

FEDERAL COURT OF AUSTRALIA

McQueen v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 812

File number: WAD 98 of 2021

Judgment of: COLVIN J

Date of judgment: 19 July 2021

Catchwords: **PRACTICE AND PROCEDURE** - application for order that Minister answer interrogatories - where Minister did not revoke cancellation of visa pursuant to power under s 501CA(4) of *Migration Act 1958* (Cth) - whether interrogatories relate to issues raised in proceeding - whether application premature - where applicant submits interrogatories relevant to claim of failure to give proper, genuine and realistic consideration - where Minister produced photographic image appearing to be signed decision record on person's lap in driver's seat of motor vehicle as record of formation of Minister's state of satisfaction for the purposes of s 501CA(4) - application adjourned

Legislation: *Migration Act 1958* (Cth) ss 501, 501CA

Cases cited: *Ali v Minister for Home Affairs* [2020] FCAFC 109; (2020) 278 FCR 627
BFH16 v Minister for Immigration and Border Protection [2020] FCAFC 54; (2020) 274 FCR 532
Egan v Minister for Home Affairs [2021] FCAFC 85
EWV20 as litigation representative for AFF20 v Minister for Home Affairs [2021] FCA 272
Minister for Immigration & Multicultural & Indigenous Affairs v Wong [2002] FCAFC 327
QJMV v Minister for Home Affairs [2021] FCA 136
QJMV v Minister for Home Affairs [2021] FCA 255
Tohi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCAFC 125

Division: General Division

Registry: Western Australia

National Practice Area: Administrative and Constitutional Law and Human Rights

Number of paragraphs: 19

Date of hearing: 16 July 2021

Counsel for the Applicant: Dr J Donnelly with Mr K Tang (Pro Bono)

Solicitor for the Applicant: Scott Calnan Lawyer

Counsel for the Respondent: Ms CI Taggart

Solicitor for the Respondent: Australian Government Solicitor

ORDERS

WAD 98 of 2021

BETWEEN: **JOSEPH LEON MCQUEEN**
Applicant

AND: **MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT
SERVICES AND MULTICULTURAL AFFAIRS**
Respondent

ORDER MADE BY: COLVIN J

DATE OF ORDER: 19 JULY 2021

THE COURT ORDERS THAT:

1. The interlocutory application by the applicant dated 1 July 2021 be adjourned to a date to be fixed.
2. There be liberty to the applicant to apply to relist the application within 14 days of filing any amended grounds of review.
3. The costs to date of and incidental to the interlocutory application be reserved.

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

REASONS FOR JUDGMENT

COLVIN J:

1 Mr Joseph McQueen is currently being detained under the provisions of the *Migration Act 1958* (Cth) consequent upon the cancellation of his five year resident return visa.

2 In late 2019, Mr McQueen was sentenced to 21 months of imprisonment for selling methylamphetamine. By reason of his conviction and sentence, his visa was cancelled under s 501(3A) of the *Migration Act*. In response to a statutorily required invitation, Mr McQueen made representations to the Minister in support of the revocation of the cancellation of his visa. A statutory power to do so is conferred upon the Minister by s 501CA(4). It provides that the Minister may revoke the visa cancellation (described as the original decision) if:

- (a) the person makes representations in accordance with the invitation; and
- (b) the Minister is satisfied:
 - (i) that the person passes the character test ... ; or
 - (ii) that there is another reason why the original decision should be revoked.

3 The Minister, acting personally, signed a statement to the effect that he was not satisfied that Mr McQueen passes the character test and was not satisfied there was 'another reason' why the cancellation of Mr McQueen's visa should be revoked. The statement then said:

Accordingly, the power in s 501CA(4) of the Act to revoke the original decision is not enlivened and Mr MCQUEEN's ... visa remains cancelled.

4 The statement signed by the Minister concluded by saying: 'My reasons for this decision are set out in the attached Statement of Reasons'. The record of the statement that has been produced by the Minister in these proceedings is a photographic image of the statement as signed by the Minister (**Image**).

5 Mr McQueen has commenced proceedings in this Court seeking review of the Minister's decision for alleged jurisdictional error. The application for review was prepared when he was acting on his own behalf. He is now assisted by counsel acting *pro bono*. Included in the grounds stated in the application is a claim that the Minister 'failed to give proper consideration to certain matters identified in the statement of reasons as steps in the decision making process'. It is submitted for Mr McQueen that, in substance, the ground alleges that the Minister did not

give proper, genuine and realistic consideration to his case. There are no particulars to the ground. The applicant's case as to the nature of the statutory obligation of the Minister when it came to forming the state of satisfaction referred to in s 501CA(4) is not explained with any precision.

6 In these circumstances, an application is brought to administer two interrogatories to be answered by the Minister. They are expressed in the following terms:

(1) How many minutes did your consideration (inclusive of reading time) of the brief from your Department occupy before you decided on 14 April 2021 not to revoke the mandatory cancellation decision (**non-revocation decision**) made earlier on 13 November 2019?

(2) Did you read the statement of draft reasons, which had been prepared by your Department and had been included in the brief, before you made the non-revocation decision on 14 April 2021? If the answer is yes, how many minutes did your consideration (inclusive of reading time) of that particular document take?

7 The principles to be applied in determining whether to allow interrogatories in judicial review proceedings were considered in *Minister for Immigration & Multicultural & Indigenous Affairs v Wong* [2002] FCAFC 327 at [24]-[34]. Interrogatories may be ordered in an 'appropriate case' according to the same principles that apply in considering whether to order discovery in judicial review proceedings. There must be a foundation in evidence or in the pleadings to support the application to administer interrogatories. There must be more than mere speculation or a bare allegation. If evidence is led as the basis for the application then it must demonstrate a foundation for suspicion that answers to the interrogatories may support a ground of review. Where an allegation is made in proceedings that have been commenced (whether in an application or a pleading) and the proceeding is not an abuse of process then a claim that has been formulated as part of the proceeding may adequately ground the order.

8 If the interrogatories are shown to have the requisite foundation then other case management considerations are brought to bear in deciding whether to allow the application to administer interrogatories. Those considerations include a balancing of the burden that would fall on the answering party, the forensic significance that the answers might have in resolving the issues, any delay that may result if interrogatories were to be administered, the practical consequences of the decision under review and whether the information may be obtained by other means.

- 9 In my view, an unparticularised claim that there was a failure by the Minister to give proper, genuine and realistic consideration to Mr McQueen's application is not a claim that would support the interrogatories. Put another way, the nature of the application that is brought is not one which raises an issue to which the answers to the interrogatories would relate. In review applications concerning the power conferred by s 501CA(4), cases of insufficiency in consideration of the case of an applicant are frequently argued by reference to the content of the reasons provided when compared to the nature of the representations made to the Minister.
- 10 There are no particulars or other aspect of the formulation of the ground to indicate that it is founded on an allegation as to the time spent by the Minister considering representations made by the applicant in support of the revocation of the cancellation of his visa or the draft reasons. To the extent that the submissions expose the basis for the present application, they refer only to a failure by the Minister in the reasons to address the expectations of the community despite stating that a reason for the decision was that protecting the Australian community outweighed countervailing considerations in favour of Mr McQueen.
- 11 For Mr McQueen, reliance is placed upon the decision of the Chief Justice in *QJMV v Minister for Home Affairs* [2021] FCA 136 to require the Minister to answer similar interrogatories in a case concerned with the power conferred by s 501CA(4). However, as was explained by Jagot J in refusing an application for leave to appeal that decision, in that instance there was a specific allegation of a *de facto* delegation of the Minister's decision making power and it was open to conclude that the matter into which inquiry was to be made by the interrogatories was relevant to that pleaded claim: *QJMV v Minister for Home Affairs* [2021] FCA 255 at [28]-[34].
- 12 Similar interrogatories were ordered to be answered by the Minister in *EWV20 as litigation representative for AFF20 v Minister for Home Affairs* [2021] FCA 272 (Griffiths J). However, in that case there were particulars provided that squarely raised an issue as to whether the 'window' in which the Minister could have considered the briefing materials was sufficient to enable the Minister to have formed the required state of satisfaction.
- 13 It was submitted that answers to the interrogatories would be relevant to the claim that the Minister did not give proper, genuine and realistic consideration to Mr McQueen's case. In particular, it was submitted that if the second proposed interrogatory was answered 'no' then that would establish such a failure. However, that is not the nature of the case as presently articulated. Interrogatories are administered to aid in establishing matters that will be relevant

to a case that has been articulated. As presently articulated in the application (as further explained in submissions) there is no claim that there was no or insufficient consideration of the draft reasons by the Minister. Nor was there any attempt to articulate the nature of the statutory task that was being performed by the Minister when forming the state of satisfaction, particularly whether it was a subjective state of satisfaction and the way in which the draft reasons operated in the formation of that state of satisfaction. The precise nature of the power and whether the state of satisfaction is a subjective jurisdictional fact (which must exist before there is power to revoke) are matters which may affect the assessment of claims that there has not been adequate consideration by the Minister: as to these matters, see *Ali v Minister for Home Affairs* [2020] FCAFC 109; (2020) 278 FCR 627 (Collier, Reeves and Derrington JJ); *BFH16 v Minister for Immigration and Border Protection* [2020] FCAFC 54; (2020) 274 FCR 532 at [29]-[33] (Murphy and O'Bryan JJ); *Egan v Minister for Home Affairs* [2021] FCAFC 85; and *Tohi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 125 at [2]-[7] (Katzmann J) and [51] (Derrington J).

14 In oral submissions, reliance was placed upon the form of the Image. It was submitted that it depicts a folder in which there is a tab with an arrow pointing 'SIGN HERE' and the signature of the Minister at that point. The Image shows the folder open on a person's lap with what was submitted to be (and appears to be) a car steering wheel adjacent to the top of the folder. It was submitted that those matters were sufficient to provide grounds for suspecting that the Minister did not consider the draft reasons which had been prepared and provided to the Minister. However, a claim of that kind is not articulated in the application. The evidence as to the claim that is sought to be advanced is a claim that proper, genuine and realistic consideration was not given to matters advanced by Mr McQueen in his representations.

15 The prospect that there will be amendments to the claim was foreshadowed. However, those further claims were not articulated in the affidavit filed in support of the application.

16 Therefore, there is no affidavit and no ground that would support the proposed interrogatories.

17 In those circumstances, I accept the submission for the Minister that the proposed interrogatories are not demonstrated to be relevant to a pleaded claim and a suspicion as to the factual circumstances and their relevance to a claim to be advanced is not demonstrated by evidence.

18 Quite properly, counsel for the Minister recognised the significance of the fact that leave has been given to Mr McQueen to file amended grounds of review on or before 19 August 2021. The Minister relied upon that matter to support a submission that the application is premature. I do not accept that submission. Had the application, as presently filed, raised an issue to which the interrogatories were relevant then there could be reliance upon the current form of the substantive application (provided counsel indicated that the same matter was to be pursued after amendment). The difficulty for the applicant is that there is nothing to ground the application for interrogatories. Nevertheless, the Minister's submission exposes the possibility that the position may change after the amended application has been filed.

19 Therefore, the appropriate order is that the interlocutory application dated 1 July 2021 be adjourned to a date to be fixed with liberty to the applicant to apply to relist the application within 14 days of filing amended grounds of review. I will reserve costs on the basis that liability for costs is more appropriately determined when the outcome of the application is known.

I certify that the preceding nineteen (19) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Colvin.

Associate: 

Dated: 19 July 2021