HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON AND BEECH-JONES JJ

PLAINTIFF M27/2025 PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS DEFENDANT

Plaintiff M27/2025 v Minister for Immigration and Multicultural Affairs
[2025] HCA 40
Date of Judgment: 15 October 2025
M27/2025

ORDER

1. *The time for the making of the application for a constitutional or other writ be extended up to and including 3 April 2025.*

2. *A writ of certiorari issue quashing the decision made by the delegate of the defendant on 13 August 2024 to refuse to grant the plaintiff a protection visa.*

3. *A writ of mandamus issue commanding the defendant to determine the plaintiff's application for a protection visa according to law within 14 days of this order.*

4. *There be no order as to costs.*

Representation

The plaintiff is represented by WLW Migration Lawyers

The defendant is represented by Australian Government Solicitor

CATCHWORDS

Plaintiff M27/2025 v Minister for Immigration and Multicultural Affairs

Immigration – Visas – Where plaintiff applied for protection (subclass 866) visa – Where document in application for visa included English text and images with Mandarin characters – Where Minister's delegate requested further information under s 56 of *Migration Act 1958* (Cth) – Where plaintiff did not provide translation of document relied on – Where delegate refused application for protection visa – Where delegate stated documents not translated not included as part of assessment – Whether delegate failed to comply with ss 54 and 56 of *Migration Act* – Whether delegate's decision legally unreasonable – Whether necessary in interests of administration of justice to grant extension of time to make application for constitutional or other writ.

Words and phrases – "certiorari", "constitutional or other writ", "extension of time", "have regard to all of the information", "invitation for additional information", "jurisdictional error", "mandamus", "materiality", "must have regard to that information", "necessary in the interests of the administration of justice", "protection obligations", "protection visa", "realistic possibility", "specify all particulars of his or her claim", "unreasonableness".

Migration Act 1958 (Cth), ss 5AAA, 54, 56, 58, 62, 65, 476, 476A, 476B, 486A.
High Court Rules 2004 (Cth), rr 4.02, 25.02.1, 25.02.2, 25.09.3.

1 GAGELER CJ, GORDON AND BEECH-JONES JJ. On 3 April 2025, the plaintiff filed an application for a constitutional or other writ, invoking the original jurisdiction of this Court conferred by s 75(v) of the *Constitution*. The principal relief sought is the issue of writs of certiorari and mandamus directed to the Minister for Immigration and Multicultural Affairs ("the Minister"), quashing a decision of the delegate of the Minister to refuse the plaintiff's application for a protection visa and requiring that application to be redetermined according to law.

2 The decision of the delegate is a "primary decision" within the meaning of s 476(4) of the *Migration Act 1958* (Cth) ("the Act").[1] It follows that the Federal Circuit and Family Court of Australia (Division 2) does not have jurisdiction in relation to the decision,[2] and nor does the Federal Court of Australia,[3] and thus this proceeding cannot be remitted to either court.[4] Instead, on 13 June 2025 this application was referred by Beech-Jones J for hearing by a Full Court.[5] The parties agreed to a hearing on the papers. One matter raised by the Court was the subject of supplementary submissions from the parties.

3 For the reasons that follow, the decision of the delegate to refuse the plaintiff's application for a protection visa is affected by jurisdictional errors. Although there has been delay in the bringing of the application, the findings of jurisdictional errors combined with the explanation for the delay means that it is necessary in the interests of the administration of justice to extend the 35 day period provided for in s 486A(1) of the Act to commence the proceedings up to and including 3 April 2025. To the extent necessary, a corresponding enlargement of time under r 4.02 of the *High Court Rules 2004* (Cth) in relation to rr 25.02.1 and 25.02.2 should also be granted. The writs of certiorari and mandamus sought should issue.

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1 The decision was reviewable under Pt 5 of the *Migration Act 1958* (Cth) but was not the subject of an application for review within the specified period: *Migration Act*, s 476(4).

2 *Migration Act*, s 476(2)(a).

3 *Migration Act*, s 476A(1).

4 *Migration Act*, s 476B; cf *Judiciary Act 1903* (Cth), s 44(1).

5 Pursuant to *High Court Rules 2004* (Cth), r 25.09.3(d).

Background

4 The plaintiff is a citizen of the People's Republic of China ("the PRC"). He most recently arrived in Australia from the PRC in April 2018. The plaintiff had previously entered Australia in July 2010 to study and work.

5 On 10 November 2019, the plaintiff applied for a protection (subclass 866) visa. His application was refused by the delegate of the Minister on 13 August 2024. The effect of the plaintiff's affidavit is that the notification of the decision was sent to his email address on 13 August 2024 but allocated to his "junk mail" folder, so that he did not discover that his application had been refused until about 7 October 2024 when he checked his immigration account for the purposes of seeking to prove his entitlement to work in Australia.

6 On 8 October 2024, the plaintiff filed an application with the Administrative Appeals Tribunal (which on 14 October 2024 became the Administrative Review Tribunal ("the ART"))[6] to extend the time for making an application for a merits review of the delegate's decision.

7 On 3 December 2024, the ART wrote to the plaintiff inviting him to provide any comments, by 17 December 2024, on whether he had made a valid application. He responded on 13 December 2024. On 10 April 2025, the ART determined that the application was invalid as the application had not been lodged within the relevant time limit.

8 In the meantime, in late December 2024 the plaintiff retained solicitors. In his affidavit the plaintiff stated that, at around this time, he learned that he was out of time in which to apply to this Court for judicial review of the delegate's decision. After applying for access to the plaintiff's file and the New Year break, the plaintiff's solicitors commenced preparing these proceedings. As noted, proceedings were not filed until 3 April 2025.

The application for a protection visa

9 In his application for a protection visa dated 10 November 2019, the plaintiff stated that, if he is returned to the PRC, it is likely that he would be subject to "[a]rrest, confessions by torture, abuse, unfair trials and imprisonment", which may be "life-threatening". He said that he had made "hundreds of programs in the media", including on the social media platforms YouTube and Twitter, "that expose the evils" of the Chinese Communist Party ("the CCP") and which have

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6 *Administrative Review Tribunal Act 2024* (Cth), s 2(1); Australia, *Administrative Review Tribunal Commencement Proclamation 2024*, 18 July 2024.

attracted "millions of view[s]". He referred to his public support for an alleged opponent of the CCP ("the alleged opponent"). He also said that he had "produced dozens of programs to support Hong Kong protesters and expose[] the truth of Hong Kong".

10 Enclosed with the plaintiff's application for a protection visa was a portable document format document said to provide "YouTube channel evidence" to support his claims ("the pdf document"). The pdf document consisted of five pages that included screenshots of results from both the search engine Google and the search function on YouTube, which depicted "thumbnail" images of YouTube videos with titles in Mandarin characters. The pdf document also included English text added by the plaintiff providing a general description of the searches that were undertaken (for example, "[s]earching for my program name [in Mandarin characters] on YouTube and Google will have many results") or a broad description of what the YouTube links depict (for example, "[e]very program is related to the opposition to the [CCP]").

11 By a letter dated 27 November 2023, an officer of the Department of Home Affairs wrote to the plaintiff seeking further information in relation to his application for a protection visa. It was common ground that the letter involved an exercise of the power conferred by s 56 of the Act to "get any information" that the Minister or his or her delegate "considers relevant" in considering an application for the visa ("the s 56 letter"). The s 56 letter advised the plaintiff that, if documents were provided in support of his application in a language other than English, then they had to be translated into English with both the translation and the document in its original language to be provided.

12 The s 56 letter also stated that the plaintiff's application for a protection visa "lack[ed] detailed information and evidence, such as dates and locations" of aspects of his claims within the application, and that the absence of that information and evidence raised a concern about the genuineness of his protection claims. The s 56 letter stated that the pdf document "lack[ed] in key details and is not in English" and requested that the plaintiff provide an English translation. The s 56 letter also requested further information, evidence and clarification about the plaintiff's claims, including details of his YouTube channel and the alleged opponent that the plaintiff supported and the plaintiff's relationship with him. Further, the s 56 letter sought information from the plaintiff about his delay in the lodging of his application for a protection visa, and his departure from Australia to the PRC and his return to Australia in 2018.

13 On 23 December 2023, the plaintiff provided a six-page typed response ("the s 56 response"). The s 56 response addressed his support for, and subsequent disillusionment with, the alleged opponent. The s 56 response provided embedded links to various sites, including YouTube pages that the plaintiff said contained

programs referring to the alleged opponent. The plaintiff said he "participated" in programs discussing the alleged opponent and joined the alleged opponent's social media group. The s 56 response also contained links to YouTube pages said to contain programs addressing the 1989 Tiananmen Square incident. The plaintiff claimed that he helped produce certain versions of this program. The plaintiff also provided a link to a YouTube page said to contain a program that the plaintiff had broadcast featuring a different opponent of the CCP regime. The s 56 response included a screenshot containing Mandarin characters, which was said to show the numbers of subscribers to and views of the plaintiff's YouTube channel.

14 The s 56 response stated that "Google Translate" could be used to verify that the titles of the videos on the plaintiff's YouTube channel matched his descriptions. He added that the "vast number and length of my videos make it impossible for me to translate each one". The s 56 response also stated that the plaintiff's Twitter account sets out his views and promotes his YouTube channel. He advised that Twitter also "has an automatic translation feature for browsing".

15 The plaintiff did not provide a translation of the pdf document, address the delay in the lodging of his application for a protection visa or address the circumstances surrounding his departure from Australia to the PRC and his return to Australia in 2018.

The delegate's decision

16 The delegate was not satisfied of the credibility of the plaintiff's claims: namely, that he had produced hundreds of programs on social media exposing the evils of the CCP; that he had participated in many organisations opposing the CCP; that he had supported the alleged opponent; or that he had produced dozens of programs in support of protesters in Hong Kong. The delegate was likewise not satisfied of the credibility of the plaintiff's claim that he is unable to return to the PRC because he will be arrested and harmed.

17 In reaching these conclusions the delegate noted that, contrary to the request in the s 56 letter, the plaintiff "did not provide any official translations of his documents which he claims are evidence of social media and online content that supports his claims". The delegate added that "[t]herefore, any documents that are not translated by accredited translators in Australia, or by official offshore translators, will not be included as part of this assessment". In relation to the plaintiff's claims that he supported protests in Hong Kong, the delegate observed that to "instruct the Department to view and translate th[at] content demonstrates that the [plaintiff] is unable or unwilling to address the specific concerns raised in the invitation under s 56 of the Act to provide further information". A similar observation was made in relation to the plaintiff's provision of links to Wikipedia and social media content concerning the alleged opponent of the CCP regime.

Unreasonableness and the obligation to have regard to the evidence

18 One class of visa that the Minister may grant is a protection visa,[7] a criterion of which is that the applicant is a person in respect of whom the Minister is satisfied Australia has protection obligations (or a member of the family unit of such a person).[8] Section 5AAA(2) of the Act provides that it is the responsibility of a non-citizen who claims to be a person in respect of whom Australia has protection obligations to specify all particulars of his or her claim and to provide sufficient evidence to establish the claim.

19 Section 54(1) of the Act obliges the Minister, in deciding whether to grant or refuse to grant a visa, to have regard to all of the information in the application, which includes a document attached to the application when it is made.[9] Section 54(3) provides that a decision to grant or refuse to grant a visa may be made without giving the applicant an opportunity to make oral or written submissions. Section 56(1) provides that "[i]n considering an application for a visa, the Minister may, if he or she wants to, get any information that he or she considers relevant but, if the Minister gets such information, the Minister must have regard to that information in making the decision whether to grant or refuse the visa". Section 58(1) provides that the invitation for additional information made pursuant to s 56 may be given in writing, at an interview, or by telephone.

20 Section 62(1) of the Act provides that, if an applicant for a visa has been invited to give additional information (under s 56) and does not give the information before the time for giving the information has passed, then the Minister may make a decision to grant or refuse the visa without taking any further action to obtain the additional information. Subject to provisions allowing for the suspension of the processing of visa applications of a specified class[10] or limiting the number of visas of a specified class that are granted,[11] s 65(1) obliges the

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7 *Migration Act*, ss 29(1), 35A, 36, 65.

8 *Migration Act*, s 36(2).

9 *Migration Act*, s 54(2)(b).

10 *Migration Act*, s 84.

11 *Migration Act*, ss 85, 86.

Minister to grant a visa if satisfied that the visa criteria have been satisfied.[12] The Minister must refuse the visa if he or she is not so satisfied.[13]

21 Each of ss 56 and 62 confers a discretionary power on the Minster. Those discretionary powers must be exercised reasonably.[14]

22 The plaintiff contended that the decision of the delegate to refuse his application for a protection visa was affected by legal unreasonableness. The plaintiff contended that, given the volume of material supplied by the plaintiff, it was unreasonable for the delegate not to take some further step under s 56 of the Act to address or resolve the "translation issue" prior to making a decision to grant or refuse the visa. The plaintiff contended that, having provided the delegate with the means to interpret the material, it would have been "administratively easy" for the delegate to ask the plaintiff to provide translations of a sample of the material or to interview the plaintiff in the presence of an interpreter who could translate "some of the YouTube content".

23 The defendant submitted that the plaintiff was afforded a clear and reasonable opportunity to provide supporting material in an appropriate form, including through translations by accredited professionals, but failed to do so. The defendant also contended that none of the alternative methods proposed by the plaintiff for translating the material, namely using Google Translate or Twitter's automatic translating features, met the necessary standards of accreditation referred to in the s 56 letter, "and thus the material could not be included as part of the delegate's assessment". The defendant further contended that it was for the plaintiff to provide sufficient evidence to establish his claims and the complaint that the plaintiff should have been offered an interview with an interpreter present is "no more than a disagreement with the delegate's assessment of how best to obtain information".

24 The plaintiff was specifically requested to provide a translated version of the pdf document but declined to do so. It was also open to him to provide a translation of the titles of his videos and a sample of their content, but he chose not to do so. In these circumstances, and where s 5AAA(2) of the Act imposed an obligation on the plaintiff to provide sufficient evidence to establish his claim, we doubt that either the failure of the delegate to exercise the discretion conferred by

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12 *Migration Act*, s 65(1)(a).

13 *Migration Act*, s 65(1)(b).

14 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 351 [29], 362 [63], 370 [88].

s 56 to get further information or the exercise of the discretion conferred by s 62 to make a decision on the application without doing so could be characterised as failing to meet the legal standard of reasonableness.[15]

25 Ultimately, however, it is not necessary to decide that issue because the delegate's decision reveals a breach of different statutory obligations, which, had they been properly complied with, may have led to different exercises of the discretions conferred by ss 56 and 62 and which invalidates the purported refusal of the visa application under s 65.

26 As noted, the effect of s 54 of the Act was that the delegate was obliged to have regard to all the information included in the plaintiff's application for the protection visa. That information included the pdf document, being a document that was attached to the application when the application was made.[16] Similarly, the delegate was obliged to have regard to the s 56 response provided by the plaintiff.[17] Parts of the pdf document and the s 56 response were in English. Although certain substantive parts of the documents were in Mandarin, those parts of the documents appeared to be at least consistent with the English language descriptions of their contents. While it would have been open to the delegate to afford minimal weight to those parts of the documents (and recordings) that were not translated into English, it was not open to the delegate to treat all documents involving untranslated components as having not been "included as part of this assessment" (as the delegate's reasons state). Sections 54 and 56 of the Act obliged the delegate to have regard to those documents. They could not be wholly put aside.

27 The defendant submitted that the statement of the delegate that "[t]herefore, any documents that [were] not translated ... will not be included as part of this assessment" was only referable to so much of the pdf document and the s 56 response that was in Mandarin, and thus the balance written in English was considered. The defendant pointed to aspects of the delegate's decision that summarised the plaintiff's claims, which in the defendant's submission were taken from those parts of those two documents that were written in English, and which were said to demonstrate that the delegate had regard to the English language portions of the relevant documents.

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15 See *Li* (2013) 249 CLR 332 at 351 [29], 362 [63], 370 [88].

16 *Migration Act*, s 54(2)(b).

17 *Migration Act*, s 56(1).

28 There are three related difficulties with this contention. First, the statement of the delegate in his reasons was that "any documents" that were not translated would not be included as part of the assessment. That statement was not confined to parts of documents. Second, even absent translation, the thumbnail images with Mandarin writing in the pdf document[18] and the embedded links in the s 56 response were capable of providing some support for the plaintiff's claims. The obligation imposed by s 54 of the Act was to "have regard to all of the information in the application", which in this case meant the entirety of the documents and not just the English words separated from the balance of the documents. The obligation imposed by s 56 to have regard to the s 56 response was not substantively different. Third, even if the delegate reviewed the pdf document and the s 56 response to identify the plaintiff's "claims for protection", the delegate nevertheless failed to have regard to "*all* of the information in the application"[19] (including the pdf document) and the information in the s 56 response *in deciding whether to grant or refuse to grant the visa* and thereby failed to comply with ss 54 and 56 of the Act.

29 If these failures to comply with ss 54 and 56 were established the defendant accepted that they were material and thus jurisdictional errors. That concession was properly made; there is a realistic possibility that the decision that was in fact made could have been different if the error(s) had not occurred.[20] It would have been open to the delegate to afford those documents weight in the evaluation of whether the visa criteria were satisfied. Further, as noted, had the delegate appreciated that some regard had to be had to those documents, the delegate may have again exercised the power conferred by s 56, and exercised the power conferred by s 62 differently.

Extension of time

30 Section 486A(1) of the Act provides that an application to this Court for a remedy to be granted in exercise of this Court's original jurisdiction in relation to a migration decision, such as the decision made by the delegate, must be made within 35 days of the decision. Section 486A(2) enables this Court to extend that 35 day period if (a) "an application for that order has been made in writing ... specifying why the applicant considers that it is necessary in the interests of the

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18 See [10] above.

19 *Migration Act*, s 54(1) (emphasis added).

20 *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321 at 327 [7].

administration of justice to make the order; and (b) this Court "is satisfied that it is necessary in the interests of the administration of justice to make the order".

31 In the case of the plaintiff, the 35 day period referred to in s 486A(1) ended on 17 September 2024. As noted, the application for a constitutional or other writ was not filed in this Court until 3 April 2025. An extension of the 35 day period by a period of many months has been described by this Court as "exceptional".[21]

32 Rule 25.02.1 of the *High Court Rules* provides that an application for a writ of mandamus "must be filed within 2 months after the day of the" relevant refusal to hear and determine a matter. Rule 25.02.2 requires that an application for a writ of certiorari must be filed "within 6 months after the day the decision sought to be quashed was made", or within a shorter period as any other law may require. Section 486A(1) of the Act is such a law. Otherwise, r 4.02 provides that any period of time fixed by or under the *High Court Rules* may be enlarged or abridged by an order of the Court or a Justice, whether made before or after the expiration of the time fixed. For this matter it suffices to observe that, if the Court is satisfied pursuant to s 486A(2)(b) of the Act that it is in the interests of the administration of justice to extend the time for the making of the application until 3 April 2025, then, to the extent necessary, an appropriate order under r 4.02 would be made.

33 For the purposes of s 486A(2)(a), the plaintiff's posited reasons for which he considers it necessary in the interests of the administration of justice to make an order for an extension of time comprise: the merit of his substantive application; the lack of prejudice to the Minister; and his explanation for the delay as summarised above. Those matters also bear upon whether it is necessary in the interests of the administration of justice to extend the 35 day period.[22]

34 We have already concluded that the delegate's decision is affected by jurisdictional errors. In written submissions, the defendant criticised the plaintiff's explanation that he overlooked the email notification of the delegate's decision because it was allocated to his junk email folder. It is noteworthy, however, that there is no evidence that the plaintiff only took action in respect of the refusal of his application for a protection visa because of any threatened enforcement action. Once apprised of the decision, the plaintiff filed an application with the Administrative Appeals Tribunal to extend the time for making an application for

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21 *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.

22 *Ex parte Marks* (2000) 75 ALJR 470 at 473-474 [13]; 177 ALR 491 at 495.

merits review of the delegate's decision, although that application was out of time and invalid. Upon suspecting that the application was out of time and invalid, he retained solicitors in late December 2024.

35 The period between the retention of solicitors and the commencement of proceedings was not consistent with the appropriate level of expedition that can be expected in the circumstances. Even so, when the plaintiff's explanation is considered with our findings in relation to the validity of the delegate's decision, we are satisfied that it is necessary in the interests of the administration of justice to grant an extension of the 35 day period up to and including 3 April 2025.

Costs

36 The plaintiff was out of time to bring the proceedings. The basis for the finding of jurisdictional errors was raised by the Court with the parties. In those circumstances there should be no order as to costs.

Relief

37 The following orders should be made:

(1) The time for the making of the application for a constitutional or other writ be extended up to and including 3 April 2025.

(2) A writ of certiorari issue quashing the decision made by the delegate of the defendant on 13 August 2024 to refuse to grant the plaintiff a protection visa.

(3) A writ of mandamus issue commanding the defendant to determine the plaintiff's application for a protection visa according to law within 14 days of this order.

(4) There be no order as to costs.