HIGH COURT OF AUSTRALIA

GAGELER J

ALESSIO MANUEL VELLA PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR DEFENDANTS

Vella v Minister for Immigration and Border Protection
[2015] HCA 42
30 November 2015
S233/2015

ORDER

1. *Application for an order under s 486A(2) of the* Migration Act *1958 (Cth) refused.*

2. *Application for an order to show cause dismissed.*

3. *The plaintiff pay the defendants' costs.*

Representation

B W Walker SC with C L Lenehan for the plaintiff (instructed by ACA Lawyers)

S P Donoghue QC with A M Mitchelmore for the defendants (instructed by Australian Government Solicitor)

CATCHWORDS

Vella v Minister for Immigration and Border Protection

Practice and procedure – High Court of Australia – Extension of time – Migration law – *Migration Act* 1958 (Cth), s 486A imposes 35 day limit on application for remedy in High Court's original jurisdiction in relation to migration decision – High Court may extend 35 day period if necessary in the interests of the administration of justice – Application for order to show cause in relation to migration decision made 16 months out of time – Whether order extending 35 day period should be made – Whether case for extension of time exceptional.

Words and phrases – "interests of the administration of justice".

Migration Act 1958 (Cth), s 486A.

1 GAGELER J. By application for an order to show cause filed on 11 November 2015, the plaintiff, Mr Vella, has invoked the original jurisdiction conferred on the High Court by s 75(iii) and by s 75(v) of the Constitution to challenge a decision made by the Minister for Immigration and Border Protection on 13 June 2014. Because that decision answers the description of a "migration decision", Mr Vella accepts that for the application to proceed he requires an order under s 486A(2) of the *Migration Act* 1958 (Cth) ("the Act") extending the period for the making of the application by some 16 months and has sought such an order in his application for an order to show cause.

2 In compliance with s 486A(2)(a), Mr Vella has specified in writing why he considers that it is necessary in the interests of the administration of justice to make the requisite order extending the period for the making of the application. That specification is in his written submissions and in an affidavit of his solicitor, Mr Lewis. The considerations there specified have been amplified in oral submissions made on Mr Vella's behalf by Mr Walker SC, who has appeared with Mr Lenehan.

3 The critical question for me is that posed by s 486A(2)(b): whether I am to be satisfied that it is necessary in the interests of the administration of justice to make the order extending the period for the making of the application. Mr Walker has properly conceded that, given the length of the extension sought, I would only reach that satisfaction were I to be persuaded that Mr Vella's case is "exceptional"[1].

4 Mr Vella was born in Malta on 5 June 1953. He migrated from Malta to Australia on 6 December 1967. Mr Vella never became an Australian citizen, although it appears from exhibits to the affidavit of Mr Lewis that he has been enrolled as an elector within the Commonwealth Electoral Division of Prospect for at least most of the period since he turned 21 in 1974. It also appears that he remains so enrolled, although an issue as to his entitlement to be so enrolled has recently been raised by the Australian Electoral Commission.

5 Mr Vella departed Australia on 9 June 2014. At the time of his departure, he held a Return (Residence) (Class BB) subclass 155 visa.

6 On 13 June 2014, while Mr Vella was still absent from Australia, the Secretary of the Department of Immigration and Border Protection sent him a letter which informed him that the Minister had on that day decided to cancel his visa under s 501(3) of the Act. The letter attached a statement of reasons for the

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1 *Re The Commonwealth; Ex parte Marks* (2000) 75 ALJR 470 at 474 [13]; 177 ALR 491 at 495; [2000] HCA 67, citing *Gallo v Dawson* (1990) 64 ALJR 458 at 459; 93 ALR 479 at 481; [1990] HCA 30.

decision in which the Minister stated that, based on information which was protected from disclosure under s 503A of the Act, he reasonably suspected that Mr Vella did not pass the character test defined by s 501(6) and that, based on that and other information, he was satisfied that cancellation of the visa was in the national interest.

7 The letter invited Mr Vella to make representations to the Minister about the possible revocation of the decision under s 501C of the Act. Mr Vella took up that invitation, which resulted in the Minister making a subsequent decision under s 501C on 18 July 2014 not to revoke his original decision to cancel the visa.

8 By an originating application for review filed in the Federal Court of Australia on 12 August 2014, naming the Minister as respondent, Mr Vella invoked the original jurisdiction conferred on that Court by s 476A of the Act to claim relief framed as follows:

> "1. An order that the decision of the respondent made on 13 June 2014 to refuse to revoke the cancellation of the applicant's Return (Residence) (Class BB) subclass 155 visa be quashed.
>
> 2. A writ of mandamus be directed to the respondent, requiring the respondent to determine the decision about revocation of the decision to cancel the applicant's visa according to law."

9 In subsequent correspondence with the Australian Government Solicitor, the solicitors who then acted for Mr Vella confirmed that the decision he sought to review was that made by the Minister on 18 July 2014 and added:

> "Our client reserves his position in relation to the decision of the respondent made on 13 June 2014 to cancel the applicant's visa until access has been provided to the respondent's documents. We accept that if our client decides to seek review of that decision it will be necessary to seek an extension of time from the Court to do so."

10 On 18 September 2014, Wigney J granted Mr Vella leave to amend the originating application for review in the Federal Court by replacing "13 June 2014" with "18 July 2014" in paragraph 1. The application resulted in a decision of the Full Court of the Federal Court which dismissed the amended application on 21 April 2015[2]. This Court dismissed an application for special leave to

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2 *Vella v Minister for Immigration and Border Protection* (2015) 230 FCR 61.

appeal from the decision of the Full Court of the Federal Court on 16 October 2015[3].

11 The affidavit of Mr Lewis deposes that Mr Lewis was retained by Mr Vella in late August 2015, that he received Mr Vella's file from Mr Vella's former solicitors on 9 September 2015, and that he was instructed by Mr Vella to draft a response to a letter dated 4 September 2015 from the Australian Electoral Commission as to why Mr Vella was entitled to remain on the electoral roll. Mr Lewis's affidavit continues:

> "Having reviewed the plaintiff's file obtained from his previous solicitors, and in the course of preparing submissions to the Australian Electoral Commission and preparing for the hearing of the Special Leave Application and having conferred with counsel, it was apparent to counsel and me that the plaintiff may have a right to bring an application to this Court pursuant to s 75(v) of the Constitution for an order to show cause in respect of the decision by the Minister dated 13 June 2014 to cancel the plaintiff's Permanent Residency Visa ('**Cancellation Decision**').
>
> I am informed by the plaintiff and believe that his previous solicitors did not advise him of his right to make this Application in respect of the Cancellation Decision.
>
> On or about 8 October 2015 I was instructed by the plaintiff to file this Application and seek an order that the time in which the Application could be filed be extended."

12 Mr Walker has submitted that I should read the penultimate paragraph of Mr Lewis's affidavit as indicating no more than that Mr Vella was not advised by his previous solicitors of his ability to rely on the grounds for challenging the decision made by the Minister on 13 June 2014 which now appear in the application for an order to show cause. I am prepared to read the paragraph in that way and, on that basis, to accept the truth of what Mr Lewis says in that paragraph on information and belief. Mr Walker has made clear that Mr Vella makes no allegation of any shortcoming on the part of his former legal representatives.

13 The grounds for challenging the decision made by the Minister on 13 June 2014 which now appear in the application for an order to show cause are three-fold. First, it is said that s 501(3) in its application to Mr Vella is beyond the scope of the power of the Commonwealth Parliament to make laws with respect to "aliens" because Mr Vella is one of the "people" referred to in ss 7, 15, 24 and 25 of the Constitution and one of the "electors" referred to in ss 8, 30 and 128 of

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3 [2015] HCATrans 263.

the Constitution. Second, it is said that insofar as that provision permits the Minister to act on information which was protected from disclosure under s 503A of the Act, s 501(3) infringes Ch III of the Constitution by either or both purporting to confer judicial power on the Minister or curtailing the right or ability of a person whose visa has been cancelled to seek judicial review under s 75(v) of the Constitution. Third, it is said that the Minister failed to have regard to mandatory considerations and erred in law in making the decision.

14 Mr Walker frankly acknowledges that the first two of those grounds are ambitious. To accept the first would require reopening the holding in *Shaw v Minister for Immigration and Multicultural Affairs* expressed in terms that "the aliens power has reached all those persons who entered this country after the commencement of the Citizenship Act on 26 January 1949 and who were born out of Australia of parents who were not Australian citizens and who had not been naturalised"[4]. To accept the second would require an extension of previous jurisprudence on Ch III of the Constitution.

15 Each of those grounds for challenging the decision made by the Minister on 13 June 2014 could have been pursued in the Federal Court proceeding which was concluded on 21 April 2015.

16 The fact that the decision made by the Minister on 13 June 2014 was not challenged on those grounds in the Federal Court proceeding cannot be inferred to have resulted from Mr Vella's former legal representatives having been insensitive to the possibility of constitutional grounds along those lines being raised. The inference which I draw is rather that the omission of those grounds resulted from the former legal representatives having made a sound forensic judgment to pursue a litigious course which reasonably appeared to them to give Mr Vella his greatest prospect of ultimately having his visa reinstated. The former legal representatives can be assumed to have been aware of the relevant holding in *Shaw*, and there is evidence before me of interlocutory skirmishing in the course of the proceeding in the Federal Court which showed counsel then appearing for Mr Vella to have been acutely conscious of Ch III issues associated with the operation of s 503A of the Act.

17 The course pursued on Mr Vella's behalf, not to challenge the Minister's decision to cancel his visa under s 501(3) of the Act and instead to challenge the Minister's subsequent decision under s 501C not to revoke that decision, was logically premised on an acceptance of the validity of the cancellation decision. So much is spelt out in the form of the order for mandamus which was sought in the originating application for review filed in the Federal Court. As acknowledged in the correspondence with the Australian Government Solicitor,

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4 (2003) 218 CLR 28 at 43 [32]; [2003] HCA 72.

it was a course chosen in the knowledge that any subsequent attempt to challenge the cancellation decision would necessitate an application for an extension of time.

18 In *University of Wollongong v Metwally (No 2)*, where a new argument of constitutional invalidity was sought to be raised after the hearing of a special case in this Court in which validity had been assumed, this Court unanimously stated[5]:

> "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."

19 The principle to which reference was made in *Metwally (No 2)* is reflected in the overlapping doctrines of issue estoppel and abuse of process recently considered in *Tomlinson v Ramsey Food Processing Pty Ltd*[6]. It is not necessary or appropriate to bring either of those specific doctrines to bear in the present case. It is sufficient that the principle tells strongly against the conclusion that the interests of the administration of justice make it necessary to extend time for a party to litigate issues which that party has already had an opportunity to raise in earlier litigation.

20 In the result, given the length of the period for which the extension is sought and the forensic choices which have been made in the litigation which was pursued in the Federal Court during that period, I am not satisfied that it is necessary in the interests of the administration of justice to make the order extending the period for the making of the application for an order to show cause.

21 Accordingly, I refuse to make an order under s 486A(2) of the Act and, as a consequence of that refusal, the application for an order to show cause must be dismissed.

22 The orders I will make are therefore as follows:

1. The application for an order under s 486A(2) of the *Migration Act* 1958 (Cth) is refused.

2. The application for an order to show cause is dismissed.

3. The plaintiff is to pay the defendants' costs.

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5 (1985) 59 ALJR 481 at 483; 60 ALR 68 at 71; [1985] HCA 28.

6 (2015) 89 ALJR 750 at 756-758 [22]-[26]; 323 ALR 1 at 7-9; [2015] HCA 28.