FEDERAL COURT OF AUSTRALIA

SZUOU v Minister for Immigration and Border Protection [2017] FCA 1410

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| Appeal from: | *SZUOU v Minister for Immigration and Border Protection* [2017] FCCA 1270 |
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| File number: | NSD 1070 of 2017 |
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| Judge: | **MIDDLETON J** |
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| Date of judgment: | 22 November 2017 |
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| Legislation: | *Migration Act 1958* (Cth)  *Migration Legislation Amendment (2017 Measure No 3) Regulations 2017* (Cth)  *Migration Regulations 1994* (Cth) |
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| Cases cited: | *Sayadi v Minister for Immigration and Border Protection* [2015] FCA 1235  *SZUOU v Minister for Immigration and Border Protection* [2017] FCCA 1270  *SZUPB v Minister for Immigration and Border Protection* [2014] FCCA 2466 |
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| Date of hearing: | 22 November 2017 |
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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: | 16 |
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| Counsel for the Appellant: | The Appellant appeared in person |
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| Counsel for the First Respondent: | Ms J Strugnell |
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| Solicitor for the First Respondent: | Minter Ellison |
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| Counsel for the Second Respondent: | The Second Respondent entered a submitting notice save as to costs |

ORDERS

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|  | | NSD 1070 of 2017 |
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| BETWEEN: | SZUOU  Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | MIDDLETON J |
| DATE OF ORDER: | 22 NOVEMBER 2017 |

THE COURT ORDERS THAT:

1. The appeal be dismissed with costs.

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

REASONS FOR JUDGMENT

MIDDLETON J:

1. By notice of appeal filed on 4 July 2017, the appellant appeals from a decision of the Federal Circuit Court delivered on 22 June 2017. The background to the appeal is as follows. The appellant is a citizen of India who arrived in Australia on 15 April 2008 as the holder of a Student (Temporary) (Class TU) visa (as a member of his wife’s family unit). Apart from a few intervening days, he thereafter held another two student visas, the last of which ceased on 28 July 2010, and then a succession of bridging visas, and had an application for a protection visa refused, a decision which was affirmed by the Refugee Review Tribunal. The appellant sought judicial review of the Refugee Review Tribunal’s decision, and that application was dismissed on 20 October 2014: see *SZUPB v Minister for Immigration and Border Protection* [2014] FCCA 2466.
2. On 9 September 2015, the appellant made an application for a subclass 602 visa. The following day, a delegate of the Minister for Immigration and Border Protection (the ‘**delegate**’) refused to grant the subclass 602 visa on the basis the application was made more than 28 days after the appellant last held a substantive visa, which meant the appellant failed to satisfy cl 602.213 of Sch 2 of the *Migration Regulations 1994* (Cth) (the ‘**Regulations**’).
3. The appellant sought review of the delegate’s decision before the Administrative Appeals Tribunal (the ‘**Tribunal**’) by application dated 24 September 2015. The Tribunal made its decision on 24 December 2015, affirming the decision under review.
4. The Tribunal identified that the appellant needed to satisfy cl 602.213 of Sch 2 of the Regulations. The relevant effect of cl 602.213(3) was that – if the appellant was in Australia at the time of application, did not hold a substantive visa, and was not medically unfit to depart Australia – the appellant needed to satisfy criteria 3001, 3003, 3004 and 3005 in Sch 3 of the Regulations. The Tribunal found the appellant was in Australia and did not hold a substantive visa at the time of the application. The Tribunal found the appellant had not turned 50, and therefore failed to satisfy the requirements of being medically unfit to depart Australia (see cl 602.212(6)(b)).
5. In view of those findings, it was necessary for the appellant to satisfy criteria 3001, 3003, 3004 and 3005 in Sch 3 of the regulations (see cl 602.213(5)). Relevantly, criterion 3001 required that the application for a visa must be validly made within 28 days of the ‘relevant day’ (see criterion 3001(1)), which is defined in criterion 3001(2) and included the last day when the appellant held a substantive visa (see criterion 3001(2)(c)(i)).
6. A useful analysis of the operation of the Regulations relevant to this proceeding was made by Perram J in *Sayadi v Minister for Immigration and Border Protection* [2015] FCA 1235 (‘***Sayadi***’). His Honour set out the intellectual exercise required to reach the correct conclusion at [7]-[18], which, by analogy, is applicable to the case presently before the Court:

[7] For present purposes, Mr Sayadi’s medical conditions are not only relevant to the course of the proceeding in the Court below but also to the substantive questions before that Court and this Court. This is because on 13 January 2015 Mr Sayadi applied for a visa known as a ‘Medical Treatment (Visitor) (Class UB) visa’. If it had been granted, it would have permitted him to stay within the Commonwealth to pursue medical treatment here. In his application he nominated the treatment he wished to pursue here as the administration of Valium and Zoloft for his anxiety, depression and insomnia. He attached to his application one medical certificate certifying him unfit for work between 15 and 22 December 2014, a period of one week which had expired well before he made the application.

[8] The question of whether one thinks this was a plausible application for a medical treatment visa does not arise. This is because, by law, subject to certain immaterial exceptions, such a visa can only be issued to a person on a bridging visa if the application for it is lodged within 28 days of the date upon which the applicant's last substantive visa was in effect.

[9] This flows from the requirement that an application for a visa meet the eligibility criteria for it: s 65(1)(a)(ii) *Migration Act 1958* (Cth). There are criteria for a Medical Treatment (Visitor) (Class UB) visa specified in the *Migration Regulations 1994* (Cth). They are contained in Sch 2. …

…

[10] This provision [cl 602.213 in Sch 2 of the *Migration Regulations 1994* (Cth)], if read as if it were a clause of a regulation, appears to say nothing. Subclauses (1) and (3) specify the circumstances in which subcll (2), (4) and (5) will apply. But subcll (2), (4) and (5) do not appear to specify any rule of which it is meaningful to say, as subcll (1) and (3) do, that they ‘apply’.

[11] This problem is removed, or at least adequately contained, by observing that cl 602.213 is not a rule at all but merely the specification of particular eligibility criteria of the kind referred to in s 65(1)(a)(ii). What it means is that the criteria in subcl (2) will be the relevant criteria if subcl (1) is satisfied and those in subcll (4) and (5) will be the relevant criteria if subcl (3) is enlivened.

[12] Which criteria apply? The subcl (2) criteria do not apply. This is because subcl (1)(b) is not satisfied as Mr Sayadi did not hold a substantive temporary visa at the time he made the visa application. The next question is whether the criteria in subclauses (4) and (5) applied. The answer to that question is ‘yes’ because subclause (3) is satisfied in this case: Mr Sayadi was in Australia, he did not hold a substantive temporary visa and the requirements of cl 602.212(6) were not met.

[13] Why were the requirements of cl 602.212(6) not met? Ms Francois of counsel, for the Minister, was good enough to take me to cl 602.212(6). …

…

[14] Mr Sayadi does not satisfy this as he has not turned 50 (i.e. (b)). This renders it unnecessary to consider any of the other requirements of this subclause.

[15] One sees, therefore, that subcll (4) and (5) are criteria which Mr Sayadi was required to satisfy if he was to be eligible for the visa. He satisfies subcl (4) because he was never issued with either of the visas mentioned there. The difficulty is that he does not satisfy criteria 3001 in Sch 3 and hence cannot meet the criteria in cl 602.213(5). To see why this is so it is necessary to examine criteria 3001 itself. …

…

[16] Subclauses (2)(a), (2)(b) and (2)(d) do not apply. But subcl (2)(c) does because Mr Sayadi ceased to hold a substantive visa after 1 September 1994 (i.e. (2)(c)(i)). Consequently, the effect of criteria 3001(2) is that relevant day in relation to Mr Sayadi is the last day he held his student visa which was 21 September 2013: subcl (2)(c)(iii).

[17] The upshot of these Byzantine rules is that one of the criteria he needed to satisfy in order to be eligible for the visa was that his application for the visa be lodged within 28 days of 21 September 2013.

[18] Any application by Mr Sayadi for the medical treatment visa had, therefore, to be made by 21 October 2013 and if it was not then he was simply not eligible for the visa. Since he applied for the visa on 13 January 2015, he was not eligible for it and the Minister was bound to refuse his application, without the exercise of any discretion.

1. As I have mentioned, the reasoning applied by his Honour in that case applies equally, by analogy, to the present case. In this case, the Tribunal found that the appellant’s last substantive visa expired on 28 July 2010 and that the application of a subclass 602 visa was made on 9 September 2015. Based on these findings, the Tribunal concluded, as it was required, that the appellant did not hold a substantive visa in the 28 days prior to his application for a subclass 602 visa. Accordingly, the Tribunal found that the appellant failed to satisfy the relevant clause, and affirmed the decision under review.
2. By application dated 22 January 2016, the appellant sought judicial review of the Tribunal’s decision in the Federal Circuit Court. On 22 June 2017, the Federal Circuit Court dismissed the application: see *SZUOU v Minister for Immigration and Border Protection* [2017] FCCA 1270. In relation to the matter of the 28 day period, the Federal Circuit Court affirmed the Tribunal’s decision. In relation to whether or not the appellant had other compelling circumstances or whether there was a medical condition of mental stress, the Federal Circuit Court held that these were not matters that could be taken into account having regard to the operation of the Regulations. The Federal Circuit Court concluded that there was no jurisdictional error in the Tribunal’s decision and made orders dismissing the application.
3. In this Court, the grounds of appeal seek to re-agitate the issues raised before the Federal Circuit Court. In particular, the grounds contend the Tribunal failed to take into account compelling and compassionate circumstances, and request the Court to consider that the appellant suffered depression and that his circumstances were beyond his control.
4. The Court’s function is to apply the law and the Regulations. It is abundantly clear, by reference to the interpretation of the Regulations, that the decisions of the Tribunal and the Federal Circuit Court were correct. Whilst the relevant aspects of the Regulations are not without their complexity, a careful reading of them makes it clear that the visa in question in these proceedings can only be issued by reference to the 28 day period referred to by the Tribunal and the Federal Circuit Court.
5. Perram J observed correctly at [19] in *Sayadi* that the Tribunal and the Court cannot take into account compassionate circumstances:

[19] A delegate of the Minister refused his application on 15 January 2015. This was inevitably affirmed by the Migration Review Tribunal (as it then was) (‘the Tribunal’). The Court below was therefore correct to conclude that Mr Sayadi’s application for judicial review against the Tribunal could not succeed. It is true that Mr Sayadi submitted in the Court below that the Tribunal had failed to take into account his compassionate circumstances. However, the Tribunal did not have, for the reasons I have just given, any power to do so and cannot have erred in not doing so. Likewise, whilst the Court below was informed by Mr Sayadi of the alleged incompetence of his migration agent (which apparently related to the manner in which his temporary graduate visa had been handled) this fact, even if accepted, could not transform Mr Sayadi into a person who was eligible for the visa: cf. in a slightly different context *Awon v Minister for Immigration and Border Protection* [2015] FCA 846 at [38] to [40] per Beach J. The Court below’s conclusions about this were unavoidable.

1. Accordingly, the Tribunal could not take into account the compelling and compassionate circumstances, or other circumstances referred to by the appellant.
2. For completeness, I mention one further issue relating to amendments to the Regulations by the *Migration Legislation Amendment (2017 Measure No 3) Regulations* *2017* (Cth) (the ‘**Amending Regulations**’). In particular, cl 602.213 of Sch 2 of the Regulations was amended on 1 July 2017 by way of repealing cl 602.213(5), namely, the requirement that a visa applicant satisfies criterion 3001 of Sch 3 of the Regulations.
3. The amendments made by the Amending Regulations only affect an application for a visa made on or after 1 July 2017. This is made clear by the transitional provision, which provides in relevant part:

**6503 Operation of Schedule 3**

The amendments of these Regulations made by Schedule 3 to the *Migration Legislation Amendment (2017 Measures No. 3) Regulations 2017* apply in relation to an application for a Medical Treatment (Visitor) (Class UB) visa made on or after 1 July 2017.

1. Since the appellant’s application for a visa was made before 1 July 2017, these amendments do not affect the matter presently before this Court. I mention these amendments to make it quite clear that it has not been overlooked that these amendments occurred.
2. For the foregoing reasons, this Court has no option other than to dismiss the appeal. Accordingly, the Court will order that the appeal be dismissed with costs.

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| I certify that the preceding sixteen (16) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Middleton. |

Associate:

Dated: 29 November 2017