Federal Court of Australia

Kareem v Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs [2021] FCA 1016

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| Appeal from: | *Kareem v Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs* [2021] FCCA 743 |
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| File number: | NSD 439 of 2021 |
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| Judgment of: | **BROMWICH J** |
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| Date of judgment: | 27 August 2021 |
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| Catchwords: | **MIGRATION –** appeal of from decision of Federal Circuit Court of Australia to dismiss an application for judicial review of a decision of the Administrative Appeals Tribunal – Tribunal affirmed a decision of a delegate of the Minister to refuse the grant of a Partner (Provisional) (Class UF) (subclass 309) visa – where appellant is sponsor of partner visa applicant – where decision to affirm delegate’s decision made principally upon the basis of not being satisfied that the visa applicant and sponsor were in an exclusive relationship as required by definition of “*de facto partner*” in s 5CB of the *Migration Act 1958* (Cth)– where decision to affirm delegate’s decision not to grant visa also made upon the basis of not being satisfied that the relationship was genuine and continuing – where visa criteria in issue contained no discretionary components and could not be waived – whether primary judge erred in failing to find that Tribunal erred in failing to consider factors including best interests of the affected children or related issues including hardship – where several other grounds advanced going to merits of decision and other issues – held: best interests of the affected children and other considerations advanced not among the relevant considerations for the determination of the exclusive relationship criterion expressly provided by the legislation – held: no grounds identify or establish any error on the part of either the Tribunal or the primary judge – appeal dismissed  **MIGRATION** – whether primary judge erred in failing to find that Tribunal erred in failing to consider a statutory declaration by the sponsor relating to relationship status – where Tribunal not obliged to refer specifically to each item of evidence or other material before it – Tribunal expressly considered the evidence and other material before it on that topic – held: not established that the Tribunal failed to consider evidence – appeal dismissed |
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| Legislation: | *Migration Act 1958* (Cth) ss 5CB, s 65(1), 359A, 376  *Migration Regulations 1994* (Cth) reg 1.09A; Sch 2, cl 309.211(2)(a) |
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| Cases cited: | *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 184; 236 FCR 593  *CFE16 v Minister for Immigration* [2020] FCCA 1083 |
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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: | 32 |
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| Date of hearing: | 2 August 2021 |
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| Counsel for the Appellant: | The appellant appeared on his own behalf |
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| Solicitor for the First Respondent: | Australian Government Solicitor |

ORDERS

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| BETWEEN: | ADEWALE KOLAPO KAREEM  Appellant | |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRATION SERVICES AND MULTICULTURAL AFFAIRS  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| order made by: | BROMWICH J |
| DATE OF ORDER: | 27 August 2021 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent’s costs as assessed or agreed.

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

REASONS FOR JUDGMENT

BROMWICH J:

1. This is an appeal from orders made by a judge of the Federal Circuit Court of Australia, dismissing with costs an application for judicial review of a decision of the second respondent, the Administrative Appeals Tribunal. The Tribunal affirmed a decision of a delegate of the first respondent, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, to refuse the grant of a Partner (Provisional) (Class UF) (subclass 309) visa.
2. The appellant, an Australian citizen, is the sponsor of the visa applicant, a Nigerian citizen living in Nigeria. It is convenient to refer to the appellant in these reasons as the **sponsor**. The visa applicant applied for the visa the subject of this appeal upon the basis that she was in a de facto relationship with the sponsor, having previously been refused a number of other visas that she had applied for. The Minister’s delegate refused to grant the visa, and the Tribunal principally affirmed that decision upon the basis of not being satisfied that the visa applicant and the sponsor were in an exclusive relationship as required by part of the definition of “*de facto partner*” in s 5CB of the *Migration Act 1958* (Cth), as detailed further below.
3. Before both the delegate and the Tribunal, it was not in doubt that the sponsor had been in a polygamous relationship with the visa applicant and with another person, Ms Oluwakemi Omotayo. The sponsor did not deny that had been the situation in the past, but his case was that his relationship with Ms Omotayo had ceased, and that his sole relationship was with the visa applicant. The delegate and the Tribunal both recorded three children from the sponsor’s relationship with the visa applicant, and three children from the sponsor’s relationship with Ms Omotayo, with overlapping birth dates, in the period from 1998 to 2011. Neither the delegate nor the Tribunal were satisfied that the relationship between the sponsor and Ms Omotayo had ended, such that neither was satisfied, as required, that the sponsor was in a relationship with the visa applicant to the exclusion of all others. The Tribunal’s decision was also made upon the basis of not being satisfied that the relationship was genuine and continuing.
4. The primary judge considered the sponsor’s three written grounds of review and one oral ground of review, asserting error on the part of the Tribunal. His Honour was not satisfied that any jurisdictional error had been established, characterising much of what was advanced by the sponsor as amounting in effect to impermissible merits review. In particular, assertions that the Tribunal had failed to have regard to the best interests of the affected children were found by his Honour to be irrelevant in light of the mandatory visa criterion of an exclusive relationship that the Tribunal had found the visa applicant had not been able to meet.
5. The primary judge also rejected grounds of review and submissions of the sponsor by which it was alleged that the Tribunal was biased, or the decision tainted by pre-judgment. This assertion was largely made because there was no consideration given to the best interests of the affected children. The primary judge determined that no such consideration was required. Nor did his Honour accept the assertion that evidences generally, but not specifically, referred to by the Tribunal had not been considered.

## Legislative regime, the best interests of affected children and hardship from visa refusal

1. The sponsor continues to maintain as a dominant theme in his appeal grounds and written and oral submissions that the Tribunal was required to take into account the best interests of the affected children, and other related issues, including hardship and asserted denials of procedural fairness, in deciding whether or not to affirm the delegate’s decision. Given these arguments, it is necessary first to set out a short explanation of the relevant visa criteria.
2. Section 65(1) of the *Migration Act* requires that a valid visa application for which any application fee has been paid be granted if the criteria for the grant of the visa are met, and be refused if the criteria are not met. This is subject to certain exclusions not applicable in this case. No discretion is involved in making that binary determination, although for some visas one or more of the criteria may have a discretionary element which is able to be waived.
3. Among the criteria required to be met at the time of the 23 July 2017 visa application, and still required to be met at the time of the visa decision, was that the visa applicant was the spouse or de facto partner of an Australian citizen: *Migration Regulations 1994* (Cth) sch 2 cl 309.211(2)(a). The visa application in this case was made upon the basis of the visa applicant being the de facto partner of the sponsor, rather than spouse. The Tribunal also addressed the alternative of a spouse relationship, reaching the same conclusion, but nothing turns on this and it therefore does not need to be addressed further.
4. Section 5CB(1) of the *Migration Act* defines a de facto partner of another person as someone who is in a de facto relationship with that person. Section 5CB(2)(a) provides that one of the criteria for the existence of a de facto relationship between two people for the purposes of s 5CB(1) is that “*they have a mutual commitment to a shared life to the exclusion of all others*” (**exclusive relationship criterion**). Section 5CB(2)(b) relevantly provides that another one of the criteria for the existence of a de facto relationship for the purposes of s 5CB(1) is that “*the relationship between them is genuine and continuing*”. The remaining two criteria in s 5CB(2)(c) and (d) did not of themselves impede the grant of the visa, and can therefore be put to one side.
5. All of the visa criteria relating to the existence of a de facto relationship, and thus the exclusive relationship criterion in issue in this case, contained no discretionary component and could not be waived. If any of the mandatory criteria for the existence of a de facto relationship as defined in s 5CB(2) could not be met to the satisfaction of the Tribunal, s 65(1) of the *Migration Act* required that the visa application be refused.
6. The dominant consideration addressed in the Tribunal’s reasons was the exclusive relationship criterion. There was, and still is, no provision to enable the Tribunal to waive the requirement to meet the exclusive relationship criterion, as suggested by the appellant. Therefore the visa applicant, and through her the sponsor, could not rely upon compassionate grounds related to her children or hardship occasioned by her not being granted the visa. The fact that other criteria for other visas, even other partner visas, may be waived is of no relevance to this case.
7. There is no scope to infer that any different or additional considerations can be relied upon aside from those expressly provided for the determination of whether or not the s 5CB(2)(a) exclusive relationship criterion was met. To the contrary, there is express provision as to what *must* be taken into account in determining whether the exclusive relationship criterion, and whether the other three criteria in s 5CB(2)(b), (c) and (d), have been met.
8. Section 5CB(3) of the *Migration Act* provides that the regulations may make provision in relation to the determination of whether one or more of the conditions in s 5CB(2)(a) to (d) exist. Regulation 1.09A(2)(b) provides that if the Minister is considering an application for a Partner (Provisional) (Class UF) visa, the Minister (and thus the delegate and Tribunal) must consider all of the circumstances of the relationship, including those set out in reg 1.09A(3). Those stipulated circumstances in reg 1.09A(3), with detailed non-exhaustive particulars, are:
9. the financial aspects of the relationship;
10. the nature of the household;
11. the social aspects of the relationship; and
12. the nature of the persons’ commitment to each other.

Each of those mandatory relationship assessment criteria were considered by both the delegate and the Tribunal.

1. It follows from the above that when the Tribunal was deciding whether or not it was satisfied that the exclusive relationship criterion was met:
2. there was no room for the Tribunal to take into account:
   1. the best interests of the affected children or related issues, including any issue arising from Australia’s adoption of international conventions, such as the Convention on the Rights of the Child; or
   2. any hardship that might be occasioned by refusal of the visa, be that to the visa applicant, the sponsor, or their children, by the refusal of the visa;
3. there could not be any denial of procedural fairness in failing to have regard to the best interests of the affected children or related issues or hardship occasioned by refusal of the visa, given that this was clearly not relevant; and
4. there was no jurisdictional requirement imposed on the Tribunal to advise the appellant that evidence or other material which addressed the above irrelevant considerations was not going to be taken into account.
5. Any grounds of review, or grounds of appeal, relying upon a failure by the Tribunal to have regard to the best interests of the affected children or related issues, or hardship occasioned by refusal of the visa in determining satisfaction as to the exclusive relationship criterion, must accordingly fail. Such grounds will not be considered further in these reasons except in the characterisation below of the notice of appeal. The same applies to submissions or arguments to that effect, whether in writing or made orally, and to the authority cited in support of such submissions and arguments.

## The notice of appeal

1. The grounds in the notice of appeal are set out in 54 paragraphs over nine pages. They are a mixture of submissions, discussion and assertion, including citing and quoting from authority largely directed to the best interests of affected children, and a failure to take that into account. Most of the last three and a half pages of the notice of appeal (paragraphs 31 to 51) refer in some detail to the Convention on the Rights of the Child and to the consequences of not giving effect to it in this case. As that convention was irrelevant to the task before the Tribunal, none of those paragraphs of the notice of appeal are considered further.
2. The same approach is taken to most of the remaining paragraphs of, or parts of paragraphs of, the notice of appeal, that similarly rely upon an asserted failure to have regard to the impact of refusing the grant of the visa on the affected children, failure to consider material going to that issue, resultant hardship on the visa applicant, the sponsor or on their children, or allegations of a denial of procedural fairness in relation to any of these issues. The Tribunal was not required to take such matters into account, and did not have any obligation to spell this out in the reasons given for affirming the delegate’s decision.
3. The same approach applies to authority cited or quoted in the notice of appeal, or in oral or written submissions, going to any of the above irrelevant issues. That extends, for example, to the appellant’s complaint that the primary judge did not have regard to a decision of another Federal Circuit Court judge in *CFE16 v Minister for Immigration* [2020] FCCA 1083, a case dealing with failure to take into account the best interests of a child as a primary consideration, as required in the very different context of a visa cancellation case. Numerous other authorities relied upon by the sponsor were of no assistance to his appeal for the same reason that they were not relevant.
4. The notice of appeal does not directly allege any error related to the conclusion reached by the Tribunal that the sponsor and the visa applicant were not in a relationship with one another to the exclusion of all others, let alone any jurisdictional error on the part of the Tribunal that produced error on the part of the primary judge. The only reference to this issue in the notice of appeal was indirect, but it did feature in oral submissions at the appeal hearing, to which I now turn.
5. The only possible ground of appeal remaining in the notice of appeal, as helpfully identified in the Minister’s written submissions, is an alleged failure on the part of the Tribunal to consider a statutory declaration by the sponsor dated 24 July 2017. That statutory declaration was significantly directed towards the sponsor’s asserted ending of his relationship with Ms Omotayo. The primary judge expressly addressed this issue. I therefore treat this ground as constituting an allegation of error on the part of his Honour to find such a failure on the part of the Tribunal.
6. While it is true that there was no specific reference in the Tribunal’s reasons to the sponsor’s statutory declaration dated 24 July 2017, as the primary judge correctly pointed out (at [62]), the Tribunal was not obliged to refer specifically to each item of evidence or other material before it, let alone expressly address the individual contents of each. That has long been supported by Full Court and High Court authority, including the much-cited and quoted decision in *Applicant* ***WAEE*** *v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 184; 236 FCR 593 per French, Sackville and Hely JJ:

[46] It is plainly not necessary for the Tribunal to refer to every piece of evidence and every contention made by an applicant in its written reasons. It may be that some evidence is irrelevant to the criteria and some contentions misconceived. Moreover, there is a distinction between the Tribunal failing to advert to evidence which, if accepted, might have led it to make a different finding of fact (cf *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [87]-[97]) and a failure by the Tribunal to address a contention which, if accepted, might establish that the applicant had a well-founded fear of persecution for a Convention reason. The Tribunal is not a court. It is an administrative body operating in an environment which requires the expeditious determination of a high volume of applications. Each of the applications it decides is, of course, of great importance. Some of its decisions may literally be life and death decisions for the applicant. Nevertheless, it is an administrative body and not a court and its reasons are not to be scrutinised “with an eye keenly attuned to error”. Nor is it necessarily required to provide reasons of the kind that might be expected of a court of law.

[47] The inference that the Tribunal has failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons. But that is an inference not too readily to be drawn where the reasons are otherwise comprehensive and the issue has at least been identified at some point. It may be that it is unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected. Where however there is an issue raised by the evidence advanced on behalf of an applicant and contentions made by the applicant and that issue, if resolved one way, would be dispositive of the Tribunal’s review of the delegate’s decision, a failure to deal with it in the published reasons may raise a strong inference that it has been overlooked.

1. Those observations and principles have a direct application to this case, noting in particular that the Tribunal reasons are indeed comprehensive, especially given the relatively narrow issue in contention as to whether the exclusive relationship criterion had been met. The Tribunal expressly, and in some considerable detail, considered the question of whether the relationship between the sponsor and Ms Omotayo had ceased. In doing so the Tribunal identified the evidence and other material before it on that topic that it plainly considered to be material: see s 368(1), *Migration Act*. The Tribunal expressly stated that all of the material before it had been considered and that the reasons were no more than a synopsis of it. I see no reason not to take the Tribunal member at her word on this, especially as the issues on this topic addressed in the appellant’s 24 July 2017 statutory declaration were considered at some length.
2. As the primary judge correctly concluded at [77], there is no basis to find that the Tribunal failed to have regard to the sponsor’s 24 July 2017 statutory declaration. This reasoning also applies to a range of other material that the appellant points to as not having been expressly and individually referred to in the Tribunal’s reasons. It has not been demonstrated there was any failure on the part of the Tribunal to consider this issue, nor this nor any other evidence on this topic.

## Other issues raised by the sponsor

1. For completeness, the following observations are also made about a number of other issues raised by the sponsor in written submissions and in his oral submissions at the appeal hearing.
2. Once there was no requirement that the Tribunal take into account the best interests of the children and hardship in denying the grant of the visa sought, in determining the existence of a de facto relationship, most of the submissions went only to the merits of the conclusion that was reached. That ended up being the substance of most of the sponsor’s written and oral submissions.
3. The sponsor provided three sets of written submissions and made oral submissions at the appeal hearing for almost three hours, including in reply to the Minister’s brief oral submissions. In keeping with the sponsor’s written submissions, the great bulk of that time was taken up arguing that the best interests of his children and the hardship occasioned to him, his children, and the visa applicant, were not taken into account by the Tribunal; that this should have been taken into account; and that there had been a denial of procedural fairness in not taking this into account without giving notice to that effect. The sponsor is correct in characterising these matters not having been taken into account in determining the exclusive relationship criterion, but incorrect in asserting that they had to be taken into account, or that it was required that the sponsor be given notice that they would not be taken into account as a feature of procedural fairness. The Tribunal correctly confined the use of evidence from and about the children as going to the issue of whether the relationship between the sponsor and visa applicant was exclusive, and perhaps also to the question of whether their relationship was genuine and continuing. The primary judge was correct to characterise these issues as being otherwise irrelevant.
4. The sponsor also took issue with the following disclosure information received by the Minister’s Department, which was made the subject of a notice to the sponsor under s 359A of the *Migration Act*, seeking his response:

Allegations that the sponsor is in a continuing relationship with his ‘wife’ in Australia and they are raising the sponsor’s children together. The sponsor is attempting to bring another person to Australia on a partner visa. The sponsor’s ‘wife’ in Australia and the visa applicant know about each other. The sponsor’s intention is to have two ‘wives’ in Australia. The sponsor instructed his children to misrepresent the truth about his relationship with his ‘wife’ in Australia and his relationship with the visa applicant. The sponsor stated that he will do whatever it takes to succeed in bringing the visa applicant to Australia and he believes that he can deceive the Department and achieve a visa outcome for the visa applicant.

1. The source of the above information was subject to a certificate under s 376 of the *Migration Act*, rendering it confidential and not able to be disclosed to the sponsor or visa applicant. The Tribunal found that the certificate was valid, a conclusion that was not challenged before the primary judge or on appeal. However, the sponsor provided a detailed written response to the Tribunal (17 pages, 101 paragraphs) extending well beyond the allegation made in the information, demanding to know who provided the information, and denying that it was true. The sponsor seemed to be alleging at the appeal hearing that the Tribunal member was the likely source of the disclosure, but it was not adequately explained what basis there was for such a suggestion.
2. The Tribunal did not rely upon the disclosure information in the conclusions reached, but rather made detailed adverse credit and reliability findings in relation to the evidence and other material relied upon. This culminated in the Tribunal finding that the sponsor and the visa applicant did not have a commitment to a shared life to the exclusion of all others and did not meet the requirement in s 5CB(2)(a) of the *Migration Act*. The Tribunal additionally did not accept that the relationship between the sponsor and the visa applicant was genuine and continuing, so found that the visa applicant did not meet the requirement in s 5CB(2)(b) either.
3. The remaining matters raised by the sponsor in the course of written and oral submissions were not capable of sustaining any viable ground of appeal from the primary judge’s decision. Non-exhaustively, they included:
4. generalised complaints about how the Tribunal hearing was conducted by reference to its own hearing guidelines, which did not appear to go anywhere towards establishing any actual error, let alone vitiating error;
5. an assertion that the Tribunal was required to go behind information that he furnished from Centrelink relied upon to demonstrate the end of his relationship with Ms Omotayo and make further inquiries, which fell well short of triggering the rare and limited scope in which there may be a jurisdictional requirement to make inquiries;
6. a misconceived assertion that every submission made and every item of evidence or other material furnished, including authorities cited, had to be overtly addressed in some way by the Tribunal and notice given, or reasons given, for not taking it into account, contrary to the passages from *WAEE* quoted above; and
7. a complaint that some material that had been before the Tribunal was redacted before the primary judge, and only later provided to his Honour in unredacted form, which again did not identify, let alone establish, any error on the part of his Honour.
8. I was not satisfied that any of the above arguments, or other arguments advanced orally or in writing beyond those summarised above, identified or established any error at all on the part of either the Tribunal or the primary judge.

## Conclusion

1. As no error on the part of the primary judge, and no antecedent jurisdictional error on the part of the Tribunal hitherto undetected by his Honour, has been established, the appeal must be dismissed with costs.

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| I certify that the preceding thirty-two (32) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Bromwich. |

Associate:

Dated: 27 August 2021