

HIGH COURT OF AUSTRALIA

EDELMAN J

SHU YUEN LAM

PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND
CITIZENSHIP & ANOR

DEFENDANTS

[2026] HCASJ 21

Date of Judgment: 20 July 2026

S36 of 2026

ORDERS

1. *Pursuant to r 28.01.2(c) of the High Court Rules 2004 (Cth), the amended application for a constitutional or other writ filed 24 June 2026 is summarily dismissed.*
2. *The plaintiff pay the costs of the first defendant.*

Representation

The plaintiff is unrepresented

The first defendant is represented by MinterEllison

Submitting appearance for the second defendant

EDELMAN J.

This application

1 The plaintiff brings this application in this Court's original jurisdiction seeking an extension of time to obtain orders including orders to quash a series of decisions from which the appeal process (including applications for extensions of time to appeal) has not been exhausted: (i) a decision of a delegate of the first defendant, the Minister for Immigration and Citizenship (described in these reasons as the "second delegate"); (ii) a decision of the second defendant, the Administrative Review Tribunal (at the time known as the Administrative Appeals Tribunal but described in either event in these reasons as the "Tribunal"); and, after amendments to his application, (iii) a decision of the Federal Circuit and Family Court of Australia (Division 2). Even before the amendments to his application, the extensions of time required in respect of the second delegate's decision and the Tribunal decision were, respectively, nearly seven years (2547 days) and more than five years (1952 days).

2 The plaintiff's application to quash the decision of the Tribunal cannot be remitted by this Court, although the plaintiff could have brought an application for an extension of time within which to appeal to the Federal Court of Australia from the dismissal by the Federal Circuit and Family Court (Division 2) of the judicial review application in respect of the Tribunal decision. Whether or not the plaintiff's application to quash the decision of the Federal Circuit and Family Court (Division 2) falls within the jurisdiction and power of, and is therefore capable of being remitted to, the Federal Court,¹ no court other than this Court has jurisdiction in relation to the plaintiff's application to quash the decision of the second delegate² and that issue cannot be remitted by this Court.³ On the basis that the facts do not disclose any court to which the plaintiff's application to quash the decision of the second delegate could be remitted, it is appropriate that the entire application be determined by this Court.

3 For the reasons below, this application is an abuse of process. Rather than following the usual appellate process of bringing an application for an extension of time to appeal from the decision of the Federal Circuit and Family Court (Division 2), and rather than focusing upon the decision of the Tribunal which has

¹ *Federal Court of Australia Act 1976* (Cth), s 23, if the court otherwise has jurisdiction (for example, under *Judiciary Act 1903* (Cth), s 39B(1A)(c)).

² See *Migration Act 1958* (Cth), s 338(2) read with ss 476(2)(a), 476(4). Compare s 476A. See also *Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Act 2024* (Cth), Sch 16, cl 42.

³ *Migration Act*, s 476B.

extant legal effect instead of the decision of the second delegate which does not, the plaintiff seeks to circumvent that process and to obtain orders in this Court to quash, for jurisdictional error, each of the decisions of the second delegate, the Tribunal, and the Federal Circuit and Family Court (Division 2).

Background

4 The background to this matter is set out in the plaintiff's application and affidavit material and in the decisions the subject of the plaintiff's application. The background was not in dispute.

5 On 30 November 2015, the plaintiff applied for a Subclass 485 (Temporary Graduate) visa.⁴ On 18 March 2016, the first delegate of the Minister refused the plaintiff's visa application. Since the plaintiff's attempt to bring an application for merits review of that decision to the Tribunal was out of time, the Tribunal determined that it had no jurisdiction. Since no court other than this Court had jurisdiction to review the decision of the first delegate, the plaintiff ultimately filed an application for a constitutional or other writ in respect of the first delegate's decision in this Court. The decision was quashed by Nettle J and the matter was remitted to the Minister for determination of the plaintiff's visa application according to law.⁵

6 On 3 April 2019, the second delegate refused the plaintiff's application for a Subclass 485 (Temporary Graduate) visa under s 65 of the *Migration Act*. The plaintiff applied for merits review by the Tribunal of that decision. The Tribunal's powers under s 349 of the *Migration Act* included powers to affirm a decision, to vary a decision, to set aside a decision and substitute a new decision, and—to the extent the decision relates to a prescribed matter—to remit a matter for reconsideration in accordance with such directions or recommendations of the Tribunal as are permitted by the *Migration Regulations 1994* (Cth).

7 Concurrently with his application for merits review by the Tribunal, the plaintiff filed an application for a constitutional or other writ in this Court. The concurrent application, Matter No S141/2019, was dismissed by Gordon J as an abuse of process.⁶

⁴ In some of the material, however, the application is described as one for a Skilled (Provisional) (Class VC) (Subclass 485) visa. See *Lam v Minister for Immigration, Citizenship and Multicultural Affairs* [2026] FedCFamC2G 327 at [1].

⁵ *Lam v Minister for Immigration and Border Protection* [2019] HCATrans 43.

⁶ *Lam v Minister for Immigration and Border Protection* [2019] HCATrans 174.

3.

8 On 13 November 2020, the Tribunal affirmed the decision of the second delegate. The plaintiff then brought an application in the Federal Circuit Court of Australia for judicial review and also for a transfer of the application to the Federal Court. On 12 March 2026, after a lengthy delay, the reasons for which are not clear, the plaintiff's application, including the transfer application, was dismissed by the Federal Circuit and Family Court (Division 2).⁷

9 The plaintiff did not apply to the Federal Court to seek an extension of time to appeal from the decision of the Federal Circuit and Family Court (Division 2). It seems from an affidavit filed by the plaintiff that the reason he did not seek that extension of time to appeal is because he considered that an appeal would be futile in relation to the "primary decision" of the second delegate. But, as explained below, the Tribunal decision has extant legal effect but the decision of the second delegate does not. And the plaintiff provided no sufficient explanation for his failure to seek an extension of time to appeal to the Federal Court to seek relief in relation to the extant legal effect of the Tribunal decision. The plaintiff asserts only that the decision of the Federal Circuit and Family Court (Division 2) was "technically correct" but "unfair" because that court was "legally prevented from considering the impact of the delegate's primary jurisdictional error".

10 The plaintiff instead seeks relief in the original jurisdiction of this Court, relying upon three grounds. The three grounds are relied upon for orders to quash the decisions of the second delegate, the Tribunal, and the Federal Circuit and Family Court (Division 2). In addition to an extension of time, the plaintiff also relies on those grounds to seek the reinstatement or reopening of Matter No S141/2019 that was dismissed by Gordon J as an abuse of process, and an injunction restraining the Minister from "taking any further steps to give effect to the decisions or processing the visa application, so as to protect the Plaintiff's statutory right to withdraw the application under [s] 49 of the *Migration Act 1958*". For the reasons below, all three grounds are an abuse of process. It is therefore unnecessary to consider whether there are exceptional circumstances that could justify the extension of time sought by the plaintiff.⁸

The first ground: relief sought in relation to the second delegate's decision

11 The plaintiff's first ground for relief asserts, and the Minister concedes, that the decision of the second delegate was vitiated by jurisdictional error. But that

⁷ *Lam v Minister for Immigration, Citizenship and Multicultural Affairs* [2026] FedCFamC2G 327.

⁸ See *Gallo v Dawson* (1990) 64 ALJR 458 at 459; 93 ALR 479 at 481; *Re Commonwealth; Ex parte Marks* (2000) 75 ALJR 470 at 473-474 [13]; 177 ALR 491 at 495; *Vella v Minister for Immigration and Border Protection* (2015) 90 ALJR 89 at 90 [3]; 326 ALR 391 at 392.

decision no longer has legal effect. Speaking of a decision of the Minister or a delegate of the Minister that is affirmed by the Immigration Assessment Authority, Gageler, Keane and Nettle JJ said in *Plaintiff M174/2016 v Minister for Immigration and Border Protection*:⁹

"Once affirmed by the Authority, the decision of the Minister or delegate has no independent continuing legal operation by force of s 65 of the [*Migration Act*], whether actual or purported. For that reason, any defect of jurisdiction in the decision of the Minister or delegate can simply have no bearing on the legal position of the referred applicant."

Contrary to the approach taken by the plaintiff in this case (particularly in the amended reply), their Honours explained that this was *not* to say that the review by the Authority "in some way 'cures' a defect of jurisdiction in the decision of the Minister or delegate". It is rather that the affirming decision "alone gives the decision of the Minister or delegate legal operation".¹⁰ Writing separately, I explained that the "affirmation" of the decision by the Authority, whether or not the decision of the Minister or delegate was vitiated by jurisdictional error, "becomes the sole source of legal effect for the refusal".¹¹

12 The approach in *Plaintiff M174/2016* is very long-standing. Unless a statute expressly or impliedly provides otherwise, the legal effect of an affirming or confirming decision is that any "steps to implement the decision will be steps taken pursuant to [the] confirmation of that decision".¹² There could not be any "useful result" in the grant of any relief concerning the original decision.¹³ In the plaintiff's case, it is not to the point whether, if the second delegate did not commit any jurisdictional error, various other events might have occurred, including, as the plaintiff asserts, that he "would have withdrawn the visa application lawfully". Nor is it to the point that if he had not been required to "file a case within 35 days of the primary decision, [he] would not have filed the S141 case and risked abusing

⁹ (2018) 264 CLR 217 at 242 [70].

¹⁰ *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 241-242 [70].

¹¹ *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 246-247 [92].

¹² *R v Marks; Ex parte Australian Building Construction Employees and Builders Labourers' Federation* (1981) 147 CLR 471 at 476. See also *Wishart v Fraser* (1941) 64 CLR 470 at 483.

¹³ *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 108 [56], quoting *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 400.

5.

the legal process". The short point is that the extant decision of the Tribunal is the only decision with legal effect. Relief to set aside the decision of the second delegate would be entirely inutile.

13 Even putting to one side the extension of time of nearly seven years that is required, the plaintiff's first ground is an abuse of process because it is confused and entirely inutile.¹⁴

The second ground: relief sought in relation to the Tribunal decision

14 The plaintiff's second ground for relief seeks to quash the decision of the Tribunal on grounds which have considerable overlap with the grounds upon which the plaintiff relied in the Federal Circuit and Family Court (Division 2). But the plaintiff has not filed an application in the Federal Court for an extension of time within which to appeal the judgment of the Federal Circuit and Family Court (Division 2).

15 By seeking to bring an application to leapfrog the Federal Court, the plaintiff's application attempts to circumvent the usual appellate process. Such an application is usually an abuse of process.¹⁵ This ground is a classic example of such an abuse. For the reasons above, it is no answer for the plaintiff to assert, as he does, that the Federal Court would have no jurisdiction to set aside the second delegate's decision. The legally extant decisions with which the Federal Court would be concerned would be the decisions of the Tribunal and the Federal Circuit and Family Court (Division 2).

16 Finally, to the extent the plaintiff raises a new allegation that the Tribunal "falsely claimed"—in a fact sheet exhibited to one of the plaintiff's affidavits—to have a "remittal power over migration decisions while they could only remit very limited certain decision[s]", such allegations cannot establish any jurisdictional error in circumstances in which it is not, and could not be, suggested that there was any prospect of the plaintiff's matter being remitted to the Minister for reconsideration.

The plaintiff's third ground and further allegations

17 The third ground upon which the plaintiff seeks relief in this Court is expressed as follows:

¹⁴ See *Re Young* (2020) 94 ALJR 448 at 451 [13]; 376 ALR 567 at 570.

¹⁵ *Dimitrov v Supreme Court (Vic)* (2017) 263 CLR 130 at 138-139 [19]; *KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 95 ALJR 666 at 669 [3]; 392 ALR 186 at 188.

"[The Federal Circuit and Family Court (Division 2) and the Federal Court] lacked jurisdiction to inquire into the lawfulness [of the] primary decision [of the second delegate]. And subsequently [those courts] cannot take the jurisdictional error of [the second] delegate into consideration when the [Federal Circuit and Family Court (Division 2)] determined if decision of [the Tribunal] was affected by jurisdictional error."

18 To the extent that this ground raises any issue concerning the decision of the second delegate, it cannot add anything to the first or second grounds and is an abuse of process for the same reasons.

19 In the plaintiff's amended application, he asserts that due to the inability of the Federal Circuit and Family Court (Division 2) to review the decision of the second delegate, the decision of the Federal Circuit and Family Court (Division 2) "was not a complete review of the whole matter and fails to reflect the essential characteristics of a judicial court". That submission is manifestly hopeless. The Federal Circuit and Family Court (Division 2) was not deprived of jurisdiction in relation to the Tribunal decision with extant legal effect by its inability to review the decision of the second delegate, which had no extant legal effect. It is an abuse of process for the plaintiff to bring this application which seeks to circumvent the usual appellate process, a process which would require an extension of time to be sought to appeal from the decision of the Federal Circuit and Family Court (Division 2).

20 The dismissal of the three grounds upon which relief is sought means that there is no basis for an injunction to restrain the Minister from taking any further steps to give effect to any of the decisions. The dismissal of the three grounds also means that there is no basis for this Court to reinstate or reopen Matter No S141/2019, dismissed by Gordon J as an abuse of process. In any event, such an application is also an abuse of process when brought for the purpose, as the plaintiff asserts, of "ensur[ing] the challenge to the primary decision is not 'out of time'".

Conclusion

21 The application should be dismissed as an abuse of process under r 28.01.2(c), with orders made, and reasons given, in accordance with r 25.09.1 and r 25.09.2 of the *High Court Rules*. The plaintiff seeks to avoid an order for costs on the basis of asserted importance of legal issues involved in this case and because of impecuniosity or a disparity in resources compared with the Minister. There is no basis upon which to displace the usual order as to costs.¹⁶

¹⁶ See also *Northern Territory v Sangare* (2019) 265 CLR 164 at 175 [32].

7.

22 Orders should be made that: (i) pursuant to r 28.01.2(c) of the *High Court Rules*, the amended application for a constitutional or other writ filed on 24 June 2026 is summarily dismissed; and (ii) the plaintiff pay the costs of the first defendant.