FEDERAL COURT OF AUSTRALIA

Singh v Minister for Immigration and Border Protection [2015] FCAFC 151

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| Citation: | Singh v Minister for Immigration and Border Protection [2015] FCAFC 151 |
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| Appeal from: | Singh v Minister for Immigration & Anor [2014] FCCA 2867 |
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| Parties: | **JAGMOHAN SINGH v MINISTER FOR IMMIGRATION AND BORDER PROTECTION and MIGRATION REVIEW TRIBUNAL** |
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| File number: | VID 796 of 2014 |
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| Judges: | **KENNY, BESANKO & PERRAM JJ** |
|  |  |
| Date of judgment: | 27 October 2015 |
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| Catchwords: | **MIGRATION** – appeal from decision of Federal Circuit Court of Australia – visa application made by migration agent said to be fraudulent – whether migration agent acted fraudulently or by mistake or on instructions – whether, in any event, s 48(1) of the *Migration Act 1958* (Cth) would operate so as to render proceeding inutile |
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| Legislation: | *Migration Act 1958* (Cth) ss 48(1), 98 |
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| Cases cited: | *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 cited  *Fox v Percy* (2003) 214 CLR 118 cited  *NAWZ v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 199 cited  *Prodduturi v Minister for Immigration and Border Protection* (2015) 144 ALD 243 cited  *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189 cited |
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| Date of hearing: | 25 May 2015 |
|  |  |
| Place: | Melbourne |
|  |  |
| Division: | GENERAL DIVISION |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 58 |
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| Counsel for the Appellant: | Mr A Aleksov |
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| Solicitor for the Appellant: | Ravi James Lawyers |
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| Counsel for the First Respondent: | Mr GT Johnson SC and Mr S Rebikoff |
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| Solicitor for the First Respondent | Australian Government Solicitor |
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| The Second Respondent submitted to any order the Court might make, save as to costs |  |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| VICTORIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | VID 796 of 2014 |

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| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

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| BETWEEN: | JAGMOHAN SINGH  Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  MIGRATION REVIEW TRIBUNAL  Second Respondent |

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| JUDGES: | KENNY, BESANKO & PERRAM JJ |
| DATE OF ORDER: | 27 OCTOBER 2015 |
| WHERE MADE: | MELBOURNE |

THE COURT ORDERS THAT:

1. The appeal be 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*.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| VICTORIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | VID 796 of 2014 |

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| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

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| BETWEEN: | JAGMOHAN SINGH  Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  MIGRATION REVIEW TRIBUNAL  Second Respondent |

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| --- | --- |
| JUDGES: | KENNY, BESANKO & PERRAM JJ |
| DATE: | 27 OCTOBER 2015 |
| PLACE: | MELBOURNE |

**REASONS FOR JUDGMENT**

# The Court

## 1. Introduction

1. This is an appeal from the Federal Circuit Court of Australia (‘Federal Circuit Court’) which dismissed Mr Singh’s application for orders quashing an earlier decision of the Migration Review Tribunal (‘the Tribunal’). That Tribunal had affirmed a decision of a delegate of the Minister for Immigration and Border Protection (‘the Minister’) to refuse Mr Singh a visa known as a Skilled (Provisional) (Class VC) visa which we shall refer to as a skilled visa.
2. The effect of s 48(1) of the *Migration Act 1958* (Cth) (‘the Act’) ordinarily would be that Mr Singh is now prevented from applying for a new visa unless he first departs from Australia. This is because that section prevents application for most kinds of visa being made where an application has already been refused since the applicant last entered Australia. Section 48(1) provides:

‘**48 Non‑citizen refused a visa or whose visa cancelled may only apply for particular visas**

1. A non‑citizen in the migration zone who:

(a) does not hold a substantive visa; and

(b) after last entering Australia:

(i) was refused a visa, other than a refusal of a bridging visa or a refusal under section 501, 501A or 501B, for which the non‑citizen had applied (whether or not the application has been finally determined); or

(ii) held a visa that was cancelled under section 109 (incorrect information), 116 (general power to cancel), 133A (Minister’s personal powers to cancel visas on section 109 grounds), 133C (Minister’s personal powers to cancel visas on section 116 grounds), 134 (business visas), 137J (student visas) or 137Q (regional sponsored employment visas);

may, subject to the regulations, apply for a visa of a class prescribed for the purposes of this section or have an application for such a visa made on his or her behalf, but not for a visa of any other class.

…’

1. Mr Singh wishes to apply for a student visa and it is not in dispute that such a visa is not a visa of a class prescribed for the purposes of s 48(1).
2. The essence of the case is that Mr Singh denies that he ever applied for the skilled visa so that the Tribunal’s decision to refuse to issue the visa is invalid. Since it is invalid, so the argument goes, he has not been refused a visa within the meaning of s 48(1). Accordingly, that section does not presently bar him from applying for a fresh visa.
3. It will follow from the above that Mr Singh did not seek by his proceedings in the Federal Circuit Court, and does not seek by his appeal to this Court, to have the Tribunal consider his application afresh. To the contrary, since he denies ever applying for the visa in the first place he seeks only the quashing of the decision, and a declaration that there was no valid visa application made by him. Indeed, as we explain in more detail later, it is not now in dispute that Mr Singh is not eligible to receive a skilled visa so there is also presently no dispute that the decisions of the delegate and the Tribunal are certainly correct in the sense that it would have been unlawful for either to issue Mr Singh with a skilled visa.
4. Mr Singh does not deny that an application was made in his name but says instead it was fraudulently made by his migration agent. Because it was fraudulently made he denies that he ever applied for a visa. Alternatively, he submits that the Tribunal’s function of conducting a review of the delegate’s decision was thwarted by the conduct of his migration agent in making the fraudulent application.
5. The Federal Circuit Court rejected this case on the facts. It found that his migration agent had applied for a skilled visa by mistake. Although it was satisfied that Mr Singh had sought the advice of the migration agent to obtain a student visa rather than a skilled visa, it thought that the application for the wrong visa was a mistake on the migration agent’s part and not an act of fraud. Consequently, it rejected the case.
6. Before the Federal Circuit Court the Minister had sought to demonstrate that even if the migration agent had lodged the application fraudulently, Mr Singh had participated in the application process so that it could not be said that a fraud had been practised on him. The Federal Circuit Court found (at [61]) that he was not complicit in the actions of the migration agent, although he did participate in the Tribunal process without pointing out that the wrong visa had been applied for. As we discuss below, he did in fact point this out to the Tribunal and this finding was wrong.
7. On appeal Mr Singh now seeks to overturn the Federal Circuit Court’s factual finding that the migration agent had not acted fraudulently and only by mistake. For his part, the Minister seeks to have this Court find what the Federal Circuit Court did not, namely, that Mr Singh always knew what was happening so that there was no fraud practised upon him. He also submitted that even if the Tribunal’s decision were to be set aside, the delegate’s refusal would remain in place with the consequence that s 48(1) of the Act would continue to apply. The proceedings were therefore said to lack utility, and be liable to be dismissed for the reasons given by the Full Court in *Prodduturi v Minister for Immigration and Border Protection* (2015) 144 ALD 243 (‘*Prodduturi*’). Mr Singh submitted that *Prodduturi* was wrongly decided and should not be followed. At the hearing the Minister sought to rely upon an amended notice of contention raising these issues. He was granted that leave at the hearing.
8. It is useful to deal with these issues in the order set out above, starting with the facts.

## 2. Facts

1. On 3 June 2008, prior to their arrival in Australia, Mr Singh’s wife (Ms Kaur) applied for a student visa listing Mr Singh as a person included in the application. It seems that Ms Kaur intended to study for a Certificate IV in Information Technology (Multimedia) at the Hales Institute in Melbourne. On or around 1 April 2009, the Department of Immigration and Citizenship (as it then was) (‘the Department’) indicated that Ms Kaur’s student visa had been granted. Although the evidence is a little sparse, it seems that Mr Singh was granted a student-dependant visa at around the same time.
2. Ms Kaur and Mr Singh arrived in Australia in May 2009. It is not clear what Mr Singh did between that time and January 2011 when the events significant to the disposition of this litigation first began.
3. In the affidavit evidence given by Mr Singh in the Federal Circuit Court he testified that in around 2011 he had approached a firm of migration agents known as SS Migration Agents (‘SS Migration’) because he wished to convert his student-dependant visa to a student visa held by him in his own right. He wished to obtain a student visa to allow him to study for an automotive diploma. He had found SS Migration as a result of an advertisement in a local newspaper in Melbourne. He said that he had decided to use the services of SS Migration because they were the cheapest migration agents he had come across. By his account, he then telephoned the agents and spoke with a Mr Jatinder Ajjan. Mr Ajjan asked Mr Singh to attend his offices where his assistant, one Rajiv, would assist him.
4. Mr Singh then went to a meeting at the offices of SS Migration which were on the corner of Swanston and Collins Streets in the central business district in Melbourne. Mr Singh said that he met with Rajiv and told him that he wished to apply for a student visa. Rajiv said that this was a straightforward process which could be done entirely online. Mr Singh was not asked for any documentation, apart from a copy of his passport, or to sign anything. Mr Singh said that he asked whether he needed to provide any English language assessments but was told that he did not. His wife had provided proof of her English language abilities in her original visa application so it is natural to think that Mr Singh might have been aware of this matter.
5. In the end, Mr Singh said that he provided Rajiv with a copy of his passport, his date of birth, his residential address, his mobile phone number and $2,500.00 in fees. He said that Rajiv told him that he would ‘take care of everything’. Mr Singh was clear about a particular matter: he did not give Rajiv his email address and he did not tell Rajiv his email address was jagmohans@y7mail.com. He said that his actual email address was a different one (which he provided in the Federal Circuit Court) but privacy concerns make it unnecessary to produce it in this public document.
6. On 7 January 2011 there was lodged electronically with the Department an application purporting to be from Mr Singh for a Skilled – Graduate (Temporary) (Class VC, subclass 485) visa. That kind of visa is not a student visa but is instead granted to skilled graduates, a concept which includes, in this context, qualified trades. There were several feature of this application which warrant particular attention:

* it did not express itself to have been lodged by SS Migration but was said to have been prepared without assistance;
* it recorded his email address as jagmohans@y7mail.com, which is the address which Mr Singh denies is his;
* it recorded Mr Singh as having booked a medical examination for 12 January 2011, notwithstanding Mr Singh’s evidence that he did not tell either Mr Ajjan or Rajiv that he had undergone a medical examination and that in fact he had “never undergone a medical examination”; and
* it recorded his qualification as a Diploma in Baking issued by the Hales Institute. Mr Singh denies having any such qualification although, as we have already noted (at [11] above) the Hales Institute was the educational establishment at which Ms Kaur had proposed to study her Certificate IV in Information Technology when she applied for her student visa.

1. Mr Singh completely disclaims this application. He has maintained that he did not ask for this skilled graduate visa; that he did not suggest that he was a baker; and that he did not provide the above-mentioned email address.
2. On 8 January 2011, the Department electronically notified Mr Singh that it had received his application at the email address jagmohans@y7mail.com, which Mr Singh denies is his email address. At the same time, he was granted a bridging visa to come into effect on the expiry of his student-dependant visa.
3. If Mr Singh’s primary argument that he has never validly applied for a skilled visa were correct, then there would be a question whether it necessarily invalidated not only the decisions of the delegate and the Minister but also his bridging visa. If that were the correct view, it would most likely mean that Mr Singh presently does not hold a valid visa and is required by s 189(1) of the Actto be taken into immigration detention and, by s 198, to be removed as soon as reasonably practicable. This question was not, however, explored before this Court; and, having regard to our conclusions on other issues, it is unnecessary for us to examine this issue further.
4. On 10 February 2012, the Department wrote to Mr Singh at the residential address provided on the application form. Mr Singh does not deny that this was his residential address but he does deny receiving the letter. The letter enclosed a detailed request for further information including, by way of example, English language test report results, an academic transcript of his qualifications and his trade skills assessment.
5. On 1 March 2012, Mr Singh sent an email to the Department inquiring into the status of his application and querying whether correspondence was being sent to his correct email address, which he identified as a different address from that on his visa application form. The email had two features worth noting in the present context. First, it quoted a series of references including ‘Transaction Record Number: EGNW7XF67V’, a ‘TRIM File Number’, a ‘Permission Request ID’ number, and a ‘Client ID’ number; and secondly, its subject field, which was composed by Mr Singh, quoted the reference ‘TRN: EGNW7XF67V’ next to the words ‘for General Skilled Migration application’. This, and the other references appearing in the email, could only have been obtained from correspondence about the application sent by the Department. In an affidavit affirmed on 14 August 2014, Mr Singh affirmed that Rajiv, from SS Migration, had given him the TRN number in or about September 2011. Mr Singh was unable to explain in cross-examination, however, how he had acquired the series of references, including the ‘TRN’, stating only ‘I cannot remember where I got it’. On the whole, this was evidence from which it might well be inferred that Mr Singh must have been aware some time before March 2012 that his application was for a skilled visa.
6. The Court below did not refer to this evidence.
7. The email of 1 March 2012 provoked further email exchanges which resulted in a telephone call on 6 March 2012 between Mr Singh and a Departmental official. Mr Singh’s evidence before the Federal Circuit Court was that, during this telephone call, he told the Department that he was applying for a student visa. The file note of the call is as follows:

‘Called client at 1.35pm AEST

Client sent 2 emails from an unauthorised email address. Called client and advised them of process to update details – Form 929 and 1193 and where they can be downloaded from. Client stated that they had a migration agent when their application was lodged. No migration agent listed on application whatsoever.’

1. It will be observed that there is no reference to a student visa. Mr Singh was challenged about this under cross-examination but the Court below made no finding about the omission. In any event, by 7 September 2012, the Department was certainly communicating with Mr Singh at the email address he now agrees is his; and Mr Singh accepted as much. On 7 September 2012, the Department asked him to complete a ‘Form 929’, the present relevance of which is that, amongst the various queries within the Form 929, one asked Mr Singh to indicate what kind of application he was making. Although a ‘Student’ visa application was amongst the options on offer, Mr Singh did not tick the box for it, ticking instead a box marked ‘Residence’. Challenged on this under cross-examination Mr Singh said he did not understand the form. The Court below did not refer to this evidence either.
2. On 27 September 2012 the Department wrote again seeking further information about his ‘Skilled (Provisional) (Class VC) visa application’. Mr Singh says he did not understand what this meant. The letter referred to the fact that Mr Singh could withdraw his application if he wished.
3. The letter of 27 September 2012 also asked Mr Singh to produce evidence of a skills assessment (which made no sense in the context of a student visa) and his English language test results. These were matters which needed to be proved if Mr Singh was to be eligible for the skilled visa. Mr Singh provided none of these materials.
4. On 3 December 2012, a delegate of the Minister refused the application lodged in Mr Singh’s name because Mr Singh had not provided the requisite skills assessment and the English language test results and hence was not entitled to the visa.
5. On 10 December 2012, Mr Singh completed an application for a review of this decision in the Tribunal. There was a letter from the Tribunal dated 13 December 2012 which confirmed receipt of the application expressly referring to the visa as a skilled visa. Mr Singh gave evidence to the Tribunal on 2 October 2013. The Court below found that by then Mr Singh was aware that the application which had been made was for a skilled visa. On 9 October 2013 the Tribunal notified Mr Singh that it had affirmed the delegate’s decision.

## 3. Factual Debates (Notice of Appeal Grounds 2, 3, 4, 5, 6 and 7 and Amended Notice of Contention Grounds 1 and 2)

1. There were four available hypotheses to explain what had happened:
2. Mr Singh had never used the migration agent at all and had lodged the visa application himself;
3. Mr Singh had instructed the migration agent to lodge a skilled visa application;
4. Mr Singh had instructed the migration agent to lodge a student visa application but the agent had mistakenly lodged an application for a skilled visa; or
5. Mr Singh had instructed the migration agent to lodge a student visa application but the agent had fraudulently lodged a skilled visa application.
6. Hypothesis (a) was not pursued at trial. It is consistent with the fact that the application that was lodged does not on its face appear to have been lodged by a migration agent. Neither party pressed for this conclusion and we consider it no further.
7. Hypothesis (b) was the Minister’s case at trial whilst hypothesis (d) was Mr Singh’s case.
8. The Court below embraced hypothesis (c). It did so on the basis that it accepted Mr Singh as a credible witness but was not satisfied that the evidence justified a finding that the agent had acted fraudulently. In particular, it noted that there was no evidence that the agent’s remuneration was affected by whether a skilled or student visa application was lodged.
9. In this Court Mr Singh submitted that the Court below should have found that the application had been lodged fraudulently. The basis for this was said to be four matters:
10. the migration agent received substantial amounts by way of commission;
11. the agent was being investigated by the Department for having facilitated other fraudulent applications;
12. persons associated with the agent had fled Australia after search warrants were executed at the agent’s business premises and their residential premises; and
13. the agent in fact submitted false information to the Department, a fact that could not be explained by mistake, omission or neglect and required ‘the application of some active cerebral endeavour to concoct’.
14. Proposition (a) would have been true whatever visa was applied for and hence does not assist Mr Singh’s argument. Propositions (b) and (c) may be accepted. But they do not meet the point made in the Court below that it has not been explained *why* it was in the interests of the migration agent to apply for a skilled rather than student visa. Without some explanation of that, Mr Singh’s case involves an allegation of random motiveless fraud.
15. It may also be accepted on the appellant’s undisputed evidence that the visa application contained certain incorrect information. The evidence did not disclose anything further about how that information came to be included on the application that Mr Singh said was completed by his agent. The fact that the application contained wrong information is, however, an insufficient basis to conclude that the application or the information in it was fraudulently concocted by the agent in knowledge of the falsity, rather than having been included by mistake. Apart from the three matters just mentioned and rejected, there is nothing else that would support an inference that the agent acted fraudulently, rather than mistakenly or negligently, in submitting the application to the Department.
16. The Court below did not expand on why it rejected the Minister’s hypothesis (b) – that Mr Singh had in fact instructed SS Migration to lodge a skilled visa application.
17. There were a number of matters relevant to that hypothesis. First, it is clear that the Department wrote to Mr Singh’s home address on 10 February 2012 in terms which could not have failed to have alerted Mr Singh to the fact that an application for a skilled visa, *not* a student visa, had been lodged. If Mr Singh had received this letter, he would have known that a skilled visa rather than a student visa had been applied for. If he had known this, he could reasonably have been expected to have contacted the Department to correct the error. His failure to contact the Department was therefore capable of supporting an inference that he did not regard the application as having been lodged in error or without his authority at all. Mr Singh’s evidence was, however, that he did not contact the Department because he did not receive the letter. Although there is no dispute that the letter was sent to the correct address, it is possible that for some reason the letter was not received. At the hearing of the appeal, Mr Johnson SC, who appeared for the Minister, did not invite the Court to do other than accept that Mr Singh ‘said that he didn’t receive that letter and that he wasn’t engaged upon it’ and informed the Court that the Minister was ‘not relying upon [Mr Singh’s] awareness as at 10 February 2012’.
18. Secondly, the subject field of Mr Singh’s email of 1 March 2012 specifically referred to a ‘General Skilled Migration’ visa application with the reference number ‘TRN: EGNW7XF67V’ and, as indicated earlier (at [21] above), the email specifically included a series of other references. The ‘TRN’ and the other references could have been obtained only from Departmental correspondence. As noted above, although Mr Singh deposed at one point that he was given the TRN reference number by his migration agent, he was unable to explain in cross-examination before the Federal Circuit Court where all this reference information came from. This circumstance and his own reference in his email of 1 March 2012 to his skilled visa application is wholly inconsistent with the proposition that he did not then know that such an application had been made.
19. Prior to 1 March 2012, there were, moreover, two other items of correspondence from the Department, which might be thought relevant but, for the reasons explained, little, if anything, can be made of them. These were the email of 8 January 2011 which Mr Singh said was sent to the wrong email address, a fact that the Minister did not contest in the Federal Circuit Court; and the letter of 10 February 2012 discussed above and on which the Minister did not seek to rely on the appeal.
20. There are, however, further difficulties with Mr Singh’s case. Mr Singh’s evidence in cross-examination before the Federal Circuit Court was that he told a Departmental officer that he had applied only for a student visa in the telephone call of 6 March 2012 (see [23] above). This was the first time Mr Singh had made this claim and it would indeed have been an obvious occasion for Mr Singh to inform the Department that the wrong visa had been sought by his migration agent. There is, however, nothing to corroborate his claim that he told the Department at this point that he was not in fact seeking a skilled visa. The file note kept on the Department’s system does not record that Mr Singh had mentioned this highly relevant fact in the conversation. Rather, the file note refers only to Mr Singh’s use of an ‘unauthorised’ email address and to his claim that he had a migration agent when his visa application was lodged and the Departmental observation that the application did not disclose that latter fact. Furthermore, in an affidavit of 14 August 2014 filed before the hearing in the Court below, Mr Singh deposed merely that, in this March conversation, he had informed the Department that he had ‘a migration agent listed on [his] application’ and that he had been advised that this was not the case. This latter account is, of course, entirely consistent with the Department’s file note. Any suggestion that the Departmental officer forgot to include the critical information about the visa he sought in the file note would, in the circumstances, be difficult to maintain.
21. There is also no doubt that Mr Singh received the Department’s email of 7 September 2012 enclosing the Form 929 and that Mr Singh completed the Form 929 and returned it to the Department on 10 September 2012 without ticking the student visa box. As previously noted, his evidence in cross-examination was that he did not understand what was sought.
22. Be this as it may, Mr Singh did not notify the Department that the wrong application was being considered by it when he received the Department’s letter of 27 September 2012. This plainly indicated that the Department was considering a skilled visa application, not a student visa application. Nor did he respond to its request for a skills assessment, which can have made no sense if he was applying for a student visa. Mr Singh says that he did not understand this letter either, although he accepted that by this time he was aware that a skilled visa had been lodged, rather than a student visa. Despite this admitted knowledge, Mr Singh did not contact the Department to inform it of the error. He had ample time to do so. The delegate did not make a decision until 3 December 2012, more than 2 months after Mr Singh accepted that he was aware that a skilled visa had been sought.
23. The above considerations might well be thought to tell against Mr Singh and to favour the Minister’s case that Mr Singh had in fact instructed the migration agent to lodge a skilled visa application.
24. Significantly, however, after the application for the skilled visa was refused, Mr Singh lodged a review application and attended a hearing before the Tribunal. It is apparent from the Tribunal’s reasons that the argument he advanced on that occasion was that he had sought a student visa and not a skilled visa. This is consistent with Mr Singh’s case in this Court and the Court below. The Court below overlooked this and indeed emphasised the fact that it considered Mr Singh had done nothing to alert the Tribunal: see *Singh v Minister for Immigration & Anor* [2014] FCCA 2867 at [45]-[46], [53]. Error of the kind alleged in grounds 5 and 7 of the Notice of Appeal is therefore established. This Court’s jurisdiction to review the decision is enlivened: *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 (FC) at 438 [30] per Allsop J.
25. The Federal Circuit Court reasoned as follows. It did not refer to the Departmental email of 8 January 2011 which Mr Singh said was sent to the wrong email address; but it did refer to the letter of 10 February 2012 and accepted that Mr Singh had known since that date that the wrong visa had been applied for (although the Court later appears to accept that he had such knowledge only from September 2012: see *Singh v Minister for Immigration & Anor* [2014] FCCA 2867 at [61]). It did not advert to the improbability of Mr Singh knowing that fact without thereafter contacting the Department to correct the error. It also did not refer to Mr Singh’s evidence that he had not received that letter. Indeed, on the appeal, both Mr Singh and the Minister accepted that the statement in the reasons of the Federal Circuit Court to the effect that, by 10 February 2012, Mr Singh was aware that the application was for a skilled visa was erroneous. Nor did the Court refer to Mr Singh’s email of 1 March 2012, with its unexplained references to the series of references, including the ‘TRN’ reference, and ‘General Skilled Migration’ visa application in the subject field. It did refer to the letter of 27 September 2012 but not to its forensic significance for the Minister’s case, and neither the improbability of Mr Singh failing to contact the Department to correct the error in light of it nor Mr Singh’s evidence that he did not understand the letter were mentioned. It also referred to Mr Singh’s application for review and his appearance before the Tribunal, but, as already noted, not to the fact that Mr Singh’s argument was that he had sought a student visa and not a skilled visa.
26. The Federal Circuit Court’s reasoning was as follows:

‘44. The applicant gave evidence that he had no knowledge that his migration agent applying for a Skilled visa. Based on the evidence given before the Tribunal, the content of the applicant’s Affidavit sworn 28 March 2014, the discovered material and the oral evidence, the Court accepts that the applicant did not know until 10 February 2012 (supra) that his migration agent had applied for a Skilled (Provisional) (Class VC) visa.

45. The Court has found that the proceedings were not vitiated by fraud and the applicant is bound by the acts of his migration agent. The applicant was aware on 10 February 2012 of the type of visa that he had applied for, and did nothing to alert the Tribunal; he let it proceed on that basis.’

1. Whether or not the Federal Circuit Court found that Mr Singh was aware that the application was for a skilled, not a student, visa in February or September 2012, the fact is that the Court did not deal with the Minister’s contention that Mr Singh’s failure to correct this supposed error in a timely manner made it unlikely that the migration agent had lodged the application in error in the first place; and that the better view was that the application had been lodged on Mr Singh’s instructions. That failure to deal with the Minister’s case is also a sufficient error to engage this Court’s jurisdiction to review the matter.
2. We do not consider, however, that there is any proper basis to interfere with the Federal Circuit Court’s conclusion that the migration agent did not act fraudulently. The absence of any motive for the agent to do so remains starkly unanswered in this Court. It is of course conceivable that a migration agent, acting negligently, might apply for the wrong visa, but it is implausible that the agent in Mr Singh’s case would have dishonestly lodged the visa application where he had no interest in doing so. Mr Singh’s case simply does not make sense.
3. The only issue for determination is therefore the one which arises on the Minister’s notice of contention, that is to say, whether Mr Singh instructed the migration agent to lodge the skilled visa or whether he told him to lodge a student visa.
4. On the one hand, the Federal Circuit Court had the advantage of hearing Mr Singh give his evidence and it is clear that it accepted him as a truthful witness. That is not an advantage this Court has had. On the other hand, it is certainly curious that Mr Singh failed to notify the Department that the application had been made for the wrong visa, at least after 27 September 2012 (and before the delegate’s decision). There would appear to be a very real question as to whether a likely explanation for that failure is that he was perfectly aware that it was a skilled visa which had been applied for.
5. Notwithstanding this, we do not think that that conclusion is inevitable. It is possible that there may be a plausible explanation for Mr Singh’s conduct. For example, it may be that Mr Singh thought that the mistake was irrelevant and could be corrected at a later date by the Tribunal – a view consistent with his subsequent attempt to do so. In that circumstance, it would ordinarily be appropriate to set aside his Honour’s judgment and remit the matter for rehearing on this issue (given that we are satisfied that the trial judge’s reasoning was erroneous, in that he failed to deal with the Minister’s contention in this regard). In this case, however, there would be no purpose in doing so. As we explained earlier, we do not consider that the Federal Circuit Court’s conclusion that the migration agent was not shown to have acted fraudulently is ‘glaringly improbable’, ‘contrary to compelling inferences’ or contrary to ‘incontrovertible’ facts: cf. *Fox v Percy* (2003) 214 CLR 118 at 128 [29]. The error in the trial judge’s reasoning does not affect our judgment in this regard.
6. Regardless of whether the visa application was made in error or on Mr Singh’s instruction, the result would be the same. This is because of s 98 of the Act. It provides:

‘98 Completion of visa application

A non‑citizen who does not fill in his or her application form or passenger card is taken to do so if he or she causes it to be filled in or if it is otherwise filled in on his or her behalf.’

1. Once it is concluded that there was no fraud on the agent’s part, this provision deems Mr Singh to have completed the visa application form himself. On Mr Singh’s version of events, he left it to his migration agent to complete the application for a student visa. That is sufficient to attract s 98, even where an error was then made by the agent in completing the form. The evident purpose of s 98 is to make visa applicants responsible for what is written on an application form or passenger card made on her or his behalf even if someone else writes it. Whilst there may be different considerations where a form is completed by an agent in a fraudulent way (cf. *NAWZ v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 199) those principles have no application in a case such as the present where no fraud is established.
2. In the circumstances stated, there would be no utility in a rehearing. Without a finding of fraud there is nothing in this case. The appeal should be dismissed, with costs.

## 4. Other Matters (Notice of Appeal Ground 1 and Amended Notice of Contention Grounds 3 and 4)

1. Once that conclusion is reached the remaining issues in the appeal fall away. There is no basis for deciding whether the Court below should have found that Mr Singh was complicit in the fraud, or that he ratified or authorised it. Nor is there any foundation for an inquiry as to whether the fraud stultified the process of consideration of the application: cf. *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189.
2. There are two issues which should, however, be mentioned. First, it was said that the Federal Circuit Court had erred in considering Mr Singh’s original application when, in fact, he had filed an amended application. There is no substance in this point. Whilst it is true that the Court below set out the grounds from the wrong application at [36] in its reasons, it is plain that when it came to answer the individual grounds at [70]-[73] it was addressing the correct document.
3. Secondly, much of the appeal was devoted to the issue of whether, in the event that Mr Singh was successful in establishing fraud, relief should still be refused on the basis explained in *Prodduturi*. Mr Singh contended that *Prodduturi* was incorrectly decided. In the circumstances where we have concluded that the appeal should be dismissed due to an absence of fraud it is not necessary to enter upon this debate. We would observe, as we have suggested above at [18], that the effect of the appellant’s argument, if accepted, may be to render invalid any bridging visa issued pending review proceedings in the Tribunal. In any event, it is not necessary to pursue this matter.
4. The orders of the Court will be:
5. The appeal be dismissed.
6. The Appellant pay the First Respondent’s costs of the appeal.

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| I certify that the preceding fifty-eight (58) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Kenny, Besanko & Perram. |

Associate:

Dated: 27 October 2015