IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 82/2019
[2019] NZSC 119

BETWEEN	FARISHA FARINA DEAN Applicant
AND	ASSOCIATE MINISTER OF IMMIGRATION Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: R J Hooker for Applicant
N T Butler for Respondent

Judgment: 4 November 2019

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

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

REASONS

[1] The applicant seeks leave to appeal against a decision of the Court of Appeal dismissing her appeal to that Court.[1] The High Court had earlier dismissed her application for judicial review of the decision of the respondent refusing to cancel her liability to deportation from New Zealand under s 172 of the Immigration Act 2009 and to grant her a visa under s 61 of that Act.[2]

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1 *Dean v Associate Minister of Immigration* [2019] NZCA 343 (Stevens, Duffy and Dobson JJ) [CA judgment].

2 *Dean v Associate Minister of Immigration* [2018] NZHC 2455 (Churchman J) [HC judgment].

[2] The respondent's decision was a decision in the respondent's "absolute discretion", as that term is defined in s 11 of the Immigration Act.[3] Section 11 provides, among other things, that such a decision may not be applied for, if an application is made there is no obligation to consider it and, whether the application is considered or not, there is no obligation on the decision-maker to give reasons.

[3] Both the High Court and the Court of Appeal reviewed the briefing material that had been provided to the respondent for the purposes of his consideration of the matter. Both concluded the decision of the respondent not to intervene was not unreasonable.[4]

[4] The applicant argues that her intended appeal would raise two issues of public importance. The first relates to intensity of review. The applicant wishes to argue that the court should apply a "heightened scrutiny of whether the decision is reasonable in the "*Wednesbury*" sense" when reviewing a decision under ss 61 or 172 of the Immigration Act.[5] The second is a subset of the first. The applicant wishes to argue that when undertaking a review of such a decision the court must first determine the scope and purpose of the provision under which the decision was made and whether the outcome had no intelligible justification or reflected a characterisation of an underlying error.

[5] We accept that the intensity of review to be applied in a judicial review challenge to a decision to which s 11 of the Immigration Act applies may be an issue worthy of consideration by this Court. Having said that, there would appear to be some obstacles in the path of an argument for "heightened scrutiny" of a decision of this kind. Further, we do not see the present case as a suitable vehicle for a consideration of the issue.[6] The unusual facts of this case and its chequered history of litigation as set out and analysed in the Court of Appeal's decision do not provide an auspicious context for the consideration of the issue. Nor do we consider there is a risk of a miscarriage of justice arising if we do not give leave to appeal.

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3 Immigration Act 2009, ss 61(2) and 172(5).
4 HC judgment, above n 2, at [67]; and CA judgment, above n 1, at [60].
5 Citing *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (CA).
6 This Court expressed a similar view in *Singh v Chief Executive of the Ministry of Business, Innovation and Employment* [2016] NZSC 39 at [4].

[6] The application for leave to appeal is dismissed. The applicant must pay costs of $2,500 to the respondent.

Solicitors:
Vallant Hooker & Partners, Auckland for Applicant
Crown Law Office, Wellington for Respondent