HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, KIEFEL AND BELL JJ

MINISTER FOR IMMIGRATION AND CITIZENSHIP APPELLANT

AND

AMIT KUMAR & ANOR RESPONDENTS

Minister for Immigration and Citizenship v Kumar [2009] HCA 10
11 March 2009
S473/2008

ORDER

1. *Appeal allowed.*

2. *Set aside orders 1 and 2 of the Full Court of the Federal Court of Australia entered on 23 May 2008 and order that the appeal to that Court be dismissed.*

3. *The appellant pay the first respondent's costs of the appeal to this Court.*

On appeal from the Federal Court of Australia

Representation

S J Gageler SC, Solicitor-General of the Commonwealth with L A Clegg for the appellant (instructed by Australian Government Solicitor)

M L Brabazon SC with J G Azzi for the first respondent (instructed by Rasan T Selliah & Associates)

Submitting appearance for the second respondent

CATCHWORDS

Minister for Immigration and Citizenship v Kumar

Administrative law – Procedural fairness – Migration Review Tribunal ("Tribunal") – Application for spousal visas – *Migration Act* 1958 (Cth) ss 5, 357A, 359A – Definition of "non-disclosable information" – "Non-disclosable information" whose disclosure would found an action for breach of confidence – Relevance of "iniquity defence" – Whether Tribunal obliged to disclose to applicant information given to Tribunal in confidence by informant – Whether obligation to disclose extends to identity of informant.

Equity – Breach of confidence – Interaction of public and private law.

Words and phrases – "Non-disclosable information".

Migration Act 1958 (Cth), ss 5, 357A, 359A.

1 FRENCH CJ, GUMMOW, HAYNE, KIEFEL AND BELL JJ. The Full Court of the Federal Court (Tamberlin, Finn and Besanko JJ)[1] allowed an appeal by the first respondent (Mr Kumar) against the dismissal by the Federal Magistrates Court (Lloyd-Jones FM)[2] of his application for certiorari to quash a decision of the second respondent ("the Tribunal") and for mandamus requiring the Tribunal to hear and determine according to law an application by Mr Kumar. That application was for review by the Tribunal of the decision of a delegate of the appellant ("the Minister") that Mr Kumar is not entitled to the grant of a Partner (Temporary) (Class UK) visa, nor to the grant of a Partner (Residence) (Class BS) visa, as provided by the Migration Regulations 1994 ("the Regulations")[3] made under the *Migration Act* 1958 (Cth) ("the Act")[4].

2 The Full Court made orders for certiorari and mandamus directed to the Tribunal and in this Court the Minister seeks the setting aside of those orders. The Tribunal entered a submitting appearance.

3 This Court made orders on 30 September and 12 December 2008 limiting, until further order, the publication of certain portions of the reasons for judgment of the Full Court, of Mr Kumar's summary of argument and of the evidence. The appeal was heard in open court without the need to refer in the argument to that material and these reasons are prepared on the same footing.

4 Mr Kumar was born in Fiji on 14 September 1982. On 8 May 2004 at Lidcombe in New South Wales and pursuant to the provisions of the *Marriage Act* 1961 (Cth), Mr Kumar married Ms Rachel Sunita Krishna, an Australian citizen born in Australia on 26 September 1983.

5 The Tribunal upheld the decision of the delegate, made on 29 September 2004, that the delegate was not satisfied that the parties were in a genuine and continuing marriage relationship and was not satisfied that the parties had a mutual commitment to a shared life as husband and wife.

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1 [2008] FCAFC 67.

2 [2007] FMCA 995.

3 The appropriate reprint of the Regulations is Reprint 4, dated 1 March 2004.

4 The appropriate reprint of the Act is Reprint 10, dated 1 July 2006.

6 Mr Kumar had applied for permanent residence on "spouse grounds" on 10 June 2004, shortly after the marriage ceremony. The delegate noted that a permanent visa normally cannot be granted until two years have lapsed since the application was made, the process being "intended to test whether the relationship is continuing, 2 years after the visa application". However, a Partner (Temporary) (Class UK) visa might be granted immediately to permit presence in Australia until a decision be made on the permanent visa application. The two visa applications must be made at the same time (Regulations, Sched 1, item 1214C(3)(a)). The applicant for this temporary visa must seek to remain in Australia as "the spouse" of the person the applicant had intended to marry after entry into Australia (Regulations, Sched 1, item 1214C(3)(d)).

7 For the purposes of the Regulations, Mr Kumar is the spouse of Ms Krishna if they are in a "married relationship" within the meaning of reg 1.15A(1A). This states:

> "Persons are in a married relationship if:
>
> (a) they are married to each other under a marriage that is recognised as valid for the purposes of the Act; and
>
> (b) the Minister is satisfied that:
>
> (i) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and
>
> (ii) the relationship between them is genuine and continuing; and
>
> (iii) they:
>
> (A) live together; or
>
> (B) do not live separately and apart on a permanent basis."

8 The criterion specified in reg 1.15A(1A) must be satisfied at the time of the visa application (Regulations, Sched 2, Subdiv 820.21) and the time of decision (Regulations, Sched 2, Subdiv 820.22).

9 The application by Mr Kumar to the Tribunal was received on 1 November 2004. At a hearing conducted by the Tribunal on 31 October 2005,

Mr Kumar was given a letter from the Tribunal addressed to him and bearing that date. The letter included the following:

> "Section 359A of the Act states that the Tribunal must explain, and invite comment on, 'particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review'.
>
> You are invited to comment on the following information.
>
> - *The Tribunal has received information, in confidence, stating that your marriage to your nominator is contrived for the sole purpose of migrating to Australia*.
>
> This information is relevant to the review because it may lead the Tribunal to find that you and your nominator are not in a genuine and continuing relationship as required by Regulation 1.15A.
>
> The above information does not include information that you gave the Tribunal for the purpose of the application, or information that, under the Act, is non-disclosable.
>
> You are invited to provide the requested information, in writing, within 28 days of the date of notification of this invitation. As this letter has been given by hand, you will be considered to have been notified of this invitation on the date of this letter. The effect of this is that you have a total of **28 days from the date of this letter** to respond.
>
> If you are unable to provide the requested information within this period, you may request in writing that you be allowed additional time in which to respond. Such a request would need to include reasons for the extension and to be received before the end of the above period. The Tribunal will consider any request for an extension carefully, and advise you, in writing, whether an extension of time has been granted.
>
> **If the Tribunal does not receive any additional information within the period allowed or as extended, it may make a decision on the review without taking any further action to obtain the information**." (italicised emphasis added)

10 At the hearing, Mr Kumar denied that the allegation in the letter was true. No further evidence or comments were received by the Tribunal within the

28 day period indicated in the letter. In its reasons dated 3 February 2006, the Tribunal stated:

> "The Tribunal is not satisfied that there is sufficient evidence before it of the financial aspects of the relationship to indicate that the relationship is a genuine relationship. The Tribunal is not satisfied as to the nature of the household of the visa applicant and the nominator. The visa applicant has not been able to satisfactorily explain to the Tribunal why he is not residing with the nominator. There is insufficient evidence before the Tribunal to satisfy it that at the time of decision the visa applicant and the nominator hold themselves out to the world as being in a genuine spousal relationship. Most importantly, the credible and significant adverse information before the Tribunal leads the Tribunal to find that the visa applicant and the nominator are not in a genuine and continuing spousal relationship."

11 The references to a range of matters in the first four sentences reflect the provisions of reg 1.15A(3) which require the Minister to "have regard to all of the circumstances of the relationship" including financial aspects of the relationship, the nature of the household, the social aspects of the relationship and the nature of the commitment of the parties to each other. The final sentence reflects the information identified in the letter of 31 October 2005.

12 The Full Court upheld the submission by Mr Kumar that the decision of the Tribunal was the product of jurisdictional error by reason of what was said to be the failure of the Tribunal (in the letter dated 31 October 2005 and otherwise) to comply with the requirement imposed by s 359A of the Act that it disclose to him "the identity of the informant and the full nature of the information".

13 Section 359A appears in Pt 5 of the Act, which deals with review of decisions of the Migration Review Tribunal. It resembles s 424A, which appears in Pt 7, dealing with review of protection visa decisions by the Refugee Review Tribunal.

14 Division 5 of Pt 5 (ss 357A-367) is headed "Conduct of review" and s 357A(1) states that Div 5 is "taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with". Section 359A states:

> "**Applicant must be given certain information**
>
> (1) Subject to subsection (2), the Tribunal must:

(a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, *particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review*; and

(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review; and

(c) invite the applicant to comment on it.

(2) The information and invitation must be given to the applicant:

(a) except where paragraph (b) applies – by one of the methods specified in section 379A; or

(b) if the applicant is in immigration detention – by a method prescribed for the purposes of giving documents to such a person.

(4) This section does not apply to information:

(a) that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member; or

(b) that the applicant gave for the purpose of the application; or

(c) *that is non-disclosable information*." (emphasis added)

The expression "non-disclosable information" is defined in s 5(1) as meaning:

"*information or matter*:

(a) whose disclosure would, in the Minister's opinion, be contrary to the national interest because it would:

(i) prejudice the security, defence or international relations of Australia; or

(ii) involve the disclosure of deliberations or decisions of the Cabinet or of a committee of the Cabinet; or

(b) whose disclosure would, in the Minister's opinion, be contrary to the public interest for a reason which could form the basis of a claim by the Crown in right of the Commonwealth in judicial proceedings; or

(c) *whose disclosure would found an action by a person, other than the Commonwealth, for breach of confidence*;

and includes any document containing, or any record of, such information or matter". (emphasis added)

15 For the reasons which follow the appeal by the Minister should succeed, the substantive orders of the Full Court should be set aside and the appeal to that Court should be dismissed. However, the orders of this Court respecting non-publication made 30 September and 12 December 2008 will remain in force in accordance with their terms until further order of this Court.

16 The term "non-disclosable information" appears not only in s 359A. It appears also in s 57 (exclusion from "relevant information" to be given to non-citizen visa applicants); s 66 (exclusion from written reasons for visa refusals); ss 119, 120 and 129 (exclusion from relevant information to be given by the Minister in visa cancellation procedure); s 424A (to which reference has been made); and ss 501C, 501G and 500(6F) (respectively refusals and cancellations of visas by the Minister, and review thereof).

17 In its present form, par (c) of the definition of "non-disclosable information" was introduced by the *Migration Legislation Amendment Act* 1994 (Cth)[5]. Previously, the paragraph had read, "information or matter that was given to the Minister or an officer in confidence". The change was designed to avoid the literal interpretation of the earlier provision as encompassing "information which was not inherently confidential and information provided by other Commonwealth Departments"[6].

18 Several points should be observed concerning the construction of the definition of "non-disclosable information" in its application to s 359A. First, the phrase in pars (a), (b) and (c), "whose disclosure", must be read with the

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5 By s 4(e).

6 Australia, House of Representatives, Migration Legislation Amendment Bill 1994, Explanatory Memorandum at 5.

substantive provision made by s 359A. This suggests the answer to the question "disclosure by whom?". An answer must be "disclosure by the Tribunal". The upshot is that the obligation imposed upon the Tribunal by s 359A(1) to give certain information to the applicant does not arise if disclosure by the Tribunal would found an action by the informant or another person (not being the Commonwealth) for breach of confidence.

19 Secondly, the introduction into the Act of the expression "found an action ... for breach of confidence" may immediately invite attention to the body of doctrine in private law concerned with the protection, particularly by equitable remedies, of confidential information. But, as further remarked in what follows in these reasons, caution is required in the immediate translation into public law of such private law concepts.

20 This is so even where no statutory regime is immediately involved. The reasoning of Mason J in *The Commonwealth v John Fairfax & Sons Ltd*[7] is in point. The Commonwealth relied upon the protection given by equity to confidential information, but Mason J observed[8]:

> "The equitable principle has been fashioned to protect the personal, private and proprietary interests of the citizen, not to protect the very different interests of the executive government. It acts, or is supposed to act, not according to standards of private interest, but in the public interest. This is not to say that equity will not protect information in the hands of the government, but it is to say that when equity protects government information it will look at the matter through different spectacles."

21 Where a statutory regime such as the migration legislation is involved the consideration stressed by Mason J becomes, if anything, plainer. If the terms of a statute take as a criterion for its operation a particular doctrine of the general law the resulting compound may have elements of indeterminacy. One reason for this may be found in the statement by Francis Bennion[9] that a statute "takes on a life of its own". The particular doctrine of the general law, in this case that respecting the protection of confidential information, may have been framed by

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7 (1980) 147 CLR 39; [1980] HCA 44.

8 (1980) 147 CLR 39 at 51.

9 See *Bennion on Statutory Interpretation*, 5th ed (2008) at 1459-1460.

judicial decisions addressed to ends which do not precisely correspond to those of the statute in question. The translation from private to public law must accommodate the scope and purpose of the public law regime. So it is in the present case.

22 What was said in the judgment of the Court in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*[10] is significant for the issues on the present appeal. Their Honours stressed both the requirement of the Act that those entitled to a particular visa be granted it and that those not entitled be refused, and the corollary that information supplied by an informer be not denied to the executive branch in its administration of the legislation.

23 Section 359A is designed to accommodate those concerns. It affords to visa applicants a measure of procedural fairness and protection to informants, lest, without that protection, information be withheld and the Tribunal be denied material which assists the performance of its functions.

24 The obligation imposed upon the Tribunal by s 359A did not apply to information or matter whose disclosure by the Tribunal would have founded an action by the informant for breach of confidence. This follows from the opening words of s 359A(4), "This section does not apply ...". The leading judgment in the Full Court was delivered by Besanko J. His Honour accepted that "the information in this case is capable of precise identification" and that "it was imparted in circumstances importing an obligation of confidence". Nevertheless, Besanko J went on to decide that:

> "the information, including the identity of the informant, was not non-disclosable information. The Tribunal failed to comply with s 359A in that it did not disclose to [Mr Kumar] the identity of the informant and the full nature of the information."

25 The consideration which impressed the Full Court was that the general law does not protect confidences about such matters as the commission of crimes and frauds. In *A v Hayden*[11], when giving their reasons for answering the

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10 (2005) 225 CLR 88 at 98 [23]-[24], 100 [29]; [2005] HCA 72.

11 (1984) 156 CLR 532 at 556 per Mason J, 571-574 per Wilson and Dawson JJ, 595-596 per Deane J; [1984] HCA 67.

questions in the case stated and questions reserved by Dawson J to the Full Court, Mason, Wilson, Deane and Dawson JJ concluded that a court will not lend its aid to the enforcement of a contractual obligation of confidentiality undertaken by the Commonwealth, the effect of which would be to obstruct the administration of the criminal law. That situation may be contrasted with that on the present appeal. The preservation of the confidence of the informant's disclosures respecting the position of Mr Kumar tends to advance not obstruct the operation of the spousal visa provisions of the Act.

26 It may be accepted that similar considerations to those which underpinned the result in *A v Hayden* apply also in the general law regarding non-contractual and purely equitable obligations of confidence. It has been said both in the courts of Australia and the United Kingdom that the disclosure of an "iniquity" will not be restrained as the subject matter of an obligation of confidence[12].

27 This is not the occasion to consider further any uncertainties which attend the equitable doctrine of confidence as it operates outside the provisions of legislative measures such as s 359A. It is sufficient to indicate two points. The first was made by Gibbs CJ in *A v Hayden*[13]. His Honour referred to the refusal of relief by a court of equity "to enforce an obligation of confidentiality when the consequence would be to prevent the disclosure of criminality which in all the circumstances it would be in the public interest to reveal". To similar effect is the passage in a leading United Kingdom text[14]:

> "Something may present a serious risk to the medical health of the public, national security, the administration of justice or a matter of comparable public importance such that it may fairly be regarded as necessary in the public interest that a person possessing such information should be free to disclose it to an appropriate third party, whether or not the matter involves individual wrongdoing (by the claimant or anyone else). As in the case of 'iniquity', so also in the case of such information, it may be said that no court would imply a contractual obligation prohibiting

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12 See *A v Hayden* (1984) 156 CLR 532 at 544-547; *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 at 454-456; *Attorney-General v Observer Ltd* [1990] 1 AC 109 at 282-283.

13 (1984) 156 CLR 532 at 544-545.

14 Toulson and Phipps, *Confidentiality*, 2nd ed (2006), §6-022.

> such disclosure, or enforce an express contractual prohibition, and that such information would be regarded both at common law and in equity as lacking the necessary attribute of confidence to prevent such disclosure. ... It would be wholly unsatisfactory if, for example, a hospital doctor were prevented by his contract of employment from notifying the Department of Health of an imminent risk to public health detected by him in the course of his hospital duties, whether misconduct was involved or not."

28 However, the second point is that these remarks are not directed to the situation in which the Tribunal is placed. These remarks are directed to the situation where, for example, X wishes to make disclosures to the migration authorities concerning the true position of Y under the legislation, but X may be constrained from making the disclosure because the information was acquired by X under a cloak of confidence. The observations of Gibbs CJ and of Lord Justice Toulson and Mr Phipps in their work are directed to an answer by X at the suit of Y.

29 The Tribunal is in a different position. The Tribunal has acquired information adverse to the interests of Mr Kumar and acquired it by confidential disclosure from an informant. The issue concerns the existence and extent of any obligation imposed upon the Tribunal by s 359A to break that confidence of the informant.

30 Let it be assumed, without further entering upon the question, that the precisely identified information supplied to the migration authorities by the informant indicated that Mr Kumar or another person or persons may have committed offences against the laws of the Commonwealth. The question then is whether on its proper construction s 359A obliges the Tribunal, in affording procedural fairness to Mr Kumar, to break the confidence of the informant by revealing that information and the identity of the informant.

31 Mr Kumar submits that knowledge of the identity of the informant and the content of the information assists in understanding and thus in testing the cogency of the case against him and better discharges the obligation of procedural fairness of which s 359A is relevantly the "exhaustive statement" spoken of in s 357A.

32 However, although spoken in the application of general law principles of procedural fairness rather than in the application of s 359A, the following passage from *VEAL*[15] points to the answer in this appeal:

> "To give the appellant a copy of the letter or tell him who wrote it would give no significance to the public interest in the proper administration of the Act which, as pointed out earlier, required that those entitled to a visa be granted one and those not entitled be refused. It is in aid of that important public interest that, so far as possible, there should be no impediment to the giving of information to authorities about claims that are made for visas. That public interest, and the need to accord procedural fairness to the appellant, could be accommodated. They were to be accommodated, in this case, by the Tribunal telling the appellant what was the substance of the allegations made in the letter and asking him to respond to those allegations."

33 Upon the proper construction of the Act, the circumstance that the information supplied in confidence to the Tribunal may have disclosed or related to the commission of offences by Mr Kumar or others did not deny to the information and the identity of the informer the character of non-disclosable information within the meaning of s 359A(4).

34 The Tribunal was obliged by s 359A(1) to give "particulars of any information that the Tribunal considers would be ... part of the reason, for affirming the decision" of the delegate. The "information" there spoken of did not include the non-disclosable information (s 359A(4)). The Tribunal complied with s 359A(1) by notifying Mr Kumar that it had received information, in confidence, which stated that his marriage was contrived for the sole purpose of his migration to Australia, and inviting his response.

35 The Tribunal found that there was insufficient evidence upon which it could satisfy itself that, at the time of the decision under review, Mr Kumar and his wife held themselves out to the world as being in a genuine spousal relationship. If that conclusion were, as it was expressed to be, independent of the non-disclosable information relied upon by the Tribunal then even in the absence of that information Mr Kumar could not have succeeded. However, the proposition that this conclusion stood independent of the non-disclosable information, was not advanced on the appeal.

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15 (2005) 225 CLR 88 at 100 [29].

36 The appeal should be allowed. The Minister undertook on the grant of special leave to pay the costs of Mr Kumar in any event. Orders 1 and 2 of the orders of the Full Court entered 23 May 2008 should be set aside and the appeal to that Court should be dismissed.