HIGH COURT OF AUSTRALIA

EDELMAN J

SARA WEHBE PLAINTIFF

AND

MINISTER FOR HOME AFFAIRS DEFENDANT

Wehbe v Minister for Home Affairs
[2018] HCA 50
7 November 2018
S217/2018

ORDER

1. *The plaintiff's application for an order extending time under s 486A(2) of the* Migration Act 1958 *(Cth) be refused.*

2. *The application for an order to show cause filed on 21 August 2018 be dismissed.*

3. *The plaintiff pay the defendant's costs.*

Representation

A E Duc for the plaintiff (instructed by McEvoy Legal)

B K Lim for the defendant (instructed by Australian Government Solicitor)

CATCHWORDS

Wehbe v Minister for Home Affairs

Administrative law – Judicial review – Jurisdictional error – Usual requirement that error must be material – When error will be material – Where visa criterion that there is no evidence that plaintiff has given bogus document – Where delegate of Minister for Home Affairs refused visa application because plaintiff provided bogus document – Where plaintiff accepted that document is bogus – Where plaintiff's migration agent made errors in communications with delegate – Whether agent's errors fraudulent – Whether agent's errors material.

Words and phrases – "bogus document", "compassionate or compelling circumstances", "deprived the plaintiff of the possibility of a successful outcome", "false or misleading statement", "jurisdictional error", "material", "materiality", "privative clause decision".

Migration Regulations 1994 (Cth), Sch 2, cl 820.226, Sch 4, public interest criterion 4020.

1 EDELMAN J. This is an application made by the plaintiff for an order to show cause why various relief, including constitutional writs, should not issue in relation to a decision of a delegate of the Minister for Home Affairs. The decision was to refuse to grant the plaintiff a Partner (Temporary) (class UK) (subclass 820) / Partner (Residence) (class BS) (subclass 801) visa ("the visa"). A legal question raised by the Minister concerns the circumstances in which an application for a constitutional writ should be refused on the basis that an error is immaterial and, for that reason, not jurisdictional.

2 This application was brought after a series of errors made by a migration agent representing the plaintiff. The plaintiff was poorly represented by her migration agent, whose errors included a misstatement made to the delegate of the Minister. That misstatement was the basis of this application. However, the plaintiff has no reasonable prospect of establishing that the misstatement was made fraudulently. And the misstatement of her agent was not material to the delegate's decision. Unfortunately, the errors of the plaintiff's agent also deprived the plaintiff of the possibility of a review by the Administrative Appeals Tribunal at which she might have led additional evidence. But, for the reasons that follow, there is no legal basis upon which this Court can quash the decision of the delegate.

3 On 19 December 2016, the plaintiff lodged an "Application for migration to Australia by a partner", a form commonly described as a Form 47SP ("the Application"). The plaintiff says that she completed the Application, which was uploaded by her migration agent. In the Application, she authorised the Department of Home Affairs to send written correspondence to her agent, including electronically. In the Application, the plaintiff disclosed that she was a citizen of Iran and engaged to be married on 16 June 2017. She provided details of her fiancé's Australian citizenship. She declared that she was previously married on 8 March 2014 and that the previous marriage had ended on 10 April 2015.

4 On 28 February 2018, a delegate of the Minister sent the plaintiff a request for more information in relation to the Application. One of the items on the checklist of matters of further information requested was "Evidence that your relationship has ended with your former spouse or de facto partner".

5 On 23 March 2018, the plaintiff provided the Department with a copy of her marriage certificate certifying her marriage to her current husband ("the Marriage Certificate"). The certificate was from the New South Wales Registry of Births, Deaths and Marriages. It recorded her marriage dated 16 June 2017. The Marriage Certificate described her conjugal status as "Never Validly Married".

6 On 24 March 2018, the plaintiff's agent sent an email to the Department. Prior to sending this, the plaintiff had emailed the agent (on 21 March 2018) to

say that "[a]ll documents are ready except for the divorce decree which unfortunately has coincided with the [Iranian] new year's holidays" and (on 23 March 2018) that "regarding my divorce decree which I do not have at the moment (it) will be ready after the New Year". In the agent's email to the Department he said:

> "Regarding the applicant's previous marriage, the divorce order is still in the progress in Iran's official authorities.
>
> The applicant has had some visa related issues which made her unable to travel outside Australia to Iran to finalise the process.
>
> The applicant's previous visa was cancelled due to the fact that she was separated from her ex-husband and she is on BVE [bridging visa] now."

7 On 27 March 2018, the delegate of the Minister wrote to the plaintiff observing that in the Application the plaintiff had declared that she had been married to her previous husband and that the marriage had ended on 10 April 2015, but that on 24 March 2018 her agent advised that the divorce order was still in progress. The delegate observed that in the Marriage Certificate the plaintiff had declared her conjugal status as "Never Validly Married". The delegate added that bigamy is a criminal offence and said that the Marriage Certificate suggests that the plaintiff had provided false and misleading information in order to obtain a marriage in Australia. The delegate required a response within 28 days.

8 On 26 April 2018, the delegate of the Minister refused the Application. The delegate explained in the reasons that the plaintiff had not satisfied cl 820.226 of Sch 2 to the *Migration Regulations 1994* (Cth), which requires that public interest criterion 4020 in Pt 1 of Sch 4 is satisfied.

9 The relevant criterion requires that there is no evidence before the Minister that the applicant has given or caused to be given to relevant parties described therein "a bogus document or information that is false or misleading in a material particular in relation to ... the application for the visa". A bogus document is defined in s 5(1) of the *Migration Act 1958* (Cth) in terms that include "a document that the Minister reasonably suspects is a document that ... was obtained because of a false or misleading statement, whether or not made knowingly".

10 The relevant criterion may be waived by the Minister if he is satisfied that there are compelling circumstances that affect the interests of Australia, or that there are compassionate or compelling circumstances that affect the interests of, amongst others, an Australian citizen, which justify the granting of a visa.

11 The delegate concluded that "[t]here is evidence before the Minister that the applicant has provided, or caused to be provided, a bogus document or false

or misleading information in relation to this visa application". The delegate referred to: (i) the plaintiff's declaration on the Marriage Certificate that she was "Never Validly Married"; (ii) the plaintiff's declaration in the Application that she had been previously married; and (iii) the response of the plaintiff's agent that the divorce order was still in progress. The delegate concluded that the "marriage certificate therefore appears to be a bogus document, as it was obtained on the basis of false and misleading information provided about [the plaintiff's] conjugal status". The delegate noted that no response to the delegate's letter of 27 March 2018 had been received by the Department.

12 On 26 April 2018, the plaintiff's agent sent an email to the delegate of the Minister attaching a screenshot of an email he had purportedly sent on 18 April 2018, which was within the stipulated 28 days for a response to be provided to the delegate's letter of 27 March 2018. In the email purportedly sent on 18 April 2018 the plaintiff's agent said:

> "I should apologise and make a correction in my previous email.
>
> The divorce order in Iran was finalised in June 2016. The issue was that the applicant was not able to receive the divorce order documents because she was not able to travel to Iran.
>
> She has managed to employ a lawyer and used the legal capacities to obtain the official divorce documents and get them trans [sic]
>
> A copy of the applicant's birth certificate which is annotated by the divorce comments and also the legal divorce order by Iranian authorities dated March 2016 and registered June 2016 are attached in this email a single pdf file.
>
> It would be appreciated if you could please consider the new documents and accept the legitimacy of the applicant's marriage [to the] sponsor." (emphasis in original)

13 The delegate of the Minister replied to the agent's email, saying that the decision would stand. The delegate said that: (i) there was no record of the email in the screenshot having been received; (ii) if it had been sent, the agent would have received an automatic acknowledgement email; and (iii) the document attached was not uploaded to the plaintiff's online account with the Department. The delegate concluded by saying that "[a]s I did not receive a response or information to consider a waiver of PIC 4020 by the time I made my decision, it still stands".

14 On 4 May 2018, the agent notified the plaintiff that the Application had been refused. On 8 May 2018, the agent emailed the plaintiff with further detail about the refusal, attaching the delegate's decision and erroneously advising the plaintiff that she had 35 days to apply to the Administrative Appeals Tribunal for

review of the decision. On 16 May 2018, the agent again advised the plaintiff that the prescribed period to apply for review was 35 days. The agent's error was not identified until 23 May 2018, when the plaintiff correctly noted that the prescribed period to apply for review was 21 days. On the agent's advice, the plaintiff made an appointment with a lawyer.

15 On 24 May 2018, the plaintiff applied to the Tribunal for review of the delegate's decision. On 25 June 2018, the Tribunal gave reasons, which were sent to the plaintiff's solicitors the following day, explaining that the plaintiff was taken to have been notified of the delegate's decision on 26 April 2018 and therefore the prescribed period to apply for review ended on 17 May 2018. The Tribunal concluded that it had no jurisdiction to determine the application for review because it was out of time. No application was brought for judicial review of the Tribunal's decision that it lacked jurisdiction.

16 The plaintiff's evidence concerning subsequent events is that on 1 August 2018 she sought and obtained a correction to the Marriage Certificate. Her conjugal status was altered from "Never Validly Married" to "Divorced".

17 The plaintiff's circumstances are unfortunate, particularly when coupled with the delay caused by her agent, which has had the effect that the delegate's decision has never been the subject of review. However, there is an insurmountable obstacle to the application in this Court, which is based only upon the plaintiff's allegation that her agent provided fraudulent information to the Minister in his email of 24 March 2018 and the delegate's decision is tainted by this fraud. The obstacle to this application is that no reasonable inference that the plaintiff's agent engaged in fraud can be drawn. The natural, and only reasonable, inference is that the plaintiff's agent made a mistake.

18 The agent's mistake might have been in the way that he expressed his email. It may be that the agent intended to convey the meaning that the plaintiff had been delayed in obtaining the divorce decree document rather than the decree itself. The plaintiff herself had referred to the two interchangeably. An inference urged by the plaintiff that her agent had fraudulently intended to represent that she was still married is further negated by the agent's reference in the same email to the plaintiff's "previous marriage" and to her "ex-husband". Moreover, in the email that he claimed to have sent on 18 April 2018, he corrected the 24 March 2018 email to explain that it was the "divorce order documents" that were the issue.

19 Even if the agent's mistake was one of understanding rather than expression, there is no reasonable prospect of a conclusion that the mistake was fraudulent. The agent's statement in the 24 March 2018 email that the plaintiff's "divorce order is still in the progress in Iran's official authorities" might simply have reflected his misunderstanding of the plaintiff's statement to him that

"regarding my divorce decree which I do not have at the moment (it) will be ready after the New Year".

20 The plaintiff submitted that an inference of fraud was bolstered by the agent's reference to the plaintiff's inability to travel to Iran to "finalise the process" due to visa-related issues. But while there is no evidence to suggest that the plaintiff was unable to travel due to visa-related issues, the plaintiff did not dispute the accuracy of the final sentence of the agent's email, in which he said that the plaintiff's previous visa had been cancelled and she was on a bridging visa now.

21 The absence of any reasonable prospect of the plaintiff being able to prove fraud means that the application for constitutional writs of mandamus and prohibition, together with a writ of certiorari or a declaration that there was no valid visa application, must be dismissed.

22 The Minister also relied upon a second obstacle to relief by a constitutional writ, under s 75(iii) or (v) of the *Constitution*, for jurisdictional error in relation to a "privative clause decision"[1]. That obstacle is that, other than in exceptional circumstances, relief will generally require the error to be one that was "material" in the sense that it deprived the plaintiff of the possibility of a successful outcome[2]. The plaintiff did not submit that the alleged fraud was so pervasive, or that there was any other exceptional circumstance, as to justify a conclusion of jurisdictional error despite the lack of materiality in this sense[3]. The issue is whether the agent's erroneous misstatement in the 24 March 2018 email was material.

23 Although the Minister put this submission as his primary submission, it is logically secondary. It is not possible to determine the materiality of an error, or whether materiality is required, until the nature of the error is known. Since the error by the plaintiff's agent could not reasonably be shown to be fraudulent there is no error capable of establishing the ground of judicial review. However, in light of the detailed submissions of the Minister concerning materiality, which were the focus of the Minister's case, I address that point below.

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1 See *Migration Act*, s 474.

2 *Hossain v Minister for Immigration and Border Protection* (2018) 92 ALJR 780 at 788 [30], 795 [72]; 359 ALR 1 at 9, 19; [2018] HCA 34.

3 *Hossain v Minister for Immigration and Border Protection* (2018) 92 ALJR 780 at 789 [40], 795-796 [72]; 359 ALR 1 at 11, 19.

24 One manner of expressing the test of materiality is akin to the approach taken in criminal appeals to whether a miscarriage of justice is substantial[4]. Other than in exceptional cases where a substantial miscarriage of justice arises irrespective of the materiality of the error[5], the question is whether the same result was "inevitable"[6]. Ultimately, I do not consider that any misstatement by the agent, even if fraudulent, deprived the plaintiff of the possibility of a successful outcome. The result would inevitably have been the same irrespective of the misstatement by the plaintiff's agent.

25 A decision to approve the visa based on satisfaction of public interest criterion 4020 required the delegate to have no reasonable suspicion that the Marriage Certificate was obtained because of a false or misleading statement. The delegate concluded that the Marriage Certificate was a bogus document because it was "obtained on the basis of false and misleading information provided about [the plaintiff's] conjugal status". That false and misleading information must have been the information that led to the recording of the conjugal status on the certificate as "Never Validly Married".

26 As the plaintiff's counsel properly conceded at the oral hearing, the Marriage Certificate was a bogus document. The only basis to avoid the conclusion that the delegate's decision was inevitable could be if there were a possibility that, without the misstatement by the agent, the delegate, acting reasonably, would have waived public interest criterion 4020. To establish that possibility in this case, it would be necessary to conclude that the agent's misstatement could have prevented the delegate from finding "compassionate or compelling circumstances that affect the interests of an Australian citizen". But the misstatement by the agent was unconnected with the rationale for the delegate's decision. Its absence could not have militated against the decision or otherwise illustrated compassionate or compelling circumstances. The delegate's decision had turned only upon the Marriage Certificate being a bogus document. The 24 March 2018 email from the agent, to which the delegate referred in the reasons, was relevant to that conclusion only because it contradicted the Marriage Certificate by reiterating that the plaintiff had a "previous marriage" and referring

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4 *Kalbasi v Western Australia* (2018) 92 ALJR 305 at 339 [156]; 352 ALR 1 at 45; [2018] HCA 7. See also *Nobarani v Mariconte* (2018) 92 ALJR 806 at 813 [38]; 359 ALR 31 at 38; [2018] HCA 36.

5 See, eg, *Lane v The Queen* (2018) 92 ALJR 689 at 695-696 [38]; 357 ALR 1 at 8-9; [2018] HCA 28.

6 For recent examples, see *Lindsay v The Queen* (2015) 255 CLR 272 at 276 [4], 301-302 [86]; [2015] HCA 16; *Castle v The Queen* (2016) 259 CLR 449 at 472 [65], 477 [82]; [2016] HCA 46; *R v Dickman* (2017) 91 ALJR 686 at 688 [4]-[5], 697 [63]; 344 ALR 474 at 476, 488; [2017] HCA 24.

to a "divorce order" in progress. Although the agent's misstatement had led to the delegate raising concerns about bigamy in the earlier letter to the plaintiff of 27 March 2018, those concerns did not form any part of the delegate's reasons for decision.

27 An extension of time is required for this application. Since the application has no reasonable prospect of success, I do not consider that it is necessary in the interests of the administration of justice to extend time[7]. The plaintiff's application for an order extending time under s 486A(2) of the *Migration Act 1958* (Cth) is therefore refused. The application for an order to show cause filed on 21 August 2018 is dismissed with costs.

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7 *Migration Act*, s 486A(2)(b); see also *Spencer v The Commonwealth* (2010) 241 CLR 118 at 139-141 [51]-[60]; [2010] HCA 28.