HIGH COURT OF AUSTRALIA

GAGELER J

EBT16 PLAINTIFF

AND

MINISTER FOR HOME AFFAIRS & ANOR DEFENDANTS

EBT16 v Minister for Home Affairs
[2019] HCA 44
Date of Judgment: 13 November 2019
B37/2019

ORDER

1. The application is dismissed.

2. The plaintiff is to pay the first defendant's costs.

CATCHWORDS

EBT16 v Minister for Home Affairs

Administrative law – Judicial review – Jurisdictional error – s 477 of *Migration Act 1958* (Cth) – Where plaintiff applied to Federal Circuit Court of Australia for judicial review of decision of Administrative Appeals Tribunal – Where plaintiff required extension of time – Where extension of time was refused under s 477(2) – Where Federal Circuit Court ordered that application be dismissed – Whether Federal Circuit Court had jurisdiction to dismiss application – Whether impermissible for Federal Circuit Court to assess full merits of application – Nature of prohibition imposed by s 477(1).

Words and phrases – "assessment of the merits", "authority to dismiss an application", "exercise of jurisdiction", "extension of time", "interests of the administration of justice", "judicial review", "jurisdiction", "prohibition in s 477(1)", "scope of jurisdiction".

Constitution, s 75(v).
Federal Circuit Court of Australia Act 1999 (Cth), s 8(3).
Migration Act 1958 (Cth), ss 476, 477.

1 GAGELER J. By application for a constitutional or other writ filed in the original jurisdiction of the High Court under s 75(v) of the *Constitution* on 18 June 2019, the plaintiff seeks a writ of certiorari quashing two orders made by the Federal Circuit Court on 14 January 2019, consequent upon ex tempore reasons delivered on that day[1]. By the first order, the Federal Circuit Court refused an application by the plaintiff for an extension of the time prescribed by s 477(1) of the *Migration Act 1958* (Cth) for the filing of an application for judicial review of a decision of the Administrative Appeals Tribunal which had affirmed a decision of a delegate of the Minister for Home Affairs to refuse to grant to the plaintiff a Protection (Class XA) visa. The second order went on to dismiss the application for judicial review in respect of which the extension of time was sought. The plaintiff seeks as well a writ of mandamus requiring the Federal Circuit Court to determine his application for an extension of time according to law.

2 Before filing the present application, the plaintiff made an application to the Federal Court for an extension of the time in which to seek leave to appeal from the order of the Federal Circuit Court refusing the application for an extension of the time prescribed by s 477(1) of the *Migration Act*. The Federal Court dismissed that application on the basis that the proposed appeal would be incompetent by reason of s 476A(3)(a) of the *Migration Act*[2].

3 The Federal Court would have jurisdiction under s 39B of the *Judiciary Act 1903* (Cth) to hear and determine an application for judicial review of the orders of the Federal Circuit Court. Contrary to a submission of the Minister, however, the mere availability of that alternative avenue of judicial review presents no impediment to the plaintiff making the application which he now makes to the High Court. Had the application raised an arguable basis for the relief sought, I would have considered it appropriate for the application to be remitted to the Federal Court under s 44 of the *Judiciary Act*. In the result, for reasons I am about to explain, I do not consider that the application raises an arguable basis for that relief and propose to dismiss it for that reason under r 25.09.1 of the *High Court Rules 2004* (Cth).

4 The application relies on two grounds. The first ground is that the Federal Circuit Court had no jurisdiction to make the order dismissing his application as "the only matter before it was at that stage an application for an extension of time". The second ground is to the effect that the Federal Circuit Court misunderstood the nature of its power to grant or refuse an application for an

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1 *EBT16 v Minister for Home Affairs* [2019] FCCA 75.

2 *EBT16 v Minister for Home Affairs* [2019] FCA 832.

extension of time in that it failed to give proper consideration to, amongst other things, the length of and reason for the plaintiff's delay in making his application to that Court for judicial review of the decision of the Tribunal and in that it impermissibly decided the full merits of the plaintiff's case as opposed to making its decision based upon a preliminary assessment of the merits. Moreover, the plaintiff argues, in giving such consideration as it did to the explanation for his delay, the Federal Circuit Court erroneously took into account the fact that he had previously applied to the Federal Circuit Court for judicial review.

5 Underlying the first ground is a question as to the nature of the prohibition that is imposed by s 477(1) of the *Migration Act* in the absence of an extension of time under s 477(2). Does the prohibition operate as a limitation on the scope of the jurisdiction conferred on the Federal Circuit Court by s 476(1) of the *Migration Act*, as might be suggested by *SZICV v Minister for Immigration and Citizenship*[3] and *BZABK v Minister for Immigration and Citizenship*[4]? Or does the prohibition operate merely as a limitation on the exercise of that jurisdiction, as is suggested by *SZQDZ v Minister for Immigration and Citizenship*[5] and *SZQPN v Minister for Immigration and Citizenship*[6] and as might be thought to be suggested by analogy to the operation of s 486A(1) as explained in *Wei v Minister for Immigration and Border Protection*[7]?

6 To determine the first ground adversely to the plaintiff, it is not necessary to decide that question. If, on the one hand, the prohibition in s 477(1) operates merely as a limitation on the exercise of the jurisdiction conferred by s 476(1), the Federal Circuit Court has authority to dismiss an application to which the prohibition applies in the exercise of the jurisdiction conferred by s 476(1). If, on the other hand, the prohibition in s 477(1) operates as a limitation on the scope of the jurisdiction conferred by s 476(1), the Federal Circuit Court has authority to dismiss an application to which the prohibition applies in the exercise of the jurisdiction that is inherent in its establishment as a court of record by s 8(3) of the *Federal Circuit Court of Australia Act 1999* (Cth) to dismiss an application made to it for want of jurisdiction[8]. Either way, the order made by the Federal

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3 (2007) 158 FCR 260 at 270 [45]-[47].

4 (2012) 205 FCR 83 at 92 [43].

5 (2012) 200 FCR 207 at 212-213 [18]-[20].

6 [2012] FCA 424 at [12]-[14].

7 (2015) 257 CLR 22 at 36-37 [41]-[42], 41 [52].

8 *DMW v CGW* (1982) 151 CLR 491 at 507; *Mercator Property Consultants Pty Ltd v Christmas Island Resort Pty Ltd* (1999) 94 FCR 384 at 388 [18].

Circuit Court dismissing the application for judicial review as a consequence of having refused the application for an extension of time under s 477(2) was an order within the jurisdiction of that Court.

7 Turning to the second ground of the application, a fair reading of the Federal Circuit Court's reasons for decision makes clear that the critical reason why that Court did not consider it to have been necessary in the interests of the administration of justice to make an order under s 477(2) of the *Migration Act* was that the plaintiff, who was self-represented, failed to demonstrate that there was any merit in any of his wholly un-particularised grounds that the Tribunal committed jurisdictional error, was unreasonable, or took into account an irrelevant consideration in affirming the decision of the delegate[9]. Understood in that light, the Federal Circuit Court's decision to refuse the plaintiff an extension of time cannot be said to have gone beyond a threshold assessment of merit.

8 By rejecting the arguability of the second ground of the application on the basis on which it is put, I should not be understood to be expressing any view as to the correctness of the proposition, adopted by the Full Court of the Federal Court in *MZABP v Minister for Immigration and Border Protection*[10] and accepted with circumspection by a differently constituted Full Court in *DMI16 v Federal Circuit Court of Australia*[11], that the Federal Circuit Court would exceed its jurisdiction were the Federal Circuit Court to conclude that it was not necessary in the interests of the administration of justice to make an order under s 477(2) after undertaking a full assessment of the merits. Although the High Court cannot be bound by a decision of any other court in the exercise of its jurisdiction under s 75(v) of the *Constitution*, it would not be appropriate for me as a single Justice exercising that jurisdiction to depart from or cast doubt on a decision of the Full Court of the Federal Court. Were I to have considered the proposition adopted in *MZABP* to have been dispositive of the present application, and were I to have entertained doubt about its correctness, the appropriate course would have been for me to refer the application or the relevant part of it to the Full Court of the High Court under r 25.09.3(d) of the *High Court Rules*.

9 The plaintiff's specific complaint that the Federal Circuit Court erroneously took into account the fact that he had previously applied to the Federal Circuit Court for judicial review is not unfounded but cannot result in the relief he seeks. In the context of going on to consider whether the plaintiff had an

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9 *EBT16 v Minister for Home Affairs* [2019] FCCA 75 at [24].

10 (2016) 152 ALD 478 at 483 [23], 486 [38].

11 (2018) 264 FCR 454 at 471 [62].

explanation for his delay, the Federal Circuit Court inferred from the fact that the plaintiff had previously applied to the Federal Circuit Court for judicial review that "he knew what he had to do and did not do it in this case"[12]. That inference about a self-represented litigant's state of understanding of court procedure was not available to be drawn based solely upon the fact that he has previously brought proceedings in that court. Nor was it necessary, as the Federal Circuit Court had already found that no explanation had been given for the delay[13] and had correctly apprehended that the application was without sufficient merit to justify the granting of an extension of time. Given that the Federal Circuit Court properly assessed the application as having no merit, however, it is not arguable that the taking of the plaintiff's litigation history into consideration could have had a material effect on the outcome.

10 As the application discloses no arguable basis for the relief sought by the plaintiff, it is unnecessary to consider whether the plaintiff has established a reason for delay in making the present application which might support an enlargement of time fixed for the bringing of an application for a writ of mandamus by r 25.02.1 of the *High Court Rules*.

11 The orders I will therefore make are as follows:

1. The application is dismissed under r 25.09.1 of the *High Court Rules 2004* (Cth).

2. The plaintiff is to pay the first defendant's costs.

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12 *EBT16 v Minister for Home Affairs* [2019] FCCA 75 at [30].

13 [2019] FCCA 75 at [29].