HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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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

FIRST DEFENDANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. The first defendant (**Minister**) certifies that this outline is in a form suitable for publication on the internet.

Part II: Propositions to be advanced in oral argument

2. The key elements of the plaintiff's case are as follows **(PS [12], [58], [64]-[70]; Reply [2]-[3])**: the Federal Court did not consider whether or not his proposed judicial review application was "reasonably arguable"; the Court, *in the circumstances of this case*, was bound by s 477A(2)(b) of the *Migration Act 1958* (**Act**) to consider the merits of his proposed judicial review application against that standard; and, in failing to do so, the Court made a jurisdictional error.

3. The plaintiff does not argue that the Act imposes a general jurisdictional constraint on the Federal Court requiring it to consider the merits of a proposed judicial application only by reference to that standard in all applications under s 477A: **PS [58]; Reply [2]-[3]**.

4. No clear guidance is offered as to when the propounded duty is a jurisdictional constraint on the exercise of power under s 477A.

5. Overview of the Minister's case.

Jurisdictional error

6. Jurisdictional error refers to a failure to comply with one or more statutory preconditions to such an extent that it results in a decision lacking the characteristics necessary for it to have force and effect under the statute pursuant to which it was purported to have been made: *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at [24].

7. What constitutes jurisdictional error can vary as between courts and administrative decision-makers **(DS [30])**. Ordinarily, a failure to have regard to a matter to which a court is required to have regard in determining a question within jurisdiction will not be a jurisdictional error **(DS [20])**: *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at [67]-[68] **(JBA Tab 10)**; *Quinn v DPP (Cth)* [2021] NSWCA 294 at [12]-[13], [15], [18], [20] **(JBA Tab 27)**; *Stanley v DPP (NSW)* [2021] NSWCA 337 at [48]-[49], [58], [127] **(JBA Tab 31)**.

Legislation (DS [8]-[34])

8. ***Section 476A (DS [8]-[9])***: The scope of the Federal Court's jurisdiction in relation to migration decisions is controlled by s 476A.

9. Sections 476A(3)-(4) removed the right to appeal from a decision whether or not to extend time. Those subsections and the present form of ss 477, 477A and 486A were inserted by Schedule 2 to the *Migration Legislation Amendment Act (No 1) 2009*. Parliament intended to remove appeals from extension of time decisions and not make them subject to supervisory review for jurisdictional error.

10. ***Section 477A (DS [10]-[24])***: Section 477(1) imposes a 35-day time limit on an application for judicial review of a migration decision. Section 477A(2) contains two conditions: **DS [12]-[15]**. The first condition (in paragraph (a)) requires the applicant to apply in writing specifying why they consider it is necessary in the interests of the administration of justice to extend time. The second condition (in paragraph (b)) requires the Court to be satisfied that it is necessary in the interests of the administration of justice to extend time. It involves an evaluative judgment by the Court.

11. Section 477A(2) does not state any mandatory factors to be considered in determining where the interests of the administration of justice lie **(DS [16])**: *SZUWX* (2016) 238 FCR 456 at
10 [11]-[12], [16], [18]-[19], [21] **(JBA Tab 35)**; *SZTES* [2015] FCA 719 at [43]-[46] **(JBA Tab 33)**; *ADN18* [2018] FCA 1677 at [34]-[35] (merit not a mandatory factor) **(JBA Tab 16)**.

12. Nor does s 477A(2) prescribe the *manner* of assessing merit. As the merits of a proposed application are a permissible consideration under s 477A(2), it is within the jurisdiction of the Federal Court to have regard to that factor in such manner as it considers appropriate in the circumstances: **DS [16]-[17]**. It is within the jurisdiction of a court to identify relevant issues and formulate relevant questions: **DS [18]-[21]**.

13. Cases can, however, provide guidance as to the evaluative judgment involved: *CZA19* (2021) 285 FCR 447 at [19] **(JBA Tab 18)**.

14. The language in s 477A(2) is the same as that in ss 477(2) and 486A(2). They should be
20 given the same meaning: *Minister for Immigration and Border Protection v Moorcroft* (2021) 95 ALJR 557 at [25] **(DS [11])**. Therefore, the authorities applicable to s 486A may assist in construing s 477A: *Wei* (2015) 257 CLR 22 at [40]-[42] **(JBA Tab 15) (DS [22])**. Like s 486A, s 477A regulates the procedure applicable to the exercise of the Federal Court's jurisdiction: **DS [23]**. The plaintiff does not dispute this: **Reply [9]**. This is consistent with s 477A not imposing a jurisdictional constraint.

15. ***Context and purpose (DS [25]-[34])***: The plaintiff's case turns on a suggested implication from the context and purpose of s 477A: **PS [26]-[34]; Reply [11]-[12]**.

16. Statutory purpose is identified from the text and structure of the legislation: *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 **(JBA Tab 6) (DS [26])**.

30 17. Section 477A(2)(b) requires the Court to be satisfied that it is *necessary* in the interests of the administration of justice to extend time: Explanatory Memorandum to the Migration Legislation Amendment Bill (No 2) 2008 (**2008 Bill**) at [86] **(JBA Tab 38)**.

18. The focus of s 477A(2)(b) is not on the interests of the individual, but the interests of the administration of justice **(DS [29])**.

19. The power to extend time has been removed from the right to appeal by s 476A(3). This evinces a parliamentary inclination for decisions whether to extend time not to be able to be readily challenged: see Explanatory Memorandum to the 2008 Bill at [113] **(JBA Tab 38)**.

20. There is no statutory language suggesting that s 477A(2) is intended to "protect applicants from possible injustice". Statutory purpose cannot be identified in such an abstract manner.

Analogous authorities (DS [35]-[41])

21. There are cases where this Court has considered whether a substantive application would succeed or fail in deciding whether to grant an extension of time: *Wei* (2015) 257 CLR 22 **(JBA Tab 15)**; *KDSP* (2021) 95 ALJR 666 **(JBA Tab 24)**.

22. The plaintiff seeks to distinguish these cases by pointing to the availability of an appeal (with leave) under s 34 of the *Judiciary Act 1903*: **Reply [15]-[16]**. It is suggested that this difference authorises a Justice of this Court to form a state of satisfaction under s 486A(2)(b) by having regard to the substantive merits of the application, but that for a Federal Court judge to do the same under s 477A(2)(b) would mean that they have misapprehended their function as to fall into jurisdictional error.

23. The plaintiff argues that a refusal by the Federal Court would extinguish an applicant's "appeal rights": **Reply [17]**. However, there is no extinguishment of a right to appeal: a person who does not apply within time has no right to make an effective application and no right of appeal.

Plaintiff's authorities (DS [42]-[50])

24. The Federal Court cases relied on by the plaintiff **(PS [38]-[43])** that establish that, when deciding whether to grant an extension of time under ss 477 or 477A, it will be a jurisdictional error for a court to have regard to the merits of the substantive application were wrongly decided and should be overruled.

Federal Court's reasons (DS [51]-[59])

25. The Federal Court did not stray beyond a threshold assessment of merit: *cf* **Reply [18]**. Faced with a submission that the application lacked sufficient merit to warrant the grant of an extension of time **(AB 160 [7])**, the Federal Court was not persuaded that the proposed ground "ha[d] any merit": **AB 161 [8]**; see also **AB 166 [32]**.

26. In any event, the Court did not err even if it went beyond assessing merit at a threshold level. At worst, any error was within jurisdiction.

Dated: 10 May 2022

Stephen Lloyd Bora Kaplan

Counsel for the first defendant