

MINISTER FOR IMMIGRATION AND CITIZENSHIP v LI & ANOR (B68/2012)

Court appealed from: Full Court of the Federal Court of Australia
[2012] FCAFC 74

Date of judgment: 24 May 2012

Date of grant of special leave: 16 November 2012

On 10 February 2007 the first respondent (Ms Li), a citizen of the People's Republic of China, applied to the Department of Immigration and Citizenship for a Skilled-Independent Overseas Student (Residence) (Class DD) Visa under s 65 of the *Migration Act* 1958 (Cth) ("the Act"). The delegate refused to grant the visa.

On 30 January 2009 Ms Li applied to the Migration Review Tribunal ("the Tribunal") for review of the delegate's decision. On 19 October 2009 Ms Li's migration agent asked the Tribunal to hold the matter in abeyance as further work experience had been accumulated and a second skills assessment application was being finalised. A hearing took place on 18 December 2009 at which time Ms Li had not received a second skills assessment. The Tribunal wrote to Ms Li on 21 December 2009 calling for her to comment on a couple of issues. On 18 January 2010 the migration agent asked the Tribunal to forbear from making a final decision until the outcome of Ms Li's skills assessment was finalised. The Tribunal did not accede to that request and on 25 January 2010 proceeded to determine the application. Ms Li then applied for review of that decision by the Federal Magistrates Court. Burnett FM upheld the application to review the Tribunal's decision and remitted the matter to the Tribunal for rehearing. The Minister appealed.

The key question for determination by the Full Court of the Federal Court was whether a decision of the Tribunal to refuse to adjourn a hearing could, in particular circumstances, constitute an error going to the jurisdiction of the Tribunal, so as to warrant an order quashing the Tribunal's decision.

The Full Court (Greenwood, Collier and Logan JJ) held, (per Greenwood and Logan JJ) that "... [w]hen a tribunal fails in this way to offer an opportunity to be heard, it fails to discharge its core *statutory function* of *reviewing* the decision of the Minister or his delegate." The majority also considered that there was a denial of procedural fairness. Collier J held that in the circumstances of the case the Tribunal failed to properly consider the application for an adjournment. That failure constituted a breach by the Tribunal of its obligations, imposed by s 360 of the Act, to give an applicant a reasonable opportunity to present evidence and argument.

The grounds of appeal include:

- The majority erred in:
 - a) having regard to their assessment of the merits of the first respondent's basis for requesting an adjournment;
 - b) holding that the learned Federal Magistrate was correct in finding that the Tribunal's refusal of an adjournment was a decision that no reasonable tribunal could have made; and
 - c) holding that the discretionary power to adjourn, in s 363(1)(b) of the Act, was exercised unreasonably.