FEDERAL COURT OF AUSTRALIA

Ogawa v Carter [2020] FCA 828

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| File number: | QUD 411 of 2019 |
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| Judge: | **RANGIAH J** |
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| Date of judgment: | 16 June 2020 |
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| Catchwords: | **ADMINISTRATIVE LAW** – application for issue of writ of certiorari quashing decision to approve payment plan for Commonwealth debt – whether decision-maker had authority to make the decision – whether decision-maker failed to take into account a relevant consideration – whether decision was legally unreasonable – application dismissed |
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| Legislation: | *Judiciary Act 1903* (Cth) s 39B*Public Governance, Performance and Accountability Act 2013* (Cth) ss 10, 11, 12, 63, 107 and 110*Migration Regulations 1994* (Cth) Sch 4 |
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| Cases cited: | *Minister for Home Affairs v Ogawa* [2019] FCAFC 98*Minister for Home Affairs v Ogawa* [2019] HCASL 375*Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541*Ogawa v Minister for Immigration and Border Protection* [2018] FCA 62  |
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| Date of hearing: | 3 March 2020 |
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| Registry: | Queensland |
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| Division: | General Division |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | Catchwords |
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| Number of paragraphs: | 42 |
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| Counsel for the Applicant: | The Applicant appeared in person |
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| Counsel for the Respondents: | Ms B O’Brien |
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| Solicitor for the Respondents: | Australian Government Solicitor |

ORDERS

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|  | QUD 411 of 2019 |
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| BETWEEN: | MEGUMI OGAWAApplicant |
| AND: | SANDRA CARTER OF THE DEPARTMENT OF HOME AFFAIRS AS THE SECOND DELEGATE OF THE FINANCE MINISTERFirst RespondentFINANCE MINISTERSecond Respondent |

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| JUDGE: | RANGIAH J |
| DATE OF ORDER: | 16 JUNE 2020 |

THE COURT ORDERS THAT:

1. The originating application is dismissed.
2. The applicant pay the respondents’ costs of the application.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

RANGIAH J:

1. The first respondent, Ms Sandra Carter, is a public servant employed in the government department which was formerly known as the Department of Immigration and Border Protection (the **Department**). On 29 November 2016, Ms Carter made a decision allowing the applicant, Dr Megumi Ogawa, to repay a debt she owed to the Commonwealth in instalments of $2,000 per month.
2. On 2 July 2019, Dr Ogawa filed an application under s 39B of the *Judiciary Act 1903* (Cth) (the **Act**) seeking the issue of a writ of certiorari quashing Ms Carter’s decision, as well as other relief. Dr Ogawa’s complaint appears to be that the monthly instalments were too high.
3. Ms Carter’s decision was made pursuant to s 63(1)(b) of the *Public Governance, Performance and Accountability Act 2013* (Cth) (the **Public Governance Act**). The grounds of the application are that, firstly, Ms Carter had no authority to make the decision; secondly, Ms Carter failed to have regard to Dr Ogawa’s ability to repay; and, thirdly, that the decision was legally unreasonable.
4. I will describe the decision made by Ms Carter and some matters of background before considering the grounds of the application.

## Background and decision

1. As at 29 November 2016, Dr Ogawa owed a debt of $85,959.79 to the Commonwealth. The debt principally related to costs orders made against Dr Ogawa in various proceedings she brought against the Commonwealth or its emanations.
2. Dr Ogawa has applied for a Partner (Temporary) (Class UK) visa and a Partner (Residence) (Class BS) visa. The grant of these visas is subject to Public Interest Criterion 4004 in Sch 4 of the *Migration Regulations 1994* (Cth), which requires that:

The applicant does not have outstanding debts to the Commonwealth unless the Minister is satisfied that appropriate arrangements have been made for payment.

1. On 2 September 2016, Dr Ogawa submitted a form to the Debt Management Unit of the Department applying for deferral of the repayment of her debt to the Commonwealth. On 26 November 2016, Dr Ogawa changed her application to an application for payment of the debt by way of an instalment plan. Dr Ogawa’s intention was evidently to make an arrangement for payment of her debt so that she could satisfy Public Interest Criterion 4004.
2. Ms Carter made her decision on 29 November 2016. Ms Carter describes the decision as one made under s 63(1)(b) of the Public Governance Actto approve the payment plan for repayment of Dr Ogawa’s debt.
3. Dr Ogawa was provided with a letter on 29 November 2016 which stated:

You have offered to enter into an arrangement to make repayments of your debt by an upfront payment of AUD $2,000.00, followed by monthly instalments of AUD $2,000.00.

This offer has been accepted providing you comply with the conditions in the attached undertaking. Please sign and return the undertaking with your first payment.

1. Dr Ogawa signed and returned the enclosed document which is entitled “Instalment Undertaking” on 29 November 2016 (it was wrongly dated 29 November 2017). That document states:

INSTALMENT UNDERTAKING

FINANCIAL SERVICES SECTION

1. I, Megumi OGAWA [address omitted] acknowledge that I have a debt owing to the Commonwealth of $85,959,79.

2. I confirm my current financial circumstances prevent me from paying the above debt in full and I agree to the following conditions allowing me to repay the debt by instalment.

3. I agree that the debt will be paid by the following:

[A schedule is set out for an initial payment of $2.000 and then monthly payments of $2,000 from 30 December 2016 to 30 May 2020.]

4. I understand this arrangement to pay my debt by instalment is subject to review by DIBP.

5. I will advise Debt Management Unit immediately of any change to my financial circumstances.

6. I will advise Debt Management Unit of any change to my address.

7. I acknowledge that any outstanding debt to the Commonwealth under Public Interest Criterion 4004 of the Migration Regulations 1994 can affect future visa grants and/or my ability to enter Australia. I note that this arrangement may be subject to change in order to satisfy this criterion.

8. I agree that any default of the above conditions may result in the commencement of legal action to recover the balance in full.

9. If you breach the current arrangement you will need to pay the debt in full.

1. Ms Carter recorded her reasons for making her decision to allow payment of the debt in monthly instalments of $2,000 as follows:

1. Age of the debts - Debts date back to 2005 and up until November 2016 client had not demonstrated an attempt to repay these debts during this time. Client has previous completed the SFD but has always requested deferrals, even when employed.

2. Size of the debts - Debts total $85,959.79. Standard process is for instalments plans to not extend past 3 years, from when the debt occurred. Most of the debts are already more than 3 years overdue.

3. How the debts occurred - Debts related to the Refugee Review Tribunal and court imposed fees for unsuccessful cases. It was the client's decision to lodge applications with RRT and the courts and client should have considered how they were going to pay these costs if unsuccessful. Client works within the law sector so would have a good understanding of how court action and costs occur.

4. Likelihood of employment - client currently holds work rights, is well educated and has good communication skills. Chances of client obtaining work are high.

5. Financial status - Although the client has a low income, she was unable to demonstrate financial difficulty. Client is currently applying for a spouse visa, but she would not provide financial details for her spouse. As client is specifically applying for a spouse visa, this is particularly relevant.

1. On 17 January 2017, Dr Ogawa asked Ms Carter to reassess the amount of her monthly repayments, but Ms Carter declined to do so. On 24 January 2017, Dr Ogawa requested written reasons for this decision. On 26 January 2017, Ms Carter set out her reasons in substantially similar terms to her reasons for the decision of 29 November 2016.
2. Dr Ogawa made two payments of $2,000 each and then three payments of $100 each. She has made no payments towards her outstanding debt since March 2017.
3. On 29 March 2018, Dr Ogawa received an email from the Department indicating that her visa application would not be processed until the Minister’s appeal from a judgment in her favour in *Ogawa v Minister for Immigration and Border Protection* [2018] FCA 62 had been finalised. The Full Court dismissed the appeal on 19 June 2019 in *Minister for Home Affairs v Ogawa* [2019] FCAFC 98. Special leave to appeal was subsequently refused by the High Court of Australia in *Minister for Home Affairs v Ogawa* [2019] HCASL 375.
4. On 21 June 2019, Ms Carter told Dr Ogawa in a telephone conversation that she could apply for another repayment plan, but that, generally, multiple repayment plans would not be entered into if a previous repayment plan had been breached. It appears that it was that discussion which prompted Dr Ogawa to commence these proceedings on 2 July 2019.

## The legislation

1. Section 63 of the Public Governance Act provides:

**63 Waiver of amounts or modification of payment terms**

(1) The Finance Minister may, on behalf of the Commonwealth, authorise:

(a) the waiver of an amount owing to the Commonwealth; or

(b) the modification of the terms and conditions on which an amount owing to the Commonwealth is to be paid to the Commonwealth.

(2) An authorisation of a waiver or modification must be in accordance with any requirements prescribed by the rules.

(3) An authorisation of a waiver may be made either unconditionally or on the condition that a person agrees to pay an amount to the Commonwealth in specified circumstances.

(4) To avoid doubt, an amount may be owing to the Commonwealth even if it is not yet due for payment.

(5) An authorisation of a waiver or modification is not a legislative instrument.

1. Section 107 provides, relevantly:

**107 Finance Minister**

*When Finance Minister may delegate*

(1) The Finance Minister may, by written instrument, delegate to the Finance Secretary, or an accountable authority or an official of a non-corporate Commonwealth entity, any of the Finance Minister’s powers, functions or duties under this Act or the rules.

…

*Directions by the Finance Minister about delegation*

(4) In exercising powers, performing functions or discharging duties under a delegation, the delegate must comply with any written direction given by the Finance Minister to the delegate.

1. Under s 10(1) of the Public Governance Act, a “Commonwealth entity” includes a Department of State. Section 11 provides that a Commonwealth entity may be a “corporate Commonwealth entity” or a “non-corporate Commonwealth entity”. Section 12(1) provides that each Commonwealth entity has an “accountable authority”. Under s 12(2), the Secretary of the Department is the accountable authority of a Commonwealth entity that is a Department of State.
2. Section 110 of the Public Governance Act provides relevantly:

**110 Accountable authority**

 …

*Subdelegation of Finance Minister’s delegation*

(5) If the accountable authority of a non-corporate Commonwealth entity delegates to a person (the ***second delegate***) a power, function or duty that has been delegated by the Finance Minister to the accountable authority under subsection 107(1), then that power, function or duty, when exercised, performed or discharged by the second delegate, is taken for the purposes of this Act and the rules to have been exercised, performed or discharged by the Finance Minister.

(6) If the accountable authority of a non-corporate Commonwealth entity is subject to directions in relation to the exercise of a power, the performance of a function or the discharge of a duty, delegated by the Finance Minister to the accountable authority under subsection 107(1), then:

(a) the accountable authority must give corresponding written directions to the second delegate; and

(b) the accountable authority may give other written directions (not inconsistent with those corresponding directions) to the second delegate in relation to the exercise of that power, the performance of that function or the discharge of that duty.

(7) The second delegate must comply with any directions of the accountable authority.

## Consideration

## *Delegation*

1. Ms Carter’s decision of 29 November 2016 was a decision under s 63(1)(b) of the Public Governance Act to authorise modification of the terms and conditions on which the amount owing to the Commonwealth was to be paid. Dr Ogawa argues that Ms Carter had no authority to make that decision as she had no delegation, or valid delegation, to do so.
2. Ms Carter deposes that when she made her decision, she was exercising a delegation given to officers in the Revenue Management Section of the Finance Division of the Department at Executive Level 1 by the Secretary of the Department.
3. There is in evidence an instrument of delegation entitled, “Public Governance, Performance and Accountability (Finance Minister to Accountable Authorities of Non-Corporate Commonwealth Entities) Delegation 2014” (the **Instrument of Delegation**). Part 9 of the Instrument of Delegation is entitled, “Delegation under section 63 of the Act — Otherwise modify the terms and conditions of amounts owing to the Commonwealth”. Division 1 of Pt 9 indicates that the delegation is given to, “Non-Finance accountable authorities of non-corporate Commonwealth entities”. Clause 3 of Pt 1 of the Instrument of Delegation states that “non-Finance accountable authorities of non-corporate Commonwealth entities” means “the accountable authority for each non-corporate Commonwealth entity except the Finance Secretary”. The terms “Commonwealth entity”, “non-corporate Commonwealth entity” and “accountable authority” are defined in ss 10, 11 and 12 of the Public Governance Act respectively.
4. I am satisfied from the terms of the Instrument of Delegation that the power to make decisions under s 63(1)(b) of the Public Governance Act was delegated to persons including the Secretary of the Department.
5. Ms Carter’s affidavit annexes an instrument showing a sub-delegation by the Secretary of the Department of the power under s 63(1)(b) of the Public Governance Act to “Executive Level 1, Revenue Management Section” in the Finance Division of the Department. Ms Carter answers that description, and I am satisfied that she was sub-delegated that power.
6. I therefore reject Dr Ogawa’s submission that Ms Carter had no authority to make the decision.

## *Failing to take into account a relevant consideration*

1. Dr Ogawa submits that Ms Carter failed to have regard to Dr Ogawa’s ability to repay the debt. Dr Ogawa relies upon the Minister’s Instrument of Delegation which states, relevantly:

**9.3 Specific requirements**

(1) The delegate must comply with the following directions.

*Cases of hardship*

(2) In a situation of claimed hardship, the delegate must:

(a) require the debtor to provide evidence (by a statutory declaration or other means) sufficient to satisfy the delegate that it would be unreasonable to require the debtor to discharge the debt otherwise than by instalments or at a deferred date; and

(b) have regard to the Commonwealth’s interests not being subordinate to other creditors of the same ranking.

*Instalments*

(3) When allowing *payment by instalments*, the delegate must impose conditions on such payment with the object of ensuring that the Commonwealth recovers the amount as soon as is reasonably practicable, having regard to the debtor’s ability to repay.

…

*Information to be given to debtor*

(5) If the delegate decides to modify the terms and conditions, of an amount owing to the Commonwealth:

(a) the debtor must be informed in writing of the following matters:

(i) the amount owing to the Commonwealth;

(ii) the date or dates when payment is due;

(iii) the interest rate (if any);

(iv) any other matter the delegate considers relevant, taking into account the evidence of hardship;

(v) the conditions of acceptance specified in subdivision 9.4; and

(b) the debtor must confirm, in writing, acceptance of the matters specified above.

Note: If the debtor does not confirm, in writing, acceptance of the conditions specified then the amounts owing to the Commonwealth should be paid in full when they become due.

(Underlining added.)

1. Section 107(4) of the Public Governance Act requires a delegate to comply with any written direction given by the Finance Minister to the delegate; and s 110(6)(a) requires a delegate who is an accountable authority to give corresponding written directions to any sub-delegate. Section 110(7) requires a sub-delegate to comply with such directions.
2. There were “Accountability Authority Instructions” issued by the Department on 4 April 2016, which directed a sub-delegate exercising power under s 63 of the Public Governance Act to, “comply with the directions in the delegation from the Finance Minister”. There was also a “Financial Management Directive” issued on 11 January 2015, which required sub-delegates to, “comply with the directions issued by the Finance Minister”.
3. Accordingly, Ms Carter was required to comply with Pt 9.3 of the Instrument of Delegation. I accept Dr Ogawa’s submission that Ms Carter was required to comply with the requirement of Pt 9.3(3) to, “hav[e] regard to the debtor’s ability to repay”.
4. Ms Carter exercised the power under s 63(1)(b) of the Public Governance Act to modify the terms and conditions on which the amount owed by Dr Ogawa to the Commonwealth was to be paid. The modification was that, instead of the whole of the debt being due and payable immediately, the debt would be payable in monthly instalments of $2,000 until it was paid-off completely in May 2020.
5. Part 9.3(3) of the Instrument of Delegation presupposes that the delegate has determined, under Pt 9.3(2), that by reason of hardship, the debtor should be permitted to pay the debt to the Commonwealth in instalments. Part 9.3(3) then deals with the conditions to be imposed, which obviously include the amount and frequency of the instalments. The delegate is required to have regard to the debtor’s ability to “repay” when determining the conditions. The word “repay” must encompass the ability of the debtor to pay the instalments that may be determined. At the same time, the instalments must be determined with the object of ensuring that the Commonwealth recovers the amount of the debt as soon as is reasonably practicable. The words “reasonably practicable” contemplate that the amount and frequency of the instalments will be set at a level that will allow payment of the debt at the earliest time consistent with maximising the prospect that the debt will be repaid in full. That does not necessarily require imposition of the maximum instalments the debtor could possibly make — in some cases, the greater prospect of the debt being fully paid may lie in imposing lower repayments over a longer period.
6. In her reasons, Ms Carter noted the size of the debt. She considered the likelihood of Dr Ogawa obtaining employment. She noted that Dr Ogawa held work rights, was well educated, had good communication skills and a high chance of obtaining work. Ms Carter also considered Dr Ogawa’s financial status. Ms Carter considered that the financial status of Dr Ogawa’s spouse was relevant as she was applying for a spouse visa, but noted that Dr Ogawa declined to provide financial details for her spouse. Ms Carter noted that although Dr Ogawa had a low income, she was unable to demonstrate financial difficulty. I understand Ms Carter to have inferred that as Dr Ogawa was applying for a spouse visa, she could expect some financial support from her spouse.
7. It is apparent that Ms Carter did take into account the ability of Dr Ogawa to pay the instalments in determining the amount and frequency of the repayments.
8. I reject Dr Ogawa’s submission that Ms Carter did not take into account her financial circumstances in deciding the conditions upon which she would be allowed to pay the debt in instalments.

### Unreasonableness

1. Dr Ogawa submits that the decision made by Ms Carter was legally unreasonable. The argument seems to be that it was legally unreasonable to require payment of instalments of $2,000 per month having regard to Dr Ogawa’s financial circumstances.
2. In *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, Kiefel  CJ explained:

10 In the joint judgment in *Minister for Immigration and Citizenship v Li* it was explained that a decision made in the exercise of a statutory power is unreasonable in a legal sense when it lacks an evident and intelligible justification. That may be so where a decision is one which no reasonable person could have arrived at, although an inference of unreasonableness is not to be drawn only where a decision appears to be irrational. None of these descriptions could be applied to the Tribunal’s decision in the present case.

11 Statements such as that made in the *Wednesbury* case, that a decision may be regarded as unreasonable if no reasonable person could have made it, may not provide the means by which a conclusion of unreasonableness may be arrived at in every case. But it serves to highlight the fact that the test for unreasonableness is necessarily stringent. And that is because the courts will not lightly interfere with the exercise of a statutory power involving an area of discretion. The question is where that area lies.

1. On 26 November 2016, Ms Carter sent an email to Dr Ogawa asking what amounts she proposed for her upfront payment and monthly instalments. Dr Ogawa responded on the same day with a query regarding whether the instalments could be a set percentage of her salary.
2. On 28 November 2016, Ms Carter again asked what amounts Dr Ogawa proposed. Dr Ogawa responded on the same day, again querying whether the instalments could be a set percentage of her salary, and indicating that she had been earning very limited income and that she did not expect the situation to change until she obtained a visa other than a bridging visa.
3. Ms Carter replied later that day, stating that the Department would normally expect an immediate upfront payment of $2,000 and then monthly payments of approximately $2,000. On 29 November 2016, Dr Ogawa replied, making no complaint about her ability to pay $2,000 per month and asking Ms Carter to finalise the plan as soon as possible. In addition, Dr Ogawa signed and returned the undertaking to repay the debt by instalments as agreed. In my opinion, by agreeing to pay the instalments, Dr Ogawa represented by her conduct that she was in a financial position to be able to make the payments.
4. In making her decision, Ms Carter took into account her view of Dr Ogawa’s earning capacity, demonstrated by the fact that her visa allowed her to work, that she was well educated and appeared to have a high chance of obtaining work. Ms Carter also took into account that, although Dr Ogawa had declined to provide her spouse’s financial details, as she was applying for a spouse visa, she could expect some financial support from her spouse.
5. Ms Carter’s reasons provided an evident and intelligible justification for her decision that Dr Ogawa’s debt should be modified upon the condition that she pay instalments of $2,000 per month. Further, the decision was not one which no reasonable person could have made.
6. I am not satisfied that Dr Ogawa has demonstrated any jurisdictional error. The originating application will be dismissed with costs.

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| I certify that the preceding forty-two (42) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rangiah. |

Associate:

Dated: 16 June 2020