FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

EGH17 v Minister for Immigration, Citizenship and Multicultural Affairs [2023] FedCFamC2G 308

File number(s):	SYG1376 of 2022
Judgment of:	**JUDGE LAING**
Date of judgment:	27 April 2023
Catchwords:	**MIGRATION** – costs – application seeking an order requiring the Minister to make a decision on the applicant's protection visa application within a specified period – where the application in these proceedings was dismissed by consent after the visa was granted – dispute as to costs.
Legislation:	*Migration Act 1958* (Cth) ss 417, 501, 501A *Migration Regulations 1994* (Cth) sch 2 and 4 *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 214
	AQM18 v Minister for Immigration and Border Protection [2019] FCAFC 27; (2019) 268 FCR 424 *ASP15 v Commonwealth* [2016] FCAFC 145; 248 FCR 372 *CGP21 v Minister for Home Affairs* [2021] FedCFamC2G 11 *EGH19 v Minister for Home Affairs (No 2)* [2021] FCA 903 *EGH19 v Minister for Home Affairs* [2020] FCA 692 *ENT19 v Minister for Home Affairs* [2022] FCA 694 *Love v Commonwealth* [2020] HCA 3; (2020) 270 CLR 152 *Re Minister for Immigration & Ethnic Affairs (Cth); Ex Parte Lai Qin* [1997] HCA 6; (1997) 186 CLR 622 *Thornton v Repatriation Commission* [1981] FCA 76; (1981) 52 FLR 285
Division:	Division 2 General Federal Law
Number of paragraphs:	54

Date of hearing:	Determined on the papers
Place:	Sydney
Date of last submissions:	3 February 2023
Counsel for the Applicant:	Dr J Donnelly
Solicitor for the Applicant:	Zarifi Lawyers
Counsel for the First Respondent:	Mr B Kaplan
Solicitor for the First Respondent	Australian Government Solicitor
Solicitor for the Second Respondent:	Submitting appearance, save as to costs

ORDERS

SYG 1376 of 2022

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

BETWEEN:	**EGH17** Applicant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent

ORDER MADE BY: **JUDGE LAING**

DATE OF ORDER: **27 APRIL 2023**

THE COURT ORDERS THAT:

1. The proceedings be finalised on the basis that each party bears their own costs.

Note: The form of the order is subject to the entry in the Court's records.

Note: The Court may vary or set aside a judgment or order to remedy minor typographical or grammatical errors (r 17.05(2)(g) *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to r 17.05 *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth).

REASONS FOR JUDGMENT

JUDGE LAING

INTRODUCTION

1 These proceedings were commenced on 13 September 2022, by way of an application seeking that a writ of mandamus issue requiring the respondent to make a decision on the applicant's protection visa application within 14 days of the orders sought.

2 On 26 October 2022, the applicant was granted a protection visa. The parties agreed that the substantive application was therefore nugatory and ought to be dismissed. An order was made to this effect. The only outstanding issue in the matter is costs. The parties have asked that this issue be determined on the papers.

BACKGROUND

3 The background to this matter has been set out in affidavits filed by the parties in support of their respective positions on costs. The affidavit relied upon by the Minister was affirmed by Elizabeth Warner Knight on 16 December 2022. Whilst the applicant generally referred to this affidavit as being *"littered with hearsay evidence"* and took issue with the adequacy of various parts of it, he did not submit that it was inadmissible for the purposes of the costs dispute towards indicating evidence that the Minister might have relied upon had the matter proceeded.

4 I note that there have been changes to the identity and title of the Minister over the course of the background to this matter. For convenience, I will use the term "Minister" to refer to the current respondent as well as his predecessors.

5 The applicant is a citizen of Papua New Guinea. He last arrived in Australia in January 2004, when he was 14 years old.

6 In July 2005, aged 16, the applicant was involved in a fight which led to the death of the victim. He was convicted of one count of murder in November 2006. On account of this, the applicant was ultimately sentenced to 17 years and six months' imprisonment with a non-parole period of 12 years and six months.

7 In January 2013, the applicant's family applied for protection visas, which were granted in September 2014. The applicant was not included in this application. The applicant's parents, one brother and his sister subsequently became Australian citizens.

8 The applicant applied for a protection visa on 21 December 2017. That application was refused on 9 February 2018. The Administrative Appeals Tribunal (**Tribunal**) set aside the refusal decision on 27 June 2018 and remitted the matter with a direction that the applicant satisfied the complementary protection criterion in the *Migration Act 1958* (Cth) (**Act**).

9 On 11 September 2019, the (then) Minister personally made a decision by reference to s 501 of the Act to refuse the grant of the visa. That decision was quashed on 25 May 2020, with the matter being remitted for reconsideration according to law: *EGH19 v Minister for Home Affairs* [2020] FCA 692.

10 On 25 February 2021, the (then) Minister made a further decision by reference to s 501 of the Act refusing the grant of the visa. That decision was quashed on 5 August 2021, with the matter being remitted for reconsideration according to law: *EGH19 v Minister for Home Affairs (No 2)* [2021] FCA 903.

11 On 10 February 2022, the applicant commenced proceedings seeking a writ of mandamus to compel the (then) Minister to determine the applicant's application for a protection visa according to law on or before 4 March 2022. On 15 February 2022, the (then) Minister's representatives filed an affidavit containing information regarding steps taken by the Department towards determining a claim made by the applicant to identify as an Australian Aboriginal or Torres Strait Islander person: see *Love v Commonwealth* [2020] HCA 3; (2020) 270 CLR 152.

12 On 16 February 2022, the applicant's representatives notified the (then) Minister's representatives that they had not been aware of this claim, which was not pursued by the applicant. The representatives sought for the protection visa application to be dealt with as a matter of urgency. However, in light of the information contained within the affidavit, the applicant discontinued proceedings and agreed to pay the Minister's costs of that application. The Minister's representatives were notified of this by email on 17 February 2022. In that email, the applicant sought determination of his protection visa application by 17 March 2022. He foreshadowed seeking a writ of mandamus, with costs, if this did not occur.

13 Such further proceedings were commenced in April 2022 and were listed for hearing on 12 May 2022. However, on 5 May 2022, a delegate of the (then) Minister refused the visa application by reference to s 501 of the Act. The parties to those proceedings therefore

consented to their dismissal, with the Minister agreeing to pay the applicant's costs on that occasion.

14 This fourth refusal of the applicant's protection visa application was set aside by the Tribunal on 28 July 2022. However, the parties were not provided with reasons for the decision until 19 August 2022. In the intervening period, some correspondence appears to have taken place within the Department as to the way forward in the matter. It appears that the Department was awaiting the Tribunal's reasons for decision, with a view to considering those reasons and whether judicial review ought to be sought in relation to the Tribunal's decision.

15 The Tribunal's reasons for decision were received by the Department on 19 August 2022 (a Friday). On Monday, 22 August 2022, work was commenced updating a brief to assist the Minister in determining whether he wished to consider the exercise of his power under s 501A of the Act to set aside the Tribunal's decision. The following day, Mr Ben Nam (the legal officer in the Department with carriage of this matter and who also had carriage of the Tribunal proceedings) sought instructions from the Character, Integrity and Identity Policy section of the Department regarding potential judicial review of the Tribunal's decision. That same day, Mr Nam was instructed not to seek judicial review of the Tribunal's decision.

16 On 23 August 2022, the applicant notified the Minister by email to his representatives that if a decision on the protection visa application were not made by 1 September 2022, then the applicant would again commence proceedings seeking mandamus and costs. This email was forwarded to Mr Nam that day.

17 On 24 August 2022, the Acting Director of the National Character Consideration Centre of the Department requested that the Complex and Controversial Cases section (**CCCS**) progress the brief to the Minister regarding possible referral under s 501A of the Act.

18 On 25 August 2022, additional information was provided to CCCS by the Status Resolution Network (which is said to provide targeted services to people seeking to resolve their immigration status while in the community or in held detention). A draft brief was also sent to a senior executive officer within CCCS for review and clearance. CCCS were informed by Mr Nam of the applicant's communication regarding the deadline sought of 1 September 2022.

19 On 26 August 2022, the brief for the Minister was updated with additional information regarding the foreshadowed proceedings and provided with various levels of clearance. A process was then followed for giving the brief to the Minister's office.

20 On 30 August 2022, the brief was discussed at a weekly meeting with the Minister's office. The Minister's office requested that the brief be amended and returned with further advice on the applicant's protection claims and options available to the Minister.

21 Internal clarification was sought on 9 September 2022. A response was provided on that day. Internal communications then occurred between 13 and 15 September 2022 regarding the revised draft brief and possible Ministerial intervention options.

22 However, on 13 September 2022, the applicant commenced the proceedings in this matter seeking mandamus and costs. As set out below, the originating application and affidavit do not appear to have been served until 19 September 2022.

23 Further internal checking and review of the updated brief to the Minster occurred between 16 and 19 September 2022. On 19 September 2022, the updated brief was registered on the system through which such briefs were given to the Minister's office. The Minister's representatives were served with the originating application commencing these proceedings and supporting affidavit that day.

24 The applicant's name was included on the agenda for the weekly meeting on 20 September 2022 between the Minister's office and the Character and Cancellation Branch of the Department (**CCBD**), together with eight other pending matters. The revised brief regarding the applicant was discussed at the next weekly meeting, on 27 September 2022. It was also noted at the following weekly meeting at 4 October 2022, with other pending matters.

25 On 27 September 2022, the applicant's representatives wrote to the Minister's representatives. The correspondence stated that the communication included an *"Offer to Compromise",* but was expressed to be only open for 7 days. It proposed that the Minister concede that there had been an unreasonable delay, be required to make a decision on or before 7 October 2022 and pay 75% of the applicant's costs. It foreshadowed that the applicant would seek costs on an indemnity basis if the offer were not accepted. At the following weekly meeting on 11 October 2022, the Minister's office advised that the Minister wished to take no further action on the applicant's case.

26 On 13 October 2022, clarification was sought from the Minister's office that, as the Minister did not wish to intervene further in the applicant's case, his visa application could be referred to the visa processing area within the Department for a decision to be made. Internal correspondence then occurred to the effect that the Minister did not wish to consider exercising

his personal powers under s 501A of the Act and that action should be taken to finalise the applicant's visa application.

27 The applicant was then *"given a priority processing timeframe for decision processing by the decision assurance/finalisation team".* This involved checks being conducted in respect of criteria in Schedules 2 and 4 to the *Migration Regulations 1994* (Cth), including checks regarding health, security, and public interest criteria. This process began on 14 October 2022 and was completed on 24 October 2022, although some *"pre-emptive"* liaison is said to have occurred earlier.

28 On 24 October 2022, an officer within the National Allocations and Finalisations Section of the Department confirmed that all of the relevant checks had been completed and conducted a pre-grant assessment. Further liaison and consultation occurred on 25 October 2022.

29 On 26 October 2022, the applicant was granted a protection visa.

PRINCIPLES

30 The Minister was required to perform his obligation to determine the applicant's visa application within a reasonable time. What constitutes a *"reasonable time"* is a matter for determination by the Court, having regard to the circumstances of the case within the context of the applicable legal framework: see *ENT19 v Minister for Home Affairs* [2022] FCA 694 per Raper J at [55]-[56] and the cases referred to therein.

31 Whilst the onus was on the applicant to demonstrate unreasonable delay, it has been recognised that once a delay is established calling for an explanation, then the persuasive onus may shift to the Minister to establish what that explanation is: *AQM18 v Minister for Immigration and Border Protection* [2019] FCAFC 27; (2019) 268 FCR 424 at [59] per Besanko and Thawley JJ.

32 In assessing whether there has been an unreasonable delay, the Court assesses whether there are circumstances that a reasonable person may consider render the delay *"justified and not capricious"*: *Thornton v Repatriation Commission* [1981] FCA 76; (1981) 52 FLR 285 at 292, cited with approval in *ASP15 v Commonwealth* [2016] FCAFC 145; 248 FCR 372 at [21]-[23] per Robertson, Griffiths and Bromwich JJ.

33 This Court has a broad discretion in relation to the award of costs under s 214 of the *Federal Circuit and Family Court of Australia Act 2021* (Cth). It falls to be exercised in a particular

context in the present case, in which the proceedings have been rendered moot due to the grant of a visa to the applicant.

34 In *Re Minister for Immigration & Ethnic Affairs (Cth); Ex Parte Lai Qin* [1997] HCA 6; (1997) 186 CLR 622 (***Qin***), an applicant determined not to continue with proceedings seeking review of a decision by the Refugee Review Tribunal affirming refusal of her application for a protection visa. This was in circumstances where a visa had been granted to her pursuant to s 417 of the Act after the commencement of proceedings. At 624, McHugh J observed that although the general rule is that a successful party is entitled to their costs, when there has been no final hearing of the merits the Court *"is necessarily deprived of the factor that usually determines whether or how it will make a costs order".* His Honour reasoned (at 624-625) (footnotes omitted):

> In an appropriate case, a court will make an order for costs even when there has been no hearing on the merits and the moving party no longer wishes to proceed with the action. The court cannot try a hypothetical action between the parties (3). To do so would burden the parties with the costs of a litigated action which by settlement or extracurial action they had avoided. In some cases, however, the court may be able to conclude that one of the parties has acted so unreasonably that the other party should obtain the costs of the action (4). In administrative law matters, for example, it may appear that the defendant has acted unreasonably in exercising or refusing to exercise a power and that the plaintiff had no reasonable alternative but to commence a litigation…
>
> Moreover, in some cases a judge may feel confident that, although both parties have acted reasonably, one party was almost certain to have succeeded if the matter had been fully tried… But such cases are likely to be rare.
>
> If it appears that both parties have acted reasonably in commencing and defending the proceedings and the conduct of the parties continued to be reasonable until the litigation was settled or its further prosecution became futile, the proper exercise of the cost discretion will usually mean that the court will make no order as to the cost of the proceedings…

APPLICANT'S SUBMISSIONS

35 The applicant submitted that the Minister contravened the obligation to make a decision on the protection visa application within a reasonable time. In this regard, he submitted that:

(a) There was a period of 90 days from the Tribunal's decision on 28 July 2022 setting aside the fourth refusal of the visa, before the visa was granted on 26 October 2022. This period was submitted to be unreasonable.

(b) It was *"somewhat peculiar"* that a brief was provided to the Minister to determine whether he wished to exercise his power under s 501A of the Act. This was in circumstances where the Minister had previously sent the case back to the Department

for decision (after personal decisions had been overturned, and subsequent to which the Tribunal had overturned the refusal by a delegate).

(c) The initial brief to the Minister's office must have initially been in an unsatisfactory state, given that amendments had been required. The evidence also indicated that clarification of the amendments sought and the attendant process had been required, indicating that insufficient instructions had been given.

(d) On the evidence put forward by the Minister, it appeared that the applicant's case was discussed with the Minister's office on 27 September 2022. However, the Minister's evidence did not demonstrate that this discussion yielded any real advancement of the applicant's case. Similarly, it was not made clear how the subsequent *"not[ing]"* of the applicant's case at the following meeting with the Minister's office on 4 October 2022 advanced the applicant's matter.

(e) Despite the *"clear communication"* from the Minister's office on 11 October 2022 that the Minister *"wished to take no further action on the applicant's case",* internal clarification was sought.

(f) The applicant's visa was not granted until 26 October 2022, which was 2 weeks and 2 days after the communication on 11 October 2022 to the effect that the Minister did not wish to personally intervene in the applicant's case. This was submitted to have been unreasonable in circumstances including the applicant's detention since January 2018.

36 Further issue was taken with the adequacy of the affidavit relied upon by the Minister. This included that:

(a) Key people involved in the case from the Department had not provided affidavit evidence; and

(b) Insufficient detail was provided regarding various parts of the evidence that was given.

37 Having regard to the above, the applicant submitted that I ought to conclude that the Minister's conduct in this matter and delay in adjudicating his protection visa application were unreasonable.

MINISTER'S SUBMISSIONS

38 The Minister submitted that in order to have obtained a writ of mandamus in a case of the present kind, it would have been necessary for the applicant to have demonstrated that there was unreasonable delay as at the day on which the proceedings were commenced (on 13

September 2022). In this regard, the Minister relied upon Judge Driver's reasoning in *CGP21 v Minister for Home Affairs* [2021] FedCFamC2G 11 (***CGP21***) at [33]-[38] and the authorities cited therein.

39 The Minister emphasised that although the Tribunal set aside the most recent refusal decision on 28 July 2022, it did not provide reasons for doing so until 19 August 2022. Shortly thereafter, the Department commenced the process of updating a client brief to the Minister to assist him in deciding whether he wished to consider exercising the personal power in s 501A of the Act to set aside the Tribunal's decision. The Minister rejected the applicant's submission that there was anything *"peculiar"* about this.

40 Consideration was also given by the Department to judicial review of the Tribunal's decision, with the Department deciding not to seek such review on 23 August 2022. Between 24 and 26 August 2022, the brief was amended and given to the Minister's office. It was discussed with the Minister's advisors on 30 August 2022. The Minister did not accept that it should be inferred that the brief was *"not in a satisfactory state"* because further information was sought regarding other options available to the Minister.

41 The Minister observed that the period between the Tribunal's provision of reasons for decision and the commencement of these proceedings was in the order of 3 weeks. The Minister submitted that on no view could this be considered to have been unreasonable delay, in circumstances where consideration had to be given to whether to seek judicial review of the Tribunal's decision and whether the Minister wished to consider exercising the power under s 501A of the Act. Accordingly, the Minister submitted that, as in *CGP21*, the applicant commenced these proceedings prematurely. The Minister submitted that it was therefore almost certain that the applicant would have failed to demonstrate unreasonable delay in the relevant period. It was submitted that the applicant should therefore be ordered to pay the Minister's costs.

42 In any event, the Minister submitted that there was no unreasonable delay in the six weeks subsequently to the grant of the protection visa on 26 October 2022. In this regard, the Minister submitted:

(a) A period of 3 weeks between 19 September 2022 (when the updated brief was given to the Minister) and 11 October 2022 (when the Minister's office advised that the Minister wished to take no further action on the applicant's case) was not unreasonable in

circumstances where the applicant's case was one of eight cases before the Minister and the exercise of powers such as those conferred under s 501A of the Act required careful consideration;

(b) The seeking of clarification *"a mere two days"* following advice from the Minister's office that the Minister *"wished to take no further action on the applicant's case"* was not unreasonable in circumstances where adverse action under s 501A was not the only option available to the Minister; and

(c) In the 13-day period between 13 and 26 October 2022, the Department was required to conduct various health, security and public interest criteria checks in accordance with Schedules 2 and 4 to the *Migration Regulations 1994* (Cth), which were prioritised and performed in a timeframe that was not unreasonable.

43 In relation to the applicant's criticisms regarding the affidavit relied upon by the Minister more generally, the Minister submitted that they were misconceived. The Minister emphasised that this evidence was provided in support of an application for costs, not a trial on the substantive matter. The applicant could have sought further information or documents before the date for written submissions, had he wished. The Minister submitted that it was unnecessary to have adduced evidence for the purposes of the costs dispute of the kind that would be required upon a final hearing of a substantive matter.

CONSIDERATION

44 Both parties sought to persuade the Court that they clearly would have succeeded in this matter, such that it would be appropriate to award costs in their favour (potentially on an indemnity basis).

45 The difficulty with this is that determination of whether a writ such as that sought by the applicant ought to be issued is a serious, factually driven process. It is one that would have required the Court to have considered carefully all evidence of the circumstances relevant to determining whether or not unreasonable delay occurred.

46 Had this matter proceeded to determination at final hearing, leave to rely upon more fulsome evidence than that which is presently before the Court would most likely have been sought. Such evidence would likely have been tested at hearing. The Court would also have had the benefit of submissions made at hearing. Elaboration could have been sought regarding the parties' submissions.

47 There also appears to be, potentially, some dispute between the parties as to the date from which unreasonableness was to be assessed. As noted above, the Minister submitted by reference to *CGP21* that the relevant time for assessment was after the date that the Tribunal published its reasons for setting aside the fourth refusal decision and up to the date that proceedings were commenced. The applicant appears to have contemplated a broader factual inquiry, although did not deal with *CGP21* or otherwise expressly grapple with authorities on the time for assessment in his submissions. Those submissions were filed after the Minister's submissions in accordance with a schedule agreed between the parties. This is a matter, however, that could have been explored more fulsomely with the parties had a full and final hearing on the merits of the application occurred.

48 It is possible that, after such a hearing, I may have accepted the Minister's submission that, in all of the circumstances of this case, the relief sought by the applicant ought not to have been granted. It is also possible that the applicant may have persuaded me, after more fulsome testing of the evidence and submissions, that the application ought ultimately to have succeeded.

49 As events have rendered full determination on the merits unnecessary, however, the Court has had more limited assistance from the parties. In addition to the affidavit filed in support of the originating application, two reasonably concise affidavits have been filed in support of the submissions on costs. Those submissions were relatively brief. An example of the brevity of those submissions is provided at [12] of the applicant's submissions, where the applicant submitted that: *"Thirdly, on the question of costs, the applicant relies upon the supporting evidence filed in these proceedings and the unreasonableness of the respondent's conduct".* However, no additional indication was given as to what, if any, additional matters that the applicant wished for the Court to take into account, beyond those matters which had been canvassed earlier in the applicant's submissions and which have been summarised above.

50 It must be emphasised that I intend to make no criticism of the parties in this regard. It is entirely understandable that they should act to minimise their costs, in circumstances where that is the only outstanding issue before the Court.

51 However, it remains the case that I have not been persuaded to find with confidence that one party or the other would have succeeded upon a full hearing of the matter. Nor have I been persuaded to conclude, on the basis of the limited submissions made on the papers, that either party acted unreasonably in commencing or defending the proceedings in this matter. For these

reasons, I am minded to adopt the *"usual"* course considered in *Qin* with the consequence that each party bears their own costs in these proceedings.

52 A further question concerns whether costs should be awarded in respect of the costs dispute. In this regard, the Minister relied upon correspondence by which it was proposed to the applicant, prior to material being filed in relation to the costs dispute, that the proceedings be discontinued with no order as to costs. Ordinarily, such correspondence would indicate that the Minister ought to have his costs of the costs dispute. The Minister submits that this should occur, potentially on an indemnity basis.

53 Limited submissions have been made by the parties regarding the costs of the costs dispute. I am conscious that the dispute has occurred in particular circumstances where many of the arguments, and much of the material, may not have been apparent to the applicant prior to the Minister's evidence and submissions being filed. This was in circumstances where the applicant could not have known the steps taken by the Minister to progress his application without disclosure by the Minister. Had further correspondence in this regard occurred between the parties, then it is possible that some resolution could have been reached. I also note that the Minister's submissions and evidence were primarily directed towards an argument that the Minister ought to be awarded costs generally in these proceedings. That argument has not been accepted.

54 Overall, I am of the view that in the particular circumstances of this case, the parties ought to bear their own costs generally in this matter.

I certify that the preceding fifty-four (54) paragraphs are a true copy of the reasons for judgment of Judge Laing.

Associate: Mikaela Smith

Dated: 27 April 2023