958 (Cth), s 473CB.

Section 473CB(1) of the *Migration Act 1958* (Cth) (the Act) listed material that the Secretary was required to give the Immigration Assessment Authority (the Authority) in respect of each fast track reviewable decision referred to it. The Secretary was required to give the Authority material in the Secretary's possession or control that the Secretary considered relevant to the review.

The applicant applied for review of a fast track decision made by the Authority, whereby the Authority affirmed a decision of the Minister's delegate not to grant the applicant a protection visa. Prior to the Authority's decision, the Secretary provided the Authority with departmental communications explaining that the applicant had been charged with indecent assault.

The applicant submitted that the Authority's decision was affected by jurisdictional error because the Authority affirmed the delegate's decision on a matter that was not an issue before the delegate, and because the Authority did not afford the applicant an opportunity to comment upon material that the Authority had before it. he applicant also submitted that the Authority's decision was affected by apprehended bias because the Authority considered departmental communications that did not need to be provided to it under s 473CB(1) of the Act, were irrelevant to the review, and were significantly prejudicial to the applicant.

Held, allowing the application: (1) The common law natural justice hearing rule does not apply to reviews by the Authority. [18]-[20], [25], [35]

(2) The rules of evidence do not apply to the Authority. For the purposes of non-judicial decision-makers, evidence that is "inadmissible" can be understood as meaning evidence that is irrelevant. [39]

Webb v The Queen (1994) 181 CLR 41, distinguished.

(3) The Authority's decision was affected by a reasonable apprehension of bias. [40]

Webb v The Queen (1994) 181 CLR 41, considered.

Cases Cited

AMA16 v Minister for Immigration and Border Protection and Ors (2016) 310 FLR 456.

Annetts v McCann (1990) 170 CLR 596.

Plaintiff M61/2010E v Commonwealth (Offshore Processing Case) (2010) 243 CLR 319.

SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152.

Webb v The Queen (1994) 181 CLR 41.

Application

L De Ferrari, for the applicant.

N Wood, for the first respondent.

Cur adv vult

23 February 2017

Judge Riley.

Introduction

1 This is an application for review of a fast track decision made by the Immigration Assessment Authority (the Authority). In that decision, the Authority affirmed a decision of a delegate of the Minister not to grant the applicant a protection visa.

2 The applicant sought an extension of time in which to file the application to this court. The first respondent consented to the extension of time being granted. An order to that effect was made by a registrar on 29 March 2016.

3 A preliminary issue arose in this case concerning the Minister's claim for public interest immunity in respect of certain documents. The court provided a judgment on that issue in the matter of *AMA16 v Minister for Immigration and Border Protection and Ors* (2016) 310 FLR 456. The effect of that decision was that the court determined that it was appropriate for the court to look at the documents in respect of which the claim for public interest immunity was made. Having done that, the court indicated to the parties that the documents did not appear to give rise to a *sur place* claim, as the applicant had feared. The court further indicated that it proposed to release the documents to the applicant's legal advisers on appropriate undertakings so that the legal advisers could determine themselves whether the documents gave rise to a *sur place* claim. At that point, the Minister said that he would seek an adjournment to consider an appeal. The matter was stood down briefly. Upon resumption of the hearing, the parties advised the court that the matter had resolved and the applicant did not press for the release of the documents in respect of which public interest immunity had been claimed.

Overview of fast track provisions

4 It was common ground that the applicant is a "fast track applicant" and the delegate's decision was a "fast track decision", as those terms are defined in

s 5(1) of the *Migration Act 1958* (the Act). Consequently, the delegate's decision was a "fast track reviewable decision", as defined in s 473BB of the Act, and Part 7AA of the Act applied to the review of the applicant's protection visa application.

5 By s 473JA of the Act, the Authority is established within the Migration and Refugee Division of the Administrative Appeals Tribunal.

6 Any fast track reviewable decision made by a delegate is referred by the Minister to the Authority by virtue of s 473CA of the Act. The delegate's decision is required to be reviewed by the Authority without the applicant making any application for review.

7 When a matter is referred to the Authority, under s 473CB of the Act, the Secretary of the Minister's department must give the Authority review materials which include:

a) the delegate's decision;
b) material provided to the delegate by the applicant; and
c) any other material the Secretary considers to be relevant.

8 The Authority conducts reviews "on the papers": s 473DB of the Act. In general, the Authority is not permitted to accept or request new information, and is not permitted to interview the applicant: s 473DB(1) of the Act. However, under s 473DD of the Act, if the Authority:

a) is satisfied that there are exceptional circumstances that justify it considering new information; *and*
b) if the applicant satisfies the Authority that the new information:
    i) could not have been provided to the delegate; *or*
    ii) is credible personal information that was not previously known and might have made a difference to the delegate's decision,

the Authority may consider the new information.

9 Pursuant to s 473DA of the Act, Division 3 of Part 7AA of the Act (that is, s 473DA to s 473DF of the Act) and s 473GA and s 473GB are taken to be an exhaustive statement of the natural justice hearing rule in relation to reviews by the Authority.

10 On review, the Authority can affirm the delegate's decision, or remit the matter for reconsideration with directions from the Authority: s 473CC of the Act.

The applicant's claims

11 The applicant is a citizen of Iran. He claimed that:

a) he had been a member of the Basij but had fallen out with his commander because of the way the Basij treated people;
b) he told his commander that a good Imam, religion or god would not require such actions;
c) a few days later, the commander warned the applicant to stop making such remarks and slapped him;
d) the applicant replied with derogatory statements about the Basij, the Imam, Islam, the commander and Iran;
e) the following day, some men on a motor bike told the applicant's mother they would kill the applicant;
f) the applicant fled Iran;
g) his mother moved to Qeshm Island because of what had happened to the applicant; and

h) the applicant was at risk of being imprisoned, tortured or killed by the Iranian authorities.

The delegate's decision

12 The delegate found that the applicant's claims lacked credibility. The delegate did not accept that the applicant had been a member of the Basij, or had insulted Islam, or had been threatened by the authorities or would in the future express any dissident beliefs that would attract persecution.

The Authority's decision

13 The Authority accepted some of the applicant's claims, including that he had been an ordinary member of the Basij, and had made derogatory comments to his commander about the commander, the Basij, the Imam, Islam, and Ayatollah Khomeni. The Authority accepted that the commander and other members of the Basij may continue to bear a grudge against the applicant. The Authority accepted that the applicant's mother had moved to Qeshm Island after the applicant's problems with the Basij. However, the Authority did not accept that she moved to Qeshm Island because of the applicant's problems with the Basij. That was largely because of the delay in the mother moving. The Authority found that the applicant was of no ongoing interest to the Basij or other Iranian authorities. The Authority concluded that the applicant did not face a real chance of persecution or significant harm in Iran.

Ground 1

14 The first ground of review in the amended application filed on 5 December 2016 by leave given on 2 December 2016 is:

> The decision of the IAA was affected by jurisdictional error (excess of jurisdiction / denial of natural justice):
>
> Particulars
>
> (a) The IAA's jurisdiction, unless the provisions in Subdiv C of Div 3 of Part 7AA are engaged, is to conduct a review only on the "review material" given to it (sections 473CB and 473CC) (a purely "on the papers" review).
>
> (b) In an "on the papers" review, the IAA has no power (save perhaps for one qualification noted below) to affirm a "fast track reviewable decision" on a matter that was not an issue before the delegate. (The possible qualification is to the extent that such a matter is one in respect of which section 473GB is engaged, but in that case the IAA's discretionary decision not to disclose the information would be reviewable).
>
> (i) Div 3 of Part 7AA is directed to what statutory requirements will apply when the IAA is conducting (or considering conducting) something other than an "on the papers" review.
>
> (ii) Section 473GA(1) is a prohibition on the Secretary, and as such it is irrelevant to the IAA's jurisdiction. The document or information covered by a certificate issued under subsection (2) will never reach the IAA.
>
> (iii) Section 473GB (read with section 473GD) provides for its own procedural fairness requirements of disclosure.
>
> (c) The IAA speculated as to the timing of the most recent interaction between the Basij and the applicant and/or a member of his family (relevantly, his mother).
>
> (d) It was not an issue before the delegate that the move of the applicant's

mother to Qeshm Island in 2014 might have been for reasons unrelated to the Basij's interactions with her (the Basij still seeking the applicant and making threats to kill him).

(e) Had it been an issue before the delegate whether his mother's move to Qeshm Island in 2014 was in connection with the Basij still seeking the applicant, the applicant would have said that one of the occasions when his mother told him that the Basij had come to her house looking for him was in 2014.

(f) If, contrary to b. above, the IAA has power to affirm a "fast track reviewable decision" on a matter that was not an issue before the original decision maker, the Migration Act does not exclude the common law obligation of the IAA to:

(i) identify that issue to the applicant; and

(ii) provide the applicant with an opportunity to comment.

15 Basically, this ground of review was that:

a) it was not an issue before the delegate that the applicant's mother had moved to Qeshm Island for reasons unconnected with the Basij;

b) therefore, it was a denial of procedural fairness for the Authority to affirm the delegate's decision on that basis;

c) alternatively, if the Authority proposed to affirm the delegate's decision on that basis, the Authority had to alert the applicant to the issue and seek his comment.

16 This ground is misconceived. The delegate did not accept that the applicant had been a member of the Basij or that any of the things he had said the Basij had done to him had happened. Therefore, implicitly, the delegate did not accept that the applicant's mother had moved to Qeshm Island because of "what had happened" to the applicant. Everything that the applicant had claimed about the Basij was in issue before the Authority.

17 It was open to the Authority, as it would have been open to the Tribunal, to accept some of the applicant's claims about the Basij, even though the delegate had accepted none of them. Because all of the applicant's claims about the Basij were in issue before the Authority, the principles of common law procedural fairness, if they applied, would not have required the Authority to alert the applicant to the issue about his mother moving to Qeshm Island for reasons unrelated to the applicant's treatment by the Basij.

18 In any event, the principles of common law procedural fairness do not apply to reviews by the Authority. Section 473DA(1) of the Act provides that:

> This Division, together with sections 473GA and 473GB, is taken to be an exhaustive statement of the requirements of the natural justice hearing rule *in relation to reviews conducted by the Immigration Assessment Authority*. (emphasis added)

19 That provision is relevantly different from s 422B(1) of the Act, which applies to the Tribunal and which provides that:

> This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule *in relation to the matters it deals with*. (Emphasis added.)

20 Section 473DA(1) of the Act means that Division 3 of Part 7AA, s 473GA and s 473GB of the Act state the totality of the requirements of the natural justice hearing rule in relation to reviews conducted by the Authority. It is open

to the Parliament, "by plain words of necessary intendment",[1] to limit or exclude entirely the requirements of the natural justice hearing rule. In the present case, the Parliament has, by plain words of necessary intendment, significantly limited the natural justice hearing rule.

21 There is no equivalent of s 425 of the Act in Division 3 of Part 7AA of the Act or in s 473GA or s 473GB of the Act. Consequently, the requirements of the natural justice hearing rule identified in cases such as *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 do not apply.

22 This ground is not made out.

Ground 2

23 The second ground of review in the amended application filed on 5 December 2016 by leave given on 2 December 2016 is:

> The decision of the IAA was affected by jurisdictional error (excess of jurisdiction / denial of natural justice):
>
> Particulars
>
> (a) The IAA made a decision adverse to the applicant, without disclosing to him that it had received legal advice and certain departmental communications from the Secretary as part of the "review material".
>
> (b) The Secretary had no power to give legal advice to the IAA as part of the "review material" (see ground 3 below).
>
> (c) The IAA was under the duty to consider the "review material". Review of the "review material" that [had] been provided by the Secretary was the precise extent of the IAA's jurisdiction, duty and power.
>
> (d) The Secretary's provision of "review material" in excess of power necessarily vitiated the IAA's decision.
>
> (e) Provision of legal advice by the Secretary to the IAA, an independent review body, constitutes waiver of any client legal privilege of the Minister.
>
> (f) The legal advice and departmental communications were material given to the IAA by a person other than the applicant that could not be dismissed as not relevant, not credible or not significant and were potentially adverse.
>
> (g) The Migration Act does not exclude the common law obligation on the IAA of affording an opportunity to rebut, qualify or comment upon material of the kind identified at f. above.
>
> (h) If, contrary to g. above, the common law obligation there referred is excluded, the IAA's decision is affected by apprehended bias. A fair minded and informed observer might conclude that the IAA might not be impartial or approach the issues with an open mind, when it conducts a review "on the papers" after having been provided, by a person within the Minister's department, with undisclosed (and undisclosable, even as to the "gist", under the fair hearing rule) legal advice and departmental communications considered relevant to whether the Minister's decision will be affirmed.

24 The legal advice and related communications are contained in exhibit 2. Privilege has been waived. The documents consist of communications concerning the correct contact address for the applicant, where he had given the department his contact address but had subsequently been moved to Christmas

1 *Annetts v McCann* (1990) 170 CLR 596 at 598. Cited in *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319.

Island. The documents were not relevant to any issue that the Authority had to decide, except where to send communications to the applicant. There is no allegation in this proceeding that the Authority, or the department, sent communications to the applicant incorrectly.

25 There was no breach of the requirements of the common law natural justice hearing rule, in relation to the legal advice, because the common law natural justice hearing rule does not apply to reviews by the Authority.

26 The departmental communications are contained in CB242 to CB248. They consist of internal emails saying that the applicant had been charged with the indecent assault of a woman on 17 July 2015, he had been issued with a notice of intention to cancel his bridging visa and he had been taken into immigration detention. The Authority made no mention of the departmental communications in its reasons for decision.

27 Chelsea Clark affirmed an affidavit on 15 July 2016 to which she exhibited evidence showing that, after the Authority's decision, the indecent assault charge against the applicant was dismissed.[2] The first respondent objected to that affidavit being accepted into evidence, on the basis that the evidence about the outcome of the charge was not before the Authority and was therefore irrelevant to the question of whether the Authority made a jurisdictional error.

28 In normal circumstances, I would accept that the affidavit affirmed by Chelsea Clark on 15 July 2016 would be irrelevant and should not be admitted into evidence. However, it corrects an allegation against the applicant that is so prejudicial that it cannot be allowed to stand. Therefore, the affidavit affirmed by Chelsea Clark on 15 July 2016 is admitted into evidence.

29 It was common ground that the departmental communications were provided by the Secretary to the Authority. The first respondent submitted that the court should infer that the departmental communications were before the delegate. The departmental communications were dated 3 July 2015 and 26 August 2015. The delegate's decision was dated 3 December 2015. The first respondent's argument was essentially that, because the departmental communications preceded the delegate's decision, the delegate presumably had them.

30 I am not prepared to draw that inference. Whether or not the departmental communications were before the delegate is a matter that the first respondent could have ascertained and addressed in an affidavit. It does not seem to me to be proper to fill gaps in the evidence adduced by the first respondent with an inference that is based on nothing more than a timeline.

31 The first respondent also submitted that the court should infer that the departmental communications were provided to the Authority under s 473CB of the Act. Section 473CB of the Act provided as follows:

> Material to be provided to Immigration Assessment Authority
>
> (1) The Secretary must give to the Immigration Assessment Authority the following material (*review material*) in respect of each fast track reviewable decision referred to the Authority under section 473CA:
>
> (a) a statement that:
>
> (i) sets out the findings of fact made by the person who made the decision; and
>
> (ii) refers to the evidence on which those findings were based; and

2 Exhibit 1 in this proceeding. Affidavit filed in MLG1508/2016.

(iii) gives the reasons for the decision;

(b) material provided by the referred applicant to the person making the decision before the decision was made;

(c) any other material that is in the Secretary's possession or control and is considered by the Secretary (at the time the decision is referred to the Authority) to be relevant to the review; (emphasis added)

(d) the following details:

(i) the last address for service provided to the Minister by the referred applicant for the purposes of receiving documents;

(ii) the last residential or business address provided to the Minister by the referred applicant for the purposes of receiving documents;

(iii) the last fax number, email address or other electronic address provided to the Minister by the referred applicant for the purposes of receiving documents;

(iv) if an address or fax number mentioned in subparagraph (i), (ii) or (iii) has not been provided to the Minister by the referred applicant, or if the Minister reasonably believes that the last such address or number provided to the Minister is no longer correct—such an address or number (if any) that the Minister reasonably believes to be correct at the time the decision is referred to the Authority;

(v) if the referred applicant is a minor—the last address or fax number of a kind mentioned in subparagraph (i), (ii), (iii) or (iv) (if any) for a carer of the minor.

(2) The Secretary must give the review material to the Immigration Assessment Authority at the same time as the, or as soon as reasonably practicable after, the decision is referred to the Authority.

32 The departmental communications were not:

a) part of the delegate's statement referred to in s 473CB(1)(a) of the Act;

b) provided by the applicant to the delegate as described in s 473CB(1)(b) of the Act; or

c) details of the type referred to in s 473CB(1)(d) of the Act.

33 That leaves s 473CB(1)(c) of the Act, being material that the Secretary considered, at the time, to be relevant to the review. The first respondent did not suggest that the departmental communications were actually relevant to the review. Departmental communications about the applicant being charged with indecent assault in Australia could not have been relevant to any issue the Authority had to decide. The fact that the applicant was charged with indecent assault was not probative of whether the applicant was truthful, or whether he faced serious or significant harm in Iran. However, the first respondent submitted that the court should infer that the Secretary, at the time, considered the departmental communications to be relevant.

34 If the Secretary had considered, at the time, that the departmental communications about the applicant being charged with indecent assault were relevant to the review, the Secretary could have sworn or affirmed an affidavit to that effect. He did not do so. There was no explanation for that omission. There was also no explanation for how the departmental communications could have been relevant to the review. In these circumstances, I am not prepared to infer

that the Secretary did consider the departmental communications to be relevant to the review. Consequently, the Secretary provided the departmental communications to the Authority without any statutory warrant.

35 The departmental communications were credible and adverse but not relevant to the questions that the Authority was required to consider in assessing whether Australia owed protection obligations to the applicant. However, as discussed above, there was nothing in Division 3 of Part 7AA of the Act that required the Authority to disclose the departmental communications to the applicant and seek his comments, because the natural justice hearing rule did not apply.

36 Nevertheless, the applicant argued that the departmental communications were significantly prejudicial, and a fully informed, fair minded, lay observer might well consider that the Authority might not bring an impartial mind to the question of whether the delegate's decision should be affirmed. It was common ground that the question of apprehended bias was not covered by the substantial exclusion of the natural justice hearing rule.

37 The first respondent relied on *Webb v The Queen* (1994) 181 CLR 41 at 74 where Deane J explained the four main categories of case where a judge is disqualified for reasonable apprehension of bias. It is only the fourth category that could apply in the present case. The fourth category concerns a judge having extraneous information such as where the judge has "knowledge of some prejudicial but inadmissible fact or circumstance", for example, from hearing a different but related case.

38 The first respondent said that, assuming that the departmental communications were prejudicial, they were not inadmissible. That was said to be because they were part of the review material and therefore the Authority was obliged by s 473DB of the Act to consider them. However, as discussed above, the departmental communications were not part of the review material identified in s 473CB(1) of the Act, and therefore the Secretary was not required to provide them to the Authority.

39 *Webb & Hay v R* dealt with courts rather than the Authority. Before the Authority, evidence is not inadmissible as such, as the rules of evidence do not apply. For the purposes of non-judicial decision-makers, "inadmissible" can be understood as meaning "irrelevant".

40 In the present case, the departmental communications concerning the applicant being charged with indecent assault were highly prejudicial and irrelevant. It follows, on normal principles, that the decision of the Authority was affected by a reasonable apprehension of bias. The matter must be remitted for this reason.

Ground 3

41 The third ground of review in the amended application filed on 5 December 2016 by leave given on 2 December 2016 is:

> The decision of the Secretary was affected by jurisdictional error (excess of jurisdiction):
>
> Particulars
>
> (a) The Secretary included, as part of the review material he gave to the IAA, legal advice.
>
> (a) The Secretary has no power, under section 473CB, to give legal advice to the IAA, an independent review body, in relation to the applicant's referred "fast track reviewable decision".

42 Again, the only part of s 473CB of the Act that might cover legal advice is s 473CB(1)(c) of the Act. That provision concerns material held by the Secretary that he or she considers, at the time, to be relevant to the review. The first respondent asked the court to infer that the Secretary considered that the legal advice was relevant to the review. I am prepared to make that inference. The legal advice was relevant to the review because it concerned how the Authority should communicate with the applicant. Because the legal advice was relevant to the review, it is a small step to infer that the Secretary considered it to be relevant.

43 Consequently, the Secretary was authorised by s 473CB(1)(c) of the Act to give the legal advice to the Authority. There was no jurisdictional error in the Secretary doing so in this particular case. This ground is not made out.

Conclusion

44 As one of the applicant's grounds has been made out, the decision of the Authority must be set aside with costs. I will hear the parties on the form of the orders.

Orders accordingly

Solicitors for the applicant: *Victoria Legal Aid*.

Solicitors for the respondents: *Clayton Utz*.

LAUREN BOURKE