IN THE COURT OF APPEAL OF NEW ZEALAND

CA410/2016
[2016] NZCA 546

BETWEEN	RAM CHANDER DAHIYA Applicant
AND	CHIEF EXECUTIVE OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Respondent

Court: Miller, Asher and Brown JJ

Counsel: Applicant in person
C Paterson and N Copeland for Respondent

Judgment: (On the papers) 22 November 2016 at 11.30 am

JUDGMENT OF THE COURT

A The application for an extension of time under r 5(2) of the Court of Appeal (Civil) Rules 2005 is declined.

B The applicant must pay the respondent costs as for an application for leave to appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] Applications by Mr Dahiya and his wife to Immigration New Zealand (INZ) for permanent resident visas (PRVs) were declined on 30 April 2015, and an appeal

to the Immigration and Protection Tribunal (the Tribunal) dismissed on 18 January 2016.[1] Mr Dahiya's application to the High Court under s 245 of the Immigration Act 2009 for leave to appeal the Tribunal's decision was declined by Lang J on 8 June 2016.[2]

[2] Mr Dahiya subsequently applied to this Court for leave to appeal against Lang J's judgment. Under r 14(2)(b) of the Court of Appeal (Civil) Rules 2005 (the Rules) that application was required to be made within 20 working days after the High Court's refusal of leave. However, Mr Dahiya's application for leave to appeal was not filed until 17 August 2016. Consequently he requires an extension of time.

[3] Mr Dahiya's application for an extension of time is made in purported reliance on r 29A of the Rules. That rule is not applicable as it relates only to extensions of time for filing appeals. However, we consider we have jurisdiction to entertain the application under r 5(2) of the Rules.

[4] Mr Dahiya is self-represented and currently resides in India. He agrees to the application for extension of time being heard on the papers.

Material facts

[5] When Mr Dahiya (and his wife) first arrived in New Zealand on 30 July 2010 he was granted a residence permit and returning resident visa (RRV) valid for two years. He returned to India on 3 July 2012.

[6] On 6 September 2012, while Mr Dahiya was still outside New Zealand, he and his wife applied for PRVs. The relevant residence instructions certified by the Minister of Immigration (the Minister) at that time required an applicant for a PRV to hold a current resident visa and to have spent at least 184 days in New Zealand in each of the preceding two 12-month periods. INZ calculated that Mr Dahiya had spent 207 days in New Zealand during the 12-month period ending 6 September 2011 but only 150 days in the 12-month period ending on 6 September 2012. For

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1 *Re AM (Permanent Resident)* [2016] NZIPT 202924.

2 *Dahiya v Chief Executive of the Ministry of Business Innovation and Employment* [2016] NZHC 1217.

that reason, INZ determined that Mr Dahiya and his wife did not qualify for PRVs. Instead, on 11 September 2012, it elected to issue them both with second/subsequent resident visas (SSRVs) with travel conditions that expired on 11 September 2013. Although INZ inserted the new visas into their passports, it did not separately communicate with them to explain that they did not meet the criteria for PRVs but had instead been issued with SSRVs.

[7] Mr Dahiya and his wife returned to New Zealand between 1 February and 9 March 2013 but have not returned since that time. In February 2015 Mr Dahiya applied to have his New Zealand visa transferred to his new passport. It was then he learned for the first time that he and his wife had been issued with SSRVs rather than PRVs and that the travel conditions attached to the SSRVs had expired in September 2013 whilst they were outside New Zealand. This meant the SSRVs had become invalid.

[8] In March 2015 Mr Dahiya and his wife made further applications for PRVs or SSRVs. These were declined by INZ, again on the basis that the residency requirements were not met. Mr Dahiya appealed this decision to the Tribunal.

[9] The decision of INZ declining the visa applications was upheld by the Tribunal on the basis that INZ had correctly applied the relevant residence instructions.[3] The Tribunal also found that there were no special circumstances warranting a recommendation to the Minister under s 188(1)(f) of the Immigration Act that Mr Dahiya and his wife be considered for an exception to those instructions.[4]

High Court decision

[10] In the application for leave to appeal to the High Court Mr Dahiya did not contest the correctness of the decision reached by INZ and the Tribunal that he and his wife did not qualify for PRVs or SSRVs. Instead, he contended that the Tribunal

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3 *Re AM (Permanent Resident)*, above n 1, at [32]–[34].
4 At [50].

wrongfully concluded that there were no special circumstances to justify a recommendation to the Minister that they be issued with the visas sought.

[11] In finding that the criteria to justify a second appeal had not been established Lang J noted:

(a) There is no statutory provision requiring INZ to provide visa holders with separate advice regarding the nature of their visas. Mr Dahiya and his wife bore the onus of ensuring they were aware of the terms of the visas entered in their passports.[5]

(b) Mr Dahiya declined to take up the Tribunal's invitation to detail the steps that they would have taken if they had been aware of the true position.[6]

(c) The Tribunal applied the correct principles in considering the issue of special circumstances.[7] Consequently Mr Dahiya was effectively restricted to arguing that the Tribunal was wrong to find that the circumstances in which Mr Dahiya and his wife found themselves did not constitute special circumstances for the purposes of s 188(1)(f) of the Immigration Act. However, Lang J considered their circumstances did not have any significance or importance that extended beyond the instant case.[8]

[12] Lang J further observed that the decision would not prevent Mr Dahiya and his wife from maintaining contact with their son and his family in New Zealand as they remained free to travel between India, Australia (where their other two sons reside) and New Zealand using visitor's permits.[9]

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5 *Dahiya*, above n 2, at [21].
6 At [22].
7 At [23] noting the test as set out by this Court in *Rajan v Minister of Immigration* [2004] NZAR 615 (CA) at [24].
8 At [25] citing *Songmia v Minister of Immigration* [2013] NZHC 3233.
9 At [26].

Analysis

[13] Although the application for an extension of time is to be dealt with under r 5(2) of the Rules, we consider that the principles applicable to an extension of time to appeal under r 29A are relevant here.[10]

[14] The period of delay was not long. The time for filing an application for leave to appeal in this Court expired on 6 July 2016. Mr Dahiya's application was not filed until 17 August 2016. The explanation for the delay lies in Mr Dahiya's lack of familiarity with the processes in filing applications in this Court. The delay in itself has not prejudiced the respondent. These factors all favour granting an extension of time.

[15] However in our view those factors are outweighed by the consideration that the proposed appeal lacks merit. Appeals to the High Court under s 245(1) of the Immigration Act are confined to determinations by the Tribunal which are erroneous in point of law. Furthermore, s 245(3) states:

> **245 Appeal to the High Court on point of law by leave**
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> …
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> (3) In determining whether to grant leave to appeal under this section, the court to which the application for leave is made must have regard to whether the question of law involved in the appeal is one that by reason of its general or public importance or for any other reason ought to be submitted to the High Court for its decision.

[16] It is apparent from the notice of application for leave to appeal, Mr Dahiya's detailed written submission and reply to the respondent's synopsis of submissions that Mr Dahiya strongly believes that he and his wife have suffered a grave injustice. Those submissions reflect their frustration at being pressed to identify questions of law raised by their proposed appeal. By way of example they submit:

> If a holistic view is taken of the whole case, natural justice has not taken place and this in itself is a big, huge and serious question of law. The laws have clearly been flouted, ignored and bypassed and just not cared for by the authorities and moreover we are simply being accused. Natural justice should have been seen in restoring our visa status along with awarding

[10] *My Noodle Ltd v Queenstown-Lakes District Council* [2009] NZCA 244, (2009) 19 PRNZ 518 at [19].

> enough monetary compensation for the torture, harassment that we have gone through solely due to the fault of INZ's not issuing us the statutorily required visa explanatory letter (Visa Approval Letter).

Despite their best endeavours and their reliance on the maxim res ipsa loquitur, the reality is that none of the several matters to which they refer raises any question of law in respect of the Tribunal's decision, let alone one that satisfies the threshold of general or public importance.

[17] Nor, in view of the several matters noted by Lang J recited above at [11], is it demonstrated that there is any other reason which would warrant a further appeal from the Tribunal to the High Court.

[18] We note that Mr Dahiya attacks the judgment of Lang J as highly prejudicial, biased and one-sided. We do not accept that such allegations are well-founded but, in any event, the question of law to be appealed must stem from the Tribunal's decision.

[19] In our view there is simply no point in this Court extending the time for making an application for leave to appeal when the criteria to which regard must be had on such an application could not be established. In those circumstances we are satisfied that it is not in the interests of justice to grant an extension of time. The application for an extension of time is accordingly declined.

[20] We see no reason to depart from the ordinary rule that an unsuccessful party should pay the successful party costs. Accordingly Mr Dahiya is to pay the respondent costs as for an application for leave to appeal on a band A basis and usual disbursements.

Solicitors:
Meredith Connell, Auckland for Respondent