FEDERAL COURT OF AUSTRALIA

BJB16 v Minister for Immigration and Border Protection and Another

[2018] FCAFC 49

Kenny, McKerracher and White JJ

27 February, 29 March 2018

Immigration — Visas — Protection visa — Bogus documents — Where delegate found documents to be genuine because there was insufficient evidence to conclude that they were "bogus" — Where Immigration Assessment Authority gave same documents no weight because of their questionable authenticity — Whether Authority had power to make finding as to authenticity of documents — Migration Act 1958 (Cth), ss 5(1), 91W(2).

Administrative Law — Natural justice — Hearing rule — Meaningful opportunity to present case — Where appellant provided evidence of psychological illness to Immigration Assessment Authority — Where information was not before delegate — Where information described illness but appellant did not give evidence of impact of illness — Whether delegate denied appellant meaningful opportunity to present case.

The appellant applied for a protection visa. He provided a number of documents in support of his application. A delegate of the respondent had concerns as to the authenticity of the documents. But she found them to be genuine on the basis that there was insufficient evidence to conclude that they were "bogus" within the meaning of s 5(1) of the *Migration Act 1958* (Cth). Had the documents been "bogus", the delegate would have been obliged by s 91W(2)(b) to refuse the application. Not being so obliged, the delegate nevertheless refused the application, as she was not satisfied that the appellant had given credible evidence.

The appellant was then referred for review to the Immigration Assessment Authority. He sought to rely upon new information comprising two reports by a clinical psychologist. The psychologist reported that the appellant suffered from post-traumatic stress disorder, and said that his story would necessarily have been disjointed and out of step with external evidence. The Authority accepted the new information but nevertheless affirmed the decision made by the delegate. Like the delegate, it doubted the credibility of the appellant, and although it did not find the documents provided by the appellant to be "bogus" within the meaning of s 5(1), it gave those documents no weight because of their questionable authenticity.

The appellant claimed that the delegate had denied him a "meaningful opportunity" to present his case because it did not take steps to cater for his psychological condition. And despite the fact that the Authority did not find the documents to be "bogus" within the meaning of s 5(1), the appellant claimed that

the Authority lacked the power to make a finding as to the authenticity of the documents, which he said could be made only by the respondent or its delegate.

Held: (1) An applicant who asserts that their psychological condition deprived them of a "meaningful opportunity" to present their case must establish that their condition denied them the capacity to recount their experiences, present arguments and understand and respond to questions. [43]

SZMSA v Minister for Immigration and Citizenship [2010] FCA 345; *Minister for Immigration and Citizenship v SZNVW* (2010) 183 FCR 575, applied.

(2) The appellant failed to adduce evidence that he had been unable to participate meaningfully in the interview with the delegate. [48]

(3) The Authority may make findings about the authenticity of a document without engaging the provisions relating to whether or not the document is "bogus" within the meaning of s 5(1). [69]

Appeal against decision of Judge Riethmuller, [2017] FCCA 2367, dismissed.

Cases Cited

BJB16 v Minister for Immigration and Border Protection [2017] FCCA 2367.

BMB16 v Minister for Immigration and Border Protection (2017) 253 FCR 448.

Immigration and Citizenship, Minister for v Li (2013) 249 CLR 332.

Immigration and Citizenship, Minister for v SZNVW (2010) 183 FCR 575.

Immigration and Multicultural Affairs, Minister for v SZFDE (2006) 154 FCR 365.

Immigration and Multicultural and Indigenous Affairs, Minister for v SCAR (2003) 128 FCR 553.

SZMSA v Minister for Immigration and Citizenship [2010] FCA 345.

Appeal

L De Ferrari SC, for the appellant.

N Wood, for the first respondent.

29 March 2018

The Court

1 The appellant, now 40 years old, is a national of Bangladesh. He arrived in Australia by boat on 20 October 2012. The appellant's application for a Temporary Protection (subclass 785) visa (**protection visa**) was rejected by a **delegate** of the **Minister** for Immigration and Border Protection.

2 As the appellant was a "Fast Track Applicant", the Minister then referred the delegate's decision to the Immigration Assessment Authority (**Authority**) in accordance with s 473CA of the *Migration Act 1958* (Cth). By a decision made on 20 May 2016, the Authority affirmed the delegate's decision not to grant the appellant a protection visa.

3 The appellant then sought judicial review of the Authority's decision in the **Federal Circuit Court** of Australia, pursuant to s 476 of the *Migration Act*. That application was unsuccessful: *BJB16 v Minister for Immigration and Border Protection* [2017] FCCA 2367.

4 The appellant now appeals to this Court. The appellant's notice of appeal, filed 31 October 2017, provided four grounds of appeal. It will be necessary to identify those grounds in more detail later. For the present, it is sufficient to note that ground 1 contends that a denial of procedural fairness occurred in the hearing and determination of the appellant's application by the Minister's

delegate, which was not capable of being remedied by the Authority; ground 2 contends that it was legally unreasonable for the Authority in that circumstance not to consider the remittal of the matter to the Minister for further consideration; and ground 3 concerns the Authority's treatment of documents whose genuineness it doubted. The appellant did not pursue the fourth ground.

The factual setting

5 Having regard to the issues raised on the appeal, it is necessary to set out in some detail the claims of the appellant and the way in which they were determined by the delegate and the Authority.

6 On the following bases, the appellant claimed to have a well-founded fear of persecution in Bangladesh and to be at risk of significant harm if returned to Bangladesh. He claimed to have been a member of the Bangladesh Nationalist Party (**BNP**) since 2000 and to have been President of the youth wing in BNP's Bankra Union Branch since 2006. He said that in that capacity, he had been influential in representing the BNP in his village, and the areas surrounding it, and had thereby come to the attention of the opposition Awami League (**AL**). The appellant claimed that members of the AL had sought to induce him to leave the BNP and to join the AL. He had refused to do so. He claimed that on 1 June 2011, he had been attacked by members of the AL, who had inflicted serious injuries resulting in him being hospitalised for 18 days. The appellant further claimed that AL members threatened to kill him if he continued his activities with the BNP.

7 The appellant also claimed that criminal charges had been fabricated against him. In support of that claim, he produced three "First Information Reports" (**FIRs**). The first FIR bore the date 2 August 2011. The informant (**JG**) alleged that the appellant and others unknown had shot and killed her husband on 1 August 2011. An accompanying document appeared to be in the nature of a charge sheet identifying the appellant as the accused in relation to the death of JG's husband.

8 The second FIR bears the date 2 March 2013. In this report, the informant (**NI**) alleged that the appellant had attempted to kill him on (curiously, given the date of the report) 20 June 2013 at 9 pm. NI is referred to as a businessman and as a "Local ledger of the ruling party Awami Leage [sic]".

9 The third FIR bears the date 2 April 2013. NI is shown as the informant on this report also. This FIR too alleges an attempt by the appellant to kill NI but on this occasion on 1 April 2013 at 9 pm. Apart from the dates of the incident reported, the terms of the third FIR appear to be almost identical with those of the second FIR.

10 It will be necessary to return to these documents as they formed the subject of the appellant's third ground of appeal.

The delegate's decision

11 The delegate interviewed the appellant on 17 September 2015. There is a reference in the delegate's reasons to the interview having taken place on 8 September 2015, but this appears to be mistaken. It was not suggested that anything turns on that mistake.

12 The delegate formed an adverse view of the appellant's credibility, saying that his responses "were often lacking in detail and inconsistent". She did not accept:

- that the appellant had "a profile of interest" to the AL or Bangladesh authorities;
- that the appellant was a member or supporter of the BNP or of its youth wing;
- that the appellant had been President of the youth wing of the BNP's Bankra Union Branch;
- that the appellant had been beaten by members of the AL due to his support of the BNP or due to his claimed role as President of the BNP youth wing; and
- that the appellant had been accused of the murder or attempted murder of an AL leader.

13 In forming her view of the appellant's credibility, the delegate took into account the difficulties he had in describing the composition and colours of the BNP flag, his limited ability to recount the "ideologies" of the BNP, his lack of awareness that the BNP was overwhelmingly supported by Muslims and (unlike the AL) was not religiously inclusive, his inability to recall elections which had occurred in Bangladesh during his adulthood in which the BNP had been a significant party (the appellant could remember only one), his inability to recall the outcome of the one election he did recall, and the lack of detail in the account he gave of his own activities in the BNP.

14 In addition, the delegate had some concerns about the genuineness of the FIRs. She referred several documents to the Department's Document Examination Unit (**DEU**) but its findings were "inconclusive". The delegate said:

> I also note the FIRs submitted at the [protection visa] interview conflict with the [appellant's] migration history. The [appellant] claims to have departed Bangladesh in October 2012, several months before the date of the claimed FIRs and charge sheets submitted at the [protection visa] interview (March and April 2013). **I am satisfied the [appellant] submitted these additional claimed FIRs and charge sheets in an attempt to falsely demonstrate that he is of continuing interest to the Bangladeshi authorities.** Although the submitted FIRs appear to contradict the [appellant's] claimed migration history and adverse attention by the Bangladeshi authorities. However in consideration of the inconclusive findings of the DEU about these documents, and the country information which reflects irregularities within genuinely state issued documents, **there is insufficient evidence before me to reasonably form the view that the documents are bogus**.

(Emphasis added.)

15 On the basis of her assessment of the appellant's credibility, the delegate was not satisfied that there was a real chance that the appellant would be persecuted in Bangladesh for one or more of the reasons mentioned in s 5J(1)(a) of the *Migration Act*, with the consequence that he did not satisfy the refugee criterion specified in s 36(2)(a) of the *Migration Act*. The delegate also rejected the appellant's claim that there was a real risk that he would suffer significant harm if returned to Bangladesh, with the consequence that he did not satisfy the criterion for complementary protection contained in s 36(2)(aa) of the *Migration Act*.

The provision of new information to the Authority

16 The Asylum Seeker Resource Centre (**ASRC**) in Footscray assisted the

appellant in providing the Authority with a written submission dated 4 May 2016. However, as the ASRC made plain, it did not act on behalf of the appellant but was simply "facilitating correspondence on his behalf".

17 The submission commenced with a request that the Authority receive "new information", pursuant to s 473DD of the *Migration Act*. That information comprised two reports dated 11 September 2013 and 3 May 2016, from a clinical psychologist, Dr King. Dr King said that the appellant had attended four "sessions" at his clinic "around September 2013". Both reports were based on the appellant's attendance at those times. They did not make clear whether it was Dr King personally who had seen the appellant during those sessions.

18 In the report of 11 September 2013, Dr King said that he had seen evidence that the appellant had been the victim of a serious and unprovoked assault resulting in injuries requiring hospitalisation, and that he was suffering from post-traumatic stress disorder (**PTSD**). He did not elaborate on that evidence nor indicate when the assault had occurred. Dr King recommended that the appellant should be permitted, in the interests of his mental health, to engage in useful activities, "ideally … work along the lines of the skilled metal work (welding as I understand it) that is his profession" and that he be reunited with his family.

19 In the second report, Dr King said that the clinical assessment in September 2013 had confirmed "profoundly entrenched mood disorders compatible with the diagnosis of PTSD (and the expected concomitant disorders of anxiety and depression)".

20 Dr King then referred to two tests of the appellant's cognitive capacity, in the first of which the appellant had performed at the level of the average six year old, and in the second of which the appellant had obtained a score compatible with the average eight year old.

21 Dr King said that he had concluded, on the basis of "the brief time of clinical contact", that "the medical diagnosis of PTSD was regarded as likely the most accurate 'psychopathological' diagnosis" and that in addition the appellant had "long standing and stable intellectual deficits". He considered that the appellant is "unlikely to uptake either studies or a viable occupation in his present (and anticipated future) state".

22 Finally, Dr King expressed the opinion:

> [I]t is entirely llikely [sic] that any verbal narrative [the appellant] gives of recent or past events will necessarily be disjointed and likely out of step with known factual steps relating to that narrative but confirmed by external evidence. This mis-match should be interpreted as an inevitable outcome and essentially compatible with the cognitive functionality thus far assessed and attributed to this man.

23 In the written submission to the Authority, the appellant made responses to the specific adverse credibility findings made by the delegate. He indicated his reliance on the reports of Dr King and "the likely impact that my medical condition and cognitive limitations has had on my memory and ability to give clear evidence".

24 The written submission concluded with the following statement:

> The new information and the nature of Dr King's letter/reports is important and critical to my claims and an assessment of them. I also believe and request that I should be afforded an opportunity to present my claims in person, and therefore

that the [Authority] should schedule an oral hearing. I submit that the [Authority] would fall in error if it did not conduct a hearing, particularly if it makes adverse credibility findings.

25 Section 473DD limits the circumstances in which the Authority may, on a review pursuant to s 473CC, consider "new information". It provides:

> 473DD Considering new information in exceptional circumstances
>
> For the purposes of making a decision in relation to a fast track reviewable decision, the Immigration Assessment Authority must not consider any new information unless:
>
> (a) the Authority is satisfied that there are exceptional circumstances to justify considering the new information; and
>
> (b) the referred applicant satisfies the Authority that, in relation to any new information given, or proposed to be given, to the Authority by the referred applicant, the new information:
>
> (i) was not, and could not have been, provided to the Minister before the Minister made the decision under section 65; or
>
> (ii) is credible personal information which was not previously known and, had it been known, may have affected the consideration of the referred applicant's claims.

The decision of the Authority

26 In its decision dated 20 May 2016, the Authority had regard to the two letters from Dr King. The Authority considered that they did amount to "credible personal information which was not previously known by the delegate and had it been known, may have affected consideration of the [appellant's] claims". That being so, the Authority concluded that there were "exceptional circumstances" justifying its consideration of the new information. The member said that she had "taken the [appellant's] psychological condition and supporting evidence into account in making my decision".

27 Although the Authority took Dr King's reports into account as requested, it did not hold a further hearing with the appellant as requested. It carried out its review "on the papers". In doing so, the Authority considered each of the matters which had caused the delegate to have concerns about the appellant's credibility. The member said that she did not draw any inference adverse to the appellant by reason of his inability to describe accurately the composition of the BNP flag. In relation to the remaining matters, the Authority concluded that:

- the appellant's responses to the delegate about the ideology of the BNP were overly simplistic for someone claiming to have had 12 years active membership of the BNP and to have been president of the local youth wing for six years;
- that the appellant's psychological condition and intellectual capacity did not provide an adequate explanation for his inability to express principal tenets of the BNP;
- the appellant's lack of knowledge of Bangladesh elections was significant, in particular, his inability to recall the 2001 election result and his estimation that the BNP had won two or three seats at that election;
- it was implausible that the appellant was unable to recall other basic but significant details of the election and did not even have an awareness of the 2008 and 2014 elections;

- while a person in the appellant's position may not have had a sophisticated or detailed knowledge of the BNP structure, he did not have the knowledge of the lower level structures of the BNP to be expected of a person claiming to have had 12 years of active commitment, with six of those in a presidency role;
- while accepting that the appellant had been attacked in June 2011, that was not on account of any political rivalry: instead it was a criminal act of an isolated and random kind which is common in Bangladesh;
- because the appellant did not have any high profile role within the BNP, his refusal to join the AL had not motivated any of its members to fabricate accusations of crimes by him; and
- the appellant had not, as he had claimed, gone into hiding for several months after June 2011 before departing Bangladesh for Australia.

28 In relation to the FIRs, the Authority concluded more generally:

> [35] In addition to fabrication of charges against high-profile BNP figures, DFAT notes there have been instances of false charges being laid against individuals over familial, communal or financial disputes. I have not accepted he was attacked by AL members on account of having any BNP involvement **and I do not accept he has been subject to any false criminal accusations for political or any other reasons**. There is no other information before me to indicate the [appellant] has faced other threats or problems from AL members or the authorities for any reason.
>
> [36] The [appellant] claims that as AL is in power the police would not help him. However, I do not accept the [appellant] is politically aligned with BNP **and I do not accept the FIRs accusing him and other BNP members of criminal activities to be genuine**. There is no other information before me to indicate that the police would withhold protection for any reason.
>
> [37] I am not satisfied the [appellant] faces a real chance of persecution by AL, authorities or others on account of his claimed political involvement, fabricated criminal charges or any other related reason.

(Emphasis added.)

29 The Authority went on to conclude that the appellant does not face a real chance of being charged, imprisoned, fined or otherwise harmed upon returning to Bangladesh by reason of his having left illegally and/or returning as a failed asylum seeker. Thus, the appellant's claims to be refugee, or to be at risk of significant harm by reason that he would have the status as a failed asylum seeker returnee who had left Bangladesh unlawfully, did not satisfy either the refugee or complementary protection criteria.

The application for review in the Federal Circuit Court

30 The appellant's application for judicial review in the Federal Circuit Court contained (relevantly) two grounds, namely:

> 1. The [Authority] misconstrued its jurisdiction and/or made a decision in excess of jurisdiction and/or made a decision that is *Li* unreasonable.
>
> Particulars
>
> The [Authority] failed to recognise that it could not remedy the deficiencies with the hearing that had taken place before the delegate.
>
> The [Authority] failed to consider whether the preferable course was to remit the decision to the Minister for reconsideration, so that the delegate would be able to afford a real and meaningful hearing to the [appellant].

2. On a second basis, the [Authority] made a decision in excess of jurisdiction.

   Particulars

   The [Authority] has not [sic] jurisdiction to make findings with respect to documents being "bogus documents".

   The delegate had found the two "First Information Reports" to be genuine.

   The [Authority's] decision proceeded on bases that were inconsistent with the finding by the delegate as to the nature of those "First Information Reports".

31 The proposition which lay behind ground 1 was that the delegate had not, by reason of the cognitive and psychological state of the appellant as indicated by Dr King's reports, provided him with a "real and meaningful hearing". The fact that this had been inadvertent (because the delegate had not had Dr King's reports or any other material to indicate the appellant's condition) did not alter that circumstance.

32 We will refer to the reasoning of the Federal Circuit Court rejecting these grounds of appeal in the context of consideration of the grounds of appeal to this Court.

Grounds 1 and 2 of the appeal

33 Grounds 1 and 2 of the appeal can be considered together. They are as follows:

1. The court below erred in failing to find that the Second Respondent (**the [Authority]**) misconstrued its jurisdiction in that:
   a. the [Authority] found that the information about the Appellant's low level of cognitive competency (effectively, he has the competency of a young child), was information which, had it been known by the delegate of the First Respondent (**the Minister**) who interviewed the Appellant, may have affected the delegate's consideration of the Appellant's claims;
   b. the exercise of the power to refuse the grant of a protection visa (which decision only the Minister has jurisdiction to make) is conditioned by the common law fair hearing rule;
   c. by reason of the Appellant's low level of cognitive competency, the delegate did not afford a fair hearing to him when the interview proceeded without him having any assistance;
   d. the [Authority] had no jurisdiction to affirm a decision of the delegate vitiated by error.
2. Alternatively, the court below erred in failing to find that the decision of the [Authority] was legally unreasonable for failure to consider whether, having regard to the information about the Appellant's cognitive competency which, the [Authority] found, had it been known by a delegate may have affected at least the course which the hearing before the delegate would have taken (if not the delegate's decision itself), the matter should be remitted to the Minister.

34 As counsel for the Minister noted, the matters contained in subparas (a)-(d) in ground 1 are not separate particulars, in the sense that they allege separate and distinct ways in which the Authority had misconstrued its jurisdiction. Instead, they are to be considered sequentially, with the effect that the appellant's failure

to establish the proposition in any one of the subparagraphs should have the effect that the ground fails. Counsel for the appellant did not dispute that understanding of the ground.

35 The proposition contained in subpara (a) may be taken to be established. The Authority did say that the information in the psychologist's reports was "credible personal information which … had it been known, may have affected [the delegate's] consideration of the [appellant's] claims". This was the limb of the "gateway" contained in s 473DD(b) by which the Authority was able to consider the new information.

36 The proposition in subpara (b) in ground 1, involves a matter of statutory construction. On the view we take of the matter, it is not necessary for the Court to determine the correctness of that proposition.

37 The Court was informed that the High Court of Australia is presently reserved on a decision involving the proposition contained in subpara (d): *Plaintiff M174/2016 v Minister for Immigration and Border Protection*, M174/2016. That being so, it is inappropriate (and unnecessary) for the Court presently to be expressing a view concerning the proposition contained in subpara (d).

38 Many of the parties' submissions on the hearing of appeal focused on the proposition in subpara (c) in ground 1. This was a foundational proposition to the appellant's case on appeal on grounds 1 and 2.

39 Before addressing that particular, it is appropriate to identify some principles regarding the effect of an applicant's psychological health on the discharge of a decision-maker's duty to provide a hearing.

40 The Administrative Appeals **Tribunal**'s obligations to provide applicants with an invitation to appear to give evidence are governed by s 425 of the *Migration Act*, which states:

> 425 Tribunal must invite applicant to appear
>
> (1) The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.
>
> (2) Subsection (1) does not apply if:
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> (a) the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or
>
> (b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it; or
>
> (c) subsection 424C(1) or (2) applies to the applicant.
>
> (3) If any of the paragraphs in subsection (2) of this section apply, the applicant is not entitled to appear before the Tribunal.

41 The authorities concerning s 425 of the *Migration Act* indicate that an inability of applicants to represent themselves before the Tribunal by reason of mental or physical unfitness may, even if not known by the Tribunal, give rise to a failure by the Tribunal to provide a "real and meaningful" invitation to them to appear before the Tribunal to give evidence and to present arguments relating to the decisions under review. Thus, in *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* [2003] FCAFC 126; (2003) 128 FCR 553 (*SCAR*) at [41], the Full Court (Gray, Cooper and Selway JJ) concluded:

> Given the findings of fact made by the primary judge that the respondent was not in a fit state to represent himself before the Tribunal it is clear that the invitation he received under s 425 of the Act was not a meaningful one. Through no fault of the Tribunal it was not aware of this. Even so, the Tribunal did not comply with s 425 of the Act. It did not extend a meaningful invitation to the respondent. The respondent did not receive the fair hearing required by the Act. Consequently the Tribunal made a "jurisdictional error."

42 Although the decision in *SCAR* has been the subject of some judicial critique and discourse (see, for example, the decision in this Court in *Minister for Immigration and Multicultural Affairs v SZFDE* [2006] FCAFC 142; (2006) 154 FCR 365 at [94] (French J), at [134] (Allsop J), at [212] (Graham J); *Minister for Immigration and Citizenship v SZNVW* [2010] FCAFC 41; (2010) 183 FCR 575 (*SZNVW*) at [31] (Perram J)), this appeal does not require consideration of that debate.

43 Applicants who assert that their psychological condition deprived them of the "meaningful opportunity" required by s 425 of the *Migration Act* must establish more than the fact of the condition. They must also establish that their condition is such as to deny them the capacity to give an account of their experiences, to present argument in support of their claims, and to understand and respond to the questions put to them: *SZMSA v Minister for Immigration and Citizenship* [2010] FCA 345 at [20]-[25] and [32]-[35] (Gilmour J); *SZNVW* at [20] (Keane CJ). Further, even when psychological evidence may, had it been available to the Tribunal, have led it to take a different view of the credibility of an applicant's account, the absence of that evidence does not, of itself, establish that the hearing before the Tribunal proceeded on a false assumption about the applicant's ability to give evidence and to present arguments relating to the issues arising in relation to the decision under review: *SZNVW* at [19]. Generally, it is insufficient for applicants to show no more than that a medical condition may have deprived them of the ability to put their case to best advantage.

44 The appellant's grounds of appeal in the Federal Circuit Court had not included, at least in express terms, a complaint that his level of cognitive competency meant that he could not, without assistance, have had a "fair hearing" in the interview before the delegate. Instead, the appellant particularised the ground as a failure by the Authority "to recognise that it could not remedy the deficiencies with the hearing that had taken place before the delegate". However, at the hearing in the Federal Circuit Court, the appellant expanded his complaint to include a submission that the Authority should have concluded that a further hearing should take place with the appellant in person in the light of the medical material. In addition, the appellant argued that the process contemplated by Pt 7AA of the *Migration Act* required common law procedural fairness, which he had been denied. The primary judge dealt with the matter on that basis.

45 The conclusions of the primary judge were as follows (at [20]-[21]):

> [20] In this case, I am not persuaded that the [Authority] failed to turn its mind to the impact that the medical material may have had upon the decision of the delegate. The nature of the medical material does not show that the [appellant] was unable to receive a real hearing before the delegate, nor is this borne out by the reasons of the delegate that show detailed interactions with the [appellant]. Most importantly, the [appellant] has not

> led evidence from a relevant professional before this Court to show that he was incapable of having a real and meaningful hearing, in the sense discussed in *Minister for Immigration & Multicultural & Indigenous Affairs v SCAR* [2003] 128 FCR 553 before the delegate. In these circumstances, the relevant considerations for the [Authority] were whether or not they could proceed to deal with the matter on the papers or should consider hearing the [appellant] in person or remit the matter generally to the delegate (if the latter were available).
>
> [21] It is clear that the [Authority] did proceed to carefully consider the nature of the evidence, effectively concluding that, whilst Dr King's report might explain some but not all of the problems in the [appellant's] evidence, the [Authority] decided to affirm the decision of the delegate based on the written material before it. It appears to me that this outcome was open to the [Authority], particularly given the operation of Pt.7AA of the Act, which makes clear that the provisions of Pt.7AA contain the entirety of the rules of procedural fairness that operate with respect to the [Authority's] decision making … As a result, I am not persuaded that the [appellant] has established a ground for review in either the sense of a requirement that the [appellant] have a further oral hearing in light of the medical evidence, nor in the sense of a claim that the [appellant] never received a real and meaningful hearing before the delegate.

(Citations omitted.)

46 As can be seen, the primary judge expressed his conclusion as to the Authority's consideration of the psychologist's reports in both positive and negative terms. In the first sentence of [20], his Honour said that he was "not persuaded" that the Authority had "failed to turn its mind to the impact that the medical material may have had upon the decision of the delegate". In the first sentence of [21], his Honour expressed positive satisfaction that the Authority had considered carefully the nature of the evidence and had concluded that Dr King's reports could explain some, but not all, of the identified problems in the appellant's evidence.

47 Next, the primary judge said, in [20], that the nature of the "medical material" did not show that the appellant had been unable to receive a real hearing before the delegate. It is evident that his Honour tested that conclusion against the inferences to be drawn from the reasons of the delegate. He considered that those reasons indicated that the delegate had had "detailed interactions" with the appellant. For the purpose of assessing the quality of the interchanges between the appellant and the delegate, the primary judge of necessity was confined to the delegate's own account of them, as neither party asked him to listen to the tape of the appellant's interview with the delegate and neither provided him with a transcription of the interview. Further, as the primary judge noted, the appellant had not led evidence in the Federal Circuit Court from "a relevant professional" to demonstrate that his psychological and cognitive state meant that he had been "incapable of having a real and meaningful hearing".

48 In those circumstances, the assessment by the primary judge in [20] of his Honour's reasons was correct. The appellant failed to adduce evidence to enable the primary judge to conclude that the appellant was unable to meaningfully participate in the interview with the delegate. No transcript was provided. There was no direct evidence of what occurred. There was no expert evidence. Further, although it is unnecessary perhaps to go this far, available evidence indicating that the delegate formed the view that the appellant was able to

understand and respond to the delegate's questions in the interview was against the position argued for the appellant. We also note that the appellant's contentions as to an impaired cognitive state is somewhat contrary with Dr King's implicit opinion in September 2013 that the appellant had the capacity to engage in skilled metal work.

49 It should also be observed that the content of Dr King's reports, which were entirely untested, did not go so far as to support the appellant's position. Taken at face value at their highest, the reports may support a contention that latitude should be given to gaps and inconsistencies in the appellant's evidence. Of course, the delegate was unaware of any such possibility and there can be no contention in that circumstance that the process adopted by the delegate was deficient or unfair.

50 No basis is demonstrated for challenging the Authority's conclusion that Dr King's untested opinions might explain some, but did not explain other gaps and inconsistencies in the appellant's evidence. That evaluation on the merits was open to the Authority to make.

51 Further, the use of Dr King's reports before the Authority, on the one hand, was entirely different from the use sought to be advanced in the Federal Circuit Court. Before the Authority, the submission was, to the effect, that leniency should be accorded to any deficiency in the answers given by the appellant because of the difficulties alluded to by Dr King. In the Federal Circuit Court, the argument was that there had been an unfair hearing or lack of procedural fairness for the reasons indicated in the report. In that circumstance, as noted, the appellant was required to prove to a satisfactory evidentiary standard the inability to obtain a fair hearing by reason of the matters raised in Dr King's reports.

52 That is sufficient to dispose of grounds 1 and 2, but a further observation should be made. The appellant's argument assumes that the function of the Authority under s 473CC of the *Migration Act* was to re-examine the delegate's decision, and the process by which it was reached for jurisdictional error. This is not the Authority's function. Indeed, the Authority had no power to remit the decision for reconsideration with a direction that the delegate reinterview the appellant. This is evident from the discussion in *BMB16 v Minister for Immigration and Border Protection* [2017] FCAFC 169; (2017) 253 FCR 448 (*BMB16*) (in respect of which special leave has been granted), where Dowsett J said at [13]:

> 13 It is not uncommon for review legislation to provide for remitter, with or without directions. However s 473CC does not do so. A remitter without permissible directions or recommendations would be, in effect, a remitter with a direction to reconsider the matter at large. Such a direction would not be a permissible direction. Regulations 4.43(2) and 4.43(4) prescribe a limited number of permissible directions. They are quite specific and are limited by reg 4.43(3). In my view the ambit of any reconsideration is to be limited to compliance with the permissible directions or recommendations contained in the remitter. It follows that the ambit of the Authority's review is also limited by the permissible directions or recommendations. There would be no point in the Authority having regard to matters which could not be the subject of a permissible direction or recommendation.

53 No error has been shown in the primary judge's conclusion on this issue which, as already noted, was foundational to many of the appellant's submissions on the appeal.

54 The function of the Authority was to evaluate for itself the "review material" and any "new information" and then to either affirm the delegate's decision or to remit the decision for reconsideration in accordance with such directions or recommendations as are permitted by reg 4.43 of the *Migration Regulations 1994* (Cth).

55 It was not legally unreasonable, in the sense discussed in *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332, for the Authority to fail to consider whether to remit the matter to the delegate when, in the circumstances, it had no power to make such a remittal.

56 Grounds 1 and 2 cannot succeed.

Ground 3 of the appeal

57 Ground 3 of the appeal is:

> 3. The court below erred in failing to find that:
>
> a. it is only the Minister (not the [Authority]) that has authority to determine whether a document is a "bogus document" (as defined in s 5(1) of the [*Migration Act*];
>
> b. having regard to the definition of "bogus document", the delegate must be taken to have found the two "First Information Reports" to be genuine;
>
> c. the [Authority] had no jurisdiction to make a decision that proceeded on the [Authority's] own and different findings about the nature of the two "First Information Reports".

58 This ground of appeal involves two findings of the delegate, relevantly recorded in the delegate's reasons. The delegate referred a number of documents to the DEU. One of those documents was an FIR, which had been supplied by the appellant. The delegate recorded that the DEU made inconclusive findings about all documents, aside from two medical reports, which were found to "*lack credibility*" (emphasis in original). The delegate continued:

> I acknowledge that it is common for official Bangladesh documents to be presented in English and that country information supports that errors may be contained within genuine documents.
>
> Despite my concerns regarding the documents I am satisfied the documents are genuine for the following reasons:
>
> • Country information supports that a high rate of irregularities can be found in genuinely issued Bangladeshi documents.
>
> • The DEU's inconclusive finding.
>
> • The [appellant] has been consistent in his claim regarding his identity and his claim to have submitted genuine documents.
>
> In consideration of the inconclusive findings of the DEU about these documents, and the country information which reflects irregularities within genuinely state issued documents, there is insufficient evidence before me to reasonably form the view that the documents are bogus. I therefore find that the evidence produced is satisfactory and 91W(2) of the Act does not apply.

(Citations omitted.)

59 As noted above at [14], the delegate also recorded the following matters about FIRs, although it is not precisely clear to which FIR the delegate was referring:

> FIRs and Charge sheets
>
> At [the protection visa] interview the [appellant] was asked further questions relating to the claimed false charges made against him. The [appellant] was asked if he had assaulted or murdered anyone in Bangladesh and he replied no. The [appellant] was asked how he obtained an original FIR lodged by the wife of the person he was accused of murdering and that it was difficult to accept he would have access to this level of detail relating to a crime that he was accused of committing. The [appellant] stated that he did not know how these FIRs were obtained as his wife had sent them to him from Bangladesh. Country information could not be located to confirm these incidents took place in 2011 or 2013. In response to concerns raised regarding the genuineness of the submitted documents the [appellant] reiterated that he was unsure of the contents of the FIRs given that he did not speak English and his wife had obtained these documents. I note Bangladeshi media outlets reflect in 2005 former finance minister Shah AMS Kibria was fatally wounded in a grenade attack while he was returning from a rally in Habiganj Sadar, Bangladesh. Additionally amongst the dead was an AL leader named Abdur Rahim and over 100 party activists were also injured in the attack. However, given the discrepancy in years, location and the [appellant's] inability to satisfy me as to his political involvement, I am not satisfied these events are linked. I also note the FIRs submitted at the [protection visa] interview conflict with the [appellant's] migration history. The [appellant] claims to have departed Bangladesh in October 2012, several months before the date of the claimed FIRs and charge sheets submitted at [protection visa] interview (March and April 2013). I am satisfied the [appellant] submitted these additional claimed FIRs and charge sheets in an attempt to falsely demonstrate that he is of continuing interest to the Bangladeshi authorities. Although the submitted FIRs appear to contradict the [appellant's] claimed migration history and adverse attention by the Bangladeshi authorities. However in consideration of the inconclusive findings of the DEU about these documents, and the country information which reflects irregularities within genuinely state issued documents, there is insufficient evidence before me to reasonably form the view that the documents are bogus.

(Citations omitted.)

60 The Authority subsequently expressly rejected the appellant's assertion that the FIRs accused him and other BNP members of criminal activities, expressly finding that the FIRs were not genuine. The reasoning process was as follows:

> 32. While I do not accept the [appellant's] reasoning regarding the fabricated charges, I have nonetheless considered whether these accusations have been made against the [appellant], separately to this claimed political motivation. In relation to the murder charge, the [appellant] claims he knew police were looking for him because other village people told him. The FIR is dated 3 August 2011 and according to the Arrival interview, the [appellant] did not leave his home until 1 October 2012, more than one year later. He stated in his submission to the [Authority] that after he was beaten by AL members he fled his home and slept in fields, only going home occasionally. He claims he could not go to another village because he would be recognised as a non-local and this would raise suspicion and attract attention. He states he slept in fields for five to six months until his wife gathered enough money for him to leave the country. However, the [appellant] claims he was beaten by AL members in June 2011 and his

> suggestion that he lived in hiding for five to six months and then left Bangladesh is inconsistent with his claim that he departed Bangladesh in October 2012. He did not mention that he lived in hiding in his Arrival interview, [protection visa] application or [protection visa] interview. I do not accept that the [appellant] lived in hiding for several months following the June 2011 attack or the lodgement of the August 2011 murder FIR. The [appellant] has not suggested that anyone from the AL or authorities came looking for him after August 2011. I find that if the authorities were interested in the [appellant] and intended for him to answer this charge, they would have arrested him between August 2011 and October 2012 when he departed the country.
>
> 33. In relation to the 2013 FIRs, the 2 March 2013 FIR alleges the incident occurred on the future date of 2 June 2013 and the accompanying letter to the magistrate also states "co-assailants miss killed victim of the case [NI] on 02-03-2013 after 23.45 hours and left his dead body in the field". This contrasts with the allegation that the shooting was a near miss and the fact that [NI] survived to lodge the second, similar FIR one month later. Even noting the high rate of irregularities in Bangladeshi documents and the fact that the document is said to relate to a false charge, I find the discrepancies in the March 2013 FIR are material. I note also that the March 2013 and April 2013 FIRs are almost identical in wording, accusations and situational context suggesting that one was copied from the other. The [appellant] claims he first found out about these FIRs one month prior to the [protection visa] interview when his wife told him. He does not claim that authorities sought him in relation to these 2013 incidents, or that anyone questioned his wife about his whereabouts at any stage, including when she obtained the FIRs.
>
> 34. At the [protection visa] interview, the delegate asked the [appellant] how he came to be in possession of original FIRs and the [appellant] responded that his wife had obtained them, maybe from the police station or court and had sent them to him. The delegate put to the [appellant] it was difficult to accept he has original versions of FIRs lodged by people accusing him of these crimes. The [appellant] responded that he was not sure because his wife had collected them. According to DFAT, defendants have the right to be informed promptly and in detail of the charges against them however, I find it implausible that the police or courts would have given the [appellant's] wife the original versions of these documents. Given this, the fact that the authorities did not arrest or even question the [appellant] following the murder charge, the internal inconsistencies in the 2013 FIRs and that authorities have not questioned the [appellant's] wife about his whereabouts since the 2013 FIRs were lodged, I give no weight to these FIRs provided in support. I do not accept these accusations were made against the [appellant].

(Citations omitted.)

61 In the Federal Circuit Court, this matter was dealt with on the basis that the Authority did not conclude that the documents were "bogus documents" within the meaning of s 91W of the *Migration Act*. Rather, for the reasons there set out, there was no reliance upon those documents, nor were they found to be persuasive. The primary judge said (at [24]-[25]) as follows:

> 24 The [appellant] says that the [Authority] would have no power to conclude that the documents were bogus documents within the meaning of s.91W. Not surprisingly, this is disputed by counsel for the Minister. For the present purposes, it is not necessary to determine this question as the [Authority] did not conclude that the documents were "bogus" documents

> within the meaning of the section. Rather, the Tribunal, for the reasons that it set out, did not rely upon these documents, nor find them persuasive. It appears to me that it was open to the Tribunal to reach the conclusions that it did with respect to the documents. No issue of procedural fairness arises in this regard, as it clear from the delegate's decision that questions as to the authenticity and reliability of these documents were raised with the [appellant] in the hearing before the delegate.
>
> 25 In circumstances where the issues were raised before the delegate, the [Authority] considered the documents and provided proper reasons for the lack of reliance upon those documents by the [Authority]. I see no error in the approach of the [Authority] in reviewing the delegate's decision. I am not persuaded that the delegate made a decision that effectively rejected these documents as bogus, rather that the delegate's decision was limited to one not to conclude that the documents engaged s.91W.

62 As the appellant correctly notes, s 65 of the *Migration Act* requires the Minister, or his or her delegate, to be satisfied that the grant of a visa is not prevented, amongst other things, by s 91W, which deals with "bogus documents". Section 91W applies only in the case of protection visas. Section 91W of the *Migration Act* provides as follows:

> 91W Evidence of identity and bogus documents
>
> (1) The Minister or an officer may, either orally or in writing, request an applicant for a protection visa to produce, for inspection by the Minister or the officer, documentary evidence of the applicant's identity, nationality or citizenship.
>
> (2) The Minister must refuse to grant the protection visa to the applicant if:
>
> (a) the applicant has been given a request under subsection (1); and
>
> (b) the applicant refuses or fails to comply with the request, or produces a bogus document in response to the request; and
>
> (c) the applicant does not have a reasonable explanation for refusing or failing to comply with the request, or for producing the bogus document; and
>
> (d) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister cannot grant the protection visa to the applicant if the applicant:
>
> (i) refuses or fails to comply with the request; or
>
> (ii) produces a bogus document in response to the request.
>
> (3) Subsection (2) does not apply if the Minister is satisfied that the applicant:
>
> (a) has a reasonable explanation for refusing or failing to comply with the request or producing the bogus document; and
>
> (b) either:
>
> (i) produces documentary evidence of his or her identity, nationality or citizenship; or
>
> (ii) has taken reasonable steps to produce such evidence.
>
> (4) For the purposes of this section, a person produces a document if the person produces, gives, presents or provides the document or causes the document to be produced, given, presented or provided.

63 When s 91W is engaged by a request having been made and a document produced in response, the Minister or the Minister's delegate is required to determine whether the document is a "bogus document". In this instance, despite some reservations about the documentation, no finding was made by the delegate that any of the FIRs were bogus documents.

64 It is necessarily the case that the delegate concluded the documents were not "bogus documents" because had she not done so, then s 91W would have obliged her to:

(a) consider whether the appellant had a reasonable explanation for producing a document which she had determined was a "bogus document"; and

(b) in the absence of a reasonable explanation being provided, refused the grant of a visa.

65 A "bogus document" is defined in s 5(1) of the *Migration Act* in the following terms:

> ***bogus document***, in relation to a person, means a document that **the Minister reasonably suspects** is a document that:
>
> (a) purports to have been, but was not, issued in respect of the person; or
>
> (b) is counterfeit or has been altered by a person who does not have authority to do so; or
>
> (c) was obtained because of a false or misleading statement, whether or not made knowingly.

(Emphasis added.)

66 It follows that whether or not the description "bogus document" is satisfied will depend upon the mental state of the Minister.

67 The appellant argues that, by reason of the limited jurisdiction of the Authority, in particular, that it never "stands in the shoes" of the Minister, the reference to "Minister" in the definition of "bogus document" is incapable of applying to the Authority. Indeed, the appellant asserts that the Authority, by reason of its limited jurisdiction, is never called upon to consider s 91W of the *Migration Act*. The issue of whether a document provided by an applicant for a protection visa in response to a request under s 91W is genuine or not will be solely for the determination of the Minister. Indeed, by the definition of "excluded fast track review applicant" in s 5(1), any "fast track applicant" is excluded from review by the Authority unless the Minister otherwise makes a determination under s 473BC of the *Migration Act*.

68 The appellant argues that the Authority had no power to find to the contrary of that found by the delegate. The appellant argues that the decision of the Authority that the appellant did not meet either s 36(2)(a) or s 36(2)(aa) of the *Migration Act* depended on factual findings that the Authority had no jurisdiction to make. That being so, the decision to "affirm" the delegate's decision was said to be made in excess of jurisdiction.

69 The appellant's contention cannot be accepted. It is not the case that the Authority is incapable of reaching a decision that is inconsistent with the delegate as to a document's authenticity. Clearly, for example, the Authority is entitled to obtain and consider new information (s 473DC and s 473DD of the *Migration Act*) and that new information may well bear on the question of whether or not a document is genuine or false. The Authority can have regard to the new information and form its own view (consistently or inconsistently with that of the delegate) as to whether or not new information affects the authenticity of a document. This is not the same exercise as that carried out under s 91W of the *Migration Act*. There would not be a review in the first place if a "bogus document" finding were made by the Minister or his or her delegate.

70 As the primary judge concluded, findings about a document may be made without necessarily engaging the specific provisions of s 91W of the *Migration Act*. It may be accepted that the specified findings for the purpose of s 91W are findings by the Minister or the delegate, rather than by the Authority.

71 We would emphasise that the power of the Authority to reach its own conclusions concerning the documents and other material before it is not dependent on new information coming to light. The Authority is entitled to reach its own conclusion on the same information and arrive at a different result. It is clear from the separate reasons for judgment in *BMB16*, discussed above at [52], that the findings of the delegate do not control the reasons or findings of the Authority: see *BMB16* at [15] (Dowsett J), [38] (Besanko J) and [88] (Charlesworth J).

72 There is no reason to conclude that the Authority is bound by the views reached by the delegate, whether this be in relation to the non-formation of an opinion about a bogus document or otherwise. It is clear that the Authority is entitled to conduct a different analysis.

73 Ground 3 of the appeal cannot succeed.

Notice of contention

74 In light of the disposition of the appeal, it is unnecessary to consider the notice of contention.

Conclusion

75 The appeal must be dismissed with costs.

Orders accordingly

Solicitors for the appellant: *Victoria Legal Aid*.

Solicitors for the first respondent: *Clayton Utz*.

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