HIGH COURT OF AUSTRALIA

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File Number:	S135/2021
File Title:	Tu'uta Katoa v. Minister for Immigration, Citizenship, Migrant
Registry:	Sydney
Document filed:	Form 27E - Reply
Filing party:	Plaintiff
Date filed:	16 Mar 2022

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

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

Plaintiff

MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS

First Defendant

JUDGE OF THE FEDERAL COURT OF AUSTRALIA

Second Defendant

10 **PLAINTIFF'S REPLY**

PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II REPLY

The nature of the jurisdictional error alleged in the present case

2. At **DS [2]**, the Minister's submissions mischaracterise the issue of principle that arises in the present claim. It is not the plaintiff's case that the Federal Court commits a jurisdictional error whenever, in deciding whether or not to grant an extension of time, it considers the merits of an application other than on an "impressionistic" basis or goes beyond an assessment of whether the claim is reasonably arguable.

20 3. As **PS [58]** makes clear, the plaintiff's construction of s 477A(2) does not require that conclusion. Where it is found that the delay is a long one, or there is no adequate explanation for a delay, an exceptional case may be required in accordance with past authority of this Court. This is consistent with the scope and purpose of s 477A(2). However, where this is not the case, the Federal Court may misconceive the scope and purpose of the function conferred upon it (and thus commit jurisdictional error) if, after more than an impressionistic assessment of the merits, it refuses an extension of time on the basis that it would ultimately dismiss the substantive application.

4. Stated in this way, contrary to **DS [17]**, the present claim does not require this Court to determine whether at least some assessment of the merits, in some form, is always

required when considering whether to grant an extension of time.[1] Rather, the question is whether the Federal Court judge's assessment of the merits indicates that he has misconceived the scope and purpose of the function conferred upon the court in determining whether to grant an extension of time.

5. As to **DS [18]-[21]**, it is of course orthodox that a constitutional writ will not lie to set aside a decision of the Federal Court for either non-jurisdictional error of law or for an error in finding a fact which it is within the jurisdiction of that court to conclusively determine. The plaintiff does not challenge that orthodox understanding. Rather, the manner in which the Federal Court addressed the merits in the present case reveals a jurisdictional error in the form of a misconception of the scope and purpose of the power to extend time in s 477A(2) of the Act. The decisions in *AUK15 v Minister for Immigration and Border Protection*, relied on at **DS [21]**, and *SZTUT v Minister for Border Protection*, relied on at **DS [23],** make clear that this is a different question.

6. Curiously, the Minister's submissions suggest that the plaintiff's case is that the Federal Court cannot refuse an extension of time where it concludes that the application has "no prospect of success" (**DS [31]**) or is "destined to fail" (**DS [34]**). The plaintiff does not contend that the Federal Court cannot refuse to extend time where it forms such a view. It is accepted that, in those circumstances, it would seldom be in the interests of the administration of justice to grant an extension of time (**PS [48]**).

7. Contrary to **DS [35]**, the plaintiff does not contend that the proper construction of s 477A(2) depends upon the facts of a particular case. Rather, the power in s 477A(2) must be exercised consistently with its scope and purpose. Of course, the question whether the power was exercised in that way can only be resolved by considering how the Federal Court exercised the discretion in the circumstances of a particular case.

The relevance of the decision in *Wei v Minister for Immigration and Border Protection*

8. At **DS [22]-[24**], the Minister appears to contend that a jurisdictional error can <u>never</u> arise from the exercise of the power to extend time in s 477A(2) (or s 477(2)) of the Act unfavourably to an applicant. The Minister makes this contention on the basis that in *Wei v Minister for Immigration and Border Protection*, Gageler and Keane JJ held that s 486A(1) was a procedural provision which regulates the exercise of the original

[1] Although in this regard see *Gallo v Dawson* (1990) 64 ALJR 458 at 459 (McHugh J); *Jackamarra v Krakouer* (1998) 195 CLR 516 at [9] (Brennan CJ and McHugh J).

jurisdiction conferred by s 75(v) of the Constitution, and was not a condition precedent to the invocation of that jurisdiction.

9. The Minister's position in this regard should not be accepted. The plaintiff does not contend that s 477A(2) of the Act (or s 477(2)) constitutes a condition precedent to the invocation of the Court's jurisdiction under s 39B of the *Judiciary Act 1903* (Cth). However, it remains the case that an express and distinct power to extend time (and thus permit the exercise of that jurisdiction) has been conferred on the Federal Court by s 477A(2). As accepted at **DS [27]**, the grant of relief sought in an application is conditional upon the grant by the Federal Court of an extension of time pursuant to its power in s 477A(2). If the Federal Court, having misconceived the scope and purpose of the function conferred upon it, purports to decide not to exercise that power, it commits jurisdictional error.

10. Contrary to **DS [23]**, s 477A(2) is correctly described as a "gateway provision". When considering an application pursuant to s 477A(2), the Federal Court must determine whether to allow the exercise of the Court's jurisdiction in relation to a claim that has been filed out of time. Necessarily, therefore, the Federal Court is determining whether the application should be allowed to proceed to be determined on the merits at the next stage. It would be incongruous, in this context, for the Federal Court to conduct a full determination of the substantive merits of the application at the threshold stage.

Ascertainment of purpose

11. At **DS [28]**, the Minister says that the purpose of s 477A(2) is not to ensure that the time limits do not operate to cause injustice. This submission should be rejected. A concern to avoid injustice is consistent with the terms of a statutory power to extend time where it is "in the interests of the administration of justice" to do so. Indeed, in *Gallo v Dawson* (1990) 64 ALJR 458 at 459, McHugh J said that the object of rules to extend time (in that case to appeal a judgment of a single Justice to the Full Court) is so that the rules "do not become instruments of injustice", and that a discretion to extend time "is given for the sole purpose of enabling the Court or Justice to do justice between the parties".

12. As to **DS [30]**, the fact that cases involving powers to extend time under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) or the *Uniform Civil Procedure Rules 2005* (NSW) did not involve jurisdictional error on the part of a court does not mean those decision are irrelevant. The point to be taken from those decisions is

that s 477A(2) was enacted at a time when it was well-established that an extension of time would generally only be refused if the substantive application had no reasonable prospects of success (**PS [55]-[56]**). This Court has repeatedly stated that context for the purposes of statutory interpretation is to be understood in its "widest sense".[2] On this well-settled approach, "no limit is placed at common law upon the kinds of extrinsic material to which reference may be made, though there may be limits on the use that may be made of it".[3] That context includes the manner in which courts have approached the interpretation of powers to extend time under analogous legislation.

No inconsistency with relevant High Court authorities

13. At **DS [36]-[41]**, the Minister submits that two decisions of this Court provide a "complete answer" to the plaintiff's case. That is not so.

14. First, it is axiomatic that "[c]ases are only authorities for what they decide" and "[i]f a point is not in dispute in a case, the decision lays down no legal rule concerning that issue".[4] That the present issue was not agitated in *Wei* is accepted by the Minister, in his reliance on an "implicit acknowledgement" that the Court can engage in a full consideration of the merits (**DS [37]**, emphasis added).

15. Second, and relatedly, there is an important distinction between decisions made under s 477A (and s 477) and s 486A. By reason of s 476A(3)(b), a judgment that makes an order or refuses to make an order under s 477A(2) cannot be appealed to the Full Federal Court. There is no equivalent limitation on the availability of appeals in respect of decisions under s 486A. Accordingly, a decision of the High Court in its original jurisdiction to refuse an extension of time under s 486A can be appealed under s 34 of the Judiciary Act.[5] Even if leave would be required under s 34(2),[6] it nonetheless remains the case that there would be an avenue by which to appeal such a decision.[7] Accordingly, an important contextual consideration in the plaintiff's construction of s 477A(2) is absent (contra **DS [11]**).

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2 See, eg, *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14] (Kiefel CJ, Nettle and Gordon JJ); *R v A2* (2019) 269 CLR 507 at [33] (Kiefel CJ and Keane J).

3 Herzfeld and Prince, *Interpretation* (2020, 2nd ed) at [8.30].

4 *Coleman v Power* (2004) 220 CLR 1 at [79] (McHugh J).

5 Cf *AZAFX v Federal Circuit Court of Australia* (2016) 244 FCR 401 at [82] (Charlesworth J).

6 *Re Golding* (2020) 94 ALJR 1014 at [6] (Nettle J), citing *Hall v Nominal Defendant* (1966) 117 CLR 423 at 439-440 (Taylor J).

7 See, in relation to an application for an extension of time to appeal, *Gallo v Dawson* (1990) 64 ALJR 458 and *Gallo v Dawson (No 2)* (1992) 66 ALJR 859.

16. It is also important to observe that the issue in these proceedings could never have arisen in relation to a decision to refuse an extension of time under s 486A. It is well-established that a Justice of the High Court is not "an officer of the Commonwealth" for the purposes of s 75(v) of the Constitution.[8] Accordingly, a plaintiff could not seek review under s 75(v) of a refusal to extend time on the basis that the High Court had misconceived the nature of the function conferred on it. The only mechanism for seeking review of such a decision is an appeal by leave under s 34 of the Judiciary Act.

17. As to **DS [40]**, as the Minister notes *Jackamarra v Krakouer* (1998) 195 CLR 516 was decided in a different context. As a matter of principle, and particularly where to refuse an application for an extension of time results in the applicant's appeal rights being extinguished, the Federal Court should approach the determination of an extension of time application pursuant to s 477A(2) in the same way irrespective of whether the merits of the substantive application are fully argued at the same time. As **PS [50]** submits, Parliament cannot have intended for the availability of a right of appeal to turn on a case management decision made by the Federal Court.

Nicholas J's reasons

18. As to **DS [52]**, it is noted that it is common ground that the Federal Court's reasoning in this case was more than "impressionistic". As to **DS [53],** if the Federal Court had intended to find that the application was unarguable, it would have said so expressly. It did not. At **DS [56],** the Minister relies on Nicholas J's 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). That observation is not a conclusion as to whether or not the proposed ground of review was arguable. Rather, it is a conclusion that there was no error of a particular kind (ie no jurisdictional error). Here, his Honour concluded that the Minister's reasoning was not unreasonable (being a kind of jurisdictional error) nor affected by any other species of jurisdictional error.

Dated: 16 March 2022

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[8] See, eg, *Re Carmody; Ex parte Glennan* (2003) 77 ALJR 1202 at [6] (Gummow, Hayne and Callinan JJ) (and the cases cited there).

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Plaintiff

and

MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS

First Defendant

JUDGE OF THE FEDERAL COURT OF AUSTRALIA

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ANNEXURE TO THE PLAINTIFF'S REPLY

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the Plaintiff sets out below a list of the particular constitutional provisions and statutes referred to in his submissions in reply.

No	Description	Version	Provision(s)
1.	*Judiciary Act 1903* (Cth)	Current	ss 34, 39B
2.	*Uniform Civil Procedure Rules 2005* (NSW)	Current	r 50.3