FEDERAL COURT OF AUSTRALIA

CGX20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 1441

File number:	WAD 130 of 2020
Judgment of:	**COLVIN J**
Date of judgment:	9 October 2020
Catchwords:	**MIGRATION** - application for extension of time to seek judicial review of decision by the Administrative Appeals Tribunal - where Tribunal affirmed decision by delegate of Minister not to revoke cancellation of visa - whether necessary in interests of justice for extension to be granted - whether sufficient merit in proposed grounds of appeal - where delay not significant - where accepted that no prejudice to Minister if extension granted - application allowed
Legislation:	*Migration Act 1958* (Cth) ss 477A, 499, 501, 501CA
Cases cited:	*BHD18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 151 *DHX17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 127 *Jackamarra v Krakouer* [1998] HCA 27; (1998) 195 CLR 516 *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; (2019) 264 CLR 421 *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611 *MZABP v Minister for Immigration and Border Protection* [2015] FCA 1391; (2015) 242 FCR 585 *SZTRY v Minister for Immigration and Border Protection* [2015] FCAFC 86 *Tsvetnenko v United States of America* [2019] FCAFC 74; (2019) 269 FCR 225
Division:	General Division
Registry:	Western Australia
National Practice Area:	Administrative and Constitutional Law and Human Rights

Number of paragraphs:	38
Date of hearing:	1 October 2020
Counsel for the Applicant:	Dr J Donnelly
Solicitor for the Applicant:	Tajik Lawyers
Counsel for the First Respondent:	Ms C Symons
Solicitor for the First Respondent:	Sparke Helmore Lawyers
Counsel for the Second Respondent:	The Second Respondent filed a submitting notice save as to costs

ORDERS

WAD 130 of 2020

BETWEEN:	**CGX20** Applicant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent

ORDER MADE BY:	**COLVIN J**
DATE OF ORDER:	**9 OCTOBER 2020**

THE COURT ORDERS THAT:

1. The name and citation of the judgment of the Administrative Appeals Tribunal appealed from be redacted from the first page of the published version of this judgment.
2. The applicant be granted an extension of time pursuant to s 477A(1) of the *Migration Act 1958* (Cth) in respect of grounds 2 and 3 of the amended originating application for review dated 20 July 2020.
3. Costs of the application for an extension of time be reserved.
4. The application be listed for a case management hearing on a date to be fixed at which time a final hearing date for the application will be allocated.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

COLVIN J:

1 The applicant is a citizen of the United Kingdom who has lived in Australia for over 30 years. He came to Australia as a 12-year-old. He has three children. They are in the custody of their mother, his ex-wife. In 2015, the applicant rang his ex-wife threatening to seriously harm her. He then went to his former matrimonial home to speak to his ex-wife. He was met at the door by his ex-wife's father, Mr W, who was then 62 years of age. The applicant was enraged. Mr W tried to restrain him. The applicant pulled out a knife he was carrying and stabbed Mr W three times and inflicted serious injuries. The partner of the applicant's ex-wife tried to intervene and was also stabbed by the applicant. The applicant left the property, called the police and then attended a police station where he gave an interview in which he admitted that he had stabbed both men. He was convicted of assault occasioning grievous bodily harm and sentenced to 4 years and 6 months imprisonment. He has a history of less serious criminal offending.

2 The applicant's visa was cancelled as required by s 501(3A) of the *Migration Act 1958* (Cth). He made representations to the Minister to the effect that the decision to cancel his visa should be revoked in the exercise of the statutory power conferred by s 501CA(4) of the Act. A delegate of the Minister decided not to exercise the power to revoke. The applicant brought an application for review of the delegate's decision by the Administrative Appeals Tribunal. At the hearing before the Tribunal, the applicant appeared on his own behalf. In the result, the Tribunal affirmed the decision of the delegate.

3 The Act provides that any application for judicial review of the Tribunal's decision must be made within 35 days: s 477A(1). There is a power for this Court to extend time if it is necessary in the interests of justice to do so. An application for an extension of time was brought some 21 days outside the statutory time limit. The present issue for determination is whether there should be an extension of time.

Relevant principles

4 Usually where the delay is not significant, the reason for the delay has been adequately explained and there is no material prejudice that would arise if the extension were granted then it will be necessary in the interests of justice for the extension to be granted under s 477A(1) unless the proposed grounds are considered to be hopeless based on an impressionistic

assessment, reading them without the benefit of detailed argument: *MZABP v Minister for Immigration and Border Protection* [2015] FCA 1391; (2015) 242 FCR 585 at [62]; *SZTRY v Minister for Immigration and Border Protection* [2015] FCAFC 86 at [6]; *Jackamarra v Krakouer* [1998] HCA 27; (1998) 195 CLR 516 at [9]; and the comprehensive review of the authorities recently undertaken in *DHX17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 127 at [45]-[77]. This is the proper approach even where the question of leave and the merits of the application if leave is granted are determined together on the one application: *MZABP* at [66]. I would add only that where the grounds are not adequately expressed but arguable grounds are raised in argument it may be necessary to have regard to matters raised by way of further elucidation of the grounds in order to assess whether there is a point with the requisite merit that means it is necessary in the interests of justice to grant the extension of time.

5 In this matter, the parties agreed that it was appropriate that the question whether an extension of time should be granted was a matter that should be determined at a separate hearing. Orders to facilitate that hearing were made by consent. The parties then presented what might be described as fulsome but not complete arguments as to the merits. This is a course that tends to distract the Court away from adopting the required impressionistic approach in assessing the merits of the grounds that are sought to be raised.

Summary of outcome

6 In this case, for the following reasons, assessing the matter at an impressionistic level principally by reference to the grounds as stated, I am satisfied that there is sufficient merit in the application for an extension. There is no consideration that would lead to any real injustice if the extension were granted to enable the merits to be properly and finally considered. The extension sought is minimal and the delay is explained. Therefore, I am satisfied that it is necessary in the interests of justice for the extension to be granted and I will grant the application. However, as merit has been demonstrated only as to proposed grounds 2 and 3, the extension of time should be confined to those grounds. Given its subject matter, the application should be listed for case management to arrange the final hearing of the application as soon as possible.

The significance of Direction 79

7 The applicant raises three alleged grounds of jurisdictional error in the decision of the Tribunal. In a number of respects those grounds concern the consequences that flowed from the

Tribunal's approach to *Ministerial Direction No 79 - Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA (Cth)* (**Direction**) made under s 499 of the Act. Section 499 provides that the Minister may give directions about the performance of functions and the exercise of powers under the Act and that the directions must be complied with by the person or body to whom its terms are directed.

8 The Direction applied to the exercise of the power whether to revoke the cancellation of the applicant's visa. Therefore, its terms were to be given effect by the Tribunal when standing in the shoes of the delegate in making its decision on review.

9 Amongst other things, the Direction sets out the relevant factors that must be considered in making a decision whether to revoke the cancellation of a visa under s 501CA. Relevantly for present purposes, it specifies three primary considerations (para 13), namely:

> a) Protection of the Australian community from criminal or other serious conduct;
>
> b) The best interests of minor children in Australia;
>
> c) Expectations of the Australian community.

10 It also specifies certain 'Other considerations' (para 14). One of the specified other considerations that must be taken into account where relevant is 'Impact on victims'. As to that consideration, the Direction says (para 14.4(1)):

> Impact of a decision not to revoke on members of the Australian community, including victims of the non-citizen's criminal behaviour, and the family members of the victim or victims where that information is available and the non-citizen being considered for revocation has been afforded procedural fairness.

11 As to the application of para 14.4(1), the Tribunal observed that it 'directs the decision-maker to consider the impact of a decision not to revoke cancellation of the visa on members of the Australian community, including the victims' and referred to Tribunal decisions which were said to be to that effect. It then said (para 99):

> That is curious given that a decision not to revoke that cancellation of the visa would result in the result in the non-citizen being removed from Australia. It is not clear how the offending non-citizen being forced to leave Australia would impact victims, other than positively.

12 The Tribunal went on to say:

> The Tribunal adopts the course taken in the above matters. The considerations listed in paragraph 14 of Direction 79 are not exhaustive and the Tribunal assumes, in any event, that paragraph 14.4(1) was meant to direct the decision maker to consideration of the impact of revoking the cancellation rather than not revoking the cancelation. The Tribunal therefore considers the former consideration.

13 It was claimed for the applicant that para 14.4(1) was concerned only with the additional impact of a decision not to revoke (which would have the consequence that the applicant would be removed from Australia). Instead of approaching the matter on that basis, it was claimed that the Tribunal took a different matter into account, namely the impact upon victims of the applicant's offending if he was to remain in Australia.

Proposed ground 1: Alleged procedural unfairness

14 The applicant says that there are two strands to its claim of procedural unfairness. First, it says that the Tribunal by its approach to para 14.4(1), in effect, identified a consideration that was not evident from the terms of the Direction being the impact upon victims if the applicant was to remain in Australia, and then proceeded to address that consideration. By following that course it was said that the Tribunal acted in a manner that was procedurally unfair. It was a procedural course that was said to have denied the applicant the opportunity to put material before the Tribunal as to that matter. It was not said that the matter was irrelevant. Rather, it was said that the applicant was deprived of an opportunity to present material to the Tribunal as to that matter.

15 The difficulty for the applicant on that contention is that there was no matter identified by the proposed ground that was not before the Tribunal and that the applicant might otherwise have put. Nor was it suggested that any such matter might have been put to the Tribunal by the applicant if the alleged procedural unfairness had not occurred. Demonstrating materiality is essential to the demonstration of jurisdictional error and is a matter on which the applicant bears the onus of proof: *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; (2019) 264 CLR 421 at [45]-[46] (Bell, Gageler and Keane JJ). If no consequence of an alleged failure to afford procedural fairness is pointed to then it cannot be said that there was 'at least a possibility' of a different result if a different procedure had been followed.

16 For that reason the first strand to proposed ground 1 has no merit.

17 The second strand concerned the following reasoning by the Tribunal (para 81):

> The Tribunal accepts that in normal circumstances the best interests of a child are served by having their father in their life. That norm is, however, diminished in the present case because of the factors identified by the Respondent as set out in [78] above and by the fact that, on the Applicant's version of the circumstances, his daughters are, in effect, being used as a weapon against him by his wife. The children are the innocent victims in this circumstance.

18 It was said that the adverse conclusion drawn to the effect that the best interests of the applicant's children are not served because the applicant's children are being used against him by their mother was not an obvious conclusion that would be open on the material, it was not put to the applicant and therefore there had been procedural unfairness.

19 For the respondent it was submitted that the conclusion was obvious and occurred in circumstances where the applicant had himself complained that his wife was using their children as a weapon against him. The proposition that the applicant had presented his case in that way was not contested.

20 In those circumstances, the finding made by the Tribunal in the context of dealing with the interests of the children was simply reasoning from the evidence as advanced by the applicant. It was obvious that the evidence might be used to reach conclusions about the interests of the children. Therefore, the second strand is without merit.

21 It follows that there is no merit in proposed ground 1.

Proposed ground 2: Alleged taking account of irrelevant information

22 The applicant complains that the effect of the Tribunal's approach to para 14.4(1) and its view that it should consider the impact on the victims of his offending of the applicant remaining in Australia was that, in effect, it twice accounted for that consideration. The Direction required the Tribunal to give primary consideration to the protection of the Australian community from criminal and other serious conduct. It undertook that consideration and concluded that it was a matter that weighs heavily against revocation of the visa cancellation. It was submitted that in doing so the Tribunal, amongst other things, considered the applicant's likelihood of reoffending and the consequence if that occurred. In that context, it was said to amount to a form of double-counting to then consider the same matter later in the reasons and conclude that it too weighed against revocation of the visa cancellation. The point was characterised as taking into account irrelevant information.

23 The submissions for the Minister amounted to arguments why the Court should conclude that, in all the circumstances when the reasons were considered there was no double-counting. To seek to meet the ground in that way is to recognise that the claim as articulated is arguable and requires consideration of the circumstances in order to determine whether it should be accepted. Merit has been demonstrated in proposed ground 2.

Proposed ground 3: Alleged unreasonableness, illogicality or irrationality

24 The applicant submitted that there were three respects in which the reasoning by the Tribunal was unreasonable, illogical and/or irrational. Each concerned a particular factual finding by the Tribunal.

25 The first alleged error was said to have arisen from a submission advanced to the Tribunal on behalf of the Minister. It was a submission to the effect that there was no independent evidence of the effect that separation would have on the children as they currently have no contact with the applicant and there appears to be no impediment to the applicant maintaining contact through electronic means if he was deported. The submission (together with others advanced for the Minister) was recounted by the Tribunal (para 78). Then, the Tribunal reached the conclusion that has been quoted above at [17]. It was submitted that the reasoning depended in part upon an acceptance of the submission made for the Minister. Further, the Tribunal had separately found that there was a seemingly toxic dispute between the applicant and his ex-wife and the likelihood of a normal, constructive and positive relationship between the applicant and his children was 'if not impossible, at least less likely'.

26 The submission for the Minister on the present application was to the effect that the findings about animosity between the applicant and his ex-wife did not dictate a finding that communication by electronic means was impossible or improbable. A submission to that effect simply exposed the countervailing argument. It did not demonstrate that the error was unarguable.

27 The second alleged error concerned a finding by the Tribunal to the effect that there was no evidence 'of the impact that the Applicant being removed from Australia would have on any of those who gave letters of support' (para 95). As to this finding the claim made is that there was such evidence, a matter that the Tribunal noted at a later point when it found that there was evidence which referred to the impact on the applicant's family and friends who would suffer a great loss of he was deported (para 101).

28 It was submitted for the Minister that only one of the seven letters of support said anything about the impact of the applicant's removal and it said only that the applicant 'has a network of family and friends here and we would suffer a great loss if he were to leave the country'. This is to join issue as to the characterisation of the alleged finding. The alleged error is arguable.

29 It was also said, in the alternative, that consideration of the material could not realistically have resulted in a different decision. As to its consequence, this is not an instance where the ground fails to articulate a consequence. It is said to be a factual finding relating to an important human consequence of not revoking the cancellation of the applicant's visa. In those circumstances, I am not prepared to find that it is inevitable that any such error was not material. Such a conclusion requires a judgment to be formed of a kind that should be reached after consideration of full argument.

30 The third alleged error again concerns the reasoning quoted at [17] above. It was said to be unjust, capricious and unreasonable for the Tribunal to reason that because his children were being used as a weapon against him by his wife that it was appropriate to diminish the weight given to the norm that the best interests of a child are served by having their father in their life. In short, just because the applicant's wife was using the children as a weapon (a matter raised by the applicant), this did not provide a foundation for concluding that the interests of the children would not be adversely affected by the deportation of the applicant.

31 The Minister submitted that the finding was open to be made and the fact that the applicant might claim that it was not his fault as to how his ex-wife was acting did not mean it was an error to take that matter into account.

32 In my assessment, the point being raised is arguable.

33 The final question is whether the three claims either individually or taken together would be a sufficient basis upon which to establish a ground of unreasonableness, illogicality or irrationality. The presence of a factual finding that might be characterised in those terms is not, of itself, sufficient to demonstrate a failure to undertake the required statutory task.

34 As to unreasonableness, the review ground is not made out by demonstrating an error in factual reasoning. It requires an assessment of the overall character of the administrative decision and whether it conforms to the implied statutory standard of reasonableness. Therefore, either the overall result must be unreasonable or the reasons as a whole must fail to provide an intelligible justification for the result: *Tsvetnenko v United States of America* [2019] FCAFC 74; (2019) 269 FCR 225 at [82]-[85]. The same approach pertains to claims of alleged jurisdictional error characterised in terms of irrationality and illogicality: *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611 at [119]; and *BHD18 v Minister*

for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCAFC 151 at [29].

35 Little was said by either party about whether the three complaints as to factual findings, even if accepted, would have the required significance for the decision as a whole that is needed to demonstrate jurisdictional error of the kind alleged. The submissions for the Minister were principally directed to whether the three points raised were arguable bases upon which the factual findings might be criticised. In those circumstances, I am not prepared to conclude on an impressionistic assessment that it is not arguable that those claims even if accepted lack the requisite character to demonstrate a jurisdictional error of the kind alleged.

Other matters

36 The Minister characterised the delay of 21 days as 'moderate'. I do not accept that characterisation. The delay was minor, especially given the circumstances in which it occurred. The affidavit evidence establishes reasons for the delay that include the inability to secure representation, the applicant was in custody and the applicant took active steps to bring an application for judicial review in this Court but lacked the knowledge and understanding to meet the procedural requirements. It is accepted that there is no prejudice. Therefore, there are no other reasons why the application for an extension should be refused.

Orders and costs

37 The application should be allowed insofar as it relates to grounds 2 and 3. I propose to reserve the question of costs to be dealt with when the outcome of the substantive application is known.

38 In view of the fact that the name of the applicant in these proceedings has been replaced by a pseudonym which was not used in the Tribunal, I will make orders that the reference to the Tribunal decision the subject of the present application not be published. I do so particularly in the interests of those persons who are not parties to these proceedings, who include the children of the applicant, and by reason that certain aspects of these proceedings concern matters the subject of family court proceedings.

I certify that the preceding thirty-eight (38) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Colvin.

Associate:

Dated: 9 October 2020