FEDERAL COURT OF AUSTRALIA

Singh v Minister for Immigration and Border Protection [2016] FCA 1066

|  |  |
| --- | --- |
| Appeal from: | *Singh v Minister for Immigration & Anor* [2015] FCCA 3214 |
|  |  |
| File number: |  |
|  |  |
| Judge: | **MURPHY J** |
|  |  |
| Date of judgment: | 2 September 2016  |
|  |  |
| Catchwords: | **MIGRATION** – Appeal from judicial review of decision of Migration Review Tribunal – application for partner visa – whether genuine spousal relationship – allegation of refusal to allow an adjournment – allegation of lack of procedural fairness – appeal dismissed |
|  |  |
| Legislation: | *Migration Act 1958* (Cth)*Migration Regulations 1994* (Cth) |
|  |  |
| Cases cited: | *Minister for Immigration and Citizenship v Li* (2013)249 CLR 332; [2013] HCA 18  |
|  |  |
| Date of hearing: | 22 August 2016 |
|  |  |
| Registry: |  |
|  |  |
| Division: |  |
|  |  |
| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 25 |
|  |  |
| Counsel for the Appellant: | The Appellant appeared in person |
|  |  |
| Counsel for the First Respondent: | Ms C Symons |
|  |  |
| Solicitor for the First Respondent: | DLA Piper |
|  |  |
| Counsel for the Second Respondent: | The Second Respondent did not appear |

ORDERS

|  |  |
| --- | --- |
|  | VID 941 of 2015 |
|   |
| BETWEEN: | MAHAR SINGHAppellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

|  |  |
| --- | --- |
| JUDGE: | MURPHY J |
| DATE OF ORDER: | 2 september 2016 |

THE COURT ORDERS THAT:

1. The appeal is dismissed.
2. The Appellant pay the First Respondent’s costs of the appeal.

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

REASONS FOR JUDGMENT

MURPHY J:

1. The appellant, Mr Mahar Singh, appeals from the judgment of the Federal Circuit Court on 4 December 2015 (*Singh v Minister for Immigration and Anor* [2015] FCCA 3214) in which the court dismissed his application for judicial review of a decision of the Migration Review Tribunal (as it was then known) (“Tribunal”) on 5 September 2014. The Tribunal had affirmed a decision by a delegate of the first respondent, the Minister for Immigration and Border Protection (“Minister”), not to grant the appellant a Partner (Residence) (Class BS) (Subclass 801) visa (“Subclass 801 visa”).
2. For the reasons I explain, the appeal must be refused. I have made orders accordingly.

## The legislative framework

1. The appellant applied for a Subclass 801 visa on 5 May 2011. The appellant was sponsored in his application by an Australian citizen, Ms Emma Jane Tamme (“sponsor”). Ms Tamme died on 22 June 2013, before a decision had been made on the appellant’s Subclass 801 visa application.
2. To be successful in the application the appellant had to meet the requirements of subclauses 801.221(2), (2A), (3), (4), (5), (6) or (8) of Schedule 2 to the *Migration Regulations 1994* (Cth) (“Regulations”). The relevant subclause in the present case is cl (5).
3. Subclause 801.221(5) provides as follows:

An applicant meets the requirements of this subclause if the applicant:

(a) is the holder of a Subclass 820 visa; and

(b) would meet the requirements of (2) or (2A) except that the sponsoring partner has died; and

(c) satisfies the Minister that the applicant would have continued to be the spouse… of the sponsoring partner if the sponsoring partner had not died; and

(d) has developed close business, cultural or personal ties in Australia.

1. For the purposes of subclause 5(b), the relevant subclause was (2) which relevantly required that the visa applicant be the “spouse” of the sponsoring partner.
2. Section 5F of the *Migration Act 1958* (Cth) (“the Act”) relevantly provides:

(1) For the purposes of this Act, a person is the **spouse** of another person if, under subsection (2), the two persons are in a married relationship.

(2) For the purposes of subsection (1), persons are in a **married relationship** if:

(a) they are married to each other under a marriage that is valid for the purposes of this Act; and

(b) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and

(c) the relationship between them is genuine and continuing; and

(d) they:

(i) live together; or

(ii) do not live separately and apart on a permanent basis.

(3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs 2(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.

(Original emphasis.)

1. Regulation 1.15A of the Regulations makes provision for the purposes of s 5F(3). It provides that the Minister must consider all the circumstances of the relationship, including the financial aspects of the relationship, the nature of the household, the social aspects of the relationship, and the nature of the persons’ commitment to each other.

## The Tribunal decision

1. Before the Tribunal the appellant was represented by his registered migration agent. The Tribunal heard evidence from the appellant, Mr Sanjeet Kumar and Mr Suljit Singh and considered various documents and photographs put forward by the appellant as evidencing that the appellant’s relationship with his sponsor satisfied the requirements of the Regulations and the Act.
2. The Tribunal:
3. identified (correctly) that its task was to decide whether Mr Singh satisfied the requirements of subclause 801.221(5) (at [23]);
4. was satisfied that the appellant met the requirement of subclause 801.221(5)(a), being the holder of a Subclass 820 visa (at [25]);
5. accepted that the appellant and his sponsor married in January 2011. However, the Tribunal was not satisfied that the appellant was the sponsor’s “spouse” before her death within the meaning of the Act (at [26]-[44]). The Tribunal was therefore not satisfied that the appellant met the requirements of subclauses 801.221(5)(b) and (c).
6. Specifically, the Tribunal found:
7. in relation to the financial aspects of the relationship - that the appellant had provided only “limited” evidence that he and his sponsor had any joint liabilities or that they pooled their financial resources (at [28]);
8. in relation to the nature of the household - while the appellant provided evidence of a residential tenancy agreement and residential and services agreements for him and his sponsor, the Tribunal placed greater weight on government sources of information which indicated that they lived at different addresses (at [31]);
9. in relation to the social aspects of the relationship - that there was limited evidence that the appellant and his sponsor represented themselves and were accepted by friends and family as a couple (at [34]-[37]);
10. in relation to the nature of the commitment - the Tribunal was concerned that the appellant’s account of the cause of his sponsor’s death differed from independent medical evidence (at [38]-[39]), and that the appellant was unaware of a coronial inquest into the cause of his sponsor’s death (at [40]) and was unaware of his sponsor’s criminal history (at [41]);
11. that there was evidence that “strongly suggested” that the appellant and the sponsor had contrived their relationship, including evidence that the appellant was in a relationship with a different woman and evidence provided by two third parties to the effect that the marriage was a “sham” and that the appellant was paying the sponsor for themarriage (at [42]-[43]); and

(f) was also not satisfied that the appellant had developed close business, cultural or personal ties in Australia (at [45]), and accordingly was not satisfied that he met the requirement of subclause 801.221(5)(d).

The Tribunal provided detailed reasons for these findings.

## The application for judicial review by the Federal Circuit Court

1. The application for judicial review by the Federal Circuit Court contained only the following ground:

The MRT erred in not giving consideration to the evidence that the Applicant being myself had a genuine, credible relationship with my Sponsor being my spouse who is now deceased. Accordingly MRT failed to give consideration to the evidence as a matter of law.

1. Notwithstanding a direction by the Court to do so, the appellant did not file and serve an Amended Application which particularised the matters upon which he relied and he did not file written submissions.
2. The Federal Circuit Court dismissed the application for judicial review. In summary, the court made observations and findings as follows:
3. the appellant only challenged the Tribunal’s decisions under subclauses 801.221(5)(b) and (c), and made no challenge to the Tribunal’s decision under subclause (d). It was open to the Tribunal to decide that it was not satisfied that the appellant had developed close business, cultural or personal ties in Australia. On that basis the application for judicial review could be dismissed without the necessity for more to be said (at [26]);
4. the ground of review pleaded was not particularised and the appellant did not file written submissions or provide a cogent explanation in support of the ground (at [27]); and
5. notwithstanding the appellant’s failure to properly particularise the ground of review, the primary judge had regard to the Tribunal’s consideration of the issues relevant to the requirements of subclauses 801.221(5)(b) and (c). Her Honour considered that the Tribunal had engaged in a thorough and detailed analysis of the appellant’s claim that the sponsor was his “spouse” within the meaning of the Regulations and concluded that the Tribunal’s failure to accept that claim was open to the Tribunal on the evidence before it (at [38]).

## The appeal to this Court

1. The appellant was not legally represented in the appeal. Notwithstanding directions that he do so he did not put on written submissions. His oral submissions were directed only to an alleged lack of merit in the Tribunal’s decision, including by giving a version of the events leading up to his sponsor’s death which appears to be different to the account he gave to the Tribunal.
2. Ground 1 of the appeal alleges that the primary judge erred in not adjourning and/or refusing to grant an adjournment of the hearing on 22 September 2015, taking into account all the surrounding facts and circumstances including that the appellant was not legally represented, the application was complex and required specialised skill, the appellant had little understanding of court proceedings in Australia and the appellant had limited understanding of the English language insofar as it related to court proceedings.
3. There is little merit in this ground of appeal. The judgment of the Federal Circuit Court does not record that the appellant applied for an adjournment, the Minister denies that any adjournment application was made, and the appellant put on no evidence that he made such an application. When I pressed the appellant as to whether, in fact, he made an application for an adjournment before the Federal Circuit Court he said that he could not remember. I cannot be satisfied on the evidence that the appellant made an application for an adjournment, let alone be satisfied that the primary judge unreasonably refused an adjournment application, in the sense discussed in *Minister for Immigration and Citizenship v Li* (2013)249 CLR 332; [2013] HCA 18.
4. Ground 2 of the appeal alleges that the appellant was not afforded a reasonable opportunity to argue his case on 22 September 2015, in that the primary judge failed to afford him an opportunity to adequately and/or properly present his case, that the court had an obligation and/or duty to assist the appellant to present his case because he was not legally represented, and that the court should have adjourned the application to enable him to get assistance to adequately and/or properly present his case.
5. In my view there is little merit in this ground of appeal too. To the extent that this ground is based in the proposition that the appellant was not allowed an adjournment application it cannot be sustained for the reasons I have already given. Nor is there any material to ground the allegation that the primary judge more generally failed to afford the appellant a reasonable opportunity to argue his case. The appellant did not particularise the ground at all and there is nothing to show that he was given anything less than a reasonable opportunity to appear and present his case before the primary judge. On the face of the judgment it appears that her Honour gave proper attention to the issues to be dealt with.
6. Ground 3 of the appeal, although somewhat difficult to follow, in essence alleges that the primary judge erred in failing to find that the Tribunal’s decision was affected by jurisdictional error because:
7. the Tribunal misapplied the applicable test and/or applied the wrong test to ascertain whether the appellant was a genuine applicant for a spouse visa; and
8. the hearing conducted by the Tribunal was unreasonable because the Tribunal:
9. failed to take into account relevant matters, information and/or evidence and/or took into account irrelevant matters, information and/or evidence;
10. failed to give proper consideration and weight to the appellant’s evidence;
11. summarily dismissed and discounted the appellant’s evidence;
12. failed to consider the appellant’s evidence in totality and cumulatively;
13. failed to properly and adequately investigate and assess the appellant’s evidence and claims; and
14. denied the appellant procedural fairness by failing to give him a reasonable opportunity to respond to the issues put to him.
15. Again, the appellant did not particularise these allegations of a lack of procedural fairness and jurisdictional error by reference to particular aspects of the evidence or the hearing before the Tribunal.
16. I do not accept this ground of appeal. In my view the decision shows that the Tribunal applied the correct test, it engaged in a thorough analysis of the appellant’s claim that the sponsor was his “spouse” within the meaning of the Act and Regulations, and the Tribunal’s findings were open to it on the evidence. I consider the primary judge was correct to find that the Tribunal gave proper consideration to the evidence before it and that it did not fall into jurisdictional error in respect of the application of subclauses 801.221(5)(b)(c) and (d) of the Regulations. I can see nothing to show that the Tribunal did not accord the appellant procedural fairness.
17. The appellant’s real complaint is with the Tribunal’s conclusion that the marriage between the appellant and his sponsor was not genuine. In my view that conclusion is not illogical or irrational and it was open on the evidence. The Court has no jurisdiction to engage in a reconsideration of the merits of the Tribunal’s findings as the appellant invited.
18. Finally, in my view the primary judge was correct in concluding that (even if the Tribunal erred in its consideration of the requirements of subclauses 801.221(5)(b) and (c)) the appeal must fail because the appellant made no challenge to the Tribunal’s finding in relation to subclause (d) that it was not satisfied that Mr Singh had developed close business, cultural or personal ties in Australia.

## Conclusion

1. I have made orders dismissing the appeal and ordering the appellant to pay the first respondent’s costs.

|  |
| --- |
| I certify that the preceding twenty-five (25) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Murphy. |

Associate:

Dated: 2 September 2016