FEDERAL COURT OF AUSTRALIA

Kaur v Minister for Immigration and Border Protection [2016] FCA 1340

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| Appeal from: | *Kaur v Minister for Immigration & Anor* [2016] FCCA 843 |
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| File number: | VID 583 of 2016 |
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| Judge: | **PAGONE J** |
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| Date of judgment: | 14 November 2016 |
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| Date of publication of reasons: | 15 November 2016 |
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| Catchwords: | **MIGRATION** – Application for extension of time and leave to bring an appeal from a decision of the Federal Circuit Court – whether the merits of the case are such that leave to appeal should be granted – no demonstrable error in Federal Circuit Court decision. |
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| Legislation: | *Federal Court Rules 2011* (Cth)  *Migration Regulations 1994* (Cth) |
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| Date of hearing: | 14 November 2016 |
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| Registry: | Victoria |
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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: | 6 |
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| Counsel for the Applicant: | The applicant appeared in person |
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| Solicitor for the First Respondent: | Ms S Koya of DLA Piper |
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| Counsel for the Second Respondent: | The second respondent submits |

ORDERS

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|  | | VID 583 of 2016 |
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| BETWEEN: | AMRITPAL KAUR  Applicant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | PAGONE J |
| DATE OF ORDER: | 14 NOVEMBER 2016 |

THE COURT ORDERS THAT:

1. The application be dismissed with costs.

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

REASONS FOR JUDGMENT

(Revised from transcript)

PAGONE J:

1. This is an application by Ms Kaur for an extension of time and leave to bring an appeal from a decision of the Federal Circuit Court made on 18 May 2016. That decision dismissed an application by Ms Kaur for judicial review of a decision by the Migration Review Tribunal dated 31 October 2014. An application for an extension of time in which to lodge an application for leave to appeal has been said to require consideration, in particular, of the reason for the delay, any prejudice to the respondent in granting leave (noting that the mere absence of prejudice is not sufficient to grant an extension of time) and the merits of the appeal.
2. The reason given for the failure to comply with the time required for lodging the application to appeal was that Ms Kaur was not aware of the 14 day requirement provided by the *Federal Court Rules 2011* (Cth), and that she thought that she had a period of 21 days in which to lodge an appeal. The basis of that belief appears to have been something that she had been told by a friend. That reason is not a satisfactory explanation but, as conceded by the legal representatives for the Minister, the explanation could be accepted if it were not for the Minister’s contention that the merits of the appeal did not justify granting the extension of time. The potential prejudice to the Minister is another factor to take into account in deciding whether to grant the extension of time to bring an appeal, and in this proceeding, the Minister conceded, appropriately, that there would be no prejudice caused by the delay. The case, therefore, depends essentially, on a consideration of whether the merits of the case are such that the extension of time should be granted. There is no point in allowing an appeal to be brought if the case is so lacking in merits as to be a waste of time.
3. The circumstances of this case are that Ms Kaur had applied for a Student (Temporary) (Class TU) visa. The application was made on 20 December 2012 and was rejected. Ms Kaur made an application to the Tribunal, but her application to that Tribunal was also rejected. At the time of the visa application, a criteria for the grant of a subclass 573 visa included the following:

[…]

(2) If the applicant is not an eligible higher degree student, or does not have a confirmation of enrolment in each course of study for which the applicant is an eligible higher degree student:

(a) the applicant gives the Minister evidence in accordance with the requirements mentioned in Schedule 5A for the highest assessment level for the applicant; and

(b) the Minister is satisfied that the applicant is a genuine applicant for entry and stay as a student, having regard to:

(i) the stated intention of the applicant to comply with any conditions subject to which the visa is granted; and

(ii) any other relevant matter; and

(c) 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.

In this case, the Tribunal was not satisfied that the applicant was a genuine applicant for entry and stay in Australia as a student and that she did not meet the requirements in clause 573.223(2)(b). The Tribunal found that the applicant had a poor academic record and it did not accept that the applicant’s need to look after her husband in hospital inhibited her capacity successfully to study and to maintain enrolment. The Tribunal did not accept that the applicant was subject to domestic violence which impacted on her capacity to maintain enrolment or to successfully pursue studies.

1. The statement of the Tribunal’s reasons are set out in the Tribunal’s decisions at [10]-[28]:

10 The applicant in this case is not an eligible higher degree student with a corresponding CoE. As such the applicant must meet the requirements of cl.573.223(2)(b).

**Is the applicant a genuine student having regard to intention to comply and other relevant matters?**

11 The delegate rejected the student visa application on the basis that the applicant had not provided an acceptable explanation for a 10 month gap in her studies in 2013 between 2 February 2010 and 1 December 2010. The delegate was also concerned about the applicant’s academic success. Having arrived in Australia in 2008, the applicant had completed only a Certificate III in Printing and Graphics, a Diploma of Management and an Advanced Diploma of Management.

12 At hearing the applicant gave evidence that she arrived in Australia on 6 November 2008 holding a higher education visa. She submitted documentary evidence to the tribunal showing that she has completed an Advanced Diploma of Management and a Diploma of Management with Imperial College of Technology. On the departmental file (folio 13) is evidence that the applicant has completed all the academic and practical requirements for the Certificate III in Printing and Graphic Arts (Graphic Prepress). The tribunal accepts that the applicant has completed those qualifications and finds accordingly.

13 As at the hearing date the applicant had commenced and completed two subjects in the current Bachelor of Business (Accounting) degree. In accordance with the letter provided by the applicant from an admissions officer at Cambridge International College, dated 28 March 2014 the applicant commenced that course on 23 March 2013. Despite the applicant providing a confirmation of enrolment to the Department showing a completion date of 6 February 2015 (folio 20 of the departmental file), the applicant’s expected completion date as at 28 March 2014 was 11 October 2015 (as indicated on the letter from Cambridge College dated 28 March 2014). The change in the expected completion date is to some part accounted for by the applicant taking an approved deferral of her studies for compassionate reason for the August term 2013 (19 August 2013 to 11 October 2013). The applicant was overseas for two weeks after her father died on 15 September 2013. It is not apparent however why the applicant had taken leave a month before her father died and a month before departing Australia. For the purposes of this application however the tribunal accepts that the applicant was granted a deferral in August term 2013.

14 The statement of academic results from Cambridge International College provided by the applicant is dated 31 March 2014. The statement shows that the applicant was granted exemptions for eight subjects, that she had passed two subjects and failed two subjects. The statement does not show when the applicant undertook those four subjects for which she was not granted exemption. It appears however that they relate to 2013 courses rather than reflecting any courses undertaken in 2014. The tribunal notes that after the hearing the applicant provided a copy of email correspondence to her from a course coordinator at Cambridge International College on 7 January 2014. The applicant was advised in that correspondence that she had been granted special consideration in respect of one subject, Project Management Accounting, due to health issues and that a supplementary examination would be conducted in the study week in term one 2014. The subject ‘Project Management Accounting’ is not stated on the statement of academic results, dated 31 March 2014.

15 At hearing the tribunal spoke with the applicant for some about why she hadn’t completed any higher education courses, despite having arrived on a higher education visa. She referred to family problems, particularly in reference to her ex-husband who was injured and in hospital. She had provided a written statement to the tribunal setting out that whilst she was studying the Diploma of Multimedia course her ex-husband met a serious accident and was hospitalised and admitted to Royal Melbourne Hospital for treatment where he remained for almost 5 months. She stated in part that:

*During this period I couldn’t able to attend some classes and unable to concentrate on my studied as we don’t have anyone in Australia to support me and my ex-husband. Due to this reason, there were some personal problems started with my ex-husband and finally our relationship broke down and ends up with divorce. I don’t have any intention to breach my visa conditions.*

16 The applicant submitted a copy of the Divorce Order made by a Registrar of the Federal Magistrates Court of Australia on 22 May 2011. Initially at hearing the applicant said that she and her ex-husband were divorced by the time of his accident in 2010. The applicant later said that her husband had the accident at the end of 2009. The tribunal queried whether they had separated by that stage. The tribunal suggested that divorces are not generally granted until parties had been separated for 12 months. The applicant said that they separated in 2011. In the tribunal’s view it is inconsistent that the marriage had irretrievably broken down by May 2010 (as the applicant would have been required to attest in the divorce proceedings) but that the applicant continued to be so distracted by her husband’s medical-condition that she was unable to attend classes from February 2010 until December 2010.

17 In response to a question as to whether she took leave of absence from her education provider after her husband’s accident, the applicant said she did not. She said she went to college sometimes. The tribunal put to the applicant that there appeared to be inconsistencies in her evidence. The tribunal asked the applicant what was preventing her from studying full-time. The applicant said that she was emotionally very attached to her husband and she could not leave him alone. She spent the whole days in hospital with her husband. He was in Royal Melbourne Hospital in the middle of February and went to Epworth in April or May. She said that he returned home in August or September. In her statement to the Department the applicant claimed that she was required to be in hospital to look after her husband. It is not evident to the tribunal how the applicant was required to look after her husband in an Australian hospital which is staffed with doctors and nurses who have the role of looking after patients.

18 The applicant’s written statement dated 14 April2014 refers to her not being able “*to attend some classes*” and unable to concentrate on her studies without anyone to support her. The applicant however has not provided corroborative evidence of attending any classes or being enrolled between 2 February 2010 and 1 December 2010. Her email of January 2013 to the Department refers to her “*gap in studies*”. There is some apparent inconsistency in the applicant’s written and oral evidence as to whether she was attending any classes in that period. The tribunal is simply not satisfied that the applicant was attending classes in the period, noting she is represented by a registered migration agent who could have assisted the applicant with providing relevant evidence on this point. Nor has the applicant provided any corroborative evidence of her claim that her ex‑husband spent many months being treated in Royal Melbourne Hospital and Epworth Hospital. She said that she didn’t have any documents about her husband being in hospital because she had had no contact with him after the divorce. Taking into account concerns about the reliability of the applicant’s evidence, that the applicant did not seek leave of absence from her education provider and that the divorce order was dated 21 April 2011 and took effect on 22 May 2011, the tribunal does not accept that the applicant was attending to her husband in hospital or was distracted by his injuries to the extent that she was unable to successfully pursue her studies.

19 The applicant also claims that her academic progress has been inhibited because she was a victim of domestic violence including physical assault. She states that since coming to Australia she has been in a state of severe depression. She has not provided any evidence of having received counselling, medication or other treatment for depression, anxiety or any similar condition. There is no suggestion that she sought medical treatment for any injury at any stage arising from assault. A medical certificate, dated 16 December 2013 appears to have been in respect to a headache and iron deficiency. The applicant has not apparently made any police report complaining of domestic violence nor to her education provider is explanation for her limited academic progress. Taking into account concerns about the applicant’s credibility the tribunal does not accept that her academic progress has been impeded on the basis that she was a victim of domestic violence and physical assault.

20 In respect of the applicant’s failure to complete any higher education courses since her arrival in November 2008 the applicant said that at the time she wanted to start a Bachelor of Accounting degree but took advice to pursue the Diploma of Management course. Since then she studied the Advanced Diploma course and was admitted in 2013 to a Bachelor of Accounting degree and receive exemptions for some subjects. The tribunal asked the applicant why she didn’t earlier pursue an accounting course rather than the management course. In response the applicant said that she wanted exemptions from some subjects and to have “*a little bit of knowledge*”. The tribunal considers this evidence undermines the applicant’s claim to be a genuine applicant for entry and stay temporarily in Australia as a student. The tribunal sees little benefit in the applicant pursuing the diploma and advanced diploma subjects in order to obtain exemptions and a little bit of knowledge.

21 The tribunal notes that the applicant on her own evidence did not commence the bachelor degree course until March 2013 some 4 ½ years after her arrival in Australia as the holder of a higher education .visa. The diploma and advanced diploma of management courses undertaken by the applicant took two years (as shown in her application for a student visa on the departmental file). Whilst accepting that the applicant was granted exemptions in her current bachelor degree course, those exemptions total eight subjects only which, consistent with the applicant’s evidence, would normally take one academic year. She has therefore undertaken two academic years of study in order to obtain credit for one academic year. In the tribunal’s view having arrived on a higher education visa the pursuit of those vocational courses does not reflect the applicant to be a genuine applicant for entry and stay temporarily in Australia as a student.

22 In response to questions at hearing about her current degree studies the applicant said that in the previous year she had passed two subjects and failed two subjects. She said that a student would normally undertake eight units in a year. She enrolled in March 2013 and had therefore (at the time of hearing) been enrolled for year in her bachelor’s degree course. The tribunal suggested then that on the applicant’s own evidence she had been enrolled for one year, the normal subject load was eight units but she had only completed two units. The applicant nodded her head in agreement. The tribunal queried why she did not complete eight subjects if that was the normal loading. The applicant said that she went overseas in September 2013 for two weeks. In second semester she was undertaking subjects of economics and financial accounting practice. The tribunal noted that she then appeared to be undertaking two units rather than usual four units. The applicant said that she went overseas for her father’s cremation and was stressed. She received special consideration for one subject. In this term she undertook three units including the previous one. The tribunal asked why then she didn’t undertake four units. In response the applicant said that she wished to complete the previous one.

23 At hearing the applicant asserted that she would still complete her course in September 2015. The tribunal queried how that would be the case if she was not undertaking a full time course load. The applicant said that she could study between semesters. She later said in the hearing that she would make up the subjects. The tribunal spoke with the applicant further about whether it should consider that she would fail subjects in the future as she had done in the past.

24 After the hearing the applicant lodged a copy of a translated death certificate. She also provided a printout of an email from Cambridge College dated 7 January 2014 advising the applicant that her application for special consideration had been approved and that she would have a supplementary examination in the study week of term one 2014. She also provided a medical certificate in respect of one day on 16 December 2013, a death certificate in respect of her father’s death which was registered on 16 September 2013 and copies of imaging and diagnostic reports. The tribunal accepts that the applicant attended her father’s funeral / cremation in September 2013.

25 The tribunal has found above that since arrival in Australia in November 2008 the applicant has completed a Certificate III in Printing and Graphic Arts, a Diploma of Management and an Advanced Diploma of Management. Despite arriving on a subclass 573 student visa is taken the applicant some 4 ½ years to commence a higher education course which is not consistent with the grant of the higher education visa. Further, taking into account her level academic achievement in the explanations she has provided, the tribunal considers that the applicant has a particularly poor academic record. The tribunal has not accepted that the applicant’s need to look after her husband in hospital inhibited her capacity to successfully study and maintain enrolment. Nor has the tribunal accepted that the applicant was subject to domestic violence which impacted on her capacity to maintain enrolment or successfully pursue studies.

26 In her first year of the Bachelor of Business degree the applicant completed two subjects and failed two subjects. The tribunal further finds on the basis of the applicant’s evidence that a student would normally complete eight units in the year. Accordingly the applicant has completed on own evidence only two units out of eight units successfully in her first year of study of the bachelor’s degree. The tribunal does not accept the applicant’s bare assertions that she can still complete the degree by October 2015 taking into account the failure of various subjects. The tribunal has taken account of the applicant’s explanation as her lack of academic success in her first year of the degree course and that her education provider, Cambridge International College, approved the deferral of studies for compassionate reasons for the August 2013 term (19 August 2013 to 11 October 2013) and that she continued her studies in the term commencing 28 October 2013 (letter dated 28 March 2014 at folio 60). Even so tribunal considers that record does not bode well for the future.

27 The tribunal notes that the applicant has been granted exemptions for various subjects as is set out in the statement of academic results from Cambridge International College dated 31 March 2014. As is discussed above however on consistent with the applicant’s evidence she pursued two years of study in order to obtain one year of credit in her bachelor’s degree. The tribunal considers that the applicant has attempted to prolong her stay in Australia rather than to pursue qualifications which would assist her in a future career. That consideration is reinforced by the applicant’s changes in direction, such that she commenced a course in printing and graphic arts before pursuing courses in management and more recently a Bachelor of Business with an emphasis in accounting. The tribunal has little confidence that the applicant would not again find herself in the situation in which her completion date is significantly deferred.

28 On the basis of the above, and having considered the applicant’s circumstances, immigration history, and other matters it considers relevant, the Tribunal is not satisfied that the applicant is a genuine applicant for entry and stay in Australia as a student. Accordingly, the applicant does not meet cl.573.223(2)(b).

Judge Burchardt sitting in the Federal Circuit Court considered the issues as they had been before the Tribunal and found that the Tribunal had made no error in reaching its conclusion. I need not set out the text of the decision of the Federal Circuit Court, but to note his Honour’s consideration of the issues, particularly at paragraphs [10]-[18]. His Honour concluded, at [19] and [20] of his Honour’s reasons, that the case for the applicant before his Honour was in the Federal Circuit Court, and it continued to be in this Court, an application for review of the merits of the decision by the Tribunal. That is not something that the Federal Circuit Court or this Court can do. There is nothing shown in the decision of the Tribunal or of the Federal Circuit Court indicating any error in the Tribunal proceeding to consider as it did the applicant’s failure to qualify for the requirements in subclass 573.223(2)(b).

1. In this Court, the applicant filed an affidavit in support of her application, but there is nothing in that affidavit demonstrating any error on the part of the Tribunal or the Federal Circuit Court. She also filed a draft notice of appeal containing nine proposed grounds, but none of the grounds indicate any error on the part of the Federal Circuit Court or of the Tribunal.
2. Accordingly, the application will be dismissed.

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| I certify that the preceding six (6) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Pagone. |

Associate:

Dated: 15 November 2016