FEDERAL COURT OF AUSTRALIA

Mohamed v Minister for Immigration and Border Protection [2020] FCA 158

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| Appeal from: | *Mohamed v Minister for Immigration & Anor* [2019] FCCA 2441  |
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| File number: |  |
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| Judge: | **WIGNEY J** |
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| Date of judgment: | 20 February 2020 |
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| Catchwords: | **MIGRATION** –appeal from decision of the Federal Circuit Court of Australia – where primary judge dismissed judicial review application of decision by Administrative Appeals Tribunal – where Administrative Appeals Tribunal held there were no compelling reasons for not applying the relevant visa criteria – appeal dismissed  |
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| Legislation: | *Migration Act 1958* (Cth) ss 357A, 360, 361  |
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| Cases cited: | *Abebe v Commonwealth* (1999) 197 CLR 510; HCA 14 |
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| Date of hearing: | 14 February 2020 |
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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: | 30 |
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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: | Mills Oakley |
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ORDERS

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|  | NSD 1441 of 2019 |
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| BETWEEN: | MOUSTAFA MOHAMED GHOUNEIMI MOHAMEDAppellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| JUDGE: | WIGNEY J |
| DATE OF ORDER: | 20 FEBRUARY 2020 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent’s costs.

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

REASONS FOR JUDGMENT

WIGNEY J:

1. In February 2016, a delegate of the **Minister** for Immigration and Border Protection refused an application made by the appellant, Mr Moustafa **Mohamed**, for a partner visa. Mr Mohamed applied to the Administrative Appeals **Tribunal** for a review of that decision. That application was refused, though Mr Mohamed successfully challenged that decision in judicial review proceedings in the Federal **Circuit Court** of Australia. Upon remittal, a differently constituted Tribunal again affirmed the delegate’s decision to refuse Mr Mohamed’s visa application. Mr Mohamed again challenged the Tribunal’s decision in the Circuit Court. This time, however, he was unsuccessful. Mr Mohamed filed an appeal in this Court against the Circuit Court’s dismissal of his application.
2. For the reasons that follow, Mr Mohamed’s appeal has no merit and must be dismissed.

# Factual and procedural background

1. The full factual and procedural background to the matter is set out in the judgment of the primary judge (**Judgment**). It is unnecessary to rehearse that detail here. It suffices to say that the central, if not sole, issue for consideration and determination before the Tribunal was whether there were, in Mr Mohammed’s case, compelling reasons not to apply a particular criterion for the grant of the visa for which Mr Mohamed had applied. That criterion required the visa applicant to make a valid application for the visa within 28 days of the last day that the visa applicant had held a substantive visa. Mr Mohamed had not applied for the visa within that time. He therefore did not satisfy that criterion. Unless he was able to persuade the Tribunal that there were compelling reasons not to apply the criterion in his case, his application was bound to fail.
2. The Tribunal invited Mr Mohamed to appear at the hearing. That invitation, which was in writing, indicated that the Tribunal “may wish to take evidence from Ms Amanda Taylor”, who was Mr Mohamed’s wife and his sponsor for the purposes of his visa application. Mr Mohamed responded in writing to that invitation and advised that he would take part in the hearing, but that his wife would not be attending in person. Mr Mohamed also indicated that he would not be requesting the Tribunal to take oral evidence from any other person.
3. It would appear, however, that at the hearing itself Mr Mohamed told the Tribunal that his wife was available to give evidence by telephone. That is apparent from the Tribunal’s Written Statement and **Decision**, which records that Mr Mohamed “offered the oral evidence of his sponsor at [the] hearing via telephone”: Decision at [2]. It would also appear from the Decision that, consistently with its hearing invitation, the Tribunal intended to take evidence from Mr Mohamed’s wife but by oversight neglected to do so. The Decision records, in that regard, that the Tribunal “mistakenly concluded the hearing without taking oral evidence from the … sponsor”: Decision at [2].
4. The Tribunal took steps to remedy that mistake or oversight. Following the hearing, it wrote to Mr Mohamed’s migration agent and advised as follows:

Given oral evidence was not taken from the applicant’s partner (via telephone), the Tribunal can either accept a statement from her in writing, or convene another hearing to take evidence (if the applicant elects to do so). The applicant had made her available (via telephone), and the Member had intended to contact her, nonetheless this did not occur during the hearing.

1. Mr Mohamed’s migration agent promptly responded to the Tribunal’s communication in the following terms:

Please be informed that Applicant spouse is currently preparing a statutory declaration in relation to her medical condition and dependence on her husband and has requested medical certificates that will be forwarded to MRT as soon as available.

1. Shortly after that communication, Mr Mohammed’s migration agent sent the Tribunal a statutory declaration made by Mr Mohamed’s wife and a short medical certificate relating to Mr Mohamed’s wife.

# The Tribunal’s Decision

1. It is readily apparent that the main arguments that were advanced by Mr Mohamed to persuade the Tribunal that it should be satisfied that there were compelling reasons to waive compliance with the relevant visa criterion were based on his wife’s medical condition and the consequential need for him to provide her with support. In considering Mr Mohamed’s arguments in that regard, the Tribunal considered and assessed Mr Mohamed’s oral evidence about his wife’s medical condition and the support he was required to provide to her. Importantly, the Tribunal also clearly had regard to the documentary evidence that had been provided by Mr Mohamed, including both the medical report and his wife’s statutory declaration.
2. The Tribunal was not, however, satisfied that Mr Mohamed’s evidence and submissions provided a compelling reason not to apply the relevant visa criterion. The Tribunal’s reasons for not being so satisfied included that the evidence did not provide any detail concerning the nature of the support that was required by Mr Mohamed’s wife’s medical condition, or the nature of the support that Mr Mohamed in fact provided to her. The Tribunal noted that Mr Mohamed himself, in his evidence to the Tribunal, did not provide any detail concerning the nature of support he was required to, and did, provide to his wife: Decision at [6]. Nor did the medical report. The Tribunal noted, in that regard, that the report was brief and did not state the nature of the support that was required to be given to Mr Mohamed’s wife to deal with the medical condition referred to in the certificate: Decision at [6]. The Tribunal also had regard to Mr Mohamed’s wife’s statutory declaration, but found that the evidence in the statutory declaration concerning the support that Mr Mohamed provided was not “sufficiently forceful” to amount to compelling circumstances, particularly given that the evidence in that regard was not corroborated by any medical practitioner: Decision at [8].
3. The Tribunal also gave consideration to other evidence and arguments that had been advanced by Mr Mohamed. It concluded, however, that it was not satisfied there were compelling reasons not to apply the relevant visa criterion. It follows that Mr Mohamed did not satisfy an essential criterion for the grant of the partner visa. The Tribunal accordingly affirmed the decision under review.

# Circuit Court proceedings and judgment

1. Mr Mohamed’s application for relief in the Circuit Court relied on two grounds.
2. The first ground, in summary, was that the Tribunal did not call evidence from his wife. Mr Mohamed contended, in relation to that ground, that had the Tribunal called his wife, it “would have been able to ask the questions that the doctor did not address”.
3. The second ground concerned the Tribunal’s finding about the medical report relating to Mr Mohamed’s wife’s medical condition. The appellant contended that the Tribunal should have “let [him] know that it wanted more information from [the] doctor or from [him]”.
4. The primary judge rejected both of those grounds.
5. As for the first ground, the primary judge held that the Tribunal “did not act in a procedurally unfair way” and that Mr Mohamed had not suffered any “practical injustice”: Judgment at [30]. That was because once the Tribunal had recognised its oversight, it offered Mr Mohamed the option of either convening another hearing so his wife could give evidence, or submitting a statutory declaration from his wife. Mr Mohamed took the second option. In those circumstances, the primary judge held that Mr Mohamed was “not put in any worse position by the oversight”: Judgment at [30].
6. As for the second ground, the primary judge held that it “was for the Applicant [Mr Mohamed] to advance whatever evidence, claims or arguments he wished to advance” (Judgment at [33]) and that the Tribunal was “not under an obligation to let the Applicant [Mr Mohamed] or the sponsor [his wife] know its thought processes or to give them a running commentary or advice”: Judgment at [35]. It followed that the complaint the subject of this ground did not give rise to a jurisdictional error.
7. The primary judge accordingly dismissed with costs.

# The appeal

1. Mr Mohamed’s notice of appeal contained the following four grounds of appeal (as drafted):
2. His Honour failed to interpret and act upon compelling reasons and even though the Tribunal had a psychological report that my partner had high levels of depression, anxiety and stress, the Tribunal as well as His Honour failed to accept that such condition amounts to compelling circumstances.
3. Even both the Tribunal and His Honour failed to see that a genuine relationship based on long term also should be considered as compelling.
4. As previously stated the Tribunal mistakenly concluded the hearing without taking the oral evidence from my sponsor. Even though I appreciate that the Tribunal replied to my agent I do believe that my agent who is no longer able to practice as migration agent failed to request another hearing where my sponsor would be given the opportunity to discuss and provide evidence about her medical condition as well as her strong commitment.
5. I continue to rely on the grounds which were before His Honour Judge Dowdy and hope that the Federal Court of Australia will make a different decision specifically a decision in my favour as a result of the compelling circumstances which were overlooked by both His Honour and the Tribunal.
6. Mr Mohamed did not file any written submissions. While he did make some oral submissions at the hearing, those submissions did not squarely address his appeal grounds. They essentially amounted to a re-agitation of the grounds he had advanced in the Circuit Court and a general complaint that the primary judge had not accepted those grounds. As for the fact that the Tribunal did not call evidence from his wife at the hearing, Mr Mohamed conceded that the Tribunal had given him two options to remedy its oversight and that he chose the option of providing a statutory declaration from his wife and a medical report. His main complaint or grievance was that, once he had provided those documents, the Tribunal did not ask him for any more information. As for the judgment of the primary judge, Mr Mohamed’s submission was simply that the primary judge had refused his application without considering his rights.
7. There is no merit in any of the appeal grounds and no merit in any of Mr Mohamed’s submissions.
8. The first ground of appeal fails to identify any, or any coherent or comprehendible, appellable error on the part of the primary judge. It amounts to no more than a general challenge to the merits of the Tribunal’s finding that the evidence before it did not provide a compelling reason not to apply the relevant visa criterion. To the extent that this ground of appeal addresses the judgment of the primary judge at all, it appears to proceed on the erroneous basis that it was somehow part of his Honour’s jurisdiction to consider whether there were compelling circumstances. The primary judge’s jurisdiction was limited to considering whether the Tribunal made any jurisdictional errors in considering and deciding Mr Mohamed’s review application. It was not within his Honour’s jurisdiction to simply reconsider the merits of Mr Mohamed’s review application.
9. The second ground raises an argument which was not advanced in the Circuit Court. That argument appears to be that the length of Mr Mohamed’s relationship with his wife provided a compelling reason to not apply the relevant criterion. Because that argument was not put in the court below, Mr Mohamed required the Court’s leave to raise it on appeal. Even putting that procedural issue or problem to one side, the more fundamental problem for Mr Mohamed is that it does not appear that he squarely even put any argument concerning the length of his relationship with his wife to the Tribunal upon remittal. That is perhaps unsurprising given that the evidence, such as it was, on that topic went no further than revealing that Mr Mohamed and his wife had been married for two years. In any event, the fact that the Tribunal did not expressly advert to that consideration in its reasons could not have amounted to a jurisdictional error in all the circumstances. It should also be noted that Mr Mohamed did not make any oral submissions in support of this ground at the hearing.
10. The third ground relates to the fact that the Tribunal did not take oral evidence by telephone from Mr Mohamed’s wife at the hearing. Mr Mohamed asserted, in that context, that his migration agent “failed to request another hearing”. To the extent that, by so asserting, Mr Mohamed is somehow attempting to blame his agent for not requesting a hearing, no such argument was put to the Circuit Court. Nor, more fundamentally, did Mr Mohamed adduce any evidence in the Circuit Court in support of any such contention. In any event, Mr Mohamed did not, in his submissions in support of his appeal, suggest that his migration agent was somehow to blame for the decision not to accept the Tribunal’s offer to reconvene the hearing. Indeed, he freely accepted that he chose the option of submitting a statutory declaration.
11. The primary judge was plainly right to reject Mr Mohamed’s ground of review based on the fact that the Tribunal did not take oral evidence from his wife. The Tribunal complied with all the relevant obligations imposed on it by the *Migration* ***Act*** *1958* (Cth) in relation to the exercise of its jurisdiction. It invited Mr Mohamed to appear at the hearing in compliance with s 360 of the Act. Mr Mohamed did not notify the Tribunal that it wanted the Tribunal to obtain oral evidence from any witnesses, including his wife, in accordance with s 361 of the Act. It could not, therefore, be said that in failing to call evidence from Mr Mohamed’s wife, the Tribunal somehow breached s 361 of the Act.
12. While it appears that, at the Tribunal hearing, Mr Mohamed indicated that his wife was available to give oral evidence, the Tribunal was not obliged, under any provision of the Act, to call oral evidence from Mr Mohamed’s wife in response to that indication. Even so, it appears that the Tribunal had intended to take evidence from Mr Mohamed’s wife, but had mistakenly neglected to do so. Once it realised that mistake, the Tribunal offered to reconvene the hearing for the purpose of taking that evidence. Mr Mohamed chose not to accept that offer, electing instead, through his migration agent, to submit written evidence from his wife by way of statutory declaration. In those circumstances, even if, contrary to s 357A of the Act, the Tribunal was somehow bound to afford Mr Mohamed procedural fairness in a way that extended beyond the provisions in the Act concerning the conduct of reviews in the Tribunal, there was plainly no denial of procedural fairness. The primary judge was right to so conclude.
13. The fourth ground of appeal simply repeats the grounds advanced before the Circuit Court. It does not identify any error on the part of the primary judge in rejecting those grounds.
14. As has already been noted, Mr Mohamed’s oral submissions essentially sought to re-agitate his grounds of review in the Circuit Court. For the reasons already given, Mr Mohamed’s complaint based on the fact that the Tribunal did not call evidence provides no basis for the finding of jurisdictional error on the part of the Tribunal and the primary judge was correct in rejecting the ground of review based on that complaint.
15. Mr Mohamed’s complaint that the Tribunal was somehow obliged to, but did not, ask him for more information also has no merit for the reasons given by the primary judge. It is well established that, as the proceedings in the Tribunal are inquisitorial, it is for the applicant to advance whatever evidence and arguments he or she wishes to advance: *Abebe v Commonwealth* (1999) 197 CLR 510; HCA 14 at 576 [187]. The Tribunal is not obliged, during or after the hearing, to advise an applicant that it is not satisfied by that evidence and is not obliged to give an applicant the opportunity to supplement the evidence if it is not satisfied by the evidence initially adduced.

# Conclusion and disposition

1. Mr Mohamed failed to demonstrate any error on the part of the primary judge in dismissing his application for judicial review. The appeal must accordingly be dismissed with costs.

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| I certify that the preceding thirty (30) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wigney. |

Associate:

Dated: 20 February 2020