

HIGH COURT OF AUSTRALIA

GAGELER CJ,
STEWART AND JAGOT JJ

GXT25

PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND CITIZENSHIP

DEFENDANT

GXT25 v Minister for Immigration and Citizenship
[2026] HCA 32

Date of Judgment: 9 September 2026
M48/2026

ORDER

- 1. The application for an extension of time to file the application for a constitutional or other writ is refused.*
- 2. The application for a constitutional or other writ is dismissed.*
- 3. The plaintiff pay the defendant's costs.*

Representation

The plaintiff is represented by Asylum Seeker Resource Centre

The defendant is represented by Australian Government Solicitor

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

GXT25 v Minister for Immigration and Citizenship

Administrative law – Judicial review – Where delegate refused application for Protection (Subclass 866) visa – Where plaintiff claimed protection on basis of fear of harm by reason of religion – Where plaintiff subsequently raised fear of harm by reason of sexual orientation – Where delegate found sexual orientation claim fabricated – Whether denial of procedural fairness – Whether delegate required to notify plaintiff of adverse inference arising from delay – Whether delegate failed to comply with s 57 of *Migration Act 1958* (Cth) by failing to provide particulars of country information and invite comment – Whether delegate's decision illogical, irrational or unreasonable – Whether extension of time should be granted.

Words and phrases – "adverse inference", "constitutional writ", "country information", "extension of time", "fabricated claim", "illogicality", "irrationally", "judicial review", "jurisdictional error", "merits review", "opportunity to comment", "procedural fairness", "protection visa", "request for further information", "sexual orientation", "significant harm", "unreasonableness".

Migration Act 1958 (Cth), ss 57, 486A.

The application

- 1 The plaintiff filed an application for a constitutional or other writ seeking: (i) an extension of time in which to do so (under s 486A(2) of the *Migration Act 1958* (Cth) and r 4.02 of the *High Court Rules 2004* (Cth)); (ii) an interlocutory injunction restraining the defendant, the Minister for Immigration and Citizenship, and the Minister's servants and agents, from removing or taking any steps to remove the plaintiff from Australia pending the determination of this application; (iii) a writ of certiorari to quash the decision a delegate of the Minister made on 12 December 2024 to refuse to grant the plaintiff a Protection (Subclass 866) visa ("the protection visa"); (iv) a writ of mandamus directed to the Minister requiring the Minister to determine the plaintiff's application for the protection visa according to law; and (v) costs. The writs of certiorari and mandamus are sought against the Minister as an officer of the Commonwealth under s 75(v) of the *Constitution* and s 32 of the *Judiciary Act 1903* (Cth) on these three grounds:

"*Ground 1*: The Delegate denied the Plaintiff procedural fairness by failing to give the Plaintiff notice of, and an opportunity to respond to, critical adverse issues and inferences upon which the Decision [relating to the protection visa] turned, including findings of fabrication and the rejection of the Plaintiff's documentary evidence.

Ground 2: The Delegate failed to comply with s 57 of the [*Migration Act*] in that the Delegate relied upon relevant information, being country information concerning document fraud, without giving the Plaintiff particulars of that information, informing the Plaintiff of its relevance, or inviting the Plaintiff to comment upon it prior to making the Decision.

Ground 3: The Delegate's finding that the Plaintiff's claim was fabricated was illogical, irrational or unreasonable, in that it lacked an evident and intelligible justification."

- 2 It is common ground between the plaintiff and the Minister that the Federal Circuit and Family Court of Australia (Division 2) does not have jurisdiction to hear an application for judicial review of the decision because the decision was capable of being reviewed by the Administrative Review Tribunal ("the Tribunal") under Pt 5 of the *Migration Act* but the plaintiff did not seek such review within

2.

the time prescribed by that Act.¹ The Federal Court of Australia also lacks jurisdiction.² Accordingly, the matter cannot be remitted to either Court.³

3 Pursuant to r 25.09.1 of the *High Court Rules*, the Court or a Justice may make an order determining an application for a constitutional or other writ without listing it for hearing. That is the course we now take. The Court has received extensive written submissions from the parties. The Minister consents to the determination of the matter without it being listed for hearing. The plaintiff does not consent but has advanced no reason why the interests of justice in its determination would be advanced by listing it for hearing.

4 For the following reasons, the application for an extension of time is to be refused and the application for a constitutional or other writ is to be dismissed.

The extension of time application

5 The plaintiff is a citizen of Kenya. He arrived in Australia on 11 February 2022 as the holder of a Student (Subclass 573) visa. On 16 October 2024, he applied for the protection visa. The Minister's delegate refused that application on 12 December 2024. The plaintiff sought review of the delegate's decision in the Tribunal, but that application was made outside the time prescribed by the *Migration Act* as then in force (seven working days⁴) and was therefore required to be dismissed. He applied for judicial review of the Tribunal's decision, but the Federal Circuit and Family Court of Australia (Division 2) dismissed that application on 16 April 2026.⁵ It follows that the plaintiff is presently an unlawful non-citizen and is liable to removal from Australia.

6 The jurisdiction invoked by the plaintiff in filing the application for a constitutional or other writ is regulated by s 486A of the *Migration Act*.⁶ By s 486A(1) of the Act, the application was required to be filed within a period of

1 *Migration Act 1958* (Cth), ss 476(2), 500(1)(c).

2 *Migration Act*, s 476A.

3 *Judiciary Act*, s 44.

4 *Migration Act*, s 347(3)(a); *Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Rules 2024* (Cth), s 13.

5 *GXT25 v Minister for Immigration and Citizenship* [2026] FedCFamC2G 367.

6 *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 at 37 [42].

3.

35 days from the date of the delegate's decision. By s 486A(2), the Court is empowered to make an order extending that 35-day period as it considers appropriate if an application for such an order is made in writing to it "specifying why the applicant considers that it is necessary in the interests of the administration of justice to make the order" and it "is satisfied that it is necessary in the interests of the administration of justice to make the order".

7

In an affidavit supporting the application for an extension of time, the plaintiff explained that: (i) he paid approximately \$5,000 for assistance with his protection visa application but, after lodgment, received no further assistance; (ii) he was detained at Yongah Hill Immigration Detention Centre when his protection visa application was refused but did not understand the legal importance of the refusal or the extremely short deadline for review; (iii) his mental health had deteriorated significantly while in detention and, as his phone had been disconnected, he could not access his documents, including the full set of documents he had lodged in support of his protection visa application, to enable him to apply for review to the Tribunal; and (iv) he was placed in High Care Accommodation following a dispute where he believed his phone had been stolen and requested help from the welfare team at the detention centre but did not receive any assistance. He first obtained pro bono assistance from the Asylum Seeker Resource Centre ("the ASRC") in September 2025. After his application to the Federal Circuit and Family Court of Australia (Division 2) was dismissed the ASRC provided him with support. The time between the dismissal of his application to the Federal Circuit and Family Court of Australia (Division 2) on 16 April 2026 and the filing of the application in this Court on 15 May 2026 has been "due to the time required to consult with [his] pro bono supporters and prepare the complex documentation required for" this Court.

8

The Minister submitted that the Minister "does not rely on prejudice as a basis to resist the extension of time. The primary reason why an extension of time should be refused is the absence of merit in each of the Plaintiff's three grounds". In circumstances where an explanation for the substantial delay has been provided, the Minister's position is appropriate, noting that the terms of s 486A(2) enable this Court to extend time only if both conditions are satisfied, which include that the extension is necessary in the interests of the administration of justice.⁷

7 *Tu'uta Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 276 CLR 579 at 588-589 [11]-[12].

Facts

9 Having arrived in Australia on 11 February 2022, the plaintiff made a protection visa application on 16 October 2024 after expiry of his student visa and being taken into immigration detention.

10 When making his application for a protection visa, the plaintiff did not make a claim for protection based on his sexual orientation. Rather, his claim was that he feared harm in Kenya by reason of his Christianity. The form required to be completed for the protection visa application included information as follows:

"It is up to you to provide the details of your claim for protection and supporting evidence before the Department of Home Affairs makes a decision.

You must clearly explain why you need protection in Australia and provide the Department with complete and accurate information as soon as possible."

11 The form also said:

"A decision may be made on the information provided in this application and applicants may not be given another opportunity to present these claims. Therefore, it is important that applicants include all details relevant to their case and attach any supporting documentation to this application before it is submitted."

12 The form otherwise contained multiple warnings about fraud, including that:

"Giving false or misleading information is a serious offence in Australia and you can face criminal penalties.

A person who provides false or misleading information in a visa application can face large fines, 10 years in jail, or both."

13 The form also contained a declaration which included the following:

"The applicants declare that they:

...

- Have provided complete and correct information in every detail on this form, and on any attachments to it."

5.

14 A question on the form asked, "Did this applicant experience harm in that country or those countries?" (in the plaintiff's case, meaning Kenya). The plaintiff responded "No" to that question.

15 Under s 56 of the *Migration Act*, the Minister's Department informed the plaintiff that it needed further information to assess the application. The request for further information included the following:

"Do not provide fraudulent information

Do not provide fraudulent documents or make false claims. If you do:

- we may refuse your application
- it might affect any applications you make in the future."

16 The information specifically requested concerned the plaintiff's claimed Christianity. The request included this statement:

"Your application for a valid Protection visa was made on 16/10/2024. In your Protection visa application form you stated that you most recently arrived in Australia on 11/02/2022. Therefore, it took you approximately more than two years to apply for a protection visa. Given you claim to fear returning to your home country, I am inviting you to explain why you did not apply for a protection visa soon after you realised that you were unable to return to your home country because you feared you would experience harm if you did so."

17 The plaintiff first responded to the request on 15 November 2024 (AEDT) and provided further information about his Christianity.

18 The plaintiff responded again on 21 November 2024, which was when he first made the claim concerning his sexual orientation. Under the heading "Threats and Harms Experienced", the plaintiff said that he "was assaulted [on 14 July 2021] by unknown individuals who targeted [him] because of [his] sexual orientation as a gay man". He said that he sustained a tear on his lower lip, injuries to his hands and chest pains. His mother took him to hospital where he received medical care and was bedridden for a week due to the severity of his injuries. His mother filed a complaint with the police. The plaintiff also said that he had been subjected to years of harassment and discrimination in Kenya due to his sexual orientation. The accompanying documents the plaintiff lodged included a Medical Examination Report dated 14 July 2021, a letter from the plaintiff's mother, a letter from the hospital, and a "Submission Before the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Unlawful Killing Of

LGBTIQ+ Persons in Kenya" published by the "National Gay and Lesbian Human Rights Commission".

19 In providing this information the plaintiff included the following statements:

"Delay in Lodging the Protection Visa Application

I arrived in Australia on 11th February 2022 on a student visa and applied for a Protection Visa on 16th October 2024. The delay in lodging my application was due to the following:

- I hoped to remain in Australia through a lawful student pathway and did not initially seek legal advice about a Protection Visa.
- I was unaware of the detailed requirements and process for seeking protection.
- The fear of being targeted for my sexual orientation made me hesitant to disclose my identity, even in a legal setting."

20 The delegate's reasons for decision record that:

"In his initial application for protection, the [plaintiff] did not raise any protection claims other than fear of persecution due to his religious affiliation, being a Catholic man from Kenya. Neither did he raise any other claim other than religious claims in his first response dated 15 November 2024.

In his second submission dated 21 November 2024, the [plaintiff] introduced new claims about being a homosexual man. He indicated that he had been subjected to years of verbal harassment and discrimination in Kenya because he was a homosexual man."

21 While accepting "the challenges LGBTIQ+ applicants may face and the need for particular care in assessing claims about sexual orientation and gender identity", the delegate found it:

"of note that the [plaintiff] did not advance his new claims at an earlier occasion during the opportunities he had to advance his protection claims; as such his newly introduced testimony appears formulaic and opportunistic. It is the omission of the claim until the last opportunity to comment about his protection claims rather than an inability to say much about it which leads me to question the veracity of his claims about his alleged sexual orientation."

7.

22 The delegate also recorded that the plaintiff had "not provided a detailed account of what happened" on 14 July 2021, which "casts further doubts that the situation is not as claimed". As to the plaintiff's contention that "stigma and discrimination against LGBTQ+ individuals are pervasive throughout the country, including urban centres", the delegate said this was "not supported by country information which shows that although homophobic attitudes are prevalent throughout Kenya, larger cities such as Nairobi may be more tolerant of LGBTI persons, with the presence of civil society organisations including LGBTI NGOs and churches, and an active LGBTI community".

23 In respect of the documents the plaintiff had lodged, the delegate said that the delegate had:

"taken into consideration country information, which indicates that the use of fraudulent documents is reported to be common in Kenya, and pervasive corruption is a serious problem, with police and authorities issuing identification documents being cited the most for taking bribes[]. I give weight to the country information in light of the [plaintiff's] evolving testimony about his alleged sexual orientation as well as his alleged assault. ... I put greater weight in the view formed that the [plaintiff] has fabricated a claim[] regarding his sexual orientation and an alleged attack to enhance his protection claims."

24 The delegate also said that:

"the [plaintiff] indicated that his delayed protection visa application was because he had hoped to remain in Australia through a student visa pathway and he did not initially seek legal advice about a protection visa. In addition, the [plaintiff] feared being targeted for his sexual orientation in Australia, therefore he felt hesitant to disclose his identity, even in a legal setting. I note that the [plaintiff's] response contradicts earlier written assertions that he left Kenya fearing persecution as a member of a religious minority. I consider that had he believed that he had genuine claims to Australia's protection obligations under the Convention he would have applied much sooner. ... The delay in lodging his Protection visa application adds weight to the finding that the [plaintiff's] claims appear not to reflect the reality of his circumstances."

25 The delegate therefore did not accept that the plaintiff was a homosexual man who feared harm in Kenya on that basis.

Ground one: denial of procedural fairness?

Plaintiff's case

26 The plaintiff's case in respect of ground one is that the request for further information under s 56 of the *Migration Act* is irrelevant as it was made before the plaintiff had disclosed his sexual orientation (and, indeed, that disclosure was made as part of the plaintiff responding to the invitation to provide further information in support of the application for a protection visa). The plaintiff contends that it is obvious that the plaintiff's delay in making that disclosure was a critical issue underlying the delegate's conclusion that the plaintiff had fabricated this claim, but the delegate did not give the plaintiff any notice that "the delay in disclosure would be treated as evidence he had fabricated his new claim" with the consequence that the plaintiff "was not given an opportunity to address a key basis on which his claim was rejected". According to the plaintiff, because "the timing of the claim was susceptible to multiple explanations, the Delegate could not treat the delay as evidence of 'fabrication', a finding critical to the ultimate conclusion, without first inviting the Plaintiff to address the adverse inference".

27 The plaintiff also contends that a further denial of procedural fairness arose from the treatment of the plaintiff's documentary evidence. In sum, "[g]eneral material (the country information) was effectively converted into a determinative finding about the authenticity of particular evidence" (the plaintiff's documents relating to the assault) in circumstances where no notice of any such inference was given to the plaintiff, so that he was not given any opportunity to address that inference (of fabrication).

28 The plaintiff accepted that procedural fairness does not require a decision-maker to expose their mental processes or provisional conclusions but submitted that where a decision is likely to turn upon an adverse inference that is not apparent from the material, the decision-maker is required to bring that matter to the attention of the applicant.⁸ The errors, submitted the plaintiff, are material in that there is a realistic possibility that, had that opportunity been afforded, the outcome could have been different.⁹

8 *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591-592; *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 161-163 [29]-[32].

9 *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 134-135 [30]-[31]; *Minister for Immigration and Border Protection v SZMTA*

Consideration

29 Neither party submitted that the terms of s 51A(1), read with s 57(1) of the
Migration Act, were relevant. The matter is to be decided on that basis.¹⁰

30 The relevant principle as expressed in *Commissioner for Australian Capital
Territory Revenue v Alphaone Pty Ltd*¹¹ and approved in *SZBEL v Minister for
Immigration and Multicultural and Indigenous Affairs*¹² is that:

"Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material. Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question."

31 The first requirement of procedural fairness relevant to this case is that which required the delegate to identify to the plaintiff any issue critical to the decision which was not apparent from its nature or the terms of the statute under which it was made. Whether an adverse finding was obviously open or apparent on the known material is a question which is to be decided on all relevant materials, which, in this case, includes all the documents summarised above. The plaintiff's submission that all events before 21 November 2024 are irrelevant is incorrect.

(2019) 264 CLR 421 at 445 [45]; *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321 at 327 [7].

10 See, eg, *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 267 [42]; *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 442 [35].

11 (1994) 49 FCR 576 at 591-592.

12 (2006) 228 CLR 152 at 161-163 [29]-[32].

32 The plaintiff addressed the delay in the making of his application for a protection visa in the information provided on 21 November 2024 and, in so doing, said that the "fear of being targeted for [his] sexual orientation made [him] hesitant to disclose [his] identity, even in a legal setting". This statement did not explain why the plaintiff had not included his claimed homosexuality in his protection visa application or the further information provided on 15 November 2024 other than, perhaps, indirectly in the form of a general fear about disclosing his sexual identity.

33 As the Minister submitted, that the plaintiff chose to include this information under the heading "Delay in Lodging the Protection Visa Application" demonstrates that the plaintiff was aware of the potential relevance of delay in making his claims. The plaintiff must have known that he first claimed to fear harm in respect of his sexual orientation in Kenya on his third provision of information to the Department (being his second response to the request for further information) yet left his explanation for doing so, such as it was, vague and general. It cannot be said in these circumstances that the delegate's adverse conclusion, that the plaintiff had belatedly fabricated his claimed homosexuality and that this explained why the claim had not been made when he made the protection visa application or when he first responded to the request for further information, was other than obviously open on the known material. In the Minister's words:

"The delegate's assessment of what significance to attach to the sequence and timing of the Plaintiff's new basis for claiming protection was not some extraneous matter of which the Plaintiff had no notice, it was an assessment of the internal consistency of the Plaintiff's own account."

34 The plaintiff's contention, that his "explanation for his delay does not show he was on notice of the specific, dispositive inference ultimately drawn against him, namely that concealment [of his sexual orientation] was treated as fabrication" and that "authorities on provisional reasoning do not permit a dispositive fabrication finding to be made without affording a person in [his] position ... procedural fairness by giving him notice of the proposed finding and an opportunity to respond" goes too far. Each case will depend on its facts. The material available to the delegate that LGBTIQ+ persons in Kenya, including refugees, are "often compelled to hide their sexual orientation or gender identity to protect themselves" did not and could not explain why the plaintiff did not refer to his sexual orientation until his third occasion of giving information to the Department without any clear explanation of why he had not done so in his initial protection visa application (which he made while in Australia) or why he was willing to do so on 21 November 2024. That is, the delegate did no more than draw inferences as to the credibility of the plaintiff's claims from the very material the plaintiff himself submitted about a topic of obvious relevance, being the delayed claim for protection together with the even more delayed claim to fear harm by reason of being homosexual.

35 It follows that to conclude that the delegate was subject to a duty to give the plaintiff an opportunity to comment on the delay in the disclosure of his claimed sexual orientation would involve a duty on the delegate to "expose his or her mental processes"¹³ about the information as and when submitted by the plaintiff. There is no such duty known to law.

36 The second requirement of procedural fairness relevant to this case is that which required the delegate to enable the plaintiff to comment on adverse material from other sources which was put before the decision-maker. This duty does not arise if inferences supported by that information, while from a source other than the person whose interests stand to be affected by the decision, would obviously be open on the known material. The other source of information in this case was the country information. The issue that information disclosed was the commonness of fraudulent documents being created by authorities in Kenya in return for a bribe. The adverse conclusion the delegate drew from this information was that greater weight should be given to the delegate's view from the delayed protection visa application and delayed claims of fear of harm based on homosexuality than to the documents which referred to the assault being caused by the plaintiff's sexual orientation.

37 It could not be said, however, that the veracity of the documents the plaintiff had provided in support of his protection visa application was other than an obvious and known issue for consideration by the delegate. As noted, the protection visa application form contained several references to the need for the information and documents provided to be complete, accurate and not false or misleading. The form required an applicant to declare that the information and documents provided were complete and correct. The request the Minister gave for further information under s 56 said "Do not provide fraudulent documents or make false claims" and that, if an applicant did, the application may be refused. In these circumstances, the veracity of the information and documents provided in support of any application, in common with the veracity of the plaintiff's claims, constituted obvious and known issues on the available material. It therefore cannot be said that the plaintiff was denied an opportunity to "rebut or qualify by further information, and comment by way of submission"¹⁴ the country information on which the delegate relied as part of the decision-making process. That information

13 *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 592; *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 162 [29].

14 *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 592; *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 162 [29].

did not raise any issue not apparent from the nature of the decision or the terms of the statute under which it was made. The veracity of the plaintiff's claims and supporting documents was obviously open to question on the known material.

38 Ground one, accordingly, must be rejected.

Ground two: contravention of s 57?

39 Section 57 of the *Migration Act* imposes a duty in these terms:

"(1) In this section, **relevant information** means information (other than non-disclosable information) that the Minister considers:

- (a) would be the reason, or part of the reason for refusing to grant a visa; and
- (b) is specifically about the applicant or another person and is not just about a class of persons of which the applicant or other person is a member; and
- (c) was not given by the applicant for the purpose of the application.

(2) The Minister must:

- (a) give particulars of the relevant information to the applicant in the way that the Minister considers appropriate in the circumstances; and
- (b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to consideration of the application; and
- (c) invite the applicant to comment on it."

40 The plaintiff's submissions in support of ground two do not meaningfully confront the limitation imposed by s 57(1)(b) confining "relevant information" required to be provided to an applicant to information that "is specifically about the applicant or another person and is not just about a class of persons of which the applicant or other person is a member". The plaintiff submitted that in this case the delegate did not use the country information "merely as general background" but, rather, used that information "in an adverse and evaluative way as part of the basis for rejecting specific documents provided by the Plaintiff in support of his claim".

41 This submission is unpersuasive. Section 57(2) is concerned with the nature of the information and not the use to which it is put by a decision-maker.¹⁵ To be relevant information, the information must be "specifically about the applicant or another person and ... not just about a class of persons of which the applicant or other person is a member". Country information, almost by definition, is not information specifically about an applicant or another person. In the present case, the country information concerned the prevalence of fraudulent documents in Kenya obtained because of the bribery of officials. That the use the delegate made of the country information led to the delegate giving greater weight to the views the delegate had formed about the plaintiff's lack of veracity than to the information in the supporting documents the plaintiff lodged does not transform the nature of the country information into information specifically about the plaintiff or any other person.

42 Ground two, accordingly, must be rejected.

Ground three: legal unreasonableness and illogicality?

43 The plaintiff particularised the alleged legal unreasonableness and illogicality of the delegate's decision in three ways: (i) relying on the plaintiff's delay in raising his sexual orientation claim as a reason for concluding it was fabricated; (ii) using country information to assign limited weight to the documentary material supplied in support of the sexual orientation claim; and (iii) using country information about the greater tolerance of LGBTIQ+ persons in Nairobi to reject the plaintiff's account of the alleged assault and his claim that relocation within Kenya was not viable. The plaintiff relied on *Minister for Immigration and Citizenship v SZMDS*¹⁶ to support the contention that the delegate's reasoning from the plaintiff's delay in disclosing his claim based on sexual orientation was the result of the delegate's "own (untested) assumptions about human behaviour" rather than a rational inference from the evidence, a flaw that also infected the balance of the delegate's relevant reasoning. The plaintiff also referred to *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*¹⁷ to support the proposition that in protection claims based on sexual identity, concealment may be consistent with a well-founded fear of persecution, such that delayed disclosure does not inherently undermine credibility and that, as the plaintiff put it, "conduct explicable by the very fear said to be in issue cannot

15 *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 at 1196 [18]; 235 ALR 609 at 616.

16 (2010) 240 CLR 611 at 627-628 [51]-[53] (in dissent in the result).

17 (2003) 216 CLR 473 at 489-491 [40]-[43].

rationally be treated as proof that the fear was invented, unless the decision-maker engages with that explanation".

44 As explained otherwise in *Minister for Immigration and Citizenship v SZMDS*, the question of legal unreasonableness and illogicality ultimately involves deciding if, on the material, the conclusion reached was open or not. If the conclusion is one in respect of which, on the available material, "different minds might reach different conclusions", it cannot be said that the conclusion is legally unreasonable or illogical.¹⁸ That is, "[u]nreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification".¹⁹

45 The plaintiff's contention that the delegate "accepted that LGBTIQ+ claimants often face difficulty in disclosure, then treated the same delay as proof of fabrication. A decision-maker cannot rationally do both" must be rejected. For one thing, that is not what the delegate did. The delegate simply evaluated the credibility of the plaintiff's claimed homosexuality in all the circumstances in which it was made, including the delay. For another, that was precisely what the delegate was required to do – evaluate the plaintiff's claim in all the circumstances, including the delay in the making of that claim. Finally, acceptance that LGBTIQ+ claimants often face difficulty in disclosure is not inherently logically inconsistent with a conclusion that a delay in disclosure is proof of fabrication of a claim – it all depends on the particular circumstances of the case and the reasoning to the conclusion of the particular decision-maker. The plaintiff's submissions wrongly seek to elevate a question which can be answered only in a specific case to a general proposition or principle.

46 It also cannot be said that the delegate failed to engage with the plaintiff's explanation for the delay in disclosing his claimed homosexuality. This was not a case in which the plaintiff claimed that he had concealed his sexual orientation in Kenya and had continued to do so in Australia, including by not disclosing his homosexuality in his application for a protection visa. Rather, on the third occasion on which the plaintiff provided information to the Department, the plaintiff disclosed his homosexuality, said he had been assaulted and repeatedly verbally abused in Kenya because of his homosexuality, and had delayed in lodging his application for a protection visa as "[t]he fear of being targeted for [his] sexual orientation made [him] hesitant to disclose [his] identity, even in a legal setting". That explanation did not directly deal with the delay in disclosing the plaintiff's sexual orientation until the third occasion on which the plaintiff provided

18 (2010) 240 CLR 611 at 648 [131].

19 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 367 [76].

15.

information to the Department or why the plaintiff became willing to disclose the information on that occasion.

47 The delegate's reasoning process towards rejecting the plaintiff's claimed homosexuality involved multiple strands. The delegate took into account: (i) the delayed disclosure and the explanation for it (such as it was); (ii) the "formulaic and opportunistic" appearance of the claim in the circumstances in which it was made; (iii) the lack of any information as to how the plaintiff "came to terms with his sexual orientation despite claiming that he had faced years of harassment and discrimination in Kenya" or managed to support his mother in Kenya; (iv) the lack of "a detailed account of what happened" in respect of the claimed assault; and (v) the inconsistency of the new claim with the original claim that he left Kenya fearing persecution as a member of a religious minority. There was nothing illogical or irrational in the delegate inferring that the plaintiff's claimed homosexuality was false given this reasoning.

48 Contrary to the plaintiff's submissions, the delegate did not reason that the plaintiff's claimed homosexuality was false because the country information led to the inference that the supporting documents were false. Rather, the delegate reasoned that in all of the circumstances the plaintiff's claimed homosexuality was false, and the country information assisted the delegate to give greater weight to this view than to the information in the documents which apparently supported the plaintiff's claimed homosexuality and his being assaulted in Kenya on that basis. No similar error exists in respect of the documents themselves or in respect of the plaintiff's claim that he could not safely relocate within Kenya (a claim which necessarily failed given the delegate's rejection of the plaintiff's claimed status as a homosexual).

49 Nor can it be said that the delegate's "reliance on the UKHO [United Kingdom Home Office] report^[20] was selective and contradictory". The delegate referred to that report in support of the proposition that "although homophobic attitudes are prevalent throughout Kenya, larger cities such as Nairobi may be more tolerant of LGBTI persons" when considering the plaintiff's claim that he could not relocate within Kenya. The delegate, however, had already concluded that the plaintiff's claimed homosexuality could not be accepted given the multiple other considerations which informed the delegate's decision (as set out above).

50 Ground three, therefore, must be rejected.

20 United Kingdom Home Office, *Country Policy and Information Note – Kenya: Sexual Orientation and Gender Identity and Expression* (2020) at 12.

Gageler *CJ*
Steward *J*
Jagot *J*

16.

Conclusion and orders

51 As the grounds of the application are without merit, it would be futile to grant the extension of time for the filing of the application. The orders are:

- (1) The application for an extension of time to file the application for a constitutional or other writ is refused.
- (2) The application for a constitutional or other writ is dismissed.
- (3) The plaintiff pay the defendant's costs.

