FEDERAL COURT OF AUSTRALIA

Singh v Minister for Immigration and Border Protection [2018] FCA 1392

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| Appeal from: | *Singh v Minister for Immigration and Border Protection* [2017] FCCA 1923 |
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| File number: | VID 886 of 2017 |
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| Judge: | **DAVIES J** |
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| Date of judgment: | 13 September 2018 |
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| Catchwords: | **MIGRATION –** appeal from dismissal of application for judicial review of decision of Administrative Appeals Tribunal – where appellant denied visa for not satisfying requirements of PIC 4020 in *Migration Regulations 1994* (Cth) – where evidence that visa applicant gave or caused to given to the Minister a bogus document within the meaning of s 5 of the *Migration Act 1958* (Cth) – whether Tribunal erred in law by failing to make specific findings about appellant’s involvement in fraud – whether Tribunal required to address appellant’s knowledge of and involvement in fraud – whether Tribunal failed to afford procedural fairness by not providing clear particulars |
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| Legislation: | *Migration Act 1958* (Cth)  *Migration Regulations 1994* (Cth) |
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| Cases cited: | *Gill v Minister for Immigration and Border Protection* (2016) 248 FCR 398  *Maharjan v Minister for Immigration and Border Protection* [2017] FCAFC 213  *Singh v Minister for Immigration and Border Protection* (2016) 247 FCR 554  *Trivedi v Minister for Immigration and Border Protection* (2014) 220 FCR 169 |
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| Date of hearing: | 27 August 2018 |
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| Registry: | Victoria |
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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: | Catchwords |
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| Number of paragraphs: | 12 |
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| Counsel for the Appellant: | Mr R Sorensen |
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| Solicitor for the Appellant: | Goz Chambers Lawyers |
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| Counsel for the First Respondent: | Ms C Symons |
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| Solicitor for the First Respondent: | DLA Piper Australia |
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ORDERS

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|  | | VID 886 of 2017 |
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| BETWEEN: | KULDEEP SINGH  Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | DAVIES J |
| DATE OF ORDER: | 13 september 2018 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the costs of the first respondent, such costs to be taxed in default of agreement.

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

REASONS FOR JUDGMENT

DAVIES J:

1. The appellant has appealed the decision of the Federal Circuit Court of Australia (“**FCC**”) dismissing his application for judicial review of a decision of the Administrative Appeals Tribunal (“**the Tribunal**”) which affirmed the decision of a delegate of the first respondent not to grant the appellant a Skilled (Provisional) (Class VC) visa.
2. The appellant is a citizen of India. In May 2009 he applied for the visa and submitted documents with his application that included a Trades Recognition Australia (“**TRA**”) skills assessment dated 30 August 2008 for the appellant’s nominated occupation of cook and a work reference letter from Salera’s Pizza & Pasta dated 3 August 2008. A delegate of the Minister refused to grant the visa on the basis that the delegate was not satisfied that the appellant met the requirements in Public Interest Criterion (“**PIC**”) 4020. PIC 4020(1) requires that there is no evidence that the visa applicant has given or caused to be given to the Minister a bogus document or information that is false or misleading in a material particular in relation to the application for the visa. The term “bogus document” is defined in s 5 of the *Migration Act 1958* (Cth) (“**the Act**”) to mean a document that the Minister reasonably suspects is a document that:
   1. purports to have been, but was not, issued in respect of [the visa applicant]; or
   2. is counterfeit or has been altered by a person who does not have authority to do so; or
   3. was obtained because of a false or misleading statement, whether or not made knowingly.
3. The requirement in PIC 4020(1) applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the visa applicant (PIC 4020(3)), and whether or not the visa applicant was aware that the information was purposely untrue when he or she provided it: see *Trivedi v  Minister for Immigration and Border Protection* (2014) 220 FCR 169 (“***Trivedi***”) at [27]‑[28], [49]‑[50], [52] and [54]. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi* at [33].
4. In this case, a delegate of the Minister determined that the skills assessment issued by the TRA for the appellant which the appellant submitted with his visa application was a bogus document. The delegate noted that the skills assessment by the TRA was based on documents supplied to the TRA which included a work reference supporting the claim that the appellant had 900 hours of work experience at Salera’s Pizza & Pasta. The appellant was invited to comment on the information that a Mr Amarante had pleaded guilty to the manufacture and sale of fraudulent work references from Salera’s Pizza & Pasta which he created to assist visa applicants, including the appellant, to apply for a TRA skills assessment in support of their visa applications. In response to the invitation the appellant produced various documents, including a statutory declaration that the work reference he provided to the TRA was provided to him by his employer and that he had worked at Salera’s Pizza & Pasta during 2007 and 2008. A  delegate of the Minister took into account the additional information but considered that the information was insufficient to counter the admissions made by Mr Amarante about the manufacture and sale of fraudulent work references from Salera’s Pizza & Pasta and, as a result, the delegate was satisfied that the skills assessment was a bogus document
5. The appellant applied to the Tribunal for review of the delegate’s decision. The Tribunal noted that the “central evidentiary issue” in dispute was whether it reasonably suspected that the TRA skills assessment that the appellant provided with his visa application was a document that was obtained because of false or misleading statements regarding the hours of work experience as a cook that he had completed at Salera’s Pizza & Pasta as set out in the work reference. The Tribunal affirmed the decision of the delegate. In reaching its decision the Tribunal placed significant weight on all the information gathered during the course of the criminal investigation and the plea of guilty by Mr Amarante to the charges relating to the manufacture and sale of fraudulent work references from Salera’s Pizza & Pasta, and that they were created to assist persons to apply for permanent residence. The Tribunal also placed significant weight on a document located on a USB stick at the home of Mr Amarante which was an exhibit in the criminal proceedings and which had the personal information of the appellant and the period of his employment at Salera’s Pizza & Pasta, which the Tribunal noted was in identical terms to the work reference letter which the owner of Salera’s Pizza & Pasta supplied to the TRA in support of the skills assessment application for the appellant.
6. The appellant sought judicial review of the Tribunal’s decision. Seven grounds of review were identified, raising two substantive issues. The first substantive issue was whether the Tribunal erred in law by failing to make specific findings about the appellant’s involvement in the fraud. In support of his submission that the Tribunal was required to address the level of knowledge and/or involvement of the appellant in the fraud in determining whether PIC 4020 was engaged, the appellant relied upon *Singh v Minister for Immigration and Border Protection* (2016) 247 FCR 554 (“***Singh***”) and *Gill v Minister for Immigration and Border Protection* (2016) 248 FCR 398 (“***Gill***”). The FCC distinguished the appellant’s circumstances from those at issue in *Singh* and *Gill*, reasoning as follows at [14]–[15]:

The argument pressed forcefully by counsel for the applicant was that the Tribunal failed to make a specific finding as to the extent of the applicant’s involvement in any fraudulent act. It seems that, at best, this becomes an argument to the effect that whilst the applicant obtained the reference that he says was submitted to the TRA from his employer…, that in some way, either his agent or somebody else replaced it with a fraudulent document or, for some other unexplained reason, a copy of it ended up on the USB stick of the fraudster.

It appears to me that this is not a case in the style of Singh where the issue was whether or not the agent had ever been instructed to make application for the particular visa category type that the applicant had formally sought from the Department or was aware or indifferent to a fraud by an agent. This is a case where the applicant was actively pursuing this particular visa and, on the applicant’s case, a genuine work reference was provided. The real issue in this case was simply whether or not the reference provided was genuine or bogus, which turned upon whether or not to accept the direct evidence of the applicant or rely upon the circumstantial evidence of the document or copy of the document being found on the fraudster’s USB stick. The case as articulated to the Tribunal did not go higher than that and was not put as a case that the applicant had not sought to obtain this type of visa or, in some other way, was distanced from the fraud involved. This is certainly not a case where the applicant ever suggested that this was not a visa application that he had ever sought to progress. It therefore seems to me that these arguments do not provide a proper basis for judicial review, but in reality are only an argument to pursue a merits review on the facts and circumstances of the case.

1. The second substantive issue was whether the Tribunal failed to afford the appellant procedural fairness by failing to give the appellant clear particulars of information which the Tribunal considered would be a reason for a refusal of the visa and to invite him to comment on it or to respond to it. The FCC rejected that submission reasoning that pursuant to s 359AA of the Act the Tribunal had invited the appellant to comment at the hearing on the information provided to the Tribunal by the Minister and the TRA and in its reasons had referred to the appellant’s response to this information. The FCC found that the Tribunal had provided the appellant with ample notice of the issues on the review.
2. The appellant has advanced the same two contentions on appeal.
3. Since the FCC decision, the Full Court handed down its decision in *Maharjan v Minister for Immigration and Border Protection* [2017] FCAFC 213 (“***Maharjan***”), which considered *Gill, Singh* and *Trivedi*. The appellant relies on *Maharjan* in support of ground 1, in addition to *Gill* and *Singh*, as authority that the Tribunal was required to address the appellant’s knowledge of and involvement in the fraud.
4. In *Maharjan* the Full Court affirmed the correctness of *Trivedi* that PIC 4020, on its proper construction, does not require the Minister (or Tribunal on review) to form any positive state of satisfaction about the knowledge of a visa applicant as to the fraudulent nature of information provided in a visa application. *Gill, Singh* and *Maharjan* all addressed a different issue, namely the effect of an alleged fraud committed on the visa applicant during the visa application process. Those cases are authority for the proposition that where an applicant has claimed that there has been fraud by a third party on the visa applicant in relation to the visa application process, thereby putting into issue the validity of the visa application, the question of whether the visa application is valid will involve consideration of the appellant’s knowledge of and involvement in the fraud. That is not this case. The appellant had not claimed before the Tribunal that he was a victim of a fraud. To the contrary, the appellant’s case was that a genuine work reference was provided to the TRA and so the issue as to whether the visa application was invalidated by a fraud committed on the appellant did not arise. For the reasons given, the FCC was correct to hold that the Tribunal did not fall into legal error by not determining whether the appellant was an innocent victim of the fraud.
5. Counsel for the appellant advised that the claim of denial of procedural fairness was based on the proposition that the Tribunal was required to provide the appellant with the opportunity to satisfy the Tribunal that he was not involved in the fraud. As that contention is rejected, the claim of denial of procedural fairness also fails.
6. Accordingly the appeal should be dismissed.

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| I certify that the preceding twelve (12) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Davies. |

Associate:

Dated: 13 September 2018