FEDERAL COURT OF AUSTRALIA

Bornecrantz v Secretary, Department of Social Services [2019] FCA 1733

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| Appeal on a question of law from: | *Bornecrantz and Secretary, Department of Social Services (Social Services second review)* [2019] AATA 1471 |
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| File number: | NSD 913 of 2019 |
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| Judge: | **GRIFFITHS J** |
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| Date of judgment: | 22 October 2019 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application for summary dismissal under s 31A(2) of the *Federal Court of Australia Act 1976* (Cth) – where the applicant claimed entitlement to an age pension by virtue of her Australian citizenship, despite conceding that she was not an Australian resident at the time of lodging her claim for the age pension - where the Administrative Appeals Tribunal (**AAT**) dismissed an application for second review for failure to comply with an AAT direction within a reasonable time and because the application had no reasonable prospects of success – no challenge to first basis and in any event no reasonable prospects of success of challenging second basis of the AAT’s decision – application upheld – proceedings summarily dismissed, with costs |
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| Legislation: | *The Constitution* ss 51(xxiii), 81 and 83  *Administrative Appeals Tribunal Act 1975* (Cth) ss 33, 42A, 42B and 44  *Federal Court of Australia Act 1976* (Cth) ss 31A  *Judiciary Act 1903* (Cth) s 78B  *Social Security Act 1991* (Cth) s 7  *Social Security (Administration) Act 1999* (Cth) ss 11 and 29  *Federal Court Rules 2011* (Cth) rr 26.01 and 33.22 |
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| Cases cited: | *AMS v AIF* [1999] HCA 26; 199 CLR 160  *Andelman v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2011] FCA 299; 213 FCR 345  *Charara v Commissioner of Taxation* [2016] FCA 451; 103 ATR 118  *Haritos v Commissioner of Taxation* [2015] FCAFC 92; 233 FCR 315  *Jefferson Ford Pty Ltd v Ford Motor Co of Australia Ltd* [2008] FCAFC 60; 167 FCR 372  *Re Culleton* [2017] HCA 3; 340 ALR 550  *Riva NSW Pty Limited v Official Trustee in Bankruptcy* [2017] FCA 188  *Spencer v Commonwealth* [2010] HCA 28; 241 CLR 118  *White Industries Australia Ltd v Federal Commissioner of Taxation* [2007] FCA 511; 160 FCR 298 |
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| Date of hearing: | Determined on the papers |
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| Date of last submissions: | 13 October 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: | 32 |
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| Counsel for the Applicant: | The applicant was represented by her husband |
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| Counsel for the Respondents: | B Lim |
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| Solicitor for the Respondents: | Australian Government Solicitor |

ORDERS

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|  | | NSD 913 of 2019 |
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| BETWEEN: | ELIZABETH FRANCIS BORNECRANTZ  Applicant | |
| AND: | SECRETARY, DEPARTMENT OF SOCIAL SERVICES  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | GRIFFITHS J |
| DATE OF ORDER: | 22 OCTOBER 2019 |

THE COURT ORDERS THAT:

1. The first respondent’s interlocutory application dated 12 September 2019 is upheld.
2. The appeal be summarily dismissed under s 31A of the *Federal Court of Australia Act 1976* (Cth) and r 26.01 of the *Federal Court Rules 2011* (Cth).
3. The appellant is to pay the first respondent’s costs, as agreed or taxed.

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

REASONS FOR JUDGMENT

GRIFFITHS J:

1. By an interlocutory application filed on 12 September 2019 the first respondent (**Department** of Social Services), seeks an order under s 31A(2) of the *Federal Court of Australia Act 1976* (Cth) (***FCA Act***) and/or r 26.01(1) of the *Federal Court Rules 2011* (Cth) (***2011 FCRs***) that the applicant’s appeal from a decision of the Administrative Appeals Tribunal (**AAT**) published on 1 May 2019 be summarily dismissed. The basis for the application is that the appeal has no reasonable prospects of success. In brief, the subject matter of the appeal is whether the applicant is entitled to an “age pension” on the basis that she is an Australian citizen and irrespective of statutory residency requirements.
2. Orders were made on 17 September 2019 for the filing of outlines of submissions and for the application for summary dismissal to be heard and determined on the papers. Both parties have filed outlines of submissions.
3. For the following reasons, the interlocutory application will be upheld, with costs.

## Summary of background matters

1. On 26 October 2016, the applicant lodged a claim for the age pension. She gave her permanent address as one in the United Kingdom and she answered “No” to the question whether she was living in Australia permanently. She indicated that she had last resided in Australia some five years prior to her claim.
2. The applicant’s claim was rejected by the Department, both at first instance and by an authorised review officer. Essentially, the claim was rejected on the basis that the applicant was not an Australian resident when she lodged her claim and, therefore, did not meet the residency requirements of ss 11 and 29 of the *Social Security (Administration) Act 1999* (Cth) (***Administration Act***). On 9 August 2018, an authorised review officer reviewed the rejection decision and determined that it was correct for the same reason.
3. The applicant then sought a review in the Social Services & Child Support Division of the AAT, claiming that the legislation should be construed such that Australian citizens were not required to be residents for the purposes of receiving the age pension. On 29 October 2018, the AAT affirmed the decision of the authorised review officer, relying primarily on the combined effect of ss 11 and 29 of the *Administration Act* and the definition of “Australian resident” in ss 7(2) and (3) of the *Social Security Act 1991* (Cth). The applicant conceded that she was not residing in Australia when she made her claim.
4. On 21 November 2018, the applicant lodged an application for review in the AAT of the decision made in the Social Services & Child Support Division of the AAT. The applicant did not contest that she was not a resident in Australia when she lodged her pension application but she contended that, as an Australian citizen, she was entitled to the age pension in any event on that basis.
5. On 1 May 2019, for reasons which were published subsequently on 26 June 2019, the applicant’s second AAT review was dismissed. This is the decision the applicant now appeals under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (***AAT Act***).
6. Significantly, there were two separate bases for the AAT’s decision. The first was that the applicant failed within a reasonable time to comply with an AAT direction, namely that she participate in a telephone conference. This failure occurred in circumstances where the applicant’s husband, who was representing her, emailed the AAT to say that they were not interested in participating in the scheduled telephone conference and that nothing could be achieved “by an inconvenient telephone conference”. The AAT stated that the approach taken by the applicant and her husband who was representing her “resulted in delay and uncertainty” and the submissions provided by them the day before the scheduled teleconference did not assist as they failed to deal with the substantive issue before the AAT. Accordingly having regard to the principles guiding the AAT’s discretion (*Andelman v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2011] FCA 299; 213 FCR 345 at [32] per Jagot J and *Charara v Commissioner of Taxation* [2016] FCA 451; 103 ATR 118 at [75]-[82] per Wigney J), the application was dismissed under s 42A(5)(b) of the *AAT Act*.
7. The second independent basis for the AAT’s decision was that the application for review had no reasonable prospects of success. It was therefore dismissed under s 42B(1)(b) of the *AAT Act*. The AAT reasoned that, having regard to the objective facts and the applicant’s own concession that she was not a resident of Australia when she lodged her pension application, the applicant could not possibly be found to be resident in Australia at the relevant time. At the end of its reasons for decision, the AAT noted the applicant’s submissions concerning citizenship, but the Deputy President stated that he was “bound by the Australian legislation”, which is a clear implicit reference to ss 11 and 29 of the *Administration Act*, which turn on residency, not citizenship.

## Appeal to this Court

1. At a case management hearing on 6 August 2019, the Court raised for the applicant’s consideration the fact that her original notice of appeal did not address the first basis for the AAT’s decision. The applicant then filed an amended notice of appeal on 12 September 2019. It is notable that the stated questions of law and grounds of appeal in the amended notice of appeal are directed to the applicant’s core proposition that, as an Australian citizen, she should be entitled to the age pension. None of the questions of law, nor grounds of appeal, are directed to the first and separate basis of the AAT’s decision, namely that the applicant had failed to comply with an AAT direction. As the AAT had made clear, this ground was sufficient to dispose of the appeal. The AAT proceeded to determine the second ground only as a fall-back position.
2. Some of the introductory paragraphs to the amended notice of appeal refer to the first basis of the AAT’s decision, but the applicant goes no further than stating that the Deputy Director was “truculent” in dismissing the appeal on the first basis. Further disparaging remarks made about the Deputy President, which are scandalous, fall far short of identifying any questions of law or grounds with reasonable prospects of success.
3. The questions of law are difficult to follow and are more in the nature of submission. They appear to include the question whether the *Social Security Act 1991* (Cth) (which provides *inter alia* for certain pensions, including the age pension for persons who, relevantly, have reached pension age and have ten years qualifying residence), is constitutionally invalid in not giving effect to claimed entitlements attaching to Australian citizenship, the effect of international law and the relevance of the applicant’s past and present associations with Australia.

## The parties’ submissions summarised

1. To avoid adding unduly to the length of these reasons, I will address the parties’ primary relevant submissions in my reasons below for upholding the interlocutory application.

## Consideration and determination

### (a) Relevant principles summarised

1. Section 31A(2) of the *FCA Act* confers a power on the Court summarily to dismiss a proceeding or any part of a proceeding where it is satisfied that the applicant or appellant has no reasonable prospects of successfully prosecuting the proceeding or that part of the proceeding. It is made clear in s 31A(3) that, for the purpose of s 31A, a proceeding or part of a proceeding need not be hopeless or bound to fail for it to have no reasonable prospects of success.
2. Rule 26.01 of the *2011 FCRs* provides for summary judgment and is in the following terms:

**26.01 Summary judgment**

(1) A party may apply to the Court for an order that judgment be given against another party because:

(a) the applicant has no reasonable prospect of successfully prosecuting the proceeding or part of the proceeding; or

…

1. Under r 33.22(d) of the *2011 FCRs*, a party in an appeal from a decision of the AAT may apply to the Court for summary judgment.
2. The relevant principles which apply to both s 31A and r 26.01 are well settled. Some are reflected in the following paragraphs from *Riva NSW Pty Limited v Official Trustee in Bankruptcy* [2017] FCA 188 (emphasis in original):

45. First, the respondent as the moving party bears the onus of persuading the Court that the application has no reasonable prospects of succeeding: *Australian Securities and Investments Commission v Cassimatis* [2013] FCA 641; (2013) 220 FCR 256 (***Cassimatis***) at 271 [45] (Reeves J).

46. Secondly, the intention behind the enactment of s 31A is “*to lower the bar for obtaining summary judgment (including summary dismissal) below the level that had been fixed by such authorities as Dey v Victorian Railway Commissioners* (1949) 78 CLR 62 at 91-92, *and General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125 at 129-130…*”: *White Industries Aust Ltd v Commissioner of Taxation* [2007] FCA 511; (2007) 160 FCR 298 (***White Industries***) at 310 [54] (Lindgren J); see also *Cassimatis* at 271 [46] (Reeves J). In the cases to which Lindgren J referred in *White Industries*, the requirement had been expressed in such terms as “*manifestly groundless*” or “*hopeless*”. As Hayne, Crennan, Kiefel and Bell JJ held in *Spencer v The Commonwealth of Australia* [2010] HCA 28; (2010) 241 CLR 118 (***Spencer***) at 139 [52]-[53]:

52. …effect must be given to the negative admonition in sub-s (3) that a defence, a proceeding, or a part of a proceeding may be found to have no reasonable prospect of successful prosecution even if it cannot be said that it is “hopeless” or “bound to fail”. …[I]t is important to begin by recognising that the combined effect of sub-ss (2) and (3) is that the inquiry required in this case is whether there is a “reasonable” prospect of prosecuting the proceeding, not an enquiry directed to whether a certain and concluded determination could be made that the proceeding would necessarily fail.

53. In this respect, s 31A departs radically from the basis upon which earlier forms of provision permitting the entry of summary judgment have been understood and administered.

47. Thirdly, the assessment required by s 31A of whether a proceeding has no reasonable prospects of success necessitates the making of value judgments in the absence of a full and complete factual matrix and argument, with the result that the provision vests a discretion in the Court: *Kowalski v MMAL Staff Superannuation Fund Pty Ltd* [2009] FCAFC 117; (2009) 178 FCR 401 (***Kowalski***) at 408-409 [28] (the Court). That discretion includes whether to deal with the motion at once or at some later stage in the proceedings when the legal and factual issues have been more clearly defined: *Butorac v WIN Corporation Pty Ltd* [2009] FCA 1503 at [19] (Buchanan J); *Cassimatis* at 272 [50] (Reeves J).

48. In the fourth place, despite the threshold for summary dismissal having been lowered, the discretion must still be exercised with caution (*Spencer* at 131 [24] (French CJ and Gummow J) and 141 [60] (Hayne, Crennan, Kiefel and Bell JJ)). Consistently with this, the discretion is concerned “*with the bringing and defending of proceedings, not just with pleadings; with substance, not just with form*”: *White Industries* at [50] (Lindgren J) (approved in *Kowalski* at 409 [30] (the Court); see also *Spencer* at [23] (French CJ and Gummow J)).

49. Finally, in his Honour’s helpful explanation of how these principles are to be applied, Reeves J in *Cassimatis* further explains at 271-272 [46] that:

…the determination of a summary dismissal application therefore does not require a mini-trial based upon incomplete evidence to decide whether the proceedings are likely to succeed or fail at trial. Instead, it requires a critical examination of the available materials to determine whether there is a real question of law or fact that should be decided at trial. Each application for summary judgment or summary dismissal has to be determined according to its particular circumstances. What is required is a practical judgment of the case at hand. The relevant circumstances will partly depend upon the stage which the proceedings have reached. Among other things, this will affect the materials available to the Court considering the application, for example, whether pleadings have been exchanged, or discovery of documents has occurred.

50. To illustrate the application of these principles, Reeves J explained at [47] that the moving party is more likely to succeed if she or he demonstrates that the applicant’s success relies on a question of fact that is fanciful, trifling, implausible, improbable, tenuous or contradicted by all the available documents or evidence. Conversely, his Honour explained that, as a general principle, such an application is unlikely to succeed where, on a critical examination of all the available materials, the Court is satisfied that there appears to be a real question of fact to be determined. The latter, in his Honour’s view, is more likely to be the case where the available materials include pleadings that raise factual disputes that can truly be described as significant, substantial, plausible or weighty.

1. To those principles may also be added the proposition that, once a moving party has established a *prima facie* case that the opponent has no reasonable prospect of success, the opposing party must respond by pointing to specific factual or evidentiary disputes that make a trial necessary (see *Jefferson Ford Pty Ltd v Ford Motor Co of Australia Ltd* [2008] FCAFC 60; 167 FCR 372 at [127], [130] and [132]). This principle may require some modification in the context of an appeal on a question of law under s 44 of the *AAT Act*.

### (b) Applying those principles to the circumstances here

#### (i) No reasonable prospect in relation to first basis for AAT decision

1. As noted, the Court drew to the applicant’s attention that her appeal did not challenge the first basis on which the AAT dismissed her application for second review, namely, the failure to comply with a direction of the AAT and the AAT’s exercise of discretion to dismiss the application before it under s 42A(5)(b) of the *AAT Act*. In the absence of such a challenge it did not appear that the appeal could succeed. The applicant was afforded an opportunity to file an amended notice of appeal.
2. As further noted, the applicant availed herself of that opportunity, but her amended notice of appeal still raised no question of law or ground of appeal in relation to the first basis of the AAT’s decision.
3. The balance of the amended notice of appeal does not disclose any reasonable challenge to the AAT’s decision to dismiss her application for failure to comply with its direction. Indeed, in her amended notice of appeal, the applicant describes s 33(2) of the *AAT Act* as being “Irrelevant” and it expresses the same position taken before the AAT’s scheduled directions hearing, namely that the applicant regards telephone conferences as a waste of time.
4. Even in the case of a litigant in person, it is not for the Court to determine whether there might be other questions of law that the applicant might raise in respect of the first basis for the AAT’s dismissal of her application for second AAT review. In an appeal on a question of law, the question or questions of law themselves form the very subject-matter of the appeal and define the “proceeding” to which s 31A speaks (*Haritos v Commissioner of Taxation* [2015] FCAFC 92; 233 FCR 315 at [194]). Of course, the Court may look beyond the precise questions of law as articulated in order to determine whether, in substance and not merely form, the applicant has reasonable prospects of successfully prosecuting the appeal: see *Spencer v Commonwealth* [2010] HCA 28; 241 CLR 118 at [23] per French CJ and Gummow J, quoting *White Industries Australia Ltd v Federal Commissioner of Taxation* [2007] FCA 511; 160 FCR 298 at [47] per Lindgren J. Summary dismissal would not be justified on account of matters of mere drafting. But it is the appeal itself – that is, the questions of law – that must be determined to have reasonable prospects or not. Even looking beyond the questions of law (and grounds of appeal) as drafted in the amended notice of appeal to the other material before the Court, there is no reasonable prospect of the appeal succeeding having regard to the lack of any substantial challenge to the first basis of the AAT’s decision.
5. Absent any challenge to it, the first basis for the AAT’s decision must stand. Accordingly, there is no utility in determining other questions about the second basis for the decision.

#### (ii) No reasonable prospect in relation to the second basis for AAT decision

1. In any event, there is no reasonable prospect that the applicant would succeed in challenging the second basis on which the AAT dismissed her application for review. That is because, on the proper construction of the relevant provisions, including ss 11 and 29 of the *Administration Act* and s 7(2) of the *Social Security Act 1991* (Cth), the applicant was precluded from being granted the age pension because she was not resident in Australia at the time of her claim.
2. The applicant does not allege any legal error in the manner of the AAT finding as a fact that she was not resident in Australia at that time. Indeed, the applicant does not contend, and has never contended, that she was resident in Australia at the time of the claim. In those circumstances, there is no reasonable prospect of the applicant successfully establishing her entitlement to make a claim for the age pension under the *Administration Act*.
3. That leaves those questions of law which contend that the applicant is nonetheless entitled to the age pension by reason of being an Australian citizen, notwithstanding the terms of the relevant legislative provisions which focus on residence alone. Those questions of law have no reasonable prospect of success, even having regard to the possibility that current legal understandings may be overruled, qualified or further explained.
4. As to Questions 1, 2, 3, 4, 6, 7, and 8 in the amended notice of appeal, I accept the first respondent’s submission that the legislative choice to exclude non-resident citizens from applying for an age pension is plainly within the power of the Parliament to make laws with respect to old-age pensions: s 51(xxiii) of the *Constitution*. There is nothing in the *Constitution* to suggest that the Parliament is required to provide old-age pensions to anyone at all, or that if Parliament does provide for old-age pensions it cannot make residence in Australia a condition of making a claim for the pension regardless of citizenship.
5. To the extent that the applicant relies on an argument that the entitlement to the old-age pension is derived from a right to “repayment of salary/wages sacrifice” (Questions 1 and 4), that argument is misconceived. Sections 81 and 83 of the *Constitution* provide for all moneys raised or received by the Executive Government of the Commonwealth to form one Consolidated Revenue Fund to be appropriated by law. There is no basis for the suggestion that the applicant maintains some Constitutional entitlement to taxes she may have paid in the past.
6. As to Question 5, the international law materials to which the applicant refers do not limit the extent of the Parliament’s power to enact legislation such as the *Administration* *Act*: (see *AMS v AIF* [1999] HCA 26; 199 CLR 160 at [50] per Gleeson CJ, McHugh and Gummow JJ and the authorities cited there).
7. Finally, I accept the first respondent’s submission that compliance with s 78B of the *Judiciary Act 1903* (Cth) does not stand in the way of granting summary judgment. The obligation to comply with s 78B is engaged only where the pending cause truly “involves” a matter arising under the *Constitution* or involving its interpretation, and a mere assertion to that effect is insufficient (see *Re Culleton* [2017] HCA 3; 340 ALR 550 at [29] per Gageler J). Moreover, the absence of any reasonable prospects in relation to the first basis for the AAT’s decision provides a sufficient basis for summary judgment, with the consequence that the Constitutional issue does not arise.

## Conclusion

1. For these reasons, the first respondent’s interlocutory application will be upheld, with the consequence that the appeal will be dismissed summarily, with costs following the event, as is the ordinary course and where no proper basis has been shown for departing from that course.

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

Associate:

Dated: 22 October 2019