FEDERAL COURT OF AUSTRALIA

Ramjali v Minister for Immigration and Border Protection [2017] FCA 271

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| Appeal from: | *Ramjali v Minister for Immigration & Anor* [2016] FCCA 2296 |
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| File number: | NSD 1525 of 2016 |
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| Judge: | **BROMWICH J** |
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| Date of judgment: | 20 March 2017 |
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| Legislation: | *Migration Act 1958* (Cth), ss 65, 140GB, 338  *Migration Regulations 1994* (Cth), Sch 2, cl 457.223(4) |
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| Cases cited: | *Minister for Immigration and Border Protection v Lee* [2014] FCCA 2881  *Ahmad v Minister for Immigration and Border Protection* [2015] FCAFC 182; (2015) 237 FCR 365 |
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| Date of hearing: | 8 March 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: | 33 |
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| Counsel for the Appellant: | The appellant appeared in person |
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| Solicitor for the First Respondent: | Mr L Leerdam, DLA Piper Australia |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice save as to costs |

ORDERS

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|  | | NSD 1525 of 2016 |
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| BETWEEN: | RAJ KUMAR RAMJALI  Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | BROMWICH J |
| DATE OF ORDER: | 20 MARCH 2017 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the respondents’ costs of and incidental to the proceedings in this Court as assessed or agreed.

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

REASONS FOR JUDGMENT

# BROMWICH J:

## Introduction

1. This is an appeal from orders made by a judge of the Federal Circuit Court of Australia on 22 August 2016. Her Honour dismissed an application for review of a 15 January 2015 decision of the Migration Review Tribunal, now the Administrative Appeals Tribunal. The Tribunal had affirmed a 9 November 2012 decision of a delegate of the first respondent, the Minister for Immigration and Border Protection, not to grant the appellant a Temporary Business Entry (Class UC) Subclass 457 visa under s 65 of the *Migration Act 1958* (Cth). The primary reason for the delay in the Tribunal’s decision was that the delegate’s decision had to be re-served due to a defect in the manner of its original service.

## Before the delegate

1. The delegate considered the appellant’s visa application in relation to both Subclass 456, being a Business (Short Stay) visa, and Subclass 457, being a Business (Long Stay) visa. It is not controversial that the delegate refused the grant of the Short Stay visa because the applicant proposed to remain in Australia for more than three months. In relation to the Subclass 457 visa, the appellant was required, inter alia, to meet the requirements of cl 457.223(4)(a) in Schedule 2 to the *Migration Regulations 1994* (Cth) which provided as follows:

(4) The applicant meets the requirements of this subclause if:

(a) either:

(i) if the applicant and a business activity specified in the application and relating to the applicant were the subject of an approved business nomination under regulation 1.20H as in force immediately prior to 14 September 2009:

(A) the nomination was made by a person who was a standard business sponsor at the time the nomination was approved; and

(B) the approval of the nomination has not ceased to have effect under subregulation 1.20H (5) as in force immediately prior to 14 September 2009; or

(ii) if a nomination of an occupation in relation to the applicant has been approved under section 140GB of the Act:

(A) the nomination was made by a person who was a standard business sponsor at the time the nomination was approved; and

(B) the approval of the nomination has not ceased as provided for in regulation 2.75 […]

1. The delegate concluded that the appellant was unable to meet those requirements because on 28 August 2012 a decision was made to refuse the application for standard business sponsorship approval lodged by the appellant's prospective employer, **Zak Form** **Work** Pty Ltd. Because the appellant's prospective employer was not an approved standard business sponsor, the nomination application lodged by the appellant's prospective employer was unable to be assessed. Therefore the requirements of cl 457.223(4)(a) had not been met.

## Before the Tribunal

1. On 15 January 2015, the Tribunal found that it did not have jurisdiction in relation to the appellant’s application for review. This conclusion was reached upon the basis that, when the application for review was received by the Tribunal on 27 November 2014, the appellant’s sponsor, Zak Form Work, was not approved as a standard business sponsor. As established before the original decision-maker, a delegate had refused the sponsor’s approval, which decision had also been affirmed on review by a differently constituted Tribunal on 5 March 2014.
2. In the course of the Tribunal's consideration of the appellant's application, the appellant indicated that he wished the Tribunal to consider his application on the basis of being nominated by a new sponsor, **Green Formwork** Group Pty Ltd. He hoped that the Tribunal would be able to accept his application for review because he had a genuine sponsor and was not, he said, properly notified in relation to his previous sponsor. However the Tribunal considered that, given that it was not in dispute that there was no approved sponsor for citizenship and therefore no approved nomination in force at the relevant time and no application for review of a sponsorship or nomination refusal decision pending before the Tribunal, applying the decision in *Minister for Immigration and Border Protection v Lee* [2014] FCCA 2881 compelled the conclusion that the delegate's decision to refuse the appellant's visa application was not an MRT-reviewable decision. As the relevant circumstances for lodging of the application for review were not met, the Tribunal did not have jurisdiction. This was the case even if the appellant had not been properly notified by the Department.

## Before the Federal Circuit Court

1. On 5 February 2015, the appellant applied to the Federal Circuit of Australia to review the Tribunal's decision.
2. When that application was first before the learned Federal Circuit Court judge for hearing, her Honour raised with the solicitor for the Minister certain concerns. They included whether there was any evidence of an approved sponsorship in force at the time of the appellant's application to the Tribunal in relation to Green Formwork or any nomination of the appellant by Green Formwork, having regard to screenshots from departmental records that had been reproduced in the court book. The existence of any such evidence was relevant because it was clear to her Honour that the Tribunal had access to records from the Department's computer database, known as the integrated client services environment (**ICSE**), in relation to the former sponsor, Zak Form Work, and the suggested replacement sponsor, Green Formwork.
3. One of the screenshots before the primary judge in relation to Green Formwork stated that there was a nomination approved on 20 November 2014, which was a week prior to the lodgement of the application for review to the Tribunal. This raised an issue as to whether this nomination related to the appellant as he had appeared to claim in a subsequent letter to the Tribunal of 26 December 2014, albeit that another screenshot indicated that there was a nomination by Green Formwork on 20 November 2014 which related to a different person.
4. The hearing was adjourned and the Minister filed supplementary written submissions and an affidavit of a solicitor which annexed more recently obtained screenshots from the ICSE database. This further evidence made it clear that the Green Formwork nomination approved on 20 November 2014 did indeed relate to a person other than the appellant. There was no evidence that the appellant was the subject of an approved nomination by Green Formwork. Nor was there any evidence that a nomination had been lodged by Green Formwork in relation to the appellant at any time, let alone before his application for review by the Tribunal.
5. The extracts from the ICSE records before the primary judge revealed, as noted above, that the appellant was at one point in time the subject of a nomination application lodged by Zak Form Work which was refused by the Department on 28 August 2012. That refusal was affirmed by the Tribunal in March 2014, well before the application for review was made by the appellant to the Tribunal on 27 November 2014. The records did not indicate any other nomination in respect of the appellant at the time of his review application or indeed up to the time that the proceedings were commenced in the Federal Circuit Court in 2015.
6. It follows that notwithstanding the appellant’s letter to the Tribunal of 26 December 2014, there was no evidence before the primary judge that was in any way contrary to what the records before her Honour established. The appellant did not claim before the Federal Circuit Court that he was sponsored by, or the subject of a nomination application by, Green Formwork at the time of his application to the Tribunal. There was nothing in the material before the primary judge to indicate that the appellant was sponsored (or identified in a nomination by an approved sponsor) at the time of the review application or that there was at that time any pending Tribunal review in relation to any such sponsorship or nomination application.
7. The appellant’s first ground before the primary judge was to the effect that the Tribunal had failed to notify him properly of the refusal of his prior sponsor’s nomination. Her Honour correctly observed that the Tribunal’s obligation was to notify Zak Form Work as the review applicant, not to notify the appellant who was intending to rely upon Zak Form Work’s nomination. Because the appellant’s review application to the Tribunal was lodged long after the time of the decision by a differently constituted Tribunal to affirm the decision refusing Zak Form Work’s application, the application for review was not made while a Tribunal review of a sponsorship or nomination application by Zak Form Work was pending.
8. The primary judge concluded that because the appellant did not provide any evidence that he was the subject of a sponsorship or approved nomination or that there was a pending review application in that respect by Green Formwork, either at the time of his review application or subsequently, ground one could not succeed.
9. Ground two before the primary judge was that the Department failed to notify the appellant properly of his previous refusal and “*this can be the case with the Tribunal failing to notify my previous sponsor of the refusal*”. However, as her Honour observed, the Department acknowledged that it had not properly notified the appellant of its decision, but upon discovering the error acted to ensure that he was re-notified. The time to apply for a review commenced from that re-notification date. That sequence of events did not affect the Tribunal’s jurisdiction. The appellant did not establish any error in its decision that it did not have jurisdiction.
10. Whatever complaint the appellant had to the effect that the Tribunal failed to notify his previous sponsor was a matter between the differently constituted Tribunal and Zak Form Work. This did not indicate any error on the part of the present Tribunal or that the present Tribunal in some way had jurisdiction in relation to the appellant's visa application decision. Accordingly ground two also failed.
11. In ground three, the appellant contended that he “*now*” had a sponsor who needed his services. He therefore sought to have the primary judge remit the case to the Tribunal to consider that. However her Honour (correctly) characterised this as impermissible merits review which did not establish any error in the Tribunal's decision that it did not have jurisdiction.
12. The primary judge accepted that the facts in this case could be distinguished from those in the Full Court decision in ***Ahmad*** *v Minister for Immigration and Border Protection* [2015] FCAFC 182; (2015) 237 FCR 365. Unlike the situation described in *Ahmad* at [99]-[100], in this case there was no evidence before the Tribunal that the appellant was, at the time of the review application, or for that matter subsequently, the subject of any nomination or sponsorship. Nor was there anything pending: cf *Ahmad* at [100] and [106].
13. The primary judge therefore concluded that the Tribunal was correct in finding that it had no jurisdiction and accordingly the application for review had to be dismissed.

## Before this Court

1. By a notice of appeal filed within time on 9 September 2016, the appellant advances the following single ground of appeal:

While I acknowledge the Order of Judge Barnes I still believe that I have an arguable case and I have not received the judgment yet to put my arguments and I will provide details of grounds when the judgment will be ready.

1. When the matter came on for hearing the appellant told the Court that he still did not have a copy of the decision of the Federal Circuit Court. He was unable to give any explanation as to why he had not obtained a copy, including at the time that he successfully applied for an exemption from paying court fees by an application dated 6 January 2017. By reason of what follows, it is apparent that the appellant having a copy of the reasons of the primary judge could not have assisted him in any event because there was nothing he could do in the circumstances of this case.
2. The appellant handed up short written submissions in response to the Minister's written submissions, to which I will turn shortly.
3. The Minister’s submissions went through the history of the matter in a similar manner to the above. The Minister’s submissions correctly pointed out that the task of the primary judge in dealing with the judicial review proceedings before her Honour was to determine whether the Tribunal’s decision was infected by jurisdictional error. The task of this Court on appeal was to determine whether her Honour’s decision revealed any appellable error. It was submitted that the sole ground of appeal pleaded by the appellant failed to identify or make out any appellable error on the part of the primary judge and that both the decision of the Tribunal and the decision of the primary judge were plainly correct. That submission is plainly correct.
4. It was submitted that the Tribunal’s jurisdiction was derived, relevantly, from s 348 of the *Migration Act*, which states that it must review a decision if an application is properly made under s 347 for review of a Part 5-reviewable decision. Such a decision is relevantly defined in s 338(2)(d) of the *Migration Act* to include a decision:

(d) where it is a criterion for the grant of the visa that the non-citizen is sponsored by an approved sponsor, and the visa is a temporary visa of a kind (however described) prescribed for the purposes of this paragraph:

(i) the non-citizen is sponsored by an approved sponsor at the time the application to review the decision to refuse to grant the visa is made; or

(ii) an application for review of a decision not to approve the sponsor has been made, but, at the time the application to review the decision to refuse to grant the visa is made, review of the sponsorship decision is pending.

1. The Court’s attention was drawn to *Ahmad* in which the Full Court of the Federal Court considered the meaning of s 338(2)(d) of the *Migration Act* and found:
2. at [90], that s 338(2)(d)(i) of the *Migration Act* could be satisfied if a visa applicant was identified in a nomination under s140 GB(1) which was yet to be determined at the time of the making of an application for review to the Tribunal; and
3. at [99]-[101], that s 338(2)(d)(ii) of the *Migration Act* could be satisfied where a decision not to approve the sponsor had been made and was pending review at the time of the application to review the decision to refuse the grant to grant the visa was made – their Honours found that the expression “*decision not to approve the sponsor*” in that provision included both approval of the sponsor and approval of the nomination, so that where a review of a nomination refusal was pending, the Tribunal would also have jurisdiction.
4. However, neither of the circumstances identified by the Full Court in *Ahmed* existed in this case. At the time the application for review was lodged, Zak Form Work was not approved as a standard business sponsor. While Green Formwork was an approved sponsor, the appellant was not the subject of a nomination, either pending or approved, made by Green Formwork. This was confirmed by the ICSE records annexed to the affidavit that was before the primary judge. Those records did not indicate any other nomination in respect of the appellant at any relevant time.
5. There was no suggestion by the appellant that there was a pending review application filed by Zak Form Work in respect of either the decision to refuse the nomination application or to refuse this application for approval as a standard business sponsor. Thus at the time that the appellant lodged the application for review in the Tribunal, he was plainly not identified in a nomination, either determined or pending, and neither was there a pending review of the decision to refuse either a nomination in respect of the appellant or decision to refuse his employer approval as a standard business sponsor.
6. In the circumstances, the Tribunal had no discretion to conclude anything other than that it lacked jurisdiction, and the primary judge was therefore plainly correct to dismiss the appellant’s application for review.
7. I consider that the submissions made on behalf of the Minister are unassailably correct.
8. For completeness I should refer briefly to the submissions furnished at the hearing by the appellant.
9. In substance, the appellant renews his complaints about the notification processes that took place.
10. In relation to Zak Form Work however, it can only be concluded that the company was indeed notified of the adverse decision on its sponsorship approval application because it sought, unsuccessfully, a review of that decision by a differently constituted Tribunal. The appellant asserts – without any evidence, and contrary to the records and evidence before the Tribunal and the primary judge, and the additional evidence before the primary judge – that the Tribunal did have jurisdiction and that he was denied procedural fairness because he was not asked to comment on the information. However none of these matters raised by the appellant address the fundamental and insurmountable problem that his appeal faces.
11. It is plain that, on the material that was before the Tribunal and subsequently confirmed before the primary judge, the necessary nomination or sponsorship in relation to the appellant was absent and accordingly the Tribunal did not have jurisdiction. The Tribunal could not properly reach any other conclusion. It follows that the primary judge was correct in those circumstances to uphold the Tribunal’s decision and to dismiss the application for review. For the same reasons, this appeal must fail.
12. The appeal must therefore be dismissed with costs.

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| I certify that the preceding thirty-three (33) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromwich. |

Associate:

Dated: 20 March 2017