FEDERAL COURT OF AUSTRALIA

Gohil v Minister for Home Affairs [2019] FCA 977

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| Appeal from: | *Gohil v Minister for Home Affairs* [2018] FCCA 3027 |
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| File number: | NSD 2030 of 2018 |
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| Judge: | **PERRAM J** |
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| Date of judgment: | 21 June 2019 |
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| Catchwords: | **MIGRATION** – appeal from Federal Circuit Court – where Court dismissed application for judicial review of decision of Administrative Appeals Tribunal – where Tribunal found it had no jurisdiction – where appellant was not subject to approved nomination at time of Tribunal decision – whether Tribunal erred in finding it had no jurisdiction |
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| Legislation: | *Migration Act 1958* (Cth) ss 140GB, 338, 348  *Migration Regulations 1994* (Cth) Sch 2 cl 457.223 |
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| Cases cited: | *Singh v Minister for Home Affairs* [2019] FCA 291 |
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| Date of hearing: | 20 June 2019 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 13 |
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| Counsel for the Appellant: | The Appellant appeared in person |
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| Counsel for the First Respondent: | Mr M Cleary |
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| Solicitor for the First Respondent: | Sparke Helmore |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice save as to costs |

ORDERS

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|  | | NSD 2030 of 2018 |
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| BETWEEN: | SHNEHALBEN DINESHBHAI GOHIL  Appellant | |
| AND: | MINISTER FOR HOME AFFAIRS  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | PERRAM J |
| DATE OF ORDER: | 21 JUNE 2019 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The Appellant pay the First Respondent’s costs as taxed or agreed.

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

REASONS FOR JUDGMENT

PERRAM J:

1. This is an appeal from the Federal Circuit Court: *Gohil v Minister for Home Affairs* [2018] FCA 3027. That Court dismissed the Appellant’s application for orders quashing an earlier decision of the Administrative Appeals Tribunal (‘the Tribunal’) made on 19 April 2018. The Tribunal had found that it did not have jurisdiction to review the Appellant’s application for review of a decision by a delegate of the Minister made on 8 March 2018 to refuse to grant the Appellant a Temporary Work (Skilled) (subclass 457) visa.
2. The Appellant, Ms Gohil, is a citizen of India and applied for the visa on 6 April 2016. There were several criteria which needed to be satisfied before the Minister was authorised to issue her with a visa. One such criterion is that an applicant must demonstrate that the nomination of the applicant’s proposed occupation has been approved under s 140GB of the *Migration Act 1958* (Cth) (‘the Act’), as required by cl 457.223(4) of Sch 2 to the *Migration Regulations 1994* (Cth) (‘the Regulations’). However, with respect to the Appellant’s application, the delegate of the Minister was not satisfied that this was the case and refused to grant her a visa on that basis.
3. The Appellant applied to the Tribunal for review on 22 March 2018. A decision to refuse to grant a subclass 457 visa is a reviewable decision as defined by s 338(2) of the Act and reg 4.02(4) of the Regulations where it meets certain criteria including, relevantly, that an occupation nomination has been approved under s 140GB at the time the applicant applies for review of a visa decision, or that an application for review of a decision to refuse to approve a relevant nomination is pending at the time the applicant applies for review of the visa decision.
4. At the hearing, the Tribunal identified that it had no record of a relevant nomination or application for review of a decision to refuse to approve a nomination in respect of the Appellant. The Tribunal had written to the Appellant to that effect on 3 April 2018, but received no response. It was in those circumstances that the Tribunal found that, at the time the Appellant applied for review, she was not the subject of an approved nomination and there was no pending application for review of a decision to refuse to approve a nomination. Accordingly, the Tribunal found that the Appellant did not meet the criteria in s 338(2)(d) of the Act and that, as such, it had no jurisdiction to review the matter.
5. In the Federal Circuit Court, the Appellant sought constitutional writ relief in respect of the Tribunal’s decision. The Appellant advanced ten grounds of review in her amended application, the first of which alleged that the Tribunal had made a jurisdictional error by not allowing the Appellant to prove that she had submitted a valid visa application. The remaining nine grounds did not identify specific legal error and instead asserted, variously, that she did in fact meet the visa criteria and that she had been misled or mistreated by her proposed sponsor. The primary judge found that the Tribunal had given the Appellant an adequate opportunity to address adverse information and the Tribunal’s concern as to a want of jurisdiction, and that the remaining grounds did not identify any bases upon which it could be said that the Tribunal’s decision was affected by any relevant legal error. The primary judge further noted that the application on its face was ‘doomed to failure’ and it was not apparent why the proceedings were not the subject of a show cause application under r 44.12 of the *Federal Circuit Court Rules 2001* (Cth): at [21]. Consequently, the primary judge dismissed the application.
6. In this Court, the Appellant advanced seven grounds of appeal, which are as follows (errors in original):

‘1. Hon Judge Street failed to hold that Administrative Appeals Tribunal made jurisdictional error of law when it took into account irrelevant consideration and misconduct the facts.

2. The Applicant claims he satisfies all requirements for visa. The first respondent overlooked or mistook the facts and made decesion on limited information without considering all the information and circumstances.

3. The applicant claim that she did not know about the nomination hasn’t been lodge by his employer. She blindly trust to her employer and they keep telling that they lodge everything now you have to wait.

4. This is breach of trust to her by employer. They hide all facts and keep her in dark. And immigration department did not consider her application. They refused and AAT said they do not have jurisdiction.

5. Applicant appeal to higher court they gave her fair chance so I will get justice.

6. In my matter employer had done grave mistake and they refused at last to help me. It’s clear and plain they are conspirators and spoil my life.

7. I hope that honourable court look in this matter and give fair decesion.’

1. At the hearing these grounds were supplemented by an unfiled notice of appeal disclosing eight grounds. Leave was not sought to rely upon those eight grounds. In any event, those eight grounds and the original seven grounds do not substantively differ inasmuch as that neither discloses any cognisable ground of review. Both cannot result in any kind of favourable outcome for Ms Gohil. I do not say that critically. This area is technical and Ms Gohil is not a lawyer.
2. I propose, therefore, to treat the grounds of appeal as including a challenge to the correctness of the conclusion of the Court below that the Tribunal was correct in deciding that it had no jurisdiction. I do so because, so far as I can see, that is the only conceivable available challenge to the Tribunal’s decision.
3. Taking that to be the ground of appeal, it is plain that the appeal must be dismissed. The obligation of the Tribunal to entertain Ms Gohil’s application arose only from s 348(1) which required it to review the delegate’s decision ‘if an application is properly made under s 347 for review of a Part 5-reviewable decision’. If the visa in question is not of a kind which can only be granted to applicants who are overseas (not suggested to be the case here), a Part 5-reviewable decision is defined in s 338(2) to mean a decision to refuse to grant the visa where the applicant for the visa was at the time the visa is applied for in fact in the migration zone (here satisfied); where, at the time the visa application was refused the applicant for it was not in immigration clearance or otherwise refused entry (here satisfied); and, significantly for present purposes, where the visa is a temporary visa of a kind which must be accompanied by an ‘approved nomination’ that there is such a nomination in place (held by the Tribunal *not* to be satisfied).
4. This last requirement emerges from s 338(2)(d) which provides relevantly:

(2) A decision (other than a decision covered by subsection (4) or made under section 501) to refuse to grant a non‑citizen a visa is a Part 5‑reviewable decision if:

…

(d) if the visa is a temporary visa of a kind (however described) prescribed for the purposes of this paragraph:

(i) the non‑citizen is, at the time the decision to refuse to grant the visa is made, identified in an approved nomination that has not ceased under the regulations; or

(ii) a review of a decision under section 140E not to approve the sponsor of the non‑citizen is pending at the time the decision to refuse to grant the visa is made; or

(iii) a review of a decision under section 140GB not to approve the nomination of the non‑citizen is pending at the time the decision to refuse to grant the visa is made; or

(iv) except if it is a criterion for the grant of the visa that the non‑citizen is identified in an approved nomination that has not ceased under the regulations—the non‑citizen is, at the time the decision to refuse to grant the visa is made, sponsored by an approved sponsor.

1. The visa sought by Ms Gohil was a Temporary Work (Skilled) (subclass 457) visa. This visa is of a kind which must be supported by an approved nomination. The Tribunal concluded that there was no nomination in place. Consequently, the inevitable conclusion was that it had no jurisdiction under s 348(1).
2. This reasoning is irresistible. Steward J reached the same conclusion in *Singh v Minister for Home Affairs* [2019] FCA 291 at [2]-[9]. Notwithstanding, I am prepared to accept, for the sake of argument, Ms Gohil’s submission that her employer has behaved wrongfully towards her in not providing the nomination and that she is blameless in the events which have occurred. Be that as it may, Ms Gohil’s treatment at the hands of her employer cannot impact on the jurisdiction of the Tribunal. Without a nomination the Tribunal had no jurisdiction. Accepting that this is an apparently harsh outcome for Ms Gohil, the Tribunal’s conclusion that it had no jurisdiction was inevitable and, whilst no doubt disappointing for Ms Gohil, plainly correct.
3. Consequently, the conclusion of the Federal Circuit Court that the Tribunal had no jurisdiction is also correct. The appeal must, therefore, be dismissed with costs.

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| I certify that the preceding thirteen (13) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perram. |

Associate:

Dated: 21 June 2019