HIGH COURT OF AUSTRALIA

GAGELER CJ,
STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

PLAINTIFF M19A/2024 & ORS — APPELLANTS

AND

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS — RESPONDENT

Plaintiff M19A/2024 v Minister for Immigration and Multicultural Affairs
[2025] HCA 17
Date of Judgment: 10 April 2025
M92/2024

ORDER

1. *The name of the Respondent be amended from 'Minister for Immigration, Citizenship and Multicultural Affairs' to 'Minister for Immigration and Multicultural Affairs'.*

2. *Appeal allowed.*

3. *Set aside the orders made by Justice Gordon on 18 October 2024, and, in their place, order that:*

   (a) *A writ of certiorari issue directed to the Respondent quashing the decision of the delegate of the Respondent dated 19 December 2019 to cancel the First Appellant's Protection (Class XA) (subclass 866) visa.*

   (b) *Declare that the Protection (Class XA) (subclass 866) visas held by the Second Appellant and Third Appellant were not cancelled by operation of s 140 of the* Migration Act 1958 *(Cth).*

   (c) *The Respondent pay the Appellants' costs of the proceeding (M19/2024), except the costs of the hearing on 26 July 2024.*

4. The Respondent to pay the Appellants' costs of the appeal (M92/2024) and of the application for leave to appeal (M97/2024).

On appeal from the High Court of Australia

Representation

The appellants are represented by the Asylum Seeker Resource Centre

The respondent is represented by the Australian Government Solicitor

CATCHWORDS

Plaintiff M19A/2024 v Minister for Immigration and Multicultural Affairs

High Court – Appellate jurisdiction – Practice – Reasons for judgment – Where first appellant sent Notice of Intention to Consider Cancellation ("NOICC") of visa – Where first appellant did not respond to NOICC – Where first appellant did not have legal obligation to respond to NOICC – Where delegate of respondent gave weight to first appellant not responding to NOICC – Where appellants sought to raise in amended notice of appeal for first time contention that delegate of respondent committed jurisdictional error by giving weight to first appellant's non-response to NOICC – Where respondent conceded that jurisdictional error before hearing of appeal – Where parties provided to Court agreed document explaining circumstances – Whether reasons for decision required when orders sought by consent – Whether appropriate to make orders by consent – Whether decision of delegate affected by jurisdictional error.

Words and phrases – "appellate jurisdiction", "concession", "consent orders", "institutional responsibility", "jurisdictional error", "legal obligation", "original jurisdiction", "reasons".

Constitution, ss 73, 75.
Judiciary Act 1903 (Cth), s 37.
Migration Act 1958 (Cth), ss 116, 119, 140.

1 GAGELER CJ, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ. These reasons for judgment concern an appeal under s 73(i) of the Constitution from a final judgment of a Justice exercising original jurisdiction under s 75(v) of the Constitution.[1]

2 In their amended notice of appeal, the appellants raised for the first time a contention that the decision of the delegate of the Minister for Immigration, Citizenship and Multicultural Affairs to cancel the first appellant's protection visa under s 116(1AA) of the *Migration Act 1958* (Cth) is vitiated by jurisdictional error by reason of the delegate having given weight to the fact that the first appellant did not respond to a "Notice of Intention to Consider Cancellation" of that visa in circumstances where there was no legal obligation on the first appellant to respond to such a notice. In written submissions filed in support of the appeal, the appellants sought leave to raise this new issue on the basis that it could not have been the subject of any additional evidence at first instance and did not involve any "fresh consideration of facts that are neither admitted nor beyond controversy".[2]

3 In response to the application for leave to raise the new issue, the Minister consented to the making of orders allowing the appeal, setting aside the judgment and substituting orders which include the issue of a writ of certiorari and a declaration. The parties also provided to the Court an agreed document explaining the circumstances in which this new point has been raised for the first time in this appeal. This document records the Minister's concession that:

> "it is not reasonably open to a decision maker, when exercising their discretion to cancel a visa under s 116 of the [*Migration Act*], to take into account a failure to respond to an NOICC [Notice of Intention to Consider Cancellation] in a manner adverse to a visa holder, as there is no legal requirement for a person to respond to such a notice. As such, the [Minister] concedes that the delegate fell into jurisdictional error in doing so in this case."

4 The agreed document also records that the "basis of the Minister's concession is consistent with the Minister's concession in an earlier proceeding

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1 *Plaintiff M19A/2024 v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCASJ 39.

2 *Bird v DP (a pseudonym)* (2024) 98 ALJR 1349 at 1360-1361 [39], 1406 [256]; 419 ALR 552 at 563, 622.

before a single judge of this Court, where a writ of certiorari was issued: see *Lazenby v Minister for Home Affairs* (S51/2022)" but that no reasons for that earlier decision were published and "only the Minister and not the [a]ppellants were aware of that conceded issue of principle at first instance".

5 In these circumstances, and where the issue was not raised by the appellants below because they were not and could not reasonably have been aware of the relevant authority, it is necessary in the interests of justice that the appeal be determined on the basis of the concession as to jurisdictional error by the delegate now properly made by the Minister.

6 The power of this Court to make orders in the exercise of its appellate jurisdiction is to "affirm reverse or modify the judgment appealed from" and to "give such judgment as ought to have been given in the first instance".[3] The proper exercise of that power in an appeal from a judgment given in the original jurisdiction of the Court under s 75(v) of the Constitution necessitates that the Court on appeal be satisfied that such orders as it makes are appropriate. That is so even if those orders are sought and made by consent.

7 That constraint on the making of orders by consent in an appeal from a judgment given in the original jurisdiction of the Court under s 75(v) of the Constitution arises because the original jurisdiction exists to ensure that "officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them"[4] and because the law declared and enforced in the exercise of the original jurisdiction is incapable of alteration by agreement.[5]

8 Moreover, performance by this Court of its institutional responsibility ordinarily to publish reasons for such orders as it makes[6] has heightened significance where orders are made in its appellate jurisdiction which involve a departure from a judgment given in its original jurisdiction in respect of which extensive reasons were published at the time of judgment. Those who are bound

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3 Section 37 of the *Judiciary Act 1903* (Cth).

4 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 514 [104].

5 Compare *VNPC v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 181 ALD 49 at 50 [3], citing *Kovalev v Minister for Immigration and Multicultural Affairs* (1999) 100 FCR 323 at 328 [12].

6 See *Wainohu v New South Wales* (2011) 243 CLR 181 at 214-215 [56].

to obey and apply the law as declared by this Court are entitled to know exactly why that departure has occurred.

9 Accordingly, the concession of error on which the consent orders are founded is identified above. We now record our satisfaction that the concession is correct.

10 The conceded error is an instance of jurisdictional error arising from legal unreasonableness in the manner in which a decision has been made,[7] the focus of which is "upon the particular circumstances of exercise of the statutory power".[8] By s 116(1AA) of the *Migration Act* the Minister may cancel a visa if he or she is not satisfied as to the visa holder's identity. By s 119, if the Minister is considering cancelling a visa under s 116, the Minister must, in writing, notify the holder that there appear to be grounds for cancelling it, give particulars of those grounds and the information because of which those grounds appear to exist, and invite the holder to show within a specified time that those grounds do not exist or that there is a reason why it should not be cancelled. The *Migration Act* imposes no legal obligation on the holder to respond to an invitation under s 119.

11 In deciding to cancel the first appellant's protection visa under s 116(1AA) (the effect of which was also to cancel the protection visas of the second and third appellants under s 140 of the *Migration Act*) the delegate said "[t]he visa holder has failed to respond to the Notice [of Intention to Consider Cancellation] or engage in the cancellation process ... I give this consideration some weight in favour of cancelling the visa." The Minister's concession accepts that the delegate was not entitled to give that fact any weight given that there was no obligation on the first appellant to respond to the notice under s 119.

12 The Minister's concession is correct. The decision of the delegate being affected by jurisdictional error, it follows that the consent orders founded on the Minister's concession are appropriate to be made.

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7 See *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 362 [63], 371 [91], 375 [105].

8 *Minister for Home Affairs v DUA16* (2020) 271 CLR 550 at 563 [26].