FEDERAL COURT OF AUSTRALIA

Amoorthum v Minister for Immigration and Border Protection [2016] FCA 277

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| File number: | VID 923 of 2015 |
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| Judge: | **TRACEY J** |
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| Date of judgment: | 21 March 2016 |
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| Catchwords: | **MIGRATION** – application for extension of time – application for judicial review of a decision of the Minister to refuse to grant a visa on the ground that the applicant did not pass the character test – where applicant was invited to provide information or comment on why the Minister should not refuse to grant the visa – where applicant’s response to the invitation was not provided to the Minister – whether applicant was denied procedural fairness – whether Minister’s decision was unreasonable |
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| Legislation: | *Migration Act 1958* (Cth), ss 476A(1)(b), 477A, 501(1), 501(6) |
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| Cases cited: | *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44  *Maxwell v Minister for Immigration and Border Protection* [2016] FCA 47  *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24  *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332  *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11  *Wei v Minister for Immigration and Border Protection* (2015) 327 ALR 28 |
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| Date of hearing: | 16 March 2016 |
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| Registry: | Victoria |
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| Division: | General Division |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | Catchwords |
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| Number of paragraphs: | 45 |
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| Solicitor for the Applicant: | MyVisa Lawyers |
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| Counsel for the Respondent: | Mr W Mosley |
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| Solicitor for the Respondent: | Sparke Helmore |

ORDERS

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|  | | VID 923 of 2015 |
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| BETWEEN: | JEAN MARIE CLAREL AMOORTHUM  Applicant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  Respondent | |

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| JUDGE: | TRACEY J |
| DATE OF ORDER: | 21 March 2016 |

THE COURT ORDERS THAT:

1. Leave be granted to the applicant to file and serve his amended originating application, dated 19 February 2016.
2. The decision of the Minister, made on 10 August 2015, to refuse the applicant’s application for a visa be quashed.
3. The applicant’s application for a visa be remitted to the Minister to be heard and determined according to law.
4. The respondent pay the applicant’s costs of the application.

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

REASONS FOR JUDGMENT

1. This is an application for an extension of time to apply for judicial review of a decision of the respondent (“the Minister”) to refuse to grant the applicant a Skilled (Residence) (Class VB) visa (“the visa”). By his amended originating application filed on 19 February 2016, he also seeks review of the Minister’s decision.
2. On 10 August 2015, the Assistant Minister for Immigration and Border Protection, acting under s 501(1) of the *Migration* Act 1958 (Cth) (“the Act”), refused to grant the applicant the visa on the ground that he did not pass the character test. It was common ground that the Assistant Minister was the “Minister” for the purposes of decision-making under the Act: cf *Maxwell v Minister for Immigration and Border Protection* [2016] FCA 47 at 3.1 (Perry J).
3. Since the decision was made, the applicant has been held in immigration detention.

# BACKGROUND

1. The applicant is a citizen of Mauritius.
2. In September 2006, he arrived in Australia as the holder of a Student (Temporary) subclass visa. Since then, he has applied for and held various other visas until the Minister determined to refuse to grant him the visa in August 2015.
3. The applicant and his wife have three children, born in 2005, 2008 and 2014.
4. On 30 June 2010, the applicant applied for the visa.
5. On 21 July 2014, the applicant, following a plea of guilty, was convicted in the County Court of Victoria of stalking another person and threatening to inflict serious injury. The offences took place in November 2012. He was sentenced to imprisonment for a period of eight months, together with a community corrections order for unpaid community work and an order that he submit to assessment and treatment for alcohol abuse, violence and mental health.
6. On 26 February 2015, the Minister issued to the applicant a ‘Notice of Intention to Consider Refusal’ pursuant to s 501(1) of the Act, together with a copy of Ministerial Direction 65, which set out matters to which the decision-maker (if the decision was to be made by a person other than the Minister) was required to have regard in exercising his or her discretion to refuse to grant the visa. The notice advised the applicant that:

If you wish to comment or provide information on whether the decision-maker should exercise his or her discretion to not refuse your visa application, and in particular to give reasons why your visa should not be refused, you should do so within 28 days after you are taken to have received this notice.

1. The applicant responded to this invitation by letter dated 21 March 2015. The letter was addressed to a named officer working in the Department’s Visa Applicant Character Consideration Unit in the National Character Consideration Centre. For reasons which will later emerge, it is necessary that I set out the terms of the letter (formal parts omitted) as it appears in its original form:

I would be grateful if you could consider the following reasons why I believe that the Delegate of the Minister may consider about my Character Test;

By definition ‘Character Test’ quoting Section 6 A(a) the person has a substantial criminal record (as defined by subsection (7)).

(c) the person has been sentenced to a term of imprisonment of 12 months or more.

I was sentenced to a total of 8 months of imprisonment.

Before the incident dated 5 November 2012 where I was arrested and charged I had a clean Police Record. I have always been a person of Good Character, a very good student at school, a good son for my parents, a good and reliable banking employee for 3 banks in Mauritius, a law abiding citizen, a good husband for my wife, a good father for my children and a good member of the community. I’ve been involved in Charity and was always ready to help anyone in help. Please refer to my Character references and letters that were addressed to the Judge.

After the incident where I was in remand for 6 months I never had any incident there as well. On the contrary I was facing all the challenges of Prison by studying I.T, working as a cleaner or in the laundry there and doing programmes to better myself. I was also praying and growing my faith in God.

When I was on Bail for 14 months I duly applied without fail to all my bail conditions, work and supply and support my family and was also involved in my community and church.

For the good ruling of the Court I had to go back to prison for 2 more months where due to my behaviour and charges I was in a Minimum Security Prison. I am now fulfilling my Court Order with the Dandenong Community Corrections Government Services Office. I have been assessed and cleared from Drug and Alcohol Treatment because I never did drugs in my entire life and do not have any alcohol problems. I have been assessed and cleared from an Offending Behaviour Programme because I do not need treatment in violence. I have 62 hours out of a 100 of unpaid Community Work left. (Please find attached a request dated 11 March 2015 for a written report but I was explained by my Case Officer (Tulia) on 19 March 2015 that the Manager will not give any written report unless they are directly contacted by Immigration).

Please consider as well, by virtue of Section 501 (6) Dthat I am not is a risk to any of the following:

(i) engage in criminal conduct in Australia’

(ii) harass, molest, intimidate or stalk any person in Australia; or

(iii) vilify a segment of the Australian community; or

(iv) incite discord in the Australian community or in a segment of that community; or

(v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to,

that community or segment, or in any other way

In regards to my criminal history, the stalking charge is a result of a one off road rage where I followed a car that ran in front of me and could have resulted in a tragic accident. Not to justify my action, but one year before, my family and I had a car accident resulting in a total loss of our family car and my wife and daughter urgently transported to the hospital by ambulance. A negligent driver had burned the red light and crashed into our car. Please refer to the Psychological Report dated 11 July 2014, I quote ‘the prior car accident seemed to have triggered a defensive response from the patient’. I extremely regret my action because it has lead of me having a criminal history resulting in disastrous consequences on my family and me.

My Psychological Report dated 11 July 2014 clearly stated that I am not a danger to the community, I quote ‘I believe Mr Amoorthum is not a threat to the community’. On the contrary I am well involved in my community and church where we meet, pray and support each other. I respect and have the respect of the members of the community.

In the Sentencing report the Judge suggested that my conduct dated 5 November 2012 is out of character, I quote ‘having regard to the whole material I am satisfied that your rehabilitative prospects are good. These offences occurred in 2012 and I accept your rehabilitation has been ongoing…Tendered on your plea were a number of references. These all speak very highly of you. They show a different side to the one displayed by you on the night in question. I accept your conduct on the night is out of character’.

I thank you for your kind consideration.

1. The letter had attached to it some character references which had been tendered in the County Court. The applicant foreshadowed that he wished to furnish a psychological report and some more recent references and asked for an extension of time within which to provide this material to the Department.
2. Following receipt of this material, Departmental officers prepared an Issues Paper for the Minister. It contained details of the applicant’s immigration record, his application for the visa and his conduct leading to his convictions in the County Court. The Minister was advised of the potential relevance of ss 501(1) and 501(6)(d) of the Act. Attached to the Issues Paper were a number of documents which had been sent to the applicant with the notice and the attachments to the applicant’s response to that notice. The applicant’s letter of 21 March 2015 containing his submissions to the Minister was not, however, provided to the Minister. No explanation for this failure was given to the Court, nor was the Minister advised of the letter’s existence.
3. On 10 August 2015, the Minister refused to grant the applicant the visa. On 24 August 2015, a ‘Notice of Visa Refusal’ was sent to the applicant. The Minister provided written reasons for her decision.

# EXTENSION OF TIME APPLICATION

1. Pursuant to s 477A(1) of the Act, an application for review under s 476A(1)(b) or (c) must be made within 35 days of the date of the migration decision. For the purposes of this section, the date of the migration decision was 10 August 2015.
2. The applicant filed his application in the Federal Court of Australia on 14 December 2015.
3. In supporting his application for an extension of time, the applicant relied principally on the fact that he had been labouring under the misapprehension that an application had been filed on his behalf in the High Court by his previous lawyers. Upon learning that this had not occurred, he immediately sought out and obtained alternative legal assistance. The application to this Court was thereafter made promptly.
4. The Minister opposed the application on the ground that it was not in the interests of justice to grant the extension. He contended that the delay in commencing the proceeding was considerable and that the applicant’s grounds lacked merit. He did not seek to challenge the applicant’s explanation for the delay.
5. The application was filed less than three months after the statutory deadline. Before the deadline had expired, the applicant had instructed lawyers to commence proceedings to challenge the Minister’s decision. He was under the impression that those proceedings had been commenced. Once he found out that his lawyers had not acted in accordance with his instructions, he found alternative lawyers and the present applications were made. The applicant has provided an acceptable explanation for the delay.
6. The principal discretionary consideration, in dealing with this application for an enlargement of time, is whether the applicant has an arguable case. There would be no point in granting his application if it was wholly lacking in legal merit. It was for this reason that the parties agreed that the application for an enlargement of time should be heard together with the application for review. As will become apparent, I have formed the view that the applicant has at least one viable ground. His application for an extension of time within which to commence the proceeding should, therefore, be granted.

# APPLICATION FOR REVIEW

1. The applicant relied on five grounds his amended originating application. The first two grounds (which alleged unreasonableness and denial of procedural fairness) arose from what the applicant said was the failure of the Minister to consider certain documents (including the applicant’s letter of 21 March 2015) and information on which the applicant relied in seeking to persuade the Minister not to refuse to grant him a visa. The third ground complained that the Minister had failed to treat the best interests of the applicant’s third child as a primary consideration when determining how her discretion should be exercised. The fourth ground alleged at the Minister had erred by failing to obtain information which, he said, was centrally relevant to his attempt to persuade the Minister that he passed the character test. Some of that information had been identified in his letter of 21 March 2015. A fifth ground was abandoned.

# CONSIDERATION

## Grounds 1 and 2

1. It will be convenient to deal with these two grounds together. As already noted, they both arise out of the applicant’s complaint that the Minister had failed to have regard to certain documents and information when making her decision. For reasons which will become apparent, it is only necessary for me to deal with the failure of the Minister to have regard to the letter of 21 March 2015 and its contents (reproduced at paragraph 10 above).
2. That letter was prepared by the applicant in response to the invitation to him to provide the decision-maker with information and reasons “why your visa should not be refused.” The applicant had 28 days to respond and he submitted his letter and supporting documents within the prescribed period. His letter contained information and submissions of the kind contemplated by the invitation. As a result, he had every reason to expect that his letter would be placed before the person who was going to make the critical decision.
3. English is the applicant’s second language. As a reading of his letter makes clear, he does not write fluently in English. Indeed, some parts of his letter are difficult to comprehend and may have a tendency to mislead. He says in one sentence, for example, that: “For the good ruling of the Court I had to go back to prison for 2 more months where due to my behaviour and charges I was in a Minimum Security Prison.” On one reading, this sentence may suggest that the applicant had misbehaved himself whilst on parole and had, as a result, been required to serve a further two months in prison. This was not the case. At the time he was sentenced, the applicant had been at large in the community for over a year without committing any further offences or breaching any conditions of his release. He was sentenced to eight months imprisonment. Because he had already been held in custody on remand for six months he was only required to serve a further two months before his release. This example serves to highlight both the language difficulties under which the applicant laboured and the need for his submission to be read with care.
4. Counsel for the Minister submitted that the failure to provide her with a copy of the letter did not give rise to error because the Minister had been provided with other documents which contained all of the information which the applicant had incorporated in his letter. There was, for example, other material which supported his claims to have had a “clean” police record prior to the offending and to have worked in Mauritius for banks. Furthermore, the psychological report and the trial judge’s sentencing remarks, parts of which were extracted in the applicant’s letter, had been provided to the Minister.
5. The Issues Paper also advised the Minister that the applicant had been required to complete 100 hours of community service and to undergo assessment for alcohol dependence, mental health and a possible violence intervention program. The Minister was advised that the applicant had asserted, in another document, that he had been examined and found not to require any drug, alcohol or violence or anger management treatment “though he has not provided independent evidence of this.” No mention was, however, made of the applicant’s reassertion of this position in his letter or that he had made a request to his case officer at the Dandenong Community Correctional Service Office for written confirmation that what he had said was true. A document was furnished at the hearing which confirmed that the applicant had been assessed for each of these conditions prior to his letter to the Minister, and was found not to require treatment.
6. The Minister correctly submitted that the information contained in the letter was available to her from other material supplied to her by the Department. The letter, however, contained more than information. It contained submissions and assertions by the applicant, many of which were self-serving, but which sought to persuade the Minister that he satisfied the character test and should be granted a visa. He said, for instance, that, whilst in prison on remand, he undertook programs in order to better himself and had developed his religious faith.
7. At another point he said that he extremely regretted his offending “because it has [led me to] having a criminal history resulting in disastrous consequences on my family and me.” The issue of whether or not the applicant was remorseful for his criminal conduct was one to which the Minister referred in her reasons. She said (at [18]) that she noted “that the psychologist has stated that [the applicant] was very remorseful for his actions and that he had participated well in counselling after his release from prison, and was now fully rehabilitated.” Despite this, in the following paragraph the Minister said that the applicant had “not expressed any remorse for his offending …”. The Minister might more readily have accepted that there was less of a risk of the applicant engaging in conduct of the kind referred to in s 501(6)(d) of the Act had he shown remorse.
8. I accept the Minister’s submission that, read literally, the applicant’s statement in his letter about regretting his action because of the consequences for his family and himself may not be understood as an expression of remorse; it focusses on the consequences for him and his family rather than the effect of his offending on his victim. Nonetheless, it may be that, had the Minister read the letter, having regard to the applicant’s language difficulties, she might have treated the statement as being indicative of remorse. In any event, it would have been open to her to consider that the applicant’s experience of the criminal process (including his incarceration) and its adverse effects on him and his family, would have had a salutary effect and provided a strong disincentive for any further offending.
9. The exercise of the Minister’s power under s 501 of the Act is conditioned by the requirement that it be exercised in accordance with the principles of procedural fairness: see *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 56-7 (Gleeson CJ). It is a basic and fundamental requirement of procedural fairness that a person in the applicant’s position should be provided with an opportunity to make *his or her* case to the Minister. The means by which this opportunity was to be afforded in the present case was proposed by the Department. The Department’s invitation identified the purposes which any response was intended to serve. They were to advance, by provision of information and the making of submissions, the applicant’s reasons for urging the Minister to accept that he met the character test and should be granted a visa. It was a matter for him (subject, of course, to relevance) to decide what information would be provided and which submissions would be made. It was for him (as he did) to assemble the particular pieces of information which, individually or collectively, he thought might evoke a favourable response from the Minister. It was for him (as he did) to choose which passages from other documents, such as the psychological report, which he wished to highlight and have the Minister take into account. It was for him (as he did) to decide what claims he would make in an effort to persuade the Minister that his rehabilitation was complete. It was for him (as he did) to choose what submissions he wished to include with a view to the Minister making the decision which he sought. Unless the Minister read and considered the submissions, as prepared by the applicant, it cannot, in my view, be said that he had been afforded the opportunity to present *his* case to the Minister.
10. The material which he assembled in his letter or which he attached to it may or may not have had the desired result. It is not, however, for the Court to speculate about what the Minister might have done had she been provided with a copy of the applicant’s letter. The letter should, as a matter of procedural fairness, have been placed before her and considered by her. It contained the substance of the applicant’s case. It was the means by which he was to be accorded a fair hearing. It was not a matter for the Department to determine (if it did) that the material which it had assembled and provided to the Minister was sufficient to expose to her the substance of the applicant’s case such that she did not need to see the letter. I do not overlook the possibility that the letter was not provided to the Minister as a result of some oversight. Whatever the reason be, the failure to place the letter before the Minister deprived the applicant of the opportunity, to which he was entitled, to be heard in support of his application for a visa.
11. This failure constituted a jurisdictional error. The Minister’s decision must be quashed.
12. The exercise of the Minister’s power was also conditioned by a requirement that it be exercised reasonably: see *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 348-350 (French CJ); 362-3 (Hayne, Kiefel & Bell JJ); 370-1 (Gageler J). In many respects the reasonableness requirement is analogous with that of procedural fairness: see *Li* at 371. The content of the concept of legal unreasonableness continues to be developed in the wake of *Li*: see *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11 at [6]-[12] (Allsop CJ); [52]-[62] (Griffiths J). It may well be argued that a decision which has been vitiated by reason of denial of procedural fairness is unreasonable. Similarly, it may be argued that some, if not all, of the material in the letter was material that the Minister was bound to take into account in making her decision and her failure to do so was unreasonable: cf *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41 (Mason J). It is not, however, in the circumstances, necessary to explore this issue further.

## Ground 3

1. The applicant argued that in reaching her decision, the Minister was bound to, but had not, given primary consideration to the best interests of his youngest child Grace. The two older children were of school age. Grace, at the relevant time, was 11 months old.
2. In her reasons, the Minister took into account the adverse psychological effects on the two older children of their father’s incarceration and psychological and other harm which may be occasioned by the applicant’s deportation to Mauritius. No reference was made to Grace in this context.
3. I do not consider that it can be inferred that any failure by the Minister to deal with psychological harm (actual or potential) to Grace is indicative of a failure by the Minister to give primary consideration to her best interests. She was simply too young to have experienced diagnosable psychological harm as a result of the applicant’s offending.
4. The Minister, in her reasons, specifically said that she had given “primary consideration to the best interests” of the applicant’s children. She concluded that it *was* in their best interests *not* to refuse the applicant a visa. That consideration was, however, outweighed, in the Minister’s view, by other considerations and, in particular, the risk that the applicant might reoffend.
5. There is no reason to conclude that the Minister had not, as she had said she had, treated the interests of all of the applicant’s children (including Grace) as a primary consideration (whether or not she was obliged to do so).
6. This ground has not been made out.

## Ground 4

1. The applicant submitted that the Minister had erred by failing to ask the Dandenong Community Correctional Services Office for a written report dealing with its assessment of his response to any drug or alcohol issues and the need for any treatment to overcome anger management. He had raised these issues in his letter to the Minister and advised her that the manager of the office would not provide a report at his request. Any report would have to be sought by the Department.
2. The Minister had not seen the letter and was not advised by the Department that the applicant had tried to obtain such a letter only to be advised that it would not be provided unless requested by the Department.
3. The applicant contended that this information was “centrally relevant” to the decision to be made by the Minister and that the Minister was required to obtain it: cf *Wei v Minister for Immigration and Border Protection* (2015) 327 ALR 28 at [49] (Nettle J).
4. Given that the Minister was unaware of the difficulty experienced by the applicant in obtaining a report, any failure of the kind alleged by the Minister could only have been constructive in nature. More importantly, however, the Minister was not aware of the matter as a result of what I have found to be a denial of procedural fairness.
5. It may be that the Minister, on any reconsideration of the applicant’s application, may be prepared to accept his assertions that he was found not to have required treatment for any addiction or violent behaviour. If so, no confirmation would be required and it would not be necessary for the Minister to cause enquiries to be made of the community corrections authorities.
6. This ground has not been established.

# DISPOSITION

1. The applicant should be granted leave to file his application out of time. The Minister’s decision should be quashed. The Minister should pay the applicant’s costs of his application.

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| I certify that the preceding forty-five (45) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Tracey. |

Associate:

Dated: 21 March 2016