FEDERAL COURT OF AUSTRALIA

Sachin v Minister for Immigration and Border Protection [2017] FCA 527

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| Appeal from: | *Sachin v Minister for Immigration & Anor* [2016] FCCA 2815  |
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| File number: | NSD 2104 of 2016 |
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| Judge: | **ROBERTSON J** |
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| Date of judgment: | 16 May 2017 |
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| Catchwords: | **MIGRATION** – appeal from Federal Circuit Court of Australia – whether that Court erred in its judicial review of decision of former Migration Review Tribunal – cancellation of higher education visa – whether Tribunal failed to make a finding as to the claimed negligence of the appellant’s agent – whether the Tribunal took into account an irrelevant consideration in the exercise of its discretion where that consideration, the appellant’s failure to continue to be enrolled in a course, was the ground for cancellation  |
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| Legislation: | *Migration Act 1958* (Cth) s 116*Migration Regulations 1994* (Cth) Sch 2, cll 573.111 (definition of “eligible higher degree student”), 573.223(1A), 573.231  |
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| Cases cited: | *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 184; 236 FCR 593*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; 162 CLR 24 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; 185 CLR 259*Wan v Minister for Immigration and Multicultural Affairs* [2001] FCA 568; 107 FCR 133  |
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| Date of hearing: | 16 May 2017 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 26 |
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| Solicitor for the Appellant: | Mr R Turner of Turner Coulson Immigration Lawyers |
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| Solicitor for the First Respondent: | Mr K Eskerie of Sparke Helmore |
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| Counsel for the Second Respondent: | The Second Respondent submitted save as to costs |

ORDERS

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|  | NSD 2104 of 2016 |
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| BETWEEN: | SACHIN SACHINAppellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| JUDGE: | ROBERTSON J |
| DATE OF ORDER: | 16 MAY 2017 |

THE COURT ORDERS THAT:

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

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

REASONS FOR JUDGMENT

ROBERTSON J:

1. The question in this appeal is whether there was any appellable error on the part of the judge of the Federal Circuit Court of Australia (**FCCA**) when his Honour concluded that there was no jurisdictional error on the part of the former Migration Review Tribunal (the **Tribunal**) in its decision made on 16 April 2015.
2. The Tribunal affirmed the decision to cancel the appellant’s Subclass 573 Higher Education Sector visa.
3. The background facts, as stated by the FCCA, were as follows (omitting footnotes and correcting one date):

Mr Sachin was born on 15 August 1994 in India and is a citizen of that country.

On 8 November 2013, Mr Sachin applied for a student visa sub class 573.

On 21 December 2013, that visa was granted.

On 24 October 2014, a delegate of the Minister (delegate) sent Mr Sachin a Notice of Intention to Consider Cancellation of Mr Sachin’s Higher Education Sector (subclass 573) visa by reason of his non compliance with condition 8516 of clause 573.231 or 573.223(1A) of Schedule 2 to the *Migration Regulations 1994* (Cth) (Regulations). Mr Sachin provided a response to the delegate on 28 October 2014. On 8 January 2015, the delegate decided to cancel Mr Sachin’s visa on the basis that Mr Sachin had breached condition 8516. On 12 January 2015, Mr Sachin applied to the Tribunal for review of the delegate’s decision. On 16 April 2015, following a hearing on the same day, the Tribunal affirmed the decision under review.

1. Under s 116(1)(b) of the *Migration Act 1958* (Cth), the Minister may cancel a visa if he or she is satisfied, relevantly, that its holder has not complied with a condition of the visa.
2. Condition 8516 was attached to the appellant’s visa. It stated:

The holder must continue to be a person who would satisfy the primary or secondary criteria, as the case requires, for the grant of the visa.

1. The criteria for the grant of the visa required the appellant to meet, among other criteria, cl 573.231 or cl 573.223(1A) in Sch 2 to the *Migration Regulations 1994* (Cth). Those provisions and the definition of “eligible higher degree student” in cl 573.111 were in the following terms:

***eligible higher degree student*** means an applicant for a Subclass 573 visa in relation to whom the following apply:

(a) the applicant is enrolled in a principal course of study for the award of:

(i) a bachelor’s degree; or

(ii) a masters degree by coursework;

(b) the principal course of study is provided by an eligible education provider;

(c) if the applicant proposes to undertake another course of study before, and for the purposes of, the principal course of study:

(i) the applicant is also enrolled in that course; and

(ii) that course is provided by the eligible education provider or an educational business partner of the eligible education provider.

**573.223**

(1) …

(1A) If the applicant is, and was, at the time of application, an eligible higher degree student who has a confirmation of enrolment in each course of study for which the applicant is an eligible higher degree student:

…

**573.231**

If subclause 573.223(1A) does not apply:

(a) the applicant is enrolled in, or is the subject of a current offer of enrolment in, a course of study that is a principal course; and

(b) the principal course is of a type that was specified for Subclass 573 visas by the Minister in an instrument:

(i) made under regulation 1.40A; and

(ii) in force at the time the application was made.

1. The Tribunal found, at [14] that the appellant was not enrolled in a bachelor’s degree or a “masters” degree and was not enrolled in a course of study that was a principal course of the type specified for Subclass 573 visas. At the hearing, Mr Sachin agreed that he did not comply with condition 8516, but said “it was not his fault,” having been “misguided by the agent”. Mr Sachin accepted that it was his decision to change to the hospitality course, but said he “accepted the agent’s advice”.
2. The Tribunal therefore found, at [15], that the appellant did not continue to be a person who would satisfy the primary criteria for the grant of the visa as required by condition 8516. For those reasons, the Tribunal was satisfied that the ground for cancellation in s 116(1)(b) existed and then proceeded to consider whether the power to cancel a visa should be exercised.
3. I next set out the paragraphs from the reasons of the Tribunal which grounded the claims of jurisdictional error.
4. At [18], the Tribunal said:

Given that the visa was granted to the applicant to enable him to study at a higher education level, the Tribunal considers his failure to continue to be enrolled in a course at the appropriate level as a significant factor that supports the cancellation of the visa.

1. At [20]-[24], the Tribunal said as follows:

He consulted an agent who enrolled him in a Diploma of Management and an Advanced Diploma of Management with a different education provider, but, before the first course started, his agent said the provider did not have a very good reputation and the applicant should consider a hospitality course because it would increase his job prospects for his return to India.

The applicant said he was misguided by the agent, who did not tell him that he had to remain enrolled in a degree in order to comply with condition 8516. The applicant said the reasons for his non-compliance were beyond his control, because he relied on the advice of an experienced migration agent, whom he trusted.

The applicant said he was young when he came to Australia and he did not know “the laws and regulations”. Nevertheless, the Tribunal finds it implausible that his agent in India told him that he must comply with the conditions of his visa and the applicant did not ask what those conditions are.

It is the applicant’s responsibility to ensure that he understands the conditions attached to his visa and to ensure that he complies with those conditions while holding the visa. He could have informed himself of his visa conditions through discussion with his agent in India, but he told the Tribunal that he did not do so. He also told the Tribunal that he did not contact the Department to ask if it was acceptable for him to change courses. The applicant’s claimed ignorance of his visa conditions is not a reason not to cancel the visa. The Tribunal does not accept that the breach of condition 8516 occurred in circumstances which were beyond the applicant’s control.

The Tribunal makes no findings about the alleged advice from the agent the applicant consulted in Australia. The Tribunal explained to the applicant that he is entitled to make a formal complaint about the agent if he believes he has reason to do so. His current agent said he will be assisting the applicant to lodge a complaint.

1. The appellant’s amended application for judicial review to the FCCA was in the following terms:
2. The Tribunal failed to consider all integers of the applicant’s claim.

**Particulars**

1. The Applicant argued, inter alia, that he failed to meet the prescribed criteria due to the negligence of his agent …
2. The Tribunal failed to consider this integer of the Applicant’s claim at [24]. “*The Tribunal makes no findings about the alleged advice from the agent the applicant consulted in Australia*.”
3. The Tribunal took account of an irrelevant consideration.

**Particulars**

1. When considering “*consideration of Discretion*” the Tribunal found [8] “*the Tribunal considers his failure to continue to be enrolled in a course at the appropriate level as a significant factor that supports the cancellation of the visa*”
2. This is not a relevant consideration in the exercise of the discretion as it is the reason for the cancellation being a step prior to the exercise of the discretion.
3. In relation to ground 1, the primary judge held, at [24], that the contention did not accord with a fair reading of the Tribunal’s decision. The Tribunal specifically considered Mr Sachin’s claims in relation to the alleged negligence of his agent as made in a statutory declaration dated 31 March 2015, and at the hearing. In particular, the primary judge said, the Tribunal considered these claims in relation to whether to exercise the power to cancel the visa pursuant to s116(1)(b) of the *Migration Act*. Ultimately, the Tribunal found, at [23], that it was Mr Sachin’s responsibility to ensure that he understood the relevant visa conditions; and it did not accept the “breach of condition 8516 occurred in circumstances which were beyond the applicant’s control”. In light of these findings, it was not necessary for the Tribunal to make findings about the alleged advice from Mr Sachin’s agent. The primary judge said, at [25], that the Tribunal at [24] declined to make findings concerning the advice alleged to have been given by the agent in circumstances where the Tribunal had invited Mr Sachin to make a formal complaint against the agent to the Office of the Migration Agents Registration Authority (OMARA). Mr Sachin was assisted by a new migration agent before the Tribunal who told the Tribunal that he would be assisting the appellant to lodge just such a complaint. The primary judge read the Tribunal’s reasoning at [24] as meaning that “the Tribunal was simply declining to venture into territory best left to the OMARA.” The Tribunal took into account the allegations made against the agent but the Tribunal did not consider those allegations provided a reason not to cancel Mr Sachin’s visa in circumstances where he made the decision to change courses and Mr Sachin did not seek any clarification from the Minister’s Department. That conclusion was open to the Tribunal on the material before it.
4. As to ground 2, the primary judge said at [33]-[35] that Mr Sachin’s failure to be enrolled in a registered course caused him to breach cl 573.231 of his previous visa and that that gave rise to the power to consider whether to exercise the discretion to cancel Mr Sachin’s visa under s.116(1)(b) of the *Migration Act*. However, this did not render Mr Sachin’s failure to enrol in a course at an appropriate level an irrelevant consideration in respect of the Tribunal’s assessment of whether to exercise the discretion to cancel. For a matter to constitute an irrelevant consideration, the consideration must be one that, either expressly or by implication, a decision maker is forbidden or prohibited from taking into account. There was no such prohibition in this case. In the absence of any prohibition identified by Mr Sachin, and given the unconfined terms of the provision conferring the discretion, the Tribunal was entitled to take into account Mr Sachin’s enrolment when considering whether to exercise its discretion under s 116 of the *Migration Act*.
5. The grounds in the notice of appeal to this Court were as follows:
6. The Federal Circuit Court erred in finding that the Second Respondent did not fail to consider all integers of the Appellant’s claims
7. The Federal Circuit Court erred in finding that the Second Respondent did not take into account an irrelevant consideration.
8. As to ground 1, in written submissions on behalf of the appellant it was contended that the Tribunal was required to make a finding about the alleged advice from the appellant’s agent and consider it in the context that it was raised. It was submitted that the failure of the Tribunal to do so was a fundamental error. In oral submissions, the appellant relied on *Wan v Minister for Immigration and Multicultural Affairs* [2001] FCA 568; 107 FCR 133 for the proposition that the Tribunal could not take into account the conduct of the migration agent without making a finding as to what that conduct was. The appellant also submitted that recital of evidence did not mean it had been taken into account.
9. As to ground 2, it was submitted that the Tribunal erred at [18] in stating that it considered the appellant’s failure to continue to be enrolled in a course at the appropriate level was a significant factor that supported the cancellation of his visa. It was submitted that such a finding was the reason for cancelling the visa and was therefore not relevant to the exercise of the discretion to cancel, or not to cancel, the appellant’s visa. It was submitted that the finding by the Tribunal that the appellant had not continued to be enrolled and thus failed to meet the terms of condition 8516 was a jurisdictional fact which was not a relevant consideration in the exercise of the Tribunal’s discretion. “Because the fact of non-enrolment is the reason for cancelling a visa, there is an implied prohibition on it being taken into account in the exercise of the discretion.” It was submitted that the primary judge erred at [36] in this respect.
10. The Minister submitted that there was no error in the decision of the primary judge. In relation to ground 1, the Minister adopted the reasoning of the primary judge at [24] and relied on *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 184; 236 FCR 593, in particular at [47]. In relation to ground 2, the Minister relied on the reasoning of the primary judge, particularly at [35] and [37].

## Consideration

1. In my opinion, ground 1 depends on an overly literal reading of the Tribunal’s reasons, contrary to the principles in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; 185 CLR 259. The Tribunal’s reasoning was, in effect, that because it was the appellant’s responsibility to ensure that he understood the conditions attached to his visa and to ensure that he complied with those conditions while holding the visa, and because he could have informed himself of his visa conditions either through discussion with his agent in India or through contact with the Department, his claimed ignorance of his visa conditions was not a reason not to cancel the visa and the breach of condition 8516 did not occur in circumstances which were beyond the appellant’s control. This was in the context where the Tribunal found it implausible that when the appellant’s agent in India told him that he must comply with the conditions of his visa, the appellant did not ask his agent in India what those conditions were. In effect, the Tribunal took into account the appellant’s claim that he was misguided by the agent he consulted in Australia but decided that it did not have weight in its discretionary decision for the reasons it gave. In my opinion, the statement that the Tribunal “makes no findings about the alleged advice from the agent” means that the Tribunal found it was not necessary and not appropriate to reach a concluded view about whether a complaint against the agent would be well founded.
2. In my view, *Wan* is distinguishable. In effect the Tribunal’s error in *Wan* was to look at the consequences of Mr Wan’s deportation for the children without first, or at all, looking at the best interests of the children with respect to the visa application itself. The Tribunal was there required to give primary consideration to the best interests of the children. The Full Court held that the Tribunal could not do that without having first identified what the best interests of the children indicated should be decided with respect to Mr Wan’s visa application. In the present appeal, however, the reasoning of the Tribunal was that, in light of its view of the appellant’s responsibilities, the claimed conduct of the former migration agent did not need to be decided on. The major point of distinction with *Wan* is that the former agent’s conduct was not a mandatory relevant consideration or a primary consideration. I do not accept the appellant’s submission that it is a general test that the Tribunal makes a jurisdictional error if it does not make a finding of fact as to what a matter is before it can take that matter into account. I refer in this respect to *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 184; 236 FCR 593 at [47], as follows:

The inference that the Tribunal has failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons. But that is an inference not too readily to be drawn where the reasons are otherwise comprehensive and the issue has at least been identified at some point. It may be that it is unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected. Where however there is an issue raised by the evidence advanced on behalf of an applicant and contentions made by the applicant and that issue, if resolved one way, would be dispositive of the Tribunal's review of the delegate's decision, a failure to deal with it in the published reasons may raise a strong inference that it has been overlooked.

1. In the present case, the Tribunal rejected the premise that the former agent’s claimed negligent conduct was a factor bearing on the exercise of its discretion.
2. I accept that mere recital of evidence will not always mean that it was taken into account, but that is not this case.
3. In my opinion, this ground fails.
4. As to ground 2, I see no basis for concluding that the Tribunal was prohibited from taking into account, in the exercise of its discretion as to whether the visa should be cancelled, the factor that the visa was granted to the appellant to enable him to study at a higher education level and that he failed to continue to be enrolled. I refer, as did the primary judge, to *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; 162 CLR 24 at 40. That the ground for cancellation had been established by the appellant’s failure to comply with condition 8516 did not make that factor a prohibited consideration in the exercise of the discretion whether to cancel the visa. As I understand the reasoning of the Tribunal it was that the power was enlivened because the appellant was not enrolled in a relevant course; the power was discretionary; the purpose of the grant of the visa was to enable the appellant to study at a higher education level; and the failure of that purpose by the appellant’s failure to continue to be enrolled in a relevant course was a significant factor that supported the exercise of the discretion to cancel the visa. In my opinion, speaking generally, the occasion for the exercise of a discretion is not irrelevant to the content of the discretion, that is, the grounds on which that discretion may or may not be exercised. The appellant’s legal representative referred to no authority supporting the conclusion for which he contended.
5. I do not accept the submission that the primary judge erred in referring to the PAM3 policy. That policy included the statement that the decision-maker should take into account “The circumstances in which the ground for cancellation arose”. I would not read that statement as standing for the proposition that the fact of cancellation is irrelevant to the exercise of the discretion. In any event what is or is not a prohibited consideration is very much a question of construction, in this case of s 116(1)(b) of the *Migration Act*.
6. Neither of the grounds of appeal having been made out, the appeal should be dismissed, with costs and I so order.

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| I certify that the preceding twenty-six (26) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Robertson. |

Associate:

Dated: 16 May 2017