MINISTER FOR IMMIGRATION AND BORDER PROTECTION v KUMAR & ORS (P49/2016)

Court appealed from:	Federal Court of Australia [2016] FCA 177
Date of judgment:	23 February 2016
Date special leave granted:	2 September 2016

The first respondent held a Subclass 485 (Temporary Graduate) visa which was due to expire on Sunday, 12 January 2014. On Friday, 10 January 2014, he lodged an application for a Student (Temporary) (Class TU) Subclass 572 (Vocational Education and Training Sector) visa by post and it was received by the Department of Immigration and Border Protection on Monday, 13 January 2014. The relevant criterion stipulated in cl 572.211(2)(d) of Schedule 2 to the *Migration Regulations* 1994 (Cth) (the Regulations) for the first respondent to obtain a 572 visa was that he was the holder of a 485 visa at the time of application. The Migration Review Tribunal, affirming the delegate's decision not to grant a 572 visa, held that the first respondent did not satisfy the requirement in cl 572.211(2)(d) and consequently could not be a granted a 572 visa. The first respondent applied to the Federal Circuit Court for a review of the decision of the Tribunal on the ground that the Tribunal made a jurisdictional error by failing to apply s 36(2) of the *Acts Interpretation Act* 1901(Cth) which provides:

If: (a) an Act requires or allows a thing to be done; and
(b) the last day for doing the thing is a Saturday, a Sunday or a holiday; then the thing may be done on the next day that is not a Saturday, a Sunday or a holiday.

The primary judge (Judge Street) rejected this argument on the ground that cl.572.211(2) does not, in express terms or in its effect, prescribe or allow anything to be done on a particular day. He found that cl.572.211(2) identifies a state of affairs that must exist as part of the criteria for the making of a valid application and, accordingly, s 36(2) of the *Acts Interpretation Act* had no application. In reaching this conclusion, his Honour relied on the majority judgment of Neaves and Beazley JJ in *Zangzinchai v Milanta* (1994) 53 FCR 35.

The first respondent's appeal to the Federal Court (North J) was successful. North J held that where s 45 of the *Migration Act* allows a person to apply for a visa, the Act allows a thing to be done within the meaning of s 36(2)(a) of the *Acts Interpretation Act*. In the present case, the last day for the first respondent to apply for the 572 visa was Sunday, 12 January 2014. Section 36(2) of the *Acts Interpretation Act* then operated to allow the thing to be done on the next day which was not a Saturday, a Sunday, or a holiday. In this case that allowed the application for the 572 visa to be made when it was made on Monday, 13 January 2014.

North J noted that *Zangzinchai* was decided in 1994 and dealt with the previous form of s 36(2) of the *Acts Interpretation Act*. The Act was amended to its current form with effect from 27 December 2011. The previous version of the section

operated on a period prescribed, or allowed, by an Act, whereas the current version operates on a broader set of circumstances where an Act requires or allows a thing to be done. His Honour held that he views of the majority in *Zangzinchai*, on the earlier version of the section, did not apply to the different text of the amended version.

The ground of appeal is:

- The Federal Court erred in concluding that s 36(2) of the *Acts Interpretation Act* 1901 (Cth) had the effect that the first respondent's application for a Student (Temporary) (Class TU) Subclass 572 (Vocational Education and Training Sector) visa was to be assessed as if that application had been made before the expiry of his Skilled (Provisional) (Class VC) Subclass 485 (Temporary Graduate) visa.