

# HIGH COURT OF AUSTRALIA

KIEFEL CJ,  
GAGELER, KEANE, GORDON, EDELMAN, STEWARD AND GLEESON JJ

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SOSEFO KAUVAKA LELEI TU'UTA KATOA PLAINTIFF

AND

MINISTER FOR IMMIGRATION, CITIZENSHIP,  
MIGRANT SERVICES AND MULTICULTURAL  
AFFAIRS & ANOR DEFENDANTS

*Tu'uta Katoa v Minister for Immigration, Citizenship, Migrant Services and  
Multicultural Affairs*

[2022] HCA 28

*Date of Hearing: 10 May 2022*

*Date of Judgment: 17 August 2022*

S135/2021

## ORDER

*Application dismissed with costs.*

### Representation

O R Jones with J G Wherrett for the plaintiff (instructed by Turner Coulson  
Immigration Lawyers)

S B Lloyd SC with B D Kaplan for the first defendant (instructed by  
Australian Government Solicitor)

Submitting appearance for the second defendant

Notice: This copy of the Court's Reasons for Judgment is subject to  
formal revision prior to publication in the Commonwealth Law  
Reports.



## CATCHWORDS

### **Tu'uta Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**

Immigration – Visas – Review of cancellation decision – Application for extension of time – Where then Minister for Home Affairs cancelled plaintiff's visa pursuant to s 501(3)(b) of *Migration Act 1958* (Cth) – Where plaintiff applied pursuant to s 477A(2) for extension of time to file application for review of Minister's decision – Where primary judge heard application for extension of time concurrently with underlying substantive application – Where primary judge refused application for extension of time on basis that proposed ground of review had no merit – Whether primary judge misapprehended or misconceived nature of statutory power in s 477A(2) – Whether primary judge committed jurisdictional error – Whether exercise of discretion in s 477A(2) may involve more than impressionistic assessment of merits of proposed grounds of review.

Words and phrases – "extension of time", "impressionistic assessment", "jurisdictional error", "misapprehended or misconceived", "necessary in the interests of the administration of justice", "reasonable prospects of success", "reasonably arguable".

*Migration Act 1958* (Cth), ss 476A, 477A.



1 KIEFEL CJ, GAGELER, KEANE AND GLEESON JJ. This case concerns the correct approach to be taken by a judge of the Federal Court of Australia in the exercise of the power to extend time for making an application under s 477A(1) of the *Migration Act 1958* (Cth) ("the Act"). Section 477A(1) provides that an application to the Federal Court for a remedy to be granted in the exercise of the Court's original jurisdiction under s 476A(1)(b) or (c) in relation to a "migration decision"<sup>1</sup> must be made within 35 days of the date of the migration decision. However, by s 477A(2), the Federal Court may extend the 35 day period "as the Federal Court considers appropriate" if an application has been made in the required form, and the Federal Court "is satisfied that it is necessary in the interests of the administration of justice to make the order".

2 The plaintiff sought an extension of time to file an application for judicial review of a decision to cancel his Class TY Subclass 444 Special Category (Temporary) visa. The visa had been cancelled by the then Minister for Home Affairs under s 501(3)(b) of the Act, on the basis of matters that included the Minister's suspicion that the plaintiff had been or was a member of the Comanchero Outlaw Motorcycle Gang ("the Comanchero OMG").

3 The primary judge (Nicholas J) dismissed the extension of time application, after failing to be persuaded that the single ground of review in the proposed substantive application had any merit<sup>2</sup>. The plaintiff contends that the primary judge's decision involved jurisdictional error because his Honour misapprehended or misconceived the nature and purpose of the statutory power in s 477A(2) to extend time. The plaintiff argues that this error is revealed by the primary judge's reasons, which are said to extend beyond an assessment of the merits of the application on an "impressionistic" basis for the limited purpose of assessing whether the application was reasonably arguable.

4 The primary judge did not err in dismissing the extension of time application. His Honour was entitled to exercise the power in s 477A(2) by forming the view that the substantive application lacked merit in the manner recorded in his Honour's reasons. Accordingly, the plaintiff's application in this Court fails.

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1 *Migration Act 1958* (Cth), s 5(1).

2 *Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1000 at [9].

Kiefel CJ  
Gageler J  
Keane J  
Gleeson J

2.

### Primary judge's reasons

5 In accordance with common practice in the Federal Court, the primary judge heard the extension of time application together with argument on the substantive application. This approach is efficient, but did require the primary judge to avoid the error of conflating the two applications by refusing to extend time on the basis of a final determination of the issues raised by the substantive application, instead of by reference to a consideration of what was necessary in the interests of the administration of justice<sup>3</sup>.

6 The primary judge recorded the Minister's acceptance that the plaintiff's delay of about three weeks was "not inordinate" and that the Minister would not be prejudiced by the grant of an extension of time, but that the Minister opposed the extension of time sought on the basis that the proposed ground of review "lack[ed] sufficient merit"<sup>4</sup>.

7 At the hearing before the primary judge, the single proposed ground of review concerned the Minister's reference to several criminal charges pending against the plaintiff at the time of the visa cancellation. The ground was stated in the following terms:

"In relying on the charges laid against the [plaintiff] in support of a determination that the [plaintiff] posed a risk of reoffending and/or a risk to the Australian community, the Minister failed to act on the basis of probative material and/or took into account an irrelevant consideration and/or acted in a legally unreasonable and/or illogical and/or irrational way and/or acted contrary to the presumption of innocence and therefore committed jurisdictional error."

8 The primary judge recorded that he was not persuaded that this proposed ground had any merit. After recording the plaintiff's submissions in support of that ground, the primary judge stated that he did not accept those submissions. His Honour's reasons may be summarised as follows: (1) it was permissible for the Minister to have regard to the existence of criminal charges, even if the allegations supporting the charges had not been proven or the visa holder had been acquitted; (2) the Minister's findings did not depend upon an acceptance that the plaintiff had in fact committed the criminal offences with which he had been charged; (3) there

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3 *SZTES v Minister for Immigration and Border Protection* [2015] FCA 719 at [82]-[85].

4 *Katoa* [2021] FCA 1000 at [7].

3.

was probative material before the Minister from which he could reasonably infer that the pending charges arose out of the plaintiff's involvement with the Comanchero OMG, and that, as late as 18 January 2019, the plaintiff was keeping company with other members of the Comanchero OMG and that their activities resulted in the plaintiff and other members being charged with serious criminal offences; (4) the Minister's process of reasoning was not unreasonable in the legal sense nor was it affected by any other error capable of amounting to jurisdictional error.

### **The power to extend time in s 477A(2)**

9 Section 477A provides relevantly:

- "(1) An application to the Federal Court for a remedy to be granted in exercise of the court's original jurisdiction under paragraph 476A(1)(b) or (c) in relation to a migration decision must be made to the court within 35 days of the date of the migration decision.
- (2) The Federal Court may, by order, extend that 35 day period as the Federal Court considers appropriate if:
  - (a) an application for that order has been made in writing to the Federal Court specifying why the applicant considers that it is necessary in the interests of the administration of justice to make the order; and
  - (b) the Federal Court is satisfied that it is necessary in the interests of the administration of justice to make the order."

10 The "may" in the chapeau to s 477A(2) confers an authority to exercise the jurisdiction conferred under s 476A(1)(b) or s 476A(1)(c) of the Act, and is not merely facultative in nature<sup>5</sup>. The power is discretionary in the sense that it involves an evaluative judgment as to a state of satisfaction<sup>6</sup>.

11 At a high level of generality, it may be accepted that the purpose of a power to extend time is "to eliminate the injustice a prospective [applicant] might suffer

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5 *Ex parte McGavin; Re Berne* (1945) 46 SR (NSW) 58 at 60-61; *Ward v Williams* (1955) 92 CLR 496 at 507; *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at 299-300 [33].

6 *cf Norbis v Norbis* (1986) 161 CLR 513 at 518.

Kiefel CJ  
 Gageler J  
 Keane J  
 Gleeson J

4.

by reason of the imposition of a rigid time limit within which an action was to be commenced"<sup>7</sup>. However, what amounts to injustice in this context is not obvious. The text of s 477A reveals a legislative intention to restrict the Federal Court's exercise of its original jurisdiction under s 476A(1)(b) and (c) by a 35 day time limit on applications, and to ameliorate injustice that might result from that time limit by allowing that time to be extended only in cases where a judge has reached the state of satisfaction in s 477A(2)(b).

12 On its face, the power conferred by s 477A(2) is unfettered except by the requirements of a written application in conformity with s 477A(2)(a) and the Court's satisfaction that an order extending time "is necessary in the interests of the administration of justice"<sup>8</sup>. Other than the "interests of the administration of justice", there are no mandatory relevant considerations, whether express or to be implied from the "subject-matter, scope and purpose" of the Act<sup>9</sup>. The focus of s 477A(2)(b) is not on the interests of the applicant, but the broader interests of the administration of justice<sup>10</sup>. So framed, the paragraph allows the Court to look at a myriad of facts and circumstances, including the length of the applicant's delay, reasons for the delay, prejudice to the respondent, prejudice to third parties and the merits of the underlying application. The level of satisfaction for the Court to reach is not low: the Court must be satisfied not just that an extension of time is desirable, but that it is needed in the interests of the administration of justice.

13 In the absence of mandatory considerations for determining whether his Honour had the state of satisfaction required by s 477A(2)(b), the primary judge properly referred to the well established principles guiding decisions whether to extend time under s 11 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) that were stated by Wilcox J in *Hunter Valley Developments Pty Ltd v*

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7 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 553, quoting *Sola Optical Australia Pty Ltd v Mills* (1987) 163 CLR 628 at 635.

8 *CZA19 v Federal Circuit Court of Australia* (2021) 285 FCR 447 at 452 [19]; *WZASS v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 282 FCR 516 at 522-523 [29]-[33].

9 *SZUWX v Minister for Immigration and Border Protection* (2016) 238 FCR 456 at 458 [11]-[12], 459 [18], [19]; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40.

10 cf *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 421-422 [15].



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*Cohen*<sup>11</sup>. Those principles, which are non-exhaustive of the factors that may be relevant to an extension of time under s 477A(2), include that "[t]he merits of the substantial application are properly to be taken into account in considering whether an extension of time should be granted"<sup>12</sup>.

14 Guidelines for the proper exercise of the power in s 477(2) of the Act (which is in relevantly similar terms to s 477A(2)) were stated by the Full Court of the Federal Court in *DHX17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*<sup>13</sup>. In particular, the Full Court stated that an evaluation of the merits of the proposed substantive application that goes further than an "impressionistic evaluation of the [applicant's] proposed ground of review, strongly suggests that it misconceived its function or power and acted in excess of its jurisdiction"<sup>14</sup>. The Court added that "the decisional process of exercising the discretion in s 477(2) neither requires nor warrants anything more than an impressionistic consideration of the proposed grounds of review" and, if "a court seeks to assess the merits of the proposed grounds of review against a standard of whether they would ultimately succeed on the hearing of the application, the conclusion will usually be drawn that it has misconceived its function and or power"<sup>15</sup>.

15 The reasoning of the Full Court in *DHX17* was informed by the earlier decision of Mortimer J in *MZABP v Minister for Immigration and Border Protection* concerning s 477(2)<sup>16</sup>, endorsed on appeal by a different Full Court<sup>17</sup>. In *MZABP*, Mortimer J noted that the subject matter of an application under

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11 (1984) 3 FCR 344 at 348-349, affirmed in *Parker v The Queen* [2002] FCAFC 133 at [6]; *Mentink v Minister for Home Affairs* [2013] FCAFC 113 at [2], [33]-[36]; *BQQ15 v Minister for Home Affairs* [2019] FCAFC 218 at [33]; *Porter v Ghasemi* (2021) 286 FCR 556 at 566 [40].

12 *Hunter Valley Developments* (1984) 3 FCR 344 at 349.

13 (2020) 278 FCR 475 at 492 [64].

14 *DHX17* (2020) 278 FCR 475 at 493 [68].

15 *DHX17* (2020) 278 FCR 475 at 493 [68], 495 [76].

16 *DHX17* (2020) 278 FCR 475 at 488-489 [47]-[53]; *MZABP* (2015) 242 FCR 585 at 598-599 [62]-[63].

17 *MZABP v Minister for Immigration and Border Protection* (2016) 152 ALD 478 at 486 [38].

Kiefel CJ  
Gageler J  
Keane J  
Gleeson J

6.

s 477(2) is not whether the applicant will ultimately be successful in challenging the decision under review<sup>18</sup>. Her Honour considered that the "correct approach" to the assessment of the merits of the proposed application, for the purpose of deciding whether to extend time, "may be expressed by the use of language such as whether a ground is 'arguable', 'reasonably arguable', 'sufficiently arguable' or has 'reasonable prospects of success'"<sup>19</sup>. Her Honour also expressed the view that "[i]f a judge travels beyond an examination of the grounds at what should be a reasonably impressionistic level ... into a fuller consideration of the arguments for and against each ground of review ... that is not a function appropriate to a discretion such as that contained in s 477(2)"<sup>20</sup>.

16 Underlying Mortimer J's reasoning was an analysis of the nature of the power conferred by s 477(2). Her Honour considered the legislative history and extrinsic materials but concluded that they shed no particular light on the content of the phrase "in the interests of the administration of justice"<sup>21</sup>. Ultimately, her Honour characterised the judgment to be made under s 477(2)(b) as involving a conclusion that "it is appropriate, or fair and equitable, that a litigant should have the opportunity for which the legislative scheme provides: namely, a review of the lawfulness of the decision said to affect the litigant, conducted in accordance with judicial process and subject to considered judicial determination"<sup>22</sup>. Her Honour also expressed the view that it will seldom be appropriate to refuse to extend time where a ground of review is properly described as weak as opposed to hopeless, citing the observation of French J in *Seiler v Minister for Immigration, Local Government and Ethnic Affairs*, made in relation to s 11 of the *Administrative Decisions (Judicial Review) Act*, that "a strong case may be a positive factor in favour of the grant of extension, but an apparently weak case cannot be treated as a factor weighing against it"<sup>23</sup>.

17 French J's observation in *Seiler* cannot be applied to the operation of s 477A(2) without regard to the important fact that the power considered by his Honour did not require the state of satisfaction set out in s 477A(2)(b). Even so, it

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18 *MZABP* (2015) 242 FCR 585 at 598 [63].

19 *MZABP* (2015) 242 FCR 585 at 598 [63].

20 *MZABP* (2015) 242 FCR 585 at 598 [62].

21 *MZABP* (2015) 242 FCR 585 at 594 [47]-[50].

22 *MZABP* (2015) 242 FCR 585 at 596 [56].

23 *MZABP* (2015) 242 FCR 585 at 599 [65], quoting *Seiler* (1994) 48 FCR 83 at 98.

7.

may be accepted that, in determining what is necessary in the interests of the administration of justice for the purposes of s 477A(2) (or s 477(2)), it will often be appropriate to assess the merits of the proposed grounds of review at a "reasonably impressionistic level"<sup>24</sup>. 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<sup>25</sup>, 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<sup>26</sup>.

18           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"<sup>27</sup>. 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<sup>28</sup>. 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.

19           It follows that the Full Court in *DHX17* was wrong to say that "the decisional process of exercising the discretion in s 477(2) [here, s 477A(2)] neither requires nor warrants anything more than an impressionistic consideration of the proposed grounds of review"<sup>29</sup>. As the merits of a proposed application are a

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24    *CZA19 v Federal Circuit Court of Australia* (2021) 285 FCR 447 at 452 [19].

25    *MZABP* (2015) 242 FCR 585 at 597 [58].

26    *Federal Court of Australia Act 1976* (Cth), s 24(1)(a).

27    cf, for example, *Vella v Minister for Immigration and Border Protection* (2015) 90 ALJR 89 at 90 [3]; 326 ALR 391 at 392, citing *Re Commonwealth; Ex parte Marks* (2000) 75 ALJR 470 at 474 [13]; 177 ALR 491 at 495 citing *Gallo v Dawson* (1990) 64 ALJR 458 at 459; 93 ALR 479 at 481.

28    *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 130.

29    *DHX17* (2020) 278 FCR 475 at 493 [68].

Kiefel CJ  
Gageler J  
Keane J  
Gleeson J

8.

permissible consideration, it is within the Federal Court's jurisdiction under s 477A(2) to have regard to that factor in such manner as it considers appropriate in the circumstances. Put another way, s 477A(2) entrusts to the Federal Court the function of identifying and formulating the interests of the administration of justice and how they should be weighed and assessed, including by reference to the merits of the proposed application<sup>30</sup>. The opinion expressed by the Full Court in *DHX17*, that a judge who undertakes more than an impressionistic evaluation of the underlying merits of the applicant's case is likely to commit jurisdictional error, was mistaken.

20 In this case, there is no basis to conclude that the primary judge's consideration of the plaintiff's proposed ground of review involved error. His Honour considered the substance of the ground of review and concluded that it lacked merit. His Honour's reasons say nothing to suggest that this consideration involved the identification of any issue that might have had merit, and the plaintiff did not point to any such issue. Nor, contrary to the example posited by Mortimer J in *MZABP*<sup>31</sup>, do his Honour's reasons suggest that the primary judge would only have concluded that it would be necessary in the interests of the administration of justice to extend time if his Honour was persuaded that the proposed ground of review would succeed. It was permissible, and in this case appropriate, for the primary judge to assess whether the proposed ground of appeal had any merit in order to decide the extension of time application. Having failed to be satisfied that the proposed ground had any merit, it was open to his Honour to fail to be satisfied that it was necessary in the interests of the administration of justice to grant an extension of time.

## Conclusion

21 The plaintiff's amended application should be dismissed with costs.

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30 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 572 [67].

31 (2015) 242 FCR 585 at 599 [68].

22 GORDON, EDELMAN AND STEWARD JJ. The plaintiff, a citizen of New Zealand, held a Class TY Subclass 444 Special Category (Temporary) visa. On 2 September 2019, the then Minister for Home Affairs<sup>32</sup> ("the Minister") cancelled the plaintiff's visa pursuant to s 501(3)(b) of the *Migration Act 1958* (Cth) on the basis that the Minister reasonably suspected that the plaintiff did not pass the character test and was satisfied that the cancellation of his visa was in the national interest ("the Minister's decision").

23 The plaintiff had 35 days from the date of the Minister's decision to file an application in the Federal Court of Australia to seek review of the Minister's decision pursuant to s 476A(1)(c) of the *Migration Act*<sup>33</sup>. Any application was, therefore, due to be filed by 7 October 2019. On 1 November 2019, some 25 days late, the plaintiff applied to the Federal Court pursuant to s 477A(2) of the *Migration Act* for an extension of time in which to file an application for review of the Minister's decision under s 476A. An affidavit affirmed by the plaintiff's solicitor and filed in support of the application for an extension of time explained the delay. An amended draft originating application for review of the Minister's decision was annexed to the affidavit. The Minister opposed the extension of time.

24 On 8 October 2020, the primary judge heard the application for an extension of time<sup>34</sup> and, in the event that an extension of time was granted, the substantive underlying application. The plaintiff's proposed ground of review was fully argued. On 24 August 2021, the primary judge refused the application for an extension of time on the basis that he was not persuaded that the proposed ground of review had any merit.

25 On 17 September 2021, the plaintiff filed an application for a constitutional or other writ in this Court's original jurisdiction. The plaintiff sought a writ of certiorari to quash the orders of the primary judge made on 24 August 2021 and a writ of mandamus that the primary judge determine the plaintiff's application for an extension of time pursuant to s 477A(2) of the *Migration Act* according to law.

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32 Now the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs.

33 *Migration Act*, s 477A(1).

34 There was a separate application before the primary judge for an extension of time under s 477(2) of the *Migration Act* in a proceeding that was transferred to the Federal Court from the Federal Circuit Court of Australia. That application is not in issue in this case.

26 The plaintiff had no right to bring an appeal, or to seek leave or special leave to appeal, in either the Full Court of the Federal Court or this Court, from the decision of the primary judge to refuse to grant an extension of time under s 477A(2)<sup>35</sup>. On 9 December 2021, Gageler J granted leave to the plaintiff to file an amended application for a constitutional or other writ and referred the amended application for hearing by the Full Court.

27 The sole ground raised in the amended application is that the primary judge erred in law in failing to assess whether, in respect of the plaintiff's proposed ground of review of the Minister's decision, "the [p]laintiff's claim *had reasonable prospects of success* so as to justify the grant of an extension of time pursuant to s 477A(2) of the [*Migration Act*]" (emphasis added). That is, the plaintiff submitted that, in the particular circumstances of this case, because the primary judge went further and undertook a more complete review of the merits of the proposed ground of review, the primary judge had misapprehended or misconceived the nature and purpose of the statutory power in s 477A(2) of the *Migration Act* and therefore committed jurisdictional error. The plaintiff did not contend in this Court that his underlying substantive review ground had any reasonable prospects of success or that it should have been accepted by the primary judge. The plaintiff's amended application for a constitutional or other writ should be dismissed.

### Statutory framework

28 Section 476A(1)(c) of the *Migration Act*, under the heading "Limited jurisdiction of the Federal Court", relevantly provides that despite any other law, including s 39B of the *Judiciary Act 1903* (Cth) and s 8 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), "the Federal Court has original jurisdiction in relation to a migration decision" if "the decision is a *privative clause decision*<sup>36</sup>, or purported privative clause decision,

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35 See *Migration Act*, s 476A(3)(b); see also s 476A(4); *Federal Court of Australia Act 1976* (Cth), s 33(2).

36 "[P]rivative clause decision" means "a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under [the *Migration Act*] or under a regulation or other instrument made under [the *Migration Act*] (whether in the exercise of a discretion or not), other than a decision referred to" in s 474(4) or (5): *Migration Act*, s 474(2); see also s 5(1) para (a) of the definition of "migration decision" and definition of "privative clause decision".

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made personally by the Minister under section 501, 501A, 501B, 501BA, 501C or 501CA" (emphasis added). The Minister's decision was such a decision.

29 Section 476A(3)(b) provides that, despite s 24 of the *Federal Court of Australia Act 1976* (Cth), "an appeal may not be brought to the Federal Court from ... a judgment of the Federal Court that makes an order or refuses to make an order under subsection 477A(2)".

30 Section 477A, headed "Time limits on applications to the Federal Court", relevantly provides:

"(1) An application to the Federal Court for a remedy to be granted in exercise of the court's original jurisdiction under paragraph 476A(1)(b) or (c) in relation to a migration decision must be made to the court within 35 days of the *date of the migration decision*<sup>[37]</sup>.

(2) The Federal Court may, by order, extend [the] 35 day period [prescribed in s 477A(1)] as the Federal Court considers appropriate if:

(a) an application for that order has been made in writing to the Federal Court specifying why the applicant considers that it is necessary in the interests of the administration of justice to make the order; and

(b) the Federal Court is satisfied that it is necessary in the interests of the administration of justice to make the order." (emphasis added)

### **Jurisdictional error?**

31 The specific question raised in this proceeding is whether the primary judge fell into jurisdictional error by misconceiving the nature of the function he was performing in deciding whether or not to make an order for an extension of time under s 477A(2). The answer to that question depends on the proper construction of s 477A(2). The proper construction of s 477A(2) is to be resolved "by applying the fundamental principles of statutory interpretation, which require

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37 "[D]ate of the migration decision" relevantly means "the date of the written notice of the decision or, if no such notice exists, the date that the Court considers appropriate": see *Migration Act*, ss 477(3)(d) and 477A(3).

reading the text of the relevant provisions in their context" and having regard to statutory purpose<sup>38</sup>.

*Broad discretion*

- 32 Section 477A(2) confers a broad discretion on the Federal Court to extend the 35-day time limit imposed by s 477A(1) for the filing of an application to the Federal Court for review of a migration decision. Section 477A(2) provides that the Federal Court "may", by order, extend the 35-day period as it "considers appropriate" if two conditions are met. The first condition is that "an application for that order has been made in writing to the Federal Court specifying why the applicant considers that it is necessary in the interests of the administration of justice to make the order"<sup>39</sup>. The second condition is that "the Federal Court is satisfied that it is necessary in the interests of the administration of justice to make the order"<sup>40</sup>. The second condition is of particular relevance in this proceeding.

*Purpose of s 477A(2)*

- 33 Before considering the second condition further, it is convenient to say something about the purpose of s 477A(2), as statutory purpose occupied a significant place in the plaintiff's argument that the discretion conferred upon the Federal Court by s 477A(2) must be subject to limits in respect of the assessment of the merits of a proposed application.

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38 *Binsaris v Northern Territory* (2020) 270 CLR 549 at 571 [54]. See also *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 581 [11], 605 [81]; *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 368 [14], citing *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[72] and *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47].

39 *Migration Act*, s 477A(2)(a). A person must file an application for an extension of time, in accordance with a prescribed form, accompanied by an affidavit stating briefly but specifically the facts on which the application relies and why the application was not filed within time, as well as a draft originating application: *Federal Court Rules 2011* (Cth), r 31.23.

40 *Migration Act*, s 477A(2)(b).



34 Section 477A(1) creates a time limit for seeking review of a migration decision. Insofar as that sub-section of s 477A is concerned, the Minister was correct to submit that the evident purpose is to control, in the sense of restrict, the exercise of the original jurisdiction of the Federal Court in relation to a migration decision where an applicant has not made their application within 35 days of the date of that decision. Much like limitation periods enacted in other statutory contexts, the time limit in s 477A(1) no doubt "represents the legislature's judgment that the welfare of society is best served" by judicial review applications being instituted within a particular period of time, notwithstanding that the enactment of that period may result in a good ground of review being defeated<sup>41</sup>.

35 But while the time limit is "the general rule", a provision (like s 477A(2)) authorising a court to extend time is "the exception to it"<sup>42</sup>. The exception has a different statutory purpose or object than the general rule. Having regard to the text and context of s 477A(2)<sup>43</sup>, the purpose of the exception authorising the Federal Court to grant an extension of time is to ensure that the imposition of a time limit on seeking judicial review does not undermine the administration of justice. Put differently, the purpose is to ensure that the provision fixing the time limit within which to seek judicial review (s 477A(1)) does not become an "instrument[] of injustice"<sup>44</sup>. That purpose is reflected in the two conditions governing the exercise of the power to extend time: (1) that an applicant identify in writing why they consider it "necessary in the interests of the administration of justice" to extend time; and (2) that the Court be satisfied that it is "necessary in the interests of the administration of justice" to extend time. Those are the only express limits on what is otherwise a broadly conferred power to extend time.

36 And that statutory purpose is consistent with the legislative history of the provision<sup>45</sup>. Since 2001, when provisions were enacted which expressly excluded

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41 cf *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 553.

42 cf *Brisbane South Regional Health Authority* (1996) 186 CLR 541 at 553.

43 See *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 389-390 [25]-[26], 395 [41].

44 cf *Gallo v Dawson* (1990) 64 ALJR 458 at 459; 93 ALR 479 at 480, citing *Hughes v National Trustees Executors & Agency Co of Australasia Ltd* [1978] VR 257 at 262.

45 See *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39].

the ability of the High Court and the Federal Court to extend the statutorily prescribed time limits for making applications for judicial review of migration decisions<sup>46</sup>, the capacity to extend time has twice been expanded: first, in 2005<sup>47</sup>, to allow the High Court, the Federal Court and the then Federal Magistrates Court to extend the time limits by up to 56 days if an application for an extension of time was made within 84 days of the decision and the relevant court was satisfied that it was "in the interests of the administration of justice" to extend time; and second, in 2009<sup>48</sup>, to confer a broad discretion on the High Court, the Federal Court and the then Federal Magistrates Court to extend the time limits if an application for an extension of time was made and the relevant court was satisfied that it was "necessary in the interests of the administration of justice" to extend time. The circumstances surrounding those amendments are important.

37 The 2005 amendments were made not long after *Plaintiff S157/2002 v The Commonwealth*<sup>49</sup>, in which Callinan J relevantly concluded that s 486A of the *Migration Act* as it then stood was invalid "to the extent that it purport[ed] to impose a time limit of [35] days within which to bring proceedings under s 75(v) [of the *Constitution*] in [the High] Court"<sup>50</sup>. At this time, the *Migration Act* conferred no power on the High Court (or the Federal Court) to extend time. While Callinan J did not doubt that there was a power to prescribe time limits that were binding on the High Court in relation to the remedies for which s 75(v) provides, he considered that such time limits must be "truly regulatory in nature and not such as to make any constitutional right of recourse virtually illusory"<sup>51</sup>, amounting in substance to a prohibition<sup>52</sup>. In respect of s 486A, his Honour emphasised that persons seeking remedies under

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46 See *Migration Legislation Amendment Act (No 1) 2001* (Cth), Sch 1, item 4 (relevantly inserting s 486A into the *Migration Act*); *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth), Sch 1, item 7 (relevantly inserting s 477 into the *Migration Act*).

47 See *Migration Litigation Reform Act 2005* (Cth), Sch 1, items 18 and 30-33.

48 See *Migration Legislation Amendment Act (No 1) 2009* (Cth), Sch 2, items 1-6.

49 (2003) 211 CLR 476.

50 (2003) 211 CLR 476 at 537 [174]. The other members of the Court in *Plaintiff S157* did not rule upon the validity of s 486A: see *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 661 [15].

51 *Plaintiff S157* (2003) 211 CLR 476 at 538 [176].

52 *Plaintiff S157* (2003) 211 CLR 476 at 537 [173].

s 75(v) may be incapable of speaking English and would often be living or detained in places remote from lawyers and, in those circumstances, the 35-day time limit would effectively deny applicants recourse to constitutional remedies<sup>53</sup>. His Honour observed that a "substantially longer period might perhaps lawfully be prescribed, or perhaps even [35] days accompanied by a power to extend time"<sup>54</sup>. The 2005 amendments apparently took up the former suggestion of providing longer time periods<sup>55</sup>.

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The 2009 amendments were made after this Court's decision in *Bodruddaza v Minister for Immigration and Multicultural Affairs*<sup>56</sup>, which held that the non-extendable time limit on applications for judicial review in s 486A as it stood after the 2005 amendments was unconstitutional. The Court held that s 486A curtailed or limited the right or ability of applicants to seek relief under s 75(v) in a manner that was inconsistent with the place of that provision in the constitutional structure<sup>57</sup>; its constitutional vice was that it did not "allow for the range of vitiating circumstances which may affect administrative decision-making"<sup>58</sup>. The plurality, with whom Callinan J agreed<sup>59</sup>, observed that some individuals may be unaware of the circumstances giving rise to a possible challenge until after the time provided in s 486A had lapsed – for example, where the decision was procured by a corrupt inducement or affected by actual or apprehended bias; the relevant circumstances may have been unknown or unknowable while the s 486A timescale was in operation but later become known to the applicant<sup>60</sup>. The plurality added that "supervening events" may "physically incapacitate the applicant or otherwise, without any shortcoming on the part of the applicant, lead to a failure to move within the stipulated time limit", including where a delay is caused by a failure on the part of a

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53 *Plaintiff S157* (2003) 211 CLR 476 at 537 [174]-[175].

54 *Plaintiff S157* (2003) 211 CLR 476 at 538 [176].

55 See *Bodruddaza* (2007) 228 CLR 651 at 661 [16].

56 (2007) 228 CLR 651.

57 See *Bodruddaza* (2007) 228 CLR 651 at 671-672 [53], [55], [60]; see also 676 [79].

58 *Bodruddaza* (2007) 228 CLR 651 at 671-672 [55]; see also 676 [79].

59 *Bodruddaza* (2007) 228 CLR 651 at 676 [79].

60 *Bodruddaza* (2007) 228 CLR 651 at 672 [56].

migration adviser<sup>61</sup>. The plurality held that those examples, while not exhaustive, were "instances where the time limit subvert[ed] the constitutional purpose of the remedy provided by s 75(v)"<sup>62</sup>. The 2009 amendments sought to address the constitutional issues identified in *Bodruddaza* and to "enable[] the Courts to protect applicants from possible injustice caused by the time limits"<sup>63</sup>.

*Second condition – interests of administration of justice deliberately broad*

39 Turning to the second condition, the phrase "necessary in the interests of the administration of justice" in s 477A(2)(b) is "deliberately broad"<sup>64</sup>. The provision does not contain a list of considerations that must or may be taken into account by the Court in determining whether it is satisfied that it is "necessary in the interests of the administration of justice" to grant an extension of time. As the plaintiff's counsel accepted, there is nothing in the text, context or purpose of s 477A(2) to suggest that, in forming the relevant state of satisfaction referred to in para (b), the Court must have regard to any particular consideration. Other than consideration of whether the grant of the extension of time sought is "necessary in the interests of the administration of justice", which would require having regard to the application made under s 477A(2)(a), there are no mandatory relevant considerations that can be discerned from the "subject-matter, scope and purpose" of the provision<sup>65</sup>.

40 The text of the provision – the broad terms in which the discretion is conferred – recognises that there will be a range of potentially "permissible" considerations, depending on the case. It is, in each case, for the judge hearing the extension of time application to determine which of a range of

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61 *Bodruddaza* (2007) 228 CLR 651 at 672 [57].

62 *Bodruddaza* (2007) 228 CLR 651 at 672 [58].

63 See Australia, Senate, *Parliamentary Debates* (Hansard), 3 December 2008 at 7944. See also Australia, Senate, *Migration Legislation Amendment Bill (No 2) 2008*, Explanatory Memorandum at 2, 12 [68], 13-14 [76]-[77], 15-16 [87], [89]-[90], 18-19 [102], [104]-[105].

64 *SZSZW v Minister for Immigration and Border Protection* [2018] FCAFC 82 at [27], quoting *MZABP v Minister for Immigration and Border Protection* (2015) 242 FCR 585 at 595 [52].

65 cf *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40. See also *WZASS v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 282 FCR 516 at 522-523 [29]-[33]; *CZA19 v Federal Circuit Court of Australia* (2021) 285 FCR 447 at 452 [19].

potentially relevant factors are to be taken into account in evaluating whether the interests of the administration of justice make it necessary for an extension of time to be granted in that particular case<sup>66</sup>. Factors that are commonly regarded as relevant to the exercise of the Court's discretion to grant an extension of time include<sup>67</sup>: the length of the delay; the explanation for the delay; any prejudice to the administration of justice as a result of the delay; and the prospects of the applicant succeeding in the application or the "strength or weakness of the case ... sought to be advanced and the utility of advancing that case"<sup>68</sup>.

41 Although there are no mandatory relevant considerations other than the second condition in s 477A(2) (namely, that it is necessary in the interests of the administration of justice to grant the extension of time), that is not to deny that there may well be circumstances where, by failing to consider a particular consideration in the context of a particular case (such as an explanation for delay), the Court may be found to have misconceived the nature of the power being exercised under s 477A(2)<sup>69</sup> or acted outside the bounds of legal reasonableness or rationality<sup>70</sup>. Those issues do not arise in this case.

*Arguments about jurisdictional error misconceived*

42 The essence of the plaintiff's argument was that: (1) the discretion conferred upon the Federal Court by s 477A(2) "must be exercised within the limits indicated by the subject matter and purpose of the power to extend time"<sup>71</sup>,

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66 cf *APP17 v Minister for Immigration and Border Protection* [2019] FCA 794 at [12]-[13]; *Huynh v Federal Circuit Court of Australia* (2019) 166 ALD 228 at 237 [39]; *DHX17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 278 FCR 475 at 492 [62].

67 See *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344 at 348-349.

68 See *Plaintiff M90/2009 v Minister for Immigration and Citizenship* [2009] HCATrans 279 at lines 1264-1265.

69 cf *BVW17 v Minister for Immigration and Border Protection* [2017] FCA 1508 at [64]; *Huynh* (2019) 166 ALD 228 at 237 [41]-[43].

70 See *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.

71 Relying on *Klein v Domus Pty Ltd* (1963) 109 CLR 467 at 473, *Brisbane South Regional Health Authority* (1996) 186 CLR 541 at 554, *Jackamarra v Krakouer* (1998) 195 CLR 516 at 539 [66], *Wu v The Queen* (1999) 199 CLR 99 at 123-124 [70]-[71] and *Rozenblit v Vainer* (2018) 262 CLR 478 at 491 [40].

otherwise the Court will misconceive the nature of the function it is exercising<sup>72</sup>; and (2) it would be contrary to the subject matter and purpose of the power to extend time for a judge hearing an extension of time application (at least where the delay is minor and has been explained and there is no prejudice to the respondent) to conduct an assessment of the substantive merits of the application, rather than a preliminary or threshold assessment of whether an applicant's proposed ground of review is reasonably arguable. In short, the plaintiff's argument was that "it can never be in the interests of the administration of justice to refuse an extension of time by determining the substantive merits [of a proposed application] if the other factors favour the grant of an extension of time".

43 As was explained in *Kirk v Industrial Court (NSW)*<sup>73</sup>, the Court in *Craig v South Australia*<sup>74</sup> gave the following three examples in amplifying what their Honours said about the ambit of jurisdictional error by an inferior court and, in particular, the circumstances when an inferior court acts beyond jurisdiction by entertaining a matter outside the limits of the inferior court's functions or powers<sup>75</sup>:

"(a) the absence of a jurisdictional fact; (b) disregard of a matter that the relevant statute requires be taken to account as a condition of jurisdiction (or the converse case of taking account of a matter required to be ignored); and (c) *misconstruction of the relevant statute thereby misconceiving the nature of the function which the inferior court is performing or the extent of its powers in the circumstances of the particular case.*" (emphasis added)

Regarding the last example, the Court in *Craig*<sup>76</sup> observed that "the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern".

44 Although the Federal Court is designated as a "superior court of record"<sup>77</sup>, the errors described in *Craig* in the context of inferior courts also constitute jurisdictional error when made by a judge of the Federal Court. The amenability

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72 Relying on *Craig v South Australia* (1995) 184 CLR 163 at 177-178.

73 (2010) 239 CLR 531 at 573-574 [71]-[73].

74 (1995) 184 CLR 163 at 177-178.

75 *Kirk* (2010) 239 CLR 531 at 574 [72], citing *Craig* (1995) 184 CLR 163 at 177-178.

76 (1995) 184 CLR 163 at 178, quoted with approval in *Kirk* (2010) 239 CLR 531 at 574 [72].

77 *Federal Court of Australia Act*, s 5(2).

of judicial review for such errors "does not depend upon the court of which the judge is a member being an 'inferior' court, but upon the jurisdiction of the court being limited"<sup>78</sup>.

45 But not every error of law made by a court involves jurisdictional error<sup>79</sup>. As the Court explained in *Craig*<sup>80</sup>, "the ordinary jurisdiction of a court of law encompasses authority to decide questions of law, as well as questions of fact, involved in matters which it has jurisdiction to determine". The discharge of that ordinary jurisdiction – whether by a superior court such as the Federal Court or by an inferior court – routinely involves "[t]he identification of relevant issues [and] the formulation of relevant questions"<sup>81</sup>. Where a court is "entrusted with authority to identify, formulate and determine"<sup>82</sup> the relevant issues and questions (as the Federal Court is under s 477A(2)<sup>83</sup>), demonstrable error in the identification of the issues or the formulation of the questions will not ordinarily constitute jurisdictional error, but will be an error "within jurisdiction"<sup>84</sup>.

46 The plaintiff identified six reasons why an assessment of the substantive (rather than impressionistic) merits of a proposed application in the context of determining whether to exercise the discretion to extend time under s 477A(2) in the circumstances of a case such as the present involves jurisdictional error (namely, by the Court misconceiving the nature of the function it is performing and, therefore, acting in excess of jurisdiction). It is necessary to address each in turn.

47 First, the plaintiff's argument started from the premise that s 477A(2) is in the nature of a "gateway provision", pursuant to which the Court must determine whether the application should proceed to a full and final determination

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78 *Kirk* (2010) 239 CLR 531 at 583 [107].

79 *Craig* (1995) 184 CLR 163 at 180; *Kirk* (2010) 239 CLR 531 at 577 [85].

80 (1995) 184 CLR 163 at 179, quoted with approval in *Kirk* (2010) 239 CLR 531 at 573 [68].

81 *Craig* (1995) 184 CLR 163 at 179.

82 *Craig* (1995) 184 CLR 163 at 180.

83 *cf AUK15 v Minister for Immigration and Border Protection* [2016] HCATrans 36 at lines 1597-1609.

84 *Craig* (1995) 184 CLR 163 at 180. See also *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 390; *Kirk* (2010) 239 CLR 531 at 572-573 [67]-[68].

of the merits; and undertaking such a full and final determination at the "gateway stage" is inconsistent with the statutory scheme. As the Minister submitted, even assuming that the time limit imposed by s 477A(1) operates as a limitation on the scope of the Federal Court's jurisdiction<sup>85</sup>, that would not mean that it is a jurisdictional error for the Court to go beyond a threshold assessment of the merits of the substantive application in circumstances where there is nothing in s 477A that imposes such a limitation. Describing s 477A(2) as a "gateway provision" does not assist in identifying the limits of the power. It does not tell you whether a Federal Court judge who identifies a wrong issue or asks a wrong question falls into jurisdictional error.

48           Moreover, there are real difficulties in any attempt to draw a strict line between a "gateway" consideration and a full and final determination on the merits. As Barwick CJ observed in *General Steel Industries Inc v Commissioner for Railways (NSW)*<sup>86</sup>, sometimes argument, "perhaps even of an extensive kind, may be necessary to demonstrate that the case of the plaintiff is so clearly untenable that it cannot possibly succeed".

49           Second, and in the context of s 477A(2) being said to be a "gateway provision", the plaintiff submitted that there is nothing in the text or context of s 477A(2) to suggest that Parliament intended that the Court could or should use the power to extend time as an "alternative mechanism" for determining the substantive application itself. It may be accepted that, in imposing a time limit for seeking judicial review, Parliament did not intend that the Federal Court would undertake a full assessment of the substantive merits of every proposed application. But that says nothing about whether, in determining whether the Court is satisfied that it is "necessary in the interests of the administration of justice" to extend time under s 477A(2)(b), the Court would commit jurisdictional error by undertaking more than an impressionistic assessment of the merits of a proposed application. If a judge determining whether to grant an extension of time under s 477A(2) asked themselves, independently of other factors, "should the applicant lose on the merits of their proposed substantive application?" and resolved the application for an extension of time by reference only to the substantive merits of the application, it may be that they would have misconceived the nature of the function which they were performing in the sense explained in *Craig*<sup>87</sup>.

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85   cf *Parisiennne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 377, 385, 388, 394; *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 at 37 [42].

86   (1964) 112 CLR 125 at 130.

87   (1995) 184 CLR 163 at 177-178.



But that does not mean that, in circumstances where other factors favour the grant of an extension of time, consideration of the merits of a proposed application beyond an impressionistic analysis of whether the proposed application is "reasonably arguable" necessarily involves jurisdictional error.

50 Third, having regard to the purpose of s 477A(2) being to ameliorate injustice arising from strict application of the time limit, the plaintiff contended that where the other discretionary factors – such as the reasons for the delay, the extent of the delay and the existence (or otherwise) of prejudice to the respondent – do not weigh against the grant of an extension of time, the applicant is entitled to be placed on an equal footing with those who brought their applications within time. In this regard, the plaintiff emphasised that applicants who commence proceedings within time are in a position to advance their case in the usual way to a final hearing and, thereafter, may access any available appellate process. The plaintiff submitted that, subject to other discretionary factors, an applicant with an arguable claim brought out of time should have the same opportunity<sup>88</sup>.

51 That argument finds no support in the text or context of s 477A(2); it would involve reading in a gloss on the statutory text, which (as explained) deliberately confers a broad discretion on the Federal Court<sup>89</sup>. It is for the judge hearing the application to determine which considerations bear on the interests of the administration of justice in the particular case. The approach urged by the plaintiff would essentially involve establishing a default rule whereby if a short delay is adequately explained and there is no prejudice to the respondent, an extension of time would have to be granted if the application was reasonably arguable. It would involve drawing a distinction between the limits on the exercise of the power to extend time under s 477A(2) by dividing all applications for extensions of time into two categories. In cases of the kind just described, the Court would exceed jurisdiction by considering the merits of a proposed application beyond an impressionistic analysis of whether the proposed application is "reasonably arguable". But in cases outside that category, the Court would act within jurisdiction if it engaged in a more detailed assessment of the merits of a proposed application. There is no basis in the text, context or purpose of s 477A(2) for introducing such a default rule or for drawing a sharp distinction between the limits on the Federal Court's power by funnelling applications for an extension of time into two categories.

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88 cf *MZABP* (2015) 242 FCR 585 at 596 [56].

89 cf *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421.

52 More generally, the plaintiff gave little recognition to the fact that, by imposing a statutory time limit, Parliament has evinced a clear intention to place an applicant who fails to comply with the time limit in a different position to applicants who have complied. As Wilcox J put it in *Hunter Valley Developments Pty Ltd v Cohen*<sup>90</sup>, "it is the prima facie rule that proceedings commenced outside [the relevant] period will not be entertained".

53 Fourth, the plaintiff emphasised that it was unlikely that Parliament would have intended that a refusal to extend time under s 477A(2) could foreclose the statutory right of appeal to the Full Court of the Federal Court that would otherwise be available under s 24 of the *Federal Court of Australia Act* unless the claim was not reasonably arguable, or where other factors – such as the reason for and extent of the delay – weighed in favour of refusing the extension of time. Moreover, the plaintiff submitted that Parliament is unlikely to have intended a result whereby it was left to the Court, in its discretion, whether to engage in a more substantive assessment of the merits or not as part of the determination of an application for an extension of time, because such a construction would result in "arbitrary outcomes" whereby the availability of appellate review depended on whether the particular judge decided to descend into a more detailed examination of the merits or not.

54 Such a contention is contrary to the text, context and purpose of s 477A(2). Parliament left it to the judge hearing a particular application for an extension of time, in their discretion, to make an assessment of the extent to which the merits of the application (along with the range of other potentially relevant considerations) are to be taken into account in determining whether they are satisfied that an extension of time is necessary in "the interests of the administration of justice" in the case. In assessing whether it is necessary in the interests of the administration of justice to grant the extension under s 477A(2), the merits of the underlying application may be, and often are, considered and given considerable weight. In some, maybe most, extension of time applications, the judge can and does consider the merits of the underlying application at what might be described as a threshold level – inquiring whether the proposed grounds of review enjoy reasonable prospects of success. In order to resolve the facts and issues raised in an application for an extension of time, however, the judge may sometimes consider that it is necessary to have regard to the merits of the proposed application in greater detail. Indeed, in assessing some extension of time applications, a failure to consider the merits of the proposed application in greater detail might give rise to error.

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90 (1984) 3 FCR 344 at 348.

55 The plaintiff's suggestion that there may be "arbitrary outcomes" where the availability of appellate review depends on the extent to which a judge considers it necessary to descend into the merits of the substantive application is misplaced. Parliament has evinced a clear intention to prevent appellate review of extension of time decisions in s 476A(3) and (4) of the *Migration Act*. It is simply a consequence of the legislative scheme that some applicants for an extension of time will be successful, so that their substantive application goes on to be determined with the consequence that they have an entitlement to appeal an unsuccessful outcome, while other applicants will be unsuccessful and not able to appeal the decision. That is not arbitrary. And, in any event, an applicant who does not obtain an extension of time can seek relief in the Federal Court pursuant to s 39B of the *Judiciary Act* or in the High Court's original jurisdiction (as the plaintiff did in this case). Redress for such an applicant is not completely unavailable<sup>91</sup>.

56 The "injustice" identified by the plaintiff was essentially that if a judge considering whether it is necessary in the interests of the administration of justice to grant an extension of time in a particular case assesses the substantive merits of a proposed application at more than a reasonably impressionistic level, the applicant is limited to the narrower grounds available for judicial review of a judicial decision, whereas if the judge assesses the merits of the proposed application at a threshold level and grants the extension, then the substantive application is filed and heard on its merits and the losing party has a right of appeal under s 24 of the *Federal Court of Australia Act*. That is a consequence of the statutory regime; it is not a basis for concluding that the former approach involves jurisdictional error.

57 Further, the usual and proper approach of judges determining applications for an extension of time will ensure that such injustice is unlikely. Where there is not much force in the factors other than the merits which weigh against an extension of time so that the judge hears the application for an extension of time together with the substantive application, then even if the substantive application is unsuccessful the proper course may often be to grant an extension of time if the underlying claim had reasonable prospects of success.

58 Fifth, it was said that the application of a standard that a proposed ground of review be reasonably arguable, assessed on an impressionistic basis, is consistent with the common law's reluctance to deny aggrieved persons with an arguable complaint access to the courts – a concern which is particularly acute in

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91 *SZRIQ v Federal Magistrates Court of Australia* (2013) 236 FCR 442 at 456 [69]. See also *SZTES v Minister for Immigration and Border Protection* [2015] FCA 719 at [97]-[98].

the migration context. The plaintiff relied, in particular, on observations made by the Full Court of the Federal Court in *DHX17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*<sup>92</sup>. The plaintiff's reliance on the sensitivity of the common law to the premature curtailment of a person's ability to access the courts is misplaced; it does not bear on the issue raised by the application – whether the Federal Court will commit jurisdictional error by engaging in more than an impressionistic assessment of the merits of a proposed application – and it impermissibly seeks to elevate principles expressed in different decision-making contexts into a limitation on the exercise of the broad discretionary power conferred on the Federal Court under s 477A(2). In any event, the premise of this submission was misconceived. There is a clear difference between the denial of a person's access to the courts and the regulation of that access by reference to reasonable requirements of timeliness in the circumstances. Section 477A(2) concerns the latter, not the former.

59 Sixth, and finally, the plaintiff drew attention to the fact that his approach to the merits of a proposed application in the context of an application for an extension of time was consistent with the manner in which provisions affording a discretion to extend time have been traditionally understood. He submitted that, given s 477A(2) was inserted into the *Migration Act* against this considerable body of case law concerning other powers to extend time, it is likely that Parliament intended the discretion conferred on the Federal Court by s 477A(2) to be exercised in the same way. The plaintiff relied on Mortimer J's observations in *MZABP v Minister for Immigration and Border Protection*<sup>93</sup>, where her Honour explained that the inappropriateness of requiring an applicant, in effect, to establish that their proposed grounds of review "will succeed" was made clear more than 20 years earlier by French J in *Seiler v Minister for Immigration, Local Government and Ethnic Affairs*<sup>94</sup> in the context of the discretion to extend time conferred under s 11 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The plaintiff also referred to cases in other statutory contexts where the same approach to the assessment of the merits has been adopted<sup>95</sup>. None of the cases relied upon by the plaintiff from other statutory contexts

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92 (2020) 278 FCR 475 at 493-494 [68]-[70], 494-495 [75].

93 (2015) 242 FCR 585 at 598-599 [65].

94 (1994) 48 FCR 83 at 98. See also *Barrett v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 18 ALD 129 at 130-131.

95 See *Tomko v Palasty [No 2]* (2007) 71 NSWLR 61 at 65 [14], 75 [58]; *Renshaw v New South Wales Lotteries Corporation Pty Ltd* [2021] NSWCA 41 at [23].

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involved judicial review for jurisdictional error on the part of a court. Observations in those cases about the desirable or proper approach to assessing the merits of a proposed application do not bear upon whether the Federal Court will exceed its jurisdiction in not following that approach in the context of considering an application for an extension of time under s 477A(2).

60 Further, and no less significantly, the unworkability of the approach propounded by the plaintiff is apparent both generally and by reference to the facts of this case. The plaintiff did not suggest that *it will never be* permissible to consider the merits of an application, beyond whether it is reasonably arguable, in determining whether to grant an extension of time. He accepted that, for example, "if the delay is a long one and there is no proper explanation for that delay, then the Court may be minded to refuse an extension of time unless an exceptional case is demonstrated", and "[t]he strength of the claim may, in these circumstances, tip the balance in favour of the grant of an extension of time". But he submitted that because the present case "involved a minor, and explained, delay" that issue does not arise. A bright line for the permissibility of considering the merits of a case at more than an impressionistic level was sought to be drawn by reliance upon concepts such as "proper explanation" and "minor" delay. As the Minister correctly submitted, the difficulty with the plaintiff's argument is that it imposes a bright line distinction in the construction of s 477A which distinction is dependent on the application of the facts of a particular case to these evaluative concepts. That is unprincipled and unworkable.

61 The plaintiff drew particular support for his contention that, where the Federal Court goes beyond an assessment of the merits on an impressionistic basis when considering an application for an extension of time under s 477A(2), the more detailed consideration of the merits strongly suggests that the Court has misconceived its function or power and acted in excess of jurisdiction, from the decision of Mortimer J in *MZABP*<sup>96</sup> (which was relevantly endorsed by the Full Court of the Federal Court on appeal<sup>97</sup>) and the Full Court of the Federal Court's decision in *DHX17*<sup>98</sup>. Although there are statements in those authorities to the effect that the assessment of the merits of a proposed application should be conducted at a reasonably impressionistic level, there is not a consistent line of authorities in the Federal Court to the effect that a failure to do so (by conducting a fuller assessment of the merits) necessarily will constitute

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96 (2015) 242 FCR 585 at 597-598 [62]-[63].

97 *MZABP v Minister for Immigration and Border Protection* (2016) 152 ALD 478 at 486 [38]; see also 482-484 [21]-[23].

98 (2020) 278 FCR 475 at 493 [68], 496-497 [82]-[83].

jurisdictional error<sup>99</sup>. As these reasons have shown, the latter proposition is not correct. It is inconsistent with the text, context and purpose of s 477A(2) of the *Migration Act*.

62 In sum, it is within the ordinary jurisdiction of the Federal Court (in the sense discussed in *Craig*<sup>100</sup>) to identify the relevant issues and to formulate the relevant questions in determining whether the Court is satisfied that it is necessary in the interests of the administration of justice to extend time under s 477A(2) of the *Migration Act*. Where an application for an order under s 477A(2) has been made to the Federal Court "specifying why the applicant considers that it is necessary in the interests of the administration of justice to make the order"<sup>101</sup>, the question for the Federal Court – the statutory question – is whether the Court is satisfied that it is necessary in the interests of the administration of justice to grant the extension. There are no mandatory considerations. A number of factors may be relevant and it is for the judge hearing the application to decide what is both necessary and sufficient to resolve the issues raised in the application. In assessing whether it is necessary in the interests of the administration of justice to grant the extension under s 477A(2), the merits of the underlying application may be, and often are, considered and given considerable weight. In some, maybe most, extension of time applications, the judge can and does consider the merits of the underlying application at what might be described as a threshold level – inquiring whether the proposed grounds of review enjoy reasonable prospects of success. But 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.

63 In exercising the power conferred by s 477A(2) of the *Migration Act* to refuse to grant an extension of time in which a person may seek judicial review of a "migration decision", subject to according the parties procedural fairness and acting within the bounds of legal reasonableness and rationality, when answering the statutory question posed by s 477A(2) – whether the Federal Court is satisfied that it is necessary in the interests of the administration of justice to grant the extension – the Federal Court does not ordinarily fall into jurisdictional error by concluding that it is not necessary in the interests of the administration of justice to grant an extension of time after having undertaken something more than a

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99 cf *SZTES* [2015] FCA 719 at [90]; *DBA16 v Minister for Home Affairs* [2018] FCA 1777 at [60]; *Huynh* (2019) 166 ALD 228 at 240 [58], 241-242 [64]-[69]; *CZA19* (2021) 285 FCR 447 at 452 [19].

100 (1995) 184 CLR 163 at 178-179.

101 *Migration Act*, s 477A(2)(a).

27.

preliminary or threshold assessment of whether the proposed grounds of review enjoy reasonable prospects of success.

### **Prudential approach**

64 That does not deny the utility of the prudential approach often adopted by the Federal Court, when the merits of the underlying claim might be reasonably arguable or require further and more detailed consideration before a concluded view can be formed on the application for an extension of time under s 477A(2), of listing and hearing both the s 477A(2) application and the underlying substantive application at the one time and, where appropriate, in the disposition of those applications, granting leave under s 477A(2) and determining the substantive application. Of course, whether and when a judge may conclude that it is more prudent to grant the extension of time but leave consideration of the full merits of grounds of judicial review for a subsequent hearing is a matter for the judge to decide in the circumstances of the case. That decision may be much affected by whether having a separate hearing about the merits of the substantive application is necessary to give the parties procedural fairness.

### **Conclusion and order**

65 In light of the reasoning above, it is unnecessary to consider whether the primary judge's reasoning involved a threshold or impressionistic assessment of the merits of the proposed application. Even if the primary judge did assess the merits at more than a threshold or impressionistic level, in doing so his Honour did not commit jurisdictional error by misconceiving the nature of the function he was performing.

66 For those reasons, the plaintiff's amended application for a constitutional or other writ should be dismissed with costs.