HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **SOSEFO KAUVAKA LELEI TU'UTA KATOA**

Plaintiff

and

MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS

First Defendant

JUDGE OF THE FEDERAL COURT OF AUSTRALIA

Second Defendant

SUBMISSIONS OF THE PLAINTIFF

PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II CONCISE STATEMENT OF ISSUES

2. The issue is whether the second defendant, in exercising the discretion to extend time under s 477A(2) of the *Migration Act 1958* (Cth), committed a jurisdictional error in relation to his assessment of the merits of the plaintiff's application for review of the decision of the first defendant.

PART III SECTION 78B NOTICE

3. The plaintiff does not consider that any notice is required to be given under s 78B of the *Judiciary Act 1903* (Cth).

PART IV MATERIAL FACTS

4. The plaintiff is a citizen of New Zealand and was the holder of a Class TY Subclass 444 Special Category (Temporary) visa. On 2 September 2019, the Minister cancelled the plaintiff's visa pursuant to s 501(3)(b) of the Act (**AB 16**).

5. The deadline for filing an application in the Federal Court to seek review of the Minister's decision was 35 days from the date of the decision: Migration Act, s 477A(1). Accordingly, the plaintiff was required to file an application by 7 October 2019. The plaintiff did not file his application until 1 November 2019 (**AB 136**)[1] and was therefore late by a period of 25 days.

6. The Federal Court has the power to extend the time for filing an application. Section 477A(2) of the Act provides:

> (2) The Federal Court may, by order, extend that 35 day period as the Federal Court considers appropriate if:
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> (a) an application for that order has been made in writing to the Federal Court specifying why the applicant considers that it is necessary in the interests of the administration of justice to make the order; and
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> (b) the Federal Court is satisfied that it is necessary in the interests of the administration of justice to make the order.

7. The application for an extension of time, and the substantive application if an extension of time were granted, came on for hearing before Nicholas J on 8 October 2020. Following the hearing, on 23 March 2021 the parties made further submissions in relation to the effect of this Court's decision in *Minister for Immigration and Border Protection v EFX17*.[2]

8. The plaintiff explained in evidence to the Federal Court that the delay of 25 days in filing the application was caused by his efforts to find legal representation following his notification that his visa had been cancelled.[3] This evidence was not challenged. Further, it was common ground before Nicholas J that the delay was not inordinate, and that the Minister would not be prejudiced by the grant of an extension of time: [7] (**AB 160**). Indeed, in *Tuberi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1029, Steward J had described a delay of similar length as "minor" (at [7]).

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1 There was also an application for an extension of time under s 477 of the Act in respect of a proceeding originally filed in the Federal Circuit Court which was transferred by consent to the Federal Court (NSD 1195 of 2020) (**AB 159, J [2]**). The present proceedings only concern the application for an extension of time filed in the proceeding originally commenced in the Federal Court (being NSD 1812 of 2019).

2 (2021) 95 ALJR 342; 388 ALR 342.

3 See the affidavit of Sai Priya Sivalohan affirmed 23 September 2020, [3]-[6] (**AB 141-142**).

9. Nevertheless, on 24 August 2021, the Federal Court refused the application for an extension of time (**AB 157**).

10. An appeal may not be brought to the Full Federal Court from a judgment of the Federal Court refusing to make an order under s 477A(2): Migration Act, s 476A(3)(b). On 17 September 2021, the plaintiff filed an application in this Court's original jurisdiction under s 75(v) of the Constitution seeking a writ of certiorari to quash the Federal Court's decision to refuse to extend time, and a writ of mandamus to require the Federal Court to make the decision according to law. On 9 December 2021, Gageler J referred the application for hearing by the Full Court.[4]

PART V ARGUMENT

Summary

11. In the present case, Nicholas J refused the application for an extension of time under s 477A(2) of the Act solely by reference to the perceived merits of the proposed ground of review. That is, there was no suggestion that the explanation provided for the delay by the plaintiff was not adequate, or that the delay was anything other than minor, or that the delay had caused any prejudice to the Minister.

12. Nicholas J then assessed the merits of the proposed ground of review as if he was making a final determination of the substantive application. This assessment went beyond an impressionistic analysis of whether the proposed ground of review was reasonably arguable, as should have occurred in the context of an application for an extension of time. As a result, in the particular circumstances of this case Nicholas J misapprehended or misconceived the nature and purpose of the statutory power in s 477A of the Act. The Federal Court therefore committed jurisdictional error.

Review for jurisdictional error on the part of the Federal Court

13. It is "firmly established" that a writ of prohibition or mandamus will lie from the High Court exercising jurisdiction under s 75(v) of the Constitution to a judge of the Federal

[4] As amended pursuant to leave granted by Gageler J: *Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] HCATrans 214.

Court for jurisdictional error on the part of that judge.[5] Certiorari will lie to set aside a decision of the Federal Court as ancillary or alternative relief where jurisdictional error is established.[6]

14. In *Craig v South Australia* (1995) 184 CLR 163 (***Craig***), the High Court provided a number of examples of what constitutes jurisdictional error on the part of an inferior court. Relevantly, Brennan, Deane, Toohey, Gaudron and McHugh said at 177:

> An inferior court falls into jurisdictional error if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist. Such jurisdictional error can infect either a positive act or a refusal or failure to act. Since certiorari goes only to quash a decision or order, an inferior court will fall into jurisdictional error for the purposes of the writ where it makes an order or decision (including an order or decision to the effect that it lacks, or refuses to exercise, jurisdiction) which is based upon a mistaken assumption or denial of jurisdiction or a misconception or disregard of the nature or limits of jurisdiction.

15. The Court also said at 178:

> … an inferior court will exceed its authority and fall into jurisdictional error if it misconstrues that statute or other instrument and thereby misconceives the nature of the function which it is performing or the extent of its powers in the circumstances of the particular case.

16. The same kinds of errors will constitute jurisdictional errors where they are made by the Federal Court. The fact that the Federal Court is designated a "superior court of record" by s 5(2) of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) does not affect its amenability to judicial review for such errors. As the joint judgment explained in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531:[7]

> … the amenability of a judge of a federal court to a writ of prohibition does not depend upon the court of which the judge is a member being an "inferior" court, but upon the jurisdiction of the court being limited …

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5 *AUK15 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2016] HCATrans 36 at 1552-1557, quoting *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 374-375 (Mason J). See also *New South Wales v Kable* (2013) 252 CLR 118 at [30] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), [55] (Gageler J).

6 *AUK15 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2016] HCATrans 36 at 1560-1570, quoting *Edwards v Santos Ltd* (2011) 242 CLR 421 at [53] (Heydon J, French CJ, Gummow, Crennan, Kiefel and Bell JJ agreeing).

7 At [107] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell) (emphasis added), citing *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 385 (Deane J).

17. This point was explained by Wilson and Dawson JJ in *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, where their Honours said (at 618):[8]

> Notwithstanding that the Federal Court is declared by s 5(2) of the *Federal Court of Australia Act* to be a superior court of record and a court of law and equity, there are limits upon its functions which differentiate it from other Australian superior courts. Ordinarily, a superior court of record is a court of general jurisdiction which means that, even if there are limits to its jurisdiction, it will be presumed to have acted within it. That is a presumption which is denied to inferior courts and is denied to a federal court such as the Federal Court. The consequence of the presumption is that prohibition does not, in general, go to a superior court, but prohibition is the means provided to keep such federal courts within the bounds of their jurisdictional limits…In those courts jurisdiction cannot be presumed so as to displace this remedy. (emphasis added)

18. The possibility of judicial review of federal superior courts was again affirmed in *New South Wales v Kable* (2013) 252 CLR 118. As Gageler J explained at [55]:[9]

> Any judicial order made in excess of jurisdiction by a federal court, whether the court be created as a superior court or an inferior court, may be set aside by a writ of certiorari issued under s 32 of the *Judiciary Act 1903* (Cth) in the exercise of the original jurisdiction of the High Court conferred by s 75 or under s 76 of the *Constitution*. (emphasis added)

19. In light of the above, the question in the present appeal is whether Nicholas J "misconceived the nature of the function he was performing in deciding whether or not to make the order for an extension of time".[10] If so, his Honour made a jurisdictional error that can be corrected by this Court.

20. Whether Nicholas J misconceived the nature of the function he was performing must of course be resolved as a matter of statutory construction.[11] As Allsop CJ said in *SZUWX v Minister for Immigration and Border Protection* (2016) 238 FCR 456 at [21], "[t]he question of whether an error is jurisdictional is, and always will be, context-specific". In the present context, the assessment of whether or not a particular error is jurisdictional

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8 See also *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at [63] (Kirby J); *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at [139]-[140] (McHugh J).

9 See also [29]-[32] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

10 *SZTUT v Minister for Immigration and Border Protection* [2016] HCATrans 150 at 124-127 (Gageler J). See also *FEZ17 v Minister for Home Affairs* [2019] FCAFC 76 at [13] (Rares, Flick and Burley JJ); *CKX16 v Judge of the Federal Circuit Court of Australia* [2018] FCA 400 at [23] (Steward J).

11 See, in the context of administrative decision-makers, *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at [30] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

depends upon "an analysis of the terms in which a statutory discretion or power has been conferred",[12] namely s 477A(2) of the Act.

The nature and limits of the power conferred by s 477A(2) of the Act

Section 477A(2) confers a broad discretion

21. As noted above, s 477A(2) of the Act confers on the Federal Court a discretion to extend the 35 day time limit for the filing of an application for review of a migration decision in that Court. The Court can extend the time limit if it is "satisfied that it is necessary in the interests of the administration of justice to make the order".

22. The phrase "in the interests of administration of justice" is "deliberately broad".[13] Generally speaking, "where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined".[14] The breadth of the discretion conferred enables the Federal Court to have regard to the "myriad of facts and circumstances by which an application for review came to be lodged outside the 35-day statutory time limit".[15]

23. Nevertheless, the discretion conferred upon the Federal Court by s 477A must be exercised within the limits indicated by the subject matter and purpose of the power to extend time.[16] That point was made by the High Court in *Klein v Domus Pty Ltd* (***Klein***) (1963) 109 CLR 467, which concerned a statutory discretion to extend time cast in broad terms. Dixon CJ (McTiernan and Windeyer JJ agreeing) said at 487:[17]

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12 *APP17 v Minister for Immigration and Border Protection* [2019] FCA 794 at [11] (Bromwich J), citing *SZUWX v Minister for Immigration and Border Protection* (2016) 238 FCR 456 at [15] (Flick J), [21] (Allsop CJ); see also *Huynh v Federal Circuit Court of Australia* (2019) 166 ALD 228 at [24] (Colvin J); *AZAFX v Federal Circuit Court of Australia* (2016) 244 FCR 401 at [68] (Charlesworth J).

13 *SZSZW v Minister for Immigration and Border Protection* [2018] FCAFC 82 at [27] (Collier, Wigney and Gleeson JJ), quoting *MZABP v Minister for Immigration and Border Protection* (2015) 242 FCR 585 at [52] (Mortimer J).

14 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40 (Mason J).

15 *SZUWX v Minister for Immigration and Border Protection* (2016) 238 FCR 456 at [12] (Bromwich J, Allsop CJ and Flick J agreeing).

16 See *Wu v The Queen* (1999) 199 CLR 99 at [70]-[71] (Kirby J); *Rozenblit v Vainer* (2018) 262 CLR 478 at [40] (Keane J); *Jackamarra v Krakouer* (1998) 195 CLR 516 at 539 [66] (Kirby J).

17 See also *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at [12] (Kiefel CJ), [79], [90] (Nettle and Gordon JJ); *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [67] (Hayne, Kiefel and Bell JJ), [109] (Gageler J); *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165; 198 ALR 59 at [69] (McHugh and Gummow JJ).

> We have invariably said that wherever the legislature has given a discretion of that kind you must look at the scope and purpose of the provision and at what is its real object. If it appears that the dominating, actuating reason for the decision is outside the scope of the purpose of the enactment, that vitiates the supposed exercise of the discretion. But within that very general statement of the purpose of the enactment, the real object of the legislature in such cases is to leave scope for the judicial or other officer who is investigating the facts and considering the general purpose of the enactment to give effect to his view of the justice of the case.

24. The same point was made in the context of a discretionary power to extend a limitation period. In *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, McHugh J referred to *Klein* and said at 554:

> In determining what the justice of the case requires, the judge is entitled to look at every relevant fact and circumstance that does not travel beyond the scope and purpose of the enactment authorising an extension of the limitation period.

25. It is therefore necessary to identify the scope and purpose of the discretion to extend time. Even though the discretion is broad, the Federal Court will misconceive the nature of the function it is exercising if it does not exercise the power to extend time consistently with its scope and purpose.

The scope and purpose of the power to extend time

26. The scope and purpose of the power to extend time is "to eliminate the injustice a prospective plaintiff might suffer by reason of the imposition of a rigid time limit within which an action was to be commenced".[18] Obviously enough, the scope and purpose of the power to extend time is not to determine the substantive merits of the application. This characterisation of the purpose of the provision is supported by the relevant legislative history.

27. Before 2005, the Federal Court did not have the discretion to extend the time limit imposed on the filing of "privative clause decisions".[19] Section 477(1), as it then stood, provided that an application to the Federal Court had to be made within 28 days of the notification of the decision. Further, the Federal Court was expressly prohibited from making an order allowing an applicant to lodge an application outside the 28 day period (s 477(2)).

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[18] *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 553 (McHugh J), quoting *Sola Optical Australia Pty Ltd v Mills* (1987) 163 CLR 628 at 635 (Wilson, Deane, Dawson, Toohey and Gaudron JJ).

[19] See *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth), Sch 1, item 7.

28. In *Plaintiff S157/2002 v Commonwealth* (***Plaintiff S157***) (2003) 211 CLR 476, Callinan J[20] held that the similarly-worded time limit applicable to the High Court in s 486A of the Act was constitutionally invalid.[21] His Honour said that the time limit would "deny applicants recourse to the remedies for which [s 75(v) of the Constitution] provides, particularly where, as here, the section purports to deny power to the Court to extend the time that it might otherwise have under O 60, r 6 of the Rules" (at [175]). His Honour went on to say (at [176]):

> I do not doubt that there is a power to prescribe time limits binding on the High Court in relation to the remedies available under s 75 of the Constitution as part of the incidental power with respect to the federal judicature. But those time limits must be truly regulatory in nature and not such as to make any constitutional right of recourse virtually illusory as s 486A in my opinion does. A substantially longer period might perhaps lawfully be prescribed, or perhaps even thirty-five days accompanied by a power to extend time. (emphasis added)

29. Parliament responded to Callinan J's judgment by enacting the *Migration Litigation Reform Act 2005* (Cth). Under s 486A as amended, the time limit was 28 days but the High Court had the power to extend the time period up to 56 days (Sch 1, item 31). At the same time, the Act inserted s 477A, which conferred the same power to extend time on the Federal Court.

30. The High Court considered the new version of s 486A in *Bodruddaza v Minister for Immigration and Multicultural Affairs* (***Bodruddaza***) (2007) 228 CLR 651. The Court unanimously held s 486A constitutionally invalid. In a joint judgment, Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ (Callinan J agreeing) observed at [55] that the provision "does not allow for the range of vitiating circumstances which may affect administrative decision-making". Their Honours went on to provide examples of circumstances in which the strict time limit imposed could operate unfairly. In particular, the time of notification of the decision could be different from the time when a person becomes aware of the circumstances giving rise to a possible challenge to the decision (eg where the decision had been procured by corrupt inducement, or where there may be circumstances giving rise to actual or apprehended bias) (see [56]). In addition, the time limit did not "allow for supervening events which may physically incapacitate the applicant or otherwise, without any shortcoming on the part of the applicant, lead[ing] to

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[20] The other Justices did not need to consider the validity of s 486A.

[21] The time limit applicable to the High Court was 35 days.

a failure to move within the stipulated time limit" (see [57]). Their Honours concluded at [58]:

> It is no answer to say that some unfairness is to be expected and must be tolerated. The above examples are instances where the time limit subverts the constitutional purpose of the remedy provided by s 75(v). Further examples may be suggested from practical experience.

31. Parliament responded to *Bodruddaza* by enacting the *Migration Legislation Amendment Act (No 1) 2009* (Cth). This Act conferred on the High Court, the Federal Court and the Federal Magistrate's Court (as it was then known) the powers found in the current Act, ie a broad discretion to extend time where the Court is "satisfied that it is necessary in the interests of the administration of justice to make the order".

32. The Explanatory Memorandum (**EM**) for the relevant Bill said that "[v]esting the Courts with such broad discretion will protect applicants from possible injustice".[22] In relation to the amendments made to s 486A, the EM expressly stated that the conferral of a broad discretion on the High Court sought to address the decision in *Bodruddaza*.[23] In the Second Reading Speech, Senator Ludwig made similar observations, stating that the amendment "seeks to address the constitutional issues identified by the High Court in Bodruddaza and enables the Courts to protect applicants from possible injustice caused by the time limits".[24] The Minister also said that the amendments made by the Bill "will ensure a more efficient migration review system, while maintaining the rights of applicants to procedural fairness".[25]

33. The 2009 Act also removed the ability to appeal from decisions to extend time under s 477A(2) (Sch 3, item 1). The EM said that the limitation on appeals "will help ensure the effectiveness of the new time limits for applying for judicial review of a migration decision as inserted by the Bill".[26] In the Second Reading Speech, the Minister relevantly said:[27]

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22 EM to the Migration Legislation Amendment Bill (No 2) 2008 (Cth) at 2, see also [68], [87].

23 EM at [102].

24 Hansard, Senate (3 December 2008) at 7944.

25 Hansard, Senate (3 December 2008) at 7943.

26 EM at 2.

27 Hansard, Senate (3 December 2008) at 7944.

> This measure will strengthen and enhance the new time limits for applying for judicial review of a migration decision as inserted by the Bill.
>
> It may also help to prevent applicants from making weak or vexatious appeals to deliberately delay their removal from Australia.
>
> …
>
> The amendments that limit appeals seek to encourage applicants to seek timely resolution of their cases.

34. The imposition of time limits is intended to encourage applicants to bring their applications in a timely manner. The removal of the ability to appeal decisions refusing an extension of time was evidently intended to act as further encouragement in that regard. However, the legislative history makes it clear that the amendments made by the 2009 Act pursued that objective while at the same time ensuring that the time limits did not operate to cause injustice. More particularly, the broad discretion conferred on each of the relevant courts was intended to allow those courts to avoid the kinds of unfair outcomes that could result from a strictly-imposed time limit referred to by Callinan J in *Plaintiff S157* and by the Court in *Bodruddaza*. That is the purpose for which the power in s 477A of the Act was conferred on the Federal Court.

The correct approach to the merits

35. It is not in dispute that the Federal Court can have regard to the merits of the application in determining whether or not to exercise its discretion under s 477A(2) of the Act.

36. However, the Court's consideration of the merits, and the extent to which that consideration informs the exercise of the discretion, must be consistent with the subject matter and purpose of the power to extend time.

37. As a generality, it would not be consistent with the subject matter and purpose of the power to extend time under s 477A of the Act for the Court to engage in more than an assessment, on an impressionistic basis, of whether the applicant's proposed ground of review is reasonably arguable. Where the Court goes beyond this, the more detailed consideration of the merits strongly suggests that the Court has misconceived its function or power and acted in excess of jurisdiction.

38. The Full Federal Court has held repeatedly that an impressionistic assessment of merits is the correct approach in relation to the equivalent power to extend time conferred on

what is now the Federal Circuit and Family Court of Australia by s 477 of the Act.[28] In *MZABP v Minister for Immigration and Border Protection* (***MZABP***),[29] in comments subsequently endorsed by the Full Court,[30] Mortimer J said:

> … it will seldom be in the interests of the administration of justice to grant leave where an appeal has little or no prospects of success … . There is, however, in that approach a level of certainty about the unsuccessful outcome which is not borne of an exhaustive preliminary examination of the grounds as if they had been fully considered, developed and argued. Rather, the certainty or confidence a judge may have about an unsuccessful outcome is because the grounds on their face, and without the detailed argument and development which attends a full hearing, are plainly hopeless. That in my opinion is the kind of threshold intended by the presence of merit as a consideration in the discretion to extend time. If a judge travels beyond an examination of the ground at what should be a reasonably impressionistic level into a fuller consideration of the arguments for and against each ground of review, then in my respectful opinion that is not a function appropriate to a discretion such as that contained in s 477(2).

39. Mortimer J went on to explain that this approach is consistent with the subject matter and purpose of the power to extend time. Her Honour said at [63]:[31]

> The correct approach may be expressed by the use of language such as whether a ground is "arguable", "reasonably arguable", "sufficiently arguable" or has "reasonable prospects of success". Whichever description is chosen, the approach taken under s 477(2) should not be transformed into a de facto full hearing, especially where the outcome is not subject to any appeal as of right. The subject matter of s 477(2) is whether time for bringing a judicial review application, which is to be heard and determined in the ordinary course of the processes of the Federal Circuit Court, should be extended. The subject matter is not whether the applicant will ultimately be successful in impugning the merits review decision.

40. Similarly, in *DHX17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 278 FCR 475 (***DHX17***) the Full Court (Collier, Rangiah and Derrington JJ) concluded, after a detailed survey of the authorities, as follows at [68]:

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28 *CZA19 v Federal Circuit Court of Australia* (2021) 390 ALR 1; [2021] FCAFC 57 at [19] (Allsop CJ, Markovic and Colvin JJ); *DHX17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 278 FCR 475 at [68] (Collier, Rangiah and Derrington JJ); *DKX17 v Federal Circuit Court of Australia* (2019) 268 FCR 64 at [95] (Rangiah J, Reeves and Bromwich JJ agreeing); *Guo v Minister for Immigration and Border Protection* [2018] FCAFC 34 at [27] (Siopis, White and Perry JJ); *Singh v Minister for Immigration and Border Protection* [2017] FCAFC 195 at [21] (Perram, Farrell and Perry JJ). See also *Tuberi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1029 at [4] (Steward J); *Huynh v Federal Circuit Court of Australia* (2019) 166 ALD 228 at [58]; *DBA16 v Minister for Home Affairs* [2018] FCA 1777 at [60] (Wheelahan J).

29 (2015) 242 FCR 585 at [62].

30 *MZABP v Minister for Immigration and Border Protection* (2016) 152 ALD 478 at [38] (Tracey, Perry and Charlesworth JJ).

31 See also [56] ("[t]he judgment made by a court exercising the discretion is that it is appropriate, or fair and equitable, that a litigant should have the opportunity for which the legislative scheme provides").

> …the fact that, on an application under s 477(2), the FCC has engaged in more than an impressionistic evaluation of the appellant's proposed ground of review, strongly suggests that it misconceived its function or power and acted in excess of jurisdiction … As the discussion in the authorities reveals, the decisional process of exercising the discretion in s 477(2) neither requires nor warrants anything more than an impressionistic consideration of the proposed grounds of review. Where the proposed grounds are examined for the purposes of ascertaining whether they would succeed were an extension granted, it is apparent that the power and the function to be performed are misunderstood.

41. It should be noted that in *DHX17* the Minister did not contest the findings made by Greenwood J at first instance that the Federal Circuit Court judge had proceeded on a "misconception" as to "the function to be performed and the power to be exercised under s 477(2)",[32] and that the Full Court regarded the failure of the Minister to file a Notice of Contention as "an impediment to an outcome favourable to the Minister on the appeal" (see [82]). However, the Full Court clearly regarded Greenwood J's conclusion to be correct. Their Honours said at [83]:

> The primary judge's conclusion that, in the circumstances of this case, the error by the FCC judge fell within that class of jurisdictional error demonstrated by the third exemplar in *Kirk* is supported by many of the authorities referred to above. That was entirely consistent with the conclusion drawn above that it is not appropriate on an application under s 477(2) to ascertain whether the proposed grounds of review will ultimately succeed and that such an approach is indicative of an excess of jurisdiction. However, it is not irrelevant that the primary judge's conclusion was in the context that the only determinative matter relevant to the discretion under s 477(2) in the matter before the FCC judge was the issue of the merits of the proposed grounds of review. This was not a case where a multitude of factors were weighed in the decisional process. In such circumstances where the sole discrimen affecting the discretion is a matter which is not logically relevant to the exercise of power in the particular circumstances, the primary judge's conclusion that the FCC judge misconceived the scope of the function to be discharged, was undoubtedly correct.

42. The position as articulated by the Full Court in *DHX17* is correct and applies equally to the power to extend time conferred on the Federal Court.

43. **First**, s 477A of the Act is evidently in the nature of a gateway provision, pursuant to which the Court must determine whether the application should proceed to a full and final determination on the merits.[33] Undertaking such a full and final determination at the gateway stage is inconsistent with the statutory scheme.

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[32] *DHX17 v Minister for Home Affairs* [2019] FCA 2150 at [83].

[33] *AZAFX v Federal Circuit Court of Australia* (2016) 244 FCR 401 at [79] (Charlesworth J). See, in the context of s 486A, *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 at [42] (Gageler and Keane JJ) ("Section 486A operates rather to regulate the procedure applicable to the exercise of the jurisdiction that has been invoked … by making the grant of the relief sought in the application conditional on an order extending the period for the making of the application" (emphasis added)).

44. **Second,** there is nothing in the background to s 477A, its text or the surrounding context in the Act, to suggest that the legislature intended that the Court could or should use the power to extend time as an alternative mechanism for the determination of the substantive application itself.

45. To the contrary, as noted above, the Minister in the Second Reading Speech for the 2009 Act said that the limitation on appeals from a refusal of an extension of time "may also help to prevent applicants from making weak or vexatious appeals to deliberately delay their removal from Australia". This is an implicit acknowledgement that reasonably arguable applications would ordinarily be granted an extension of time, with an appeal being available in the event the substantive application was dismissed.

46. **Third**, the purpose of s 477A of the Act is to ameliorate injustice that may be suffered by a strict application of the time limit. Where the other discretionary factors – such as the reasons for the delay, the extent of the delay and the existence (or otherwise) of prejudice to the respondent – do not weigh against the grant of an extension of time, the applicant is entitled to be placed on an equal footing with those who brought their applications within time. An applicant who commences within time is in a position to develop and advance his or her case in the usual way to a final hearing (subject to the claim being so devoid of merit as to justify it being struck out), and thereafter, to access any available appellate process: see *MZABP* at [56]. Subject to the other discretionary factors, an applicant with an arguable claim brought out of time should have the same opportunity.

47. For example, if an applicant misses the applicable time limit by one day for reasons entirely outside his or her control, such as ill health, there is no good reason to treat that applicant differently from a person not suffering from a similar affliction who brought his or her claim within time.

48. Thus if, following an impressionistic assessment of the merits, the Court decides that the application is hopeless or has no prospects of success, it may be open for the Court to conclude that an extension of time would not be "in the interests of the administration of justice".[34] In this scenario, it would not be unjust to refuse to place the applicant on an

[34] *SZSZW v Minister for Immigration and Border Protection* [2018] FCAFC 82 at [25] (Collier, Wigney and Gleeson JJ); *MZABP v Minister for Immigration and Border Protection* (2015) 242 FCR 585 at [62] (Mortimer J).

equal footing with a person who commenced proceedings within the relevant period. Beyond this, however, absent a reason outside of the merits to refuse the extension of time, it should be granted.

49. **Fourth**, a refusal to extend time under s 477A forecloses the statutory right of appeal to the Full Federal Court that would otherwise be available under s 24 of the FCA Act: see s 476A(3)(b) of the Act. Parliament is unlikely to have intended that result unless the claim was not reasonably arguable, or where other factors – such as the reasons for and extent of the delay – weighed in favour of refusing the extension of time.

50. Moreover, the legislature is unlikely to have intended a result whereby it was left to the Court, in its discretion, whether to engage in a more substantive assessment of the merits or not as part of the determination of an application for an extension of time. Such a construction would result in arbitrary outcomes, because the availability of a right of appeal would then turn upon whether a particular judicial officer decided to descend into a more detailed examination of the merits or not. In light of those arbitrary outcomes, this construction should be disavowed.[35]

51. **Fifth**, the application of a standard only that the claim be reasonably arguable, when assessed on an impressionistic basis, is consistent with the common law's reluctance to deny aggrieved persons with an arguable complaint access to the Court. This concern is particularly acute in the migration context, where the practical consequences for people as a result of migration decisions are significant.

52. As the Full Court in *DHX17* observed at [69]:

> [This conclusion] is coherent with the historical and prevailing attitude of the common law not to deny access to the courts to litigants who have some arguable claim. In this respect, an important consideration is that s 477(2) enables the FCC to extend the time in which a person may seek review in circumstances where no other avenue of redress exists. For the intending applicant it is clear that the consequences of a refusal to extend time are legally and practically significant. In relation to the former, their access to the courts for the purposes of ventilating their claimed rights will be terminated. In respect of the latter, it is regularly said that the gravity of the consequences to a *bona fide* asylum seeker of being

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35 *Newcrest Mining Ltd v Thornton* (2012) 248 CLR 555 at [125] (Bell J). In *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390, Dixon CJ said that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed" (emphasis added) (quoted with approval in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69] (McHugh, Gummow, Kirby and Hayne JJ)).

> denied access to the Courts may, of itself, be a real reason for granting an extension: *Ariaee v Minister for Immigration and Multicultural Affairs* [2001] FCA 1627.

53. The Court went on to observe that "[h]istorically, the courts of this country have been sensitive to the premature curtailment of a person's ability to agitate a claimed right" and that "[s]uch a view permeates a range of procedural powers which regularly arise in litigation", such as summary dismissal (at [70]). While acknowledging that the power to extend time is not the same as a power of summary dismissal, the Court said that "a refusal to exercise the power to extend time has the same practical consequences as summary dismissal with the result that the same tenderness concerning the exclusion of persons from the courts is inherent in the power's exercise" (at [75])

54. **Sixth**, this approach to the consideration of the merits in the context of an application for an extension of time is consistent with the manner in which provisions affording a discretion to extend time have been traditionally understood.

55. Mortimer J in *MZABP* observed at [65] that the same approach to assessing the merits had been adopted almost 20 years earlier in the context of the discretion to extend time conferred by s 11 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). In *Seiler v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 48 FCR 83, French J said at 98:

> In deciding to allow time to be extended, I have not taken into account the merits of the application. It was fully argued on the merits in any event. In the circumstances, it would be artificial to import into the consideration of the extension of time some assessment of the likelihood of the success of the application. The question of the merits of a substantive application has to be approached with some caution in any consideration of a claimed extension of time. If an application has no reasonable prospects of success, then the decision to refuse an extension on that basis reduces to a decision to strike it out. To say that a substantive application has a reasonable prospect of success is to say no more than that there is a finite non-trivial probability that it will succeed. The statement of its merits is then stochastic. It is based upon necessarily incomplete evidence or consideration of the case. It is difficult to imagine any case which appeared weak but not hopeless in which it would be proper to refuse an extension on that account. … [A] strong case may be a positive factor in favour of the grant of extension, but an apparently weak case cannot be treated as a factor weighing against it.

56. There are other cases in the s 11 context to the same effect.[36] The same approach to the assessment of the merits has also been adopted in other statutory contexts.[37] Given the broad discretion in s 477A(2) was inserted into the Migration Act against this considerable body of case law concerning other powers to extend time, it is likely that Parliament intended the discretion conferred on the Federal Court by s 477A(2) of the Act to be exercised in the same way.[38]

57. For these reasons, in engaging in a substantive (rather than impressionistic) assessment of the merits, the Court does not merely fail to follow "judicial guidance".[39] Rather, it will have "misconceived the nature of the function [it] was performing in deciding whether or not to make the order for an extension of time".[40]

58. The above analysis does not require a conclusion that it will never be permissible to consider the merits of an application, beyond whether it is reasonably arguable, in determining whether to grant an extension of time. For example, if the delay is a long one and there is no proper explanation for that delay, then the Court may be minded to refuse an extension of time unless an exceptional case is demonstrated.[41] The strength of the claim may, in these circumstances, tip the balance in favour of the grant of an extension of time. This is because "the stronger the case appears to be, the higher may be the probability that an injustice will be done if an extension is refused".[42] However, the

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36 See eg, *Barrett v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 18 ALD 129 at 130-131 (Pincus, Gummow and Lee JJ).

37 See eg, *Tomko v Palasty (No 2)* (2007) 71 NSWLR 61 at [14] (Hodgson JA), [58] (Basten JA); *Renshaw v New South Wales Lotteries Corporation Pty Ltd* [2021] NSWCA 41 at [23] (Brereton JA).

38 The "existing state of the law" being part of the relevant context: *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

39 Cf *DBA16 v Minister for Home Affairs* [2018] FCA 1777 at [60] (Wheelahan J); *Huynh v Federal Circuit Court of Australia* (2019) 166 ALD 228 at [58]-[67] (Colvin J). See also *CZA19 v Federal Circuit Court of Australia* (2021) 390 ALR 1 at [19] (Allsop CJ, Markovic and Colvin JJ).

40 *SZTUT* [2016] HCATrans 150 at 124-127. In *DMI16 v Federal Circuit Court of Australia* (2018) 264 FCR 454 (at [62]), the Minister conceded that the Federal Circuit Court would fall into jurisdictional error if it approached the prospects of success as if it were making a final decision. He was right to do so.

41 *Salum v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] HCATrans 51 (Gordon J); *Vella v Minister for Immigration and Border Protection & Anor* (2015) 326 ALR 391; [2015] HCA 42 at [3] (Gageler J), citing *Re Commonwealth; Ex Part Marks* (2000) 177 ALR 491; [2000] HCA 67 at [13] (McHugh J); *WQRJ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 736 at [29] (Derrington J).

42 *Seiler v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 48 FCR 83 at 98 (French J).

present case involved a minor, and explained, delay and therefore does not raise these issues.

59. Even where there is a long delay, if there is a cogent explanation for the delay there is authority in this Court that a detailed examination of the merits should not be undertaken. In *Gibson v Minister for Home Affairs* [2020] HCATrans 046, there was a delay of more than nine months. After summarising the parties' submissions, Edelman J said (at 1317-1327):

> It is neither necessary nor appropriate to descend into any more detail concerning the merits of all of these various submissions and those related to them. It suffices to say, and to say no more than, that I am satisfied that the plaintiff's submissions are sufficiently arguable in the circumstances of this case to justify the extension of time required by the plaintiff. The circumstances of this case include (i) the explanations for the delay, including the cogency of the explanation for the period until 11 June 2019; and (ii) the lack of any particular prejudice to the Minister beyond the general prejudice of allowing the application to proceed. I am, therefore, satisfied that it is necessary in the interests of the administration of justice that an extension of time should be granted.

60. Moreover, it is no part of the plaintiff's case to throw doubt upon the appropriateness of the Federal Court's practice of listing an application for an extension of time together with substantive application itself, to be determined if the application is granted.

61. However, where that occurs, the Federal Court must ensure that it approaches each application discretely, with the merits only being assessed in the limited way discussed above in determining the application for an extension of time.

62. The correct approach in these circumstances was summarised by Wigney J in *SZTES v Minister for Immigration and Border Protection* [2015] FCA 719,[43] where his Honour said at [102]:

> Where an application to extend time under s 477(2) of the Act is listed for hearing at the same time as the substantive application for review, and where full argument takes place in relation to the merits of the application, care should be taken to ensure that the issues that arise in relation to the extension application are dealt with clearly and discretely from the issues that arise in relation to the substantive application. That will avoid the sort of confusion that arose in this matter. Furthermore, when the merits of the substantive application are fully argued, it will ordinarily be quite artificial to import into the consideration of the extension application an assessment of the likelihood of success of the application. Where the only issue on the extension application is the merits of the substantive application, and where the merits are fully argued, the better course in all but clearly hopeless cases would be to extend time and deal with the merits on a final basis.

[43] There was an appeal in *SZTES*, but the Full Court did not cast any doubt on the correctness of these observations: see *SZTES v Minister for Immigration and Border Protection* [2015] FCAFC 158.

> That will avoid the unfortunate perception that might otherwise arise to the effect that the extension application was refused so as to deny the applicant appeal rights in relation to the substantive application. (emphasis added).

63. This approach was (correctly) endorsed by the Full Court in *DHX17* (at [101]) and by Mortimer J in *MZABP* (at [66]).

Nicholas J made the error

64. In the present case, Nicholas J considered the merits of the plaintiff's application on more than an impressionistic basis and did not merely assess whether the proposed ground was reasonably arguable. Consistently with the discussion above, in doing so, his Honour committed jurisdictional error.

65. Nicholas J commenced his judgment by stating: "Before me is an application for an extension of time in which to file an application for the review of a migration decision pursuant to s 476A of [the Act] and, if granted, the hearing of that application" (**AB 159, J [1]**). His Honour went on to identify the factors enumerated by Wilcox J in *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344 at 348-349, one of those factors being expressed as "the merits of the substantial application" (**AB 160, J[6(f)]**). His Honour then said (**AB 160-161, J [7]-[8]**):

> The Minister accepted that the applicant's delay was not inordinate and did not contend that he would be prejudiced by the grant of an extension of time. However, the Minister argued that the applicant's extension of time should be dismissed because the applicant's proposed grounds of review lack sufficient merit to warrant the grant of an extension of time.
>
> Ground 2 of the applicant's proposed grounds of review was fully argued. For the reasons that follow, I am not persuaded that ground 2 has any merit. In the circumstances, I propose to dismiss the applicant's application for an extension of time.

66. The "reasons that follow" at [10]-[32] address the applicant's substantive application. After setting out the applicant's submissions in some detail, Nicholas J said that he did not accept them (**AB 165, J [28]**).

67. On a fair reading of the judgment, Nicholas J cannot be said to have simply reviewed the merits of the proposed ground on an impressionistic basis to determine whether it was reasonably arguable. Certainly, this is not said anywhere in the judgment. In particular, his Honour does not at any stage refer to the relevant test being whether the claim was "plainly hopeless" or lacked a "reasonable prospect of success". To the contrary, his

Honour identified the test as involving an analysis of "the merits of the substantive application", based on "full argument", without reference to the lower threshold.

68. The comments made by the Full Federal Court in *DHX17* about the reasons of the Federal Circuit Court judge at issue in that case (at [79]) apply equally to the reasons of Nicholas J:

> Although the FCC judge did not specifically assert that he would extend time only if he were satisfied that the appellants "could succeed" on any of the proposed grounds of review, that is the effect of his conclusions. There is no other reason for the FCC judge's deep analysis of the proposed grounds and there is nothing in his Honour's reasons to suggest that he considered any other test was appropriate for the purposes of exercising the power under s 477(2).

69. As in *DHX17*, this was a case where "the sole discrimen affecting the discretion [was] a matter which is not logically relevant to the exercise of power" (at [83]). In failing to apply the correct test, Nicholas J misapprehended or misconceived the nature of the function he was exercising and so committed a jurisdictional error.

70. As acknowledged above, it was open to Nicholas J to decide to list both the application for an extension of time and the substantive application to be heard at the same time. However, with respect, his Honour fell into the error identified by Wigney J in *SZTES*. That is, Nicholas J did not take "care … to ensure that the issues that arise in relation to the extension application are dealt with clearly and discretely from the issues that arise in relation to the substantive application" (at [102]). His Honour should have granted the extension of time unless he was convinced that the case was clearly hopeless. Nicholas J did not reach any such conclusion.

The error was material

71. It is clear that, if the statutory task had been performed correctly, the Federal Court could have made a different decision on the application for an extension of time. Accordingly, the error was material. In this regard, it is not relevant to consider whether the Federal Court would have ultimately dismissed the substantive application.[44]

PART VI ORDERS SOUGHT

72. The plaintiff seeks the following orders:

[44] *DHX17* (2020) 278 FCR 475 at [98] (the Court).

72.1. A writ of certiorari that the orders of the second defendant made on 24 August 2021 be quashed.

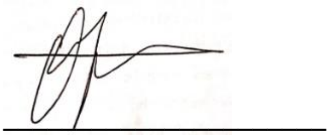
72.2. A writ of mandamus that the second defendant determine the plaintiff's application for an extension of time pursuant to s 477A(2) of the Migration Act according to law.

72.3. Costs.

PART VII ESTIMATE OF TIME FOR ORAL ARGUMENT

73. The plaintiff estimates that he will require approximately 1 hour for argument in chief, and up to 15 minutes in reply.

10 Dated: 4 February 2022



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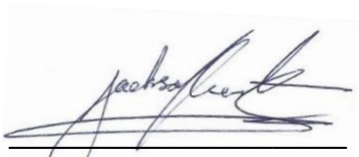

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: **SOSEFO KAUVAKA LELEI TU'UTA KATOA**

Plaintiff

and

MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS

First Defendant

JUDGE OF THE FEDERAL COURT OF AUSTRALIA

Second Defendant

ANNEXURE TO THE SUBMISSIONS OF THE PLAINTIFF

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the Plaintiff sets out below a list of the particular constitutional provisions and statutes referred to in his submissions.

No	Description	Version	Provision(s)
1.	Commonwealth Constitution	Current	s 75(v)
2.	*Administrative Decisions (Judicial Review) Act 1977* (Cth)	Current	s 11
3.	*Federal Court of Australia Act 1976* (Cth)	Current	s 5(2), 24
4.	*Migration Act 1958* (Cth)	Current	ss 476A, 477, 477A, 486A
5.	*Migration Legislation Amendment (Judicial Review) Act 2001* (Cth)	As enacted	Sch 1, item 7
6.	*Migration Legislation Amendment Act (No 1) 2009* (Cth)	As enacted	Sch 2, item 4; Sch 3, item 1
7.	*Migration Litigation Reform Act 2005* (Cth)	As enacted	Sch 1, items 18, 31