HIGH COURT OF AUSTRALIA

7 February 2024

ISMAIL V MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
[2024] HCA 2

Today, the High Court of Australia, within its original jurisdiction, unanimously dismissed an application for a constitutional or other writ by which the plaintiff sought judicial review of a decision of a delegate of the Minister to refuse the plaintiff a visa under s 501 of the *Migration Act 1958* (Cth) ("the Act"). The plaintiff contended that, in making the decision, the delegate erred in law on several grounds, each relating to *Direction No 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* ("Direction 90").

Direction 90, made under s 499(1) of the Act, required a decision-maker to take into account the considerations identified in sections 8 and 9 where relevant to the decision. These considerations included: the protection of the Australian community (para 8.1); any engagement in family violence by non-citizens (para 8.2); the best interests of a minor child affected by the decision (para 8.3); and the expectations of the Australian community (para 8.4).

The plaintiff, following his conviction for various offences, was notified that consideration was being given to the refusal of his visa application on "character grounds" under s 501(1) of the Act because he had a "substantial criminal record" as defined by s 501(7) of the Act. The plaintiff was invited to comment and was given notice that, in preparing any response, he may wish to consider Direction 90. Further information was submitted in support of the plaintiff's application, but the delegate ultimately decided to refuse to grant the plaintiff a visa, concluding that the plaintiff did not pass the "character test" and that the considerations favouring non-refusal of the visa application were outweighed by the considerations favouring refusal.

Before the High Court, the plaintiff contended, by ground 1, that the delegate failed to comply with para 8.3 or failed to inquire about the status of a minor child (referred to as "MC") in circumstances where it was legally unreasonable not to do so. The Court observed the proposition that it is generally for the person making the application to identify the personal facts and circumstances relevant to the decision. The information contained only a single reference to MC and did not disclose that MC was, in fact, a minor child. In those circumstances, the delegate did not fail to comply with para 8.3(1). It was, accordingly, not legally unreasonable for the delegate to decide to refuse the visa application without making an inquiry about MC.

By grounds 2 and 3, the plaintiff contended variously that: (1) para 8.2 did not permit the delegate to give weight to family violence in circumstances where the delegate had already given weight to the same family violence under paras 8.1 and/or 8.4; (2) if Direction 90 permits this giving of "repetitious weight", para 8.2 is invalid; (3) alternatively, para 8.2 does not permit family violence to be given weight in the consideration of whether a visa should be granted for reasons other than the protection or expectations of the Australian community; or (4) if para 8.2 permits family violence to be given weight in the consideration of whether a visa should be granted for other reasons, para 8.2 is ultra vires. The Court held that para 8.2 does not unlawfully require a decision-maker to give weight to the same factor twice or illegitimately fetter the discretionary

Please direct enquiries to Ben Wickham, Executive Registrar & Head of Public Affairs
Telephone: (02) 6270 6893 Fax: (02) 6270 6868
Email: enquiries@hcourt.gov.au Website: www.hcourt.gov.au

power in s 501, nor is it otherwise invalid. Further, a delegate is entitled to give such weight to relevant acts of family violence as the delegate sees fit by reference, relevantly, to paras 8.1, 8.2 and 8.4. There was no irrational, illogical, or unreasonable weighing of the same factor in the same context and for the same purpose twice.

By ground 4, the plaintiff contended that the delegate misapplied para 8.4 in that the delegate was required to consider the expectations of the Australian community in light of the plaintiff's personal circumstances and did not do so. The Court held that no such inference could be drawn. Further, para 8.4 does not stipulate that, in assessing what weight is to be given to the expectations of the Australian community, the decision-maker must attribute to that hypothesised community knowledge of the personal circumstances of the applicant for the visa as known to the delegate.

Accordingly, the Court held that none of the grounds was established and dismissed the application.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*