FEDERAL COURT OF AUSTRALIA

Ara v Minister for Immigration and Border Protection [2017] FCA 130

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| Appeal from: | *Ara v Minister for Immigration & Anor* [2016] FCCA 2154 |
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| File number(s): | NSD 1810 of 2016 |
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| Judge(s): | **JAGOT J** |
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| Date of judgment: | 17 February 2017 |
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| Catchwords: | **MIGRATION –** appeal from decision of the Federal Circuit Court – whether primary judge erred in dismissing application for judicial review of decision to affirm cancellation of partner visa – no error established – appeal dismissed. |
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| Legislation: | *Migration Act 1958* (Cth) s 140(2) |
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| Cases cited: | *Ara v Minister for Immigration & Anor* [2016] FCCA 2154 |
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| Date of hearing: | 17 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: | Catchwords |
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| Number of paragraphs: | 19 |
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| Counsel for the Appellant: | The appellant appeared in person |
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| Solicitor for the Respondents: | Ms C Hillary of DLA Piper |

ORDERS

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|  | | NSD 1810 of 2016 |
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| BETWEEN: | SHAMIM ARA  Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | JAGOT J |
| DATE OF ORDER: | 17 FEBRUARY 2017 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent’s costs as agreed or taxed.

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

REASONS FOR JUDGMENT

JAGOT J:

1. On 31 March 2015, the Migration Review Tribunal (now, the Administrative Appeals **Tribunal**) affirmed a decision of the Minister for Immigration and Border Protection (the **Minister**) to cancel the appellant’s Subclass 100 (Partner Migrant) visa.
2. On 23 April 2015 the appellant applied to the Federal Circuit Court of Australia (the **FCC**) for judicial review of that decision.
3. On 29 September 2016, the FCC dismissed the application for review.
4. On 17 October 2016, the appellant filed a notice of appeal in this Court from the FCC’s decision. There are three grounds set out in the notice of appeal. They appear in the following terms:
5. The judge of the Federal Circuit Court in his honourable judgment delivered on the 29 September 2016 failed error of law and relief under the judiciary Act. He failed to find that the Administrative Appeals Tribunal (AAT) has not found any evidence in relation to may claims and thus its decision influenced by sufficient doubt.
6. The Administrative Appeals tribunal’s decision was affected by the recent High Court reported decisions.
7. Besides, the Administrative Appeals Tribunal did not follow the proper procedure as required by the Act in arriving its decision in deciding my Permanent Residence visa review application. Thus, the procedures that were required by the act or regulations to be observed in connection with the making of the decision were not observed.
8. The appellant supported her appeal by a written submission, dated 9 February 2017, and also made oral submissions at the hearing today.
9. The appellant’s first proposition is that the provision under which her visa was cancelled, s 140(2) of the *Migration Act 1958* Cth (the **Act**), does not apply to her. Section 140 is as follows:

(1) If a person’s visa is cancelled under section 109 (incorrect information), 116 (general power to cancel), 128 (when holder outside Australia), 133A (Minister’s personal powers to cancel visas on section 109 grounds), 133C (Minister’s personal powers to cancel visas on section 116 grounds) or 137J (student visas), a visa held by another person because of being a member of the family unit of the person is also cancelled.

(2) If:

(a) a person’s visa is cancelled under section 109 (incorrect information), 116 (general powers to cancel), 128 (when holder outside Australia), 113A (Minister’s personal powers to cancel visas on section 109 grounds), 133C (Minister’s personal powers to cancel visas on section 116 grounds) or 137J (student visas); and

(b) another person to whom subsection (1) does not apply holds a visa only because the person whose visa is cancelled held a visa;

the Minister may, without notice to the other person, cancel the other person’s visa.

(3) If:

(a) a person’s visa (the ***cancelled visa***) is cancelled under any provision of this Act; and

(b) the person is a parent of another person; and

(c) the other person holds a particular visa (the ***other visa***), that was granted under section 78 (child born in Australia) because the parent held the cancelled visa;

the other visa is also cancelled.

(4) If:

(a) a visa is cancelled under subsection (1), (2) or (3) because another visa is cancelled; and

(b) the cancellation of the other visa is revoked under section 131, 133F, 137L or 137N;

the cancellation under subsection (1), (2) or (3) is revoked.

1. The appellant’s first proposition is the same argument that was put before the FCC, to the effect that she did not hold a visa “only because the person whose visa is cancelled held a visa”, as set out in s 140(2)(b) of the Act. The primary judge considered and rejected this argument, at [33] to [44] of the reasons for judgment below. I can see no error in the primary judge’s reasoning. Section 140(2)(b), by the use of the word “only because”, should be understood to mean that the person holds a visa by reason of another person having held a visa, in the sense that another person holding a visa was, as the primary judge said, “a condition precedent to the grant of the visa” (*Ara v Minister for Immigration & Anor* [2016] FCCA 2154 at [33]).
2. The issue, then, is whether the primary judge was wrong in concluding that the Tribunal’s discretion did not miscarry.
3. The appellant has made a number of points, both in writing and orally, to support an argument that the Tribunal’s discretion did miscarry.
4. The appellant submitted that she had no notice of the cancellation of her visa. However, s 140(2) of the Act expressly provides that the Minister may cancel a visa without notice.
5. The appellant submitted that the Tribunal failed to consider adjourning the decision to await the outcome of her husband’s judicial review application of the decision to cancel his visa. The first respondent has submitted, and I agree, that there is no evidence that the appellant applied for an adjournment and, even if the appellant had done so, the judicial review application of her husband would not have necessitated an adjournment of her own matter.
6. The appellant submitted that the Tribunal had not considered her situation as an individual, separate from her husband. However, it is clear from the Tribunal’s reasons that it did consider the appellant’s individual position.
7. The appellant submitted that the Tribunal had to consider whether the cancellation of her visa was justified in the public interest. Having regard to s 140(2) of the Act, construed in context, I do not accept that the Tribunal could only exercise the discretion to cancel the visa if it thought this was justified in the public interest.
8. The appellant submitted that the Tribunal made its decision on the basis that it had a discretion not to cancel her visa, only if satisfied that there were sufficiently strong reasons for doing so, and that this was in error. I do not think this is a fair characterisation of what the Tribunal did. At paragraph 16 of its reasons, the Tribunal asked itself the correct question, that is, whether the applicant’s visa should be cancelled. This is the relevant question posed by s 140(2) of the Act. The fact that the Tribunal then invited the appellant to give her reasons as to why the visa should not be cancelled was an appropriate way for the Tribunal to obtain information from the appellant about all of the circumstances she thought were relevant to any cancellation of her visa.
9. The appellant repeated before me many of the matters that she put to the Tribunal, including about a petition which had been submitted to the Tribunal on her behalf, her concern that she would not be able to get a decent paying job in Bangladesh, her inability to support and educate her children in Bangladesh, and the bad political and economic situation in Bangladesh. These were all matters that the Tribunal took into consideration, and I have no power to reconsider the merits of the Tribunal’s assessment.
10. In addition, the appellant submitted that it would not be safe for her or her family in Bangladesh because of political associations of her father-in-law. The appellant said that she understood that my power was limited to considering what had been put before the Tribunal, which is correct in that I am not able to take into account this information as it was not before the Tribunal.
11. The appellant submitted that if the Tribunal had considered all of the facts, it would not have refused her application. It appears, however, that the Tribunal considered all of the material which the appellant provided and decided to affirm the Minister’s decision. I do not have any power to review the merits of the Tribunal’s weighing up of all of the material.
12. The appellant submitted that the lawyers who represented her before the FCC may not have done so as she wished, and she was now representing herself and wanted to be provided with natural justice. I have no doubt that the appellant has put before me everything she can to support her case. However, there is nothing in any of the material which would support a conclusion that there has been any denial of natural justice. It cannot be inferred that the appellant was not competently represented before the FCC. The fact that the appellant can no longer afford legal representation is unfortunate but commonplace, but does not provide any basis for concluding that the FCC’s decision was wrong.
13. Having reviewed the Tribunal and FCC’s reasons, I am unable to see any legal error. As a result, I have no power to intervene in the way the appellant has requested.

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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 Jagot. |

Associate:

Dated: 17 February 2017