GURUNG

v

MINISTER FOR IMMIGRATION, MULTICULTURAL AND INDIGENOUS AFFAIRS

JUDGMENT

CALLINAN J

26 June 2002
Brisbane

Gurung

v

The Minister for Immigration, Multicultural and Indigenous Affairs

This is an application for an interlocutory injunction to restrain the respondent from removing the applicant from Australia, pending the hearing of his application for leave to appeal to this Court against the decision of a single judge of the Federal Court (Carr J) made on 24 April 2002.

The applicant arrived in Australia on 6 July 1995 on a Student Temporary Class TU, subclass 560 visa, which entitled him to remain in Australia until 17 August 1997. On 14 August 1997 the applicant sought renewal of his student visa. He was granted a bridging visa so that he could lawfully remain in Australia whilst his application was being processed by a delegate of the respondent. The applicant's application for a Student Temporary visa was refused on 24 November 1997, because the delegate of the respondent was of the opinion that the applicant had not complied with a condition of his visa, enrolment in an undergraduate course[1].

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[1] Schedule 2, Migration Regulations (reprinted as at 30 November 1995 ("the Migration Regulations") regulation 560.213 condition 8202.

On 22 December 1997 the applicant applied for review of the original decision to a Migration Internal Review Officer ("MIRO"). On 26 February 1998 the MIRO affirmed the original decision. Under regulation 4.10 of the Migration Regulations, the applicant's right of review of the MIRO's decision to the Immigration Review Tribunal (the "IRT") was exercisable within 28 days of the notification of the decision of the MIRO. Regulation 4.10 relevantly provided:

> **"Time for lodgment of application for review by the Tribunal**
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> 4.10(1) Subject to subregulation (2), the period within which an application for review of an IRT-reviewable decision must be given to the Tribunal is:
>
> (a) in the case of a primary decision of a kind mentioned in paragraph (a) of the definition of "Part 5 reviewable decision" in section 337 of the Act – 28 days after the notification of the IRT-reviewable decision ..."

The applicant's application was apparently received by the IRT on 27 March 1998. The applicant's letter to the IRT was dated 24 March 1998. The IRT wrote to the applicant advising that his application would not be considered because it was made out of time.

In coming to the view that it did, the IRT relied on regulation 5.03, which at the relevant time provided:

> **"Time of receipt of document etc that is sent**

> 5.03(1) For the purposes of these Regulations, and subject to specific provision elsewhere in these Regulations, a document that is sent by the Minister or a Tribunal is taken to be received:
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> (a) if the document is sent from a place in Australia to an address in Australia - 7 days after the date of the document ...
>
> (2) Subregulation (1) does not apply to a document unless it is sent within 7 days of the document."

The relevant passage of the IRT's letter to the applicant denying the applicant review of MIRO's decision stated:

> "Your application to the Tribunal should have been lodged within a 28 day time limit. The letter from the Department informing you of the decision was dated 26 February 1998. The 28 day period expired on 26 March 1998. Your application to the Tribunal was not received by the Tribunal until 27 March 1998 and the Tribunal cannot extend the time limit."

The applicant submitted to the IRT that his application was not made out of time because he sent it by overnight "Registered Post" on 25 March 1998, that is by a date from which, in the ordinary course of registered post, it should have reached the IRT on 26 March 1998.

By their letter of 26 May 1998 the IRT rejected the applicant's submission and stated its interpretation of regulation 5.03 in the following passage:

> "Paragraph 5.03(1)(a) states that if a document is sent from a place in Australia to an address in Australia - the document is taken to be received 7 days after the date of the document. Regulation 4.10 sets out the time for lodgment of applications for review by the Tribunal. The 28 day period that you were granted for

making your application to the Tribunal consists of the 21 days for the time limit and 7 days for postage."

Implicit in the respondent's submissions before me was also a suggestion that, as a matter of policy, and perhaps of caution on the part of the respondent, 7 days was not only the period specified by regulation but also was a reasonable period in fact to adopt for the interval between the date of a document sent by the respondent and its receipt by its addressee. That policy may perhaps provide some evidence that the giving or notification of a notice by this respondent by and in the ordinary course of post pursuant to s 29 of the Acts Interpretation Act 1901 (Cth), ordinarily requires 7 days.

On 19 April 2002 the applicant applied to the Federal Court for an injunction to prevent his deportation and for an extension of time to appeal against the rejection by the IRT of his application to it. French J refused both applications. Leave to appeal against the decision of French J was refused by Carr J on 24 April 2002 pursuant to 241A Federal Court of Australia Act 1976 (Cth).

Whilst I am of the view that the applicant's application for special leave is unlikely to succeed, I am concerned that the applicant may have an arguable case that his application was made within time. Submissions made by counsel for the applicant have been, I regret to say, unhelpful. They have not addressed the relevant issues. The material upon which they are based is not

in proper, and in some respects, admissible form. My concerns should not however be taken in any way to be an indication of any likely outcome of a properly formulated application on relevant and admissible materials after competent argument.

In Minister for Immigration & Multicultural Affairs v Singh[2], the Federal Court (O'Connor and Mansfield JJ; Tamberlin J dissenting) held regulation 5.03 to be invalid in so far as it purported to operate in respect of time limits imposed by regulation 4.31 of the Migration Regulations. Their Honours held regulation 5.03 invalid because its effect could be to abridge the time limits prescribed by regulation 4.31 and to nullify the right of review available under s 412 of the Migration Act 1958 (Cth) ("the Act").

O'Connor and Mansfield JJ said[3]:

> "(i)t is apparent on the face of reg 5.03 that it is capable of operating to abridge the time limits prescribed by reg 4.31, and to do so in a way which might effectively render the right of review nugatory. That is because it operates so long as the document is sent within seven days after it is dated. It deems the date of receipt to be seven days after the date of the document. The date of receipt is determined by reference to the date of the document rather than the date it is sent. Thus, a document may be sent on the very day it is deemed to have been received. If the document is sent on the seventh day after it is dated, and it takes some time to be delivered ... the period of time within which an application for review may be

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2 (2000) 171 ALR 53.

3 (2000) 171 ALR 53 at 64 (44).

> brought ... will have effectively been shortened by the time it takes for the document to be received. ... Effectively, therefore, reg 5.03 would operate in such circumstances to remove the right of review which the Act grants."

Their Honours in the majority in Singh applied a dictum of Lockhart J in Minister for Primary Industries & Energy v Austral Fisheries Pty Ltd[4] in which his Honour said[5]:

> "(d)elegated legislation may be declared to be invalid on the ground of unreasonableness if it leads to manifest arbitrariness, injustice or partiality; but the underlying rationale is that legislation of this offending kind cannot be within the scope of what Parliament intended when authorising the subordinate legislative authority to enact laws."

Their Honours' comments with respect to regulation 5.03 may be equally applicable to regulation 4.10. Regulation 5.03 may, if the notice of the decision were sent on the seventh day after the date of the document, operate to abridge the time limits prescribed by reg 4.31, and to do so in such a way as to render the right of review nugatory. Absent regulation 5.03, the time within which the applicant's application for review had to be lodged could be governed by regulation 4.10, to be read with s 29 Acts Interpretation Act 1901 (Cth) which relevantly provides:

> **"29 Meaning of Service by Post**

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4 (1993) 40 FCR 381.

5 (1993) 40 FCR 381 at 384.

> (1) Where an Act authorizes or requires any document to be served by post, whether the expression "serve" or the expression "give" or "send" or any other expression is used, then unless the contrary intention appears the service shall be deemed to be effected by properly addressing prepaying and posting the document as a letter, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post. ..." (emphasis added)

Section 29 would deem the applicant to have received notice of the MIRO's decision in the "ordinary course of post" after 26 February 1998. At the earliest, section 29 would deem the applicant to have received notice on 27 February 1998, that is, the following day, assuming the letter was posted by the MIRO on 27 February 1998. The date 28 days after 27 February 1998 is 27 March 1998, the date on which the respondent admits to having received the applicant's application. On this reading of the Migration Regulations, the application may well have been made within time.

Even if I am wrong in the tentative view I have reached, I am of the opinion that the respondent possibly wrongly applied regulations 5.03 and 4.10. Regulation 5.03 is expressed to apply to documents "sent by the Minister or a Tribunal". The notice of the MIRO's decision fell within this category of document. The notice of the MIRO's decision was dated 26 February 1998. Regulation 5.03 deems it to have been received by the respondent 7 days after 26 February 1998. The applicant would therefore be deemed to have received notice of the MIRO's decision on 5

March 1998. The 28th day after 5 March 1998 fell on 2 April 1998, six days after the respondent received the applicant's application. The respondent could well have erred in regarding the seven days referred to in regulation 5.03 as being included in the 28 days allowed for the making of an application for review under regulation 4.31. This could have the effect of abridging the time allowed for the applicant to apply for review under regulation 4.31 from 28 days to just 21 days. Regulation 4.31 expressly provides that, for the purposes of reckoning "the period within which an application for review ... must be given to the Tribunal ... (the period) commences on the day on which the applicant is notified of the decision to which the application relates, and ends at the end of ... 28 days." The "day on which the applicant is notified of the decision" may be seven days after the date of the document (regulation 5.03).

For these reasons I am of the view that the application to the IRT may have been within time and the IRT bound to proceed to hear and determine the application on its merits. The injunction should be continued to give the applicant an opportunity to apply for prerogative or other relief to compel the IRT to rehear the matter and for any necessary extensions of time in that regard.

No comprehensive argument was addressed in relation to any of these matters before me. Nor was the operation of s 347(1) of the Act, which provides as follows, given due consideration:

> **"347 Application for review by Migration Review Tribunal**
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> (1) An application for review of an MRT-reviewable decision must:
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> (a) be made in the approved form; and
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> (b) be given to the Tribunal within the prescribed period, being a period ending not later than:
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> (i) if the MRT-reviewable decision is covered by subsection 338(2), (3), (3A), (4) or (7A)-28 days after the notification of the decision; or
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> (ii) if the MRT-reviewable decision is covered by subsection 338(5), (6), (7) or (8)-70 days after the notification of the decision; or
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> (iii) if the MRT-reviewable decision is covered by subsection 338(9) - the number of days prescribed, in respect of the kind of decision in question prescribed for the purposes of that subsection, after the notification of the decision; and
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> (c) be accompanied by the prescribed fee (if any)."

It may be that the effect of that section is that, absent valid prescription, it is determinative as to time limits, or that there are in fact no relevant time limits, a doubtful but perhaps still arguable proposition.

The application to the Federal Court sought relief in these terms:

"1. An extension of time be granted;

2. An Order that the Applicant be not detained until a finality is reached in this application;

3. An urgent injunction be granted that the applicant be not removed/deported until the Court makes a final order on this application.

4. For such other and further orders that this Court deems fit.

5. For costs."

The application for special leave to appeal to this Court contained a claim for an injunction as well as relief against the refusal of such an order by the Federal Court. No mention was made of any claim for any prerogative or like relief pursuant to s 75 of the Constitution against the Tribunal in either the application to the Federal Court or the application to this Court. In an ill drafted written outline of argument there is a reference to Teoh's case[6] but no useful analysis of it, or attempt to relate what occurred here to the reasoning in it.

I suggested, during the two hearings before me, that consideration be given to the possibility of looking at the questions

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[6] Immigration & Ethnic Affairs, Minister for v Teoh (1995) 183 CLR 273.

that I have raised and pursuing avenues that might be open to the applicant. My suggestions were to no avail.

In all of the circumstances, and with some considerable hesitation I am prepared to extend the existing injunction but only for a finite time. I do so for these reasons.

There is a possibility that the applicant may have a right to seek relief under s 75 of the Constitution with respect to the Tribunal's refusal to hear this application for review. There may be, again I do not decide this to be so, special circumstances justifying an extension of time. These questions simply have not been addressed. No properly formulated application or adequate argument has been made or presented on any aspect of the applicant's situation. If he is deported it would quite obviously be more difficult for him to pursue any application for a form of visa allowing him to remain in Australia.

I have therefore in these very unusual circumstances, of inadequate representation of the applicant, the uncertainty arising out of the invalidation of a relevant regulation, the apparent acceptance by the respondent that 7 days probably will elapse between dating a letter and its receipt, the relative convenience and inconvenience to the parties, decided to grant an injunction to the applicant against the respondent to restrain the latter from removing the applicant from Australia until 4:00pm

21 August 2002 when the matter should be brought on again before me. It is a condition of the injunction that the applicant file and serve by 7 August 2002 all properly formulated and presented applications as he may be advised, together with a comprehensive outline of submissions. Material and submissions of the kind already filed and made are totally unacceptable. The applicant should pay the costs of the hearings before me.