Federal Court of Australia

Al-Dmoor v Minister for Immigration Citizenship and Multicultural Affairs [2023] FCA 663

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| Appeal from: | *Al-Dmoor & Anor v Minister for Immigration & Anor*[2020] FCCA 909 |
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| File number: | NSD 595 of 2020 |
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| Judgment of: | **BROMWICH J** |
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| Date of judgment: | 16 June 2023 |
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| Date of publication of reasons: | 19 June 2023  |
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| Catchwords: | **MIGRATION**: appeal from orders made by a judge of the (former) Federal Circuit Court of Australia, dismissing an application for judicial review of a decision of the Administrative Appeals Tribunal – where the Tribunal affirmed a decision of the Minister’s delegate to refuse to grant the appellant a student visa – where each of the grounds of appeal advanced are in substance the same as the grounds of review considered by the primary judge – whether the primary judge erred by failing to find that the Tribunal fell into jurisdictional error by making a finding of fact that was legally unreasonable in that it lacked an evident and intelligible justification, being that his ownership of a business was a significant incentive for him to remain in Australia – whether the primary judge erred by failing to find that the Tribunal fell into jurisdictional error by making a finding of fact which was legally unreasonable or otherwise misapplying the statutory scheme in relying upon the appellant’s previous application for a protection visa – Held: appeal dismissed, no error on the part of the primary judge  |
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| Legislation: | *Migration Act 1958* (Cth) s 499*Migration Regulations 1994* (Cth) Sch 2; cl.500.211, 500.212  |
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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: | 18 |
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| Date of hearing: | 16 June 2023  |
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| Counsel for the Appellants: | The first appellant appeared in person  |
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| Counsel for the First Respondent: | Ms A Hammond  |
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| Solicitor for the First Respondent: | Australian Government Solicitor  |
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| Counsel for the Second Respondent: | The second respondent filed a submitting notice, save as to costs  |

ORDERS

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|  | NSD 595 of 2020 |
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| BETWEEN: | ASEM MAJED NAIF AL-DMOORFirst AppellantAFNAN ADEL BADAWISecond Appellant |
| AND: | MINISTER FOR IMMIGRATION CITIZENSHIP AND MULTICULTURAL AFFAIRS First RespondentADMINISTRATIVE APPEALS TRIBUNAL Second Respondent |

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| order made by: | BROMWICH J |
| DATE OF ORDER: | 16 June 2023 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellants pay the first respondents’ 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, now Division 2 of the Federal Circuit and Family Court of Australia, dismissing an application for judicial review of a decision of the Administrative Appeals Tribunal, with costs. The first appellant was a primary applicant for the visa, with the second appellant, his wife, making her application based on being a member of her husband’s family unit. It is convenient to refer to the first appellant simply as “the appellant”. The Tribunal had affirmed a decision of a delegate of the first respondent, now the Minister for Immigration, Citizenship and Multicultural Affairs, to refuse to grant the appellant a Student (Temporary) (Class TU) visa.
2. The appellant did not provide any written submissions as required by procedural orders made by a registrar of the Court, but the Minister did. When the matter was called on for hearing, the appellant acknowledged having received the Minister’s written submissions, but said he had nothing to say as to why the appeal should not be dismissed, but rather sought to have the Court do something to help him and his family remain in Australia.
3. I explained to the appellant that this Court has no role in granting or refusing of a visa. As the appellant did not resist the appeal being dismissed in those circumstances, and I was of the view that the submissions made by the Minister were plainly correct as to why the appeal should be dismissed, I made orders to that effect and indicated that reasons would be furnished for doing so. These are those reasons.
4. The appellant first arrived as a student in Australia in January 2012. Since then he has held a series of student and bridging visas. Prior to coming to Australia he had obtained a Bachelor of Science and Software Engineering from a university in his home country of Jordan. Since he has been in Australia he has, in the period from 2013 to 2018, commenced and completed the following courses:
5. English for academic purposes;
6. a Master of Management in Human Resources;
7. an International English Language Testing System (**IELTS**) preparation course;
8. a Certificate IV in Marketing; and
9. a Diploma and Advanced Diploma in Marketing.
10. He also applied for a protection visa in in 2012 which was refused, a refusal that was affirmed by the then Refugee Review Tribunal (**RRT**).
11. The visa application presently under consideration was made by the appellant in February 2017 in order for him to undertake further study being the Diploma and Advanced Diploma in Marketing. On 21 April 2017, the delegate refused to grant the visa and thus also the visa sought by the appellant’s wife, upon the basis of the appellant was not a genuine temporary entrant to Australia, being one of the visa criteria.
12. The appellants applied for merits review of that decision by the Tribunal. The Tribunal hearing took place on 10 October 2018, with the Tribunal affirming the delegate’s decision the same day. By then, in May 2018, the appellant had completed his Diploma and Advanced Diploma in Marketing. At the time of the Tribunal hearing, the appellant was not enrolled in any course of study, although he expressed an intention to progress to a Masters of Marketing.
13. At all relevant times, cl 500.212 in Schedule 2 to the *Migration* ***Regulations*** *1994* (Cth) required, inter-alia, that an applicant for a student visa must intend genuinely to stay in Australia temporarily having regard to the applicant’s circumstances, immigration history and any other relevant matter. In considering whether the appellant satisfied those criteria, the Tribunal was required to have regard to Direction No 69 titled “*Assessing the genuine temporary entrant criterion for student visas and student guardian visa applicants*”, made under s 499 of the *Migration Act 1958* (Cth). That direction required the Tribunal to have regard to several specified factors including the appellant’s circumstances in Australia and his immigration history. Further, at all relevant times, cl 500.211 of the *Regulations* relevantly prescribed as a criterion for the grant of a student visa that the applicant be enrolled in a course of study.
14. The grounds of appeal before this Court mirror the grounds of judicial review before the primary judge, with the addition of a purported additional ground of appeal, which in truth is a part of the first judicial review ground maintained on appeal. Accordingly, that additional ground of appeal and the first ground of review maintained on appeal will be treated together as ground 1.
15. Ground 1 asserts that the Tribunal made a jurisdictional error by making a finding of fact that was legally unreasonable in that it lacked an evident and intelligible justification (citing authority for that proposition), being that his ownership of a business was a significant incentive for him to remain in Australia. The legal unreasonableness is pleaded as arising from the circumstances that there was no evidence or consideration as to the success or otherwise of the business and whether or not the business could be sold by the appellant.
16. In considering this ground of review, maintained on appeal, the primary judge referred to an exchange between the Tribunal member and the appellant during the course of the merits review hearing, during which the appellant confirmed that he owned and managed a small convenience store and had been doing so for three years at that time. The appellant said that this business provided for living expenses and travel, and if he needed any extra money he would ask his parents. His Honour observed that:
17. there was no further questioning on this topic, nor was any further information provided by the appellant in relation to his involvement with the convenience store;
18. there was no obligation on the Tribunal to give the appellant a running commentary on the matters of concern, in order for him to have the opportunity to provide additional evidence to address these concerns;
19. there was no general obligation on the Tribunal to investigate the appellant's claims;
20. the Tribunal did not see this particular issue as being a critical fact given that it was simply a matter that went into the overall evaluation whether or not the appellant was a genuine temporary entrant.
21. The primary judge referred to the Tribunal observing that the appellant did not claim to have any assets or financial ties in Jordan other than the property and assets of his parents, and that the Tribunal was not satisfied that the appellant’s family and economic ties in his home country acted as a significant incentive for him to return there. His Honour was satisfied that the conclusion arrived at by the Tribunal was within the legitimate bounds of decisional freedom reposed in it and that it could not be said that the conclusion reached was either legally unreasonable or lacked an evident and intelligible justification. As such, his Honour agreed with the Minister in submitting that the complaint by the appellant was asking that Court to engage in impermissible merits review.
22. I can see no error in the approach taken by the primary judge, nor in the conclusions his Honour reached. It follows that ground 1 and the additional ground in substantially the same terms must both be dismissed.
23. Ground 2 alleges that the Tribunal made a jurisdictional error by making a finding of fact that was legally unreasonable or otherwise misapplying the statutory scheme in relying upon the appellant’s previous application for a protection visa, asserting that the matter was historical, the visa was not necessarily permanent and in any event, the seeking of a permanent visa did not of itself preclude a temporary only a temporary intention of remaining in Australia. The primary judge made several pertinent observations in relation to this ground of appeal:
24. the appellant had confirmed that he had asked for a protection visa in 2012 due to circumstances in Jordan pertaining to the Arab Spring;
25. the Tribunal noted that this protection visa application indicated that the appellant in the past had wished to remain permanently in Australia, although the appellant claimed this was not the case and it was just a temporary situation but no longer applied.
26. The primary judge observed that the matter that was of concern to the Tribunal was that after the initial application for a protection visa was refused, the appellant sought merits review to the RRT. The appellant claimed that he was not responsible for persisting with the merits review application and that his former migration agent had persisted with the review despite his instructions to withdraw. The Tribunal was not satisfied that the review would have proceeded before the RRT without instruction or agitation of the appellant. His Honour was satisfied that this was a matter that the Tribunal was reasonably able to take into account when assessing the overall credit of the appellant. His Honour observed that in any event, the Tribunal had also said that the appellant’s migration history did not of itself weigh against the grant of a visa. The primary judge rejected the appellant’s submission that that observation only applied to part of the Tribunals decision, but his Honour correctly rejected that interpretation of the Tribunal’s reasons.
27. The primary judge found that the most critical aspect of the Tribunal’s decision was contained in paragraphs 27 to 29, which summed up the reasons for finding that the appellant did not genuinely intend to stay in Australia. His Honour observed that the appellant’s previous migration history did not feature in that summation and accordingly his Honour was not satisfied that this was dispositive. Again, I see no error in the conclusions reached by his Honour, such that ground 2 must fail.
28. For completeness, it should also be noted that the primary judge observed that even if there was an error in respect of the individual grounds of appeal, any of the asserted errors were in any event not material in the sense that had those findings of fact not been made this could not realistically have resulted in the Tribunal coming to a different conclusion. Further, his Honour observed that the appellant could not have been granted the visa in any event because he was not enrolled in the course of study by the time of the Tribunal decision. Both of those conclusions are correct, and therefore constitute additional reasons for dismissing the appeal.
29. It follows that as each of the grounds of appeal advanced, being in substance the same as the grounds of review considered by the primary judge, were correctly rejected by his Honour, the appeal must be dismissed with costs.

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| I certify that the preceding eighteen (18) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Bromwich. |

Associate:

Dated: 19 June 2023