HIGH COURT OF AUSTRALIA

GORDON J

ASHISH LAMA PLAINTIFF

AND

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS DEFENDANT

[2025] HCASJ 13
Date of Hearing: 21 February 2025
Date of Judgment: 6 March 2025
P36 of 2024

ORDER

1. *The plaintiff's application filed on 30 October 2024 for a constitutional or other writ is dismissed with costs.*

Representation

S L Frankel for the plaintiff (instructed by Estrin Saul Lawyers)

C M R Ernst for the defendant (instructed by Australian Government Solicitor)

1 GORDON J. On 5 September 2023, the plaintiff ("Mr Lama") lodged an application for a Temporary Graduate (class VC) Temporary Graduate (subclass 485) visa ("the Visa") on the basis of completing his studies on a Student (subclass 500) visa. The defendant, the Minister, must only grant the Visa under the *Migration Act 1958* (Cth) if satisfied, amongst other things, that the criteria prescribed by the *Migration Regulations 1994* (Cth) ("the Regulations") have been satisfied.[1] Relevantly, the Regulations prescribe that an application for the Visa must be accompanied by evidence that the applicant had applied for an Australian Federal Police ("AFP") check in the 12 months before the application was made[2] and that the applicant is required to satisfy public interest criteria 4001.[3]

2 Regulation 2.03AA of the Regulations relevantly provides that:

> "(1) ... if a person is required to satisfy public interest criteria 4001 or 4002 for the grant of a visa, the criterion in subregulation (2) is prescribed.
>
> (2) *If the Minister has requested the following documents or information*, the person has provided the documents or information:
>
> (a) *a statement (however described) provided by an appropriate authority in a country where the person resides, or has resided, that provides evidence about whether or not the person has a criminal history;*
>
> (b) a completed approved form 80.
>
> Note: For paragraph (a), an example of an appropriate authority is a police force.
>
> (3) The Minister may waive the requirement in paragraph (2)(a) if the Minister is satisfied that it is not reasonable for the applicant to provide the statement." (emphasis added)

3 In his application for the Visa, in response to the question whether he had ever been charged with an offence that is currently awaiting legal action, Mr Lama answered "yes". The offence type was described as "assault" although Mr Lama said he had been "wrongly accused". As part of the application, Mr Lama provided

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

2 Clause 485.213(1) of Sch 2 to the Regulations.

3 Clause 485.216 of Sch 2 to the Regulations.

an AFP National Police Check ("NPC") headed "Immigration/Citizenship – Australia – Name check only" dated 8 April 2021.[4]

4 On 20 September 2023, the Department of Home Affairs ("the Department") sent a letter by email to Mr Lama requesting that he provide a current AFP NPC as the certificate provided with his application had expired. Importantly, there was a document enclosed with the letter headed "Request detail; Australian Federal Police (AFP) National Police Certificate". Under that heading, Mr Lama was told that the application form to be used to obtain the certificate was on the AFP website. The website address was set out. Further instructions about how to complete the form were then provided, followed by the statement that:

> "For the purpose of the check, use code 33 'Immigration/Citizenship - for supply to the Department of Home Affairs'. *This will ensure you receive the correct certificate titled 'Immigration/Citizenship - Australia'*." (emphasis added)

The NPC headed "Immigration/Citizenship - for supply to the Department of Home Affairs" will be referred to in these reasons as the "Code 33 NPC".

5 On 26 September 2023, Mr Lama did not provide the Department with a Code 33 NPC. Instead, Mr Lama provided a Code 35 NPC headed "Overseas Visa – Supply to a Country other than Australia – Name Check Only". That NPC certified that there were "no disclosable court outcomes" recorded against his name. It will be necessary to return to consider the purpose and content of a Code 33 NPC and a Code 35 NPC.

6 On 13 November 2023, the Department emailed a letter to Mr Lama stating that the NPC he had provided, being a Code 35 NPC, was "insufficient" and requesting a new NPC headed "Immigration/Citizenship – Australia", being a Code 33 NPC. The emailed letter again included the same page headed "Request detail" which had been provided to Mr Lama in September 2023.

7 On 20 December 2023, the Department again emailed a letter to Mr Lama stating that "[w]e need more information to help us assess your application". The letter again stated that the NPC Mr Lama had provided was "insufficient" and requested a new NPC headed "Immigration/Citizenship – Australia", a Code 33

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4 The application for a constitutional or other writ filed by the applicant incorrectly referred to this document as being an "Overseas Visa – Supply to a Country other than Australia – Name Check Only", referred to in these reasons as a "Code 35 National Police Certificate or Code 35 NPC".

NPC.[5] Again, the letter directed Mr Lama to "follow the instructions below to obtain the correct certificate" and under the heading "Request detail" provided the same information which had been provided to Mr Lama in September and November 2023.

8 On 22 January 2024, Mr Lama's visa application was refused by a delegate of the Minister for Home Affairs ("the delegate") who formed the view that Mr Lama had failed to meet the requirements of para 2.03AA(2)(a) of the Regulations because he had "not provided the required documentation that provides evidence about whether or not the person has a criminal history". In short, Mr Lama had provided a Code 35 NPC, not a Code 33 NPC.

9 On 30 October 2024, Mr Lama filed in this Court an application for a constitutional or other writ seeking review of the delegate's decision. The parties correctly agree that this Court cannot remit the matter in accordance with s 476B of the *Migration Act* as the Federal Circuit and Family Court of Australia (Division 2) and the Federal Court of Australia do not have jurisdiction.[6]

10 In addition to an extension of time to file the application for a constitutional or other writ, Mr Lama seeks: a writ of certiorari to quash the decision of the delegate to refuse Mr Lama the Visa; a writ of mandamus requiring the Minister to decide the application according to law; and ancillary relief. The writ identifies a single ground: that the delegate failed to consider relevant material, namely a police clearance certificate issued by the AFP, when determining whether Mr Lama met reg 2.03AA of the Regulations.

11 In support of the application for the constitutional or other writ, Mr Lama's solicitor filed an affidavit in this Court exhibiting a copy of the AFP NPC application form. The form contains nine sections: 1 (Type of check required); 2 (Fingerprints (Optional)); 3 (Details of Applicant); 4 (Other names you have used); 5 (Current & Previous Residential Addresses); 6 (Mailing Address for Police Certificate); 7 (Payment Details); 8 (Purpose of Check); and 9 (Applicant's consent). For present purposes, it is sufficient to focus on sections 8 and 9.

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5 The Department also requested that Mr Lama provide a Form 1221 headed "Additional personal particulars information"; a Form 80 headed "Personal particulars for assessment including character assessment"; and police clearance certificates from each country where Mr Lama had lived for a total of 12 months or more in the last 10 years.

6 The Federal Circuit and Family Court of Australia (Division 2) has no jurisdiction in relation to a "primary decision": see ss 338(2), 476(2)(a), 476(4), 476B(3) of the *Migration Act*. Further, the decision is not within the limited jurisdiction conferred on the Federal Court by s 476A(1)(b) or (c) of the *Migration Act*.

12 In Section 8, "Purpose of Check", the form states that "[i]f the purpose for your NPC is not listed or you are unsure please call the National Police Check Help Desk" on an identified number during specified hours. A number of codes are then listed. The "Commonwealth Employment / Purpose" for each code is specified. Relevantly, the form records:

Code Number	**Commonwealth Employment/Purpose**	**Offences recorded in the Commonwealth that will be released (Part VIIC Crimes Act 1914)**
...		
33	Immigration/Citizenship – for Supply to the Department of Home Affairs	All Commonwealth offences. Other State/Territory offences as legislation permits.
35	Overseas Visa - Supply to a Country Other than Australia	All Commonwealth offences. Other State/Territory offences as legislation permits.
...		

13 Section 9, headed "Applicant's consent", which an applicant for a NPC must sign, states, in part:

> "i. I acknowledge I have read all the instructions while completing this application and I am aware exclusions from spent convictions legislation may apply to some categories of NPCs.
>
> ...
>
> iv. I consent to the AFP and any other Australian police force extracting details of any convictions, findings of guilt or pending court proceedings relating to me, including in relation to any traffic offence, and *providing that information* to me or *to the Employer/Organisation named in Section 6*.
>
> v. I acknowledge the information provided in this application will not be used without my prior consent for any other purpose, unless otherwise authorised by law." (emphasis added)

Issues and parties' submissions

14 The application raises two issues: first, the proper construction of reg 2.03AA(2)(a) and, second, whether the Code 35 NPC provided by Mr Lama responded to the delegate's request and satisfied reg 2.03AA(2)(a).

15 It is common ground that Mr Lama did not provide the Code 33 NPC that was requested by the delegate.

16 Counsel for Mr Lama properly accepted that a purpose of the request by the delegate under reg 2.03AA(2)(a) for a statement from an appropriate authority about a person's criminal history was to enable the delegate to obtain evidence about whether or not the applicant for a visa has a criminal history.[7] Mr Lama did not contest the Minister's submission that this requires a comprehensive account of the applicant's criminal history including spent convictions, but submitted that the regulation does not prescribe how that information is to be provided, and that the Code 35 NPC he provided on 26 September 2023 was capable of satisfying reg 2.03AA(2)(a).

17 Mr Lama submitted that, although the NPCs have two different titles, in practice they are materially the same and both provide complete accounts of a person's criminal history, including spent convictions. That submission is based on an assertion that the information that will be released for both the Code 33 NPC and Code 35 NPC checks include spent convictions because both specify "[a]ll Commonwealth offences. Other State/Territory offences as legislation permits" in the AFP NPC application form. Mr Lama also submitted that, where he provided a Code 35 NPC, it was not open to the delegate not to consider the substance of that NPC. Mr Lama submitted that the delegate's error in rejecting the Code 35 NPC by reference to its heading was a material error because the delegate should have concluded that the Code 35 NPC was a full disclosure of Mr Lama's criminal history.

18 In response, counsel for the Minister submitted that under reg 2.03AA(2)(a), if the Minister or their delegate decided to request specific documents or information that provides evidence of an applicant's criminal history, so long as that request was properly characterised as a request under reg 2.03AA(2)(a), the applicant was required to provide documents or information of that kind and in the form requested. And the failure of Mr Lama to do so was a complete answer to Mr Lama's application for a constitutional writ.

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7 See also Explanatory Statement, *Migration Amendment (2014 Measures No. 2) Regulation 2014*, at 1 and Attachment C under the heading "Item [3] - After regulation 2.03A".

19 Counsel for the Minister further submitted that the NPC Mr Lama in fact provided did not substantively respond to the delegate's request because the document that Mr Lama requested and provided to the Department, being the Code 35 NPC, did not evidence Mr Lama's complete criminal history.

20 That latter submission requires some further explanation. As an applicant acknowledges when completing the AFP NPC application form, the applicant must: provide their consent to their criminal history being disclosed in an NPC and, in so doing, (i) expressly acknowledge that "exclusions from spent convictions legislation *may apply to some categories of NPCs*"; (ii) consent to the AFP and any other Australian police force extracting details of any convictions, findings of guilt or pending court proceedings relating to the applicant, including in relation to any traffic offence, and *providing that information* to the applicant or *to the Employer/Organisation named in Section 6* of the AFP NPC application form; and (iii) finally, acknowledge that the information provided in the application will not be used without the applicant's prior consent for any other purpose, unless authorised by law. The three limbs are interconnected. The applicant's consent to and acknowledgement of these matters reinforces that the form and purpose of the NPC requested will necessarily determine not only the entity to which the NPC will be directed but what is disclosed.

21 It was common ground that, in substance, although the spent convictions legislation in Victoria,[8] South Australia[9] and Tasmania[10] prohibit disclosure of spent convictions, each Act contains an exception for immigration or citizenship checks by the Department, but that exception does not extend to immigration or citizenship checks by a foreign government.

22 In other words, by applying for a Code 35 NPC, Mr Lama provided his consent for his criminal history to be disclosed *only* for the more limited extent that the State and Territory laws permitted disclosure to a country other than Australia. Put another way, Mr Lama did not consent to disclosure of his criminal history, to the extent permitted by law, for the purpose of immigration checks by the Department.

23 Mr Lama's response was that the exemptions are not relevant as in applying for a NPC, a person makes a request for their own criminal history to be provided

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8 *Spent Convictions Act 2021* (Vic), ss 20(1)(c) and 22(1) read with s 3 definition of "law enforcement agency".

9 *Spent Convictions Act 2009* (SA), ss 11(1) and 13(1), Sch 1 item 2(c).

10 *Annulled Convictions Act 2003* (Tas), s 11(2) and (3) read with s 3(1) definition of "Justice Agency".

directly to them and that Mr Lama could have been provided with his own criminal history (including spent convictions). That does not assist Mr Lama because the consent he provided to the AFP for the release of his criminal history was constrained. The fact remains he applied for a Code 35 NPC – a form that is received by the AFP when a person wants to obtain their criminal history for the particular purpose of supply to an overseas country. Unfortunately, that was not the purpose for which Mr Lama needed an NPC. And, as has been explained, the different purposes of the different forms meant different inquiries by, and restrictions on, the AFP and therefore a different NPC being provided by the AFP.

Extension of time

24 Mr Lama requires an extension of more than 230 days for the filing of the application for a constitutional or other writ.[11] Mr Lama submitted he should be granted an extension of time for the following reasons:

(1) The Visa was refused on 22 January 2024 but Mr Lama did not become aware until 14 February 2024 as the email with the refusal went to his spam folder.

(2) Mr Lama lodged his application for merits review with the Administrative Appeals Tribunal on 19 February 2024 after becoming aware of the delegate's decision. The application for merits review was out of time.

(3) Mr Lama sought legal advice from several different agencies after becoming aware of the Administrative Appeals Tribunal having no jurisdiction. However, Mr Lama was dealing with a separate legal matter that he focused on finalising first due to its seriousness.

(4) Mr Lama did not initially get advice that he could appeal his matter to the High Court. On 30 July 2024, Mr Lama engaged lawyers who advised him of the possibility of making an application to this Court. Once they formed the view the application to this court had reasonable prospects of success, Mr Lama instructed them to lodge an application.

(5) This explanation for delay is satisfactory considering the novel legal issue and complexity of lodging an application in this Court.

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11 The application was required to be brought within 35 days of the refusal decision, which would have been 26 February 2024: s 486A(1) of the *Migration Act* read with the *High Court Rules 2004* (Cth), r 25.02.2(b).

25 The Minister submitted that, given the length of the extension sought, the Court must be persuaded that the case is "exceptional".[12] The Minister submitted that Mr Lama has not adequately explained the delay for two reasons. First, the fact that Mr Lama was dealing with a separate legal matter does not explain why he could not seek advice on the refusal decision. Second, the "complexity of lodging a High Court application" and the need for research and drafting does not explain the elapse of almost three months between when Mr Lama's solicitors were engaged and the application was filed. Given this, and the weakness of the merits, the Minister submitted the extension of time should be refused. It is appropriate to address the merits of the matter.

No arguable basis for relief

26 The plaintiff's single proposed ground of review – that the delegate failed to consider relevant material, namely a police clearance certificate issued by the AFP, when determining whether Mr Lama met reg 2.03AA – does not disclose an arguable basis for relief. It may be accepted that Mr Lama provided a Code 35 NPC issued by the AFP and that the delegate rejected that certificate.

27 However, as the Minister submitted, there are two responses to Mr Lama's application. First, as a matter of construction, reg 2.03AA(1), in its terms, provides that where a person, such as Mr Lama, is required to satisfy the public interest criteria 4001 for the grant of a visa, then reg 2.03AA(2) "prescribes" that:

> "*If the Minister has requested the following documents or information*, the person has provided the documents or information:
>
> (a) *a statement (however described) provided by an appropriate authority in a country where the person resides*, or has resided, that *provides evidence about whether or not the person has a criminal history*" (emphasis added)

28 Here, the delegate prescribed Code 33 NPC from the AFP because that form of NPC provided the delegate with evidence by an appropriate authority in Australia (where Mr Lama resided) of whether or not Mr Lama has a criminal history. There was nothing to suggest that the AFP was not an appropriate authority or that in making the request the delegate was not acting reasonably.[13] Not only did the delegate request a specific document – a Code 33 NPC – on at least three

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12 *Vella v Minister for Immigration & Border Protection* (2015) 90 ALJR 89 at 90 [3]; 326 ALR 391 at 392.

13 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 351 [29], 362 [63], 370 [88]. See also *Kruger v The Commonwealth* (1997) 190 CLR 1 at 36.

occasions, the delegate provided Mr Lama with the AFP's web address and instructions as to how to obtain a Code 33 NPC.

29 Second, the difficulty for Mr Lama is that the Code 35 NPC did not, because it could not, provide the information requested in reg 2.03AA(2)(a) of the Regulations. As explained, the extent of the inquiry undertaken and then the extent of the disclosure by the AFP was required to be and was necessarily constrained under a Code 35 NPC compared to that undertaken by the AFP for a Code 33 NPC. The fact remains that, for the purpose of the check being undertaken by the delegate under the *Migration Act*, Mr Lama did not provide the required documentation that provides evidence about whether or not he has a criminal history.

Conclusion and orders

30 For those reasons, the application for a constitutional or other writ filed on 30 October 2024 is dismissed with costs.