IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 136/2019
[2020] NZSC 27

BETWEEN	KRUTI PATEL Applicant
AND	MINISTER OF IMMIGRATION Respondent

SC 137/2019

BETWEEN	KRUTI PATEL Applicant
AND	IMMIGRATION AND PROTECTION TRIBUNAL First Respondent
	MINISTER OF IMMIGRATION Second Respondent

Court:	Glazebrook and O'Regan JJ
Counsel:	A Schaaf for Applicant I M G Clarke and E G R Dowse for Respondent in SC 136/2019 and Second Respondent in SC 137/2019
Judgment:	2 April 2020

JUDGMENT OF THE COURT

A The applications for an extension of time to file the applications for leave to appeal are granted.

B The applications to adduce further evidence are dismissed.

C The applications for leave to appeal are dismissed.

D The applicant must pay costs of $2,500 to the respondent.

REASONS

[1] These two applications for leave to appeal relate to a decision of the High Court.[1] In that decision, Gordon J dismissed the applicant's appeal against the decision of the Immigration and Protection Tribunal (the Tribunal) finding her eligible for deportation and also dismissed an application for judicial review of the Tribunal's decision.

[2] The applications for leave were filed out of time, but the reasons for this have been adequately explained and we grant the necessary extensions of time to file them.[2]

[3] The applicant seeks leave to appeal directly to this Court from the decision of the High Court under s 75 of the Senior Courts Act 2016. The reason she does so is because she was unable to obtain leave to appeal against the High Court decision to the Court of Appeal.[3] It is not possible for her to appeal to this Court from the decision of the Court of Appeal refusing leave to appeal to that Court because such an appeal is precluded by s 68(b) of the Senior Courts Act.

[4] In order to obtain leave, the applicant must establish that the proposed appeal meets the criteria for leave to appeal set out in s 74 of the Senior Courts Act and must also establish that there are exceptional circumstances justifying a direct appeal to this Court.[4] It is well established that in circumstances where an appeal from the decision of the Court of Appeal to this Court is precluded by s 68(b), only a rare and exceptional

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1 *Patel v Minister of Immigration* [2018] NZHC 2616 (Gordon J) [HC judgment]. The decision of the Tribunal was *Patel v The Minister of Immigration* [2017] NZIPT 600365. The necessary leave to appeal and bring judicial review proceedings was granted by Edwards J: *Patel v Minister of Immigration* [2018] NZHC 577.

2 Supreme Court Rules 2004, r 11.

3 Leave was declined by the High Court: *Patel v Immigration and Protection Tribunal* [2019] NZHC 1618 (Gordon J) [HC leave judgment]. Special leave to appeal to the Court of Appeal was declined by the Court of Appeal: *Patel v Immigration and Protection Tribunal* [2019] NZCA 607 (French and Brown JJ) [CA judgment].

4 Senior Courts Act 2016, s 75(b).

case would justify the grant of leave to appeal directly from the High Court, notwithstanding that the Court of Appeal declined leave to appeal to that Court.[5]

Factual background

[5] The applicant arrived in New Zealand on a student visa in 2008. In late 2008, a Mr Jingar contacted Immigration New Zealand claiming he had married the applicant in India in 2007 and had a marriage certificate. Immigration New Zealand did not act on these allegations at the time.

[6] The applicant met Mr Patel, an Indian citizen living in New Zealand, in 2008. They started a relationship in that year and were married in 2009. After the marriage, the applicant applied for a work visa based on her marriage to Mr Patel. Mr Patel also applied for a permanent residence visa and included the applicant in his application as a secondary applicant.

[7] In 2011 and 2012, the applicant was interviewed by Immigration New Zealand to determine whether her relationship with Mr Patel was "genuine and stable". The applicant was asked about the allegations made by Mr Jingar. She denied she had married Mr Jingar and claimed the marriage documents he had supplied were fraudulent. She suggested that he had been trying to blackmail both her and her family.

[8] Immigration New Zealand accepted the applicant's account and granted residency to the applicant and to Mr Patel in 2012. They had a daughter, born in March 2014. Immigration New Zealand granted the applicant and Mr Patel permanent residency in September 2014. One month later, they separated. Their marriage was dissolved in October 2016.

[9] In June 2015, Mr Jingar provided Immigration New Zealand with a copy of a marriage certificate and photographs of Mr Jingar, Ms Patel and her daughter taken during a visit to India in 2014. He also told Immigration New Zealand that the applicant had returned to India in 2009 to commence divorce proceedings against him

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5 *Sena v New Zealand Police* [2018] NZSC 92 at [4]; *Burke v Western Bay of Plenty District Council* [2005] NZSC 46, (2005) 18 PRNZ 560 at [4]; and *White v Auckland District Health Board* [2007] NZSC 64, (2007) 18 PRNZ 698 at [5]–[6].

and that the divorce proceedings were dismissed in 2011 for want of prosecution. The Immigration New Zealand office in India investigated Mr Jingar's claims and found that the marriage certificate appeared valid and confirmed Mr Jingar's account of the divorce proceedings.

[10] Immigration New Zealand advised the applicant of its investigation in December 2015. The applicant reasserted that the marriage certificate was fraudulent. She said that after she discovered the marriage had been registered, she received legal advice in India that it would be easier to commence divorce proceedings on the grounds of abuse rather than to obtain a declaration annulling the marriage.

[11] Immigration New Zealand served a deportation liability notice on the applicant in August 2016 on the grounds that she had concealed relevant information pursuant to s 158(1)(b)(ii) of the Immigration Act 2009. The concealed information was the fact that she was married and that she had commenced divorce proceedings in India.

[12] The applicant appealed to the Tribunal against Immigration New Zealand's factual findings and also on humanitarian grounds under s 158(3)(b). After the Tribunal dismissed her appeal, the applicant commenced her appeal to the High Court.

Further evidence

[13] The applicant also filed two applications to adduce further evidence. Having considered that material we are satisfied that we would not be assisted by the admission of the evidence at the leave stage. The applicant also sought directions that her former counsel be required to file a response to her questions about the alleged failure of counsel to call evidence in the High Court. There is no basis for an order compelling the giving of evidence in this way and we are satisfied that it would not be appropriate to make such an order.

Proposed grounds of appeal

[14] There are four broad grounds on which the applicant seeks leave. The first three relate to her appeal to the High Court and the last to the judicial review claim. We will deal with those relating to the appeal first.

[15] The first ground relates to the conclusion of the High Court that the divorce proceedings were "relevant information". The applicant wishes to challenge this finding. She adduced evidence designed to establish that the marriage to Mr Jingar was fraudulent, and argued that, if that were accepted, then the divorce proceedings were not relevant information and the failure to disclose them could not therefore amount to the concealing of relevant information. The High Court concluded that the failure to disclose the existence of the divorce proceedings was the concealing of relevant information, whether or not the marriage was fraudulent.[6] We do not consider there is sufficient prospect of success in overturning that finding to grant leave to appeal, let alone to establish that this is a rare and exceptional case justifying direct leave to appeal.

[16] The second point relates to the applicant's argument that there were exceptional circumstances of a humanitarian nature making it unduly harsh to require her removal from New Zealand.[7] In support of that argument, the applicant said that she was a victim of fraud in relation to the alleged marriage to Mr Jingar. She said both absence of fault and being the victim of fraud were relevant to the determination of this issue, citing the observations of this Court in *Guo v Minister of Immigration*.[8] It is not necessary for us to engage with this issue because we see insufficient prospect of success in an argument that the applicant was not, in fact, at fault in concealing the information about the divorce proceedings to justify a further appeal. That means there is no factual underpinning for the argument she wishes to make if leave to appeal is granted.

[17] The third proposed ground of appeal is the applicant's contention that the High Court unduly restricted the definition of "humanitarian circumstances" to the consequences and effects of deportation.[9] This was, she says, contrary to the decision in *Ye v Minister of Immigration*, where this Court said it was undesirable to define the phrase.[10] The effect of this argument is to establish that being a victim of fraud qualifies as a humanitarian circumstance, and that the evidence she wished to adduce

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6 See HC leave judgment, above n 3, at [40].
7 Immigration Act 2009, s 207(1)(a).
8 *Guo v Minister of Immigration* [2015] NZSC 132, [2016] 1 NZLR 248 at [10].
9 HC judgment, above n 1, at [85].
10 *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [34].

about the circumstances of the alleged marriage would establish this. However, this is not a matter on which the applicant obtained leave to appeal to the High Court. We do not consider it would be appropriate for this Court to deal with that issue as a court of first and last instance. Nor do we consider that this would be an appropriate case for consideration of the issue, given that it depends on disputed factual matters which would have to be resolved by this Court as, in effect, a court of first instance.

[18] The last ground of appeal the applicant wishes to pursue relates to the judicial review proceedings. She wishes to argue that the counsel who acted for her before the Tribunal failed to call relevant evidence, leading to a breach of natural justice. She argues that this is a point of public importance, giving the Court the opportunity to give guidance on when an error by counsel will amount to procedural unfairness. We see this as essentially factual in nature, not giving rise to any point of public importance. The difficulty the applicant faces is that whether or not the marriage was fraudulent, her failure to disclose the divorce proceedings to Immigration New Zealand was concealing what would undoubtedly have been highly relevant information, that would have led Immigration New Zealand to inquire further into the circumstances of the marriage to Mr Jingar.

[19] The criteria for leave to appeal to this Court in s 74 of the Senior Courts Act are not met in this case, let alone the exceptional circumstances requirement in s 75. In these circumstances, the applications for leave to appeal are dismissed.

Result

[20] The applications for an extension of time to file the applications for leave to appeal are granted.

[21] The applications to adduce further evidence are dismissed.

[22] The applications for leave to appeal are dismissed.

[23] The applicant must pay costs of $2,500 to the respondent.

Solicitors:
M F Tuilotolava, Auckland for Applicant
Crown Law Office, Wellington for Respondent in SC 136/2019 and Second Respondent in SC 137/2019