FEDERAL COURT OF AUSTRALIA

JSMJ v Minister for Immigration, Citizenship and Multicultural Affairs

[2023] FCA 1466

Review of:	*JSMJ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 4183
File number(s):	NSD 527 of 2023
Judgment of:	**PERRY J**
Date of judgment:	24 November 2023
Catchwords:	**PRACTICE AND PROCEDURE** – application for an extension of time under s 477A(2) of the *Migration **Act** 1958* (Cth) – proposed second application for judicial review of a decision of the Administrative Appeals **Tribunal** – consideration of principles where significant delay (here 17 months) in seeking judicial review of Tribunal decision – application dismissed **MIGRATION** – whether the Tribunal misunderstood the exercise of the power under s 501CA(4) of the Act – whether the Tribunal treated the exercise of power as purely discretionary or as evaluative– held: merits of the proposed application not sufficiently strong to justify the grant of an extension of time
Legislation:	*Migration Act 1958* (Cth) ss 36, 36A, 477A, 500, 501, 501CA(4), 501E(1) *Federal Court Rules 2011* (Cth) rr 39.04, 39.05 *Migration Regulations 1994* (Cth) cl 5001 in Sch 4
Cases cited:	*AHZ21 v Minister for Immigration, Citizenship and Multicultural Affairs* [2022] FCA 884 *AIO21 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 114 *Applicant S270/2019 v Minister for Immigration and Border Protection* [2020] HCA 32; (2020) 383 ALR 194 *Au v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 125; (2022) 295 FCR 315 *Collector of Customs v Pozzolanic Enterprises Pty Ltd* - [1993] FCA 456; (1993) 43 FCR 280 *Hasan v Minister for Immigration, Citizenship, Migrant*

	Services and Multicultural Affairs [2022] FCA 1194 *Hunter Valley Developments Pty Ltd v Cohen* [1984] FCA 186; (1984) 3 FCR 344 *JSMJ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 718 *Minister for Home Affairs v Omar* [2019] FCAFC 188; (2019) 272 FCR 589 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 158 CLR 259 *Minister for Immigration, Citizenship and Multicultural Affairs v JSMJ* [2023] FCAFC 77; (2023) 297 FCR 630 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v EBD20* [2021] FCAFC 179; (2021) 287 FCR 581 *MZZGC v Minister for Immigration and Border Protection* [2015] FCA 842 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCATrans 154 *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17; (2022) 178 ALD 304 *Port of Melbourne Authority v Anshun Pty Ltd* [1981] HCA 45; (1981) 147 CLR 589 *SZVBN v Minister for Immigration and Border Protection* [2016] FCA 898 *Tu'uta Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] HCA 28; (2022) 178 ALD 573
Division:	General Division
Registry:	New South Wales
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	45
Date of last submission/s:	6 November 2023
Date of hearing:	14 November 2023
Counsel for the Applicant:	Dr J Donnelly
Solicitor for the Applicant:	Zarifi Lawyers
Counsel for the First Respondent:	Ms R Francois

Solicitor for the First Respondent:	Clayton Utz
Solicitor for the Second Respondent:	The Second Respondent filed a submitting notice save as to costs

ORDERS

NSD 527 of 2023

BETWEEN:	**JSMJ** Applicant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent
ORDER MADE BY:	**PERRY J**
DATE OF ORDER:	**24 NOVEMBER 2023**

THE COURT ORDERS THAT:

1. The application for an extension of time is dismissed.

2. The applicant is to pay the first respondent's costs, as agreed or taxed.

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

REASONS FOR JUDGMENT

PERRY J:

1. INTRODUCTION

1 This is an application under s 477A(2) of the *Migration **Act** 1958* (Cth) for an extension of time within which to apply for judicial review of a decision of the second respondent, Administrative Appeals **Tribunal**. The Tribunal affirmed a decision of a delegate of the first respondent, the **Minister** for Immigration, Citizenship and Multicultural Affairs, which decided under s 501CA(4) of the Act not to revoke the mandatory cancellation of the applicant's Class XB Subclass 200 Refugee **visa**.

2 For the reasons set out below, the application for an extension of time should be dismissed.

2. BACKGROUND

3 The applicant was born in a refugee camp in Tanzania. His parents held Burundi citizenship and had fled that country as a result of the ongoing civil war.

4 The applicant arrived in Australia with his family in 2006 on the visa.

5 On 9 February 2021, a delegate of the Minister cancelled the applicant's visa pursuant to s 501(3A) of the Act on the basis that the applicant had a "*substantial criminal record*" as defined by s 501(7)(c) of the Act and was serving a sentence of imprisonment at the time of the decision.

6 On 5 March 2021, the applicant made representations to the Minister seeking to have the cancellation of his visa revoked pursuant to s 501CA(4) of the Act. On 19 August 2021, a delegate of the Minister decided not to revoke the mandatory cancellation of the applicant's visa. On 12 November 2021, the Tribunal affirmed the delegate's decision.

7 On 18 December 2021, the applicant applied for judicial review of the Tribunal's decision (**first judicial review application**). Justice Logan granted the applicant the necessary one-day extension of time. The substantive application, in the course of submissions at the hearing before Logan J, came to focus on two alleged jurisdictional errors:

(1) the Tribunal misconstrued s 500(6H) of the Act which resulted in a consequential wrongful exclusion of information from the applicant as to his ignorance of his

citizenship and a related failure to make an assessment as to whether the applicant was a citizen of Burundi;

(2) the Tribunal constructively failed to exercise the review jurisdiction consigned to it by s 500 of the Act.

8 On 21 June 2022, Logan J upheld that application and quashed the decision of the Tribunal: *JSMJ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 718 (***JSMJ No 1***).

9 On 14 July 2022, the Minister filed a notice of appeal from Logan J's decision. The Minister relied on the following grounds of appeal.

(1) The primary judge erred in concluding that the Tribunal's finding that the applicant was a national of Burundi was not supported by any evidence and was illogical and irrational.

(2) The primary judge erred in concluding that the Tribunal had misunderstood or misapplied s 500(6H) of the Act and had committed errors resulting from, or connected with, such a misunderstanding/misapplication.

(3) The primary judge erred in concluding that the errors identified by his Honour were material errors.

10 On 16 September 2022, the applicant filed a notice of contention. The applicant relied on two grounds:

> (1) The AAT failed to properly '***evaluate*** *the representations*', or the issues and thereby breached the obligation set out in *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17 at [24].
>
> [Particulars omitted]
>
> (2) To the extent the AAT relied upon material about 'returnees' to Burundi, the AAT failed to carry out a proper review because the [applicant] was not born in Burundi, had never ever stepped foot in Burundi, had no friends, relatives or contacts in Burundi, had minimal language skills of any language spoken in Burundi and hence the past experiences or issues concerning 'returnees' was simply not material to the circumstances of the [applicant] by any definition the [applicant] could never be a 'returnee' to Burundi.

11 On 2 August 2022, the Full Court (Perry, Derrington and O'Sullivan JJ) handed down judgment in ***Au*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 125; (2022) 295 FCR 315. The relevance of this decision is explained below.

12 On 23 February 2023, the Minister's appeal from *JSMJ No 1* was heard by the Full Court constituted by Collier, Halley and Meagher JJ and allowed on 25 May 2023: *Minister for Immigration, Citizenship and Multicultural Affairs v JSMJ* [2023] FCAFC 77; (2023) 297 FCR 630 (***JSMJ No 2***).

13 In both *JSMJ No 1* and *JSMJ No 2*, the applicant was represented by counsel instructed by No Borders Law Group.

3. THIS PROCEEDING

14 On 31 May 2023, the applicant applied for an extension of time within which to seek judicial review of the Tribunal's decision (**proposed second judicial review application**). The applicant, in this proceeding, has new legal representation, namely, Dr J Donnelly of counsel instructed by Zarifi Lawyers.

15 The affidavit of Mr Ziaullah Zarifi affirmed on 30 May 2023 explains that the delay in filing the proceeding arose because of the applicant's change in legal representation and the identification of a new ground of review by the applicant's new legal representatives.

16 The draft originating application annexed to the affidavit of Mr Zarifi relies on one ground of review, namely, that the Tribunal "*acted on a misunderstanding of the law*". The ground is supported by the following particulars.

(a) The Tribunal determined that the issue was whether the discretion to revoke the mandatory cancellation of the applicant's visa may be exercised.

(b) The Tribunal erred in applying s 501CA(4) of the Act. It did not seek to ascertain whether the subjective jurisdictional fact—being the satisfaction of the matter in s 501CA(4)(b)(ii) existed—but wrongly perceived that the exercise of power in issue was the discretion to revoke the cancellation decision.

(c) The Tribunal's error was material.

17 The proposed ground of review relies upon the Full Court decision in *Au*.

18 In written submissions, the Minister opposed the grant of an extension of time on two bases:

(1) The proposed second judicial review application is estopped given the applicant was readily able to raise the *Au* type error before the Full Court hearing in February 2023 (relying on the principle in *Port of Melbourne Authority v Anshun Pty Ltd* [1981] HCA 45; (1981) 147 CLR 589 (***Anshun* estoppel**)) or is an abuse of process.

(2) It is not necessary in the interests of the administration of justice to make the order for an extension of time because the delay is not sufficiently explained, there is no real prejudice to the applicant and the *Au* type error does not have sufficient prospects of success.

19 The abuse of process submission was premised on a claim that the applicant could have sought to re-open the Full Court proceeding after judgment pursuant to r 39.04 of the *Federal Court Rules 2011* (Cth) (**FCR**) or the inherent jurisdiction of the Court. However, at the hearing, the Minister did not press this submission as the Full Court's orders were entered on the date of judgment and therefore the Court did not have jurisdiction to re-open the Full Court's judgment, subject to the limited exceptions in r 39.05 of the FCR.

20 In written submissions the Minister also submitted that even if the Court were to find that there was an error based on the decision in *Au*, the error was not material in the circumstances of this case. However, at the hearing, the Minister accepted that if the question of whether any error was material arose, the applicant would have established an arguable case sufficient to justify the grant of an extension of time.

21 During the hearing, the question also arose as to whether I should consider the *Anshun* estoppel issue or the application for an extension of time first in my decision. The question is significant because the onus lies upon the Minister to establish the factual basis for the alleged operation of *Anshun* estoppel: *AIO21 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 114 at [74]. In contrast, while the power to grant an extension of time under s 477A(2) of the Act "*does not, in terms, place any onus of proof upon an applicant for extension an application has to be made… the court will not grant the application unless positively satisfied that it is proper so to do*": see ***Hunter Valley Developments*** *Pty Ltd v Cohen* [1984] FCA 186; (1984) 3 FCR 344 at 348 (Wilcox J). In those circumstances, the Minister accepted that, if the Court were not satisfied that it is in the interests of justice to grant the application for an extension of time, it would be unnecessary to consider the issue of *Anshun* estoppel.

4. SHOULD THE EXTENSION OF TIME BE GRANTED?

4.1 Relevant legal principles

22 The applicant requires an extension of time within which to commence these proceedings because he failed to commence them within 35 days of the date of the Tribunal's decision as required by s 477A(1) of the Act.

23 Under s 477A(2), the Court has a discretion to make an order extending time where the Court is satisfied that it is necessary in the interests of justice to make the order. The discretion to extend time under s 477A(2) of the Act is not confined by express criteria: *Tu'uta **Katoa** v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] HCA 28; (2022) 178 ALD 573 at [12] (Kiefel CJ, Gageler, Keane and Gleeson JJ), [39] (Gordon , Edelman and Steward JJ). However, there are a range of considerations which may appropriately be taken into account in the exercise of discretion and are of varying weight depending on the circumstances of the particular case, namely:

(1) the length of the delay;

(2) whether the applicant has demonstrated an acceptable explanation for the delay;

(3) whether the respondent would be prejudiced by the grant of an extension of time; and

(4) the merits of the substantive appeal, if the extension of time were granted.

See, eg, *Hunter Valley Developments* at 348–349 (Wilcox J); *Kotoa* at [13] (Kiefel CJ, Gageler, Keane and Gleeson JJ) [40] (Gordon, Edelman and Steward JJ).

24 As to the third of these considerations, the Minister has not submitted that the grant of an extension of time would cause the Minister any prejudice in this case. However, that factor is essentially neutral given that a lack of prejudice alone to the respondent is not a sufficient reason to grant the application: *Hunter Valley Developments* at 349 (Wilcox J).

25 With respect to the last of these factors, in *Katoa*, Kiefel CJ, Gageler, Keane and Gleeson JJ held at [17]–[18]:

> it may be accepted that, in determining what is necessary in the interests of the administration of justice for the purposes of s 477A(2) [of the Act] (or s 477(2)), it will often be appropriate to assess the merits of the proposed grounds of review at a "reasonably impressionistic level". That is because the interests of justice are likely to be advanced by granting an extension of time to an application with some merit, depending, of course, on other relevant factors. In this regard, it may be relevant, as Mortimer J observed, that an extension of time will confer upon the applicant not only the right to a determination of their substantive application on the merits but also a

right of appeal from that judgment, if adverse to the applicant.

However, and as the plaintiff accepted, there will be circumstances in which it is appropriate for the Court to engage in more than an impressionistic assessment of the merits. For example, if the delay is lengthy and unexplained, the applicant may be required to show that their case is strong or even "exceptional". In such a case, a proper exercise of the power conferred by s 477A(2) will not require the judge to confine their consideration of the merits to an assessment of what is "reasonably arguable" or some similar standard. In other cases, the proposed ground of review may be hopeless but it may be necessary to examine the proposed application in some detail to reach that conclusion. The broad power in s 477A(2) does not prevent a judge from undertaking such an examination and from relying upon that determination to refuse an extension of time.

(Citations omitted.)

26 Similarly, Gordon, Edelman and Steward JJ held that, while in some cases a judge may determine an application for an extension of time with a threshold level of consideration of the merits, "*in order to resolve the facts and issues raised in an application, the judge may sometimes consider that it is necessary to have regard to the merits of the underlying application in greater detail*": *Katoa* at [62]; see, eg, *Hasan v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 1194 at [26] (McElwaine J).

27 It is possible for the absence of an acceptable explanation for delay to be outweighed by the presence of an arguable case, especially where the decision under review is a migration one with serious consequences for the applicant: *MZZGC v Minister for Immigration and Border Protection* [2015] FCA 842 at [13] and [17] (Mortimer J as her Honour then was); *SZVBN v Minister for Immigration and Border Protection* [2016] FCA 898 at [44] (Griffiths J). However, a very lengthy delay such as in the present case requires "*compelling merit of the substantive application to be demonstrated*": ***AHZ21*** *v Minister for Immigration, Citizenship and Multicultural Affairs* [2022] FCA 884 at [24] (Farrell J). As the applicant accepts, the merits of the substantive application must be "*exceptional*" where an extension of time of many months or years is sought: *AHZ21* at [27].

4.2 Disposition of the application

4.2.1 Length and explanation of the delay

28 The Tribunal's decision was made on 12 November 2021 and as a result, the application for judicial review should have been filed by 17 December 2021. The applicant, therefore, requires an extension of time of 530 days.

29 I am not satisfied that the applicant has provided an adequate explanation for the delay. As the Minister submits, the applicant has provided no explanation as to why the *Au* type error could not have been raised in the applicant's notice of contention in *JSMJ No 2*, or at any point in time before the hearing of the Full Court which was 6 months after the decision in *Au*. Indeed, the applicant appropriately accepted that "*there is no evidence as to why… the discretionary point [was] not raised earlier, and of course, that is a matter that would weigh against the exercise of the discretion to grant the extension of time*".

4.2.2 Serious human consequences for the applicant

30 The applicant submits that refusing to grant the extension of time would have serious human consequences for the applicant and would therefore be prejudicial to him.

31 ***First***, I accept that a negative decision would effectively close the door to any reconsideration by the Tribunal of the question whether the mandatory cancellation of his visa should be revoked. Further, by operation of s 501E(1) of the Act, the applicant would not be permitted to apply for another visa, other than a protection visa, while in the migration zone. If the applicant were then subsequently removed from Australia, the applicant may not be able to satisfy special return criterion 5001 in Sch 4 of the *Migration Regulations 1994* (Cth) and there would be no ability for a decision-maker to waive that criterion. Therefore, in respect of the classes of visas to which special return criterion 5001 applies, it is likely that the applicant would be permanently precluded from returning to Australia.

32 ***Secondly***, the applicant submits that the fact that he could apply for a protection visa is irrelevant in the context of considering the consequences for him of a decision refusing the extension of time and, in any event, there is no evidence that the applicant would apply for a protection visa. I do not accept this submission. It is apparent from the Tribunal's decision that there are grounds on which it could be expected that the applicant would apply for a protection visa if the mandatory cancellation of his previous visa was not revoked. This was because the applicant made claims to the delegate and the Tribunal that he feared harm if he was removed to Burundi: at [156]–[158], [166]–[172] of the Tribunal's decision. While the Tribunal was not satisfied that those claims would engage Australia's non-refoulement obligations, this finding was based on the evidence before the Tribunal and for the purposes of whether there was "*another reason*" why the mandatory cancellation should be revoked pursuant to s 501CA(4): at [192]. That finding would not have any binding effect on the later consideration of whether the applicant satisfies s 36(2) of the Act for the purpose of a protection

visa application. To the contrary, the decision-maker on any such application would have to approach the issue with a fresh mind on the basis of the evidence before them at that time. In those circumstances, I do not consider that the question of whether the applicant may apply for a protection visa if the extension of time application is unsuccessful is mere speculation but is in fact likely.

33 In relation to any subsequent protection visa application, while the Tribunal found there was a "*moderate risk*" that the applicant would re-offend (at [124]), it would not be inconsistent with that finding if a different decision-maker were to find that the applicant is not a "*danger to the Australin community*" for the purposes of s 36(1C) of the Act: *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v EBD20* [2021] FCAFC 179; (2021) 287 FCR 581 at [52]. The Tribunal's comment at [195] that the applicant's prospects of obtaining a protection visa seemed "*poor given s 36(1C)*" did not amount to a fulsome consideration of that issue and, in any event, would not be binding on a subsequent decision-maker. The question whether any future application for a protection visa should be refused under s 501(1) of the Act would arise only in the context of a decision-maker having been satisfied that the applicant meets the criteria in either ss 36(2)(a) or (aa) (see s 36A), and would involve the exercise of a true discretion under s 501(1) as opposed to the making of an evaluative decision. In those circumstances, it cannot be assumed that the decision-maker considering a protection visa application would refuse the application under s 501(1) of the Act.

34 ***Thirdly***, in terms of the immediate consequences of my decision, the applicant submits that if the application for an extension of time were refused, he would be prejudiced by reason of the fact that he would remain in immigration detention pending removal or determination of any future protection visa application. However, even if the extension of time was granted and the application for judicial review were allowed, the applicant would remain in immigration detention, unless and until he had a favourable decision by the Tribunal on remittal. The granting of the application for judicial review, in other words, would not result in the applicant being released from immigration detention: cf ***NZYQ*** *v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCATrans 154 where the High Court recently ordered the release of a plaintiff where there was no real prospect of the removal of the plaintiff from Australia becoming practicable in the reasonably foreseeable future.

4.2.3 Merits of the proposed ground of review

35 Finally, given the exceptional length of the delay, it is necessary for the applicant to establish that the merits of the substantive appeal are (at least) reasonably strong.

36 The applicant submits that the Tribunal failed to address the statutory question posed by s 501CA(4) for three reasons:

(1) the Tribunal references the power as a discretion or as discretionary on five occasions in the course of its reasons (referring to [6], [9], [162], [198] and [245]);

(2) both parties in their respective Statements of Facts, Issues and Contentions in the Tribunal referred to the power in s 501CA(4) as discretionary; and

(3) the Tribunal at [9] stated that it was "*bound by s 499(2A) to comply with any directions made under the Act[, i]n this case,* Direction No 90", in circumstances where *Direction No 90,* Part 2, is titled "*Exercising the discretion*" and cl 6 is titled "*Exercising discretion*".

37 For the following reasons, I am not persuaded that the prospects of success of the proposed application for judicial review are sufficiently strong to render it in the interests of justice to grant the extension of time.

38 Section 501CA(4) of the Act involves an evaluative assessment of whether the decision-maker is satisfied "*that there is another reason why the [mandatory cancellation] should be revoked*". I do not consider that the use of the word "*discretion*" by a decision-maker in reference to s 501CA(4), in itself, necessarily establishes jurisdictional error. Indeed the High Court has described the power as "*discretionary*" or a "*discretion*": see, eg, *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17; (2022) 178 ALD 304 at [20] (Kiefel CJ, Keane , Gordon and Steward JJ); *Applicant S270/2019 v Minister for Immigration and Border Protection* [2020] HCA 32; (2020) 383 ALR 194 at [36] (Nettle , Gordon and Edelman JJ). Justice Derrington has described the use of the word "*discretion*" in the present context in *Au* as follows (at [34]):

> So, even if the concept of a decision-maker being satisfied of a particular matter or thing can be described *in a sense* as being a discretion, there remains a distinction between it and a general discretion which might roughly equate to the qualitative difference between a "weak" discretion and a "strong" discretion respectively…
>
> (Emphasis in original.)

39 Thus it is accepted that the word "*discretion*" may be used in these two senses, namely: (1) to refer to a discretion properly so called; and (2) to describe an evaluative decision which

involves the weighing up of different considerations (even though in my view it is preferable to avoid using the term discretion in this second sense). The real question that the proposed ground of review raises is: did the Tribunal fail to address the question of whether, on the material before it, there was "*another reason for revocation*" but simply "*asked itself whether, as a matter of discretion, the cancellation decision should be revoked*"? (*Au* at [51] (Derrington J, with whose reasons Perry J relevantly agreed at [1]–[2]) and [153]–[155] (O'Sullivan J).)

40 The extracts from the Tribunal's decision on which the parties rely are as follows and for the reasons explained below, do not reveal error:

> LEGISLATIVE FRAMEWORK
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> 5. Revocation of the mandatory cancellation of visas is governed by s 501CA(4) of the Act. Relevantly, this provides that:
>
> The Minister may revoke 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 (as defined by section 501); or
>
> (ii) that there is another reason why the original decision should be revoked.
>
> 6. I am satisfied that the Applicant made the representations required by s 501CA(4)(a) of the Act. Thus, the issue is **whether the discretion to revoke the mandatory cancellation of the Applicant's visa may be exercised. If either of paragraphs (i) or (ii) are satisfied, I should revoke the original decision** [citing *Minister for Home Affairs v Buadromo* [2018] FCAFC 151].
>
> …
>
> **Is There Another Reason Why the Cancellation of the Applicant's Visa Should be Revoked?**
>
> 9. In considering whether to exercise the **discretion in s 501CA(4) of the Act**, the Tribunal is bound by s 499(2A) to comply with any directions made under the Act. In this case, *Direction No 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* ("the Direction") applies.
>
> …
>
> 162. Sections 36(2)(a) and 36(2)(aa) of the Act provide the tests for protection on the basis of refugee status and for complementary protection. Those tests contain exclusions that are not contained in the CAT or ICCPR. Accordingly, a person who could not satisfy the criteria for a protection visa may still engage Australia's non-refoulement obligations as a matter of fact despite the

> Government's interpretation of the scope of its obligations. As Mortimer J said in *Minister for Home Affairs v Omar* [[2019] FCAFC 188; (2019) 272 FCR 589]
>
> > "Critically, what matters for the exercise of the **s 501CA(4) discretion** is not the consideration of a visa criterion which might have similar content (in some respects) to Australia's non-refoulement obligations: it is whether Australia's non-refoulement obligations are engaged in respect of a particular individual."
>
> …
>
> 198. As a guide for **exercising the discretion**, Paragraph 9.2 of the Direction directs a decision-maker to take into account the extent of any impediments that the non-citizen may face if removed from Australia to their home country, in establishing themselves and maintaining basic living standards (in the context of what is generally available to other citizens of that country), taking into account:
>
> …
>
> CONCLUSION
>
> 244. I am now required to weigh all the Considerations in accordance with the Direction. The Applicant will face serious hardship and risk of harm if removed to Burundi. His removal will negatively impact members of his family to varying degrees. Given those matters, compelling reasons are required to justify a non-revocation decision. In this case there are compelling reasons which are captured in Primary Considerations 1, 2 and 4.
>
> 245. I cannot **exercise the discretion in s 501CA(4) of the Act to revoke the cancellation of the Applicant's visa**.
>
> (Footnotes omitted; emphasis in original omitted; boldface added).

41 Insofar as the references to the Tribunal exercising a discretion mirror the language of Direction 90, no error on the part of the Tribunal could be established. The Tribunal was bound to apply the Direction, as it recognised, and there was no suggestion that the Direction was somehow invalid by reason of its references to the power as a discretion or otherwise. Nor could error be established by reason of the Tribunal quoting from the reasons of Mortimer J (as her Honour then was) in *Omar* referring to "*the s 501CA(4) discretion*" for the proposition that the criteria for a protection visa are more narrow than Australia's non-refoulement obligations under international law.

42 Otherwise, I consider that read fairly, it is sufficiently apparent that the Tribunal asked itself the right question. In this regard, it is well established that the reasons of an administrative decision-maker are to be read fairly and "*are not to be construed minutely and finely with an eye keenly attuned to the perception of error*": *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 158 CLR 259 at 272 (Brennan CJ, Toohey, McHugh

and Gummow JJ, quoting with approval *Collector of Customs v Pozzolanic Enterprises Pty Ltd* [1993] FCA 456; (1993) 43 FCR 280 at 287 (the Court)). Specifically, as the Minister submits and is identified above, the Tribunal quoted the correct statutory test. It also posed for itself the correct question of whether there was another reason why the cancellation of the applicant's visa should be revoked in the heading above paragraph [9] of its reasons. In those circumstances, the likelihood is that the Tribunal was using the term "*discretion*" in the extracts from its reasons quoted above in the sense that the question posed by s 501CA(4) required it to make an evaluative assessment, rather than approaching the issue on the assumption that it had the flexibility of a true discretion. In this respect, I consider that this matter is distinguishable from *Au*.

43 It follows that the proposed ground of review does not have sufficiently strong prospects of success to warrant the grant of an extension of time. It would not, therefore, be in the interests of justice to grant the extension of time and the application must be dismissed.

44 In these circumstances, it is unnecessary to consider whether *Anshun* estoppel applies to the present proceeding.

5. CONCLUSION

45 The application for an extension of time is dismissed with costs.

I certify that the preceding forty-five (45) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Perry.

Associate:

Dated: 24 November 2023