

# HIGH COURT OF AUSTRALIA

JAGOT J

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DAQ22

PLAINTIFF

AND

FEDERAL COURT OF AUSTRALIA & ANOR

DEFENDANTS

[2024] HCASJ 27

*Date of Judgment: 25 June 2024*

M18 of 2024

## ORDERS

- 1. The time fixed for the filing of this application be extended from the time period prescribed by r 25.02.1 of the High Court Rules 2004 (Cth) to the date it was accepted for filing.*
- 2. The writ of certiorari be issued quashing the orders of the first defendant, the Federal Court of Australia, made on 8 December 2023 in matter VID499 of 2022.*
- 3. The writ of mandamus be issued requiring the first defendant, the Federal Court of Australia, to determine according to law the plaintiff's application under s 477A of the Migration Act 1958 (Cth) ("the Act") for an order extending the time within which he may file an application for judicial review in relation to a decision of the second defendant, the Minister, not to revoke the cancellation of his visa under s 501CA(4) of the Act.*
- 4. The second defendant pay the plaintiff's costs of this application, and below.*

## Representation

The plaintiff is represented by Norton Rose Fulbright Australia

The second defendant is represented by MinterEllison

Submitting appearance for the first defendant



JAGOT J.

### **The application**

1        These reasons for judgment concern an application for a constitutional or other writ in which the plaintiff seeks, relevantly: (a) certiorari to quash a decision of O'Sullivan J ("the primary judge") in the Federal Court of Australia<sup>1</sup> dismissing the plaintiff's application for an extension of time to file an application ("the extension of time application") for judicial review of the Minister's decision under s 501CA(4) of the *Migration Act 1958* (Cth) not to revoke the mandatory cancellation of the plaintiff's protection visa ("the judicial review application"); and (b) mandamus requiring the Federal Court of Australia to determine according to law the extension of time application.

2        The plaintiff requires an extension of time to file the application in this Court, but the Minister (the second defendant in these proceedings) does not oppose that extension of time application. That extension of time application should be granted because: (a) it is not opposed; (b) the required extension of time is relatively short; and (c) there is an adequate explanation for the failure to file the application for the constitutional writ within the time required by r 25.02.1 of the *High Court Rules 2004* (Cth). As explained below, the constitutional writs sought must also be granted.

### **Background to application for constitutional or other writ**

3        The application for the constitutional or other writ is brought on two grounds. First, that, in deciding to dismiss the plaintiff's extension of time application, the primary judge ignored, overlooked, or misunderstood a substantial and clearly articulated argument in submissions for the plaintiff. Second, that, in so deciding, the primary judge misunderstood the applicable law. The grounds are interrelated and arise from the fact that this Court delivered its reasons for judgment in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor*,<sup>2</sup> confining the constitutionality of continuing migration detention for the purpose of removal from Australia to circumstances in which there is a real prospect of the removal of the unlawful non-citizen from Australia becoming practicable in the reasonably foreseeable future,<sup>3</sup> before the primary judge dismissed the plaintiff's extension of time application.

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1     *DAQ22 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCA 1557.

2     (2023) 97 ALJR 1005.

3     (2023) 97 ALJR 1005 at 1016 [44]-[46], 1018 [55], 1019 [61], 1020 [69]-[71].

4 Following the delivery of reasons for judgment in *NZYQ*, the primary judge invited the parties to make such further submissions as they wished addressing the relevance of that decision to the plaintiff's extension of time application.<sup>4</sup> His Honour did so in the context that both parties had agreed that the extension of time application should be determined having regard to the merits of the judicial review application.<sup>5</sup> This is important because it establishes that the primary judge dismissed the extension of time application because he considered that there was "no merit in the substantive [judicial review] application, [so that] it is not in the interests of the proper administration of justice that there be an order extending time within which to file the [substantive] application".<sup>6</sup> His Honour did not dismiss the extension of time application on any other basis, such as the length of the delay or the adequacy of the explanation for the delay in the filing of the extension of time application and judicial review application to which it related.

5 In accordance with the invitation to do so, the plaintiff filed further submissions concerning the relevance of *NZYQ*.<sup>7</sup> Those submissions advanced two additional contentions as to why "aspects of the Minister's analysis [were] in error".

6 The first contention was that the Minister fell into error because: (a) the true legal position emerging from there being "poor" prospects of the plaintiff being able to be removed from Australia was not, as the Minister reasoned in refusing to revoke the cancellation of the plaintiff's visa, "indefinite detention", but was, rather, that the plaintiff would be at liberty and destitute in Australia (due to the plaintiff's possible inability, if released into the Australian community as an unlawful non-citizen, to work or access social security due to his legal status);<sup>8</sup> (b) such circumstances have been found elsewhere to amount to conditions that are

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4 *DAQ22 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCA 1557 at [57].

5 *DAQ22 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCA 1557 at [13].

6 *DAQ22 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCA 1557 at [93].

7 *DAQ22 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCA 1557 at [57].

8 The plaintiff was granted a (temporary) bridging visa on 23 November 2023.

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inhuman at law;<sup>9</sup> and (c) in deciding not to revoke the cancellation of the plaintiff's visa, the Minister did not consider these matters.

7 The second contention was that the Minister erred because: (a) in deciding not to revoke the cancellation of the plaintiff's visa based on the belief that the legal consequence would be the plaintiff's indefinite detention, the Minister misunderstood and misapplied the law as decided in *NZYQ*; and (b) as decided in *Minister for Immigration and Border Protection v Mohammed*,<sup>10</sup> a decision can be legally unreasonable at the time it is made if, when made, the decision-maker acts on an understanding of the law later held to be incorrect. On either contention, the Minister's decision not to revoke the cancellation of the plaintiff's visa was, according to the plaintiff, void for jurisdictional error.

8 The Minister made no further submissions in response to *NZYQ*.<sup>11</sup>

### Primary judge's reasons

9 The primary judge, in dismissing the plaintiff's extension of time application, reasoned that: (a) the power to extend time in s 477A(2) of the *Migration Act* is unfettered except that there must be a written application and the Court must be satisfied that it is "in the interests of the administration of justice" to extend time;<sup>12</sup> (b) in considering whether it is in the interests of the administration of justice to grant an extension of time, the merits of the proposed application are an important consideration;<sup>13</sup> and (c) in the circumstances of this matter it was appropriate to consider "both the substantive [judicial review]

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9 In support of this contention, the plaintiff referred to *R (Limbuela) v Secretary of State for the Home Department* [2006] 1 AC 396 at 402-402 [8], 405 [19], 406 [25], 407 [31], 408 [34], 412 [47].

10 [2019] FCAFC 49.

11 *DAQ22 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCA 1557 at [57].

12 *DAQ22 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCA 1557 at [11], quoting *Tu'uta Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 96 ALJR 819 at 824 [12]; 403 ALR 604 at 607-608.

13 *DAQ22 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCA 1557 at [12].

application and the application for an extension of time".<sup>14</sup> These preliminary steps in his Honour's reasoning process are unobjectionable.

- 10 In considering "both the substantive [judicial review] application and the application for an extension of time", his Honour relevantly reasoned that the plaintiff's first contention must be rejected as, while "those matters may well be factors to be taken into account now, it is for the reasons set out above concerning the proper approach to the exercise of the power in s 501CA(4) that I do not accept that those factors by themselves could comprise 'another reason' for the Minister to decide to revoke the cancellation of the applicant's visa".<sup>15</sup> His Honour relevantly reasoned that the plaintiff's second contention must also be rejected as "[a]lthough the law has changed, I do not consider the Minister's decision was legally unreasonable as that concept was discussed by Crennan and Bell JJ in *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; 240 CLR 611 at [131], [133] and [135]".<sup>16</sup>

### **Jurisdictional error?**

- 11 The Minister submitted that the primary judge's reasoning does not disclose any jurisdictional error. As the Minister put it: (a) "the mere fact that a proposed ground may not have been considered in the sense that a different view may be taken by other judges as to the nature and scope of the grounds is not jurisdictional ... [I]t is only the crucial arguments that are to be addressed by judges in their reasons and it is for the judge to formulate the issues by considering the application";<sup>17</sup> (b) his Honour did not "wholly neglect to deal with, or fundamentally misunderstand, the plaintiff's ... argument based on *Mohammed*"; (c) while his Honour did not refer to *Mohammed*, it is plain that he identified and considered the submission based on *Mohammed*; and (d) in any event, as held by Kennett J in *AJN23 v Minister for Immigration, Citizenship and Multicultural*

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14 *DAQ22 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCA 1557 at [13].

15 *DAQ22 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCA 1557 at [67].

16 *DAQ22 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCA 1557 at [69].

17 *CZA19 v Federal Circuit Court of Australia* (2021) 285 FCR 447 at 456 [34], citing *DL v The Queen* (2018) 266 CLR 1 at 12-13 [33].

*Affairs*,<sup>18</sup> legal unreasonableness "is to be judged at the time the power is exercised or should have been exercised".<sup>19</sup>

12 The Minister's submissions do not confront the reality of the primary judge's reasoning. There are different kinds of legal unreasonableness. The plaintiff's further submissions framed the relevance of *NZYQ* to the alleged unreasonableness of the Minister's decision not to revoke the cancellation of the plaintiff's visa as consisting of two contentions. The plaintiff's first contention was capable of being answered by the proposition that legal unreasonableness "is to be judged at the time the power is exercised or should have been exercised". This is because the first contention concerns only the Minister's (mis)understanding of the consequences of his decision, which resulted from his application of the law subsequently found to be wrong (ie, the fact of whether the plaintiff would remain in indefinite detention or be released into the community). The Minister did not know, and could not have known, those consequences at the time the Minister decided not to revoke the cancellation of the plaintiff's visa. This reflects the argument put to, and rejected by, Kennett J in *AJN23*.<sup>20</sup>

13 The plaintiff's second contention, however, could not be answered by the proposition that legal unreasonableness "is to be judged at the time the power is exercised or should have been exercised". The second contention is not concerned with the Minister's misunderstanding of the consequences of the Minister's legal error in applying the law subsequently found to be wrong. The second contention reflects that the common law, once determined, operates both prospectively and retrospectively.<sup>21</sup> In *NZYQ*, this Court overruled *Al-Kateb v Godwin*.<sup>22</sup> The consequence is that the reasoning in *NZYQ* is the law and is taken to have always been the law, including at the time of the Minister's decision not to revoke the cancellation of the plaintiff's visa. The second contention alleges that, in making that legal error, the Minister's decision was legally unreasonable.

14 Contrary to the Minister's submissions, the primary judge did not consider the substance of the second contention. This emerges from the fact that his Honour,

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18 [2024] FCA 130.

19 *AJN23 v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCA 130 at [37].

20 *AJN23 v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCA 130 at [37]-[38].

21 See, eg, *Kleinwort Benson Ltd v Lincoln City Council* [1998] 3 WLR 1095 at 1100.

22 (2004) 219 CLR 562.

in rejecting that contention,<sup>23</sup> relied on the reasoning of Crennan and Bell JJ in *Minister for Immigration and Citizenship v SZMDS*.<sup>24</sup> In that case, their Honours were not dealing with an argument such as that in the second contention. They were dealing with a (typical) case in which legal unreasonableness could be assessed only by reference to the material before the decision-maker. As their Honours said, the case before them was one of "illogicality or irrationality ... in the process of reasoning" in fact undertaken.<sup>25</sup> Given that ground of challenge, the "correct approach [was] to ask whether it was open to the Tribunal to engage in the process of reasoning in which it did engage and to make the findings it did make on the material before it".<sup>26</sup> And, on that approach, their Honours concluded that "[o]n the probative evidence before the Tribunal, a logical or rational decision maker could have come to the same conclusion as the Tribunal".<sup>27</sup> In the context of the issue before them, this is all orthodox. But it has nothing to do with the plaintiff's second contention in this case.

- 15        Accordingly, it is not merely that the primary judge did not refer to a submission clearly put for the plaintiff and central to the merits of the judicial review application and, therefore, central also to consideration of the interests of the administration of justice in granting or refusing to grant the extension of time. It is that his Honour fundamentally misunderstood the submission that was put and, in misunderstanding it, failed to consider the second contention at all. This was not a case of the Court merely not dealing with every submission made. The submissions made about the relevance of *NZYQ* were concise and focused. The primary judge did not consider one of only two contentions made about the relevance of *NZYQ* which were crucial to the plaintiff's case as put. This involves jurisdictional error vitiating his Honour's decision.

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23    *DAQ22 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCA 1557 at [69].

24    (2010) 240 CLR 611 at 648 [131], 648-649 [133], 649-650 [135].

25    (2010) 240 CLR 611 at 648 [131].

26    (2010) 240 CLR 611 at 648-649 [133].

27    (2010) 240 CLR 611 at 649-650 [135].

**Orders**

16           The following orders, as sought by the plaintiff in the application for the constitutional or other writ, should be made:

- (1)    The time fixed for the filing of this application be extended from the time period prescribed by r 25.02.1 of the *High Court Rules 2004* (Cth) to the date it was accepted for filing.
- (2)    The writ of certiorari be issued quashing the orders of the first defendant, the Federal Court of Australia, made on 8 December 2023 in matter VID499 of 2022.
- (3)    The writ of mandamus be issued requiring the first defendant, the Federal Court of Australia, to determine according to law the plaintiff's application under s 477A of the *Migration Act 1958* (Cth) (the Act) for an order extending the time within which he may file an application for judicial review in relation to a decision of the second defendant (the Minister) not to revoke the cancellation of his visa under s 501CA(4) of the Act.
- (4)    The second defendant pay the plaintiff's costs of this application, and below.