FEDERAL COURT OF AUSTRALIA

SZVHE v Minister for Immigration and Border Protection [2017] FCA 154

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| Appeal from: | *SZVHE v Minister for Immigration & Anor*  [2016] FCCA 2332 |
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| File number: |  |
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| Judge: | **JESSUP J** |
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| Date of judgment: | 23 February 2017 |
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| Legislation: | *Migration Act 1958* (Cth) ss 52, 66, 494B, s 494C  *Migration Regulations 1994* regs 2.16, 4.31 |
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| Date of hearing: | 23 February 2017 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | No Catchwords |
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| Number of paragraphs: | 12 |
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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 and Third Appellants |
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| Solicitor for the First Respondent: | Mr L Dennis of Minter Ellison |
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| Counsel for the Second Respondent: | The second respondent filed a submitting notice |

ORDERS

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|  | | NSD 1608 of 2016 |
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| BETWEEN: | SZVHE  First Appellant  SZVHF  Second Appellant  SZVHG  Third Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | JESSUP J |
| DATE OF ORDER: | 23 FEBRUARY 2017 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellants pay the costs of the first respondent.

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

REASONS FOR JUDGMENT

JESSUP J:

1. This is an appeal from a judgment of the Federal Circuit Court of Australia, given on 7 September 2016, in which an application for judicial review of a decision made by the Refugee Review Tribunal on 29 September 2014 was dismissed. In that decision, the Tribunal held that it did not have jurisdiction to review an earlier decision made by the delegate of the respondent Minister. That earlier decision had been to refuse applications by the three appellants for protection visas under the *Migration Act 1958* (Cth) (“the Act”). It was the first appellant who claimed to have grounds for the grant of a protection visa and the second and third appellants, his wife and his son respectively, relied upon his claims and his circumstances.
2. The basis upon which the Tribunal held that it did not have jurisdiction was that the application for review was made outside the period for which reg 4.31 of the *Migration Regulations 1994* provided. It is established on the evidence that the decision of the delegate was made on 8 May 2014 and was covered by a letter bearing that date. It was dispatched the following day by registered mail to the residential address given most recently by the first appellant, apropos the delegate’s decision. However, it is also established on the evidence that the registered item was returned unopened to the sender with boxes labelled “refused” and “unclaimed” having been ticked on the postal authority’s stamp attached to the returned letter. The appellants’ case as articulated in an outline of submissions filed by them on appeal is that they had never been notified because they did not receive the letter dated 8 May 2014.
3. In submissions in reply made today, the first appellant added that the dates, and various other inscriptions, on the photocopy of the relevant envelope as tendered before the primary Judge make it apparent that the letter in question never, in fact, left the Immigration Department, and that the first appellant has been given the “run around” by officers of that department. I should say it once that I have no hesitation in rejecting that submission in reply, unfounded as it was in any findings made by the Federal Circuit Court and involving as it did a suggestion that I should draw inferences adverse to the Minister which are simply not open on the documentary evidence as it appears.
4. However, the question remains whether the Tribunal was correct in ruling that the application for review was made outside the statutory period. The period upon which the Minister relied both at first instance on appeal is that for which s 494C(4) of the Act provides. That is part of a series of provisions which deems a document to have been received by someone under circumstances there referred to. The subsection provides as follows:

If the Minister gives a document to a person by the method in subsection 494B(4) (which involves dispatching the document by prepaid post or by other prepaid means), the person is taken to have received the document:

(a) if the document was dispatched from a place in Australia to an address in Australia – 7 working days (in the place of that address) after the date of the document; or

(b) in any other case – 21 days after the date of the document.

1. By the calculations of the primary Judge, the period for which reg 4.31(2) provided expired on 16 June 2014. The application for review having been made on 11 July 2014, it was submitted, and held by his Honour below, that it was lodged outside the time provided in the regulation.
2. As I raised with the Minister’s solicitor appearing as counsel today, there is something of a disconnect between the terms of s 494C(4) and reg 4.31(2). Under reg 4.31(2), the relevant 28-day period commences on the day the applicant is notified of the decision to which the application relates. It ends at the end of 28 days commencing on that day. However, s 494C(4) relates not to the date of notification but to the date when a particular document is deemed to have been received. It is that possible disconnect which is the only respect in which I would have any reservations about the comprehensive and systematic reasons of the Federal Circuit Court in the present case.
3. The position is, however, that whether or not s 494C(4) was properly used to calculate the time within which the appellants were required to make their applications for review, they were out of time by a number of weeks at least, and, as the primary Judge noted, the Tribunal had no capacity to extend time.
4. It is provided in s 66(1) of the Act that when the Minister grants, or refuses to grant, a visa, he or she is to notify the applicant of the decision in the prescribed way. The relevant regulation is reg 2.16(3), which provides that the Minister must notify an applicant of a decision to refuse to grant a visa by one of the methods specified in s 494B of the Act. Section 494B(1) and (4) provide as follows:

(1) For the purposes of provisions of this Act or the regulations that:

(a) require or permit the Minister to give a document to a person (the recipient); and

(b) state that the Minister must do so by one of the methods specified in this section;

the methods are as follows.

…

(4) Another method consists of the Minister dating the document, and then dispatching it:

(a) within 3 working days (in the place of dispatch) of the date of the document; and

(b) by prepaid post or by other prepaid means; and

(c) to:

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

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

(iii) if the recipient is a minor—the last address for a carer of the minor that is known by the Minister.

1. In the present case, the decision of the delegate was dispatched within three working days of the date which it bore by prepaid post to the last residential address provided to the Minister by the first appellant. That was therefore a proper notification under the Act. If it be the fact that s 494C(4) had no application in the circumstance of the case, the result would be, in my view, that notification took place at the point of dispatch of the letter, that is to say on 9 May 2014. That would have produced a cut-off date by which an application for review was required to have been made some time before the date which is yielded by the application of s 494C(4), namely 16 June 2014.
2. In the circumstances, it is clear that the Federal Circuit Court was correct in its ruling that the appellants’ ostensible applications for review were made outside the time for which the Act and the regulations provided. That an application have been made in a timely way is a jurisdictional fact. I can see no error in the conclusion reached by the Federal Circuit Court that the Tribunal did not have jurisdiction to entertain the applications for review which had been made, and it was correct to have declined jurisdiction on that basis.
3. Insofar as the first appellant, in submissions filed with the court, made a point about the second and third appellants not having been notified by the letter in the same way that he was, I accept the submissions of counsel for the Minister that that possible objection is sufficiently answered by the provisions of s 52(3C) of the Act.
4. It follows that the appeals must be dismissed.

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| I certify that the preceding twelve (12) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jessup. |

Associate:

Dated: 28 February 2017