

FEDERAL COURT OF AUSTRALIA

Viane v Minister for Immigration and Border Protection (No 2)

[2018] FCAFC 175

Appeal from: *Viane v Minister for Immigration and Border Protection*
[2018] FCA 3

File number: NSD 100 of 2018

Judges: **REEVES, RANGIAH AND COLVIN JJ**

Date of judgment: 16 October 2018

Catchwords: **MIGRATION** - costs - whether appeal succeeded on ground not raised or comprising only a 'sliver' of appellant's argument before primary judge - whether appellant should be awarded costs of the proceedings below

Legislation: *Migration Act 1958* (Cth)

Cases cited: *Foots v Southern Cross Mine Management Pty Ltd* [2007] HCA 56; (2007) 234 CLR 52
Kazar (Liquidator) v Kargarian; In the matter of Frontier Architects Pty Ltd (In Liq) [2011] FCAFC 136; (2011) 197 FCR 113
Oshlack v Richmond River Council [1998] HCA 11; (1998) 193 CLR 72
Snedden v Republic of Croatia (No 2) [2009] FCAFC 132
Viane v Minister for Immigration and Border Protection [2018] FCAFC 116

Date of hearing: Determined on the papers

Date of last submissions: 29 August 2018 (Appellant)
27 August 2018 (Respondent)

Registry: New South Wales

Division: General Division

National Practice Area: Administrative and Constitutional Law and Human Rights

Category: Catchwords

Number of paragraphs: 18

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Solicitor for the Appellant: D'Agostino Solicitors

Counsel for the Respondent: Mr BD Kaplan

Solicitor for the Respondent: HWL Ebsworth Lawyers

ORDERS

NSD 100 of 2018

BETWEEN: **ALEX VIANE**
Appellant

AND: **MINISTER FOR IMMIGRATION AND BORDER
PROTECTION**
Respondent

JUDGES: **REEVES, RANGIAH AND COLVIN JJ**

DATE OF ORDER: **16 OCTOBER 2018**

THE COURT ORDERS THAT:

1. The respondent pay the appellant's costs of and incidental to the proceedings before the primary judge, to be assessed if not agreed.

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

REASONS FOR JUDGMENT

THE COURT:

1 On 2 August 2018 the Court made orders allowing an appeal by Mr Viane concerning his application to the Minister to exercise the power under s 501CA(4) of the *Migration Act 1958* (Cth) to revoke the cancellation of his visa. An order was made for the Minister to pay Mr Viane's costs of the appeal. Liberty was provided to the parties to apply in respect of the orders as to costs of the proceedings before the primary judge. Each of Mr Viane and the Minister now contend for orders in their favour as to the costs of the proceedings before the primary judge.

2 An award of costs is discretionary, but must be exercised judicially, that is according to relevant considerations and taking account of the contextual features and facts of the litigation: *Kazar (Liquidator) v Kargarian; In the matter of Frontier Architects Pty Ltd (In Liq)* [2011] FCAFC 136; (2011) 197 FCR 113 at [4]. Settled principle guides the exercise of the discretion: *Oshlack v Richmond River Council* [1998] HCA 11; (1998) 193 CLR 72 at [38]. Generally, the discretion is exercised in favour of the successful party: *Foots v Southern Cross Mine Management Pty Ltd* [2007] HCA 56; (2007) 234 CLR 52 at [25]. So, a costs order usually follows the event, but need not do so.

3 As Mr Viane was successful in the proceedings, it would be usual for costs orders to be made that followed that event and for those orders to include the costs before the primary judge.

4 However, the Minister submits that Mr Viane succeeded on appeal by presenting the case in a manner that was not argued (or 'comprised only a sliver of his arguments') before the primary judge. Further, it is submitted that the point on which the appeal was upheld was not raised in written submissions in support of the appeal. On that basis, the Minister submits that the Court should depart from the usual approach by ordering Mr Viane to pay the Minister's costs below in the manner that occurred in *Snedden v Republic of Croatia (No 2)* [2009] FCAFC 132 at [3]-[4].

The decision on appeal

5 The appeal in the present case was upheld on the basis that Mr Viane advanced a substantial and clearly articulated argument to the Parliamentary Secretary (Assistant Minister) that a refusal to revoke the cancellation of his visa would cause his partner to suffer hardship. It was

found that the argument was considered in part. However, the Parliamentary Secretary overlooked and failed to consider the part of the argument that Mr Viane's partner would be caused hardship if she moved to Samoa with Mr Viane and this failure amounted to jurisdictional error: *Viane v Minister for Immigration and Border Protection* [2018] FCAFC 116 at [31]-[32] (Rangiah J, Reeves J agreeing), [94], [104]-[105] (Colvin J).

6 For the following reasons, the basis upon which the appeal was upheld was in issue before the primary judge. Further, the gravamen of the complaint raised by ground 1 of the appeal (which ground was upheld) was the same as that which was raised before the primary judge. The precise terms in which the complaint may have been expressed for the purposes of articulating why it was a matter that had the character of jurisdictional error may have developed over the course of the proceedings. However, those differences are not of a character that would cause the Court to conclude that, in substance, Mr Viane succeeded on appeal on a point that was different to that raised below or a point that was first developed orally in the course of argument on the appeal. Therefore, we are of the view that the Minister should pay Mr Viane's costs of the proceedings before the primary judge.

The grounds advanced before the primary judge

7 The amended grounds of review before the primary judge raised three grounds. Ground 1 claimed a denial of procedural fairness or natural justice. The particulars to the ground were to the effect that the reasons of the Parliamentary Secretary failed to engage with a substantial argument advanced by Mr Viane 'to the effect, that if he were deported from Australia to New Zealand or Samoa, he (and his family) would be the subject of significant impediments in establishing themselves and maintaining basic living standards'.

8 Ground 2 claimed that the Parliamentary Secretary's decision (made on the Minister's behalf) 'was unreasonable and/or illogical and irrational'. The particulars relied upon a failure to consider at all what hardship Mr Viane (and some of his family) would face 'if removed from Australia to Samoa'.

9 Ground 3 claimed that the Parliamentary Secretary failed to give proper, genuine and realistic consideration of the information put before the Parliamentary Secretary. The particulars relied upon a submission by Mr Viane 'that should his partner, daughter and he be removed to Samoa, this would be extremely difficult' and an alleged failure by the Parliamentary Secretary to provide reasons regarding the hardship that Mr Viane or his partner would face if removed from Australia.

- 10 The written submissions on behalf of Mr Viane to the primary judge referred to a failure by the Parliamentary Secretary to consider consequences if he was 'deported to his country of national origin' (American Samoa) or 'removed to his country of origin': see, for example, paras 9, 15, 16 and 17 of the appellant's submissions. However, the submissions also referred to the Parliamentary Secretary finding that in the event of non-revocation of his visa 'he will need to relocate to New Zealand or return to Samoa' (emphasis in submissions): paras 17(c), 38 and 54. The submissions also referred to a failure by the Parliamentary Secretary to demonstrate that he took into account that 'there was a real possibility that the applicant and his immediate family would return to Samoa': paras 40 and 42.
- 11 In context, the term 'returned' was used somewhat imprecisely in the submissions to include the possibility that Mr Viane's return could be involuntary through deportation or voluntary through a choice as to where to go when faced with the cancellation of his visa. For example, in para 54, the written submissions to the primary judge used both the expression 'removed' and 'returned'.
- 12 The written submissions for the Minister to the primary judge were advanced on the basis that it was open to the Parliamentary Secretary to conclude that Mr Viane would choose to be removed to New Zealand and not American Samoa (para 24(b)). The submissions, included the statement as to ground 1 that: 'in any event, if the conditions in American Samoa are said to be worse for the applicant than New Zealand, then the Parliamentary Secretary properly considered the applicant would act rationally and not wish to be returned there. If the conditions in American Samoa are not worse than New Zealand, then the submissions have no significance'. These are not submissions treating the application as if it was confined to a complaint about the place to which Mr Viane may be forcibly returned. They recognise that the case advanced included a complaint about a failure by the Parliamentary Secretary to consider that the applicant might choose to be removed to American Samoa. They are certainly not submissions that proceed on the basis that the Minister was only required to consider the consequence of Mr Viane being deported or returned to his place of citizenship, namely New Zealand.
- 13 The reply submissions for Mr Viane were also couched in terms of a failure by the Parliamentary Secretary to consider what would occur for Mr Viane and his partner if 'removed to American Samoa' (paras 17 and 19). Further, they referred to the hardships the applicant

would face 'upon return to either New Zealand or American Samoa' (at para 20, see also, paras 25 and 28).

14 Although the primary judge dealt with the matter on the basis that it had been established that the Parliamentary Secretary did not give consideration to the impediments that Mr Viane would face if forcibly removed directly to Samoa, it had not been established that forcible removal to Samoa was in contemplation by Mr Viane or the Parliamentary Secretary: *Viane v Minister for Immigration and Border Protection* [2018] FCA 3 at [8] and [23]-[28]. It was this confined approach that was found to be in error on the appeal.

15 In those circumstances, we do not accept that the ground on which Mr Viane succeeded in the appeal was only a 'sliver' of his arguments before the primary judge. The matter having been raised before the primary judge it follows that it was not raised for the first time in argument on appeal.

16 As to the appeal, ground 1 alleged that the primary judge erred in failing to accept that Mr Viane was denied procedural fairness by the Parliamentary Secretary failing to consider a substantial argument as to why the cancellation of his visa should be revoked. The particulars to ground 1 including paragraph (d) which was expressed in the following terms:

d. The primary judge wrongly and erroneously found that the appellant would be removed from Australia to New Zealand, and would then 'voluntarily' travel to Samoa afterwards (para [28](2) and [28](5)). This finding was not open to him on the material that was before the Minister and that was before the primary judge:

...

- Nowhere in the Minister's reasons for decision is this finding made.
- The Minister did not expressly support this finding or raise this argument before the primary judge.
- The appellant expressly indicated that depending where he wanted to move, he would go to either New Zealand or Samoa (paras [17] and [20]).
- The Minister found that he 'had regard' to the appellant's submission that in the event of non-revocation he would need to relocate to New Zealand or return to Samoa (para [22]). Nowhere did the Minister find that the appellant would be removed to New Zealand first and then voluntarily go to Samoa.

17 The written submissions for Mr Viane in support of ground 1 of his appeal relied upon a submission made to the Parliamentary Secretary that if the cancellation was not revoked that the lives that Mr Viane's partner and young daughter would have in either New Zealand or Samoa 'depending on where I move to' would be extremely difficult. The submission that this

was a substantial argument that was not considered by the Parliamentary Secretary was the basis on which the appeal was upheld. Therefore, the ground on which Mr Viane was successful was raised by ground 1 and the written submissions for Mr Viane in the appeal.

18 Accordingly, the order will be: The respondent pay the appellant's costs of and incidental to the proceedings before the primary judge to be assessed if not agreed.

I certify that the preceding eighteen (18) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Reeves, Rangiah and Colvin.

Associate:



Dated: 16 October 2018