[2012] AATA 596

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| Division | **GENERAL ADMINISTRATIVE DIVISION** |
| File Number(s) | 2012/1271 |
| Re | Asif Syed |
|  | APPLICANT |
| And |  |
|  | RESPONDENT |

# Decision

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| Tribunal | **M D Allen, Senior Member** |
| Date | **5 September 2012** |
|  |  |
| Place | **Sydney** |

The decision under review is set aside and there is substituted the Tribunal’s decision that the Applicant is a fit and proper person to give migration advice.

..........[sgd]..............................................................

**M D Allen, Senior Member**

# Catchwords

CITIZENSHIP AND IMMIGRATION – Migration Agents – Refusal to approve application for initial registration on ground applicant not a fit and proper person – Refusal of applicant to sit for examination to test his proficiency in the English language – Application of policy – Decision under review set aside.

# Legislation

Migration Act 1958, s 290

Migration Agents Regulations 1998

# Cases

Comcare v Fiedler (2001) 34 AAR 237

Banovic v Repatriation Commission (1986-7) 69 ALR 395

Maxwell v Murphy (1957) 96 CLR 261

Re Dainty and Minister for Immigration and Ethnic Affair (1987) 6 AAR 259

Re Massei and Migration Agents Registration Authority [2011] AATA 401

# Secondary Materials

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# REASONS FOR DECISION

**M D Allen, Senior Member**

**5 September 2012**

1. By application made the 2nd of April 2012 the Applicant sought review of a decision by the Respondent to refuse to register him as a migration agent, on the grounds that he was not a fit and proper person to give immigration assistance.
2. Section 290 of the *Migration Act 1958* states inter alia:

**290 Applicant must not be registered if not a person of integrity or not fit and proper**

(1) An applicant must not be registered if the Migration Agents Registration Authority is satisfied that:

(a)  the applicant is not a fit and proper person to give immigration assistance;

…

(2) In considering whether it is satisfied that the applicant is not fit and proper or not a person of integrity, the Migration Agents Registration Authority must take into account:

(a)  the extent of the applicant’s knowledge of migration procedure; and

…

(h) any other matter relevant to the applicant’s fitness to give immigration assistance.

1. It is common ground between the parties that the Applicant has passed a course at the Australian National University (ANU), which gives him the academic qualifications to be registered as a migration agent, and that there are no impediments to his being a fit and proper person, save and except the Respondent’s attitude to the Applicant’s proficiency in the English language.
2. As the Applicant was born in a country where the predominant business and community language was not English, namely Pakistan, the Respondent applied its policy requiring the Applicant to demonstrate his proficiency in the English language.
3. The policy adopted by the Respondent is set out at document T6 page 83 of the documents prepared for the Tribunal pursuant to s 37 of the *Administrative Appeals Tribunal Act 1975*. It reads inter alia:

All applicants for initial registration are required to demonstrate their proficiency in the English language. In order to satisfy the English language Standard, applicants will need to provide documentary evidence of:

* an IELTS test score of 7.0 within a minimum score of 6.5 in each sub-test (speaking, listening, reading and writing) in the academic module undertaken not more than 2 years prior to lodgement of an Application for Registration as a Migration Agent:

**OR**

* an internet based TOEFL (Test of English as a Foreign Language) score of 100 with a minimum score of 22 in each subtest in speaking, listening, reading and writing undertaken not more than 2 years prior to lodgement of the Migration Agents Registration Application;

**OR**

* evidence that the person holds a current legal practising certificate (restricted or unrestricted) issued by an Australian body authorised by law in an Australian state or territory;

**OR**

* evidence that the person has successfully completed:
* matriculation level (see Note 1) with a pass in English (not “English as a Second Language”) where English was the language of instruction at the school;

**AND**

* a Bachelor degree, or a higher degree, with a minimum of 3 years’ equivalent full-time study, where:
* the degree was conferred by an Australian, New Zealand, UK or Canadian University (Note 2)
* the study was undertaken while the person was residing in the country where the degree was awarded; and
* English was the language of instruction at the University

**Note 1:** “matriculation” refers to being formally admitted to study at a university or college. Evidence that you have successfully completed matriculation level could include your Higher School Certificate results or other equivalents of Australian Year 12 including A Levels, International Baccalaureate etc

**Note 2:** other countries where English is the predominant business and community language will be considered on a case by case basis. Matters taken into account will include whether English is the predominant language of the country, the percentage of population that speak English, the literacy rates of the country and any other relevant matter.

For applicants who do not meet the criteria specified above, consideration will be given on a case by case basis to applicants who were born, educated and spent their formative years in a country where English is the predominant business and community language.

1. This policy has now been raised to that of a mandatory requirement pursuant to amendments to Regulation 5 of the *Migration Agents Regulations 1998*. Sub-regulation 5(3) of those Regulations reads as and from 1 July 2012:

**5 Prescribed qualifications**

...

(3)  For paragraph 289A (c) of the Act, if a person is not in a class of persons specified by the Minister in an instrument in writing for subregulation (2), a prescribed exam is the combination of:

(a)   an exam specified by the Minister in an instrument in writing for this paragraph; and

(b)   an exam in English language proficiency specified by the Minister in an instrument in writing for this paragraph.

1. The Respondent’s decision in this matter was made on the 13th of March 2012. In these proceedings the solicitor for the Respondent submitted that the Applicant was entitled to have his matter determined on the circumstances that existed on that day, namely that the English language competency requirement was one of policy as opposed to legislated.
2. Notwithstanding the Respondent’s submissions, it is of course axiomatic that the parties to a review cannot simply agree as to what law applies, but there remains at all times a duty upon the Tribunal to decide for itself the applicable law: see the discussion in *Comcare v Fiedler* (2001) 34 AAR at pp 246-7.
3. The right of a party to have an application determined by the Tribunal applying the law existing at the time of the original decision was discussed by the Full Court of the Federal Court in *Banovic v Repatriation Commission* (1986-7) 69 ALR 395 at 404. The court said:

The task of the Administrative Appeals Tribunal, in reviewing a decision relating to an application for a pension, is to make the decision which the primary decision-maker ought to have made, upon the basis of the evidence before the Tribunal. **Subject to any change in the relevant law, the Tribunal should put the applicant into the position in which he or she was entitled to be put at the time of the primary decision.** (Tribunal’s emphasis**.**

1. No doubt the Applicant would argue that because of the general assumption that legislation is not to apply retrospectively – see *Maxwell v Murphy* (1957) 96 CLR 261 at 267, he has a right to have his application to the Tribunal determined according to the existing policy as at the time of the Respondent’s decision. I regard this submission as correct.
2. The Applicant submitted that the policy itself was ultra vires. I do not accept this submission. A similar submission was discussed in *Re Massei and Migration Agents Registration Authority* [2011] AATA 401 commencing at para 19. I respectfully adopt that reasoning:

19. Nothing in the Act or in the Regulations appears to provide a legislative basis for the Policy and Procedures Manual. It was this type of policy guideline considered by the Full Court of the Federal Court in Drake v Minister for Immigration and Ethnic Affairs …

20. It is clear that the Manual does not purport to bind the decision-maker and it was not suggested otherwise by the Authority. The Introduction to the Manual itself sets out that decision-makers ‘must … give due regard to policy guidance such as in the PPM [the Manual], but should not apply such policy inflexibly.’

21. The Manual refers to the application of the IELTS test score as a matter which may be considered under paragraph (h) of sub-section 290(2). This paragraph provides that the authority must take into account “any other matter relevant to the applicant’s fitness to give immigration assistance.”

1. The Tribunal in *Re Massei* supra at para 27 explained the purpose of the policy in the following terms:

A migration agent is required to take instructions from a client, to accurately determine the needs of the client, to understand and interpret legislation and case law, to understand and draft documents, and to make representations on behalf of, and to advise, the client. These tasks require well-developed skills in speaking, listening, reading and writing in English. In these circumstances the requirement that an applicant achieve a Band 7 result (Good User) in an IELTS is appropriate.

1. Although I must have regard to policy in this matter, that policy must be applied taking into account the individual circumstances of the applicant. In *Re Dainty and Minister for Immigration and Ethnic Affairs* (1987) 6 AAR 259 at 266 Davies J, sitting as President of this Tribunal, said:

But to say that is not say that the Tribunal ought to treat policy as more than policy. Policy is not a legislative prescription and, though in many cases it will be appropriate to apply policy in all or almost every case, there are circumstances where it is not appropriate to decide a matter merely by reference to a policy which has been laid down.

That is I believe the crux of the present case, namely, whether it is proper to apply in Mr Dainty 's case guidelines which appear to me to be not appropriate to deal with his circumstances.

As was said in Re Aston at p 376:

"Policy is not law. A statement of policy is not prescription of binding criteria. By conferring a discretion upon the decision-maker, the law requires that all matters relevant to the exercise of the discretion shall be taken into account."

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1. The Applicant was born in Pakistan and received his primary and secondary education in Karachi. The medium of instruction at both schools was English.
2. After completing his secondary education the Applicant came to Australia. His first qualifications were obtained at North Sydney TAFE where he obtained a Certificate in Electronics and Communication.
3. In 1982 the Applicant obtained a position with what was then Telecom Australia (later Telstra) as an Assistant Technician. He received promotions and finally in 1994 was promoted to the position of Principal Technical Officer Grade II.
4. The Applicant’s evidence was that as a Principal Technical Officer he was in a management role, with responsibility for staff and internal and external communications. Part of his duties required the writing of reports.
5. Whilst employed by Telecom/Telstra, the Applicant undertook further studies at TAFE both in electronics and management.
6. In 2009 the Applicant was made redundant. Since then he has had various positions, currently he is employed by Kordia Solutions (an electronics company) in a management role which involves fault finding and liaising with other companies.
7. According to the Applicant he has had an interest in migration matters, and had successfully appeared before the Migration Review Tribunal on a couple of occasions assisting relatives. When he became redundant he thought that achieving registration as a migration agent would be a good thing to do.
8. To this end the Applicant undertook a course of study being a Graduate Certificate in Migration Law and Practice, which extended over one year at the ANU. He was successful in his studies gaining a credit and three distinctions.
9. As stated above, the Applicant is considered by the Respondent as a fit and proper person to be registered as a migration agent, save and except for demonstrating his proficiency in the English language.
10. Although the Applicant could have undertaken the testing required by the Respondent he has adamantly refused to do so, maintaining a stance of “why should I.”
11. Davies J in *Re Dainty* supra said at p 268:

 “In the present case, it appears to me that the circumstances under consideration fall outside the provisions of the guidelines and ought to be considered on their own merits.”

I find that similar considerations apply in this matter.

1. The medium of the Applicant’s primary and secondary instruction was English. This of itself counts for little given that that schooling was in Pakistan. However, following completion of his secondary education, the Applicant moved to Australia and completed trade training in Australia. He was then employed by a government, later privatised,institution, and rose to what might be regarded as a lower tier level of management. Following redundancy he successfully completed a course at the ANU regarding migration law and practice.
2. All of the above indicates that the Applicant has a capacity in the English language that can be regarded as more than a working knowledge. As he has completed the ANU course successfully, I infer that he has a capacity to understand, interpret and explain legislation.
3. The length of time the Applicant has been in Australia bears no relationship to his expertise in the English language. I have, however, had the opportunity to see and hear the Applicant give evidence and to address me.
4. In the individual circumstances of this Applicant, I find that the imposition of requiring him to undergo an English language test would be the rigid application of policy in the face of the individual’s circumstances. I find that the Applicant’s English is more than adequate for the position he seeks to obtain. The decision under review is therefore set aside and there is substituted the Tribunal’s decision that the Applicant is a fit and proper person to give immigration assistance.

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| I certify that the preceding 28 (twenty eight) paragraphs are a true copy of the reasons for the decision herein of M D Allen, Senior Member. |

............[sgd]............................................................

Dated

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| Date of hearing | **21 August 2012** |
| Applicant | **In person** |
| Solicitors for the Respondent | **Ms Katherine Hooper, DLA Piper Australia** |