

HIGH COURT OF AUSTRALIA

GLEESON J

PLAINTIFF M114/2024

PLAINTIFF

AND

MINISTER FOR IMMIGRATION, CITIZENSHIP,
AND MULTICULTURAL AFFAIRS

DEFENDANT

[2025] HCASJ 15

Date of Judgment: 18 March 2025

M114 of 2024

ORDERS

- The plaintiff's amended application filed on 8 January 2025 for a constitutional or other writ is dismissed.*
- The plaintiff pay the defendant's costs.*

Representation

The plaintiff is represented by Russell Kennedy Lawyers

The defendant is represented by the Australian Government Solicitor

1 GLEESON J. The plaintiff is a citizen of Papua New Guinea ("PNG"). On
6 February 2020, she arrived in Australia on a Visitor Visa (FA 600), and on
27 October 2023, she lodged an application for a protection visa. Her protection
claims were expressed to be "driven by a deeply distressing and traumatic
experience of continuous attack, abuse, and domestic violence perpetrated by her
ex-husband" in PNG. The plaintiff's application to this Court alleges that the
protection visa application "also outlined more broadly [the plaintiff's] fear of
remaining vulnerable to violent and powerful men and stated that this fear was
rooted in the cultural and social dynamics that perpetuate gender-based violence
in PNG".

2 On 9 February 2024, the plaintiff's application for a protection visa was
refused by a delegate of the defendant because the delegate was not satisfied that
the plaintiff is a person in respect of whom Australia has protection obligations for
the purposes of the *Migration Act 1958* (Cth) ("*Migration Act*").

3 The plaintiff has not sought merits review of the delegate's decision. She
would now be out of time to do so. The delegate's decision was a "primary
decision" for the purposes of s 476(4) of the *Migration Act*, so that neither the
Federal Circuit and Family Court of Australia (Div 2) nor the Federal Court of
Australia has jurisdiction to hear an application for judicial review of that
decision.¹ That being so, Parliament has also prevented this Court from remitting
a proceeding such as this, commenced in its original jurisdiction, to those courts.²

4 On 23 December 2024, the plaintiff filed an application for a constitutional
or other writ seeking: (1) an extension of time within which to apply to this Court
for judicial review of the delegate's decision;³ (2) an enlargement of time for filing
an application for writs of mandamus and certiorari;⁴ (3) that a writ of certiorari
issue to quash the delegate's decision to refuse the plaintiff's protection visa
application; (4) that a writ of mandamus issue directed to the defendant requiring
him to determine the matter according to law; and (5) costs. On 8 January 2025,
the plaintiff filed an amended application which made minor typographical
changes to the application.

5 Having read the amended application, the defendant's response to the
application and the plaintiff's reply, as well as affidavits made by the plaintiff's

¹ *Migration Act 1958* (Cth), ss 476 and 476A.

² *Migration Act 1958* (Cth), s 476B. See also *MZXOT v Minister for Immigration and
Citizenship* (2008) 233 CLR 601 at 616 [13], 660-661 [191].

³ *Migration Act 1958* (Cth), s 486A(2).

⁴ *High Court Rules 2004* (Cth), r 4.02, r 25.02.1 and 25.02.2.

lawyer, Hannah Dickinson on 20 December 2024 and 4 March 2025, and by the defendant's lawyer, Adrian Downie, on 30 January 2025, I have concluded that it is appropriate for the amended application to be decided on the papers.⁵

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

Principles relevant to an application to extend time

Section 486A(1) of the *Migration Act* provides that "[a]n application to the High Court for a remedy to be granted in exercise of the court's original jurisdiction in relation to a migration decision must be made to the court within 35 days of the date of the migration decision". Because the delegate made their decision on 9 February 2024, that time limit expired on 15 March 2024. The time limits in r 25.02 of the *High Court Rules 2004* (Cth) for the filing of an application for writs of mandamus and certiorari expired, respectively on 9 April 2024⁶ and 9 August 2024.⁷

The defendant opposes the grant of an extension of time.

The principles relevant to the grant of an extension of time are well-settled. As Gageler J explained in *Vella v Minister for Immigration and Border Protection*,⁸ the "critical question" is whether I am satisfied 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. The explanation of the delay in seeking to file the application and the underlying merits of the application are important considerations, as well as the consequences for the plaintiff of a grant or refusal of the extension.⁹ As the writs sought are directed to the decision of a public official, it is relevant to take into account the public interest in timely disposition of litigation concerning such a decision.¹⁰

⁵ *High Court Rules 2004* (Cth), rr 25.09.1, 25.09.2.

⁶ *High Court Rules 2004* (Cth), r 25.02.1.

⁷ *High Court Rules 2004* (Cth), r 25.02.2(a).

⁸ (2015) 90 ALJR 89 at 90 [3].

⁹ cf *Re Commonwealth of Australia; ex parte Marks* (2000) 75 ALJR 470 at 474 [15].

¹⁰ cf *Re Commonwealth of Australia; ex parte Marks* (2000) 75 ALJR 470 at 474 [15].

3.

10 The delay in this case is substantial. A delay of that kind generally requires the identification of "exceptional" circumstances to justify extending the applicable time limits.¹¹

Explanation of the delay

11 The plaintiff relies on Ms Dickinson's first affidavit to explain the delay in filing the application. That relevant facts deposed to are that: (1) after the protection visa application was refused on 9 February 2024, the plaintiff was significantly "affected"; (2) the plaintiff "did not understand the refusal decision or how to take further steps including seeking review ... [she] did not know how or where to seek legal advice"; (3) after asking "people in the community", the plaintiff sought assistance from Refugee Legal on 8 May 2024. Refugee Legal contacted the plaintiff's current solicitors on 25 June 2024 seeking *pro bono* legal assistance. On 5 July 2024, the plaintiff's solicitors opened a file; (4) on 26 July 2024 a freedom of information request was made on the plaintiff's behalf seeking documents relevant to the refusal decision. On 27 November 2024, documents responsive to that request were provided to the plaintiff's solicitors; (5) after a transcript was made of the plaintiff's protection visa interview, on 6 December 2024 the plaintiff's solicitors wrote to the Department of Home Affairs alleging jurisdictional error in the refusal decision; and (6) after an unfavourable response from the Department dated 17 December 2024, these proceedings were commenced on 23 December 2024.

12 This explanation of the delay is materially incomplete. It does not reveal when the plaintiff or her advisors became aware of the time limits for filing the application. To delay bringing proceedings which were already out of time on account of a freedom of information request is unsatisfactory. There is no explanation for why the plaintiff was unable to provide the instructions to commence the proceedings in early July 2024.

Merits of the plaintiff's arguments

13 In the face of the incomplete explanation for the delay in filing the application, the strength of the plaintiff's claim for relief is critical to a conclusion that it is necessary to grant the extensions of time sought by the plaintiff.

14 The plaintiff relies on two grounds to demonstrate error on the part of the delegate. The first ground is that the delegate failed to consider a claim that clearly arose on the material before it. The second ground is that the delegate failed to comply with s 57(2)(b) of the *Migration Act* in relation to adverse information the

¹¹ *Gallo v Dawson* (1990) 64 ALJR 458 at 459.

delegate put to the plaintiff. The plaintiff's case is that either of those grounds, if accepted, demonstrates jurisdictional error on the part of the delegate.

Alleged failure to consider a claim

15 The alleged claim is that the plaintiff faced a real risk of persecution by reason of her membership of a particular social group, being women in PNG and/or single women in PNG and/or women in PNG without male protection and/or single women in the PNG Highlands.

16 The delegate's decision record did not identify the alleged claim as one of the plaintiff's claims. However, the delegate considered country information, published by the Department of Foreign Affairs and Trade, concerning dangers for women and girls in PNG noting, among other things that women and girls are subject to high levels of primarily family-centred gender-based violence, and that police responses are usually inadequate. The delegate noted that women living in the Highlands provinces are at particular risk, although violence against women occurs nationwide. The delegate made the following finding:

"While the [plaintiff] is a divorced single woman, I have not accepted that she is being targeted by her ex-husband or his family members. She has not made claims of being targeted by or fearing any other party. She has resided with her mother whilst living in PNG and has been supported by her as stated at the interview that her mother is looking after her children.

After careful consideration of all the information before me and as discussed above, I find that if the [plaintiff] was to return to PNG, she would not face a real chance of persecution now or in the foreseeable future."

17 The delegate was required to consider claims that clearly arose on the material before them;¹² the plaintiff was not required to pick the correct "label" to describe her claims;¹³ and the failure to consider a claim that clearly arose on the material can amount to a constructive failure to exercise jurisdiction.¹⁴

18 The delegate addressed the issue of whether the applicant herself faced a real risk of persecution in PNG by reason of her situation as a divorced, single

¹² *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582 at 599-600 [25]-[27].

¹³ *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at 1100 [78].

¹⁴ See, eg, *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at 1092 [24].

woman, including after adverting to the risks for women generally in the PNG Highlands. The plaintiff's claims were not rejected on the basis that the plaintiff was not a member of a relevant social group, or on the basis that any such group did not exist. The plaintiff did not explain why defining the particular social group in any of the four alternative ways now asserted was necessary to determining whether she, as a member of that group, has a well-founded fear of prosecution.¹⁵

19 In those circumstances, and cognisant of the well-established principle that one ought not construe decisions under review with an "eye keenly attuned to the perception of error",¹⁶ the contention that the delegate constructively failed to exercise her jurisdiction in relation to the unidentified claim is, in my view, weak.

Alleged failure to comply with Migration Act s 57(2)(b)

20 Section 57(2)(b) required the delegate to ensure, as far as is reasonably practicable, that the plaintiff understood why "relevant information" was relevant to consideration of her protection visa application. Section 57(1) defines "relevant information" by reference to three criteria including, relevantly, that the Minister (or their delegate) considers the information: "(a) would be the reason, or part of the reason for refusing to grant a visa; and ... (c) was not given by the [plaintiff] for the purpose of the application".

21 The plaintiff contends that the delegate put two pieces of information to her for comment without ensuring that the plaintiff understood the relevance of the information. The two pieces of information are: (1) that the plaintiff had been in Australia in 2019 (when she originally claimed to have first arrived in Australia in 2020); and (2) that the plaintiff had arrived in 2020 but not applied for a protection visa until 2023. The delegate made the following finding concerning the information:

"I am not satisfied that [the plaintiff] has provided a reasonable explanation to address my concerns regarding the adverse information presented to her and the delay in lodgement."

22 The plaintiff contends that the delegate was incorrect about the timing of the plaintiff's application for a protection visa: she had applied on 29 April 2020 but the application was deemed invalid on 6 May 2021 due to a failure to comply with s 46(2A) of the *Migration Act*. Further, the argument goes, had the delegate done more to explain the importance of the information and its potential impact on

¹⁵ cf *Applicant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 at 486 [31].

¹⁶ *Collector of Customs v Pozzolanic* (1993) 43 FCR 280 at 287, cited in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272.

her protection visa application, the plaintiff may have provided a more detailed response to the delegate's concerns by way of outlining her previous protection visa application "and other immigration activity" and the plaintiff may have been alerted to a need to respond to the delegate's doubts concerning the plaintiff's credibility.

23 Although the delegate treated the first piece of information as "adverse information", there is a threshold question as to whether it meets the statutory description of "relevant information" for the purposes of s 57 of the *Migration Act*. Rather, the information is neutral and does not contain in its terms "a rejection, denial or undermining of the [plaintiff's] claims" to satisfy the criteria for a protection visa. It is not information that is "in its terms ... of such significance as to lead the [delegate] to consider in advance of reasoning on the facts of the case that the information of itself 'would', as distinct from 'might', be the reason or part of the reason for refusing to grant the visa".¹⁷ Further, it is strongly arguable that the delegate did not need to do more to explain the relevance of the first piece of information, because the delegate identified it as information that was inconsistent with the plaintiff's earlier statement that she had never been to Australia before 2020.

24 As to the second piece of information, it comprises an inference drawn from information given to the delegate by the plaintiff. It is arguable that the (incorrect) inference of delay from two neutral facts is not distinct information in the sense that it says nothing of itself about whether the conditions for the grant of the visa were met.¹⁸ In any event, it is strongly arguable that the delegate did not need to do more to explain the relevance of the second piece of information because the relevance was implicitly identified by the delegate's questions to the plaintiff.

Conclusion

25 The merits of the plaintiff's proposed grounds are weak. The plaintiff's explanation for her delay in filing the application is incomplete. In those circumstances, I am not satisfied that it is necessary in the interests of the administration of justice to make the orders extending the time periods for the making of the application. Accordingly, the amended application is dismissed. The plaintiff should pay the defendant's costs.

¹⁷ *Minister for Immigration and Citizenship v SZLFX* (2009) 238 CLR 507 at 513 [22], cited in *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 223 [9].

¹⁸ *SZGIY v Minister for Immigration and Citizenship* [2008] FCAFC 68 at [27].