HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW AND CRENNAN JJ

MARCOS FLAVIO BERENGUEL PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND CITIZENSHIP DEFENDANT

Berenguel v Minister for Immigration and Citizenship [2010] HCA 8
5 March 2010
M66/2009

ORDER

1. *Order that the questions stated in the Amended Special Case be answered as follows:*

Question 1

Did the delegate of the defendant misconstrue subregulation 1.15B(5) of the [Migration] Regulations [1994 (Cth)] in finding that the plaintiff had:

> … not provided an IELTS test result [for a] test conducted not more than 2 years before the day on which the application was lodged and therefore have not meet [sic] the regulatory requirement of having vocational English at time of application?

Answer

Yes.

Question 2

In the circumstances of the present case, could the plaintiff satisfy the English language requirements of clause 885.213 in Schedule 2 to the [Migration] Regulations [1994 (Cth)] by lodging an IELTS Test Report with the defendant's Department on a date after the date on which he lodged his visa application with the defendant's Department?

Answer

Yes.

Question 3

By whom should the costs of the proceeding in this Honourable Court be borne?

Answer

The defendant.

2. *Order that the decision of the defendant's delegate made on 12 December 2008 be quashed.*

3. *Order that the defendant determine the plaintiff's application received on 21 April 2008 according to law.*

4. *Order that the defendant pay the plaintiff's costs of the proceeding, including costs reserved.*

Representation

A Bonnici for the plaintiff (instructed by S.V. Winter & Co)

S B Lloyd SC with R C Knowles for the defendant (instructed by Clayton Utz Lawyers)

CATCHWORDS

Berenguel v Minister for Immigration and Citizenship

Immigration – Visa – General Skilled Migration visa – Skilled (Residence) (Class VB) Visa, Subclass 885 (Skilled – Independent) – Where application for visa refused for failure to meet English language requirements – Where "vocational English" a primary criterion for the grant of the visa appearing in subdiv 885.21 of Sched 2 to the Migration Regulations 1994 (Cth) ("the Regulations"), headed "Criteria to be satisfied at time of application" – Whether visa applicant could lodge English language test report after submission of application but before Minister's decision.

Delegated legislation – Interpretation – Meaning of "not more than 2 years before the day on which the application was lodged" in reg 1.15B of the Regulations – Purpose of the Regulations.

Delegated legislation – Interpretation – Application of s 13(1)(a) of the *Legislative Instruments Act* 2003 (Cth) – Application of s 13 of the *Acts Interpretation Act* 1901 (Cth) – Where headings in Sched 2 to the Regulations not defined – Relevance of headings of Parts, Divisions and Subdivisions of Sched 2 to the Regulations being "part of" the Regulations.

Words and phrases – "criteria to be satisfied at time of application", "legislative instrument", "not more than 2 years before the day on which the application was lodged".

Acts Interpretation Act 1901 (Cth), s 13.
Legislative Instruments Act 2003 (Cth), s 13(1)(a).
Migration Act 1958 (Cth), ss 54, 55, 65.
Migration Amendment Regulations 2007 (No 7) (Cth).
Migration Regulations 1994 (Cth), reg 1.15B, Pt 885 of Sched 2.

1 FRENCH CJ, GUMMOW AND CRENNAN JJ. The plaintiff, Marcos Berenguel, is a citizen of Brazil, who entered Australia on 3 November 2004 as the holder of a temporary student visa. He was granted further temporary student visas, the last of which expired on 22 June 2008.

2 On 21 April 2008, the plaintiff applied to the Minister for Immigration and Citizenship ("the Minister") for a Skilled (Residence) (Class VB) Visa, Subclass 885 (Skilled – Independent). It is a criterion for the grant of such a visa that the applicant have vocational English or the higher standard of competent English. Either of those criteria is established where the applicant satisfies the Minister that he or she has achieved, in a test conducted not more than two years before the day on which the application was lodged, the requisite International English Language Testing System (IELTS) test score in each of four test components of speaking, reading, writing and listening. The particular provisions of the Migration Regulations 1994 (Cth) relevant to that criterion are referred to later in these reasons.

3 The plaintiff booked an IELTS test on 26 February 2008, nearly two months before he lodged his application. However, the earliest date upon which the test could be administered to him was 10 May 2008. At the time of lodging his visa application on 21 April 2008 he paid a prescribed fee of $2,060 to the Department of Immigration and Citizenship. The application which he filled out contained a number of questions including question 29, headed "Language requirements", which was "What evidence are you providing of your English language ability?" Two alternatives were indicated. The first was the use of IELTS test or Occupational English Test (OET) results. The second alternative was defined by the words "You have booked an English language test – provide details". The plaintiff crossed that box and inserted, against the words "Date of booking", "10/05/2008". There was a note to question 29 advising that an applicant for a Subclass 885 visa (inter alia) "must provide evidence of [his or her] English ability at the time [he or she] appl[ies]."

4 The plaintiff sat the IELTS test at the Hawthorn English Language Centre on 10 May 2008 and secured a score of 6 in respect of each of the prescribed components. That score, according to the legend on the test results, indicates that the test subject "[h]as generally effective command of the language despite some inaccuracies, inappropriacies [sic] and misunderstandings. Can use and understand fairly complex language, particularly in familiar situations." This meant that he satisfied the standard of competent English and thereby the lesser standard of vocational English[1].

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1 Migration Regulations 1994 (Cth), regs 1.15B(5)(a) and 1.15C(a).

5 The plaintiff provided the Department of Immigration and Citizenship with the test result on 7 June 2008.

6 On 12 December 2008, a delegate of the Minister refused the plaintiff's application. The delegate assessed the plaintiff's application against criteria for all visa subclasses in Class VB. The relevant adverse finding related to visa Subclass 885 and to the criterion in cl 885.213 which would be satisfied by the plaintiff demonstrating either that he had "vocational English" or the higher standard known as "competent English". The delegate concluded:

> "You have not provided an IELTS test result [for a] test conducted not more than 2 years before the day on which the application was lodged and therefore have not meet [sic] the regulatory requirement of having vocational English at [the] time of application."

The delegate did not consider the "competent English" requirement in dealing with Subclass 885, but such consideration would have made no difference to the outcome having regard to the basis upon which the decision was made, namely that the IELTS test had not been conducted prior to the application.

7 The plaintiff commenced proceedings in this Court on 29 June 2009 under s 75(v) of the Constitution. He sought mandamus to direct the Minister to determine his application in accordance with law. He also sought certiorari to quash the decision of the Minister made on 12 December 2008.

8 The primary ground upon which relief was claimed was that the delegate fell into jurisdictional error by misconstruing reg 1.15B(5) of the Migration Regulations in concluding that the plaintiff had not provided an IELTS test result within the requisite period. Other grounds relating to breach of procedural fairness, failure to take into account relevant considerations and unreasonableness were also raised.

9 On 9 October 2009, Crennan J made an order extending the time limits within which the application could be brought, gave leave to the plaintiff to further amend his application and referred a special case, agreed by the parties, pursuant to r 27.08.1 of the High Court Rules 2004 to a Full Court for hearing.

The questions in the special case

10 The following questions were agreed as the questions for determination on the hearing of the special case:

Question 1

Did the delegate of the defendant misconstrue sub-reg 1.15B(5) of the Migration Regulations in finding that the plaintiff had:

> *… not provided an IELTS test result [for a] test conducted not more than 2 years before the day on which the application was lodged and therefore have not meet [sic] the regulatory requirement of having vocational English at [the] time of application?*

Question 2

In the circumstances of the present case, could the plaintiff satisfy the English language requirements of cl 885.213 in Sched 2 to the Migration Regulations by lodging an IELTS Test Report with the defendant's Department on a date after the date on which he lodged his visa application with the defendant's Department?

Question 3

By whom should the costs of the proceeding in this Honourable Court be borne?

The statutory and regulatory framework

11 The *Migration Act* 1958 (Cth) ("the Act") empowers the Minister to grant a non-citizen a visa to remain in Australia[2]. Section 31 of the Act provides for prescribed classes of visas and authorises the making of regulations prescribing criteria for a visa or visas of a specified class[3]. A non-citizen who wants a visa must apply for a visa of a particular class[4].

12 Subdivision AB of Div 3 of Pt 2 of the Act sets out a "[c]ode of procedure for dealing fairly, efficiently and quickly with visa applications". It comprises s 51A to s 64 inclusive. Section 54 requires the Minister, in deciding whether to grant or refuse to grant a visa, to have regard to all of the information in the application. This includes that which is set out in the application and in any

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2 s 29(1)(b).

3 s 31(1) and (3).

4 s 45.

document attached to the application when it is made or information given under s 55[5]. Section 55 provides:

> "(1) Until the Minister has made a decision whether to grant or refuse to grant a visa, the applicant may give the Minister any additional relevant information and the Minister must have regard to that information in making the decision.
>
> (2) Subsection (1) does not mean that the Minister is required to delay making a decision because the applicant might give, or has told the Minister that the applicant intends to give, further information."

13 Section 65 requires that if, after considering a valid application for a visa, the Minister is satisfied that the health criteria for the visa (if any) and other criteria for it prescribed by the Act or regulations have been satisfied along with other conditions not material for present purposes, the Minister is to grant the visa. If not so satisfied, the Minister is to refuse to grant the visa.

14 Regulation 2.01 of the Migration Regulations, as they stood in April 2008, provides that for the purposes of s 31 of the Act the prescribed classes of visa are such classes (other than those created by the Act) as are set out in the respective items in Sched 1. The regulation also refers to transitional classes. By operation of reg 2.02 there may be one or more subclasses in each class of visa and these are set out in Sched 2. For the purposes of s 31(3), reg 2.03 provides, inter alia, that the prescribed criteria for the grant to a person of a visa of a particular class are the primary criteria set out in a relevant Part of Sched 2.

15 The criteria for the grant of a "Skilled – Independent" visa are to be found in Pt 885 of Sched 2 to the Migration Regulations. The primary criteria are contained in Div 885.2 of Pt 885 and are divided into two categories designated "time of application" criteria and "time of decision" criteria. By virtue of s 13(1)(a) of the *Legislative Instruments Act* 2003 (Cth), where enabling legislation confers on a rule-maker the power to make a legislative instrument, then, unless the contrary intention appears, the *Acts Interpretation Act* 1901 (Cth) applies to the instrument "as if it were an Act and as if each provision of the legislative instrument were a section of an Act". The Migration Regulations fall within the definition of "a legislative instrument" in ss 5 and 6 of the *Legislative Instruments Act*. This will attract to them the application of s 13 of that Act. The headings of the Parts, Divisions and Subdivisions into which an Act is divided

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5 s 54(2).

are deemed to be part of the Act[6]. Every schedule to an Act is deemed to be part of it[7]. So Sched 2 to the Migration Regulations is "part of" those regulations. Thus, the criteria designations appearing as headings, not otherwise defined, in Sched 2 may be taken as "part of" the Migration Regulations. There is no provision otherwise giving substantive operation to the headings in which the designations appear. Nor are they otherwise defined.

16 Item 1136 in Pt 1 of Sched 1 designates a class of permanent visa known as "Skilled (Residence) (Class VB)". Subitem 8 of Item 1136 refers to the subclasses of that class of visa, which include Subclass 885 (Skilled – Independent). Schedule 2 includes an item headed "Subclass 885 Skilled – Independent". Clause 885.111, under the heading "885.1 Interpretation", includes a number of notes. Among them are:

> "*Note 2* For ***competent English***, see regulation 1.15C.
>
> …
>
> *Note 6* For ***vocational English***, see regulation 1.15B."

17 Division 885.2 sets out primary criteria. Under the heading "885.21 Criteria to be satisfied at time of application" there appears the following:

> "885.213 Either:
>
> (a) the applicant's nominated skilled occupation is in Major Group IV in the Australian Standard Classification of Occupation, and the applicant has vocational English; or
>
> (b) the applicant has competent English."

By way of relevant contrast, cll 885.214 and 885.215 require the application to be accompanied by evidence of an Australian Federal Police check and arrangements that the applicant has made to undergo a medical examination. There is no such requirement in respect of proof of compliance with the vocational English or competent English criterion.

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6 *Acts Interpretation Act*, s 13(1).

7 *Acts Interpretation Act*, s 13(2).

18 Regulation 1.03 contains "definitions" of vocational English and competent English in the following terms:

> "***competent English*** has the meaning given by regulation 1.15C.
>
> …
>
> ***vocational English*** has the meaning given in regulation 1.15B."

19 The relevant parts of the Migration Regulations dealing with vocational English and competent English are regs 1.15B and 1.15C. Regulation 1.15B relevantly provides:

> "(1) ***Vocational English***, for a person, has the meanings given in subregulations (2), (3), (4) and (5).
>
> …
>
> (5) If a person applies for a General Skilled Migration visa, the person has ***vocational English*** if the person satisfies the Minister that the person has achieved, in a test conducted not more than 2 years before the day on which the application was lodged:
>
> (a) an IELTS test score of at least 5 for each of the 4 test components of speaking, reading, writing and listening; …"

Regulation 1.15C makes provision in relevantly identical terms for the competent English criterion, save that the minimum test score required is 6.

20 Regulation 1.15B including sub-regs (1) to (4) was introduced by the Migration Amendment Regulations 2006 (No 6) (Cth). Its structure was retained in the Regulations at the date relevant to the plaintiff's application. However, by the Migration Amendment Regulations 2007 (No 7) (Cth) the additional sub-reg (5) was added. New regs 1.15C, 1.15D and 1.15E were introduced at the same time to provide definitions for "competent English", "proficient English" and "concessional competent English", respectively. Their operative terms were relevantly identical to the new reg 1.15B.

21 The Explanatory Statement accompanying the Migration Amendment Regulations 2007 (No 7) said with respect to reg 1.15B(5):

> "The effect of this amendment is that applicants for a new General Skilled Migration visa may establish that they have vocational English, if required to do so to satisfy a criterion for grant of the relevant visa, on the basis of a test taken within the previous two years (rather than the previous

12 months for applicants required to have vocational English under other current regulations)".

The passage supports the inference that the purpose of requiring an applicant to undergo a language test is to establish that the applicant currently has an appropriate standard of English competency.

Contentions and conclusions

22 The Minister submitted in the present case that the criterion which the delegate found was not met was that in cl 885.213, which is a time of application criterion. It was submitted that the test score must therefore have been achieved at the time of application because the Minister (and delegate) were bound by s 65 and the Migration Regulations to reach a state of satisfaction as to the position at that time.

23 In the present case it is said, in circumstances where the plaintiff had received no test score at all at the time of application, the delegate could not be satisfied that cl 885.213 was met. The delegate, it was submitted, had no discretion to have regard to test scores achieved after the making of the application.

24 The evident purpose of the alternative criteria in cl 885.213 is to ensure that, when the Minister or delegate decides upon the application for a visa, the applicant will have demonstrated recent competency in the English language. It does not follow that the criterion can only be satisfied by evidence provided to the Minister at the time of submitting the application. In this connection it is useful to note the contrast between the requirements of cl 885.213 and cll 885.214 and 885.215.

25 The requirement in reg 1.15B that the requisite test has been conducted "not more than 2 years before the day on which the application was lodged" is susceptible of the construction that the test was conducted no earlier than two years before the application was lodged. So construed, it does not require that the test has to be conducted before the application is lodged. That requirement can only be imposed by some direct operation of the undefined heading "Criteria to be satisfied at time of application".

26 Although cl 885.213 is part of the group of clauses headed "Criteria to be satisfied at time of application", the heading does not connect grammatically to its terms. Applying s 13 of the *Acts Interpretation Act*, it may be regarded as "part of the regulations". It may therefore inform their construction. But the text of Pt 885 does not support any general conclusion that the criteria in Pt 885 speak

exclusively to satisfaction at the time of application. For example, cl 885.212 reads:

> "The Minister is *satisfied* that the applicant has applied for an assessment of the applicant's skills for the nominated skilled occupation by a relevant assessing authority." (emphasis added)

Moreover, in this case, the construction for which the Minister contends leads to such plain unfairness and absurdity that it is not to be preferred. The alternative construction for which the plaintiff contends does not compromise the purpose of the Migration Regulations. There is nothing to prevent relevant information being submitted to the Minister after lodgement of the application. Indeed, s 55 of the Act expressly provides for that to be done and requires the Minister to have regard to such information. The Act specifically provides that the Minister may have regard to up-to-date information and, where the purpose of the relevant criterion is to ensure that the standard of English language competency is recently ascertained, a construction which would deprive him of the most recent information seems to be antithetical to that purpose.

27 In our opinion the questions posed in the special case should be answered in favour of the plaintiff in the following way:

Question 1 – Yes.

Question 2 – Yes.

Question 3 – The defendant.