Federal Court of Australia

Haider v Minister for Immigration, Citizenship and Multicultural Affairs [2023] FCA 216

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| Appeal from: | *Haider v Minister for Immigration* [2020] FCCA 1113 |
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| File number: |  |
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| Judgment of: | **YATES J** |
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| Date of judgment: | 15 March 2023 |
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| Catchwords: | **MIGRATION** – application for extension of time and leave to appeal from a judgment of the Federal Circuit Court of Australia dismissing an application for re-instatement – where applicant sought to re-instate an application for judicial review of a decision of the Administrative Appeals Tribunal – where Tribunal found it lacked jurisdiction to review decision of a delegate of the first respondent – where application for review of the delegate’s decision was made by the applicant’s sponsor – where subsequent application for review of the delegate’s decision was made by the applicant but out of time |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth) s 24  *Migration Act 1958* (Cth) s 65  *Federal Court Rules 2011* (Cth) r 35.14, Sch 3 Item 15  cl 457.223 of Sch 2 to the *Migration Regulations 1994* (Cth)  *Federal Circuit Court Rules 2001* (Cth) rr 13.03C, 16.05 |
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| Cases cited: | *BBW15 v Minister for Immigration and Border Protection* [2016] FCA 128  *Decor Corporation Pty Ltd v Dart Industries* (1991) 33 FCR 397  *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344  *Le v Minister for Immigration and Border Protection* [2019] FCA 427; 104 ALD 267 |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Number of paragraphs: | 33 |
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| Date of hearing: | 3 March 2023 |
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| Counsel for the Applicant: | The Applicant appeared in person |
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| Solicitor for the First Respondent: | Ms A Wilford of Sparke Helmore Lawyers |
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| Counsel for the Second Respondent: | The Second Respondent did not appear |

ORDERS

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|  | | NSD 649 of 2020 |
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| BETWEEN: | SYED ZESHAN HAIDER  Applicant | |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| order made by: | YATES J |
| DATE OF ORDER: | 15 MARCH 2023 |

THE COURT ORDERS THAT:

1. The name of the first respondent be amended to “Minister for Immigration, Citizenship and Multicultural Affairs”.
2. The applicant’s application for an extension of time and leave to appeal be dismissed.
3. The applicant pay the first respondent’s costs fixed in the sum of $4,000.

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

REASONS FOR JUDGMENT

YATES J:

# Introduction

1. This is an application for extension of time and leave to appeal, which has been filed under r 35.14 of the *Federal Court Rules 2011* (Cth) (the **FC Rules**). The application is made in the following circumstances.
2. The applicant, Syed Zeshan Haider, commenced a proceeding in the then Federal Circuit Court of Australia (the **Federal Circuit Court**) seeking judicial review of a decision of the second respondent, the Administrative Appeals Tribunal (the **Tribunal**) in respect of the refusal of his application for a Temporary Business Entry (Class UC) visa under s 65 of the *Migration Act 1958* (Cth) (the **Act**). The visa application was made on the basis of the applicant’s nomination, by Namitha Nakul Pty Ltd (the **sponsor**), for the occupation of “cook”.
3. A delegate of the first respondent (then the Minister for Immigration and Border Protection but now designated as the Minister for Immigration, Citizenship and Multicultural Affairs) (the **Minister**) refused the visa application because the applicant did not provide a skills assessment for that occupation, as he was required to do. As a result, he did not satisfy the requirements of cl 457.223 of Sch 2 to the *Migration Regulations 1994* (Cth) (the **Migration Regulations**), as applicable to him.
4. The applicant was informed of the refusal by a letter dated 16 August 2018 from the Department of Home Affairs. The letter told the applicant that he was entitled to apply to the Tribunal for merits review of the delegate’s decision. The letter said:

An application for review of this decision must be given to the AAT within 21 calendar days after the date on which you are taken to have received this letter. This review period is prescribed in law and an application for merits review cannot be accepted after that date.

1. The period of 21 days referred to in the letter expired on 6 September 2018.
2. On 4 September 2018, the sponsor lodged, online, an application to the Tribunal to review a nomination application refusal. However, there had been no such refusal. What had been refused was the applicant’s visa application.
3. This appears to have been a mistake by the applicant’s migration agent. Realising that a mistake had been made, the migration agent sent a communication to the Tribunal on 7 September 2018, which (leaving aside formalities) said:

We are representing our client Syed Zeshan Haider for his review application.

Unfortunately my staff lodged the application for review by selecting the nomination application refusal however nomination application has been approved by the department and only the 457 visa application has been refused and we suppose to lodge the review for 457 visa application and attached the correct refusal letter with the online application.

After talking to the staff of the AAT they suggested us to lodge the form M1 which we are enclosing, please make the necessary amendment in the application lodged on 04/09/2018 with online lodgement number 20180904-33378 and consider the application for review for 457 Visa refusal. We are enclosing the lodged online application, Tax Receipt and the 457 visa refusal Decision.

Please do not hesitate to contact us should you require any further information.

1. In conformity with that communication, the migration agent lodged an application with the Tribunal to review the delegate’s decision to refuse his visa application. However, this lodgement was outside the prescribed period for seeking a review.
2. In subsequent submissions to the Tribunal, the applicant’s migration agent contended that the applicant had lodged an application with the Tribunal on 4 September 2018 and that the further lodgement on 7 September 2018 should be treated by the Tribunal as an “amendment” to the earlier application. As the migration agent put it:

The nomination associated with the 457 visa has been approved by Department of Human Affairs on dated 19/10/2018 (which is enclosed) and hence question of lodgement of review of nomination application does not arise and that has been lodged due to error which has been rectified and corrected by way of amendment dated 07/09/2018, hence a valid application.

(As in original.)

1. The Tribunal was not persuaded. It said:

9. The Tribunal has considered the representative’s submissions. The Tribunal acknowledges the representative’s claim that a mistake was made in the lodgement of an incorrect application on the 4 September 2018; however the Tribunal has no power in the circumstances of this case to accept that a valid application for review was made by the applicant within the prescribed period.

10. The Tribunal has considered the M1 Application for review, online lodgement made on 4 September 2016 [sic]. It clearly states that the review applicant is the sponsor Namitha Nakul Pty Ltd. Details relating to the sponsor including the Director’s name and business address have been provided. No details of the visa applicant have been supplied. In response to the question ‘*Capacity to apply for review*’ it states sponsor or nominator In the Tribunal’s view these responses indicate the intention of the sponsor to lodge this application and do not suggest that it was the visa applicant who intended to apply for review on that day. The application for review clearly indicates that it is the sponsor applying for review.

11. The corrected application for review (Form M1) by the visa applicant was lodged by the representative on 7 September 2018, which was not within the prescribed period of 21 days. Having considered the representative’s submission and in regard to procedural fairness and the principles of natural justice, in this instance the Tribunal has no discretion in these matters. There is no provision in the legislation to substitute the applicant who made the application for review in circumstances where the request was made outside the prescribed period.

12. As the decision that is the subject of the review application is a decision covered by s.338(2), the application for review could only be made by the non-citizen who is the subject of the decision. In the present case, the review application was made by the sponsor. As such, the application for review is not an application properly made under s.347 and it follows that the Tribunal does not have jurisdiction in this matter.

1. The Tribunal’s reasoning seems to be that the applicant did not make a valid application for review within the prescribed period. The application made on 4 September 2018, which was within time, was not made by the applicant, but by the sponsor. The Tribunal appears to have treated the application as a Part 5-reviewable decision under s 338(2) of the Act, but noted that the application was not made by a non-citizen. The application made on 7 September 2018, although made by the applicant as a non-citizen, was not made within the prescribed time.
2. As I have said, the applicant commenced a proceeding in the Federal Circuit Court seeking judicial review of the Tribunal’s decision. However, the proceeding was dismissed under r 13.03C(1)(c) of the *Federal Circuit Court Rules 2001* (Cth) (the **FCC Rules**) for non-appearance by the applicant at the first court date. The applicant sought to have the proceeding re-instated under r 16.05(2)(a) of the FCC Rules.
3. When the re-instatement application came before the primary judge, her Honour noted that only one of the eight grounds of review which the applicant wished to raise in the judicial review application, Ground 8, was a substantive ground of review:

The Tribunal failed to consider that an amendment application has been lodged subsequent to initial application and I have not initiated the new application. The Tribunal considered the amended application to be a new application.

1. The primary judge accepted the applicant’s explanation for not appearing at the first court date and reasoned that the success of the re-instatement application depended on the applicant’s prospects of success on Ground 8.
2. The primary judge noted the applicant’s submission that the application for review made to the Tribunal on 7 September 2018 had a sufficient nexus to the application for review made to the Tribunal on 4 September 2018 to render the latter a “clarification” of the former, and not a second, new application. However, the primary judge did not accept that submission. Her Honour concluded that the case before her was distinguishable from *Le v Minister for Immigration and Border Protection* [2019] FCA 427; 104 ALD 267 (***Le***) (on which the applicant relied) and that the Tribunal correctly found that it did not have jurisdiction to review the delegate’s decision. Therefore, on her Honour’s assessment, Ground 8 had no reasonable prospects of success, with the result that the application for re-instatement should be dismissed. The primary judge made orders accordingly.

# The requirement for leave

1. A decision of the Federal Circuit Court pursuant to r 16.05 of the FFC Rules to dismiss an application for the court’s orders to be set aside is interlocutory in nature: *BBW15 v Minister for Immigration and Border Protection* [2016] FCA 128 at [5]. An appeal from interlocutory judgment is not to be brought to this Court unless leave to appeal is granted: s 24(1A) of the *Federal Court of Australia Act 1976* (Cth). Further, under r 35.13 of the FC Rules, an application for leave to appeal must be made within 14 days after the date on which the judgment or order (from which the applicant seeks to appeal) was pronounced or made.
2. In the present case, the Federal Circuit Court gave judgment and made orders on 13 May 2020. The applicant’s application for leave to appeal should have been filed no later than 27 May 2020. However, his application was not filed until 11 June 2020, 15 days late. For this reason, the applicant requires an extension of time in which to seek leave to appeal.
3. In considering whether time should be extended, general guidance is provided by Wilcox J’s observations in *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344 at 348 – 349. In that case, Wilcox J observed that, although special circumstances need not be shown, the Court will not grant the application unless positively satisfied that it is proper to do so. The applicant should establish an acceptable explanation for the delay and reasons why it would be fair and equitable in the circumstances for time to be extended. Prejudice to the respondent, including any prejudice in defending the proceeding occasioned by the delay, is a material factor militating against the grant of an extension. But the absence of prejudice is not enough to justify the grant of an extension. Further, the merits of the substantive application are to be taken into account when considering whether an extension of time should be granted.
4. The discretionary power to grant leave to appeal from an interlocutory judgment is also not a power to be exercised simply for the asking. The Court’s general approach is to consider the cumulative test in *Decor Corp Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397 at 389 to 399, which directs attention to whether, in all the circumstances, the judgment below is attended by sufficient doubt to warrant it being reconsidered on appeal and whether substantial injustice would result if leave to appeal were to be refused (supposing the decision below to be wrong).
5. In the present case, the applicant has made an affidavit in which he has said that he could not file his application for leave to appeal within time because he was unwell and, due to COVID‑19 restrictions, was “afraid to go outside to attend to the application process”. The explanation that he gave at the hearing of the present application is different. At the hearing, he appeared to attribute the fault for not filing an application for leave to appeal within time to his then lawyer. The applicant said that his lawyer “never submitted the things on time” and could not “submit the applications online”. He also questioned his lawyer’s competence, saying that “he was more into the family matters – family matters in the court, not, then, these immigration things”.
6. It is difficult to reconcile these explanations. The Minister does not accept that the applicant’s explanations are sufficient to warrant the extension that is sought. That said, the Minister accepts that the delay was “moderate” and that no specific prejudice would be suffered should an extension of time be granted. The Minister stresses that he has a legitimate interest in the timely resolution of visa applications and related litigation. He submits that the absence of prejudice in the present case is not a sufficient reason to extend time.
7. Critically, however, the Minister submits that the application for an extension of time and leave to appeal should be refused because the proposed appeal is without merit. It is convenient to turn immediately to that question.

# The proposed grounds of appeal

1. The proposed grounds of appeal are expressed in the applicant’s draft notice of appeal as follows:
2. That the decision of the court below to dismiss the application for re-instatement was unreasonable, and that the decision was arrived at without giving due consideration to the arguments/facts provided;
3. That the court below erred by failing to take into account relevant evidence provided by the appellant in relation to his non-appearance in court.
4. The applicant has not filed an outline of submissions, as ordered. The above grounds are not supported by particulars.
5. With regard to Ground 1, it is not apparent why the decision below was “unreasonable”, and there is nothing that informs the Court of the arguments or facts that were not duly considered by the primary judge.
6. With regard to Ground 2, there is nothing that informs the Court of the evidence provided by the applicant that was not taken into account by the primary judge.
7. At the hearing of the present application, the applicant was not able to offer any submission that supported these grounds, or provide any elucidation of them. This is understandable given that the draft grounds were not prepared by the applicant personally but by the lawyers previously acting for him.
8. The grounds have the appearance of generalised assertions that have been made without due regard to the primary judge’s reasons.
9. For example, Ground 2 alleges error on the part of the primary judge without recognising that the primary judge (at J[33]) accepted the applicant’s explanation for not attending the first court date and made clear (at J[34]) that the fate of the re-instatement application depended solely on the prospects of success of the substantive application.
10. As to Ground 1, there is nothing on the face of the primary judge’s reasons to indicate that the decision below was legally unreasonable. The primary judge’s reasons indicate that her Honour approached the re-instatement application methodically and carefully. After setting out the relevant background facts and recording the parties’ submissions, her Honour turned to analyse the only question of substance before her, which was whether the application made to the Tribunal on 4 September 2018 was an application made by the applicant. Her Honour carefully considered the application that was made on that day and, after comparing the facts of the present case with the facts of *Le*, concluded (at J[48]) that it was an application made by the sponsor as a review applicant (I would add, in relation to a nomination decision). Her Honour also concluded that the subsequent application that was lodged on 7 September 2018 was made out of time.
11. I am unable to see how it could be argued, cogently, that the primary judge’s decision was arrived at “without giving due consideration to the arguments/facts provided”. What is more, her Honour’s characterisation of the application lodged with the Tribunal on 4 September 2018, as an application made by the sponsor, was open to her (as it was for the Tribunal). On the basis of that finding, her Honour did not err in concluding that the Tribunal did not have jurisdiction to entertain a merits review of the delegate’s decision to refuse the applicant’s visa application (there being no dispute that the application lodged with the Tribunal on 7 September 2018 was made out of time).

# Conclusion

1. I am not persuaded that the applicant’s proposed grounds of appeal have any reasonable prospects of success. It follows that his application for extension of time and leave to appeal should be dismissed for this reason alone.
2. The Minister seeks an order for costs fixed in the sum of $4,000. This sum is less than the amount that can be claimed in a short form bill for an application for leave to appeal involving a migration decision: Item 15 in Sch 3 to the FC Rules. I am satisfied that this sum is also significantly less than the costs and disbursements actually incurred by the Minister. I am satisfied that it is a sum for costs that is reasonable and proportionate in the circumstances.

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| I certify that the preceding thirty-three (33) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Yates. |

Associate:

Dated: 15 March 2023