TAHIRI v MINISTER FOR IMMIGRATION AND CITIZENSHIP

HIGH COURT OF AUSTRALIA

FRENCH CJ, BELL and GAGELER JJ

7, 13 December 2012

[2012] HCA 61

Citizenship and migration — Visa — Application for subclass 202 refugee and humanitarian (class XB) visa by mother together with four children under 18 years old — Whether delegate committed jurisdictional error in finding that the applicant failed to demonstrate compliance with paras (a) or (b) of public interest criterion 4015 — Whether denial of natural justice — Public interest criterion 4015 — (CTH) Migration Regulations 1994.

The plaintiff's mother (Mrs Tahiri) was a citizen of Afghanistan. Mrs Tahiri made an application for a subclass 202 refugee and humanitarian (class XB) visa. The application was combined with those of four of her children under 18 years old (including the plaintiff) who were also citizens of Afghanistan. At the time of the application, Mrs Tahiri had been living illegally in Pakistan for 6 years, and the applicant's father was missing and his whereabouts had been unknown for 7 years.

The Migration Regulations 1994 (Cth) required that one of the three criteria in public interest criterion 4015 (PIC 4015) be satisfied. Relevantly, paras (a) and (b) of PIC 4015 required the minister to be satisfied either that: (a) the law of the additional applicant's home country permitted the removal of the additional applicant; or (b) each person who could lawfully determine where the additional applicant was to live consented to the grant of the visa.

A delegate of the minister refused the applications of Mrs Tahiri and the four children because the delegate was not satisfied that PIC 4015 was satisfied in relation to the children. The plaintiff challenged that decision by proceedings in the original jurisdiction of the High Court of Australia.

On the hearing, the issues for the court to determine were:

(1) whether the delegate erred in finding that para (a) of PIC 4015 was not satisfied;
(2) whether the delegate erred in finding that para (b) of PIC 4015 was not satisfied; and
(3) whether the decision was made in breach of the rules of natural justice.

Held, per French CJ, Bell and Gageler JJ, dismissing the application:

Whether the delegate erred in finding that para (a) of PIC 4015 was not satisfied

(i) Satisfaction of the application of the paragraph requires a finding as to the "home country" of an additional applicant and a finding as to the law of that country: at [14].

(ii) The definition of "home country" sets the default position as the country of a person's citizenship. Another country becomes the "home country" only if the person is not "usually resident" in the person's country of citizenship and the person is "usually a resident" of that other country. In this context, there is no difference in concept between where a person is "usually resident" and where a person is "usually a resident". It is apparent that a person may not be "usually resident" in the person's country of citizenship without necessarily being "usually a resident" of another country. However, it is equally apparent that a person who is "usually a resident" of another country cannot be "usually resident" in the person's country of citizenship. Whether a person's home country is a country other than that of the person's citizenship therefore turns on whether or not the person is "usually a resident" of that country: at [15].

(iii) Whether a person is "usually a resident" of a country other than that of the person's citizenship is a question of fact. "Usual residence" in this context, like "habitual residence" in the context of the convention on the Civil Aspects of International Child Abduction, "fall[s] for decision in a very wide range of circumstances" and involves a "broad factual inquiry", factors relevant to which include "the actual and intended length of stay in a state, the purpose of the stay, the strength of ties to the state and to any other state (both in the past and currently), [and] the degree of assimilation into the state": at [16].

(iv) Assuming the delegate to have accepted that the children had lived with Mrs Tahiri at an address in Pakistan for over 6 years before the making of the application, that factor alone was not sufficient to compel the conclusion that they were each "usually a resident" of Pakistan. The circumstances of their arrival, the fact that they were illegal residents in Pakistan and the fact that they had recently visited Afghanistan were capable of being considered countervailing factors: at [17].

Whether the delegate erred in finding that para (b) of PIC 4015 was not satisfied

(v) Unlike para (a), para (b) does not require the identification of a single country whose system of law provides other persons with an ability to determine where the additional applicant is to live. The expression "person who can lawfully determine" refers to a person who has a legal ability, alone or with others, to determine where the additional applicant is to live. The legal ability need not arise under Australian law and is not to be determined through the application of Australian choice of law rules. The legal ability may arise under any system of law that governs the relationship between such a person and the additional applicant: at [18].

(vi) The content of foreign law is a question of fact. The plaintiff did not establish that the delegate could not reasonably take the view that Afghan law applied to the relationships between the children and their father, if he were alive, and between the children and his relatives, if he were dead. Nor did the plaintiff establish that the delegate could not reasonably take the view that, under Afghan law, persons who could determine where the children were to live included the husband, if he were alive, and relatives of the husband, if he were dead: at [21].

(vii) In respect of whether the decision was made in breach of the rules of natural justice, Mrs Tahiri was sufficiently alerted to the critical issues on which the application turned: at [23].

Application

This was an application made in the original jurisdiction of the High Court of Australia pursuant to s 75(v) of the Constitution.

L G De Ferrari and *K E Grinberg* instructed by *Victoria Legal Aid* for the plaintiff (Javed Hussain Tahiri).

S B Lloyd SC and *C J Horan* instructed by the *Australian Government Solicitor* for the defendant (Minister for Immigration and Citizenship).

[1] French CJ, Bell and Gageler JJ. This special case in proceedings in the original jurisdiction of the High Court under s 75(v) of the Constitution raises questions about the meaning and application of a standard criterion for the grant of a visa to an applicant whose application is combined with that of his or her child. The special case poses four questions. Those questions and the answers are set out at the end of these reasons.

Legislation

[2] The Migration Act 1958 (Cth) (the Act) allows regulations made under the Act to prescribe classes of visas in addition to classes for which provision is made in the Act,[1] and to prescribe criteria for visas of a specified class including a class for which provision is made in the Act.[2]

[3] The Migration Regulations 1994 (Cth) (the Regulations) made under the Act prescribe a class of visa called a refugee and humanitarian (class XB) visa, in respect of which there are several subclasses.[3] The prescribed criteria for a subclass 202 refugee and humanitarian (class XB) visa include that the applicant is a person who is outside Australia, whose entry to Australia has been proposed by the holder of a subclass 866 (protection) visa, and who is a "member of the immediate family" of the proposer.[4] A person is a member of the immediate family of the proposer only if the person is a spouse or de facto partner, or a dependent child of the proposer, or if the person is a parent of a proposer who is under 18 years old.[5]

[4] Persons who are under 18 years old, who are not engaged to be married, who do not have spouses or de facto partners, and who are children of an applicant for a subclass 202 refugee and humanitarian (class XB) visa, can make a combined application so as to become additional applicants.[6] The prescribed criteria include that certain "public interest criteria" are satisfied in relation to additional applicants.[7] One of those public interest criteria, public interest criterion 4015 (PIC 4015), is expressed as follows:[8]

> The Minister is satisfied of 1 of the following:
>
> (a) the law of the additional applicant's home country permits the removal of the additional applicant;
>
> (b) each person who can lawfully determine where the additional applicant is to live consents to the grant of the visa;
>
> (c) the grant of the visa would be consistent with any Australian child order in force in relation to the additional applicant.

[5] PIC 4015 is a standard criterion for the grant of a visa to a child of a primary applicant. The expression "home country", which appears in para (a) of PIC 4015, appears also in many other provisions of the regulations. The expression is defined for the purposes of the regulations as follows:[9]

> *home country*, in relation to a person, means:
>
> (a) the country of which the person is a citizen; or
>
> (b) if the person is not usually resident in that country, the country of which the person is usually a resident.

1. Section 31(1) and (2) of the Act.
2. Section 31(3) of the Act.
3. Item 1402 of Pt 4 of Sch 1 to the Regulations.
4. Division 202.2 of Sch 2 to the Regulations.
5. Regulation 1.12AA of the Regulations.
6. Clause 202.228 of Sch 2 to, and regs 1.12 and 1.03 (dependent child) of, the Regulations.
7. Clause 202.228 of Sch 2 to the Regulations.
8. Item 4015 of Sch 4 to the Regulations.
9. Regulation 1.03 of the Regulations.

[6] The expression "Australian child order", which appears in para (c) of PIC 4015, is defined for the purposes of the regulations to have the meaning in s 70L(1) of the Family Law Act 1975 (Cth).[10] That meaning encompasses a parenting order made under Pt VII of the Family Law Act, to the extent to which the parenting order deals with whom a child is to live or spend time with or who is responsible for a child's day-to-day care,[11] as well as an order made under the law of an Australian State that provides for a person or persons to have custody of, contact with or access to a child who is under 18 or that has the effect of determining the person or persons with whom such a child is to live or providing for the person or persons with whom such a child is to spend time.[12]

Facts

[7] The plaintiff is a citizen of Afghanistan. He arrived in Australia, unaccompanied, as a 17-year-old. He was granted a subclass 866 (protection) visa. The plaintiff's mother (Mrs Tahiri) is also a citizen of Afghanistan. On the plaintiff's proposal, Mrs Tahiri made an application for a subclass 202 refugee and humanitarian (class XB) visa. The application was combined with those of four of her children under 18 years old who are also citizens of Afghanistan.

[8] A delegate of the minister refused the applications of Mrs Tahiri and the four children because the delegate was not satisfied that PIC 4015 was satisfied in relation to the children. The plaintiff challenges that refusal as erroneous in law and as wanting procedural fairness.

[9] The delegate was required by the Act to notify Mrs Tahiri of the refusal and to specify the criterion not satisfied,[13] but was not required to give reasons as to why the criterion was not satisfied.[14] The delegate in fact gave no reasons. The special case nevertheless attaches records of the Department of Immigration and Citizenship (the department) from which inferences can be drawn as to what those reasons were.[15]

[10] Mrs Tahiri said in the application that her current country of residence was Pakistan, where her status was that of an illegal resident. She said that she had lived at an address in Pakistan for over 6 years together with the children who were included as additional applicants. She said that her husband, who was the father of the children and who was not included in the application, was missing. She later explained to an officer of the department in an interview that her husband had left 7 years earlier to go to Kandahar to work and had "disappeared", following which she moved to Pakistan. She also explained that she had recently visited Afghanistan with the children. The delegate later wrote to Mrs Tahiri inviting her to provide evidence that the children satisfied PIC 4015. The letter set out the terms of PIC 4015 and pointed out that there was no evidence that "[t]he law of Afghanistan permits the removal of the children" and no evidence that "[e]ach person who can determine where the children will live has given their consent". In response, Mrs Tahiri provided what purported to be an English translation of a document emanating from the "Aram High Court, Kabul, Afghanistan". It stated that her husband "was missing from 8 years ago"

10. Regulation 1.03 of the Regulations.
11. Section 4(1) of the Family Law Act (Subdiv C parenting order).
12. Section 4(1) of the Family Law Act (state child order).
13. Section 66(1) and (2)(a) of the Act.
14. Section 66(2)(c) and (3) of the Act.
15. Rule 27.08.5 of the High Court Rules 2004 (Cth).

and that "the High Court, Afghanistan" did not have any objection to the children "leaving Afghanistan for any country". Mrs Tahiri later provided what purported to be the Persian original. When an officer of the department put to her in a telephone interview that the documents were not genuine, she explained that she had asked someone to prepare them and had paid money for that purpose to someone she did not know.

[11] In refusing the applications of Mrs Tahiri and the four children, the delegate recorded that the content of the file had been "reviewed" and that there existed "concerns … as to the right for [Mrs Tahiri] to determine where the minor children will live". The record noted that during her interview Mrs Tahiri had claimed that her husband had gone to Kandahar for work 7 years before and had not returned. The record further stated that Mrs Tahiri:

> … did not present any evidence to suggest that the husband is deceased and from what we know about the movement and migration for work and asylum seeking purposes, there are several possible scenarios with regard to his current location.

The record went on to note that Mrs Tahiri had been given an opportunity to present evidence of her ability under the law of Afghanistan to remove the children but that the documents provided by her were "non genuine" and were to be given "little weight … positive or negative". The record set out the delegate's conclusion:

> On balance I am not satisfied that the law of Afghanistan would permit the removal of the children in the circumstances claimed and we do not have any evidence as to the consent of persons who have the right to determine where the child will live, nor an Australian child order. In both Afghan law and custom, the custody of the minor children would fall to the father's side if there were credible and substantial evidence of the death of the father. On balance I am not satisfied that the public interest criterion 4015 is met in relation to this case … application refused accordingly.

[12] It may be inferred that the delegate's reasons for not being satisfied that PIC 4015 was satisfied in relation to the children were as follows. The delegate found that the "home country" of each of the children was Afghanistan. The delegate found that Mrs Tahiri's husband had been missing for more than 7 years since he had gone to Kandahar for work. The delegate made no finding as to whether the husband was alive or dead or, if alive, where he might be located. The delegate found that, under Afghan law, persons who could determine where the children were to live included the husband, if he were alive, and relatives of the husband, if he were dead. In respect of para (a) of PIC 4015, the delegate was not satisfied that the law of Afghanistan would permit the removal of children. In respect of para (b) of PIC 4015, the delegate was not satisfied that the husband or relatives of the husband consented to the grant of the visa. Paragraph (c) of PIC 4015 was irrelevant as there was no Australian child order.

Error of law?

[13] The delegate was required to decide whether or not to be satisfied that PIC 4015 was satisfied in relation to the children reasonably and on a correct legal understanding of PIC 4015.[16] The focus of the first two questions of the special case is on whether the delegate's decision was based on a correct legal understanding of paras (a) and (b) of PIC 4015.

16. *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135; 169 ALR 400; 60 ALD 342; [2000] HCA 5 at [34].

[14] Paragraph (a) of PIC 4015 is expressed in terms that "the law of the additional applicant's home country permits the removal of the additional applicant". Satisfaction of the application of the paragraph requires a finding as to the "home country" of an additional applicant and a finding as to the law of that country.

[15] The definition of "home country" sets the default position as the country of a person's citizenship. Another country becomes the "home country" only if the person is not "usually resident" in the person's country of citizenship and the person is "usually a resident" of that other country. In this context, there is no difference in concept between where a person is "usually resident" and where a person is "usually a resident"; the difference in expression in the definition is grammatical. It is apparent that a person may not be "usually resident" in the person's country of citizenship without necessarily being "usually a resident" of another country. However, it is equally apparent that a person who is "usually a resident" of another country cannot be "usually resident" in the person's country of citizenship. Whether a person's home country is a country other than that of the person's citizenship therefore turns on whether or not the person is "usually a resident" of that country.

[16] Whether a person is "usually a resident" of a country other than that of the person's citizenship is a question of fact. "Usual residence" in this context, like "habitual residence" in the context of the Convention on the Civil Aspects of International Child Abduction, "fall[s] for decision in a very wide range of circumstances"[17] and involves a "broad factual inquiry", factors relevant to which include "the actual and intended length of stay in a state, the purpose of the stay, the strength of ties to the state and to any other state (both in the past and currently), [and] the degree of assimilation into the state".[18]

[17] The plaintiff argues that it was not open to the delegate to find that the "home country" of the children was Afghanistan, on the basis that the only finding the delegate could reasonably have made on a correct legal understanding of para (a) of PIC 4015 was that each of the children was "usually a resident" of Pakistan. The argument cannot be sustained. Assuming the delegate to have accepted that the children had lived with Mrs Tahiri at an address in Pakistan for over 6 years before the making of the application, that factor alone was not sufficient to compel the conclusion that they were each "usually a resident" of Pakistan. The circumstances of their arrival, the fact that they were illegal residents in Pakistan and the fact that they had recently visited Afghanistan were capable of being considered countervailing factors.

[18] Paragraph (b) of PIC 4015 is expressed in terms that "each person who can lawfully determine where the additional applicant is to live consents to the grant of the visa". Unlike para (a), para (b) does not require the identification of a single country whose system of law provides other persons with an ability to determine where the additional applicant is to live. The expression "person who can lawfully determine" refers to a person who has a legal ability, alone or with others, to determine where the additional applicant is to live. The legal ability need not arise under Australian law and is not to be determined through the

17. *LK v Director-General, Department of Community Services* (2009) 237 CLR 582; 253 ALR 202; 40 Fam LR 495; [2009] HCA 9 at [35] (*LK*).
18. *LK* at [44], quoting *P v Secretary for Justice* [2007] 1 NZLR 40 at [88].

application of Australian choice of law rules. The legal ability may arise under any system of law that governs the relationship between such a person and the additional applicant.

[19] The plaintiff argues that the only finding the delegate could reasonably have made on a correct legal understanding of para (b) of PIC 4015 was that Mrs Tahiri was the only person who could lawfully determine where the children were to live. The argument is put on alternative bases. One is that, assuming him to be alive, the fact that the father had been missing for many years meant that he could have no responsibility for the children. The other is that the fact that the father had been missing for more than 7 years meant that he should be presumed to be dead under the common law of Australia.

[20] It is unnecessary to consider whether the circumstances of the father's disappearance, as known to the delegate, were sufficient to attract the common law presumption that a person is presumed dead where the person has not been heard of for 7 years by persons who would be expected to hear from the person if the person were alive.[19] It is also unnecessary to consider whether that common law presumption governs administrative decision-making. Mrs Tahiri did not claim that her husband was dead and the decision of the delegate did not turn on whether he was dead or alive.

[21] The content of foreign law is a question of fact.[20] The plaintiff has not established that the delegate could not reasonably take the view that Afghan law applied to the relationships between the children and their father, if he were alive, and between the children and his relatives, if he were dead. Nor has the plaintiff established that the delegate could not reasonably take the view that, under Afghan law, persons who could determine where the children were to live included the husband, if he were alive, and relatives of the husband, if he were dead.

Want of procedural fairness?

[22] The delegate was required to observe procedural fairness, which required that Mrs Tahiri be given the opportunity of ascertaining the relevant issues and be informed of the nature and content of any adverse material.[21] The focus of the third question in the special case is on whether that occurred.

[23] Mrs Tahiri was sufficiently alerted to the critical issues on which the application turned by the letter which set out the terms of PIC 4015 and invited her to provide evidence that PIC 4015 was satisfied in relation to the children. By pointing out that there was no evidence that "[t]he law of Afghanistan permits the removal of the children", the letter drew attention to what appears then already to have been the provisional view of the delegate that the children's "home country" was Afghanistan. By pointing out that there was no evidence that "[e]ach person who can determine where the children will live has given their consent", the letter also drew attention to the relevance of the consent of each person who could lawfully determine where the children were to live.

19. *Axon v Axon* (1937) 59 CLR 395 at 401 and 405; [1938] ALR 89 at 90–1 and 92; [1937] HCA 80.
20. *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331; 221 ALR 213; [2005] HCA 54 at [115].
21. *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152; 231 ALR 592; 93 ALD 300; [2006] HCA 63 at [32], quoting *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 590–1; 127 ALR 699 at 713–14; 34 ALD 324 at 329–30.

[24] The plaintiff argues that the reference by the delegate to "what we know about the movement and migration for work and asylum seeking purposes" in recording that there were "several possible scenarios" with regard to the husband's current location shows that the delegate took into account adverse material of which procedural fairness required Mrs Tahiri to be informed. That the delegate referred to undisclosed material may be acknowledged but the material has not been shown to be adverse in any relevant sense. The delegate did not treat it as contradicting Mrs Tahiri's claim that the husband was missing and did not use it to make any finding as to the husband's current location assuming him to be alive.

Order

[25] The questions stated in the special case should be answered as follows:

Question 1
Did the Delegate make a jurisdictional error in finding that para (a) of PIC 4015 was not satisfied in relation to each additional applicant?
Answer
No.
Question 2
Did the Delegate make a jurisdictional error in finding that para (b) of PIC 4015 was not satisfied in relation to each additional applicant?
Answer
No.
Question 3
Was the Decision made in breach of the rules of natural justice?
Answer
No.
Question 4
Who should pay the costs of this special case?
Answer
The plaintiff.

JONATHON DOOLEY
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