HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No: S135/2021

BETWEEN: **'SOSEFO KAUVAKA LELEI TU'UTA KATOA**
Plaintiff

and

MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS
First Defendant

JUDGE OF THE FEDERAL COURT OF AUSTRALIA
Second Defendant

SUBMISSIONS OF THE FIRST DEFENDANT

Part I: Certification

1. The first defendant, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (**Minister**), certifies that these submissions are in a form suitable for publication on the internet.

Part II: Issue

2. The issue of principle presented by this application for a constitutional or other writ is whether, in exercising the power conferred by s 477A(2) of the *Migration Act 1958* (Cth) (**Act**) to refuse the grant of an extension of the time within which a person may seek judicial review of a "migration decision" (as defined in s 5(1) of that Act), the Federal Court will fall into jurisdictional error if it assesses the merits of the application for judicial review other than on an "impressionistic" basis. Put another way, in deciding whether or not to grant an extension of time, is it a jurisdictional error for the Federal Court to consider the substantive merits of the application for judicial review, and not merely whether that application is reasonably arguable?

3. For the reasons that follow, the question posed should be answered "no".

Part III: Section 78B notices

4. The Minister certifies that he has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) and has determined that no such notice is necessary.

Part IV: Facts

5. The Minister agrees with the plaintiff's summary of the material facts at [4]-[10] of his submissions dated 3 March 2022 (**PS**).

6. Though it is not suggested otherwise at PS [8], the Minister notes that, while he accepted below that the plaintiff's delay was not inordinate, he did not accept that the reason given by his solicitors for that delay – that he was not able to secure legal representation – was satisfactory.

Part V: Argument

Legislative provisions

7. Section 39B(1) of the Judiciary Act vests in the Federal Court original jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

8. Section 476A of the Act relevantly provides as follows:

> **Limited jurisdiction of the Federal Court**
>
> (1) Despite any other law, including section 39B of the *Judiciary Act 1903* and section 8 of the *Administrative Decisions (Judicial Review) Act 1977*, the Federal Court has original jurisdiction in relation to a migration decision if, and only if:
>
> ...
>
> (c) the decision is a privative clause decision, or purported privative clause decision, made personally by the Minister under section 501 ...
>
> ...
>
> (3) Despite section 24 of the *Federal Court of Australia Act 1976*, an appeal may not be brought to the Federal Court from:
>
> ...
>
> (b) a judgment of the Federal Court that makes an order or refuses to make an order under subsection 477A(2).

9. Section 476A has been described as a law which "expressly overrides s 39B of the Judiciary Act" and an "instance of indirect express amendment: whose effect is to alter the combined legal meaning of the general conferral of jurisdiction and the specific qualification of exclusion in the later law".[1]

10. Section 477A of the Act relevantly provides as follows:

> **Time limits on applications to the Federal Court**
>
> (1) An application to the Federal Court for a remedy to be granted in exercise of the court's original jurisdiction under paragraph 476A(1)(b) or (c) in relation to a migration decision must be made to the court within 35 days of the date of the migration decision.
>
> (2) The Federal Court may, by order, extend that 35 day period as the Federal Court considers appropriate if:
>
> (a) an application for that order has been made in writing to the Federal Court specifying why the applicant considers that it is necessary in the interests of the administration of justice to make the order; and
>
> (b) the Federal Court is satisfied that it is necessary in the interests of the administration of justice to make the order.

11. Save for the description of the particular court to which the application is made, s 477A is in the same terms as s 486A (and s 477). The current form of each of those provisions was introduced by the *Migration Legislation Amendment Act (No 1) 2009* (Cth). Using as they do the same language, ss 477, 477A and 486A should be interpreted in the same way.[2]

Section 477A: text

12. Section 477A(2) confers a discretionary power on the Federal Court to extend time if two preconditions are met.

13. *First*, s 477A(2)(a) identifies an objective precondition that an application has been made to the Federal Court specifying why the applicant considers it necessary in the interests of the administration of justice to extend time.

14. *Secondly*, s 477A(2)(b) identifies a subjective precondition – one which turns on the Federal Court's satisfaction – that it is necessary in the interests of the administration of justice to make an order to grant an extension of time.

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1 Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (2nd ed, 2020) at 142.

2 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* (2021) 95 ALJR 557 at [25] per Kiefel CJ, Keane, Gordon, Steward and Gleeson JJ (and the cases there cited).

15. While the present application does not require this Court to determine whether the power in the chapeau to s 477A(2) *must* be exercised favourably to an applicant if the preconditions in that sub-section have been met, its terms would suggest that the better view is that the Federal Court retains a discretion where those preconditions have been met.[3] The Minister accepts, however, that it would be a rare case where both preconditions to the discretion in s 477A(2) were met but the discretionary power was not exercised favourably to the applicant.

16. The phrase "necessary in the interests of the administration of justice" in s 477A(2)(b) is "deliberately broad". In forming the state of mind described in s 477A(2)(b), and in exercising the discretion cast by s 477A(2), the Federal Court is empowered to have (or, put another way, not prohibited from having) regard to a range of considerations. The breadth of s 477A(2) reflects Parliament's intention that it is fundamentally for the judge constituting the Federal Court to determine what factors to take into account in considering whether to grant an extension of time. As a Full Court of the Federal Court put it in *SZUWX v Minister for Immigration and Border Protection*:[4]

> In order to show that any consideration is relevant in the sense of a decision-maker being obliged to take it into account in making a decision under a statute, that must either be express or it must be implied from the "subject-matter, scope and purpose" of the legislation: see *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 at 39-40. *I am unable to see that any conclusion can properly be reached that the terms of s 477(2) make any consideration mandatory other than the express test of whether the grant of the extension of time sought is "in the interests of the administration of justice".*
>
> *It seems to me that Parliament has deliberately set a test for granting or refusing an application for an extension of time that accommodates a myriad of facts and circumstances* by which an application for review came to be lodged outside the 35-day statutory time limit. I can see no warrant for putting any additional gloss or qualification on the words used by Parliament.

17. Thus, it has been held by the Federal Court that, given its broad terms, s 477(2) does not require the Federal Circuit and Family Court of Australia (**FCC**) to have regard to the merit

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3 *SZTES v Minister for Immigration and Border Protection* [2015] FCAFC 158 at [69] per Robertson J (Logan J and Kerr J agreeing); *WZASS v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 282 FCR 516 (***WZASS***) at [27] per Katzmann, O'Bryan and Jackson JJ. In *DHX17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 278 FCR 475 (***DHX17***), on the other hand, it was said by Collier, Rangiah and Derrington JJ that the "preferable construction" of s 477(2) was that it "confers a discretion on the [Federal Circuit Court] to extend time for the making of an application for review to the extent the court considers it necessary in the interests of the administration of justice to do so" (at [38]).

4 (2016) 238 FCR 456 (***SZUWX***) at [11]-[12] per Bromwich J (Allsop CJ and Flick J agreeing) (emphasis added). See also *SZTES v Minister for Immigration and Border Protection* [2015] FCA 719 (***SZTES***) at [43]-[46] per Wigney J; *Huynh v Federal Circuit Court of Australia* (2019) 166 ALD 228 (***Huynh***) at [39], [41] per Colvin J; *APP17 v Minister for Immigration and Border Protection* [2019] FCA 794 (***APP17***) at [12]-[13] per Bromwich J; *DHX17* (2020) 278 FCR 475 at [43], [62] per Collier, Rangiah and Derrington JJ; *WZASS* (2021) 282 FCR 516 at [29]-[33] per Katzmann, O'Bryan and Jackson JJ; *CZA19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 390 ALR 1 (***CZA19***) at [19] per Allsop CJ, Markovic and Colvin JJ.

of the substantive application, even though that is a factor that will ordinarily be taken into account.[5] The point to note for present purposes, however, is that, if assessment of merit is not required by s 477(2), it cannot follow that, where it is taken into account as a permissible factor either in the formation of the state of satisfaction required by s 477(2)(b) or in the exercise of the discretion conferred by s 477(2), there is nevertheless a jurisdictional limitation on the FCC's assessment of that factor (being that it cannot go beyond determining whether the application is reasonably arguable). More generally, the breadth of the discretion (emphasised in the cases to which the plaintiff refers) and the acceptance that the merit of the application is a permissible consideration, do not support any implied limitation on the assessment of that factor. They point against such a limitation.

18. That understanding of s 477 (and ss 477A and 486A) coheres with authority in this Court which establishes that it is within the jurisdiction of a court – whether a superior court of record such as the Federal Court or an inferior court – to identify relevant issues and to formulate relevant questions.

19. In *Re Gray; Ex parte Marsh*, Deane J described the jurisdiction of the Federal Court as including "decid[ing] the questions of fact and law involved in th[e] inquiry" and that the jurisdiction to decide them "include[d] jurisdiction to decide them wrongly".[6]

20. In *Craig v South Australia*,[7] this Court unanimously held as follows:

> … the ordinary jurisdiction of a court of law encompasses authority to decide questions of law, as well as questions of fact, involved in matters which it has jurisdiction to determine. *The identification of relevant issues, the formulation of relevant questions and the determination of what is and what is not relevant evidence are all routine steps in the discharge of that ordinary jurisdiction. Demonstrable mistake* in the identification of such issues or the formulation of such questions … on the part of an inferior court entrusted with authority to identify, formulate and determine such issues and questions *will not, however, ordinarily constitute jurisdictional error.* Similarly, *a failure by an inferior court to take into account some matter which it was, as a matter of law, required to take into account in determining a question within jurisdiction or reliance by a court upon some irrelevant matter upon which it was, as a matter of law, not entitled to rely in determining such a question will not ordinarily involve jurisdictional error.*

21. In *AUK15 v Minister for Immigration and Border Protection*, Gageler J referred to the explanation in *Craig* as "apt to describe the ordinary jurisdiction of the Federal Court".[8] The final

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5 *ADN18 v Minister for Home Affairs* [2018] FCA 1677 (***ADN18***) at [34]-[35] per Griffiths J.
6 (1985) 157 CLR 351 at 390.
7 (1995) 184 CLR 163 (***Craig***) at 179-180 per Brennan, Deane, Toohey, Gaudron and McHugh JJ (emphasis added). See also *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at [67]-[68] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.
8 [2016] HCATrans 36 at lines 1607-1608.

sentence in the quoted passage from *Craig* points, importantly, to the proper understanding of the role played by s 477A. Even if, contrary to the Minister's submissions, it be accepted that s 477A requires the Federal Court not to have regard to a "more detailed consideration of the merits" (PS [37]) beyond assessing the arguability of the ground(s) of review, a failure to comply with that requirement will not sound in jurisdictional error because (as is common ground (PS [35])) the merit of the application is a factor which it is permissible for the Federal Court to take into account. It is, as this Court put it in *Craig*, "a question within jurisdiction".[9]

22. It was noted above that s 477A is in the same terms as s 486A and was inserted by the same amending legislation. In *Wei v Minister for Immigration and Border Protection*, Gageler and Keane JJ described s 486A(1) as "a procedural provision which regulates the *exercise* of the original jurisdiction conferred by s 75(v) of the Constitution. It does not, and could not, impose a condition precedent to the *invocation* of that jurisdiction."[10] Their Honours went on to say the following:[11]

> *Section 486A does not prevent the making of an application* under s 75(v) of the *Constitution*. The application is made by filing an application for an order to show cause in accordance with the *High Court Rules*. *Section 486A operates rather to regulate the procedure applicable to the exercise of the jurisdiction that has been invoked* by the making of such an application where the application has not been made within thirty-five days of the date of the decision which the plaintiff seeks to challenge. *It does so by making the grant of the relief sought in the application conditional on an order extending the period for the making of the application.* ...

23. Like s 486A(1), the prohibition in s 477A(1) is not properly understood as "in the nature of a gateway provision" (PS [43]) – if by that phrase the plaintiff intends to convey the notion that s 477A(1) operates as a limitation on the invocation of the Federal Court's jurisdiction under s 39B of the Judiciary Act (as limited by s 476A(1) of the Act).[12] Section 477A(1) does no such thing. The Federal Court's original jurisdiction is invoked by filing an originating application in accordance with the *Federal Court Rules 2011* (Cth). Consistently with what was said in *Wei*, a procedural limitation on the *exercise* of that

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9 See, by analogy, *Snedden v Minister for Justice* (2014) 230 FCR 82, where Middleton and Wigney JJ (with whom Pagone J agreed) held that an administrative decision-maker will not fall into jurisdictional error where she or he makes an error in considering a matter which the statute under which the decision is made does not require it to be taken into account (at [153]-[154], [163]-[164], [242]). Special leave to appeal was refused by Hayne and Nettle JJ: [2015] HCATrans 120.

10 (2015) 257 CLR 22 at [41] (emphasis added). Justice Nettle agreed with their Honours at [52].

11 (2015) 257 CLR 22 at [42] (emphasis added).

12 The case cited by the plaintiff at PS [43], *AZAFX v Federal Circuit Court of Australia* (2016) 244 FCR 401 (***AZAFX***), is wrong not only in so far as it establishes that s 477 is a precondition to the invocation of the FCC's jurisdiction under s 476, but also in so far as it establishes that a threshold assessment of merit is a mandatory relevant consideration (or that the merit of the substantive application is a mandatory irrelevant consideration) in the exercise of the power conferred by s 477(2).

jurisdiction – that is to say, a limitation on the grant of judicial review remedies – is the making of an order extending time under s 477A(2). But s 477A(1) does not affect the scope of that jurisdiction; and the Court therefore does not "misapprehen[d] or disregar[d] the nature or limits of its functions or powers"[13] or "misconceiv[e] the nature of the function [it] [i]s performing"[14] even if it applies the wrong principle in deciding whether or not to extend time (*cf* PS [43]-[44]).

24. If, on the other hand, s 477A(1) operates as a limitation on the *scope* of the Federal Court's jurisdiction vested by s 39B of the Judiciary Act, it would still not be a jurisdictional error for the Court to go beyond a threshold assessment of the merit of the substantive application because there is nothing in s 477A that imposes such a limitation.

Section 477A: context and purpose

25. At various points in his submissions, the plaintiff seeks to call in aid of his construction of s 477A statements made in the extrinsic materials to the Bill that led to the enactment of the current form of that provision[15] (as well as ss 477 and 486A). The steps in his argument appear to be as follows: (a) the purpose of s 477A is to avoid injustice being worked on an applicant for judicial review of a migration decision; (b) consideration of the substantive merits of an application can lead to unjust outcomes, particularly in the light of s 476A(3)(b); and (c) because the Federal Court went beyond assessing whether the ground of review was merely arguable and instead resolved his ground of review definitively, it exercised the power conferred by s 477A(2) inconsistently with its purpose, thereby falling into jurisdictional error.[16]

26. The applicant's approach to the ascertainment of the purpose of s 477A is flawed. As French CJ and Hayne J relevantly said in *Certain Lloyd's Underwriters v Cross*:[17]

> Determination of the purpose of a statute or of particular provisions in a statute may be based upon an express statement of purpose in the statute itself, inference from its text and structure and, where appropriate, reference to extrinsic materials. *The purpose of a statute resides in its text and structure. Determination of a statutory purpose neither permits nor requires some search for what those who promoted or passed the legislation may have had in mind when it was enacted.* It is important in this respect, as in others, to recognise that to speak of legislative "intention" is to use a metaphor. Use of that metaphor must not mislead.

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13 *Craig* (1995) 184 CLR 163 at 177 per Brennan, Deane, Toohey, Gaudron and McHugh JJ.
14 *SZTUT v Minister for Immigration and Border Protection* [2016] HCATrans 150 (***SZTUT***) at lines 125-126 per Gageler J.
15 Migration Legislation Amendment Bill (No 2) 2008 (Cth) (**2008 Bill**).
16 PS [26], [32], [34], [36]-[37] and [45]-[48].
17 (2012) 248 CLR 378 (***Cross***) at [25]-[26], [41] (footnotes omitted, emphasis in original).

> "[T]he duty of a court is to give the words of a statutory provision the meaning that the legislation *is taken to have intended* them to have". ...
>
> ...
>
> *The search for legal meaning involves application of the processes of statutory construction. The identification of statutory purpose and legislative intention is the product of those processes, not the discovery of some subjective purpose or intention.*
>
> A second and not unrelated danger that must be avoided in identifying a statute's purpose is the making of some a priori assumption about its purpose. *The purpose of legislation must be derived from what the legislation says, and not from any assumption about the desired or desirable reach or operation of the relevant provisions.*
>
> ...
>
> *It is not legitimate to identify a legislative purpose not apparent from the text of the relevant provisions ... , to examine extrinsic material and notice that there is nothing positively inconsistent with the identified purpose, and then to answer the question of construction by reference to the purpose that was initially assumed.* That reasoning is not sound. ...

27. The evident purpose of s 477A is to control, in the sense of restrict, the exercise of the original jurisdiction of the Federal Court in relation to a migration decision where an applicant has not made their application within 35 days of the date of that decision. It does so by making the grant of the relief sought in the application conditional on the grant of an extension of time. The fact that the exercise of the power conferred by s 477A(2) is conditional upon the Federal Court satisfying itself that it is necessary in the interests of the administration of justice to extend time suggests that the Parliament intended that good reasons would need to be shown before a case brought outside of the period specified in s 477A(1) would be entertained.

28. Of course, the presence of s 477A(2) (as well as ss 477(2) and 486A(2)) has the effect that an applicant is not shut out from securing the grant of judicial review relief where her or his application has not been made in time,[18] but that does not mean that the legislative purpose of the section is to "ensur[e] that the time limits d[o] not operate to cause injustice" (*cf* PS [34]) or to prevent the Federal Court from assessing the substantive merits of the application in deciding whether or not the applicant should be the beneficiary of a favourable exercise of the power in s 477A(2) (*cf* PS [26], [37]). The plaintiff's contention that it is inconsistent with the "purpose" of s 477A for the Federal Court to go beyond assessing the arguability of an application sidesteps considerations of text and context.

29. As to the text of s 477A, its purpose can be seen in the rule imposed by subsection (1), and in the reference to the interests of the *administration* of justice (a concept which goes

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18 Unlike the form of s 486A under consideration in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

beyond the interests of individual litigants) as a criterion for the relaxation of that rule under subsection (2). As to the immediate context, far from supporting the plaintiff's argument (*cf* PS [49]-[50]), the presence of s 476A(3)(b), which prevents an unsuccessful applicant for an extension of time under s 477A(2) appealing to a Full Court of the Federal Court, evinces Parliament's intention that applicants not be permitted to invoke the Federal Court's appellate jurisdiction where their cases are unmeritorious. It also confirms Parliament's intention that the exercise of the power conferred by s 477A(2) is essentially a matter for the primary judge.

30. In identifying the scope and purpose of s 477A, the plaintiff receives no support from cases involving powers to extend time under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) or *Uniform Civil Procedure Rules 2005* (NSW) (*cf* PS [26], [54]-[56]). Indeed, none of those cases involved jurisdictional error on the part of a court. That is no insignificant matter, for what might be seen as a desirable approach to the assessment of merit says nothing as to whether the Federal Court will exceed its jurisdiction in not following that approach. Answering the latter question "is a tightly confined exercise".[19] And what might be a jurisdictional error on the part of an administrative decision-maker may be an error within jurisdiction for a court.[20] Ultimately, the ascertainment of the statutory limits of a decision-making authority turns on "an analysis of the terms in which [the] statutory discretion or power has been conferred".[21] For that reason, the plaintiff's reliance on *CIC Insurance Ltd v Bankstown Football Club Ltd*[22] is misplaced. Contrary to PS [56], the phrase "existing state of the law" in that case refers not to the "considerable body of case law concerning other powers to extend time", but to earlier forms of the legislation to be construed. As Gageler J said in *Baini v The Queen*:[23]

> That modern contextual approach ordinarily requires that statutory language re-enacted in an identical form after it has acquired a settled judicial meaning be taken to have the same meaning. It equally requires that, changes of drafting style aside, statutory language re-enacted in an altered form after it has acquired a settled judicial meaning be taken to have a different meaning. Were it otherwise, legislative policy choices would be blurred and orderly legislative reform would be impeded.

31. In any event, contrary to PS [32] and [34], the Explanatory Memorandum to the 2008 Bill did not merely state that the conferral on the relevant court of a broad discretion to extend time "will protect applicants from possible injustice"; it also provided that a broad

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19 *SZTUT* [2016] HCATrans 150 at line 124 per Gageler J.
20 *SZUWX* (2016) 238 FCR 456 at [20] per Allsop CJ.
21 *SZUWX* (2016) 238 FCR 456 at [15] per Flick J, [19]-[21] per Allsop CJ. See also *APP17* [2019] FCA 794 at [11] per Bromwich J.
22 (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ.
23 (2012) 246 CLR 469 at [42].

discretion will "ensur[e] that the extension is only granted where there are compelling reasons to do so".[24] It can hardly be consistent with that stated purpose of s 477A for the Federal Court to grant an extension of time where the substantive application has no prospect of success.

32. Aside from the plaintiff's appeal to the "purpose" of s 477A, his submission at PS [46] that an applicant for an extension of time "is entitled to be placed on an equal footing with those who brought their applications within time" if other factors relevant to the exercise of the discretion do not militate against the grant of an extension finds no support in the text or context of s 477A. Indeed, the plaintiff's argument also overlooks the importance of complying with legislated time limits[25] and of providing a satisfactory explanation for delay (which in this case he did not do).

33. Finally, the plaintiff's reliance on "the common law's reluctance to deny aggrieved persons with an arguable complaint access to the Court" (PS [51]) is misplaced. The argument is a distraction from the issue presented by this application and seeks to elevate principles espoused in different decision-making contexts to a binding rule of law in the application of s 477A of the Act.

34. Returning to the text of s 477A(2), it will rarely if ever be "in the interests of the administration of justice" for an extension of time to be granted if the substantive application is destined to fail. There may be danger in forming and relying on that conclusion if there is a real possibility that evidence or submissions at trial would give the case a different complexion; but that danger does not arise where (as here) the case has been prepared and argued as if on a final hearing. In such a case, the Federal Court is well equipped to decide whether the substantive application is destined to fail (at which point discussion of whether it was nevertheless "arguable" becomes somewhat unreal);[26] and if it is, the only argument against refusing the extension of time is that the applicant will have no right to appeal. That factor may influence the judge deciding the application; but it is an aspect of determining where the interests of the administration of justice lie, which is the function reposed in the Federal Court.

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24 Explanatory Memorandum to the 2008 Bill at [87] (s 477A(2)), [102] (s 486A(2)).

25 As Wilcox J observed in *Hunter Valley Developments Pty Ltd v Minister for Home Affairs and Environment* (1984) 3 FCR 344 at 348, "it is the prima facie rule that proceedings commenced outside th[e] [relevant] period will not be entertained".

26 As Wigney J observed in *SZTES* [2015] FCA 719 at [89], in such cases "it may be somewhat artificial to speak of reasonable prospects of success". There is an analogy here with the traditional test for summary dismissal which, while requiring a high degree of confidence that a case is unviable, is not limited to cases that are simple or self-evident: see, for example, *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at [103] per Kirby J.

The plaintiff's case is inconsistent with High Court authority

35. The plaintiff's case founders when it is recognised, as he does at PS [58], that this Court has endorsed the proposition that, in some cases, an extension of time under s 486A will not be granted unless a plaintiff can establish an "exceptional" case.[27] The plaintiff accepts that his construction of s 477A "does not require a conclusion that it will never be permissible to consider the merits of an application, beyond whether it is reasonably arguable, in determining whether to grant an extension of time" (emphasis in original). He further accepts that, in some cases, such as where "the delay is a long one and there is no proper explanation for that delay", it will be within jurisdiction for a court to go beyond a threshold assessment of merit. However, the plaintiff argues that, because the present case "involved a minor, and explained, delay", it "does not raise these issues". The difficulty with the plaintiff's argument is that it makes the proper construction of s 477A (and ss 477 and 486A) dependent on the facts of a particular case. That is the wrong approach to statutory construction. Either s 477A imposes a jurisdictional restraint on the degree to which the Federal Court is empowered to assess the merit of the substantive application or it does not. The proper construction of s 477A must begin (and end) with a consideration of the text, having regard to its context and purpose.[28]

36. The plaintiff's argument also collides with various judgments of this Court where, in deciding whether an extension of time should be granted under s 486A, the Court embarked upon more than an impressionistic assessment of merit.[29] It suffices to mention two examples.

37. In *Wei*, this Court granted an extension of time under s 486A(2) having found not that the application for judicial review of a decision of a delegate of the Minister to cancel Mr Wei's student visa was reasonably arguable, but that that decision "was affected by jurisdictional error".[30] While the Court ultimately decided that it was in the interests of the administration of justice to grant an extension of time, there is implicit acknowledgment

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27 See the cases cited at PS [58] (footnote 41).

28 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69] per McHugh, Gummow, Kirby and Hayne JJ; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [4] per French CJ, [47] per Hayne, Heydon, Crennan and Kiefel JJ; *Cross* (2012) 248 CLR 378 at [23]-[26] per French CJ and Hayne J; *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14] per Kiefel CJ, Nettle and Gordon JJ.

29 See, for example, *SZUSH v Minister for Immigration and Border Protection* [2016] HCATrans 112 (Nettle J); *Plaintiff M148/2017 v Minister for Immigration and Border Protection* [2018] HCATrans 109 (Bell J); *Dhir v Minister for Home Affairs* [2019] HCATrans 118 (Bell J); *KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 95 ALJR 666 (***KDSP***) (Edelman J).

30 (2015) 257 CLR 22 at [39] per Gageler and Keane JJ. See also at [35].

in the judgment that s 486A accommodates consideration of more than the mere arguability of the substantive application.

38. In *KDSP*, the plaintiff sought constitutional writs, declarations, injunctions and other relief in this Court's original jurisdiction in respect of administrative action taken by the Minister. His application required a substantial extension of time. In refusing to grant an extension of time, Edelman J resolved each of the plaintiff's grounds of review conclusively. His Honour found that the plaintiff's grounds of challenge had "no merit", "fail[ed]", were "misconceived" and should be "rejected".[31]

39. If the plaintiff's construction of s 477A were embraced, it would follow that this Court in *Wei* and *KDSP* misconceived the nature of the function being performed under s 486A of the Act. There being no mention in the plaintiff's submissions that the correctness of those judgments is in dispute, they are a complete answer to his case.

40. While decided in a different context, it is worth mentioning *Jackamarra v Krakouer*.[32] The question in that case was whether a Full Court of the Supreme Court of Western Australia erred in refusing to extend the time within which to appeal on the basis that the appeal lacked "any real prospect of success" in circumstances where it did not have before it a transcript of evidence or any exhibits before the trial judge. In upholding the appeal to this Court, Brennan CJ and McHugh J relevantly said the following:[33]

> *One reason that an appellate court does not go into "much detail on the merits" in considering whether the time for an appeal should be extended is because ordinarily it has "limited materials and argument". Unless motions to extend time for appeals are to turn into full rehearsals for those appeals, appellate courts can only assess "the merits" in a fairly rough and ready way.* In most cases that assessment will be made from the statement of the applicant's case rather than from the opposing arguments or any detailed examination of the proofs of the argument. The merits are merely one of the factors that must be considered in determining whether the discretion to extend time should be exercised. *No doubt there will be cases – this was obviously one – where instinctively the court feels that, given the apparent strength of the judgment under appeal, the arguments supporting the appeal will fail.* In that case, however, an appellate court needs to remind itself "that one story is good until another is told" and that, *if the court is inclined to act on the apparent strength of the judgment, the applicant for an extension of time should have a full opportunity to tell his or her story in rebuttal of the judgment.* The court needs to remind itself also that the parties do not expect to argue the merits issue as elaborately as if they were arguing the appeal itself.
>
> ...
>
> With great respect, it seems to us that the Full Court could not come to the conclusion that the appeal had no prospects of success unless it examined all the evidence, particularly the medical evidence. This was an appeal which depended substantially,

31 (2021) 95 ALJR 666 at [39], [43], [49], [57]-[58], [67].
32 (1998) 195 CLR 516.
33 (1998) 195 CLR 516 at [9], [13] (emphasis added, footnotes omitted).

if not entirely, on determining whether various findings of the Commissioner were correct having regard to the proper evaluation of the evidence. *If the Full Court had examined all the evidence, it may have come to a clear conclusion that the appeal could not succeed. In that case, applying the approach in Esther Investments, it would have been justified in refusing the application for an extension of time.* But without that evidence, it could not make the finding that it did.

41. If, as in the present case, the merits were "fully argued" (AB 161 [8]) and there was no further evidence to adduce, it was not inappropriate – much less a jurisdictional error – for the Federal Court to assess the merits of the substantive application beyond whether the plaintiff's ground of review was reasonably arguable in the course of deciding whether to grant an extension of time under s 477A.

The authorities relied on by the plaintiff

42. It follows from the foregoing submissions that the Federal Court cases on which the plaintiff relies (at PS [38]-[43]) were wrongly decided to the extent that they stand for the proposition that it is a jurisdictional error for a court, in deciding whether or not to grant an extension of time under ss 477 or 477A, to travel beyond an examination of the merits at a reasonably impressionistic level.[34]

43. Properly analysed, however, only the judgments of Mortimer J in *MZABP*, Charlesworth J in *AZAFX* and the Full Court in *DHX17* suggest that a full consideration of the merits of a substantive application for judicial review will result in the FCC exceeding its jurisdiction. Further, the applicant gains only limited support from *MZABP* and *DHX17*.

44. The aspect of the reasoning of Mortimer J that is relied on did not form a part of the ratio of *MZABP*, since her Honour went on to find that the FCC did not err in the manner alleged by the applicant. That conclusion was upheld on appeal, with the Full Court expressing general agreement with her Honour's observations "as to the proper disposition of applications for extensions of time".[35]

45. Strictly speaking, the judgment of the Full Court in *DHX17* stands only for the proposition that, if the FCC misconceives the nature of its function, it will ordinarily fall into jurisdictional error.[36] It was not necessary for the Full Court in that case to determine whether the FCC had, in fact, misconceived the nature of its function in determining the

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34 *MZABP v Minister for Immigration and Border Protection* (2015) 242 FCR 585 (***MZABP***) at [62]-[63], [68] per Mortimer J, *AZAFX* (2016) 244 FCR 401 at [74], [78]-[79], [81]-[82] per Charlesworth J; *DHX17* (2020) 278 FCR 475 at [68]-[76], [83], [87], [101] per Collier, Rangiah and Derrington JJ.

35 (2016) 152 ALD 478 at [38] per Tracey, Perry and Charlesworth JJ.

36 (2020) 278 FCR 475 at [68], [76] per Collier, Rangiah and Derrington JJ.

applicant's application for an extension of time, because the Minister had not put in issue a finding made by the primary judge that the FCC proceeded on a "misconception" as to "the function to be performed and the power to be exercised under s 477(2)".[37] That finding was "an impediment to an outcome favourable to the Minister on the appeal".[38] Even if it be right that the Full Court regarded that conclusion to be correct, that is of no relevant consequence because there was no contest as to its correctness.[39]

46. None of the other cases cited by the plaintiff supports his case. In each of *Singh v Minister for Immigration and Border Protection*,[40] *Guo v Minister for Immigration and Border Protection*,[41] *DKX17 v Federal Circuit Court of Australia*[42] and *Tuberi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*,[43] the Federal Court did not opine as to whether descending into a more detailed examination of merit than the approach endorsed by Mortimer J in *MZABP* will result in jurisdictional error.

47. Nor does the judgment of the Full Court in *DMI16 v Federal Circuit Court of Australia*[44] advance the plaintiff's case (*cf* PS [57]). Not only did the Court dismiss the appeal, but it was, as Gageler J pointed out in *EBT16 v Minister for Home Affairs*,[45] "circumspec[t]" about the correctness of a concession made by the Minister that the FCC "would fall into jurisdictional error if it approached the prospects of success as if it were making a final decision".[46] The Minister makes no such concession in this case.

48. The judgment of Edelman J in *Gibson v Minister for Home Affairs* does not advance matters (*cf* PS [59]). His Honour considered it "neither necessary nor appropriate to descend into any more detail concerning the merits" of the application not only because he was persuaded that the plaintiff's submissions were "sufficiently arguable in the circumstances of the case to justify the extension of time required", but also because the issues raised in the application were "still evolving and being refined" and it was appropriate to remit the matter to the FCC.[47]

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37 *DHX17 v Minister for Home Affairs* [2019] FCA 2150 at [83] per Greenwood J.
38 (2020) 278 FCR 475 at [82] per Collier, Rangiah and Derrington JJ.
39 *Coleman v Power* (2004) 220 CLR 1 at [79] per McHugh J.
40 [2017] FCAFC 195 at [21] per Perram, Farrell and Perry JJ.
41 [2018] FCAFC 34 (***Guo***) at [27] per Siopis, White and Perry JJ.
42 (2019) 268 FCR 64 at [95] per Rangiah J (Reeves J and Bromwich J agreeing). His Honour said that the FCC was "*not required* to conduct 'a de-facto full hearing'" (emphasis added).
43 [2020] FCA 1029 at [4] per Steward J. His Honour cited *Guo* [2018] FCAFC 34 at [27] in support of the proposition that "the proposed grounds of review are examined at a reasonably impressionistic level". His Honour did not say that the FCC will fall into jurisdictional error if it does not do so.
44 (2018) 264 FCR 454.
45 (2019) 94 ALJR 6 at [8].
46 (2018) 264 FCR 454 at [62] per Collier, Logan and Perry JJ.
47 [2020] HCATrans 46 at lines 1317-1322, 1359-1360 and 1434-1436.

49. Contrary to PS [38], the judgments of the Full Court in *CZA19*,[48] Wheelahan J in *DBA16 v Minister for Home Affairs*[49] and Colvin J in *Huynh*[50] support the Minister's case. In *DBA16* it was said that statements as to the proper approach to take to the assessment of the merits of a substantive application in determining an application for an extension of time amount to "judicial guidance … not … rules of law".[51] The conclusion reached in that case was driven in large part by observations of this Court in *Norbis v Norbis*, that the views expressed by appellate courts in supervising the exercise of discretionary powers amount to "guidance" falling short of enunciating a binding principle of law.[52]

50. In *SZTES* (on which the plaintiff relies at PS [62]), Wigney J doubted that an error of the kind alleged by the plaintiff in the present case would amount to a jurisdictional error, even if it amounted to an error of law. His Honour reasoned as follows:[53]

> … [A]s the reasoning in *Craig v The State of South Australia* shows, not all errors of law by an inferior court amount to jurisdictional errors. The ordinary jurisdiction of a court encompasses the authority to decide questions of law, including the identification of relevant issues and the formulation of relevant questions. The Federal Circuit Court's identification of the issues and questions concerning the interests of the administration of justice would ordinarily therefore fall within its jurisdiction. An error in the identification of such issues and questions would therefore be an error within jurisdiction.

Federal Court's reasons

51. It remains to mention the Federal Court's reasons for judgment.

52. The Federal Court's evaluation of the merits of the substantive application can be said to be more than "impressionistic", if by that it is meant that it was carefully considered and paid attention to the material before the Court and the arguments of the parties (*cf* PS [65]-[67]). The alleged vice is, apparently, not the degree of care involved but the standard applied: that the Court erred, in deciding the application for an extension of time, by considering more than whether the substantive case was arguable.

53. For reasons outlined in the submissions above, that argument misunderstands both the role and the content of s 477A. But even if those submissions are wrong, the Federal Court should be understood to have decided not merely that it would dismiss the

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48 (2021) 390 ALR 1 at [19].
49 [2018] FCA 1777 (***DBA16***) at [60].
50 (2019) 166 ALD 228 at [58].
51 [2018] FCA 1777 at [60].
52 (1986) 161 CLR 513 at 519 per Mason and Deane JJ, 537 per Brennan J. See also *Comcare v PVYW* (2013) 250 CLR 246 at [139] per Gageler J.
53 [2015] FCA 719 at [90].

application on a final basis, but that the substantive case was not sufficiently arguable to justify an extension of time.

54. The Federal Court identified what was before it: "an application for an extension of time in which to file an application for the review of a migration decision pursuant to s 476A of the *Migration Act 1958* (Cth) ("the Act") and, if granted, the hearing of that application" (AB 159 [1]). It understood, therefore, that it could not grant the relief sought by the plaintiff unless it first granted an extension of time.

55. Having identified the relevant date by which the plaintiff was required to make his application (AB 160 [5]), the Federal Court listed the factors relevant to the exercise of its discretion under s 477A(1), one of which was "the merits of the substantial application".

56. At AB 161 [7], the Federal Court recorded the Minister's submission that the application for an extension of time should be refused – not that the substantive application should be dismissed – including because "the applicant's proposed grounds of review *lack sufficient merit to warrant the grant of an extension of time*" (emphasis added). It was in this context that the Federal Court recorded its conclusion, at AB 161 [8], that it was "not persuaded that [the only live ground] has *any merit*" (emphasis added) and that, therefore, the application for an extension of time should be refused. In the face of that conclusion it should not be supposed that the Federal Court's more detailed reasoning amounts to an assessment of merit "as if [it] was making a final determination of the substantive application" (*cf* PS [12]). Such a reading is further undermined by the decisive rejection of the substantive case at AB 164-166 [19]-[32], ending with the observation that the Minister's reasoning was "not unreasonable in the legal sense nor was it affected by any other error *capable* of amounting to jurisdictional error" (emphasis added).

57. Seen against this background, the statement at AB 161 [8] that the only live ground of review "was fully argued" should be understood as nothing more than an observation that both applications were heard together, the parties made detailed submissions, and all of the evidence on which the parties wished to rely was before the Court. It was appropriate for the Federal Court to deal with the application for an extension of time and the substantive matter together, as it "avoids what may otherwise be a substantially duplicated hearing on a later date".[54]

58. The provision of detailed reasons is not inconsistent with the Court having pitched its analysis at the level of whether the substantive application had reasonable prospects of

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54 *DHX17* (2020) 278 FCR 475 at [101] per Collier, Rangiah and Derrington JJ.

success. Nor is the absence of phrases such as "arguable", "reasonably arguable" or "reasonable prospects of success". S135/2021

59. The Federal Court did not misconceive the nature of its task, whether or not it went beyond a threshold assessment of the merit in the plaintiff's second ground of review.

Part VI: Notice of contention or cross-appeal

60. No notice of contention or notice of cross-appeal has been filed by the Minister in this proceeding.

Part VII: Oral argument

61. The Minister anticipates that he will require up to one hour and fifteen minutes for the presentation of his oral argument.

Dated: 4 March 2022

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ANNEXURE TO THE SUBMISSIONS OF THE FIRST DEFENDANT

Pursuant to [3] of Practice Direction No 1 of 2019, the first defendant sets out below a list of the particular constitutional provisions and statutes referred to in his submissions:

No.	Description	Version	Provision(s)
1	*Commonwealth Constitution*	Current	s 75(v)
2	*Judiciary Act 1903* (Cth)	Current	s 39B
3	*Migration Act 1958* (Cth)	Current	ss 476, 476A, 477, 477A, 486A
4	*Migration Legislation Amendment Act (No 1) 2009* (Cth)	As enacted	Schedules 2, 3.