[2020] HCATrans 056

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Sydney

No S325 of 2019

B e t w e e n -

FYBR

Applicant

and

MINISTER FOR HOME AFFAIRS

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

Application for special leave to appeal

KIEFEL CJ
KEANE J

TRANSCRIPT OF PROCEEDINGS

FROM BRISBANE BY VIDEO LINK TO SYDNEY

ON FRIDAY, 24 APRIL 2020, AT 10.32 AM

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MR N.R. MURRAY, SC: May it please the Court, I appear with my learned friend, **DR J.D. DONNELLY**, for the applicant. (instructed by Teleo Immigration Lawyers)

MR C.L. LENEHAN, SC: May it please the Court, I appear with my learned friend, **MR B.K. LIM**, for the Minister. (instructed by Australian Government Solicitor)

KIEFEL CJ: Yes, Mr Murray.

MR MURRAY: May it please the Court. Your Honours, the issue presented by the application is the proper construction of clause 11.3 of Direction 65 made under section 499 of the *Migration Act* dealing with visa refusal and cancellation under section 501. The same clause appears in the successor direction to Direction 65, that is, Direction 79. So the issue of the proper construction of this clause remains of ongoing relevance to the very heavy volume of section 501 decisions before the Minister, his delegates, the Administrative Appeals Tribunal and the Federal Court.

In the present case the Tribunal, the primary judge and, subject to some slight differences between them, the majority in the Full Court of the Federal Court, construed the clause narrowly, applying the approach of Justice Mortimer in *YNQY v Minister* [2017] FCA 1466 in relation to a materially identical clause.

On Justice Mortimer's construction as applied in this case, clause 11.3 was found to deem the community's expectation that all visa applicants who have failed the character test should have their applications refused, that is, it is a single or unitary expectation fixed in its content applicable to every case regardless of individual circumstance. On that construction, individual circumstance was to be considered under other considerations outlined in the direction.

Justice Mortimer's construction is set out in Justice Perry's reasons at first instance at paragraph 27, page 35 of the book. In our respectful submission, that construction is not supported by the text, context or purpose of clause 11.3. It has been rejected by at least two judges of the Federal Court, being Justice Flick in dissent in the Full Court here, and Justice Griffiths in the case of *DKXY*, to which I will come.

As I foreshadowed, the majority in the Full Court differed from each other in their approach. Ultimately Justice Stewart applied Justice Mortimer's construction but, as you will see, his Honour's reasoning in getting to that point differed materially from Justice Charlesworth, the other member of the majority.

That narrow construction is also inconsistent with the broader approach taken by a unanimous Full Court of the Federal Court in *Djalic v Minister* (2004) 139 FCR 292 at paragraph 74, where Justices Tamberlin, Sackville and Stone said:

> To take account of community expectations is to give effect to the Minister's conception of the public interest. Sometimes this consideration may work in favour of the non-citizen.

Now, one accepts immediately that their Honours were not there construing a direction in the nature of Direction 65, but what their Honours were recognising was the inherent nature of community expectations. An application for special leave from their Honours' judgment was refused.

KEANE J: Mr Murray, when looks at the text of – take 11.3 at page 63 of the application book set out in paragraph 40, one does not see an invitation or a direction to the decision-maker to consult or apply the expectations of the Australian community as the decision-maker may understand them to be. What 11.3 is is a statement that the decision-maker should have due regard to the government's view which is that the Australian community expects non-citizens to obey the law. There is no invitation or direction there to consult other aspects of what the decision-maker may in his or her wisdom gleam to be the expectations of the Australian community.

MR MURRAY: In our respectful submission, your Honour, the text of 11.3 does expressly contemplate the consideration of circumstances particular to the case and if I may I will step through the text of the clause to show why that is so. The first sentence – an expectation of compliance with the law - is not directed in its terms to the outcome of the application for a visa, but rather it is an expectation of the – of an applicant's anterior conduct, and one accepts that if the character test has not been satisfied that the applicant has not met that expectation. But, nevertheless, it is not directing attention in terms to the outcome of the application.

KEANE J: No, it is a prefatory statement that is taken up again in the last sentence and read fairly one can understand that it is a direction to decision-makers to take into account, in a mandatory way, the view that non-citizens should obey the laws when the decision-maker comes to consider these questions.

MR MURRAY: It does so, your Honour, but - - -

KEANE J: But apart from that I cannot see how one can read the rest of this provision as an invitation to the decision-maker to inform the

decision-making process by reference to the decision-maker's views of other expectations of the Australian community.

MR MURRAY: That aspect of the direction comes from the second and third sentences, your Honour, and in particular the word "may" appearing in both of those sentences. The second sentence was described by both Justices Charlesworth and Stewart - - -

KEANE J: That is right. It says "may" because while it is a mandatory consideration it is not decisive. There may be reasons to depart from it, but that is dealt with by the regime. It is not an invitation to apply the regime by reference to the decision-maker's own views of what the Australian community's expectations might be. The decision-maker applies the regime.

MR MURRAY: Your Honour, in our respectful submission there is no doubt that the decision-maker must apply the regime. The question is what is the content of it? The second and third sentences are addressing not the regime as a whole, but are the place in the direction to ascertain the guidance provided by the government to the decision-maker as to what the government wants the decision-maker to take into account on this very specific topic of community expectation because the balance of the direction deals with the fact that other circumstances must be considered, and, of course, the decision-maker in the exercise of his or her discretion may find that in the exercise of that other consideration they take precedence over the community expectation. But this language is not dealing with the regime as a whole, your Honour, with respect. It is dealing with the content, such as it is stated here, of the expectation and it is not identified exhaustively. It is not identified by way of definition.

The second sentence, as your Honour knows, commences with the proposition that there has been a breach of the expectation of compliance with the law and a recognition that it may be appropriate to refuse the visa application. Now, on Justice Mortimer's approach, as applied in this case, that simply does not support the construction of her Honour, as favoured by the other judges, that there is a deemed negative expectation in every case regardless of circumstance and that is confirmed by the third sentence:

> Visa refusal may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect -

It is recognising that seriousness of conduct will exist on a spectrum and that at a particular point on the spectrum, as a matter of community expectation, there will be an expectation that whatever other circumstances

there may be in the case, simply because that point on the spectrum has been reached, the expectation is the application will be refused.

KEANE J: It is simply impossible to read that provision in that way.

MR MURRAY: Well, your Honour, in our respectful submission - - -

KEANE J: It is absolutely impossible to read the words which say "it may be appropriate to refuse the visa" as if they read "refusal of the visa is compulsory".

MR MURRAY: I am sorry, your Honour, I did not mean to suggest that it was saying that at all and, of course, such a policy direction could not say that without fettering the discretion. What this clause is doing is, not in an exhaustive way, but telling the decision-maker what the government wants the decision-maker to take into account on this specific topic of expectation. The direction elsewhere draws a link between the seriousness of the conduct and, if you like, the inverse spectra. As the seriousness of the conduct increases, the tolerance for it in the community will decrease. That arises in 11.1, so there is a clear overlap between different considerations.

It is not saying that visa refusal is compulsory, that is always left to the decision-maker's discretion, but as a matter of community expectation this clause is saying to the decision-maker you may take into account, in fact, you are directed to take into account, but as a matter of expectation the community will think that there will be some offences that are so serious, some conduct that has been so egregious, that, for example, no matter what the effect on minor children, yes you must still take them into account, but the expectation will be that because those offences are so serious, the other considerations will not support a grant of the visa.

Now, the decision-maker may, under the regime, your Honour, not follow the community expectation in that respect. But that, within the metes and bounds of this clause as to what the expectation is, demonstrates that the government is recognising that the community expects that, short of that point on the spectrum, other circumstances will be taken into account.

That was really the difference between Justice Stewart and Justice Charlesworth in the majority. If I could direct the Court please to Justice Stewart's reasons, beginning at paragraph 97 on page 77 of the book, his Honour said in the second sentence of that paragraph:

> The community thus expects that it will be necessary in every case to assess the circumstances particular to the visa applicant –

His Honour went on to say:

> That assessment is not an assessment of what the Australian community expects in the particular case.

We disagree with his Honour about that. But the anterior sentence is consistent with the way we propound the clause should be read, which is on the face of the clause there is a recognition that the community expectation is one should assess the circumstances particular to the visa applicant. His Honour made an observation to similar effect in the last sentence of paragraph 98 on page 78. Then in paragraph 103 on page 79 his Honour said, about the middle of the paragraph:

> It is also incorrect to construe the community expectation as expressing or requiring, in any particular case, either the grant or the refusal of the visa.

Now, putting aside the question of requiring because, of course, the direction cannot do that, but the notion of expressing an expectation as to refusal is one that his Honour - notwithstanding in the following paragraph he agreed with the approach taken by Justice Mortimer and the other judges applying the narrow construction – said that it was incorrect to construe the expectation as expressing refusal.

Now, that is squarely, with great respect, inconsistent with the narrow approach of Justice Mortimer as applied by Justice Perry and Justice Charlesworth. In our respectful submission, the text of the clause clearly contemplates that other considerations may, in an appropriate case, be taken into account.

The next question is, is there any direction as to where on the spectrum, for example, of seriousness of conduct does one say, well, then that would outweigh other considerations? That is not identified. That is for the decision-maker to resolve and we must accept that minds may differ about where that line will be drawn. But like a test as to public interest, which the Full Court in *Djalic* equated to this notion of community expectation, that is something that decision-makers do and is certainly not offensive to the scheme.

Your Honour, the context of clause 11.3 is consistent with that broader definition. So, as I have submitted, the other primary considerations – protection of the community and best interests of minor children – they are factors that necessarily import the circumstances of the particular case. It would be odd, as Justice Flick noted, to think that the other primary consideration was immutable and not susceptible of taking into account those particular circumstances.

The overlap between clause 11.1, nature and seriousness, with clause 11.3, something that the decision-maker is told may be taken into account on this question of expectation, shows that overlap in the analysis of considerations in this direction is not offensive to the scheme. The fact that a particular factor, a particular circumstance, may fall to be considered under multiple considerations is something expressly contemplated by the direction. So too do we see this notion of expectations adjusting to the circumstances of the case, and we see that in clause 11.1.2:

> tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases.

Again, very similar reflection to the language of clause 11.3, showing the overlap between these considerations in circumstances where it is accepted in 11.1 that the circumstances of the case may be taken into account, and thus as a matter of context, no reason why that should not also apply to 11.3.

KIEFEL CJ: Mr Murray, could you remind me what Justice Griffiths said in *DKXY*, what was his Honour's approach.

MR MURRAY: Yes, your Honour, it is set out in Justice Flick's reasons at paragraph 20 on page 56 of the book. There the relevant paragraphs [30] and [31] are identified, and they are adopted, effectively, by Justice Flick.

KIEFEL CJ: So it is Justice Griffiths and Justice Flick who are the only members of the Federal Court who hold a contrary view to the view of other judges of that court, putting aside the earlier decision to which you have referred, which does not actually direct attention to the Direction No 65.

MR MURRAY: Quite so. Your Honour, the other support is in the intermediate steps of Justice Stewart's reasoning, to which I have already taken the Court, which is accepting the community expectation - that is between paragraphs 97 and 103, your Honour – accepting that the direction recognises a community expectation of considering other circumstances. We say his Honour was right about that and it was an odd conclusion to go from that to an adoption of the narrow construction of Justice Mortimer's and the other judges.

The other matters of context that are important, your Honour, firstly clause 8, which provides that both primary and other considerations - I am sorry, I should have said specifically clause 8(3) on page 98 of the book, provides that:

> Both primary and other considerations may weigh in favour of, or against, refusal . . . of a visa.

That is also consistent with a broad construction of 11.3, but I accept it is not determinative.

Your Honours, dealing with the question of purpose, the directions-specific purpose in clause 6.1(4) is to guide decision-makers in making these decisions and the general purpose can be assumed to be to promote consistency in decision-making in line with the analysis in *Plaintiff M64/2015*. But, your Honours, in our submission, the effect of a single unitary of construction of clause 11.3 divorced from other circumstances of the case will increase the prospect of unlike cases being treated alike.

One can posit an example of where an applicant to whom no protection obligations are owed, perhaps who has committed murder or particularly violent sexual crimes, will be subject to the same community expectation as an applicant with relatively low range offences where the refusal of a visa may lead to removal, contrary to non-refoulement obligations where an alternative might be prolonged detention. Thus, neither the specific nor general purposes support a narrow construction.

KIEFEL CJ: Yes, thank you, Mr Murray. Mr Lenehan, we need not trouble you.

MR LENEHAN: Thank you, your Honour.

KIEFEL CJ: In our view, there is no reason to doubt the correctness of the decision of the majority of the Full Court of the Federal Court. Special leave is refused with costs.

The Court will now adjourn until 11.30.

AT 10.53 AM THE MATTER WAS CONCLUDED