

HIGH COURT OF AUSTRALIA

BEECH-JONES J

IN THE MATTER OF AN APPLICATION BY
MR GAMBETTO FOR LEAVE TO ISSUE OR FILE

[2025] HCASJ 28

Date of Judgment: 2 September 2025

S70 of 2025

ORDER

- 1. The application for leave to issue or file the document entitled "Application for a constitutional or other writ" dated 4 June 2025 is dismissed without an oral hearing.*

Representation

The applicant is unrepresented

1 BEECH-JONES J. This is an ex parte application for leave to issue or file an application for a constitutional or other writ. For the reasons that follow, leave is refused.

2 On or about 4 June 2025 the applicant, known by the pseudonym Mr Gambetto, sought to file an application for a constitutional or other writ ("the Application"). On 5 June 2025, Edelman J directed the Registrar of this Court to refuse to issue or file that document without the leave of a Justice first had and obtained by the party seeking to issue or file it.¹ On 6 June 2025, Mr Gambetto sought that leave. He relies on an affidavit that he swore on 4 June 2025.

3 The Application named the Federal Circuit and Family Court of Australia ("the FCFCOA") as the defendant. By the Application Mr Gambetto seeks writs of certiorari to quash the "orders and reasons" of a Judge of the FCFCOA (Division 2) (Judge Shoebridge) described below, and writs of mandamus remitting some of Mr Gambetto's applications to be heard by a Judge of the FCFCOA (without specifying a Division thereof) "who has not heard from [Mr Gambetto] previously". He also seeks that this Court consider referring Judge Shoebridge for consideration by the Commonwealth Parliament under s 72(ii) of the *Constitution*. This latter aspect of the Application is self-evidently untenable and will not be considered further.

Background

4 The Application arises from Mr Gambetto's attempts to file applications, in which Mr Gambetto alleges breaches by his former wife of final parenting orders made by the FCFCOA (Division 1) and brings an application for the purposes of locating and recovering his child.

5 On 13 October 2023 a Justice of the FCFCOA (Division 1) (Altobelli J) made final parenting orders which, inter alia, granted sole parental responsibility to Mr Gambetto's former wife with respect to the child's education and health. His Honour made an order pursuant to s 102QB(2) of the *Family Law Act 1975* (Cth) ("the Act") prohibiting Mr Gambetto from instituting further proceedings under the Act in a court having jurisdiction under the Act without first obtaining leave under s 102QE ("the vexatious proceedings order"). His Honour also ordered each of Mr Gambetto and his former wife to pay half the costs of the independent children's lawyer who acted in the proceedings ("the costs order").

6 On 18 October 2024 Mr Gambetto filed an application seeking leave under s 102QE of the Act to commence proceedings against his former wife in respect of alleged contraventions of the orders made on 13 October 2023. On 18 November 2024 Mr Gambetto attempted to file another application seeking

1 *High Court Rules 2004* (Cth), r 6.07.2.

leave under s 102QE of the Act, this time to commence proceedings "for the purpose of locating and recovering" his child.

7 On 27 November 2024 the FCFCOA (Division 2) ordered that Mr Gambetto file an affidavit within 14 days deposing to his compliance or non-compliance with the costs order. On 28 November 2024 Mr Gambetto advised the FCFCOA (Division 2) that he "respectfully decline[d] [h]is Honour's offer to adduce further evidence" and reiterated the alleged urgency of his application.

8 On 5 December 2024 Judge Shoebridge dismissed the application filed on 18 October 2024. His Honour noted that the application Mr Gambetto attempted to file on 18 November 2024 was not filed but instead referred directly to his Honour. His Honour ordered that, to the extent that leave might be required to file the application, it was declined but in any event the application was dismissed. In fact, leave was not required to file the application. Section 102QE(2) enabled Mr Gambetto to "apply to the court for leave to institute proceedings that are subject to the" vexatious proceedings order. His application for leave to institute a proceeding was to be made in accordance with r 10.24 of the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth) ("the Rules"). If leave were granted, Mr Gambetto could then "institute" the substantive proceeding in accordance with the Rules.

9 His Honour dismissed the applications because of Mr Gambetto's failure to comply with the costs order. His Honour referred to s 69F of the Act, which provides that a court vested with jurisdiction under the Act "may proceed with the hearing of proceedings in relation to a child even though the person who instituted the proceedings has failed to comply with an order of the court or of another court having jurisdiction under this Act." His Honour treated this power as permitting the Court either to hear or to refuse to hear a proceeding in circumstances where there has been a failure to comply with an order of the court or of another court having jurisdiction under the Act. His Honour referred to authority treating the exercise of that discretion as "depend[ing] upon the balance which must be struck between the applicant's right to procedural justice and countervailing public policy considerations" bearing in mind that it is a "serious step" to "[l]ock[] an applicant out of procedural access to a court".² Implicit in his Honour's reasoning is that where s 69F is relied on to refuse to proceed with a hearing the Court may dismiss the proceedings.

10 On or around 4 February 2025 Mr Gambetto filed another application seeking leave under s 102QE to commence proceedings in relation to the "[l]ocation and recovery of children" and in relation to alleged "contraventions of child-related orders". The application was listed for hearing before

2 Quoting *Dautry v Wemple* (2018) 59 Fam LR 184 at 192 [41].

3.

Judge Shoebridge on 30 April 2025. In the meantime Mr Gambetto filed written submissions.

11 Judge Shoebridge dismissed the application on 30 April 2025. In his reasons, his Honour noted that there had not been a material change in circumstances from those that existed when the previous applications were dismissed on 5 December 2024.

Leave must be refused

12 The discretion to refuse leave to issue or file a document will ordinarily be exercised where the document appears "on its face to be an abuse of the process of the Court, to be frivolous or vexatious or to fall outside the jurisdiction of the Court".³ The concept of abuse of process includes "an attempt to invoke the original or appellate jurisdiction of the High Court [of Australia] on a basis that is confused or manifestly untenable".⁴ The exercise of the discretion to refuse leave "is appropriate only in the clearest of cases".⁵

13 Mr Gambetto's application raises six grounds said to justify the relief sought. The first is that in his Honour's reasons for making the order on 30 April 2025 Judge Shoebridge failed to "address his assumption" in his judgement dated 5 December 2024 that Mr Gambetto failed to comply with the costs order and thereby displayed "bias". The sixth ground makes a similar contention in relation to his Honour's judgment and orders of 5 December 2024. However, from at least 27 November 2024 Mr Gambetto had every opportunity to address whether he had complied with the costs order and his Honour was more than entitled to conclude that he had not. In any event, these grounds are a manifestly untenable basis for a claim of apprehended much less actual bias.

14 Mr Gambetto's other four grounds are that, in dismissing his applications, his Honour: relied on an irrelevant consideration, namely Mr Gambetto's failure to comply with the costs order, when neither the independent children's lawyer nor the "Legal Aid Commission NSW" was a party to the proceedings he sought to institute; failed to apply the mandatory principles for conducting child-related proceedings formerly found in s 69ZN of the Act;⁶ supposedly wrongly prioritised

3 *High Court Rules*, r 6.07.1.

4 *Re Young* (2020) 94 ALJR 448 at 451 [13]; 376 ALR 567 at 570.

5 *Re Young* (2020) 94 ALJR 448 at 451 [13]; 376 ALR 567 at 570.

6 Section 69ZN, which appeared in Div 12A of Pt VII of the Act, was repealed by s 75 of the *Family Law Amendment Act 2024* (Cth) with effect from 10 June 2025. A similar provision now appears in s 102NE of the *Family Law Act 1975* (Cth).

the question of costs over questions of parental access and violence against a child; and otherwise failed to have regard to the best interests of the child.

15 While it was open to Judge Shoebridge to address Mr Gambetto's applications by reference to s 102QF, the question raised by the Application is not whether Mr Gambetto has raised a claim that is not manifestly untenable that Judge Shoebridge erred in dismissing his applications. Rather, the question is whether Mr Gambetto has raised a claim that is not manifestly untenable that his Honour committed a jurisdictional error in rejecting those applications. In circumstances where there is no attempt to address the authority of his Honour to rely on s 69F in the manner in which his Honour did or the fact that his Honour did not consider Mr Gambetto's applications by reference to s 102QF, these complaints at best rise no higher than a complaint of an error within jurisdiction⁷ that could potentially be raised if an appellate process is available.⁸ They do not however raise a tenable claim of jurisdictional error. This conclusion renders it unnecessary to address the relevance of the failure of Mr Gambetto to invoke any avenue of appeal from Judge Shoebridge's orders that may be available upon whether he should be granted leave to file his Application.

16 Leave to issue or file the document is refused and Mr Gambetto's ex parte Application is dismissed without an oral hearing.

7 See *Craig v South Australia* (1995) 184 CLR 163 at 178-180; *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531 at 571-573 [66]-[70].

8 As to which see: *Federal Circuit and Family Court of Australia Act 2021* (Cth), ss 26, 28, 132; *Federal Court and Federal Circuit and Family Court Regulations 2022* (Cth), reg 4.02(1)(b).