HIGH COURT OF AUSTRALIA

NETTLE J

VINCENT PRANAY BUSSA PLAINTIFF

AND

MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS & ANOR DEFENDANTS

Bussa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs
[2020] HCA 18
Date of Judgment: 24 April 2020
M164/2019

ORDER

1. *Application dismissed.*

2. *The plaintiff pay the first defendant's costs of the application to this Court.*

CATCHWORDS

Bussa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

High Court – Original jurisdiction – Applications for constitutional or other writ – Determination without hearing – Abuse of process – Where plaintiff seeks orders inter alia to quash orders of superior court of record dismissing appeal from judgment dismissing application for judicial review of decision of administrative tribunal affirming decision by delegate of defendant Minister – Where plaintiff has not applied for special leave to appeal or provided explanation for departure from ordinary appellate process – Whether application is an abuse of process.

Migration – Visas – Skilled visas – Criteria for grant – Proof of skills – Where primary criteria to be satisfied for grant of visa include that application be accompanied by evidence that applicant had applied for assessment of skills for nominated skilled occupation by relevant assessing authority – Where visa applicant had failed skills assessment and not applied for subsequent skills assessment at time of submitting application – Whether evidence provided to defendant Minister after that time relevant to satisfaction of criterion.

Words and phrases – "abuse of process", "accompanied by", "constitutional writs", "determination without oral hearing", "discretion to refuse relief", "extraordinary relief", "less convenient, beneficial and effective", "ordinary appellate process", "original jurisdiction", "skills assessment", "unnecessary recourse".

Constitution, s 75(v).
Migration Regulations 1994 (Cth), Sch 2, cl 485.223.

1 NETTLE J. This is an application for a constitutional or other writ for orders inter alia to quash the order of the Federal Court of Australia (Anastassiou J) dismissing the plaintiff's appeal from the judgment of the Federal Circuit Court of Australia (Judge Riethmuller) in turn dismissing the plaintiff's claim for judicial review of the decision of the Administrative Appeals Tribunal ("the Tribunal") affirming the decision of a delegate of the defendant Minister to refuse to grant the plaintiff a Skilled (Provisional) (Class VC), Subclass 485 (Temporary Graduate) visa in the Graduate Work stream ("the Graduate Work visa"), based on his nominated occupation of "Electronics Engineer, ANZSCO Code 233411".

The facts

2 The plaintiff is a citizen of India. On 19 August 2015, he lodged an application for the Graduate Work visa which was ultimately refused on the basis that he had not satisfied the criterion in cl 485.223 of Sch 2 to the *Migration Regulations 1994* (Cth).

3 Clause 485.223 appears in Subdiv 485.22 of Sch 2 to the *Migration Regulations*, which sets out the primary criteria to be satisfied for the grant of a Graduate Work visa[1]. The criterion in cl 485.223 is as follows:

> "When the application was made, it was accompanied by evidence that the applicant had applied for an assessment of the applicant's skills for the nominated skilled occupation by a relevant assessing authority."

4 On the application form, the plaintiff nominated "Electronics Engineer" as his skilled occupation but answered "no" to the question whether he had "applied to a relevant assessing authority for an assessment of [his] skills for [his] nominated skilled occupation". In another section of the application form, however, the plaintiff provided the following responses:

> "**Applicant skills assessment**
>
> IMPORTANT NOTE:
>
> You must provide evidence of a suitable skills assessment from the relevant assessing authority, or evidence that you have booked to undergo a skills assessment with the relevant assessing authority when you lodge this application.
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> Failure to do so may result in you being unable to satisfy the requirements for lodging an application or being unable to satisfy the criteria for this visa.

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1 See *Migration Act 1958* (Cth), s 31; *Migration Regulations*, reg 1.07.

Nominated Occupation	**Electronics Engineer**
Name of assessing authority	**Engineers Australia**
Date of Skills Assessment	**29 JAN 2014**
Reference/Receipt number	**4476073**"

What the plaintiff did not disclose in the application form was that he had failed the skills assessment of 29 January 2014.

5 After receiving the application, the delegate wrote to the plaintiff on 26 October 2015 requesting that the plaintiff provide evidence of a skills assessment. On 5 December 2015, the plaintiff responded by providing a receipt for payment for a subsequent skills assessment, dated 3 November 2015, which (unbeknown to the delegate) the plaintiff had also failed. On 15 December 2015, the delegate warned the plaintiff that "it is a mandatory requirement for the grant of this visa that [the plaintiff] provide evidence that [he] had applied for a skills assessment before the day on which the application was made" and, in light of that requirement, informed the plaintiff that he "may prefer to withdraw the application".

6 On 27 January 2016, the delegate made the decision to refuse the plaintiff's application for the Graduate Work visa on the basis that the plaintiff had not applied for a skills assessment prior to lodging his application and, therefore, did not meet the requirements for the visa to be granted.

7 On 16 February 2016, the plaintiff applied to the Tribunal for merits review of the delegate's decision. At the conclusion of a hearing on 26 October 2016, the Tribunal made an oral decision to affirm the delegate's decision for the following reasons, as stated in writing:

> "Based on the evidence before me, including oral evidence given at the hearing, I am not satisfied that you meet the regulation 485.223 because, when you applied for this visa on 19 August 2015 you have not provided, or that application was not accompanied by the evidence that you applied for skill assessments for your nominated occupation by a relevant assessing authority. You have also told me that the skills assessment application lodged on 5 December 2015 was subsequently refused, and that you were banned for 12 months from reapplying for skill assessment because of substantial amount of plagiarism that was discovered by the Institute for Engineers. So, based on all of that evidence, I am affirming the decision made by the Department not to grant you subclass 485 visa."

8 On 11 November 2016, the plaintiff applied to the Federal Circuit Court for judicial review of the Tribunal's decision, originally on 18 grounds but

subsequently on only two grounds advanced by counsel on behalf of the plaintiff before that Court. Those grounds were in substance:

(1) that the Tribunal had erred in failing to find that the plaintiff was entitled to rely upon the previous skills assessment of 29 January 2014; and

(2) that, perforce of ss 54, 55 and 56 of the *Migration Act 1958* (Cth), the application for a visa included everything given to the Minister up to the point at which the delegate's decision was made and, therefore, included the evidence provided to the Minister in December 2015 that the plaintiff had lodged an application for skills assessment in November 2015.

9 Judge Riethmuller rejected[2] both grounds as directly contrary to the decision of the Full Court of the Federal Court in *Khan v Minister for Immigration and Border Protection*[3]: that cl 485.223 aims to ensure that a person who applies for a visa has already applied for a skills assessment and is thus "ready and willing to undergo the assessment at the earliest opportunity"; that, had the clause not been enacted in that form, an applicant might be able to "use the visa application process, including processes associated with merits review by the Tribunal, to expand the time in which he or she acquires the skills necessary to fulfil the substantive visa criterion"; and that ss 54, 55 and 56 did not avail an applicant because evidence of a positive skills assessment after the application has been lodged is not "relevant information for the purposes of cl 485.223". Judge Riethmuller also noted[4] that the Full Court in *Khan* did not expressly approve[5] statements in *Anand v Minister for Immigration and Citizenship*[6] and *Nguyen v Minister for Immigration and Border Protection*[7] to the effect that an application might be "accompanied by" evidence not provided with the application, but concluded that, even if "some flexibility was contemplated", the period between the lodgement of the plaintiff's application and the provision of proper application

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2 [2019] FCCA 655 at [9], [13].

3 [2018] FCAFC 85 at [17], [23] per Tracey J (Charlesworth and Derrington JJ agreeing at [28], [33]).

4 [2019] FCCA 655 at [14].

5 [2018] FCAFC 85 at [15] per Tracey J (Charlesworth and Derrington JJ agreeing at [28], [33]).

6 (2013) 215 FCR 562 at 568 [27]-[28] per Katzmann J.

7 (2016) 310 FLR 339 at 346 [40] per Judge Burchardt.

for a skills assessment was "far too long to come within the terms 'accompanied by'".

10 On 28 March 2019, the plaintiff appealed to the Federal Court on a miscellany of grounds, which in large part repeated arguments rejected by Judge Riethmuller. The primary grounds were expressed as follows:

> "The [Tribunal] and [Judge Riethmuller] committed a legal error when they failed to follow the law settled in Berenguel v Minister for Immigration and Citizenship[8], that a time of application criterion could be satisfied by providing an information after the lodgement of the application. Also there is an exceptional circumstances exist as skill assessment has been refused and barred at the time of the application as appellant had to wait for one year to reply for skill assessment. But at the time of Judicial Review appellant had the positive skill assessment which is to considered, but it hasn't been considered." (errors in original)

No written submissions were provided in support of the grounds.

11 On 27 November 2019, Anastassiou J dismissed the appeal. His Honour rejected all grounds of appeal, upheld Judge Riethmuller's reasoning as to the application of *Khan*, and held, contrary to the plaintiff's contentions, that cl 485.223 required "strict compliance".

Grounds of application

12 The plaintiff's grounds of application to this Court repeat the grounds of appeal before Anastassiou J extracted above and continue:

> "Tribunal did not give any extension of time to solve the problem. Tribunal did not discuss anything in it decision why tribunal cant extend the time to get the skill assessment. Further Tribunal did to accept the exceptional circumstances, during the judicial review primary judge decision is plainly unfair, unjust and unreasonable. Because s.55 minister still consider the material of appellant if primary judge had assessed the appellants review according to the act. Also s.54 was subject to my visa.
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> Above information hasn't been discussed in depth by Justice of Federal court That is reason I am bringing my case to High court on Show cause grounds because of I believe this all happened by tribunal if the tribunal did give extension of time I would have got the skill assessment at

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8 (2010) 84 ALJR 251; 264 ALR 417.

the Tribunal decision where I would have met the criterion of clause 485.223 Migration Regulations 1994." (errors in original)

Abuse of process

13 As appears from the application, the plaintiff, having to this point failed at every level up to and including the Federal Court, and without troubling to apply for special leave to appeal from the decision of the Federal Court to this Court, seeks to invoke this Court's jurisdiction under s 75(v) of the *Constitution* to compel the Tribunal to reconsider the matter afresh, on the basis of grounds rejected in the courts below. Such "[u]nnecessary recourse to this Court by way of the prerogative" – or constitutional – "writs" has long been deprecated[9]. Thus, even if grounds for judicial review were established by the plaintiff, this Court would be disposed to exercise its discretion to refuse the extraordinary relief sought unless satisfied that the remedy by ordinary appellate process is "less convenient, beneficial and effective"[10] in the interests of the parties or the public[11]. And that is so notwithstanding that the ordinary appellate process available to the plaintiff would require him to obtain special leave to appeal[12]. Consequently, as this Court

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9 *R v Cook; Ex parte Twigg* (1980) 147 CLR 15 at 34 per Wilson J. See also *Re Wilkie; Ex parte Johnston* (1980) 55 ALJR 191 at 192 per Gibbs J (Stephen, Murphy, Aickin and Wilson JJ agreeing at 192); 33 ALR 660 at 661.

10 *R v Ross-Jones; Ex parte Beaumont* (1979) 141 CLR 504 at 518 per Jacobs J. See also and compare *Twigg* (1980) 147 CLR 15 at 29 per Mason J, 30 per Murphy J; *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 193-194 per Gibbs CJ (Mason J agreeing at 203), 204 per Murphy J, 218-220 per Brennan J, 222 per Deane J; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 375 per Mason J, 384-385 per Deane J; *Re Griffin; Ex parte Professional Radio and Electronics Institute (Aust)* (1988) 167 CLR 37 at 41 per Brennan J.

11 See, eg, *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 230-231 per Mason J as to matters involving a "constitutional question"; *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at 1093 [33] per Gummow and Callinan JJ (Hayne J agreeing at 1102 [95]); 197 ALR 389 at 395-396, 408 as to the effect of privative clauses.

12 *Glennan v Commissioner of Taxation* (2003) 77 ALJR 1195 at 1198 [17] per Gummow, Hayne and Callinan JJ; 198 ALR 250 at 254-255. See also *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 641 [103] per Gaudron and Kirby JJ; *Re Carmody; Ex parte Glennan* (2000) 74 ALJR 1148 at 1150 [4] per Kirby J; 173 ALR 145 at 147; *Re Heerey; Ex parte Heinrich* (2001) 185 ALR 106 at 109 [17] per Kirby J; *Re Minister for Immigration and Multicultural*

has recently made clear on several occasions[13], to seek review of a judgment on the merits by application for constitutional or other writs, rather than by application for special leave to appeal, without any explanation for the departure from the ordinary course, is an abuse of process.

14 In any event, the application does not present an arguable basis for the relief sought. Judge Riethmuller and Anastassiou J were correct that the reasoning of the Full Court in *Khan* is determinative. In contradistinction to provisions of the kind considered in *Berenguel*[14], which direct attention to whether an applicant "has" prescribed skills at the time of application, cl 485.223 refers to whether the application itself "was accompanied by" prescribed evidence. As this Court indicated in *Berenguel*[15], the difference in terms reflects a difference in effect: that criteria of the former, but *not* the latter, kind may be satisfied by evidence provided to the Minister after the time of submitting the application and considered in accordance with ss 54, 55 and 56 of the *Migration Act*. And, as Tracey J reasoned in *Khan*, the form of cl 485.223 is evidently to ensure that an applicant for a visa has applied for a skills assessment and thus demonstrated a readiness and willingness to undergo the assessment at the earliest opportunity. Were it otherwise, as Tracey J recognised, an applicant could delay acquiring the skills necessary to fulfil the substantive visa criterion for so long as the visa application and any merits review processes were on foot. And, even then, the question of whether the plaintiff had acquired a positive skills assessment by the time of the judicial review proceedings would be irrelevant.

Disposition

15 That being so, it is appropriate that this application be dismissed without an oral hearing pursuant to r 25.09.1 of the *High Court Rules 2004* (Cth). It is ordered that the application be dismissed with costs.

Affairs; Ex parte Applicant S20/2002 (2003) 77 ALJR 1165 at 1190 [151] per Kirby J; 198 ALR 59 at 93; *Dranichnikov* (2003) 77 ALJR 1088 at 1101 [84] per Kirby J; 197 ALR 389 at 406.

13 See, eg, *Plaintiff S3/2013 v Minister for Immigration and Citizenship* (2013) 87 ALJR 676 at 678 [13] per Gageler J; 297 ALR 560 at 563; *Bosanac v Federal Commissioner of Taxation* (2019) 93 ALJR 1327 at 1330 [5] per Nettle J; 374 ALR 425 at 427.

14 *Migration Regulations*, Sch 2, cl 885.213.

15 (2010) 84 ALJR 251 at 254 [17], 255 [24] per French CJ, Gummow and Crennan JJ; 264 ALR 417 at 421, 422, referring to *Migration Regulations*, Sch 2, cll 885.214, 885.215, which contained relevantly identical terms to cl 485.223.