

# MIGRATION LAW: MASTERING VISA APPLICATIONS AND APPEALS - HOW TO DRAFT JUDICIAL REVIEW APPLICATIONS

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1

## COVERAGE

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- Identifying grounds for judicial review - and are they necessary?
- Drafting considerations
- Examples of judicial review applications
- Related procedural aspects
- Practical tips

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## IDENTIFYING GROUNDS FOR JUDICIAL REVIEW

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3 tiers:

(i) Jurisdictional error/constructive failure to exercise jurisdiction

(ii) *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 per Lord Diplock:

- Procedural impropriety: unfair procedures were adopted
- Illegality: breach of a legal constraint on power
- Irrationality: an unacceptable result

(iii) Possible judicial review grounds: identifying a wrong question, ignoring relevant material, relying on irrelevant material, and (in some circumstances) making an erroneous finding or reaching a mistaken conclusion: *Craig v South Australia* (1995) 184 CLR 163 at 179

3

## ARE GROUNDS FOR JUDICIAL REVIEW NECESSARY ?

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- “My conclusion: I am not averse to labels. They can be useful as a checklist; and, for busy lawyers and judges, they may provide better guidance than principles articulated at a high level of generality. However, they may promise greater precision than they can deliver, and it is clear they do not describe independent, self-contained concepts”: J. Basten (2018)

4

## SCOPE OF JUDICIAL REVIEW I

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- Statutory framework is crucial - the scope of the exercise of administrative power is determined by the statute conferring the power
- was the power authorised by law to be exercised in that way ?
  - (i) did the decision-maker have the power to make the impugned decision ?
  - (ii) did the decision-maker act within or outside that power ?

5

## SCOPE OF JUDICIAL REVIEW 2

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- common law presumptions of statutory interpretation may be relevant: a statutory conferral of decision-making authority on a person or body is conditioned by implied statutory requirements that:
  - the person or body can validly exercise that authority only on a correct understanding of the law applicable to the decision to be made;
  - Any power will be exercised reasonably
  - procedural fairness will usually be accorded to affected individuals or entities: *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4 at [75] per Gageler J

6

## SCOPE OF JUDICIAL REVIEW 3 – THE PRINCIPLE OF JUDICIAL RESTRAINT

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The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone... The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise: *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at [17]-[18] per Brennan J

7

## LEGISLATION REFLECTED IN POTENTIAL REVIEW GROUNDS: EG 1 - UNREASONABLENESS

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Where the presumption [that statutory powers are to be exercised reasonably] prevails so as to condition the exercise of the power on the repository complying with the standard of legal reasonableness, a decision made or action taken in purported exercise of a statutory power in breach of the standard of legal reasonableness is a decision or action which lies beyond the scope of the authority conferred by the power. The question of whether or not a decision made or action taken in purported exercise of a statutory power is legally unreasonable is accordingly a question directed to whether or not the decision or action is within the scope of the statutory authority conferred on the repository: *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30 per Gageler J at [53]-[54]

8

## LEGISLATION REFLECTED IN POTENTIAL REVIEW GROUNDS: EG 2 - RELEVANT CONSIDERATIONS

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This does not deny that considerations advanced by the parties can have some importance in deciding what is or is not a relevant consideration. It may be, for example, that a particular statute makes the matters which are advanced in the course of a process of decision-making relevant considerations for the decision-maker. What is important, however, is that the grounds of judicial review that fasten upon the use made of relevant and irrelevant considerations are concerned essentially with whether the decision-maker has properly applied the law: *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30 per McHugh, Gummow and Hayne JJ at [74]

9

## DRAFTING CONSIDERATIONS I

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- An exercise in pleading:
  - Language: simple and concise
  - Formulaic (?): broad proposition + particularity
  - Sufficient specificity – articulate an error
  - Structural efficiency:
    - strongest ground first
    - Omit weak arguments
  - Addressing overlap
- Caution - reasons should not be scrutinised overzealously by seeking to discern some inadequacy in the way those reasons are expressed: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272 per Brennan CJ, Toohey, McHugh & Gummow JJ

10

## PLEADING CONSIDERATIONS 2

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- Appropriate characterisation: eg is a failure to deal with a claim:
  - A failure to address a mandatory consideration ?
    - Eg The representations made on behalf of the respondent in response to the invitation under s 501CA(3) are, viewed as a whole, a mandatory relevant consideration, but not every statement in the representations can be so described: *Minister for Home Affairs v Omar* [2019] FCAFC 188 at [34(e)]
  - A failure to inquire ?
  - A failure to exercise a statutory power ?
  - An instance of unreasonableness re genuine, proper and realistic consideration
- Assist the court eg identify and apply any test, cite relevant caselaw

11

## VISA APPLICATION EXAMPLES - I

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4. The application for the Subclass 485 visa was purportedly made by Mr Singh. Mr Singh did not however, make the Subclass 485 visa application. The application for the visa was therefore an invalid application. Subsection 47(3) of the *Migration Act 1958* precludes the Minister from considering an application that is an invalid application.

Insofar as the Applicant sought (in particular in ground 4) to rely in some way on the fact that the visa application was not submitted personally by him, s.98 addresses that contention: *Singh v Minister for Immigration & Anor* [2016] FCCA 835 at [124]

12

## VISA APPLICATION EXAMPLES - 2

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2. The Delegate failed to consider and determine whether the application made by the applicant's father was an application for a protection visa which was made on the applicant's behalf for the purposes of s48A(1AA)(a) of the Migration Act.

3. The Delegate erred by applying s48A of the Migration Act to refuse jurisdiction in circumstances where the jurisdictional fact necessary for the application of s48A was absent, namely that the application made by the applicant's father on 19 November 2010 was not an application for a protection visa made on the applicant's behalf.

4. In the alternative, the Delegate erred by finding that an application for a protection visa made by the applicant's father prior to the enactment of s48(1AA) (sic) was an application that was capable of answering the description of an application which is made for the purposes of s48A(1AA).

### Particulars

The use of the present tense in the principal provision of s48(1AA) (sic) cannot apply to an application that was made prior to the commencement of that provision.

13

## VISA APPLICATION EXAMPLES - 2

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In oral submissions counsel for the Applicants explained that while the amended applications contained four "grounds", all the grounds were directed to different manifestations of the same "problem", which was that the delegate's findings that the 2017 applications were not valid and his "refusal to entertain" those applications constituted jurisdictional error because there was a failure by the delegate to exercise jurisdiction: *CTU17 & Ors v Minister for Immigration* [2019] FCCA 449 at [59]

14

## VISA APPLICATION EXAMPLES – 3

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The Tribunal made a jurisdictional error by unreasonably exercising its discretion, under paragraphs (4)(a) and (b) of clause 4020, as to whether the requirements of paragraph (1)(a) of clause 4020 ought be waived.

### Particulars

(i) The First Applicant submitted and the Tribunal accepted that:

(a) the Diploma was sent accidentally with the present visa application and it was not the intention of the First Applicant that the bogus qualification be referred to in the application ([14]);

(b) the First Applicant and the Agent would not resubmit an application including the Diploma and false information when they had taken steps to withdraw the previous application to avoid the consequences of not meeting clause 4020 ([14]).

(ii) Nonetheless in exercising its discretion adversely to the Applicant, the Tribunal found that the "nature of the fraud committed is serious indeed" ([32]).

(iii) Upon the facts accepted by the Tribunal in paragraph (a) above, the result was unreasonable or plainly unjust, and accordingly the Tribunal fell into jurisdictional error.

15

## VISA APPLICATION EXAMPLES – 3

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The area of decisional freedom the Tribunal has in determining whether there are compelling and/or compassionate circumstances in the context of PIC 4020 was not exceeded in this case: *Dhanuka & Anor v Minister for Immigration & Anor* [2019] FCCA 2849 at [66]

16



## VISA APPLICATION EXAMPLES – 4

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1. In dealing with the Applicant's application for a Partner (Temporary) (class UK) (subclass 820)/Partner (Residence) (class BS) (subclass 801) visa (Visa Application), the Respondent committed a jurisdictional error by failing:

- (a) to have regard to, and
- (b) to decide as a preliminary matter,

her request to waive condition 8503, when he had a statutory duty under s 54 of the Migration Act 1958 (Act) to do so, and that error vitiated his decision that her visa application was invalid, as it is a purpose of the Act that an act done in breach of s 54 should be invalid.

2. In the alternative to Ground 1, ...

17

## VISA APPLICATION EXAMPLES – 4

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For the reasons outlined above, ground 1 must be dismissed, as there was no obligation on the delegate to make the Second Decision prior to the First Decision because the Partner Visa application was invalid when lodged.

It follows from the above that no jurisdictional error is made out in respect of ground 1: *Le v Minister for Immigration* [2019] FCCA 2167 at [42]-[43]

18

## VISA APPLICATION EXAMPLES - 5

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1. The second respondent erred in law by finding that the applicant is not permitted to change the nominated skilled occupation.

### Particulars

The Section 104 of the Act provides a mechanism for a visa applicant to notify the changes in the circumstance.

The Second Respondent failed to mention and rely upon the case law in support of its finding that the applicant cannot change his nominated skill occupation during the processing of his visa application.

2. The second respondent erred in exercise of its jurisdiction by failing to consider the statutory provisions of the Act.

### Particulars

Section 55 of the Act permits the applicant to give any additional relevant information, in this case the change of nominated skill occupation, before a decision is made and requires the Minister to have regard to that information in making the decision.

Section 54 requires the decision maker, in deciding whether to grant or refuse to grant a visa, to have regard to all of the information in the visa application, which in this case was the change in the nominated skilled occupation.

19

## VISA APPLICATION EXAMPLES – 5

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3. The decision of the Second Respondent is affected by jurisdictional error in that it failed to take a relevant considerations (information provided by the Applicant) and considered irrelevant considerations.

### Particulars

(i) On 09 August 2017, the Applicant notified the first respondent of the changes in the nominated skilled occupation by way of a Form 1022.

(ii) The Second Respondent failed to consider that additional relevant information when making its decision.

(iii) The Second Respondent proceeded to consider the Applicant's visa application on the basis of the skilled occupation that was initially nominated on the visa application form.

(iv) The Second Respondent failed to consider that, pursuant to the notification of change in circumstances, the nominated occupation in the visa application was the one as notified by way of Form 1023.

4. The second respondent failed to ask itself the right question.

### Particulars

(i) The Tribunal failed to consider whether it a case of change of mind or a mistake or an incorrect information in the visa application.

20

## VISA APPLICATION EXAMPLES – 5

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The original review Application, filed 5th May 2017, listed a range of grounds, most of which were, in my view, simply [inappropriate] assertions of fact.

On 8th February 2018, the Applicant filed an Amended Application. Again, the “grounds of review” were expansive and combined claims of fact and alleged legal error. They will be set out shortly. It is sufficient to note here that the primary issue for determination concerns the finding by the Tribunal that “the Applicant is not permitted to change his nominated skilled occupation during the processing of the visa application”: *Akbar v Minister for Immigration & Anor* [2018] FCCA 2001 at [9]-[10]

21

## EXAMPLE REMITTALS

(WITH MANY THANKS TO SIMON JEANS)

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The Respondent fell into jurisdictional error by taking into account irrelevant/ incorrect information in considering whether the Applicant satisfied the genuine temporary entrant criterion in cl 500.212 of Schedule 2 to the *Migration Regulations 1994 (Cth)*: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 and *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323. Contrary to the delegate's observation at paragraph [14] that the Applicant had travelled to Australia, the Applicant had indicated in her visa application that she had not visited any countries in the past ten years.

The First Respondent concedes that the decision of the Second Respondent is affected by jurisdictional error in that the Second Respondent failed to consider an integer of a claim raised by the Applicant, namely that the letter he received from the Taliban stated that teachers and students at the Applicant's school were "in opposition to the fundamentals of Islam": *NABE v Minister for Immigration (No 2)* (2004) 144 FCR 1 at [57]-[58]. The Applicant made this claim in his application form in response to question 89.

22

## SOME RELATED PROCEDURAL ASPECTS

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- Provide all required documentation
- Meeting deadlines
- Amending grounds of review:
  - Consent
  - By leave
- Abandoning grounds
- Costs

23

## PRACTICAL TIPS

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- Consider published examples:
  - Use that which works
- Only include essential details
- Provide room to move as the proceedings progress:
  - The risk of drafting error
  - A dynamic legal landscape
- Identify and evaluate counterarguments

24

## CONCLUSIONS

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- Focus on:
  - the legal test established under legislation or caselaw; and
  - the impugned aspects of the decision
- Draft with care:
  - breadth v specificity
  - Saving details for submissions
- Clearly allege an error

Thank you for your attention

Any questions ?

25

## SOME REFERENCES

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- Basten J., "Judicial review: can we abandon grounds?" (2018) 93 AIAL Forum 22-30
- Rares S., 'Judicial review of administrative decisions – should there be a 21<sup>st</sup> century rethink?' (FCA digital law library) (October 2014)

26