FEDERAL CIRCUIT COURT OF AUSTRALIA

AZF21 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCCA 2008

File number(s):	SYG 633 of 2021
Judgment of:	**JUDGE MANOUSARIDIS**
Date of judgment:	27 August 2021
Catchwords:	**MIGRATION** – application to extend time for applying for remedies under s 476 of the *Migration Act 1958* (Cth) (**Act**) in relation to a decision (**Decision**) of the Administrative Appeals Tribunal (**Tribunal**) that it did not have jurisdiction to review a decision to cancel a Global Special Humanitarian (Subclass 202) visa (**Visa**) – whether extension of time necessary in the interests of the administration of justice – whether adequate explanation given for delay in applying for remedies – whether there is any merit in the ground of the substantive application – application for extension of time granted – whether the delegate's notification of the decision cancelling the Visa was valid – notification not valid – decision Tribunal did not have jurisdiction quashed.
Legislation:	*Migration Act 1958* (Cth) ss 116(1AA), 127, 347(1)(b), 476, 477
Cases cited:	*Brisbane South Regional Health Authority v Taylor* [1996] HCA 25 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Parata* [2021] FCAFC 46 *MZABP v Minister for Immigration and Border Protection* [2015] FCA 1391 *Re Commonwealth Australia & Anor; Ex parte Marks* [2000] HCA 67 *SZRIQ v Federal Magistrates Court of Australia* [2013] FCA 1284
Number of paragraphs:	29
Date of hearing:	12 August 2021
Place:	Sydney
Counsel for the Applicant:	Dr J Donnelly, by video

Solicitor for the Applicant:	Scott Calnan, Lawyer
Counsel for the Respondents:	Mr P Knowles, by video
Solicitor for the Respondents:	Sparke Helmore Lawyers

ORDERS

SYG 633 of 2021

BETWEEN:	**AZF21** Applicant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent

ORDER MADE BY: **JUDGE MANOUSARIDIS**

DATE OF ORDER: **27 AUGUST 2021**

THE COURT ORDERS THAT:

1. Pursuant to s 477(2) of the *Migration Act 1958* (Cth) (**Act**) the 35 day period prescribed by s 477(1) of the Act for making an application for relief under s 476 of the Act in relation to the decision of the second respondent (**Tribunal**) made on 5 June 2019 is extended to 16 April 2021.
2. The decision of the Tribunal made on 5 June 2019 that it did not have jurisdiction to review the decision made by a delegate of the first respondent on 18 April 2018 cancelling the applicant's Global Special Humanitarian (Subclass 202) visa is quashed.
3. The Tribunal review the delegate's decision referred to in order 2 according to law.
4. The first respondent pay the applicant's costs as agreed or assessed.

REASONS FOR JUDGMENT

INTRODUCTION

1 By application filed on 16 April 2021 the applicant applies for an order under s 477(2) of the *Migration Act 1958* (Cth) (**Act**) to extend the 35 day period prescribed by s 477(1) of the Act for making an application to this Court for remedies under s 476 of the Act in relation to a decision made by the second respondent (**Tribunal**) on 5 June 2019. By that decision the Tribunal decided it did not have jurisdiction to determine an application for review the applicant lodged in relation to a decision made by a delegate of the first respondent (**Minister**) to cancel the applicant's Global Special Humanitarian (Subclass 202) visa (**Humanitarian visa**).

2 At the commencement of the hearing I suggested to counsel for the parties, and counsel agreed, that I should hear both the application for an order under s 477(2) of the Act, and the merits of the application, assuming an order under s 477(2) of the Act is made.

BACKGROUND

3 The applicant is a national of Nigeria. He first entered Australia on 16 March 2009 as the holder of a Tourist visa; and in 2010 the applicant was granted a Humanitarian visa.

4 By letter dated 28 February 2019 (**Notice**) a delegate of the Minister informed the applicant the delegate considered the Humanitarian visa is liable to be cancelled on the ground contained in s 116(1AA) of the Act, which provides that the Minister may cancel a visa if the Minister is not satisfied "*as to the visa holder's identity*". The Notice recorded particulars of the ground of cancellation, and invited the applicant to comment on the information contained in the Notice, and show why the ground for cancellation does not exist or give reasons why the Humanitarian visa should not be cancelled.

5 After receiving two responses to the Notice, on 18 April 2019 the delegate decided to cancel the Humanitarian visa (**Cancellation Decision**). The delegate recorded the decision in a document titled "*Record of Decision of Whether to Cancel Under section 116 of the Migration Act*" (**Decision Record**).[1] On 18 April 2019 the delegate sent an email to the applicant attaching a letter dated 18 April 2019 (**Notification Letter**) and the Decision Record. The

[1] CB57-74

delegate sent the Notification Letter in an attempt to comply with s 127 of the Act, which provides:

> (1) When the Minister decides to cancel a visa, he or she is to notify the visa holder of the decision in the prescribed way.
>
> (2) Notification of a decision to cancel a visa must:
>
> (a) specify the ground for the cancellation; and
>
> (b) state whether the decision is reviewable under Part 5 or 7; and
>
> (c) if the former visa holder has a right to have the decision reviewed under Part 5 or 7--state:
>
> (i) that the decision can be reviewed; and
>
> (ii) the time in which the application for review may be made; and
>
> (iii) who can apply for the review; and
>
> (iv) where the application for review can be made.
>
> (3) Failure to give notification of a decision does not affect the validity of the decision.

6 The Notification Letter referred to the applicant's ability to apply for merits review of the Cancellation Decision. The Notification Letter did not, however, state that the Cancellation Decision was reviewable under Part 5 or Part 7 of the Act.

7 On 25 April 2019 the applicant lodged online with the Tribunal an application for review of the Cancellation Decision. By letter dated 30 April 2019 the Tribunal referred to the applicant's "*application for review . . . in respect of a decision to cancel*" the applicant's Humanitarian visa, and noted the applicant had not yet lodged a valid application for review. The Tribunal told the applicant that the correct form was "*Form M1*".[2] The Tribunal noted there are "*strict time limits for making a valid review application that cannot be extended by the*" Tribunal. The letter further noted that another requirement for a valid application is that the application fee of $1,764 be paid "*before the prescribed review period for making a valid review application has ended*".

8 On 3 May 2019 the applicant lodged with the Tribunal the correct form of application for review, and an application for fee reduction.[3]

[2] CB80
[3] CB82-113

9 By letter dated 13 May 2019 the Tribunal informed the applicant it was of the view that his application for review of the Cancellation Decision was not a valid application. The Tribunal said it was of the view that the applicant was notified of the Cancellation Decision on 18 April 2019, which meant that the applicant was required to, but he did not, lodge with the Tribunal the application for review together with payment of the application fee by 2 May 2019. The Tribunal invited submissions. After it received submissions, on 5 June 2019 the Tribunal decided it did not have jurisdiction to determine the application for review because the applicant was notified of the Cancellation Decision on 18 April 2019.

10 There is no dispute that on 18 April 2019 the applicant received the email the delegate sent attaching the Notification Letter; that, assuming the Notification Letter was a proper notification under s 127 of the Act, the applicant was required, but he failed, to lodge his application for review and an application for a fee reduction by 2 May 2019; and that the Tribunal's decision that it did not have jurisdiction to consider the application for review would be correct. On 31 March 2021, however, the Full Federal Court published reasons for judgment in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Parata*.[4] In that case the Full Federal Court considered a letter which, like the Notification Letter, did not state whether the decision was reviewable under Part 5 of Part 7 of the Act. The Full Federal Court held that, on the proper construction of s 127(2)(b) of the Act, a notification under s 127 of a the Act of a Part 5 reviewable decision must contain a statement to the effect that the decision is reviewable under Part 5 of the Act; and the failure of a notification of a decision cancelling a visa to include such a statement means that the notification is not one that complies with s 127 of the Act and, for that reason, is not a "*notification of a decision*" for the purposes of s 347(1)(b) of the Act.

11 The Minister accepts that the findings of the Full Federal Court in *Parata* would apply to the ground of application on which the applicant intends to rely in the case before me, if an order under s 477(2) of the Act were made. The Minister also accepts that, as a consequence, I would be bound by *Parata* to conclude that: (a) the Notification Letter is not a notification that complied with s 127 of the Act and, therefore, is not a "*notification of a decision*" for the purposes of s 347(1)(b) of the Act; and (b) the Tribunal was incorrect to find that the applicant was notified of the Cancellation Decision on 18 April 2019, or at all.

[4] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Parata* [2021] FCAFC 46

PRINCIPLES GOVERNING THE EXERCISE OF POWER UNDER S 477(2)

12 Under s 477(2) of the Act the Court may order the extension of the 35-day period prescribed by s 477(1) of the Act if two things are satisfied. First, an application for such order has been made in writing to the Court specifying why the applicant considers it is necessary in the interests of the administration of justice to make the order. Second, the Court must be satisfied it is necessary in the interests of the administration of justice to make such order.

13 In *SZRIQ v Federal Magistrates Court of Australia* Foster J said:[5]

> The courts have developed guidelines as to the factors which might ordinarily be taken into account in considering the interests of the administration of justice in this context. Commonly, those factors include:
>
> (a) Whether there has been a reasonable and adequate explanation for the applicant's delay;
>
> (b) Whether there is any prejudice to the Minister;
>
> (c) Whether the applicant's substantive case for judicial review is sufficiently arguable to justify the extension of time.

14 The Federal Court has held that, on an application under s 477(2) of the Act, the Court can consider no more than whether the applicant's case has *some* merit. In the words of Mortimer J in *MZABP v Minister for Immigration and Border Protection*, a hearing of an application for an extension of time "*should not be transformed into a de facto full hearing*".[6] Further:[7]

> If a judge travels beyond an examination of the grounds at what should be a reasonably impressionistic level into a fuller consideration of the arguments for and against each ground of review, then in my respectful opinion that is not a function appropriate to a discretion such as that contained in s 477(2).

15 As her Honour noted in the same judgment, the words that have been used to describe the merits a claim for judicial review should have to justify the granting of an extension of time include "*is "arguable", "reasonably arguable", "sufficiently arguable" or has "reasonable prospects of success"*";[8] and, as her Honour also stated, that assessment is to be made on "*a reasonably impressionistic level*".[9]

16 The Minister referred to the observation McHugh J made in *Re Commonwealth Australia & Anor; Ex parte Marks* that a "*case would need to be exceptional before the time for commencing*

[5] *SZRIQ v Federal Magistrates Court of Australia* [2013] FCA 1284 at [47]-[48]
[6] *MZABP v Minister for Immigration and Border Protection* [2015] FCA 1391 at [63] (cases cited omitted)
[7] *MZABP v Minister for Immigration and Border Protection* [2015] FCA 1391 at [62] (cases cited omitted)
[8] *MZABP v Minister for Immigration and Border Protection* [2015] FCA 1391 at [63]
[9] *MZABP v Minister for Immigration and Border Protection* [2015] FCA 1391 at [62]

proceedings was enlarged by many months".[10] Also relevant is the following passage from his Honour's judgment in that case:[11]

> Independently of the merits of the case, I find it difficult to see how a person who, with knowledge of the decision, delays 17 months before seeking relief could ever be granted an extension of time to quash such a decision unless some conduct of the respondent or the public body or official had brought about the delay. . . . The periods for applying for certiorari and mandamus give a person affected by an adverse decision or judgment ample time in which to commence proceedings in this Court. In all but very exceptional cases, they should be rigidly applied when, as here, more than one year has elapsed between the decision and the commencement of proceedings in this Court.

Explanation for delay

17 The applicant has not made an affidavit in which he deposes to the facts on which he relies to explain his delay. The applicant instead relies on an affidavit made by his solicitor. The solicitor begins by referring to a conversation with counsel on 15 April 2021 in which counsel said he was persuaded the applicant had reasonable prospects of succeeding "*on these prospective proceedings*". The solicitor then says he examined "*the applicant's file*", and sets out what the solicitor says he understands the applicant's "*position*" to be in seven paragraphs. Five of those paragraphs state the basic events of the applicant's dealings with the Tribunal. The final two paragraphs are as follows:

- The applicant has been detained in immigration centre, where he has been for a substantial period.
- The applicant has indicated that he has poor financial capacity. As such, both [the applicant's counsel] and I have agreed to accept this case (for the applicant) on a condition fee agreement.

18 This evidence is barely admissible, and to the extent it is admissible it does not provide an adequate explanation for the applicant's delay in commencing this proceeding. One inference that may readily be available to be drawn is that the applicant, through lawyers he may have previously attempted to engage for assistance, or through other sources, became aware of the Full Federal Court's decision in *Parata*, and the applicant received advice that the case would be of assistance to him. I am not prepared to draw this inference, however, because, if correct, it was within the power of the applicant and his solicitor to expressly state that this was the reason the applicant did not file his application in this Court until 16 April 2021.

[10] *Re Commonwealth Australia & Anor; Ex parte Marks* [2000] HCA 67, at [13]
[11] *Re Commonwealth Australia & Anor; Ex parte Marks* [2000] HCA 67, at [16]

19 Thus, the question whether an order should be made under s 477(2) of the Act will be assessed on the basis the applicant has given no adequate explanation for the delay.

Merits of proposed ground

20 The ground of application on which the applicant proposes to rely, if an order under s 477(2) of the Act is made, is as follows:

> There was no valid notification of the primary decision to the applicant, and therefore, time had not commenced running for the review application
>
> Particulars
>
> a. The Notification did not comply with the requirements of s 127(2)(b) of the *Migration Act 1958* (Cth) (**the Act**).
>
> b. The Notification failed to state whether the decision is reviewable under Part 5 or 7 of the Act.
>
> c. The applicant has not been notified under s 127(2)(b), and therefore, the time limit for review has not yet commenced to run.

21 The ground relies on the ground the Full Federal Court in *Parata* held that the purported notification in that case was not a notification for the purposes of s 127(2)(b) of the Act because it did not state that the decision was reviewable under Part 5 of the Act.

22 The Minister accepts that the Notification Letter did not meet the requirements of s 127(2)(b) of the Act and that, "*on current authority binding on this Court, the technical defect in the*" Notification Letter "*meant that the time period in s 347(1)(b) did not cease on 2 May 2019 as found by the Tribunal*".[12] The Minister submits, however, that even if *Parata* is correct (the Minister has applied to the High Court for special leave to appeal from the orders of the Full Federal Court in *Parata*) it does not follow that the interests of justice favour the making of an order under s 477(2) of the Act; and that is because the "*technical defect*" in the Notification Letter caused no practical injustice to the applicant. The Minister relies on there being no evidence that the applicant had been misled by the technical defect that affected the Notification Letter; and the evidence shows that the reason the applicant lodged his application fee on 3 May 2019 rather than on 2 May 2019 was the need to wait for an international money transfer. In those circumstances, the Minister submits, the interests of justice do not require an extension of time. On the contrary, the Minister submits there is a strong case for relief being refused

[12] *First Respondent's outline of submissions*, [38]

because of the technical nature of the error of law on which the applicant relies, and the long and largely unexplained delay.

Necessary in the interests of the administration of justice?

23 I do not accept the Minister's implicit submission that the weight that should be given to the merits of the ground on which an applicant proposes to rely, if an order is made under s 477(2) of the Act, may depend on characterising the ground as "*technical*". The characterisation of a ground of application as "*technical*" or otherwise forms no part of determining whether the decision to which such ground is directed has been made according to law. Characterising a proposed ground as "*technical*", therefore, is not a relevant factor when assessing the weight that should be given to the merits of a proposed ground of application for the purpose of determining whether to make an order under s 477(2) of the Act. In the case before me, therefore, the question whether it is necessary in the interests of the administration of justice to make an order under s 477(2) of the Act is to be decided on the basis that, if such an order is made, the applicant is bound to succeed on his proposed ground of application.

24 I am satisfied it is necessary in the interests of the administration of justice that an order be made under s 477(2) of the Act, even though the applicant's delay is substantial, and even though the applicant has not given an adequate explanation for the delay. On the current state of the law the Tribunal's decision that it had no jurisdiction to consider the applicant's application for review is unlawful. Its unlawfulness came to light, or at least came to full light, on 31 March 2021 when the Full Federal Court published in reasons for decision in *Parata*. There is nothing to suggest that making an order under s 477(2) of the Act will cause prejudice to the Minister or to the public; and there is nothing to suggest the applicant has acted in bad faith.

25 Whether it would be necessary in the interests of the administration of justice to make an order under s 477(2) of the Act may also be approached by considering the position if an order under s 477(2) is not made. If no such order is made, there will remain an erroneous failure by the Tribunal to exercise its jurisdiction to review the Cancellation Decision, and there would, therefore, remain unsatisfied the right the applicant has for the Tribunal to review the Cancellation Decision. In the absence of evidence that the applicant's delay has produced, or might produce, consequences that are associated with delays in asserting legal rights,[13] the

[13] As to which see the judgment of McHugh J in *Brisbane South Regional Health Authority v Taylor* [1996] HCA 25; (1996) 186 CLR 547, at page 551

interests of justice necessitate the applicant's being permitted to exercise his right of review that has been denied him.

26 I am therefore satisfied that it is necessary in the interests of the administration of justice that an order be made under s 477(2) of the Act extending the time by which the applicant may apply to this Court in relation to the Tribunal's decision to 16 April 2021, being the day on which the applicant commenced this proceeding.

GROUND OF APPLICATION

27 The Minister accepts that the reasoning and decision of the Full Federal Court in *Parata* binds me to uphold the ground of application on which the applicant relies. I must record, however, that the Minister formally submits that the Full Federal Court's decision in *Parata* is wrong.

DISPOSITION

28 I propose to make an order under s 477(2) of the Act. I also propose to order that the Tribunal's decision made on 5 June 2019 be quashed, and that the Tribunal consider the applicant's application for review according to law.

29 Counsel agreed that costs should follow the event. I therefore propose also to order that the Minister pay the applicant's costs as agreed or assessed.

I certify that the preceding twenty-nine (29) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Manousaridis.

Associate:

Dated: 27 August 2021