HIGH COURT OF AUSTRALIA

GAGELER J

PLAINTIFF S3/2013 PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND CITIZENSHIP & ANOR DEFENDANTS

Plaintiff S3/2013 v Minister for Immigration and Citizenship
[2013] HCA 22
26 April 2013
S3/2013

ORDER

Application dismissed with costs.

Representation

The plaintiff appeared in person

A Markus for the first defendant (instructed by Australian Government Solicitor)

Submitting appearance for the second defendant

CATCHWORDS

Plaintiff S3/2013 v Minister for Immigration and Citizenship

Immigration – Judicial review of migration decision – Original jurisdiction of High Court – Abuse of process – Where application for judicial review of migration decision determined by Federal Magistrates Court and unsuccessfully appealed to Federal Court of Australia – Where appeal by special leave available to High Court –Where grounds of application raised or ought to have been raised before Federal Magistrates Court or Federal Court – Whether application an abuse of process.

Words and phrases – "abuse of process".

Constitution, ss 73, 75(v).
Migration Act 1958 (Cth), s 476.
High Court Rules 2004, r 27.09.4(c).

1 GAGELER J. This proceeding was commenced by an application for an order to show cause in the original jurisdiction of the High Court under s 75(v) of the Constitution. The application for an order to show cause seeks a writ of prohibition directed to the Minister for Immigration and Citizenship as first defendant ("the Minister") and writs of certiorari and mandamus directed to the Refugee Review Tribunal as second defendant.

2 Those writs are sought on two grounds. One ground is that the Refugee Review Tribunal, in affirming the decision of a delegate of the Minister to refuse the plaintiff a protection visa, denied the plaintiff procedural fairness by failing to consider the best interests of her child as a primary consideration. The other ground is an unparticularised claim that the Refugee Review Tribunal, in affirming the same decision, misinterpreted and misapplied provisions of the *Migration Act* 1958 (Cth) so as constructively to have failed to exercise its statutory jurisdiction to review the decision of the delegate.

3 The Minister by summons seeks an order that the proceeding be dismissed on alternative grounds: that it is an abuse of process; that it was commenced in breach of s 486D(3) of the *Migration Act*; and that it does not disclose an arguable case for the relief claimed.

4 The evidence establishes that the plaintiff is a national of South Africa who lived for a time with her husband in Ethiopia. After entering Australia she applied for a protection visa. She claimed to fear persecution in South Africa and Ethiopia for reasons which included her political opposition to the African National Congress Party, her being a victim of rape, her having a child of the rape, and her having had children by a foreigner. She claimed that there was a real risk that if removed from Australia she would suffer significant harm. A delegate of the Minister refused the plaintiff's application. The decision of the Refugee Review Tribunal affirming that decision was based mainly on adverse findings in relation to the plaintiff's credibility.

5 The plaintiff first applied to the Federal Magistrates Court for judicial review of the decision of the Refugee Review Tribunal in the exercise of the jurisdiction conferred by s 476 of the *Migration Act.* The application was heard by Emmett FM and dismissed on its merits. The plaintiff then appealed from the decision of the Federal Magistrates Court to the Federal Court of Australia. That appeal was heard by Griffiths J and was dismissed in a reserved judgment.

6 This proceeding, for judicial review of the same underlying decision of the Refugee Review Tribunal, was commenced soon after the dismissal of the appeal by the Federal Court from the decision of the Federal Magistrates Court.

7 Before the Federal Magistrates Court the plaintiff relied on a range of grounds of review which included particularised allegations of denial of procedural fairness on the part of the Refugee Review Tribunal and constructive

failure by it to exercise jurisdiction. In her appeal to the Federal Court the plaintiff was granted leave to raise additional, overlapping grounds of review specifically to the effect that the Refugee Review Tribunal had denied her procedural fairness by failing to consider the best interests of her child as a primary consideration. The additional grounds were amongst those Griffiths J considered on their merits in dismissing the appeal.

8 Of the two grounds on which the plaintiff seeks to rely in this proceeding, it is apparent that the first has been determined adversely to her on the merits by the decision of Griffiths J in the Federal Court and that the second ground at least could have been raised in the Federal Magistrates Court and with leave could have been raised in the Federal Court, even if it had not been raised in the Federal Magistrates Court.

9 In *University of Wollongong v Metwally (No 2)* the High Court unanimously stated[1]:

> "Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so."

10 In *D'Orta-Ekenaike v Victoria Legal Aid*[2], the joint judgment of four members of the High Court described "[a] central and pervading tenet of the judicial system": "controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances". Their Honours continued:

> "The tenet … finds reflection in the doctrines of res judicata and issue estoppel. Those doctrines prevent a party to a proceeding raising, in a new proceeding against a party to the original proceeding, a cause of action or issue that was finally decided in the original proceeding. It is a tenet that underpins the extension of principles of preclusion to some circumstances where the issues raised in the later proceeding could have been raised in an earlier proceeding." (footnotes omitted)

11 It is unnecessary, for the purposes of considering the first of the grounds on which the Minister seeks an order that the proceeding be dismissed, to consider the extent to which the doctrines of res judicata and issue estoppel apply to proceedings in the original jurisdiction of the High Court under s 75(v) of the Constitution. It is sufficient to recognise the application to that original

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1 (1985) 59 ALJR 481 at 483; 60 ALR 68 at 71; [1985] HCA 28.

2 (2005) 223 CLR 1 at 17 [34]; [2005] HCA 12.

jurisdiction of the general principle, stated in the joint judgment of three members of the High Court in *Walton v Gardiner*[3], that:

> "proceedings before a court should be stayed as an abuse of process if, notwithstanding that the circumstances do not give rise to an estoppel, their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate anew a case which has already been disposed of by earlier proceedings."

12 The same principle was, in substance, subsequently expressed by Lord Bingham of Cornhill in terms quoted with approval by French CJ in *Aon Risk Services Australia Ltd v Australian National University*[4]. Lord Bingham of Cornhill said[5]:

> "The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all."

13 The jurisdiction statutorily conferred on the Federal Magistrates Court by s 476 of the *Migration Act* to review a decision of the Refugee Review Tribunal is relevantly co-extensive with the jurisdiction of the High Court to review a decision of that Tribunal under s 75(v) of the Constitution[6]. The exercise of statutorily conferred jurisdiction of that nature is an exercise of the judicial power of the Commonwealth to quell a controversy about existing legal rights and legal duties. To permit an unsuccessful applicant for review in the Federal Magistrates Court simply to start again in the original jurisdiction of the High Court would be inconsistent with the nature of the power already exercised by the Federal Magistrates Court. It would be subversive of the processes that exist for appeal under statute from that Court to the Federal Court and ultimately, by special leave, to the High Court under s 73 of the Constitution.

14 The plaintiff's application in the original jurisdiction of the High Court seeks to re-litigate claims that either were made or could and should have been made in the earlier proceeding she brought in the Federal Magistrates Court and which she took on appeal to the Federal Court. Her application is an abuse of the

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3 (1993) 177 CLR 378 at 393; [1993] HCA 77.

4 (2009) 239 CLR 175 at 194 [34]; [2009] HCA 27.

5 *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 31.

6 Section 476(1) of the *Migration Act* 1958 (Cth).

process of the High Court and will be dismissed accordingly pursuant to r 27.09.4(c) of the High Court Rules 2004.

15 It is unnecessary to consider the consequences of the plaintiff's non-compliance with s 486D(3) of the *Migration Act*. It is also unnecessary to deal with the remaining ground of the summons.