FEDERAL COURT OF AUSTRALIA

Dhungana v Minister for Immigration and Border Protection [2016] FCA 1411

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| Appeal from: | *Dhungana v Minister for Immigration & Anor* [2016] FCCA 731 |
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| File number: | VID 287 of 2016 |
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| Judge: | **TRACEY J** |
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| Date of judgment: | 24 November 2016 |
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| Catchwords: | **MIGRATION** – appeal from Federal Circuit Court of Australia – appellant’s visa cancelled on basis of having exceeded maximum amount of English Language Intensive Courses for Overseas Students permitted by cl 572.234 of the *Migration Regulations 1994* (Cth) – failure to identify appealable error, and none apparent – appeal dismissed |
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| Legislation: | *Acts Interpretation Act 1901* (Cth), s 15AB(1)  *Migration Regulations 1994* (Cth), cl 572.234(1) |
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| Cases cited: | *Dhungana v Minister for Immigration and Border Protection* [2016] FCCA 731  *Diba v Minister for Immigration and Citizenship* (2010)240 FLR 90 |
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| Date of hearing: | 24 November 2016 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | Catchwords |
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| Number of paragraphs: | 32 |
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| Counsel for the Appellant: | The appellant appeared in person, with Mr G Heaviside as a McKenzie friend |
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| Counsel for the Respondents: | Mr A Aleksov |
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| Solicitor for the Repondents: | DLA Piper Australia |

ORDERS

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|  | | VID 287 of 2016 |
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| BETWEEN: | RISHI DHUNGANA  Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | TRACEY J |
| DATE OF ORDER: | 24 NOVEMBER 2016 |

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*.

REASONS FOR JUDGMENT

TRACEY J:

1. This is an appeal from a decision of the Federal Circuit Court of Australia (“FCC”) to dismiss the appellant’s application for judicial review of a decision of the Migration Review Tribunal (“the Tribunal”) (as it then was): see *Dhungana v Minister for Immigration and Border Protection* [2016] FCCA 731.
2. The appellant is a citizen of Nepal. He entered Australia in August 2011 as a holder of a subclass 570 visa. On 31 August 2012, he applied for a Student (Temporary) (Class TU) visa. Having regard to the courses he was intending to study the relevant visa was subclass 572.
3. On 13 December 2012, a delegate of the Minister refused the appellant’s application for a visa on the basis that he did not satisfy cl 572.234 of the *Migration Regulations 1994* (Cth) (“the Regulations”), as he had exceeded the maximum amount of English Language Intensive Courses for Overseas Students (“ELICOS”) permitted by cl 572.234.
4. Clause 572.234(1) of Schedule 2 of the Regulations relevantly provided that:

“If the applicant is subject to assessment level 3, 4 or 5, the aggregate of the period, or periods, of ELICOS that the applicant is seeking to undertake, together with the period, or periods, of any previous ELICOS undertaken as the holder of a Subclass 570, 572, 573, 574, 575 or 576 visa, or any subsequent bridging visa, does not exceed:

…

(b) for an applicant who is subject to assessment level 4 or 5 – 40 weeks”

1. On 2 January 2013, the appellant made an application to the Tribunal for review of the delegate’s decision.
2. On 29 October 2014, he attended a Tribunal hearing. He gave evidence and presented arguments in support of his application. He was assisted by a registered migration agent.
3. On 30 October 2014, the Tribunal affirmed the delegate’s decision. The Tribunal found that clause 572.234(1)(b) applied to the appellant by reason of his enrolment in an Advanced Diploma of Hospitality and because he had previously held a subclass 570 visa. As a result, the period of ELICOS training undertaken could not exceed 40 weeks.
4. The appellant conceded at the Tribunal hearing that he had previously undertaken a total of 57 weeks of ELICOS training.
5. The Tribunal referred to the following passages in *Diba v Minister for Immigration and Citizenship* (2010)240 FLR 90 in support of its conclusion that the appellant did not satisfy the criteria for the grant of a Subclass 572 visa:

“[17] The effect of cl 572.234 is to deny subclass 572 visas to applicants who, in the aggregate, have or will undertake what is deemed to be too much ELICOS training. It can be inferred from this that the clause’s underlying purpose is to discourage excessive ELICOS study and, presumably, applicants whose poor English language skills mean that they have to undertake several or many such courses before they have an adequate facility with English. The burden of the applicants’ submissions is that the interpretation which is plain from the wording of the clause does not reflect its true purpose, which is to be found in the explanatory statement. That purpose is said to be one which is focussed not on preventing them from undertaking excessive periods of ELICOS, but on pushing applicants towards their principal studies. Such an interpretation is quite at variance with cl 572.234’s obvious intention and gives the words in the explanatory statement “without commencing studies in a principal course” a significance and meaning which cl 572.234 does not justify. While it is appropriate to have regard to the explanatory statement to understand the purpose of cl 572.234 and necessary to interpret the clause with a view to promoting its purpose, the explanatory statement is not the last word on the purpose underlying cl 572.234. The purpose of the clause is apparent from its text and the explanatory statement should not be construed in such a way as to suggest that it propounds a different one.

[18] In any event, and contrary to the applicants’ submissions, a proper reading of the passage in the explanatory statement discloses that it is concerned to prevent an applicant who has not commenced studies in a principal course from undertaking periods of ELICOS deemed to be excessive. The drafter was not concerned with encouraging further study of principal courses but with preventing excessive study in an area other than the principal course, namely ELICOS. Specifically, the drafter was concerned to discourage excessive ELICOS study prior to the principal course having commenced. Consequently, it is incorrect to submit, as the applicants do, that the clause intends an applicant’s excessive periods of ELICOS study to be forgiven as long as he or she then commences studies in a principal course. If an applicant has undertaken more than the prescribed period of ELICOS tuition and has not commenced his or her principal course, whether or not he or she proposes further ELICOS study, then that applicant has undertaken “excessive periods of ELICOS without commencing studies in a principal course” and cannot satisfy cl 572.234.

[19] Given the purpose of the clause, the reference in cl 572.234 to applicants who are “seeking to undertake” periods of ELICOS, might appear redundant. However, cl 572.234 has to be able to act prospectively because an applicant may be required, in order to satisfy the criteria in cl 572.223 and cl 5A404 of Sch 5A, to give evidence that he or she “will undertake an ELICOS of no more than 20 weeks duration before commencing his or her principal course”: cl 5A404(b)(i). If an applicant to whom cl 5A404 applies achieves, in an IELTS test, an overall band score of at least 5.0 but less than 5.5 then he or she will have to undertake “no more than 20 weeks” of ELICOS training before commencing his or her principal course. That may have the result that the total period of the applicant’s ELICOS tuition will exceed the limit imposed by cl 572.234 without the applicant having yet commenced those principal studies. In such circumstances, the reference in cl 572.234 to applicants who are “seeking to undertake” periods of ELICOS is not in fact redundant.

[20] Consequently, I conclude that the purpose underlying cl 572.234 is to make subclass 572 visas unavailable to applicants who, in the aggregate, have undertaken or seek to undertake what is deemed to be excessive ELICOS training. While on occasion it may be harsh and arbitrary for subclass 572 visas to be unavailable to Assessment Level 4 applicants who have, or will have, undertaken only slightly more than 40 weeks’ ELICOS training, it is not an absurd outcome in the context of what I conclude to be the purpose of the clause. For that reason I find that the Tribunal did not err in its understanding or application of the criteria set out in cl 572.234 of the Regulations.”

1. On 21 November 2014, the appellant made an application to the FCC for judicial review of the Tribunal’s decision.
2. By his amended application dated 15 April 2015, the appellant alleged that the Tribunal’s decision was affected by jurisdictional error on the following grounds:

“1. The Tribunal erred in law in applying cl. 572.234 of Schedule 2 of the *Migration Regulations 1994* to the evidence before the Tribunal.

**Particulars**

a. An applicant does not meet the criterion in cl. 572.234 where an applicant is seeking to undertake excessive periods of ELICOS study. Here, the applicant had previously undertaken ELICOS study but was not “seeking to undertake” ELICOS study at the time of the decision.

b. At the time of the decision, the applicant had commenced studies in a principal course.

c. The purpose of the cl 572.234 is to prevent excess study in an area other than the principal course. The purpose is redundant where an applicant has commenced the principal course.

d. Where an applicant has taken “excessive periods” of ELICOS studies but has commenced their [principal] course, cl. 572.234 is satisfied, because the applicant does not seek to undertake excessive periods of ELICOS studies.

2. The Tribunal’s decision to refuse to grant the applicant’s visa was made without the Tribunal having complied with a statutory condition essential to the validity of the decision, and is therefore affected by jurisdictional error.

**Particulars**

a. An applicant does not meet the criterion in cl. 572.234 where an applicant is seeking to undertake excessive periods of ELICOS study. Here, the applicant had previously undertaken ELICOS study but was not “seeking to undertake” ELICOS study at the time of the decision.

b. At the time of the decision, the applicant had commenced studies in a principal course.

c. The purpose of the cl 572.234 is to prevent excess study in an area other than the principal course. The purpose is redundant where an applicant has commenced the principal course.

d. Where an applicant has taken “excessive periods” of ELICOS studies but has commenced their [principal] course, cl. 572.234 is satisfied, because the applicant does not seek to undertake excessive periods of ELICOS studies.”

1. The appellant contended that the decision in *Diba* was plainly wrong and that it should not be followed. He referred to the explanatory statement regarding cl 572.234, which provided that:

“This item inserts clause 572.234 into Schedule 2 to the Migration Regulations.

New clause 572.234 provides that where an applicant is subject to assessment level 3, 4 or 5, the total period or periods of ELICOS (English Language Intensive Course for Overseas Students) that the applicant is seeking to undertake together with any previous periods of ELICOS undertaken while the holder of a Subclass 570, 571, 572, 573, 574, 575 or 576 visa (or any subsequent bridging visa) must not exceed:

• 60 weeks if the applicant is subject to assessment level 3; or

• 40 weeks if the applicant is subject to assessment level 4 or 5.

The purpose of new clause 572.234 is to prevent students undertaking excessive periods of ELICOS without commencing studies in a principal course”

1. Having regard to the explanatory memorandum, the appellant submitted that clause 572.234 only applies to an applicant if he or she is seeking to undertake *further* ELICOS training. The appellant contended that the FCC was permitted to consider the explanatory memorandum under s 15AB of the *Acts Interpretation Act 1901* (Cth).
2. Section 15AB(1) of the Acts Interpretation Act provides that:

“(1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:

(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or

(b) to determine the meaning of the provision when:

(i) the provision is ambiguous or obscure; or

(ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.”

1. The FCC rejected the appellant’s submission. At [8], the FCC said:

“… [I]t seems to me that such an interpretation [as contended for by the appellant] is contrary to the plain words of cl.572.234. The clause clearly contemplates a situation where the relevant periods consist of the combination of both ELICOS studies that the applicant has already undertaken and any further ELICOS studies that the applicant is seeking to undertake.”

1. The FCC doubted that s 15AB permitted consultation of the explanatory memorandum on the basis that the ordinary meaning of cl 572.234 is clear and did not give rise to any ambiguity or obscurity.
2. The appellant further contended that the provision was intended to encourage applicants to commence a principal course rather than continue undertaking ELICOS courses. The Minister submitted that the purpose of the clause was to push people into commencing principal studies rather than studying further intensive English courses and that it achieved this purpose by establishing a disqualifying rule. The FCC accepted the Minister’s submission that the provision was intended to act as a bar.
3. The FCC dismissed the appellant’s application.

# GROUNDS OF APPEAL

1. The appellant appealed to this Court. He advanced the following grounds of appeal:

“1. The applicant failed to attend the natural justice due to the failure of the Second Respondent’s irrelevant consideration and incorrect implication of the legal principles.

2. The Second Respondent misunderstood and misapplied the law and misconstrued the claim and also failed to apply clause 572.234 of the *Migration Regulations 1994*.

3. The Second Respondent erred in law in applying or determining the statutory conditions and its essentiality in making this decision.

4. The Court below erred in making the decision in respect to the above issues.”

1. On 18 April 2016, the Court made orders for the filing of written submissions. The appellant did not originally file any written submissions in support of his appeal. He did, however, file an affidavit on 3 June 2016. That affidavit recounted the history of the appellant’s dealings with the Department, provided details of his studies in Australia and asserted that he was a “genuine student”. The hearing of his appeal was fixed for 1 August 2016. The hearing was adjourned until today because of medical conditions which prevented him from attending Court in August. On 23 August 2016 he filed a document, with attachments, which he said contained a “statement to the Federal Magistrates Court in this matter”. Yesterday, a written outline of submissions was filed on behalf of the appellant. It was filed by Mr Geoffrey Heaviside who identified himself as the sponsor of the appellant when he applied to come to Australia in 2010. Mr Heaviside is not a lawyer and sought leave to act as a McKenzie friend for the appellant at the hearing. That leave was granted.
2. The submissions contained a detailed history of the appellant’s interest in coming to Australia and studying here. It detailed the courses undertaken by the appellant and the costs which had been incurred in tuition fees and legal charges. It contained an eloquent plea “that the strict application of Migration Regulation 572.234(1)(b) (since removed altogether from the regulations) is harsh and unconscionable.”
3. The submissions did not, however, identify any appealable error on the part of the FCC or seek to develop any arguments which might have been understood to suggest the existence of such errors.
4. The Minister filed submissions in accordance with the Court’s order. He did not, of course, have access to the submissions filed on behalf of the appellant at the time at which the filing occurred.
5. The Minister submitted that grounds 1 and 3 had not been raised before the FCC and that it would not be expedient in the interests of justice to allow the appellant to advance the new grounds on appeal because they lack merit and because the appellant has failed to explain why they were not raised in the court below.
6. The Minister further submitted that ground 1 lacked merit because the appellant did attend the hearing before the Tribunal and therefore could not maintain that he had been denied “natural justice”. He contended that there was no basis for the appellant’s claim that the Tribunal took into account an irrelevant consideration nor was there any basis to suggest that the Tribunal’s decision was affected by any incorrect implication (or, perhaps, application) of legal principle.
7. The Minister similarly contended that the appellant had no basis to claim that the Tribunal erred in law in construing the statutory conditions which had to be satisfied in order for him to be eligible for the visa.
8. The Minister contended that the appellant’s second ground of appeal constituted a re‑agitation of the argument advanced before the FCC. The Minister submitted that the Tribunal correctly applied the provision to the facts of the case and that the FCC was not in error when it dismissed the amended application.
9. At the outset of the hearing this morning I sought to explain to the appellant the role of this Court on an appeal from the FCC and, in particular, invited him to advance any arguments which might support one or more of the grounds of his appeal. The appellant addressed the Court at some length. He explained the history of his study in Australia and his present circumstances. He also complained that the “system” of visa regulation was unfair at least to the extent that it applied to him. Subject to one matter he did not direct attention to any of his appeal grounds.
10. The one matter that was of potential relevance related to what he said was a refusal by the FCC to receive and consider some written submissions which were exhibited to his affidavit filed on 3 June 2016.
11. I was advised by counsel for the Minister (who had appeared for the Minister in the FCC) that the appellant had attempted to file the submissions after the primary judge had delivered her *ex tempore* reasons for dismissing the appellant’s judicial review application. The appellant did not challenge the accuracy of the Minister’s account. The rejection of the proposed tender is, in the circumstances, entirely understandable. The appellant, who was represented by counsel at the trial, had been heard and a decision had been made. Reasons had been provided. It was, by that time, too late for further submissions to be made. In any event, the document did not address the principal ground advanced on the appellant’s behalf in the FCC.
12. Having examined all of the material I have concluded that the appellant has failed to identify any appealable error on the part of the FCC. The only substantial issue relates to the construction of cl 572.234(1)(b) of the Regulations and the construction placed on that provision by the Tribunal and the FCC. The construction, in my view, was plainly correct. It is unfortunate for the appellant that the provision operated to his detriment and that he was not aware of its existence until it was applied to his detriment. I was advised by the appellant that the relevant visa condition has since been repealed.
13. The appeal must be dismissed with costs.

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| I certify that the preceding thirty-two (32) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Tracey. |

Associate:

Dated: 2 December 2016