HIGH COURT OF AUSTRALIA

KIEFEL J

NISHITHKUMAR ARVINDBHAI GAJJAR PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND CITIZENSHIP DEFENDANT

Gajjar v Minister for Immigration and Citizenship
[2013] HCA 13
1 March 2013
B37/2012

ORDER

Application dismissed with costs, such costs to include the costs of the application for remitter determined by this Court on 1 November 2012.

Representation

D C Rangiah SC for the plaintiff (instructed by Hartnett Lawyers)

G R Kennett SC with P G Bickford for the defendant (instructed by Clayton Utz Lawyers)

CATCHWORDS

Gajjar v Minister for Immigration and Citizenship

Immigration – Visa application – Plaintiff applied for Skilled (Provisional) (Class VC) Subclass 485 (Skilled – Graduate) visa requiring he have "competent English" – Plaintiff indicated his English was competent on visa application form and included reference number to a language test he had undertaken – The results of that test ("the first test results") did not achieve requisite score for competent English – Plaintiff sat second language test and achieved requisite score but results were not given to Department of Immigration and Citizenship – Using test reference number, departmental officer accessed first test results – Visa application refused on ground plaintiff did not satisfy criterion of competent English – Whether first test results were given by plaintiff for purpose of application – Whether first test results were "relevant information" for purposes of *Migration Act* 1958 (Cth), s 57(1) – Whether Tribunal breached *Migration Act*, s 57(2).

Words and phrases – "competent English", "for the purpose of the application", "relevant information", "was not given by the applicant".

Migration Act 1958 (Cth), s 57(1), (2).
Migration Regulations 1994 (Cth), Sched 2, cl 485.215.

1 KIEFEL J. The plaintiff is a citizen of India who is currently in Australia on a bridging visa. On 9 January 2011, he lodged an application with the Department of Immigration and Citizenship ("the Department") for a Skilled (Provisional) (Class VC) Subclass 485 (Skilled – Graduate) visa. A requirement for such a visa is that a visa applicant have "competent English"[1]. At the relevant time, a person was taken to have competent English if the person had successfully undertaken a test under the International English Language Testing System ("IELTS") and achieved a score of at least six for each of the four components of speaking, reading, writing and listening[2].

2 On 20 November 2010, prior to lodging his visa application, the plaintiff undertook an IELTS test. He did not achieve the requisite score, but nevertheless applied for the visa under constraint of time. The plaintiff understood that competency in English was an essential criterion of the visa and that he needed to provide test results which satisfied that criterion.

3 In the visa application form, which the plaintiff completed, there was a section headed "Applicant language ability". The words "IMPORTANT NOTE:" were placed immediately below it, followed by this advice:

> "You must provide evidence of your English language ability, or evidence that an English language test has been booked (Skilled – Regional Sponsored (Subclass 487) visa applicants only) when you lodge this application. Failure to do so may result in you being unable to satisfy the criteria for this visa, and this application may be refused".

4 In the same section, the following enquiry and request were made and the plaintiff's responses were given:

> "Have you undertaken an English test within the last 24 months?
>
> **Yes**
>
> If yes, provide details of the most recent English test
>
> | | |
> |---|---|
> | Name of test | **IELTS** |
> | Date of test | **20 NOV 2010** |
> | Test reference number | **10AU003516GAJN111G** |
> | What is your language ability | **Competent**". |

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1 Migration Regulations 1994 (Cth), Sched 2, cl 485.215.

2 Migration Regulations 1994, reg 1.15C(a)(i).

5 Following lodgement of his visa application, the plaintiff received what appears to be an automatically generated email communication from the Department, which, amongst other things, advised him that if he had not already done so, he would need to provide the Department with certain documents, including his IELTS test results.

6 The plaintiff did not provide a copy of his test results to the Department. The test reference number which was provided by the plaintiff in his visa application enabled access to his test results through the online IELTS Test Report Form ("TRF") Verification Service. That online database is maintained by an external provider and accessed by organisations using the IELTS in recruitment or application procedures. It is not kept by the Department.

7 A departmental officer, using the reference number, gained access to the plaintiff's results of the November 2010 test ("the first test results"), which, of course, showed that the plaintiff had not achieved the requisite score. On 11 January 2012, the Department notified the plaintiff's migration agent that the Minister's delegate had refused the visa application on the ground that the plaintiff did not satisfy the requirement of cl 485.215 of Sched 2 to the Migration Regulations 1994 (Cth); he did not have competent English. The delegate was unaware of the fact that the plaintiff had achieved the requisite score in a second IELTS test that he had undertaken on 19 March 2011. The plaintiff had provided his migration agent, whom he had appointed following the lodgement of his application, with the results of the March 2011 test but the migration agent had failed to inform the Department of those results.

8 The plaintiff could have sought a review of the delegate's decision by the Migration Review Tribunal but this required the plaintiff to have been present in the migration zone when his migration agent lodged the application for review[3] on 1 February 2012. The Migration Review Tribunal has informed the plaintiff that it does not consider that it has jurisdiction to review the delegate's decision on the basis that he was not in the migration zone at the relevant time. I am informed that that decision and the question concerning the plaintiff's whereabouts at the relevant time are presently before the Federal Magistrates Court.

9 The plaintiff seeks orders for certiorari and for mandamus on the ground that the delegate fell into jurisdictional error. No relevant error is attributed to the delegate for any failure to have regard to the second test results. The error which the plaintiff seeks to establish arises from the delegate's failure to give particulars of the first test results to the plaintiff. The plaintiff does not contend that the delegate was under some general obligation to point to the deficiency in

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3 See *Migration Act* 1958 (Cth), ss 338(2) and 347(3).

the plaintiff's case arising from the first test results. The obligation upon which he relies is said to arise from s 57(1) and (2) of the *Migration Act* 1958 (Cth) and the object to which it is addressed.

10 Section 57(2) provides:

> "Subject to subsection (3), the Minister must:
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> (a) give particulars of the relevant information to the applicant in the way that the Minister considers appropriate in the circumstances; and
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> (b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to consideration of the application; and
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> (c) invite the applicant to comment on it."

"Relevant information" is defined by s 57(1):

> "In this section, ***relevant information*** means information (other than non-disclosable information) that the Minister considers:
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> (a) would be the reason, or a part of the reason, for refusing to grant a visa; and
>
> (b) is specifically about the applicant …; and
>
> (c) was not given by the applicant for the purpose of the application."

11 In *Saeed v Minister for Immigration and Citizenship*[4] ("*Saeed*"), it was said that certain requirements of s 57(1) and (2) are similar to those arising under the general law. As stated by Mason J in *Kioa v West*[5], procedural fairness may require a decision-maker to bring the critical information upon which a decision is likely to turn to the attention of the person who will be affected by the decision if that information was obtained from a source other than the affected person. The object of drawing the information to a visa applicant's attention under s 57 is to provide an opportunity for his or her comment upon it[6]. It was also observed in *Saeed*[7] that not all information which is adverse to a visa applicant, and which

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4 (2010) 241 CLR 252 at 261 [20]; [2010] HCA 23.

5 (1985) 159 CLR 550 at 587; [1985] HCA 81.

6 Under the *Migration Act* 1958, s 57(2)(c).

may be influential to a decision to grant or refuse a visa, qualifies as "relevant information". The question in this case is whether the first test results fulfilled the description of "relevant information" for the purposes of s 57(1) and, in particular, by reference to pars (a) and (c).

12 The plaintiff's contention, that the first test results would be at least a reason for refusing the visa he sought, pursuant to s 57(1)(a), is contested by the Minister. The Minister seeks to draw a distinction between information which itself points to an adverse result and is relevant on that account, and information which shows that there is insufficient evidence to satisfy the relevant criterion. This is a fine distinction upon which to determine what might be a reason for refusal. It suggests that if evidence in satisfaction of a criterion can be improved upon, as was the case here, then that information does not have an inherent quality of being the reason for refusal.

13 The Minister's submission overlooks the fact that the use to which the information will be put, as the reason or a part of the reason for refusal, is to be assessed at the time the delegate's decision is made. If it has not been improved upon, that is to say, supplemented or replaced by material which does fulfil the criterion, it will, at the least, be a reason for refusal. If one considers the "critical issue or factor on which the decision [is] likely to turn", as referred to in *Saeed*[8], that factor here was the first test results.

14 More to the point in the present case is what s 57(1) identifies as not being relevant information. Paragraph (c) qualifies information by reference to a negative circumstance. Information is relevant information if it "was not given by the applicant for the purpose of the application". The effect of par (c) is that information which is given by a visa applicant for the purpose of his or her application is not relevant information which must be drawn to the visa applicant's attention.

15 It is not difficult to deduce that s 57(1)(c) is based upon a presumption that a visa applicant who provides information for the purpose of his or her application will be cognisant of its relevance. Sub-sections (1) and (2) of s 57, as *Saeed* implies, are concerned with information of which a visa applicant may not be aware. Even if a visa applicant is aware of its existence, he or she may not be aware of the information's relevance to the visa application. The circumstance to which s 57(1)(c) refers enables an assumption that the relevance of the information provided by a visa applicant is understood by that person, thus satisfying the requirement under s 57(2)(b). Section 57(1)(c) excludes

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7 (2010) 241 CLR 252 at 261 [21].

8 (2010) 241 CLR 252 at 261 [19].

information as relevant information where the circumstances to which it is addressed exist.

16 The plaintiff contends that the first test results were not given by him, but by a third party. The plaintiff did not provide a copy of those results, nor did he attach them to his application form. Rather, the delegate used the test reference number, which the plaintiff had provided, and obtained them through the IELTS TRF Verification Service. The provider of that website is the third party provider of information to which the plaintiff points in submitting that s 57(1)(c) is satisfied.

17 The plaintiff referred in this regard to *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*[9] as a case where particulars of information, which was independently provided to the Refugee Review Tribunal by a third party, in fact by a visa applicant's daughter, were required to be given to the applicant for comment. But in that case there was no question about the applicant having provided the information. She could not have known what information had been provided to the Tribunal by her daughter. The circumstances to which s 57(1)(c) is addressed were not present.

18 The Minister relies upon the observations of Heerey J in *VWBF v Minister for Immigration and Multicultural and Indigenous Affairs*[10], by reference to the analogue provisions to s 57(1) and (2), that the giving of information may comprehend a number of means. What is required is that it be conveyed to the decision-maker in some way. The concern of the common law concepts of procedural fairness which inform these statutory provisions is that notice be given of relevant information which is obtained from "another source"[11]. A reference to another source suggests the visa applicant may not know of the information.

19 Section 57(1)(c) is a composite expression. The two elements – the giving of information other than by a visa applicant and the purpose for which it is given – may only be analysed separately to an extent. To ascertain how the provision is intended to apply, the elements need to be read together and in light of the object of s 57(1) and (2).

20 "[F]or the purpose of the application" conveys that information is provided in order that it may be used in the consideration, assessment and

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9 (2005) 228 CLR 294 at 347 [179]-[180]; [2005] HCA 24.

10 (2006) 154 FCR 302 at 312 [48]-[49].

11 *VWBF v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 154 FCR 302 at 312 [50].

determination of the application. Ordinarily it will be the case that the information provided by a visa applicant is thought to be of assistance to the success of his or her application. The present case is a rare example where a visa applicant knows that is not the case, but is obliged to put evidence forward in order that the application might proceed.

21 It is not the evident concern of s 57(1)(c) how the "giving" is effected. The means by which information is provided and whether it is directly given would not appear to matter to the operation of par (c). In a practical and a legal sense, a person may provide information through the agency of a third person, yet be considered to have given it. What is important to the operation of s 57(1)(c), and the assumption upon which it is based, is whether the information comes from the applicant. If it does, and that fact is coupled with the use to which the information is to be put – the consideration and determination of the application – the *Migration Act* assumes that it is not necessary to draw the attention of the visa applicant to that information.

22 Here the plaintiff understood that he had to satisfy the visa criterion of competent English and had to provide test results to establish that competency. This is plain enough from his later actions, and it is expressly conceded. Attention was also drawn to the criterion and the method of proof of English competency in the visa application form, in the section which preceded the relevant enquiries of him. There the plaintiff asserted that his English was competent, and identified the date and reference number of the first test results.

23 In the course of oral submissions, the plaintiff made a point concerning the provision of the reference number of the first test results rather than the results themselves. The point was that there was no evidence that the plaintiff knew that the reference number would be used to access the first test results. If he did not know, the plaintiff might be disassociated from the provision of the results and from the purpose to which they were to be put.

24 It is true that the plaintiff said nothing on the matter. The plaintiff merely says that he did not attach the first test results to his application and assumed therefore that the Department must have obtained them from a third party. He does not say that it did not occur to him that the delegate, or a departmental officer, could access the results. Nor does he say that he did not understand that the enquiries, which were directed to the identification of the first test results, had that possible purpose. The plaintiff's silence leaves the matter of his understanding open to conjecture. One possibility is that he did not turn his mind to it because he did not consider the first test results to be important, since they were to be superseded. His silence does not avail him. At a factual level, it does not permit a finding which disassociates the plaintiff from the provision of the information. More importantly, it does not overcome the evidentiary purpose that the first test results were intended to serve for the purpose of the application.

25 The plaintiff, in his response to the enquiries about English tests on the application form, provided the first test results for the purpose of his visa application. The responses were given, and the first test results identified, as evidence to satisfy a criterion so that his application could proceed and be considered. It did not matter for the purposes of s 57(1)(c) that the plaintiff provided the means by which the results could be obtained rather than the results themselves.

26 The facts of this case are unusual. The plaintiff knew the first test results constituted information which did not support his application, but he was obliged to identify them, as the only evidence he had on the question of competency, in order that the application proceed. Nevertheless the objects of s 57(1) and (2), which inform the operation of s 57(1)(c), are met. The plaintiff knew of the relevance, indeed the importance, of the first test results to his visa application when he informed the prospective decision-maker of them.

27 No obligation on the part of the delegate arose under s 57(2) of the *Migration Act* with respect to the first test results. They were not relevant information within the meaning of s 57(1). The application must be dismissed with costs. These costs are to include the costs of the application for remitter which was determined in this Court on 1 November 2012.