FEDERAL COURT OF AUSTRALIA

Sanjel v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2019] FCA 1966

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| Appeal from: | *Sanjel v Minister for Home Affairs & Anor* [2019] FCCA 1436 |
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| File number(s): |  |
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| Judge(s): | **THAWLEY J** |
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| Date of judgment: | 21 November 2019 |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth) s 24(1)(d), 25(1AA)(a)  *Migration Act 1958* (Cth) s 499  *Migration Regulations 1994* (Cth) cl 500.212 |
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| Cases cited: | *AYF16 v Minister for Immigration and Border Protection* (2018) 264 FCR 654  *Han v Minister for Home Affairs* [2019] FCA 331  *Hicks v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 757  *Sanjel v Minister for Home Affairs & Anor* [2019] FCCA 1436  *Vidiyala v Minister for Home Affairs* [2018] FCA 1973 W*ozniak v Minister for Immigration and Border Protection* (2017) 258 FCR 147 |
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| Date of hearing: | 21 November 2019 |
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| Registry: | New South Wales |
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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: | No Catchwords |
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| Number of paragraphs: | 29 |
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| Counsel for the Appellant: | The appellant appeared in person |
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| Counsel for the Respondents: | Mr G Johnson |
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| Solicitor for the Respondents: | DLA Piper |

ORDERS

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|  | | NSD 945 of 2019 |
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| BETWEEN: | MAHESH SANJEL  Appellant | |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | THAWLEY J |
| DATE OF ORDER: | 21 November 2019 |

THE COURT ORDERS THAT:

1. The name of the first respondent be changed to the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs.
2. The appeal is dismissed
3. The appellant is to pay the first respondents costs.

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

REASONS FOR JUDGMENT

(Revised from transcript)

THAWLEY J:

1. This is an appeal from orders of the Federal Circuit Court made on 28 May 2019 dismissing an application for judicial review of a decision of the Administrative Appeals **Tribunal**: *Sanjel v Minister for Home Affairs & Anor* [2019] FCCA 1436.
2. The decision by the Tribunal made on 13 March 2018 affirmed a decision by a delegate of the then Minister for Immigration and Border Protection made on 29 December 2016 refusing to grant the appellant a Student (Temporary) (Class TU) visa on the ground that the appellant did not meet a criterion for the grant of the visa in cl 500.212 of Schedule 2 to the *Migration* ***Regulations*** *1994* (Cth).

# BACKGROUND

1. The appellant is a citizen of Nepal who departed in 2008 after completing the equivalent of a year 12 education. He has resided in Australia on student or related bridging visas since 2008 and has not returned to Nepal. He currently lives with his Australian citizen brother and sister-in-law.
2. At the time of the application, the appellant was enrolled in a bachelor of professional accounting, which was due to finish at the end of March 2018. The appellant had also intended on commencing further study.
3. The appellant applied for the visa on 28 September 2016. At the time of application, Class TU contained two subclasses: Subclass 500 (Student) and Subclass 590 (Student Guardian). The appellant applied for the 500 student visa to undertake study in Australia.
4. The delegate concluded that the appellant did not satisfy the requirements of cl.500.212(a) because the delegate was not satisfied the appellant was “a genuine applicant for entry and stay as a student”: T[3].

# Legislative context

1. Clause 500.212 (the genuine temporary entrant criterion) of the *Regulations* provided as follows:

The applicant is a genuine applicant for entry and stay as a student because:

(a) the applicant intends genuinely to stay in Australia temporarily, having regard to:

(i) the applicant’s circumstances; and

(ii) the applicant’s immigration history; and

(iii) if the applicant is a minor--the intentions of a parent, legal guardian or spouse of the applicant; and

(iv) any other relevant matter; and

(b) the applicant intends to comply with any conditions subject to which the visa is granted, having regard to:

(i) the applicant’s record of compliance with any condition of a visa previously held by the applicant (if any); and

(ii) the applicant’s stated intention to comply with any conditions to which the visa may be subject; and

(c) of any other relevant matter.

# TRIBUNAL

1. The appellant appeared before the Tribunal on 8 March 2018 to present evidence and give arguments. As mentioned, the Tribunal gave reasons on 13 March 2018. The Tribunal acknowledged that, in considering whether the appellant satisfied cl 500.212(a), it had to have regard to ***Direction Number 69*** *– Assessing the Genuine Temporary Entrant Criterion for Student Visa and Student Guardian Visa Applications*, authorised under s 499 of the *Migration Act 1958* (Cth): T[19].
2. The Tribunal correctly observed that *Direction Number 69* indicated that the factors specified should not be used as a checklist but rather were intended to guide decision-makers when considering an applicant’s circumstances as a whole, in reaching a finding about whether the applicant satisfied the genuine temporary entrant criterion: T[20].
3. In considering the factors mentioned in *Direction Number 69* the Tribunal stated:

[27] The Tribunal’s view, on the evidence, is that the applicant made poor academic progress from 2010 to the end of 2014. Notwithstanding that he is now doing better academically and has nearly finished a Bachelor of Professional accounting, the Tribunal does not consider his academic progress over a period of nearly 10 years indicates he is a genuine applicant for entry and stay as a student, that is, a Genuine Temporary Applicant (GTE).

[28] The applicant’s stated career goal, at the time of application, was that he is looking forward to starting his accounting career in Nepal. He completed an Advanced Diploma of Accounting in 2010 and, at the time of this decision, he has nearly completed a Bachelor Professional Accounting. He also has a Diploma of Management (2014) and a Diploma of Business (2016). The Tribunal’s view is that the applicant is, at the time of this decision, well qualified and equipped with significant life experience (gained in his time onshore from the age of 19 to 29 and working at Hungry Jacks) to return to his home country and work as an accountant or in an accounting related field. The Tribunal does not consider that the additional qualifications, in the applicant’s circumstances - Master of Professional Accounting and Master of Business Administration - will add value to his prospects of achieving his career goal in Nepal.

[29] At the time of this decision, the applicant has, or will shortly have, the following academic qualifications:

a. Bachelor of Professional Accounting (2018)

b. Diploma of Business (2016)

c. Diploma of Management (2014)

d. Advanced Diploma of Accounting (2010)

[30] At the hearing, the applicant said he had not yet paid the course fees for the Master of Business Administration starting on 2 April 2018 and, relying on this oral evidence, the Tribunal notes that the applicant has not made any financial outlay, nor will he be financially penalised if he does not commence the course. His current Bachelor of Professional Accounting finishes on 31 March 2018, in about three weeks at the time of this decision.

[31] The Tribunal’s view, having considered all relevant facts and matters, including having regard to some of the matters in Direction 69, is that the applicant has enrolled in the courses commencing in April 2018 for the primary purpose of extending his time onshore and to maintain residence. He has provided no reliable or documentary evidence that he intends to return to Nepal in the near or distant future, even to visit.

[32] On the basis of the above, the Tribunal is not satisfied that the applicant intends genuinely to stay in Australia temporarily. Accordingly, the applicant does not meet cl.500.212(a) and the Tribunal is not satisfied that the applicant is a genuine applicant for entry and stay as a student as required by cl.500.212.

# The Federal Circuit court

1. The application for judicial review to the Federal Circuit Court contained five grounds of review:

1. The Second Respondent made jurisdictional error by making legal error as to the construction of Reg 500.212 of the *Migration Regulations* 1994.

2. The Second Respondent made a decision which was irrational, unreasonable or capricious or devoid of any intellectual process by stating that it gave the Applicants claim that he intended to return home to his parents ‘little credit’.

3. The Second Respondent made jurisdictional error at [27] by making findings about academic progress which were entirely irrelevant to the relevant statutory inquiry, namely whether the Applicant intended to stay in Australia temporarily.

4. The Second Respondent made jurisdictional error by misunderstanding or misconstruing the statutory intention and construing ‘temporarily’ as meaning in the near future.

5. The Second Respondent made jurisdictional error by creating subjective views about whether further study was necessary or desirable (in the Second Respondent’s view) to add significantly to his qualifications and life experience to return to his home country as a relevant consideration in relation to whether the Applicant intended to stay in Australia temporarily.

1. The primary judge was not persuaded by any of those grounds and dismissed the application. It is not necessary to set out his Honour’s reasoning in detail. That reasoning is referred to below where relevant to the appeal.
2. Of particular relevance to the appeal, the primary judge followed the decision of Perry J in ***Vidiyala*** *v Minister for Home Affairs* [2018] FCA 1973 at [28] to the effect that paragraphs (a) to (c) of cl 500.212 are to be read cumulatively. Her Honour said:

[28] … It is apparent from the use of the word “*and*” at the end of subclauses (a) and (b) of clause 500.212 that the appellant had to satisfy the Tribunal that each of the criteria in (a), (b) and (c) were met. It follows that once the Tribunal found that the criterion in subclause (a) was not met, the Tribunal was required to dismiss the visa application irrespective of whether the criteria in subclauses (b) and (c) were met. It follows that the FCC correctly held that the Tribunal was not required to consider the criteria in clause 500.212(b) and (c) before it could lawfully decide to affirm the delegate’s decision to refuse the application.

# THE APPEAL

1. The appellant relied upon three grounds of appeal:
2. His Honour erred in failing to consider the submission that the Second Respondent had failed to consider mandatory relevant considerations and in particular the Applicant’s immigration history.
3. His Honour erred in following and applying the decision of Perry J in *Vidiyala v Minister for Home Affairs* [2018] FCA 1973
4. Further grounds may be added when the written judgment of his Honour becomes available.
5. The appellant did not file any written submissions or seek to rely upon further grounds. Accordingly, the third ground of appeal may be put to one side.

# CONSIDERATION

### Ground 2

1. For convenience, I will deal with the second ground of appeal first, namely whether the primary judge erred in following the decision of Perry J in *Vidiyala*. The Federal Circuit Court was bound to apply the decision of Perry J. Her Honour’s decision was made in the appellate jurisdiction of this Court on appeal from the Federal Circuit Court: s 24(1)(d) and s 25(1AA)(a) of the *Federal Court of Australia Act 1976* (Cth).
2. A single judge of this Court is not bound by any doctrine of precent to follow an earlier decision of a single judge of this Court but should follow it unless that decision is regarded as plainly wrong, including where the question arises in the appellate jurisdiction of the Court – see: *Hicks v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 757 at [74], [75] (French J); W*ozniak v Minister for Immigration and Border Protection* (2017) 258 FCR 147 at [35] (Kenny, Griffiths and Bromwich JJ); *AYF16 v Minister for Immigration and Border Protection* (2018) 264 FCR 654 at [29] (McKerracher, Murphy and Davies JJ).
3. I do not consider the statement of Perry J in *Vidiyala* at [28] to be plainly wrong. Indeed, I consider her Honour’s statement to be correct. A decision-maker who affirmed a decision not to grant a visa on the basis that paragraph (a) of cl 500.212 had not been met would have exercised the jurisdiction entrusted to him or her and would not have failed to exercise or complete the exercise of jurisdiction entrusted to him or her merely by failing to consider whether the paragraphs (b) and (c) were also not met.

### Ground 1

1. As framed, this ground of appeal alleges a failure by the Tribunal to assess the appellant’s immigration history under cl 500.212(a)(ii).
2. This was not a ground of review put to the Federal Circuit Court. The appellant therefore requires leave to raise it in the appeal to this Court.
3. The principles relevant to whether leave should be granted to raise on appeal grounds of judicial review which were not relied upon below were set out by Bromwich J in ***Han*** *v Minister for Home Affairs* [2019] FCA 331 at [4]-[18]. One important consideration is the merit of the ground which the appellant seeks leave to raise. Others include whether there is prejudice to the respondent, whether it is a matter of construction or law that could have been met by evidence below, whether there is an acceptable explanation and whether it is in the interests of justice. None of the considerations point in favour of granting leave.
4. The Tribunal’s reasons show engagement with the appellant’s immigration history, and there is nothing to suggest some aspect of immigration history which was put to the Tribunal was not taken into account.
5. The Tribunal expressly referred to the following as a relevant factor:

[T]he applicant's immigration history, including previous applications for an Australian visa or for visas to other countries, and previous travel to Australia or other countries.

1. Having identified that as a relevant factor, the Tribunal’s reasons included:

[13] … He has not departed Australia since arriving onshore…

[14] … If the applicant’s visa is granted and he completes the courses on time, this will mean he has resided onshore holding a student visa for over 12 years.

…

[17] The applicant has spent his whole adult life living in Australia. He has not been a full time resident of his home country since September 2008 and has spent no time in his home country since he departed in September 2008, a total of nine and a half years at the time of this decision.

…

[21] … The applicant’s brother, on the applicant’s oral evidence, has returned to Nepal on three or four occasions over the years - the applicant has not returned once…

1. There is no merit to the appellant’s contention that the Tribunal did not consider his immigration history as required by cl 500.212(a)(ii). In the circumstances of this case, which includes that no other factor weighs in favour of granting leave, that is sufficient not to grant leave to raise the new issue in the appeal.
2. If, in the appellant’s first ground of appeal, “immigration history” had been intended to refer to his “record of compliance with any condition of a visa previously held by” him (cl 500.212(b)(i)), the ground of appeal would have been dismissed for two reasons:
3. first, the Tribunal did not need to consider cl 500.212(b) in circumstances where it affirmed the decision not to grant a visa because cl 500.212(a) was not met by the appellant (as noted above in relation to ground 2 of the appeal);
4. secondly, the appellant has not discharged the onus of establishing that his record of compliance was not taken into account by the Tribunal.
5. In amplification of the last mentioned point, the Tribunal referred to the appellant’s holding of visas at T[13] in terms from which it should be inferred that it appreciated that there was no suggested non-compliance. At T[15] the Tribunal stated

The Tribunal has considered all relevant facts and matters, including documents provided by the applicant and his oral evidence at the hearing. The Tribunal has considered the matters raised in the representative’s written submissions dated 1 March 2018.

1. It was not shown either before the primary judge or this Court that anything was put to the Tribunal in respect of visa compliance that was not taken into account.

# CONCLUSION

1. The appeal must be dismissed.

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| I certify that the preceding twenty-nine (29) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Thawley. |

Associate:

Dated: 25 November 2019