Matter No B37 of 2012

GAJJAR

v

MINISTER FOR IMMIGRATION AND CITIZENSHIP

The question presently before the Court in these proceedings is whether they may be remitted to the Federal Magistrates Court. The plaintiff brings these proceedings in the original jurisdiction of this Court because the Migration Review Tribunal has no jurisdiction under the *Migration Act* 1958 (Cth) to review the decision in question.

The plaintiff is a citizen of India and lodged an application for a Skilled (Provisional) (Class VC) Subclass 485 (Skilled – Graduate) Visa on 9 January 2011. In order to qualify for the visa, he was required to satisfy the criterion of having competent English[1]. A means of meeting this requirement was to undertake a test under the International English Language Testing System ("IELTS") and to

[1] Migration Regulations 1994 (Cth), Sched 2, cl 485.215.

score at least six for each of the test components[2]. At the time he lodged his application he had not achieved that score. He subsequently undertook the test again, on 19 March 2011, and achieved the necessary score, but his migration agent did not inform the Department of Immigration and Citizenship of the result.

On or about 11 January 2012 the Minister's delegate made a decision to refuse the plaintiff's application and communicated that decision to the plaintiff by a letter dated 11 January 2012. The delegate had used the reference number which the plaintiff had provided to confirm the IELTS results, but the number provided by the plaintiff referred only to the earlier test. It would appear that the delegate was unaware of the results of the second test at the time the decision was made.

The plaintiff's agent lodged an application for review of that decision with the Migration Review Tribunal on 1 February 2012. Such a review, a review on the merits, may have enabled the Tribunal to take into account the second IELTS results. However, the application made by the plaintiff to the Migration Review Tribunal was not competent. It was not "properly made" as s 348(1) requires, because s 347(3) states that an application for review of an MRT-reviewable decision which is covered by s 338(2) can only be made by a non-citizen who is physically present in the

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2 Migration Regulations 1994, reg 1.15C(1).

migration zone when the application for review is made. There is no dispute that the decision is covered by s 338(2). Subsequently, the Migration Review Tribunal, on 27 August 2012, advised that it did not consider it had jurisdiction. On 21 September 2012 I granted an extension of time to permit the filing of the plaintiff's application for an order to show cause.

As a result of the combination of s 476B(3) and s 476A(1)(b) and (c), the Federal Court does not have jurisdiction with respect to this migration decision. As a result, any question of remitter concerns remitter to the Federal Magistrates Court (s 476B(1)). Section 476B(2) has the effect that this Court must not remit to the Federal Magistrates Court a matter that relates to a migration decision unless the Federal Magistrates Court has jurisdiction under s 476 of the *Migration Act*. The question of remitter to the Federal Magistrates Court then turns upon s 476, sub-ss (2) and (4), which in relevant part provide:

> "(2) The Federal Magistrates Court has no jurisdiction in relation to the following decisions:
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> (a) a primary decision;
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> ...
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> (4) In this section:
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> **primary decision** means a privative clause decision or purported privative clause decision:
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> (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."

The plaintiff contends that a decision is "reviewable" under Pt 5 only if it is capable of being reviewed by the Migration Review Tribunal in all the circumstances. That is to say, it is reviewable if the visa applicant is entitled to seek review and the Migration Review Tribunal has jurisdiction to undertake the review. Here the effect of s 347(3) was that the plaintiff was not able to have the decision reviewed by the Migration Review Tribunal.

The defendant's submissions focus upon the nature of the decision to which s 476 refers. The defendant points out that the plaintiff could have placed himself in a position to bring the application within time. The Act is intended to operate with respect to all primary decisions as defined and not to take account of particular circumstances that may affect a visa applicant. The defendant points out that the plaintiff's construction would produce the odd result that a person who was not present in Australia at the time the application was made could have his or her application determined by the Federal Magistrates Court, whereas a person present in the migration zone would first have to apply to the Migration Review Tribunal.

The plaintiff submits that it is significant that s 476(4)(a) does not simply define the "primary decision" to be an MRT-reviewable decision (or an RRT-reviewable decision); rather, it relevantly refers

to a privative clause decision "that is reviewable under Pt 5". That is to say, the decision must have another quality, namely, that it be reviewable. The decision must be one in respect of which the visa applicant is entitled to make an application to the Migration Review Tribunal and which that Tribunal has the power to determine. This is said to be supported by the words in s 476(4)(b) which describe the decision as one "that would have been so reviewable" if the application for review had been brought in time. It may also be observed, in terms of legislative history, that a distinction has always been maintained between the expression "MRT-reviewable decision" in Pt 5 and "reviewable" in s 476(2), but it is less clear whether that difference of expression carries the force for which the plaintiff contends.

The evident purpose of s 476, sub-ss (2) and (4) is to require a visa applicant to seek review from the Migration Review Tribunal before resorting to the Federal Magistrates Court. Further, the section treats a decision as being "reviewable" even if that possibility is lost because the application for review is not brought in a timely way.

The references in the section 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.

The plaintiff also relies upon the Second Reading Speech[3] of the *Migration Litigation Reform Act* 2005 (Cth), which inserted

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[3] Australia, House of Representatives, *Parliamentary Debates* (Hansard), 10 March 2005 at 3.

ss 476 and 476B into the *Migration Act* in their current form. The Attorney-General there said:

> "Migration cases filed in the High Court's original jurisdiction and remitted will be directed to the Federal Magistrates Court. ... The High Court is the apex of our judicial system. It should not be burdened with cases that are more appropriately handled by a lower court."

So much may be accepted. However, it cannot be said to follow that the Federal Magistrates Court, in this instance, has jurisdiction under s 476. Remitter is not possible.

The application for remitter is therefore refused. I will hear any application for costs at the hearing on 22 February 2013.

This page and the preceding six pages comprise my reasons for judgment concerning the application for remitter in *Gajjar v Minister for Immigration and Citizenship*.