FEDERAL COURT OF AUSTRALIA

Barevadiya v Minister for Immigration and Border Protection [2015] FCA 972

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| Citation: | Barevadiya v Minister for Immigration and Border Protection [2015] FCA 972 |
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| Appeal from: | Barevadiya & Anor v Minister for Immigration & Anor [2015] FCCA 832 |
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| Parties: | **MINESHKUMAR PRAVINBHAI BAREVADIYA and JIGNASABEN MINESHKUMAR BAREVADIYA v MINISTER FOR IMMIGRATION AND BORDER PROTECTION and MIGRATION REVIEW TRIBUNAL** |
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| File number: | VID 187 of 2015 |
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| Judge: | **NORTH J** |
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| Date of judgment: | 11 August 2015 |
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| Legislation: | *Migration Act 1958* (Cth), s 359A(4)(b)  *Migration Regulations 1994* (Cth), Schedule 2, cl 572.223; Schedule 5A, cl 5A405 |
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| Date of hearing: | 11 August 2015 |
|  |  |
| Place: |  |
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| Division: | GENERAL DIVISION |
|  |  |
| Category: | No Catchwords |
|  |  |
| Number of paragraphs: | 19 |
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| Counsel for the Appellants: | The first appellant appeared in person. |
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| Solicitor for the Respondents: | Mr D Brown from Australian Government Solicitor |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| VICTORIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | VID 187 of 2015 |

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| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

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| BETWEEN: | MINESHKUMAR PRAVINBHAI BAREVADIYA  First Appellant  JIGNASABEN MINESHKUMAR BAREVADIYA  Second Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  MIGRATION REVIEW TRIBUNAL  Second Respondent |

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| JUDGE: | NORTH J |
| DATE OF ORDER: | 11 AUGUST 2015 |
| WHERE MADE: | MELBOURNE |

THE COURT ORDERS THAT:

1. The appeal is dismissed.
2. The appellants to pay the costs of the first respondent, fixed in the sum of $2500.

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

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
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| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

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| BETWEEN: | MINESHKUMAR PRAVINBHAI BAREVADIYA  First Appellant  JIGNASABEN MINESHKUMAR BAREVADIYA  Second Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  MIGRATION REVIEW TRIBUNAL  Second Respondent |

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| JUDGE: | NORTH J |
| DATE: | 11 AUGUST 2015 |
| PLACE: | MELBOURNE |

**REASONS FOR JUDGMENT**

1. Before the Court is an appeal by Mineshkumar Pravinbhai Barevadiya, the first appellant, and Jignasaben Mineshkumar Barevadiya, the second appellant, from orders made by the Federal Circuit Court on 25 March 2015. The Federal Circuit Court dismissed an application for judicial review of a decision of the Migration Review Tribunal made on 9 April 2014. The Tribunal affirmed the decision of the delegate of the Minister for Immigration and Border Protection not to grant the appellants’ Student (Temporary) (Class TU) visas.
2. The appellants are husband and wife. The primary application was made by the first appellant. He lodged an application for a visa on 9 July 2013. On 10 July 2013, the Department of Immigration and Citizenship sent an email to the appellants’ migration agent detailing information required in support of the visa application, including evidence of financial capacity as required by the *Migration Regulations 1994* (Cth).
3. The regulations required him to demonstrate that he had funds from an acceptable source, being a money deposit held for at least the three months immediately before the date of the application. The relevant requirements of the regulations were:

**Schedule 2 – Clause 572.223**

1. The Minister is satisfied that the applicant is a genuine applicant for entry and stay as a student because:
   1. the Minister is satisfied that the applicant intends genuinely to stay in Australia temporarily, having regard to:
      1. the applicant’s circumstances; and
      2. the applicant’s immigration history; and
      3. if the applicant is a minor – the intentions of a parent, legal guardian or spouse of the applicant; and
      4. any other relevant matter;
   2. **the applicant meets the requirements of subclause (2).**
2. An applicant meets the requirements of this subclause if:
   1. the applicant gives the Minister evidence in accordance with the requirements mentioned in Schedule 5A for the highest assessment level for the applicant; and
   2. the Minister is satisfied that the applicant is a genuine applicant for entry and stay as a student, having regard to:
      1. the stated intention of the applicant to comply with any conditions subject to which the visa is granted and
      2. any other relevant matter; and
   3. **the Minister is satisfied that, while the applicant holds the visa, the applicant will have access to the funds demonstrated or declared in accordance with the requirements in Schedule 5A relating to the applicant’s financial capacity.**

**Schedule 5A – Clause 5A405 Financial Capacity**

1. The applicant must give, in accordance with this clause:
2. evidence that the applicant has funds from **an acceptable source** that are sufficient to meet the following expenses for the first 24 months:
   * 1. course fees;
     2. living costs;
     3. school costs; and
3. a declaration by the applicant stating that he or she has access to funds from an acceptable source that are sufficient to meet course fees, living costs and school costs for the remainder of the applicant’s proposed stay in Australia after the first 24 months; and
4. evidence that the applicant has funds from an acceptable source that are sufficient to meet travel costs; and
5. evidence that the regular income of any individual (including the applicant) providing funds to the applicant was sufficient to accumulate the level of funding being provided by that individual.
6. In this clause:

***acceptable individual***

means one or more of the following:

1. the applicant;
2. the applicant’s spouse or de facto partner;
3. the applicant’s parents;
4. the applicant’s grandparents;
5. the applicant’s brothers and sisters;

……

***funds from an acceptable source***

means one or more of the following:

**aa. ……a money deposit that an acceptable individual has held for at least the 3 months immediately before the date of the application…**

[Emphasis added.]

1. The department gave the first appellant 28 days to provide the information. On 6 August 2013, the first appellant provided the following documents via email to the department, as set out in the delegate’s decision:

* Two bank statements from AXIS. One contained no evidence of the account holder and the other dated 31 December 2010 showing a balance of 33,860.00 INR
* A bank statement from his father, with a last entry date of 24 February 2011 showing a balance of 17,5163.00 INR
* A passbook from Bank of India, with a last entry date of 30 March 2010 showing a balance of 61,9750.00 INR
* A bank statement dated 19 January 2013 showing a balance of 24,7973.29 INR
* Passbook of Mr Barevadiya’s spouse Ms Jignasaben Mineshkumar Barevadiya, dated 2 December 2011 showing a balance of 69,099.00 INR
* A deposit receipt dated 26 December 2008 showing funds of 42,800.00 INR

On 25 October 2013, the delegate determined that the documents provided were insufficient to satisfy the financial capacity requirements under the regulations, and refused the appellants’ visa applications.

1. Although not explicitly set out in the delegate’s decision, it is clear that none of the documents provided to the delegate related to the relevant period of time.
2. On 14 November 2013, the appellants applied to the Tribunal for review of the delegate’s decision. The first appellant provided a statement to the Tribunal on 29 January 2014 in which he wrote, “The reason my student visa was refused the case officer couldn’t understand the financial documents.”
3. It is not in contention that the amount required under the regulations was AUD 31,265. The appellants relied on a number of sources for evidence of this amount and provided a financial matrix to the Tribunal which set out the sources on which they relied as follows:

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| **S No.** | **DOCUMENT** | **ACC NO** | **NAME OF INSTITUTION** | **NAME OF THE SPONSOR** | **RELATION** | **AUD$** |
| 1 | FIXED DEPOSIT | \*\*9539 | BANK OF MAHARASHTRA | PRAVINBHAI J BAREVADIYA | FATHER | 1,88,572 |
| 2 | FIXED DEPOSIT | \*\*9710 | BANK OF MAHARASHTRA | PRAVINBHAI J BAREVADIYA | FATHER | 1,88,848 |
| 3 | FIXED DEPOSIT | \*\*3724 | BANK OF MAHARASHTRA | JADVJIBHAI T BAREVADIYA | GRAND- FATHER | 3,89,519 |
| 4 | FIXED DEPOSIT | \*\*3791 | BANK OF MAHARASHTRA | JADVJIBHAI T BAREVADIYA | GRAND- FATHER | 5,85,852 |
| 5 | PROVIDENT FUND |  |  | PRAVINBHAI J BAREVADIYA | FATHER | 7,85,535 |
| 6 | SAVINGS | \*\*2522 | AXIS BANK | PRAVINBHAI J BAREVADIYA | FATHER | 7,56,831 |
| 7 | PPF | \*\*109 | BANK OF INDIA | PRAVINBHAI J BAREVADIYA | FATHER | 7,88,535 |
| 8 | SAVINGS | \*\*7457 | STATE BANK OF INDIA | PRAVINBHAI J BAREVADIYA | FATHER | 2,53,462 |
|  |  |  |  |  |  | INR 39,37,154 |
|  |  |  |  |  | **TOTAL AMOUNT** | AUD $70,306 |

1. The Tribunal set out at [12] the financial evidence that was before it:

A submission to the Tribunal prior to the hearing included financial evidence in the form of:

* an affidavit of support from the applicant’s father
* a copy of the applicant’s fathers income tax return for the period 2013-2014
* A copy of a bank statement with the Maha Bank for the period 30/12/2012 to 29/12/13. In this statement for the relevant period the minimum balance was Rs.246,810 ($4400).
* A bank statement from the Axis Bank for the period 01-07-2013 to 31-12-2013.
* A handwritten document on Bank of India letterhead stating the applicant’s father had a matured Public Provident Fund Account with a balance of Rs.788,535.
* Evidence of four fixed deposits all issued on 13 November 2013.

The Maha Bank statement provided by the first appellant to the Tribunal was not listed in the financial matrix document. Item 8 in the matrix was not supported by any documentary evidence, and was not referred to in the Tribunal’s decision. Item 5 in the matrix, the provident fund statement, was not referred to in the Tribunal’s decision. The statement showed a credit balance as at March 2013 of 900,820 Indian Rupees (INR), which was different to the amount recorded in the matrix but nonetheless apparently a reference to the same document.

1. The first appellant was required by the regulations to provide evidence of a money deposit held from 10 April 2013 to 9 July 2013. The Tribunal observed that the only document which addressed that period was the statement from the Maha Bank, which covered the period from December 2012 to December 2013 and showed a minimum balance at March 2013 of INR 246,810, amounting to approximately AUD 4400. The Tribunal then referred to the bank statement from Axis Bank, showing monthly deposits of the first appellant’s father’s salary and indicating an opening balance of INR 584,423.19 on 1 July 2013. Although the first appellant claimed that this balance indicated that there had been adequate funds in the account for the prior three months, the Tribunal found that this deposit did not establish evidence of funds held in the required period.
2. It is evident from the reasoning of the Tribunal that it did not deal in detail with the other financial records for the reason that they did not relate to the necessary period of time. For example, the four fixed deposits commenced in November 2013 and therefore said nothing about the balance in the relevant period.
3. The first appellant told the Tribunal that he could provide copies of bank statements going back seven years, if required. The hearing before the Tribunal was held on 30 January 2014 and the decision was made on 9 April 2014. The first appellant provided no additional evidence in the interim. The Tribunal therefore determined:
4. ……the applicant has not given evidence in accordance with the applicable Schedule 5A requirements and therefore does not satisfy cl. 572.223(2)(a).
5. For these reasons, the Tribunal finds that criteria for the grant of a Subclass 572 visa are not met. As there is no evidence the applicant is eligible to be granted a student visa of another subclass, the decision under review must be affirmed.
6. As the primary applicant is not eligible for the grant of a visa, it follows that the application for Mrs Jignasaben Mineshkumar Barevadiya as secondary applicant must also fail.
7. The Tribunal affirms the decisions not to grant the visa applicants Student (Temporary) (Class TU) visas.
8. The ground of challenge before the Federal Circuit Court was that the Tribunal did not look at the financial documentary evidence. The first appellant’s application for judicial review stated, “I think the MRT and the Department of Immigration did not look at my financial document evidence at the time of application.” The first appellant identified two categories of financial documents that he says the Tribunal failed to take into account in making its decision, being the Bank of India public provident fund in his father’s name (item 7) and the four fixed-term deposits under his grandfather’s name (items 1 to 4). The Federal Circuit Court considered the documents and determined that they did not provide evidence of deposits held within the requisite period of time. The Tribunal had therefore correctly put these matters out of consideration because they did not support the requirements of the regulations. It had assessed the material before it and the decision it made was open to it. The Federal Circuit Court held that the Tribunal had not made any jurisdictional error, and dismissed the application for judicial review.
9. A notice of appeal was filed, setting out the grounds of appeal as follows:
10. The FM failed to find that the tribunal’s decision was in breach of s 424A of the Migration Act 1958 (Cth) and therefore fall under jurisdictional error.
    1. There was certain adverse information used by the Tribunal to affirm the decision under review and the Tribunal did not disclose the information in accordance with s 424A
11. I arrive in Australia in February 2006 on student visa. Science [sic] then I has applied for extension of my visa several time with my father’s and grandfather’s finance and same bank documents. Previously immigration department never found problem with my finance I think department and MRT tribunal misunderstood my document.
12. Ground 1 relies on s 424A of the *Migration Act 1958* (Cth) (the Act) which applies to Part 7 Reviewable Decisions, which are decisions that relate to the grant or cancellation of protection visas:

(1) Subject to subsections (2A) and (3), the Tribunal must:

(a)  give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and

(b)  ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the decision that is under review; and

(c)  invite the applicant to comment on or respond to it.

This ground was not available in the circumstances as the visa in question was not a protection visa. In any event, the ground was not pressed.

1. Section 359A of the Act applies to Part 5 Reviewable Decisions, which are decisions that relate to the grant or cancellation of visas other than protection visas. That section relevantly provides:

**359A  Information and invitation given in writing by Tribunal**

(1)  Subject to subsections (2) and (3), the Tribunal must:

(a)  give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and

(b)  ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the decision that is under review; and

(c)  invite the applicant to comment on or respond to it.

……

(4)  This section does not apply to information:

(a)  that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member; or

(b)  that the applicant gave for the purpose of the application for review; or

(ba)  that the applicant gave during the process that led to the decision that is under review, other than such information that was provided orally by the applicant to the Department; or

(c)  that is non‑disclosable information.

Section 359A did apply in the circumstances. However, there was no breach of this section, because the material relied on by the Tribunal was material supplied by the appellants and hence within the exception in s 359A(4)(b) of the Act.

1. The first appellant appeared at the hearing of the appeal. He argued that the Tribunal did not understand his financial documents. It does appear that the Tribunal failed to have regard to the provident fund statement (item 5) submitted to the delegate and amounting to INR 900,820. However, nothing turns on that omission because even if the Tribunal had taken it into account, it would not have contributed sufficient funds to bring the deposit to the required amount. It would have contributed approximately AUD 15,000 to the AUD 4,400 in the savings account. These combined figures amount to less than the required AUD 31,265. Furthermore, the provident fund statement provides evidence of the balance as at March 2013, which is prior to the required dates.
2. The first appellant told the Court that the provident fund statement, as at 30 March 2013, related to the end of the Indian financial year. He said that his father was retired at that time and that the provident fund amount was to be transferred to the personal account of his father thereafter. He said that he had told the Tribunal these things. The first appellant did not, however, provide to the Tribunal, in the period of over two months between the hearing and the date of the decision, documents supporting the transfer of funds into his father’s account. He explained that the reason he did not provide any further documents was because he was experiencing some difficulties in his personal life. The second appellant, his wife, was not well and his parents had come to Australia from India in order to help her. He submitted that it was not possible to obtain the relevant documents from India during that time.
3. The first appellant did not rely on these matters before the Federal Circuit Court. Rather, he relied on what he said was the failure of the Tribunal to take into account the documents that were before it. The transcript of the proceedings before the Tribunal are not before this Court. It is therefore not possible to say whether the first appellant explained to the Tribunal the matters put before this Court. The difficulty for the first appellant is that even if one were to accept that he did put the matter to the Tribunal and that he could have produced documents showing that the provident fund account was transferred to his father’s personal account, the total deposits in the relevant period would be insufficient meet the financial capacity requirements under the regulations.
4. In any event, what the first appellant said he told the Tribunal and the reason he did not follow up by providing relevant documents, ultimately does not go to the question of whether the Tribunal made an error of the necessary kind. The Tribunal found that there was a deposit in the savings account of around AUD 4400 in the relevant period. The evidence before the Tribunal did not support a finding that the first appellant had funds from an acceptable source, being a money deposit of AUD 31,265, held for at least the three months immediately before the date of the application. The first appellant has not demonstrated that the Tribunal made any error, let alone a jurisdictional error, in concluding that the financial requirements of the regulations had not been met. The first appellant said that he could obtain relevant documents within two days of the date of this hearing. However, it is not the role of this Court to assess new evidence on appeal where the evidence was not produced to the Tribunal. Consequently, the appeal must be dismissed.

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| I certify that the preceding nineteen (19) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice North. |

Associate:

Dated: 1 September 2015