FEDERAL COURT OF AUSTRALIA

Kaur v Minister for Immigration and Border Protection [2017] FCA 624

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| Appeal from: | *Kaur & Ors v Minister for Immigration & Anor* [2016] FCCA 1030 |
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| File number: |  |
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| Judge: | **DAVIES J** |
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| Date of judgment: | 26 May 2017 |
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| Catchwords: | **MIGRATION**  – appeal from the decision of the Federal Circuit Court to dismiss the application for review of the decision of the Migration Review Tribunal – application for an adjournment of the hearing of the appeal for medical reasons – application refused |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth), s 25(2B)(bb)(ii)  *Federal Court Rules 2011* (Cth), r 36.75 |
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| Date of hearing: | 26 May 2017 |
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| Registry: |  |
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| 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: | 12 |
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| Counsel for the Appellants: | The Appellants did not appear |
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| Counsel for the First Respondent: | N Wood |
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| Solicitor for the First Respondent: | 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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|  | | VID 405 of 2016 |
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| BETWEEN: | KANWALJIT KAUR  First Appellant  GURPREET SINGH  Second Appellant  RUHAN CHAHAL  Third Appellant | |
| AND: | MINISTER FOR IMMIGRATION & BORDER PROTECTION  First Respondent  **ADMINISTRATIVE APPEALS TRIBUNAL**  Second Respondent | |

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| JUDGE: | DAVIES J |
| DATE OF ORDER: | 26 may 2017 |

THE COURT ORDERS THAT:

1. The Appellants’ application for an adjournment be refused.
2. Pursuant to section 25(2B)(bb)(ii) of the *Federal Court of Australia Act 1976* (Cth) and rule 36.75 of the *Federal Court Rules 2011*, the appeal be dismissed.
3. The Appellants pay the First Respondent’s costs of the appeal, such costs to be taxed in default of agreement.

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

REASONS FOR JUDGMENT

(REVISED FROM TRANSCRIPT)

DAVIES J:

1. The appellants have appealed the decision of the Federal Circuit Court of Australia (“**FCC**”) which dismissed their application for judicial review of a decision of the Migration Review Tribunal, as it then was (“**the** **Tribunal**”). The Tribunal affirmed a decision of a delegate of the first respondent, the Minister for Immigration and Border Protection (“**the** **Minister**”), to refuse to grant the appellants Skilled (Provisional) (Class VC) visas.
2. The appeal was originally listed for hearing on 3 August 2016 but was adjourned by consent of the parties upon provision of medical evidence that the first appellant had a medical condition that prevented her from attending the hearing. The appeal was relisted for hearing on 9 March 2017 but the hearing was again adjourned by consent upon the provision of medical evidence showing that the first appellant was suffering from a medical condition that prevented her from attending the hearing. The appeal was relisted for the hearing on 26 May 2017 and the parties have been on notice of the new hearing date since 4 April 2017. When advised of the listings the parties were asked to confirm that the new hearing date was suitable. The appellants did not respond to that email but it is noteworthy that in response to an earlier email where the Court proposed to list the appeal for hearing on 15 May 2017, the appellants advised that they would not be available from 15 May to 21 May 2017. It may reasonably be inferred that the appellants were available for a hearing on 26 May 2017, given the absence of any indication to the contrary.
3. On 23 May 2017, the second appellant (the first appellant’s husband) sent an email to the Court and the solicitors for the Minister, advising that the first appellant was still sick and both appellants were still in India, and requesting a further adjournment. The second appellant also said, in respect of the hearing listed for 26 May 2017 “…we are really [apologetic] we told you we were available on these dates…”. The email attached a medical certificate dated 22 May 2017 which certified that the first appellant is suffering from a specified medical condition and under treatment. It was also certified that the first appellant was unable to travel and needed complete bed rest for the next three weeks.
4. The Minister’s solicitors responded by return email to the Court and to the appellants advising that the Minister opposed the appellants’ adjournment request stating that there was little utility in adjourning the hearing of the appeal because the first appellant’s bridging visa expired on 15 April 2017 and she now had no visa allowing her to return to Australia. The email also stated that:

The appellant was offshore when the last adjournment request was granted on 7 March 2017 and the Minister considers that the current medical certificate is of no significance as the appellant has put herself in a positon to be unable to return to Australia to attend her hearing by failing to return before her bridging visa expired. There is also no evidence before the Court to indicate that the appellant was unable to return to Australia before 15 April 2017.

1. Attached to the email was an affidavit sworn by Aaron Michael Day on 24 May 2017. Mr Day is a solicitor employed in the firm of DLA Piper Australia, the lawyers for the respondents. Mr Day exhibited to his affidavit screen prints from the Department of Immigration and Border Protection’s computer database, Integrated Client Services Environment (“**ICSE**”), relating to the appellants. The ICSE records show that the first appellant left Australia on 30 November 2016 and has not returned since, and the second appellant left Australia on 14 April 2017 and has not returned since. The ICSE records also show that the bridging visa held by the first appellant ceased on 15 April 2017 and she currently does not hold any Australian visa. Mr Day deposed that by examining the ICSE records he believes the first appellant does not hold a visa which would permit her re-entry into Australia.
2. The parties were advised by the Court by email on 24 May 2017 that the matter remained listed on 26 May 2017. On 25 May 2017, the Court and the Minister’s legal representatives received a further email from the first appellant stating that her agent had not told her that her visa expired on 15 April 2017, and she did not know that it had. The email went on to state that her husband’s visa was still current and he would represent her case but was not able to attend the hearing because of her health condition and also because their children were doing their mid-term exams, so “he’s not travelling in this period”. She requested again that the hearing of the application be adjourned. In response to that email, the Court informed the parties that the matter remained listed for hearing today; that the Court would not decide the application for an adjournment on the papers but would hear argument today as to whether the appeal should be further adjourned.
3. Later that day the Court and the Minister’s solicitors received a further email from the second appellant, advising that the first appellant is very sick and still under treatment and that he cannot leave her alone and also that his children have mid-term exams, and that is why he cannot attend the hearing as he needs some time to arrange somebody who will take care of his wife and his children, and then he can travel and represent his case. The second appellant repeated his request that the hearing be adjourned.
4. No-one was in attendance for the appellants when the appeal was called for hearing. The matter was then called outside and there was no appearance. Counsel for the Minister put submissions opposing the further adjournment of the appeal. The adjournment request is refused for the following reasons.
5. I am not satisfied with the explanation provided by the appellants as to why a further adjournment is necessary. The appellants have been on notice since 4 April 2017 that the appeal was relisted for hearing on 26 May 2017. Based on the medical certificate that the first appellant provided to the Court she has only been unwell since 22 May 2017. No explanation was provided as to what steps were taken by either of the appellants to return to Australia in time for the hearing prior to the first appellant becoming unwell. The evidence all points to an intention not to return for the purposes of today’s hearing.
6. These proceedings have a very long history. The Tribunal decision was handed down on 30 July 2014. The appellants applied for judicial review of that decision on 25 August 2014 but that application was not heard until 14 April 2016 by reason of several adjournments at the request of the appellants. The history is detailed in the reasons for decision of the FCC in *Kaur & Ors v Minister for Immigration & Anor* [2016] FCCA 1030, at paragraphs [5]‑[16].
7. Since the appeal was filed in this Court, there have been two previous adjournments also at the request of the appellants for various reasons. The numerous adjournment requests in this case indicate a pattern of conduct on the part of the appellants to delay the hearing of their legal processes. The first appellant has been out of the country since November 2016, and the second appellant recently departed the country in April 2017, knowing the appeal was listed for hearing on 26 May 2017. The absence of any explanation as to what steps were taken by the appellants to return to Australia in time for the hearing of the appeal, and the absence of any submissions being filed by the appellants supporting their appeal point to the conclusion that the appellants are not genuinely intending to prosecute their appeal; moreover, given the very numerous occasions on which the hearings have been adjourned, the evidence to be furnished by them in support of any further adjournment required them to do more than simply make a request by email at the last moment supported by a medical certificate which, on its face, inadequately explains the medical reasons preventing the first appellant from travelling. For those reasons, the application for an adjournment is refused.
8. The Minister has applied for summary dismissal of the appeal under s 25(2B)(bb)(ii) of the *Federal Court of Australia Act 1976* (Cth), and pursuant to r 36.75 of the *Federal Court Rules 2011* (Cth). In the absence of a proper explanation for the appellants’ absence, I am prepared to make an order dismissing the appeal proceedings.

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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 Davies. |

Associate:

Dated: 31 May 2017