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

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

PLAINTIFF'S OUTLINE OF ORAL ARGUMENT

PART I: PUBLICATION ON THE INTERNET

1. This outline is in a form suitable for publication on the internet.

PART II: PROPOSITIONS TO BE ADVANCED

2. In the present case, in considering the application for an extension of time under s 477A of the *Migration Act 1958* (Cth) (**Migration Act**), Nicholas J (the **primary judge**) went beyond an assessment of the merits of the application for review on an impressionistic basis to assess whether it was reasonably arguable.

3. As a result, in the circumstances of this case the primary judge misapprehended or misconceived the nature and purpose of the statutory power in s 477A, and thus committed jurisdictional error: PS, [11]-[12].

Legislative context

4. Where an application for review of a migration decision is made in the Federal Court of Australia, the application must be made within 35 days of the migration decision pursuant to s 477A(1) of the Migration Act. However, the Federal Court has power to extend time if it is satisfied that it is necessary in the interests of the administration of justice to make the order pursuant to s 477A(2): PS, [6].

5. No appeal may be brought from a decision to refuse an extension of time: s 476A(3)-(4)

of the Migration Act. Analogous provisions exist in relation to applications for review of migration decisions brought in the Federal Circuit and Family Court of Australia (Division 2): s 477 of the Migration Act.

The approach of the primary judge

6. In considering whether to grant the extension of time, the primary judge did not assess the merits of the application on an impressionistic basis, but rather on the basis of "full argument". Having heard that argument, the primary judge rejected the plaintiff's submissions as if dealing with the substantive application for relief: PS, [64]-[67].

7. The primary judge did not identify any other factors – such as the extent of the delay, the reasons for the delay, or prejudice to the Minister – as weighing against the grant of an extension of time: PS, [8].

The existence of jurisdictional error

8. The power in s 477A is not confined by an obligation to take into account any express or implied mandatory considerations, other than the court being satisfied that an extension is necessary in the interests of the administration of justice: PS, [22].

   - *CZA19 v Federal Circuit Court of Australia* (2021) 390 ALR 1 at [19] (Vol 4, Tab 18).

9. As a consequence, the "merits" of an application for review (assessed by reference to any particular threshold) are not a mandatory relevant consideration deriving from a proper construction of those sections.

10. However, courts have nevertheless identified guidance as to how the discretion in those sections should properly be exercised. This guidance demonstrates that the merits should be assessed on an impressionistic basis to determine whether the claim is hopeless or reasonably arguable.

    - *MZABP v Minister for Immigration and Border Protection* (2015) 242 FCR 585 at [56]-[68] (Vol 4, Tab 25).

    - *MZABP v Minister for Immigration and Border Protection* (2016) 152 ALD 478 at [20]-[23], [38] (Vol 4, Tab 26).

11. A mere failure to follow guidance of this nature does not amount to an error of law or a jurisdictional error, in and of itself. However, absent explanation it may indicate a more substantive error, including jurisdictional error: PS, [57].

- *Norbis v Norbis* (1986) 161 CLR 513 at 519-520 (Vol 3, Tab 12).

12. Jurisdictional error will arise in relation to an inferior court if it mistakenly asserts or denies the existence of jurisdiction or if it is misapprehends or disregards the nature or limits of its functions or powers: PS, [14]-[15].

- *Craig v South Australia* (1995) 184 CLR 163 at 177 (Vol 3, Tab 7).
- *Kirk v Industrial Court* (2010) 239 CLR 531 at [71]-[77] (Vol 3, Tab 10).

13. Although the Federal Court is a superior court of record, it is nevertheless a court of limited jurisdiction, such that its decisions are amenable to judicial review in this Court: PS, [16]-[18].

10 - *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 618 (Vol 3, Tab 9).

14. Section 477A is a threshold provision, pursuant to which the Court must determine whether the application should proceed to a full and final determination on the merits. Undertaking such a determination at the threshold stage is inconsistent with the nature of the function conferred on the Federal Court: PS, [26], [43].

- *DHX17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 278 FCR 475 at [65]-[83] (Vol 4, Tab 20).

15. This is consistent with the approach adopted in relation to the exercise of other powers to extend time in other contexts: PS, [55]-[56].

16. The limited nature of the Federal Court's function under s 477A must be seen in the context
20 of the absence of any right of appeal from a refusal to extend time: PS, [49]-[50].

- Cf *Jackamarra v Krakouer* (1998) 195 CLR 516 (Vol 3, Tab 8).

17. In the present case, the primary judge's approach to the merits was equivalent to a determination made in assessing whether substantive relief should be granted. The primary judge did not clearly and distinctly set out the merits issues arising on the application to extend time as opposed to the application for substantive relief: PS, [68]-[70].

18. In the circumstances of this case, the primary judge committed jurisdictional error.

O R Jones J G Wherrett