FEDERAL COURT OF AUSTRALIA

Minister for Home Affairs v Pham [2019] FCA 1689

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| Appeal from: | *Pham & Ors v Minister for Immigration & Anor* [2018] FCCA 2522 |
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| File number: | QUD 690 of 2018 |
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| Judge: | **RANGIAH J** |
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| Date of judgment: | 18 October 2019 |
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| Catchwords: | **MIGRATION** – appeal against judgment of Federal Circuit Court – provisional partner visas – failure by Tribunal to audio-record hearing – primary judge found miscarriage of justice – whether miscarriage of justice is necessarily jurisdictional error – primary judge erred by ordering constitutional writs without finding jurisdictional error – whether failure to record hearing was jurisdictional error – appeal allowed |
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| Legislation: | *Constitution* s 75(v)  *Administrative Appeals Tribunal Act 1975* (Cth) s 62A  *Federal Proceedings (Costs) Act* *1981* (Cth) s 7  *Migration Act 1994* (Cth) ss 5, 348(1), 360(1), 365, 366C and 476  *Migration Regulations 1994* (Cth) Part 309 Schedule 2 |
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| Cases cited: | *Hossain v Minister for Immigration and Border Protection* (2018) 35 ALR 1; [2018] HCA 34  *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332  *NAIS v Minister for Immigration, Multicultural and Indigenous Affairs* (2005) 228 CLR 470  *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476  *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 |
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| Date of hearing: | 12 July 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: | 33 |
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| Counsel for the Appellant: | Mr J Byrnes |
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| Solicitor for the Appellant: | Clayton Utz |
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| Counsel for the First, Second, Third and Fourth Respondents: | The First Respondent appeared in person and on behalf of the Second, Third and Fourth Respondents |
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| Counsel for the Fifth Respondent: | The Fifth Respondent did not appear |

ORDERS

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|  | | QUD 690 of 2018 |
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| BETWEEN: | MINISTER FOR HOME AFFAIRS  Appellant | |
| AND: | HIEU MINH PHAM  First Respondent  THI MINH THANG HOANG  Second Respondent  HUONG THAO HOANG (and others named in the Schedule)  Third Respondent | |

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| JUDGE: | RANGIAH J |
| DATE OF ORDER: | 18 OCTOBER 2019 |

THE COURT ORDERS THAT:

1. The appeal is allowed.
2. The orders of the Federal Circuit Court of Australia made on 4 September 2018 are set aside.
3. The matter is remitted to the Federal Circuit Court of Australia for further hearing and determination.
4. The respondents pay the appellant’s costs of the appeal.
5. The appellant be granted a certificate under s 7 of the *Federal Proceedings (Costs) Act 1981* (Cth) stating that in the opinion of the Court it would be appropriate for the Attorney-General to authorise payment under that Act to the appellant in respect of the costs ordered against the respondents.

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

REASONS FOR JUDGMENT

RANGIAH J:

1. This is an appeal by the Minister for Home Affairs (**the Minister**) against a judgment of the Federal Circuit Court of Australia delivered on 4 September 2018.
2. The application before the Federal Circuit Court was for judicial review of a decision of the Administrative Appeals Tribunal (**the Tribunal**) affirming a decision of the Minister’s delegate not to grant Partner (Provisional) (Class UF) visas (**Provisional Partner Visas**) to the second, third and fourth respondents.
3. The respondents to the appeal were the applicants before the Tribunal and the Federal Circuit Court. It is convenient to refer to them as respondents throughout these reasons.
4. The Federal Circuit Court ordered that a writ of certiorari issue quashing the Tribunal’s decision and a writ of mandamus issue requiring the Tribunal to consider the respondents’ application according to law.

## The application for Provisional Partner Visas

1. The first respondent is an Australian citizen. The second, third and fourth respondents are citizens of Vietnam. The first respondent is married to the second respondent. The third and fourth respondents are the second respondent’s children from an earlier marriage.
2. On 18 March 2015, the second, third and fourth respondents applied for Provisional Partner Visas on the basis of the second respondent’s marriage to the first respondent. The first respondent was the second respondent’s sponsor. The third and fourth respondents applied as members of the second respondent’s family unit.
3. The criteria for the grant of a Provisional Partner Visa are set out in Part 309 of Schedule 2 of the *Migration Regulations 1994* (Cth). Clauses 309.211(2) and 309.221 required, relevantly, that at the time the visa application was made and at the time of the decision, the visa applicant be the “spouse” of an Australian citizen.
4. The term “spouse” is defined in s 5F of the *Migration Act 1994* (Cth) (**the Act**). Section 5F(1) provides that a person is the “spouse” of another person if they are in a “married relationship”. Under s 5F(2), persons are in a “married relationship” if, relevantly, they have a mutual commitment to a shared life as a married couple to the exclusion of all others and the relationship is genuine and continuing.
5. On 9 June 2016, the Minister’s delegate refused to grant the Provisional Partner Visas. The delegate was not satisfied that the first and second applicants were in a genuine and continuing spousal relationship, nor that they had a mutual commitment to a shared life together to the exclusion of all others.
6. On 14 March 2017, the Tribunal affirmed the delegate’s decision. The Tribunal concluded:

46. Having considering the matters as required under r.1 .15A(3) the Tribunal is not satisfied that the parties have a mutual commitment to shared life to the exclusion of others, that they in a genuine and continuing relationship, and that they live together and not separately and apart on a permanent basis.

47. Given these findings the Tribunal is not satisfied that at the time the visa application was made and the time of this decision the parties were in a spousal relationship,

48. Therefore the visa applicant does not meet cl.309.211 or cl.309.221.

49. As the primary applicant does not meet the criteria for the visa, neither do the secondary applicants.

50. For the reasons above, the visa applicant does not satisfy the criteria for the grant of the visa.

## The application to the Federal Circuit Court

1. The respondents then applied to the Federal Circuit Court for judicial review of the Tribunal’s decision. The grounds set out in the application were as follows:

1. The second respondent failed to give proper reasons as it is required to do pursuant to s 368 of the Migration Act 1958;

2. The second respondent failed to explain its actual pathway of reasoning in its reasons for decision and hence made an error of law;

3. The second respondent’s reasons for decision were inadequate and therefore involved an error of law;

4. The second respondent misinterpreted Reg 1.15AA of the Migration Regulations.

5. The decision of the second respondent was unreasonable;

6. In reaching its decision the second respondent took into account irrelevant matters;

7. In reaching its decision the second respondent failed to take into account relevant matters

8. The second respondent’s decision was an improper exercise of power;

9. The second respondent’s decision was otherwise not in accordance with the law.

10. The second respondent did not conduct a proper review in accordance with the Migration Act.

1. Before the Federal Circuit Court, the respondents relied upon the affidavit of Mr Hu, a lawyer acting for the respondents. Mr Hu deposed that he had sought a copy of the audio-recording of the hearing before the Tribunal. The Tribunal provided an audio-recording of part of the hearing, but indicated that the remainder of the hearing had not been recorded due to technical difficulties.
2. The respondents also relied upon the affidavit of Ms Tieu, their lawyer before the Tribunal. Ms Tieu deposed, relevantly:

3. The hearing started at about 11.23am and was completed at about 1.50pm. The hearing was heard in two parts with a break of about 15 minutes in between.

4. I confirm that the AAT has only provided the audio recording for the first part of the hearing which was from 11.23am to about 12.30pm and note the second part of the hearing which was from 12.52pm to about 1.50pm.

5. The Member spent the first part of the hearing questioning the Applicant’s visa sponsor, Mr Hieu Minh Pham. The Member’s questioning of the sponsor lasted for about an hour and ten minutes.

6. Throughout the second part of the bearing, I observed that the Member became more short in her dealing with the primary visa applicant, Thi Minh Thang HOANG. There were many occasions when the Applicant, Thi Minh Thang HOANG, had more to say however the Member would move onto another question, in effect cutting her off.

7. I observed that the Member’s questioning of the Applicant, Thi Minh Thang HOANG, in contrast to the questioning of the sponsor, only lasted for about 25 minutes. The balance of the period of time was used for questioning of the two witnesses who were present at the hearing.

8. I further observed that the Member’s questioning of the Applicant, Thi Minh Thang HOANG, was not to ascertain whether the criteria of Schedule 2 of the Migration Regulations 1994 and s 5F of the Migration Act 1958 are met but instead questioning the Applicant, Thi Minh Thang HOANG, and the other witnesses why the Applicant could not marry someone in Vietnam instead.

1. Neither Mr Hu nor Ms Tieu was required for cross-examination at the hearing.
2. Before the Federal Circuit Court, the respondents were represented by counsel. The written submissions that were before the Federal Circuit Court were not placed before this Court. A transcript of the hearing shows that the major point argued for the respondents was that there was no audio-recording of a substantial part of the hearing before the Tribunal. The primary judge summarised the argument as being that, “if there is no record of that evidence, there is no way of this Court assessing whether the proceedings before the tribunal member miscarried or not.” The transcript does not identify which ground or grounds of the application the argument was said to be relevant to.
3. The primary judge’s reasons for judgment observed that at least an hour of the hearing had not been recorded. His Honour referred to the matters deposed to by Ms Tieu at paragraphs 6, 7 and 8 of her affidavit. His Honour went on to say:

25. It was submitted on behalf of the first respondent by Mr Byrnes that in the present case, the decision record is evidence of what transpired at the hearing sufficient to enable this Court to properly assess whether any jurisdictional error had occurred in the proceedings before the AAT or not.

…

27. That submission does not take into account, however, the evidence of Ms Tieu, which, at least in paragraph 6 of her affidavit, is suggestive of the Member having unfairly cut the first named applicant wife off when answering questions put to her by the Member.

28. The submission also does not have regard to the fact that the relevant findings of the Tribunal were made in circumstances where the Tribunal had, as an apparent foundation for arriving at its decision, expressed itself in terms of either “the Tribunal accepts” or “the Tribunal suspects” or “the Tribunal does not accept” or “nor does it accept” or “the Tribunal notes” or “the Tribunal places little weight on” or “no convincing evidence was provided to the Tribunal”, without a reasoned analysis being undertaken by the member as to why such observations were made, or the pathway by which the Tribunal arrived at such a position.

29. Had there been a transcript available, then this Court could have been in the position of assessing whether, as submitted on behalf of the first respondent, the record as contained in the reasons correctly reflected the evidence adduced before the Tribunal or not. In the absence of a transcript, particularly in relation to the giving of important evidence by the applicant wife, this Court is unable to do so.

30. It cannot also be said that the reasons of the Tribunal were so particular, concise or detailed so as to enable the Court to have comfort in the findings as expressed in the reasons so as to be able to proceed to adequately review the decision of the AAT pursuant to the application for review filed on behalf of the applicants.

1. The primary judge’s reasons then referred to a letter to the first respondent from the Tribunal dated 13 December 2016 which indicated that all hearings were audio-recorded and that the first-respondent could ask for a copy of the recording. In light of that letter, his Honour said that an applicant who is to appear before the Tribunal does so with the reasonable expectation that the hearing will be recorded.
2. The primary judge’s reasons referred to s 62A of the *Administrative Appeals Tribunal Act 1975* (Cth) (**the AAT Act**). Section 62A provides that a person commits an offence if the person appears as a witness before the Tribunal and the person gives evidence knowing that the evidence is false or misleading. The relevance of this provision to his Honour’s reasons is unclear.
3. The primary judge then concluded:

39. This is not a case where this Court has been able to have comfort in being able to assess the short reasons of the Tribunal by reference to a transcript, and, in those circumstances, the proceedings before the Tribunal have miscarried.

40. This Court has been unable to assess whether the Tribunal has, or has not, given proper reasons, or whether the Tribunal has properly considered all relevant matters, because it has been unable to look at the relevant evidence to enable it to do so. The same applies to a consideration as to whether the Tribunal properly explained the pathway of reasoning by which it arrived at its decision or whether its reasons were adequate or inadequate.

41. In all of the circumstances, there would, in my view, be a miscarriage of justice should the decision of the Tribunal not be quashed.

## The appeal to this Court

1. The Minister’s amended notice of appeal before this Court contains the following grounds:

1. The learned Federal Circuit Court judge erred by reviewing the decision of the Fifth Respondent (“**the Tribunal**”) in circumstances where his Honour made no finding of jurisdictional error. Instead of finding jurisdictional error, the learned Federal Circuit Court judge held that the proceeding before the Tribunal had miscarried (Judgment at [39]) and that there would be had been a miscarriage of justice should the decision of the Tribunal not be quashed (Judgment at (41)).

2. If the Judgment is construed such that jurisdictional error was found, the learned Federal Circuit Court judge erred by finding that a failure to provide to the First to Fourth Respondents an audio recording of part of a hearing before the Tribunal amounted to jurisdictional error (Judgment at (291 and (40) – this being the “*relevant evidence*”). This includes an error as to the application of the *Administrative Appeals Tribunal Act 1975* (Cth) (Judgment at [35] to (38)).

3. If the Judgment is construed such that jurisdictional error was found, the learned Federal Circuit Court judge erred by misapplying the onus of establishing jurisdictional error and reviewing the Tribunal’s decision in circumstances where his Honour was of the view that the Tribunal’s reasons for its decision could not be assessed. The learned Federal Circuit Court judge considered that his Honour was unable to assess whether or not the Tribunal’s reasons were properly given due to a failure to provide an audio recording of part of a hearing before the Tribunal (Judgment at [291, [39) and [40)).

The learned Federal Circuit Court Judge should not have found jurisdictional error in circumstances where his Honour was not in a position to assess and ·be satisfied on the balance of probabilities that the Tribunal’s decision was infected with jurisdictional error.

4. The learned Federal Circuit Court judge erred by failing to dismiss the First to Fourth Respondents’ application to the Federal Circuit Court. The learned Federal Circuit Court judge should have dismissed the application on the basis that the First to Fourth Respondents failed to establish that jurisdictional error infected the Tribunal’s decision in respect of the remaining grounds of their application (namely, grounds 1 to 5, 7 and 10).

(Underlining omitted.)

1. The respondents have filed a notice of contention contending that the judgment should be affirmed on grounds other than those relied on by the Court. The notice of contention essentially repeats the grounds relied upon in the application to the Federal Circuit Court.
2. The first respondent represented himself and the other respondents at the hearing of the appeal, with the assistance of an interpreter. He did not file any written submissions. He did not make submissions of any substance in opposition to the appeal.
3. In support of the first and second grounds of appeal, the Minister submits that it was not open to the primary judge to quash the Tribunal’s decision without making a finding that the Tribunal’s decision was affected by jurisdictional error. The Minister submits that his Honour’s finding that there was a miscarriage of justice was not a finding of jurisdictional error. Further, the Minister submits the Tribunal’s failure to record part of the hearing could not amount to jurisdictional error.

## Consideration of the appeal

1. The jurisdiction of the Federal Circuit Court to hear and determine an application for judicial review of a migration decision made by the Tribunal arises under s 476 of the Act. Under s 476(1), the Federal Circuit Court has the same jurisdiction in relation to migration decisions as the High Court has under s 75(v) of the Constitution. The remedies provided by s 75(v) of the Constitution are available only for jurisdictional error: *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at 83; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 46.
2. The primary judge held that, “the proceedings before the Tribunal have miscarried”, and “there would…be a miscarriage of justice should the decision of the Tribunal not be quashed”. His Honour identified the miscarriage of justice as being, or stemming from, the absence of a transcript (through the lack of an audio-recording) for part of the hearing. His Honour considered that in the absence of a transcript, the Court could not assess whether the Tribunal had given proper reasons, or had properly explained the pathway of reasoning by which it arrived at its decision, or had considered all relevant matters. The concern expressed by the primary judge seems to have been about the difficulty the absence of an audio-recording created in determining *whether* there was jurisdictional error. The question of whether a failure to give proper reasons amounts to jurisdictional error may be left to one side for present purposes.
3. In *NAIS v Minister for Immigration, Multicultural and Indigenous Affairs* (2005) 228 CLR 470, Callinan and Heydon JJ observed at [159] that a miscarriage of justice is not necessarily jurisdictional error. Their Honours gave the example that erroneous findings of fact may produce a grave miscarriage of justice, but still not constitute jurisdictional error.
4. The primary judge found that the absence of a transcript and audio-recording of the hearing meant that there would be a miscarriage of justice unless the Tribunal’s decision was quashed. However, his Honour did not make any finding that the Tribunal made any jurisdictional error. It was an error for his Honour to order the issue of writs of certiorari and mandamus without a finding of jurisdictional error.
5. In addition, the failure of the Tribunal to make an audio-recording of the hearing, or part of it, could not, of itself, amount to jurisdictional error. The Tribunal’s review was conducted pursuant to Pt 5 of the Act. Part 5 expressly imposes a number of obligations upon the Tribunal. For example, under s 348(1), the Tribunal must review the decision. Section 360(1) requires the Tribunal to invite the applicant to appear before the Tribunal to give evidence and present arguments. Section 365 requires that the Tribunal must (usually) take oral evidence in public. Section 366C provides that the Tribunal must (usually) provide an interpreter when one is requested. However, there is no provision that *requires* the Tribunal to make, or provide the applicant with, an audio-recording of a hearing. Neither is there any such provision under the AAT Act. Further, just as there is no general obligation upon a decision-maker to give reasons for an administrative decision (*Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 670), there can be no general obligation to make, and give to the applicant, an audio-recording of an administrative hearing.
6. In *Hossain v Minister for Immigration and Border Protection* (2018) 35 ALR 1; [2018] HCA 34 at [24], the plurality described jurisdictional error as, “a failure to comply with one or more statutory preconditions or conditions to an extent which results in a decision which has been made in fact lacking characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make it”. As there is no statutory condition requiring the Tribunal to make, or give an applicant, an audio-recording of a hearing, a failure to do so cannot amount to jurisdictional error.
7. Further, the primary judge overstated the position by indicating that in the absence of an audio-recording of the hearing, the Court could not assess whether or not there was jurisdictional error. While it is certainly true that in a case where there is a dispute about what evidence was given, or about the way a hearing was conducted, the Court’s task will be made easier by the production of an audio-recording and transcript of the hearing, the problem is not necessarily insurmountable. That is demonstrated by the present case where Ms Tieu provided evidence as to the conduct of the hearing before the Tribunal. The affidavit was apparently aimed at suggesting there was a denial of procedural fairness, although such a ground was not pleaded. However, his Honour seems to have taken the view that findings as to what happened at the hearing could not be made without a transcript, rather than deciding whether to accept or reject the evidence of the solicitor and deciding whether such evidence, taken together with the Tribunal’s reasons and any other evidence, established jurisdictional error.
8. The first and second grounds of appeal should be accepted and the appeal allowed on that basis. It is unnecessary to consider the third and fourth grounds. For the reasons indicated below, it is unnecessary to consider the respondents’ notice of contention.
9. I reject the Minister’s submission that this Court ought to proceed to determine that there was no jurisdictional error on the part of the Tribunal and dismiss the application made to the Federal Circuit Court. Each of the grounds raised before the primary judge (and in the notice of contention) would have to be considered, even though they were not dealt with by the primary judge. To decide these grounds at an appellate level when they were not decided at first instance would be inappropriate, particularly when the outlines of submissions that were before the Federal Circuit Court have not been placed before this Court. In addition, the respondents would be deprived of a layer of appellate scrutiny. The matter should be remitted to the Federal Circuit Court for a further hearing.
10. The respondents should pay the appellant’s costs of the appeal. I am satisfied that the appellant should be granted a certificate under s 7 of the *Federal Proceedings (Costs) Act* *1981* (Cth).

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| I certify that the preceding thirty-three (33) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rangiah. |

Associate:

Dated: 18 October 2019

SCHEDULE OF PARTIES

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|  |  |
| Respondents |  |
| Fourth Respondent: | HIEU MINH PHAM AS LITIGATION GUARDIAN FOR MINH TUAN HOANG |
| Fifth Respondent: | ADMINISTRATIVE APPEALS TRIBUNAL |