HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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Matter No C1 of 2022

TRUNG TIEN NGUYEN & ORS

v

MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS

JUDGMENT

STEWARD J

Matter No C1 of 2022

TRUNG TIEN NGUYEN & ORS

v

MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS

1. The plaintiffs require an extension of time within which to apply for a constitutional or other writ to, among other things, quash a decision of a delegate of the defendant ("the delegate") made on 25 November 2021 to refuse to grant each of them a Business Talent (subclass 132) visa in the Significant Business History stream pursuant to s 65 of the *Migration Act 1958* (Cth) ("the Act"). The plaintiffs also contend that this proceeding should be remitted to the Federal Circuit and Family Court of Australia (Division 2) ("the FCFCA"), which they submit has jurisdiction to hear their judicial review application. The defendant does not oppose an extension of time, but submits that the delegate did not err, and, moreover, that there can be no remittal to the FCFCA as it has no applicable jurisdiction. For the reasons that follow, the plaintiffs' application for remittal is refused, but they are otherwise substantially entitled to the relief they seek.

Facts

2. The plaintiffs' migration agent applied for the subclass 132 visa on 16 June 2020 pursuant to s 45 of the Act following an invitation from the Minister issued on 5 May 2020[1]. When the application was lodged, the plaintiffs were in Vietnam; they were therefore outside the migration zone. In support of the application, the migration agent submitted, among other things, evidence of the plaintiffs' shareholdings and property interests in Vietnam, the value of which was said to exceed AUD $3 million. He did so in order to demonstrate compliance with cl 132.226 in Sch 2 of the *Migration Regulations 1994* (Cth) ("the Regulations"). Clause 132.226 is in the following terms:

> "The business and personal assets of the applicant, the applicant's spouse or de facto partner, or the applicant and his or her spouse or de facto partner together:
>
> (a) have a net value of at least AUD 1,500,000; and
>
> (b) are lawfully acquired; and
>
> (c) are available for transfer to Australia within 2 years after the grant of a Subclass 132 visa."

3. The first plaintiff, who was the primary visa applicant, held a valid visitor visa from 20 January 2020 to 20 January 2021. He came to Australia for a brief period in early 2020 to prepare the visa application. He then returned to Vietnam. Due to the unfolding

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1 *Migration Regulations 1994* (Cth), sch 2 cl 132.221.

COVID-19 pandemic and Australia's "inwards travel restrictions", the plaintiffs were subsequently prevented from travelling to Australia, the Department of Home Affairs having ceased to issue travel visas. The defendant did not dispute this.

4. The plaintiff's migration agent made the following claim about cl 132.226 in a submission sent to the delegate by email on 19 April 2021:

> "The Primary Applicant satisfies this criterion 188.226 because the total business and personal assets of the Primary Applicant and his wife at the time of invitation was AUD 3,005,569 (more than AUD 1,500,000) that are lawfully acquired and are available for transfer to Australia within 2 years after the grant of a Subclass 132. Please see Doc no. 97 (Form 1139A as at 16 June 2020) for more details."

5. Form 1139A, referred to above, was entitled "Statement of Assets and Liabilities Position". It contained a table identifying ownership in Vietnam of four properties and shares in two companies, Alpha France JS Co. and Tien Thanh JS Co. The table, in each case, contained references to other primary source documents, all of which had been translated into English (the accuracy of the translations was not in dispute). The documents exceeded 100 pages in length. They included a 25-page "Deed of Valuation & Report" prepared by "VNG Vietnam Valuation Company Limited", which valued the four properties as having an aggregate value of $2,091,322 as at 16 June 2020. The report expressed that its purpose was to "[d]etermine the market value of the valuated

assets as a reference for Australian immigration purposes". The referenced documents also included: four "Certificate[s] of Land Use Right[s]" issued by the Socialist Republic of Vietnam ostensibly confirming the plaintiffs' ownership of each property and in each case containing an applicable "map of land"; a "Certificate of Collaterals", which appeared to have been issued by the Vietnam Joint Stock Commercial Bank for Industry and Trade and by the Vietnamese government, and which recorded the existence of mortgages over two of the properties; letters from the two companies apparently confirming the plaintiffs' ownership of the two parcels of shares; and audited financial statements of both companies for the year ended 31 December 2019. All of these documents were provided to the delegate for consideration on 19 April 2021.

6. On the face of the supporting documentation, three of the four properties referred to in Form 1139A are held jointly by the first and second plaintiffs. The exception is one property which is registered only in the name of the second plaintiff. As for the two companies identified, the first plaintiff appears to own 45% of the share capital in Tien Thanh JS Co., while the second plaintiff owns 50% of the share capital in Alpha France JS Co. and 38.78% of the share capital in Tien Thanh JS Co. The third and fourth plaintiffs do not hold any of the assets referred to in Form 1139A.

7. The foregoing comprises only a small part of the information sent by the plaintiff's migration agent to the Delegate. Ultimately, over 800 pages of material was provided in support of the visa application. All of this material was contained in a three-volume application book filed with the Court.

8. The delegate sent a lengthy request for further information on 9 September 2021, specifically seeking within 28 days further evidence in support of satisfaction of cl 132.226 (but also making other information requests). Relevantly, part of the request was in this form:

> "Real estate assets: Please provide Sales Contracts for the four properties claimed in your application. You have provided Land Use Right certificates that indicate the Lot and Map no's for each LUR will be updated. The valuation notices for each property also have a Lot and Map no associated to each property.
>
> - Evidence of legal ownership (certificate of title/title deed, or similar).
> - Evidence of value (valuation certificate by an accredited property valuer).Valuations by real estate agents who are not accredited property valuers are not acceptable. Ownership claims made through Power of Attorney arrangements do not constitute acceptable evidence of legal ownership of a property. Therefore, such arrangements or claims may not be considered.
> - Evidence of mortgage balances outstanding against the property as at the two points in time identified above."

9. This request appeared, at least in part, to be unresponsive to the primary documents referenced in Form 1139A. For example, the

request for certificates of title or something "similar" did not address the fact that the Certificates of Land Use Rights, which are mentioned in the further information request, appeared to be documents of this type. Moreover, the relevance of what I infer is intended to be a supposed anomaly with these certificates, namely that the Lot and map numbers were to be updated, was not explained. The reference to the need for evidence of value failed to grapple with the valuation already given (although, again, the existence of "valuation notices" is mentioned), and the relevance then to two issues, namely the use of real estate agents and power of attorney arrangements, was not apparent. Finally, the request for evidence of mortgage balances did not address in any way the document entitled "Certificate of Collaterals".

10. The plaintiffs sought an extension of time on 7 October 2021 within which to provide the further material sought. But the delegate never responded to this request. No further evidence was provided by the applicants, inferentially because they assumed that their request had been declined. The migration agent gave evidence that he "was not sure what it was the delegate required or was looking for ... as substantial evidence had already been supplied". He further deposed that he "had hoped to gather whatever further evidence we could obtain in Hanoi, but in September 2021, the whole of the government apparatus in Hanoi was disrupted due to stringent lockdowns".

11. The delegate's reasons for refusing the first plaintiff's visa are spartan in nature and are the source of the principal complaint the first plaintiff makes. It is prudent to set out the relevant section of the delegate's reasons, titled "Evidence and Findings", in its entirety:

> "The applicant provided a Statement of Liabilities and Assets dated 16 June 2020 and property valuations dated 16 June 2020. The applicant provided a submission stating clause 132.226, 'The Primary Applicant satisfies this criterion 132.226 because the total business and personal assets of the Primary Applicant and his wife at the time of invitation was AUD 3,005,569 (more than AUD 1,500,000) that are lawfully acquired and are available for transfer to Australia within 2 years after the grant of a Subclass 132. Please see Doc no.97 (Form 1139A as at 16 Jun 2020) for more details.' This statement by itself is not sufficient as evidence in supporting the claims of the applicant to meet clause 132.226.
>
> On 9 September 2021 a Request for Further Information (RFI) was sent to the applicant requesting further evidence to support his claims made in this application, specifically related to clause 132.226; it was specifically requested:' 132.226 – (a) Business and personal assets (at time of decision) at least $1,500,000 132.226 – (b & c) lawfully acquired and available for transfer within 2 years after grant'. A 28 day response period was prescribed. No documents were received in response to this request.
>
> The applicants underwent their Health examinations and were able to complete their Health examinations during this time on 7th and 8th of October 2021, respectively.
>
> On 07 October 2021, the applicant wrote to the Department requesting a further 28 day extension of time to provide supporting documents due to restrictions imposed that related to the Global Pandemic. No extension of time was given in response to this request.
>
> As at the date I make my decision, sufficient time has now passed since the applicant lodged his 132 visa application and the subsequent request received for a further 28 day extension, therefore sufficient time has been allowed for supporting documents to be provided to

> satisfy the claims made in this application related to clause 132.226. As no further supporting evidence to support time of decision primary criteria clause 132.226; business and personal assets to the value of AUD1,500,000 that are recently dated, to support the applicants claims related to clause 132.226 has been provided, I will now assess the application on the documents and information before me.
>
> As a result I am not satisfied that the applicant satisfies clause 132.226. The applicant has failed to provide adequate supporting documents that provide evidence of the value of assets currently held at the time I make my decision."

12. In relation to the second to fourth plaintiffs, the delegate refused each application on the basis that each plaintiff failed to satisfy the "secondary criteria" set out in cl 132.311, specifically the condition in cl 132.311(a). That clause required that the relevant applicant, among other things, be "a member of the family unit of a person who holds a Subclass 132 visa". Given the first plaintiff's visa application was refused, the delegate decided that none of the second, third or fourth plaintiffs satisfied the condition in cl 132.311(a); they each could not otherwise independently meet the "primary criteria" for the grant of the subclass 132 visa.

Application for remittal

13. The plaintiffs seek to have this matter remitted to the FCFCA for determination according to law. However, for the reasons that follow, the FCFCA does not have jurisdiction with respect to this

migration decision. Accordingly, the matter may not be remitted to it[2].

14. The jurisdictional problem is this. Section 476(1) confers on the FCFCA the same original jurisdiction in relation to "migration decisions" as this Court has under s 75(v) of the *Constitution*. However, that is subject to a series of excepted decisions set out in s 476(2). One of these, found in sub-s (2)(a), is a "primary decision". That term is defined by s 476(4) as follows:

> "'primary decision' means a privative clause decision or purported privative clause decision:
>
> (a) that is reviewable under Part 5 or 7 or section 500 (whether or not it has been reviewed); or
>
> (b) that would have been so reviewable if an application for such review had been made within a specified period; or
>
> (c) that has been, or may be, referred for review under Part 7AA (whether or not it has been reviewed)."

15. It was not in dispute that the delegate's decision was a "privative clause decision or purported privative clause decision". The real issue was whether the decision was "reviewable under Part 5" of the Act. Part 5 confers on the Administrative Appeals Tribunal ("the Tribunal") power to review the merits of certain migration decisions. If a decision is so "reviewable" by the Tribunal, the FCFCA has no jurisdiction. Section 338 of the Act defines which

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2 *Migration Act 1958* (Cth), s 476B.

decisions are "reviewable". These are called "Part 5-reviewable decision[s]". It was not in dispute that the decision here met the requirements of s 338(7A), which is in these terms:

> "A decision to refuse to grant a non-citizen a permanent visa is a Part 5-reviewable decision if:
>
> (a) the non-citizen made the application for the visa at a time when the non-citizen was outside the migration zone; and
>
> (b) the visa is a visa that could be granted while the non-citizen is either in or outside the migration zone."

16. A feature of this type of decision is that it only applies when the non-citizen was outside the "migration zone" when he or she made the visa application. That was the case here. This type of visa was described by the plaintiffs as an "offshore visa".

17. In *Gajjar v Minister for Immigration and Citizenship*[3], a very similar issue about remittal and jurisdiction arose before Kiefel J in this Court (as her Honour then was). In *Gajjar*, the relevant decision satisfied the elements of s 338(2) which, amongst other things, included a requirement that the non-citizen must have made his or her visa application while in the migration zone. This type of visa was described by the plaintiffs as an "onshore visa". As such, it was an "MRT-reviewable decision" (now called a Part 5-reviewable decision). Mr Gajjar had done this and there was no dispute that his

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3 Matter No B72 of 2012.

visa cancellation decision was subject to s 338(2). When it was made, however, he had left the migration zone. He subsequently made an application for review of that decision by the Tribunal whilst remaining outside the migration zone. The Tribunal decided that it had no power of review. That was because Mr Gajjar had not complied with s 347(3). This provision now states that an application for review of a "Part 5-reviewable decision ... may only be made by a non-citizen who is physically present in the migration zone when the application for review was made" (at the time of *Gajjar*, this sub-section referred to an "MRT-reviewable decision").

18. A similar fetter on the power of the Tribunal to review Part 5-reviewable decisions that are subject to s 338(7A) exists in s 347(3A). It is in these terms:

> "If the Part 5-reviewable decision was covered by subsection 338(7A), an application for review may only be made by a non-citizen who:
>
> (a) was physically present in the migration zone at the time when the decision was made; and
>
> (b) is physically present in the migration zone when the application for review is made."

19. The foregoing imposes the same fetter on the Tribunal's power as that found in s 347(3), but adds the additional requirement that the non-citizen be in the migration zone when the decision was made. The plaintiffs could not meet the latter requirement because of COVID-related travel restrictions.

20. On one view, it might be thought that neither the decision refusing Mr Gajjar's visa application, nor the decision here, were "reviewable" decisions under Part 5, for the purposes of the definition of "primary decision", because in both cases it is accepted that the Tribunal had and has no power of review. However, in *Gajjar*, Kiefel J rejected that proposition and held accordingly that no remittal was possible to the then Federal Magistrates Court. In essence, that was because if a decision was one subject to s 338 of the Act, it did not matter whether the decision was or was not in fact reviewed by the Tribunal. Nor, also, did it matter whether the decision was or was not capable of being reviewed by the Tribunal because of non-compliance with some other requirement outside of s 338. In *Gajjar*, that was the requirement set out in s 347(3). Failure to meet that requirement did not deny or undo the character or attribute of the decision as remaining an MRT-reviewable decision for both the purposes of s 338 and the definition of "primary decision" in s 476(4)(a) of the Act. As Kiefel J said:

> "The references in [s 474(4)] to a decision being reviewable 'whether or not it has been (in fact) reviewed', or whether it would have been if the application had been within time, direct attention to the quality of the decision rather than whether or not review is capable of being achieved. The section is concerned with decisions of a kind for which review is provided in Pt 5 or elsewhere. It would follow that it contemplates that the relevant Tribunal has jurisdiction to hear the review. However, that would be because the Act provides that jurisdiction. The section does not, inferentially, exclude from what is otherwise a reviewable decision, by reference to Pt 5, a decision in respect of which jurisdiction to review has been lost by reason of non-compliance with a provision such as s 347(3).

> The plaintiff seeks to extend the notion of a reviewable decision beyond one for which review is simply provided to a decision for which review may be achieved, having regard to the circumstances pertaining to a particular visa applicant and whether or not the applicant can satisfy other provisions. The language and purposes of s 476 do not support such an interpretation. Its language suggests that the achievement of a review is not its concern. It says nothing about the effects of non-compliance with the Act upon review and may be taken to allow such effects to follow depending upon the nature of the non-compliance. In this case the effect is that the prospect of a review was lost and there is no alternative route to the Federal Magistrates Court provided."

21. The foregoing reasoning is entirely correct. The question is whether the plaintiffs can distinguish *Gajjar*. They say they can. The basis for distinction is that *Gajjar* concerned an "onshore visa" application and not an "offshore visa" application. They relied upon the distinction that s 347(3A) requires the non-citizen to be in the migration zone when the decision was made. No such requirement applied to Mr Gajjar. It was submitted that when the decision was made in *Gajjar*, it immediately became eligible for review by the Tribunal and thus was properly characterised as an MRT-reviewable decision. It was Mr Gajjar's own failure to be in the migration zone when he made his application for review that then "dissolved" thereafter (to use the plaintiffs' language) the Tribunal's power of review. Here, the plaintiffs had no possible means of meeting the requirements of s 347(3A). Unlike Mr Gajjar, for them Part 5 review was an impossibility. Accordingly, it could not be said that the decision was in any way "reviewable".

22. With great respect, this is not a legitimate point of distinction. Whether the decision here was one subject to s 338(7A) cannot turn upon the particular factual circumstances of the plaintiffs. It turns upon whether the decision satisfies the language in s 338(7A). No-one suggested that it did not. It, therefore, like the decision in *Gajjar*, had the quality or attribute of being a Part 5-reviewable decision, which then fell within the definition of "primary decision" in s 476(4)(a). As in *Gajjar*, and for the reasons given by Kiefel J, non-compliance with the requirements of s 347, whether voluntary or otherwise, does not alter the character of the decision.

23. It follows that the decision here was a "primary decision". The FCFCA has no jurisdiction in relation to it. The remittal application is refused.

Jurisdictional error

24. The plaintiffs made two essential complaints. The first was that there had been a failure to consider the information given to the delegate concerning compliance with cl 132.226. There was no dispute that if this were so, the delegate had failed to comply with s 55 of the Act, which obliges the delegate to "have regard" to "additional relevant information" given to them. Here, and again it was not disputed, the furnishing of Form 1139A and the documents it referred to were "additional relevant information". The second complaint was that the exercise of the Minister's discretion in

s 58(4) of the Act to extend time for compliance with the delegate's information request had miscarried.

25. How one is to "have regard" to submitted information is well established. In *Tickner v Chapman*[4], Kiefel J (as her Honour then was) said the following about an obligation to "consider" representations[5]:

> "To 'consider' is a word having a definite meaning in the judicial context. ... It requires that the Minister have regard to what is said in the representations, to bring his mind to bear upon the facts stated in them and the arguments or opinions put forward and to appreciate who is making them. From that point the Minister might sift them, attributing whatever weight or persuasive quality is thought appropriate. However, the Minister is required to know what they say."

26. This passage was recently adopted in *Plaintiff M1 v Minister for Home Affairs*[6] in the context of considering a Minister's obligations when dealing with an application for revocation of a visa cancellation decision pursuant to s 501CA of the Act. Upon receiving submissions seeking revocation, the plurality said that the decision-maker must "read, identify, understand and evaluate the representations"[7]. Whilst both *Tickner* and *Plaintiff M1* concerned

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4 (1995) 57 FCR 451.

5 (1995) 57 FCR 451 at 495.

6 (2022) 96 ALJR 497 at 508 [24] per Kiefel CJ, Keane, Gordon and Steward JJ; 400 ALR 417 at 425.

7 (2022) 96 ALJR 497 at 508 [24] per Kiefel CJ, Keane, Gordon and Steward JJ; 400 ALR 417 at 425.

different statutory contexts, they nonetheless provide relevant guidance as to the delegate's duty to "have regard" to information received in a visa application, both for the purposes of s 54 of the Act in respect of the application itself and, in respect of additional information provided by an applicant, for the purposes of s 55 of the Act. In both cases, the obligation to "have regard" to "information" is one which "must" occur. An absolute failure to do so is a failure to have regard to a mandatory consideration, which may give rise to jurisdictional error. But once considered, in the sense described above, as Kiefel J observed in *Tickner*, it is a matter for the delegate to determine what weight to give to the materials, if any, and to assess for him or herself their persuasive quality, if any.

27. In this matter, the plaintiffs' case turns upon a consideration of the reasons given by the delegate in the context of the totality of the material give to him or her, and in particular by reference to the material identified in Form 1139A. To this, the defendant contends he has an absolute answer. The decision records the following:

> "I am a delegated decision maker under section 65 of the Migration Act 1958. In reaching my decision, I have considered the following:
>
> ...
>
> documents and information provided by the applicant(s)."

28. The foregoing assertion, expressed as a form of incantation, is no sufficient answer to the plaintiffs' complaint, if the reasons

otherwise show that it is not true. Numerous authorities support the proposition that a bare assertion of this kind is often insufficient[8].

29. Analysis of the reasons here demonstrate that the delegate did not "read, identify, understand and evaluate the representations" contained in the documents referenced in Form 1139A. The reasons reference receipt of the form itself and to one of the documents it identifies, namely the valuation. But those reasons do not deal with the other documents referred to in the form, and do not attempt to engage with the contents of the valuation. Instead, the short contention made by the plaintiffs in the email dated 19 April 2021, concerning satisfaction of cl 132.226, is reproduced, and then the delegate states that this statement "by itself" was not sufficient evidence. But that was never the plaintiffs' case. They did not rely on that statement and nothing else. The statement expressly refers to Form 1139A, and the supporting documentation annexed to that form expressly references the primary documents that purported to evidence compliance with cl 132.226.

30. All of those documents were critical to the plaintiffs' case. They may have had shortcomings and deficiencies; but the delegate does not identify any. The juxtaposition of the length and detail of the plaintiffs' material and the cursory dismissal of their claims is notable. In these circumstances, the proper inference to be drawn is

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8 See, eg, *XA v Minister for Home Affairs* (2019) 274 FCR 289 at 332 [200]-[202] per Thawley J.

that the relevant information submitted by the plaintiffs has not been considered; there is nothing to suggest that the contents of all of the documents identified by the plaintiffs have been read, understood and evaluated. It follows that the delegate erred in not complying with s 55 of the Act. In that respect, it was not submitted that such non-compliance was, in any event, only an immaterial error[9].

31. For these reasons, the plaintiffs' application must succeed. It is not otherwise necessary to address the plaintiffs' other contention. The plaintiffs' application for an extension of time should be granted and orders should be made quashing the decision and directing that the matter be remitted to the defendant or his delegate for re-determination according to law. The defendant should pay the plaintiffs' costs of and incidental to the application.

32. It should be ordered that:

1. the plaintiffs be granted an extension of time until 7 January 2022 within which to file their application for a constitutional or other writ dated 7 January 2022.

2. the plaintiffs' application dated 7 January 2022 be determined on the papers.

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9 *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441; 390 ALR 590.

3. the decision of the defendant dated 25 November 2021 be quashed.

4. the matter to be remitted to the defendant to re-determine the plaintiffs' application for a Business Skills - Business Talent (Migrant) (class EA) Business Talent (subclass 132) visa dated 16 June 2020 in accordance with law.

5. the defendant pay the plaintiffs' costs.

This page and the preceding eighteen pages comprise my reasons for judgment in Matter No C1 of 2022, *Trung Tien Nguyen & Ors v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs.*

22 July 2022

IN THE HIGH COURT OF AUSTRALIA

File no C1/2022

TRUNG TIEN NGUYEN & ORS
PLAINTIFFS

AND

MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS
DEFENDANT

JUDGMENT

Judgment delivered in Chambers on
Friday, 22 July 2022

Counsel for the plaintiffs: Mr L. Boccabella

Solicitor for the plaintiffs: Jindalee Lawyers

Counsel for the defendant: Mr T. J. Reilly

Solicitor for the defendant: Minter Eillison