

HIGH COURT OF AUSTRALIA

GORDON J

DEEPAK KUMAR

PLAINTIFF

AND

MINISTER FOR IMMIGRATION, CITIZENSHIP,
MIGRANT SERVICES AND MULTICULTURAL
AFFAIRS & ORS

DEFENDANTS

[2024] HCASJ 41

Date of Judgment: 22 November 2024

S88 of 2024

ORDERS

- 1. The name of the first defendant be amended to the Minister for Immigration and Multicultural Affairs.*
- 2. The plaintiff's application filed on 18 July 2024 for a constitutional or other writ is dismissed.*
- 3. The plaintiff pay the first defendant's costs.*

Representation

The plaintiff is represented by Ray Turner Immigration Lawyers

The first defendant is represented by Clayton Utz

Submitting appearances for the second, third and fourth defendants

1 GORDON J. The plaintiff is a citizen of India. On 6 June 2013, the plaintiff applied for a Partner (Temporary) (Class UK) Visa (subclass 820) ("Partner Visa") and a Partner (Residence) (Class BS) Visa (subclass 801) ("801 Visa") on the basis of his marriage to an Australian citizen. They married on 25 March 2013.

2 On 31 July 2013, a delegate of the Minister¹ refused to grant the plaintiff the Partner Visa as the plaintiff did not satisfy cl 820.211 of Sch 2 of the *Migration Regulations 1994* (Cth) in force at the time. The delegate also refused to grant the plaintiff the 801 Visa. On 14 August 2013, the plaintiff applied to the Migration Review Tribunal (the "**Tribunal**") to review the delegate's decision to refuse him the Partner Visa.

3 On 3 December 2014, the Queensland Magistrates Court granted a temporary protection order against the plaintiff's partner requiring that she "be of good behaviour towards (the plaintiff) and not commit domestic violence against (the plaintiff)".²

4 On 29 January 2015, the Tribunal affirmed the delegate's decision.³ Clause 820.211(2)(d)(ii) of Sch 2 provided that it was a requirement for the grant of the Partner Visa that the plaintiff satisfied criteria 3001, 3003 and 3004 in Sch 3 to the Regulations, "unless the Minister is satisfied that there are compelling reasons for not applying those criteria". Criteria 3001(1) required that the application is validly made within 28 days after the "relevant day", within the meaning of subcl (2).

5 As the plaintiff had not lodged his visa application within 28 days of the "relevant day" as defined in criterion 3001(2) in Sch 3 to the *Migration Regulations*, the Tribunal needed to be satisfied there were *compelling reasons* for it to waive the Sch 3 requirements.⁴ The plaintiff claimed that a compelling reason for waiver was that he was a victim of domestic violence from his partner. The Tribunal found, however, that the compelling reason needed to have existed at the time of the visa application, following the decision of the Federal Court of Australia in *Boakye-Danquah v Minister for Immigration and*

1 In these reasons, a reference to "the Minister" is a reference to the relevant Minister administering the *Migration Act 1958* (Cth), at that point in time.

2 *Kumar v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCA 1263 at [6].

3 *Kumar v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCA 1263 at [8].

4 *Migration Regulations*, Sch 3, cl 820.211(2)(d)(ii) (emphasis added).

Multicultural and Indigenous Affairs.⁵ The Tribunal found that the plaintiff's domestic violence claim concerned conduct that occurred after the Partner Visa application, and therefore was not capable of amounting to *compelling reasons*.

6 In 2016 (after the Tribunal's decision), the Full Court of the Federal Court held that *Boakye-Danquah* was wrongly decided.⁶ The Full Court held that the waiver power in cl 820.211(2)(d)(ii) was not limited to events that existed at the time of the application for a visa.⁷

7 On 25 November 2019, some four years and ten months after the Tribunal's decision, the plaintiff filed an application in the Federal Circuit Court to review the Tribunal's decision. The plaintiff required, and sought, an extension of time under s 477(2) of the *Migration Act 1958* (Cth).⁸ The plaintiff relied on an affidavit in which he deposed that his delay in commencing the proceeding was because of erroneous legal advice he had received regarding his prospects of success.⁹ The Minister submitted that the Circuit Court should refuse the extension of time in light of the extensive delay in filing the review application.¹⁰ The Minister, however, accepted that while the Tribunal correctly applied the law as it was at the time of the decision, the Tribunal erred in its consideration of *compelling reasons*.¹¹

8 The Circuit Court refused to exercise its discretion to extend the 35 day limit in s 477(1) of the *Migration Act*.¹² The Circuit Court identified the considerations relevant to the hearing of an application for an extension of time under s 477(2) of the Act (the extent of the delay, whether there is any acceptable explanation for the delay, whether there is any prejudice to a respondent in the

5 (2002) 116 FCR 557.

6 *Waensila v Minister for Immigration and Border Protection* (2016) 241 FCR 121 at 125 [22], 135 [59].

7 *Waensila* (2016) 241 FCR 121 at 124-125 [15]-[18], 131 [49].

8 *Kumar v Minister for Immigration (No 2)* ("**Kumar No 2**") [2020] FCCA 2516 at [8].

9 *Kumar (No 2)* [2020] FCCA 2516 at [16].

10 *Kumar (No 2)* [2020] FCCA 2516 at [12].

11 *Kumar (No 2)* [2020] FCCA 2516 at [11] (emphasis added).

12 *Kumar (No 2)* [2020] FCCA 2516 at [19].

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event that the extension is granted and the merits of the substantive application).¹³ The primary judge (Judge Egan) then referred to *Vella v Minister for Immigration and Border Protection*¹⁴ (which considered an application for an extension of time for a period of 16 months) where Gageler J had said that given the length of the extension sought, his Honour would only reach the satisfaction that it is necessary in the interests of the administration of justice to make the order extending the period for the making of the application if his Honour was persuaded that the plaintiff's case is "exceptional".¹⁵ Judge Egan was not prepared to accept the plaintiff's submissions that his receipt of poor legal advice ought to be considered exculpatory.¹⁶ Judge Egan found that the delay on the part of the plaintiff "was in all respects inexcusable"¹⁷ and that the plaintiff's "delay was so extensive that the filing of the [application] out of time was an abuse of the [Circuit] Court's process".¹⁸ Given the excessive delay, Judge Egan, while setting out the Minister's concession that the Tribunal had erred, did not consider the merits of the plaintiff's substantive application.¹⁹

- 9 The plaintiff filed a notice of appeal in the Federal Court of Australia. There is however no appeal to the Federal Court from a decision of the Circuit Court to refuse to extend time under s 477(2) of the *Migration Act*.²⁰ Justice Thomas, with the Minister's agreement, treated the proceeding as an application for constitutional writs in the Court's original jurisdiction under s 39B of the *Judiciary Act 1903* (Cth) in relation to the decision of the Circuit Court.²¹ His Honour dismissed

13 *Kumar (No 2)* [2020] FCCA 2516 at [9].

14 (2015) 90 ALJR 89; 326 ALR 391.

15 *Vella* (2015) 90 ALJR 89 at 90 [3]; 326 ALR 391 at 392.

16 *Kumar (No 2)* [2020] FCCA 2516 at [17].

17 *Kumar (No 2)* [2020] FCCA 2516 at [17].

18 *Kumar (No 2)* [2020] FCCA 2516 at [18].

19 *Kumar (No 2)* [2020] FCCA 2516 at [18].

20 *Migration Act*, s 476A(3)(a).

21 *Kumar v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCA 1263 at [15].

the application on the basis that the plaintiff had not identified any jurisdictional error in the decision of the Circuit Court.²²

10 The plaintiff then appealed to the Full Court of the Federal Court. He sought to raise two grounds of appeal: that the Federal Court Judge failed to take into account (1) that the Circuit Court Judge was biased "towards the acceptable explanation of delay" and (2) that the Circuit Court Judge ignored that the plaintiff "was in depression after family violence".²³ The Full Court proceeded on the basis that the plaintiff required leave to advance the second ground of appeal.²⁴ The Full Court dismissed the plaintiff's appeal.²⁵

11 It is appropriate to address the second ground of appeal at the outset. After reviewing the materials filed in, and the transcript of the hearing before the Federal Court, the Full Court concluded that it was not appropriate to grant the plaintiff leave to raise this new ground in the Full Court.²⁶ The Full Court found that the plaintiff had not pointed to any material which indicated he had advanced the claim in the Circuit Court, the plaintiff provided no explanation for not having raised the ground before the Circuit Court and the ground was not of sufficient merit to warrant a grant of leave.²⁷ The Full Court found that the Circuit Court Judge could not be held to have failed to take into account information about the plaintiff's depression if the plaintiff had advanced no such claim.²⁸

12 In relation to the first ground of appeal, after setting out the applicable principles in relation to apprehended bias, the Full Court held that submission had no merit.²⁹ The Full Court held that each case must be decided on its own merits and that the Circuit Court Judge formed the view that the length of delay on the part of the plaintiff was a factor which outweighed other reasons for granting an extension of time and that although another decision-maker may have reached a

22 *Kumar v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCA 1263 at [43].

23 *Kumar v Minister for Immigration, Citizenship and Multicultural Affairs* ("**Kumar (Full Court)**") [2024] FCAFC 79 at [16].

24 *Kumar (Full Court)* [2024] FCAFC 79 at [27].

25 *Kumar (Full Court)* [2024] FCAFC 79 at [43].

26 *Kumar (Full Court)* [2024] FCAFC 79 at [42].

27 *Kumar (Full Court)* [2024] FCAFC 79 at [38]-[41].

28 *Kumar (Full Court)* [2024] FCAFC 79 at [40].

29 *Kumar (Full Court)* [2024] FCAFC 79 at [34].

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different decision, that did not mean that the Circuit Court Judge was biased.³⁰ The Full Court found the decision of the Circuit Court was open and according to law.³¹

13 On 18 July 2024, the plaintiff filed an application for a constitutional writ in this Court seeking the following relief:

- (1) a writ of mandamus directed to the Federal Circuit and Family Court of Australia (Division 2) requiring it to determine the plaintiff's application according to law; and
- (2) a writ of certiorari to quash the decisions of the Circuit Court, the Federal Court and the Full Court of the Federal Court.

14 There was no dispute that this Court should determine the plaintiff's application. The plaintiff and the first defendant have filed written materials and for that reason and because of the nature of the application, I have concluded that it is appropriate for the application to be dealt with on the papers.³² Accordingly, I direct pursuant to r 25.09.1 of the *High Court Rules 2004* (Cth) that the application be dismissed without listing it for hearing because the application does not disclose an arguable basis for the relief sought or is an abuse of the process of this Court.

15 For the reasons that follow, the plaintiff's application should be dismissed with costs.

Extensions of time required

16 The plaintiff is out of time to seek a writ of mandamus directed to the Circuit Court requiring it to determine the plaintiff's application according to law. An application for mandamus commanding a person to hear and determine a matter must be filed within two months after the day of the refusal to hear.³³ The Circuit Court made its decision on 9 September 2020.³⁴

17 The plaintiff is also out of time to seek a writ of certiorari to quash the decisions of the Circuit Court and the Federal Court. In the circumstances of this case, an application for a writ of certiorari must be filed within six months after

30 *Kumar (Full Court)* [2024] FCAFC 79 at [33].

31 *Kumar (Full Court)* [2024] FCAFC 79 at [33].

32 The second, third and fourth defendants filed submitting appearances.

33 *High Court Rules*, r 25.02.1.

34 *Kumar (No 2)* [2020] FCCA 2516.

the day the decision sought to be quashed was made.³⁵ The plaintiff's application for a writ of certiorari against the Circuit Court's decision (made on 9 September 2020) and the Federal Court's decision (made on 20 October 2023) is out of time. The plaintiff is not out of time to seek a writ of certiorari to quash the decision of the Full Court of the Federal Court (made on 13 June 2024).

18 The extensions of time are opposed by the Minister. Of course, any period of time fixed by or under the Rules may be enlarged or abridged by order of the Court or a Justice whether made before or after the expiration of the time fixed.³⁶ The plaintiff, among other things, must specify in their written application to this Court why they consider it is "necessary in the interests of the administration of justice"³⁷ and the Court must be so satisfied. The factors relevant to the exercise of the Court's discretion to grant an extension are well established.³⁸

19 Given the period of time that has elapsed, the plaintiff's case would need to be exceptional before the time for commencing proceedings is enlarged by months or years.³⁹

20 The plaintiff has provided no explanation as to why this Court should enlarge or abridge time to enable him to seek the issue of the writs against the Circuit Court and the Federal Court. As the factual background identifies, the reason the plaintiff did not seek the relief earlier is because they pursued their remedies in the Federal Court and then in the Full Court. The fact that those applications were unsuccessful does not justify an order extending the time limit for applying for judicial review in this Court.⁴⁰

21 The application for a constitutional writ and certiorari identifies two grounds: first, that there was a concession by the Minister before the Circuit Court

35 *High Court Rules*, r 25.02.2.

36 *High Court Rules*, r 4.02.

37 *Migration Act*, s 486A(2)(a).

38 See, eg, *Plaintiff M90/2009 v Minister for Immigration and Citizenship* [2009] HCATrans 279; *Zhang v Minister for Immigration and Border Protection* [2015] HCATrans 244; *Vella v Minister for Immigration and Border Protection* (2015) 90 ALJR 89 at 90 [3]; 326 ALR 391 at 392.

39 See, eg, *Re Commonwealth; Ex parte Marks* (2000) 75 ALJR 470 at 473-474 [13]; 177 ALR 491 at 495. See also *Vella* (2015) 90 ALJR 89 at 90 [3]; 326 ALR 391 at 392.

40 See, eg, *Plaintiff S3/2013 v Minister for Immigration and Citizenship* (2013) 87 ALJR 676 at 678 [13]; 297 ALR 560 at 563.

that the decision of the Tribunal was affected by jurisdictional error and thus the merits of the application were overwhelming and the Court failed to take these matters into account; and, second, that the Court failed to recognise and take into account that the plaintiff's delay was in part occasioned by his application to the Minister to exercise their discretion under s 417 of the *Migration Act*.

22 Each ground will be addressed in turn.

23 The first ground contends that before the Circuit Court there was a concession by the Minister that the decision of the Tribunal was affected by jurisdictional error and thus the merits of the application were overwhelming and the Court failed to take these into account. As the Minister submitted, that submission is misconceived.

24 First, the submission misapprehends the nature of the task the Circuit Court was required under s 477(2) of the *Migration Act* to perform. The Circuit Court's power to extend time was subject to the Court being "satisfied that it is necessary in the interests of the administration of justice to make the order".⁴¹ The Circuit Court had a discretion, that was required to be exercised within the bounds of legal reasonableness,⁴² whether to extend time. The plaintiff does not identify any jurisdictional errors the Circuit Court is said to have committed. That the plaintiff had a strong case to advance that the Tribunal's decision was affected by a jurisdictional error was one factor that the Circuit Court identified it would ordinarily take into account in deciding whether it was necessary in the interests of the administration of justice to make the order under s 477(2) of the *Migration Act*. Another factor, however, identified by the Circuit Court, was the very significant (and unexplained) delay in the bringing of the proceedings. The Circuit Court did not disregard a matter required to be taken into account as a precondition to the exercise of its authority.⁴³ Nor did it misconceive the nature of the function it was performing in deciding whether or not to extend time or the extent of its powers in the particular circumstances of the case.⁴⁴

25 To adopt and adapt the language of Thomas J in the Federal Court,⁴⁵ the Circuit Court did weigh the merits of the application for review against the extent

41 *Migration Act*, s 477(2)(b).

42 See, eg, *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 362 [63].

43 See, eg, *Craig v South Australia* (1995) 184 CLR 163 at 177.

44 See, eg, *Craig* (1995) 184 CLR 163 at 177-178.

45 *Kumar v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCA 1263 at [42].

of the delay in bringing the proceedings and the explanation for the delay. Further, the fact that the Minister before the Circuit Court apparently conceded that the plaintiff would have had a strong case on the merits if the matter were remitted to the Tribunal was taken into account by the Circuit Court judge.⁴⁶ As has been explained, the plaintiff did not identify any error in these findings by the Federal Court.

26 As the Minister submitted, the plaintiff has not identified any basis for this Court to do again that which the Federal Court undertook. Indeed, the plaintiff has not identified any substantive or other error in the judgment of the Federal Court that found no jurisdictional error in the decision of the Circuit Court. Moreover, I cannot identify any error.

27 Next, by his second ground, the plaintiff contended that the Circuit Court failed to recognise and take into account that his delay was, in part, occasioned by his application to the Minister to exercise discretion under s 417 of the *Migration Act*. As the Minister submitted, the plaintiff adduced no evidence to prove that he provided to the Circuit Court as part of his explanation for the delay in commencing the proceedings the fact that he had sought ministerial intervention. Before the Circuit Court and the Federal Court, the plaintiff maintained that his explanation for the delay in commencing the Circuit Court proceedings was that he had received legal advice that he had poor prospects of challenging the Tribunal's decision. On appeal to the Full Court, the plaintiff added a new explanation, which was that he was depressed (an explanation which the Full Court found was not supported by any material in the Circuit Court identified by the plaintiff). The Minister submitted that the plaintiff should not now be permitted to advance yet another explanation for the delay, in circumstances where he did not raise that explanation earlier, and made no complaint in the Federal Court or in the Full Court that the Circuit Court had failed to take such an explanation into account. None of these matters were addressed in the reply that the plaintiff filed in this Court. The Minister's submissions should be accepted.

28 For the above reasons, the plaintiff should not be granted the extensions of time which he requires to support his application for mandamus, and for certiorari to quash the decisions of the Circuit Court and the Federal Court. In any event, the plaintiff's application for that relief does not disclose an arguable basis for the relief sought or is an abuse of process of the Court.⁴⁷

29 The plaintiff's application for a writ of certiorari to quash the decision of the Full Court should be dismissed on the basis the application does not disclose

46 *Kumar (Full Court)* [2024] FCAFC 79 at [33].

47 *High Court Rules*, r 25.09.1.

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an arguable basis for the relief sought or is an abuse of the process of the Court.⁴⁸ The plaintiff has not identified any substantive or other error in the judgment of the Full Court that found no jurisdictional error in the decision of the Federal Court. I also cannot identify any error. Further, as explained, the plaintiff should not be permitted, by his second ground, to raise a new explanation for his delay which was not before the Full Court (or the Federal Court or Circuit Court).

Conclusion and orders

30 For these reasons, the plaintiff's application for a constitutional or other writ should be dismissed with costs. There should also be an order that the name of the first defendant be amended to the Minister for Immigration and Multicultural Affairs.

48 *High Court Rules*, r 25.09.1.