Federal Court of Australia

Kumar v Minister for Immigration, Citizenship and Multicultural Affairs [2024] FCAFC 79

|  |  |
| --- | --- |
| Appeal from: | *Kumar v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCA 1263 |
|  |  |
| File number(s): | QUD 500 of 2023 |
|  |  |
| Judgment of: | **COLLIER ACJ, Goodman and Meagher JJ** |
|  |  |
| Date of judgment: | 13 June 2024 |
|  |  |
| Catchwords: | **MIGRATION** - Federal Circuit and Family Court of Australia (FCFCOA) refused extension of time to review Migration Review Tribunal decision – extensive delay in bringing application before FCFCOA – Federal Court Judge treated “appeal” from FCFCOA as judicial review application – Federal Court Judge dismissed judicial review application – new grounds raised on appeal to Full Court – whether FCFCOA Judge biased – whether allegedly incorrect legal advice to appellant constituted sufficient explanation for delay – whether subsequent judicial decisions make previous legal advice incorrect – finding of FCFCOA that extensive delay outweighed prospects of success if matter remitted to Tribunal - whether alleged depression of appellant adequately considered by FCFCOA Judge – litigant in person – leave to raise new grounds of appeal allowed in part – appeal dismissed |
|  |  |
| Legislation: | *Judiciary Act 1903* (Cth) s 39B(1)  *Migration Act 1958* (Cth) ss 476, 477  *Migration Regulations 1994* (Cth) Sch 2 cl 820.211(2),  Sch 3 criterion 3001 |
|  |  |
| Cases cited: | *Blakeley v National Australia Bank* [2018] FCA 796  *BBT16 v Minister for Home Affairs* [2018] FCA 1225  *Boakye-Danquah v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 116 FCR 557; [2002] FCA 438  *DKY22 v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCAFC 24  *Hot Wok Food Makers Pty Ltd v United Workers Union (No 3)* [2024] FCAFC 51  *JSMJ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1466  *Kumar v Minister for Immigration & Anor (No. 2)* [2020] FCCA 2516  *Kumar v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCA 1263  *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507; [2001] HCA 17  *Mohammed v Minister for Immigration & Anor* [2018] FCCA 2893  *MZZGC v Minister for Immigration and Border Protection* [2015] FCA 842  *Nobarani v Mariconte* [2018] HCA 36; (2001) 265 CLR 236  *Platcher v Joseph* [2004] FCAFC 68  *Tran v Minister for Immigration and Border Protection* [2014] FCA 533  *VUAX v Minister for Immigration & Multicultural & Indigenous Affairs* (2004) 238 FCR 588; [2004] FCAFC 158  *Waensila v Minister for Immigration and Border Protection* (2016) 241 FCR 121; [2016] FCAFC 32  *Young v Hughes Trueman Pty Ltd (No 5)* [2017] FCA 690  *Zaghloul v Woodside Energy Limited (No 9)* [2019] FCA 1718 |
|  |  |
| Division: | General Division |
|  |  |
| Registry: | Queensland |
|  |  |
| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Number of paragraphs: | 43 |
|  |  |
| Date of hearing: | 21 May 2024 |
|  |  |
| Counsel for the Appellant: | The appellant appeared in person |
|  |  |
| Counsel for the First Respondent: | Ms S Spottiswood |
|  |  |
| Solicitor for the First Respondent: | Clayton Utz |
|  |  |
| Counsel for the Second Respondent: | The second respondent filed a submitting notice |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | QUD 500 of 2024 |
|  | | |
| BETWEEN: | DEEPAK KUMAR  Appellant | |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

|  |  |
| --- | --- |
| order made by: | COLLIER ACJ, Goodman and Meagher jJ |
| DATE OF ORDER: | 13 June 2024 |

THE FULL COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the costs of the first respondent, of and incidental to the appeal, on a party-party basis.

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

REASONS FOR JUDGMENT

THE COURT

1. Before the Court is an appeal from a decision of a single Judge of the Federal Court (**FCA Primary Judge**) in *Kumar v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCA 1263. In that matter, his Honour dismissed proceedings brought by the appellant referable to an earlier judgment of the Federal Circuit Court of Australia in *Kumar v Minister for Immigration & Anor (No. 2)* [2020] FCCA 2516.

# BACKGROUND

1. In summary, the appellant is a citizen of the Republic of India who applied for a Partner (Temporary) (Class UK) visa (**visa**) on 6 June 2013 on the basis of his claimed relationship with his sponsor. The delegate of the Minister who considered the application was not persuaded of the existence of a genuine and continuing relationship between the appellant and his sponsor. On 31 July 2013 the delegate refused to grant the visa, pursuant to cl 820.211(2) of Sch 2 to the *Migration Regulations 1994* (Cth) (**Migration** **Regulations**).
2. The appellant applied on 14 August 2013 for review of the delegate’s decision by the (then) Migration Review Tribunal (**Tribunal**). The Tribunal found that the appellant had failed to satisfy Sch 3 criterion 3001 of the Migration Regulations, namely the appellant had not lodged his visa application within 28 days of “the relevant day” as defined by criterion 3001(2). The Tribunal then considered whether there were compelling reasons for it to waive the Sch 3 requirements within the meaning of cl 820.211(2)(d) of Sch 2 to the Migration Regulations. The appellant claimed that a compelling reason for waiver was that he was the victim of domestic violence from his partner, however the Tribunal found that a compelling reason was required to exist at the time of the visa application pursuant to the decision of the Federal Court in *Boakye-Danquah v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 116 FCR 557; [2002] FCA 438 at [33]. The Tribunal found that, on the evidence, the alleged domestic violence had not commenced until after the appellant’s visa application had been made.
3. The decision of the Tribunal was dated 28 January 2015.

## Federal Circuit Court of Australia Proceedings

1. On 25 November 2019 the appellant filed an originating application for review of the Tribunal’s decision pursuant to s 476 of the *Migration Act 1958* (Cth) (**Migration Act**). On 21 May 2020 he filed an amended application for review. The amended application for review included an application for extension of time in which to file the originating application for review.
2. The Judge who heard the application in the Federal Circuit Court (**FCCA Judge**) noted that considerations relevant to the hearing of an application for extension of time pursuant to the provisions of s 477(2) of the Migration Actincluded:

* The extent of the delay in filing the substantive application;
* Whether there was any acceptable explanation for the delay;
* Whether there was any prejudice to a respondent in the event of an extension of time being granted; and
* The merits of the substantive application.

1. Before the FCCA Judge, the Minister conceded that the Tribunal had erred in confining its consideration of what may or may not have constituted compelling reasons for waiving the Sch 3 criteria to facts, matters and circumstances evident at the time of the visa application. In particular, the Full Court of the Federal Court in *Waensila v Minister for Immigration and Border Protection* (2016) 241 FCR 121; [2016] FCAFC 32 found, materially, that a decision-maker could take into account events which occurred after a visa application, and further that circumstances which constituted “compelling reasons” and gave rise to hardship can arise at any time including after a visa application was made. However, the Minister submitted that the FCCA Judgeshould not grant an extension of time for the filing of the originating application for review of the decision of the Tribunal because the originating application for review was filed by the appellant 4 years and 10 months after the decision of the Tribunal, and also 3 years and 8 months after the decision in *Waensila*.
2. Before the FCCA Judge the appellant relied on an affidavit in which he deposed, *inter alia*, that his delay was also because of the erroneous legal advice he had received as to his prospects of success.
3. At [17] the FCCA Judge found that the appellant’s alleged receipt of poor legal advice ought not be considered exculpatory. At [18] his Honour found that the appellant’s delay was so extensive that the filing of the originating application for review out of time was an abuse of the process of the Court. The application for extension of time was dismissed.

## Federal Court of Australia Proceedings

1. On 1 October 2020 the appellant filed a Notice of Appeal in the Federal Court of Australia. The proceedings in the Federal Court of Australia were, at first instance, framed in terms of an appeal from the judgment of the Federal Circuit Court. At [15] however, the FCA Primary Judge observed that the parties had treated the proceedings as an application for the issue of constitutional writs under s 39B(1) of the *Judiciary Act 1903* (Cth) referable to the judgment of the Federal Circuit Court.
2. It follows that the decision of the FCA Primary Judge was a decision in the original jurisdiction of the Court, rather than an exercise of the appellate jurisdiction of the Federal Court.
3. Before the FCA Primary Judge, the appellant relied on the following grounds:

1. The Federal Circuit Court (The FCC) made error by refusing to accept the explanation of delay which was unreasonable and not logical.

1.1 In the judgement, Para 16 & 17 states that poor legal advice regarding the prospect of success is not an adequate and satisfactory explanation to be acceptable by the court. Whereas no practical and logical explanation is given to support the non-acceptance of given explanation of delay.

2. The FCC failed to consider that no prejudice to the respondent weighed in favour of the grant of extension of time.

3. At para 11 of the FCC judgement, even after it was conceded by the respondent that the tribunal was wrong at law by not considering the compelling reasons at the time of decision. The FCC failed to further investigate the prospect of success of the review of the tribunal’s decision to grant the extension of time.

(transcribed from the original)

1. In relation to the first ground, the FCA Primary Judge referred to the decision of Wigney J in *Tran v Minister for Immigration and Border Protection* [2014] FCA 533 as authority for the proposition that, historically, unfavourable legal advice was an inadequate explanation for delay. His Honour observed however (at [25]) that at the time the appellant had received the relevant legal advice, the decision of the Full Court in *Waensila* had not been delivered, and the legal advice was based on then current case law. His Honour concluded:

30. The decision of the primary judge to not accept Mr Kumar’s explanation for the delay was open and according to law. Mr Kumar is, in effect, requesting this Court to substitute its decision for the primary judge’s decision. Mr Kumar has not identified any jurisdictional error with respect to the primary judge’s decision to not accept the explanation for the delay. The primary judge’s decision to not accept that explanation is not so unreasonable that no reasonable person could have come to it, nor does it lack an evident and intelligible justification as per *Li*. Accordingly, this ground must fail.

1. In relation to the second ground, his Honour observed:

35. The primary judge referred to the passage from *Taylor* at [33] above in the context of considering whether Mr Kumar had any reasonable explanation for the delay. From that reference, it is clear that the primary judge considered the issue of presumptive prejudice to the Minister by virtue of the delay and then considered whether any explanation for the delay may outweigh the prejudice. It is also clear that the primary judge focused on the “considerations viewed as being significant”, as occurred in *SZUWX*. No jurisdictional error is apparent in either case.

36. In this ground, Mr Kumar appears to be challenging the finding of the primary judge and has not identified any jurisdictional error. This ground must fail.

1. In relation to the third ground, his Honour noted the concession of the Minister at the hearing before the FCCA Judge that, in light of the decision of the Full Court in *Waensila*, the appellant had very strong prospects of success were the matter remitted to the Tribunal for redetermination. His Honour observed that the FCCA Judge was mindful of the merits of the appeal, however noted at [42] that the FCCA Judge weighed the merits of the application for review against the extent of the delay (both before and after the decision of *Waensila*) in bringing the proceeding, and the explanation for the delay. His Honour concluded that the decision of the FCCA Judge was not so unreasonable that no reasonable person could have made the decision, nor did it lack an evident and intelligible justification. Ground 3 also failed.

# THE APPEAL

1. In his notice of appeal filed on 16 November 2023, the appellant relied on the following grounds:

1. Federal Court of Australia made error by failing to take into account relevant consideration related to bias of a judge towards the acceptable explanation of delay, which has a big impact on the outcome of my case.

2. FCA made error by failing to take into account relevant consideration that while making decision, Federal Circuit Court ignored the relevant information that I was in depression after family violence which I mentioned in affidavit and also ignored the fact that the explanation that I provided for the delay was accepted in many court cases, which I also mentioned in affidavit.

(transcribed from the original)

1. At the hearing the appellant was self-represented, with the assistance of an interpreter. Both the appellant and the Minister (who was represented) relied almost entirely on their written submissions.
2. In summary, the appellant submitted:

* Leave should be granted for the appellant to raise new grounds of appeal. The discretion to grant or refuse such leave is broad*: DKY22 v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCAFC 24.
* He did not have legal representation at any time despite trying many times to obtain *pro bono* assistance.
* The new grounds raised had reasonable prospects of success. It was in the interests of justice that leave be granted.
* In relation to the first ground of appeal:
  + The FCA Primary Judge failed to take into account considerations relevant to what constituted an acceptable explanation of delay. There were cases where judges had accepted the explanation of delay on the basis of such principles as “*we never like a litigant to suffer by the mistake of his lawyers*”.
  + The FCA Primary Judge incorrectly found that the legal advice obtained by the appellant was correct. The decision in *Waensila* demonstrated that the Tribunal’s decision was wrong at law, even though it was based on the-then current case law. That decision also proved wrong the advice of lawyers that the appellant’s case had poor prospects, notwithstanding that it was based on the case law at the time.
  + The appellant’s lawyers should have known, contrary to the law at the time, that the appellant had good prospects of success. Their failure to advise him of such should be accepted as an extraordinary circumstance warranting the grant of an extension of time.
  + The Tribunal and his lawyers misinterpreted the law at the time. The case has strong prospects of success.
  + The reasoning in *MZZGC v Minister for Immigration and Border Protection* [2015] FCA 842 showed that a different Judge may make a different finding in relation to whether an explanation of delay is acceptable.
  + There will be significant prejudice to the appellant if he was deported after living in Australia for 15 years. There was no prejudice to the respondent.
  + The finding of the FCA Primary Judge that the delay in filing the application for an extension of time was extensive and outweighed any factor in favour of granting the extension of time improperly restricted future applications for extensions of time commenced after long delay, even if other factors favoured the grant of an extension of time.
  + The strong merits and prospects of success of the appellant’s case outweighed the absence of an acceptable explanation for delay: see *JSMJ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1466.
  + In *Mohammed v Minister for Immigration & Anor* [2018] FCCA 2893, which was very similar to the appellant’s case in that the delay in filing was almost 3 years and 6 months, the Court made orders by consent granting an extension of time.
* In relation to the second ground of appeal:
  + The FCA Primary Judge failed to take into consideration that the appellant felt helpless and depressed after taking action against family violence, which caused him refusal of his visa. The appellant became socially isolated and struggled for basic needs because his immigration status became unlawful.
  + The purpose of family violence provisions in migration was to enable applicants to continue their application after family violence. In this case however it took away the appellant’s opportunity to continue his application. This was a clear injustice to the appellant.

1. The Minister submitted, in summary:

* The notice of appeal raised two grounds which were not raised before the FCA Primary Judge, and for which the appellant required leave. Leave should be refused because the appellant had not explained his failure to previously raise these grounds, and because in any event the grounds were without merit.
* In relation to the first ground of appeal there was nothing in the reasons, the record or other evidence which supported a claim of bias on the part of the FCCA Judge. An exercise of discretion by the FCCA Judge which may have been different to the exercise of discretion by another Judge does not suggest personal bias on the part of the FCCA Judge.
* In relation to the second ground of appeal:
  + While the appellant’s affidavit made passing reference to his depression, he did not attribute his delay to his depression. Rather, the appellant referred to his difficulty in obtaining legal advice, and the fact that the legal advice he received was ultimately proven wrong.
  + In any event, the FCCA Judge did take into account the parts of the appellant’s affidavit that included references to his depression.
  + Even if the FCCA Judge failed to consider the appellant’s depression, the error did not rise to the level of jurisdictional error.

# CONSIDERATION

1. The appellant in this case is a litigant in person, and it is common for Courts to take a lenient view of the rules and the law in aid of such litigants: see for example *Zaghloul v Woodside Energy Limited (No 9)* [2019] FCA 1718 at [18], *Blakeley v National Australia Bank* [2018] FCA 796 at [51], *BBT16 v Minister for Home Affairs* [2018] FCA 1225 at [5].
2. Nonetheless, as Colvin J went on to explain in *Zaghloul* at [18], the Court may be lenient in the standard of compliance which it exacts from a litigant in person, provided that leniency does not go so far as to confer an advantage on the person who acts on their own behalf: *Nobarani v Mariconte* [2018] HCA 36; (2001) 265 CLR 236 at [47], *Platcher v Joseph* [2004] FCAFC 68 at [104]‑[105].
3. The application before the FCCA Judge was to extend the time limit for the appellant to seek judicial review of a decision of the Tribunal pursuant to s 477(2)(b) of the Migration Act. The time limit in which to make an application to what was then the Federal Circuit Court of Australia, as prescribed by s 477(1) of the Migration Act, was 35 days from the date of the Tribunal decision. Section 477(2)(b) empowered the Federal Circuit Court of Australia to extend that 35 day period as the Court considered appropriate ***if*** ***satisfied*** that the extension of time was necessary in the interests of the administration of justice. The use of this power is discretionary.
4. The grounds on which the appellant relies concern an allegation of bias on the part of the FCCA Judge, and – at its highest – a claim that the appellant suffered from depression as a result of family violence which in turn caused (and explained) his delay in filing. The Minister contends that neither ground was raised before the FCA Primary Judge.
5. We accept the submission of the Minister that the grounds before the FCA Primary Judge did not specifically address the issues now raised in the grounds of appeal. It may be, however, that the issues were raised otherwise before the FCA Primary Judge.
6. Beginning with the issue of depression, plainly it was not identified at the hearing before his Honour as a reason for delay on the part of the appellant in seeking review of the decision of the Tribunal. Insofar as we can ascertain, it was only raised by the appellant before his Honour in the context of the appellant being unhappy about the decision of the Tribunal and the legal advice he subsequently received, rather than any medical condition or influence on him seeking review of the Tribunal’s decision. This is clear from the following excerpt of the transcript of the hearing before the FCA Primary Judge:

HIS HONOUR: How was the question of family violence related to the delay in filing the original appeal? How did that affect – you’ve called that – I think you’ve called that an exceptional circumstance to the delay, and I wanted you to tell me how you submit that is relevant to the delay. How did that cause the delay – the family violence matter?

MR KUMAR: Your Honour, I believe – like, I didn’t even know what is family violence before knowing all this stuff. So – so when I got to know about family violence, I did all the stuff which is required by law. And according to immigration law, I fulfilled all the requirements which is required in immigration law to consider family violence as part of this application. But even after meeting all these conditions, I still didn’t get considered in the tribunal, and because of that I was just mentally so depressed by all of this, and after that I did other avenues like ..... intervention and everything, which was under the ministerial guidelines which was their legislation, does not anticipate and the decision led to unfair decision. And even in that circumstance, the Minister refused to intervene. I know he has no obligation, but that’s the only way I could do, because after – after the refusal from MRT, I took advice from a lawyer. And lawyer told me there is nothing you can do by going to the court. And I would say anyone in the community who have no knowledge of legal stuff, they will believe the lawyer’s advice and then they will act upon it.

(transcript page 3)

1. We also note the appellant’s affidavit filed on 25 November 2019 in the Federal Circuit Court of Australia where the appellant made some references to being depressed, for example:

9. After getting refusal from ministerial intervention and knowing that taking action against family violence caused me to lose my visa, I felt helpless and became mentally depressed. But only thing I could do is ask an immigration lawyer about what can i do after the refusal of Ministerial Intervention to get justice or any other way to resolve the matter. So I contacted FC lawyers in Brisbane for advice.

…

14. I did everything possibly I could do by law to make things right. I was in sheer depression and one thing that bothered me was why I took action against family violence? I could have stayed in a violent relationship then I would not have ended up this miserable. While I was affected emotionally due to violence and broken marriage, I believed in the system of this country that it will protect me from the consequences of family violence but it made my life even worse. Department of immigration put out this message that the applicant of partner visa don't have to live in an abusive relationship to stay in Australia. But in my situation I did not even get considered for that. The message I got that it was my mistake to speak up against family violence. I could not even seek help from support services, which made my situation worse. I became socially isolated and struggled to survive. I felt deceived and the injustice to me stopped me from leaving the country because I was hoping for a chance to get some explanation. But I had no other way left to try.

1. We are satisfied that the issue of depression was not raised in the Courts below as a reason for the appellant’s delay in seeking review of the Tribunal’s decision. The appellant requires leave to rely on ground of appeal 2.
2. The position is different in respect of ground of appeal 1. It is clear from the transcript of proceedings before the FCA Primary Judge that issues of alleged bias on the part of the FCCA Judge were raised in submissions before the FCA Primary Judge – specifically, that the appellant contended that the decision of the FCCA Judge was affected by jurisdictional error by reason of bias.
3. Given that the appellant is a litigant in person, that the issue of bias was raised before the FCA Primary Judge, and that no prejudice was identified by the Minister in respect of the appellant’s reliance on this ground of appeal, we do not consider that the appellant requires leave to rely on ground of appeal 1.
4. We will examine each ground separately.

## Ground of appeal 1

1. An allegation of apprehended bias is a serious matter which must be specifically pleaded: *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507; [2001] HCA 17 at [69]. As a general proposition, the formation by a Judge of an adverse view of the merits of a case, even if firmly expressed, does not necessarily, or even ordinarily, constitute bias: Bromwich J in *Young v Hughes Trueman Pty Ltd (No 5)* [2017] FCA 690 at [14].
2. Recently in *Hot Wok Food Makers Pty Ltd v United Workers Union (No 3)* [2024] FCAFC 51 the Full Court explained principles of apprehended bias in the following terms:

72. In *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337 (***Ebner***), the plurality identified at [6] the “governing principle” by which apprehended bias is demonstrated:

...if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.

(Citations omitted.)

73. Their Honours added at [7]:

The question is one of possibility (real and not remote), not probability. Similarly, if the matter has already been decided, the test is one which requires no conclusion about what factors *actually* influenced the outcome.

74. Their Honours went on to observe at [8] that application of the governing principle requires the following steps:

First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an “interest” in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.

75. In *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 409 ALR 65; [2023] HCA 15 (***QYFM***), Kiefel CJ and Gageler J at [38] indicated that there are really three steps discernible from the analysis in *Ebner*, the third being to assess the reasonableness of the asserted apprehension of bias from the perspective of a fair-minded lay observer. Their Honours added at [45] that, “it is the court’s view of the public’s view, not the court’s own view, which is determinative”: see also *CNY17 v Minister for Immigration and Border Protection* [2019] HCA 50; (2019) 268 CLR 76 at [21].

76. Although the governing principle stated in *Ebner* applies a test of possibility at two levels, a conclusion that apprehended bias has been established must not be too lightly drawn. The reasonable suspicion must be “firmly established”: *R v Commonwealth Conciliation and Arbitration Commission; ex parte Angliss Group* (1969) 122 CLR 546 at 553. The possibility must be, “real and not remote”: *Ebner* at [7]. It is important not to accede “too readily” to suggestions of appearance of bias: see *Re JRL; ex parte CJL* [1986] HCA 39; (1986) 161 CLR 342 at 352 (Mason J).

77. In *Ebner*, the plurality observed that in *Webb v The Queen* [1994] HCA 30; (1994) 181 CLR 41 at 74, Deane J identified four distinct, though overlapping, categories of cases involving appearance of bias: interest; conduct; association; and extraneous information…

1. The principal submission of the appellant appears to be that the FCCA Judge was biased against him, because other Judges in similar cases had accepted – as a reason for delay – the provision of incorrect legal advice by lawyers. In our view this submission has no merit. In particular:

* Other decisions referable to incorrect legal advice, or the length of a delay in seeking judicial review, are not necessarily relevant to a different case before a different Judge. Each case must be decided on its own merits.
* That the FCCA Judge formed the view that the length of the delay on the part of the appellant was a factor which outweighed other reasons for granting an extension of time, whereas another decision-maker may have reached a different decision, does not mean that the FCCA Judge was biased.
* The particular view formed by the FCCA Judge of the length of the delay on the part of the appellant and the absence of an explanation, namely that it was “in all respects inexcusable”, was open to his Honour, and according to law. The decision was not one where a fair-minded lay observer might reasonably apprehend that the FCCA Judge did not bring an impartial mind. There is no material before us to substantiate a finding that the FCCA Judge was biased in concluding that the delay was extreme, as alleged by the appellant.
* As the FCA Primary Judge found, the legal advice provided by the appellant’s lawyers relating to the first instance decision in *Waensila* was accurate at the time it was given. Lawyers can only be expected to provide advice based on the law as it stands at the time of that advice. The evolution of legal principles by reference to subsequent judicial decisions does not necessarily mean that earlier legal advice was faulty at the time it was given, or that lawyers should be expected to ignore existing case law by reference to possible future legal developments.
* Similarly, the Tribunal must make decisions based on the law as it stands at the time of that decision.
* That the law subsequently changed is not an extraordinary circumstance sufficient to automatically allow the grant of an extension of time.
* The fact that the Minister before the FCCA Judge apparently conceded that the appellant would have had a strong case on the merits if the matter were remitted to the Tribunal was taken into account by the FCCA Judge. The FCCA Judge made findings referable to all relevant material before the Court. His Honour’s decision cannot be attributed to bias on his Honour’s part as claimed by the appellant.

1. Ground of appeal 1 is not substantiated.

## Ground of appeal 2

1. Principles guiding the Court in considering whether leave should be granted in these circumstances were explained by the Full Court in *VUAX v Minister for Immigration & Multicultural & Indigenous Affairs* (2004) 238 FCR 588; [2004] FCAFC 158:

46 … Leave to argue a ground of appeal not raised before the primary judge should only be granted if it is expedient in the interests of justice to do so: *O’Brien v Komesaroff* [1982] HCA 33; (1982) 150 CLR 310; *H v Minister for Immigration & Multicultural Affairs*; and *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833; (2001) 117 FCR 424 at [20]-[24] and [38].

47 *In Coulton v Holcombe* [1986] HCA 33; (1986) 162 CLR 1, Gibbs CJ, Wilson, Brennan and Dawson JJ observed, in their joint judgment, at 7:

*"It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish."*

48 The practice of raising arguments for the first time before the Full Court has been particularly prevalent in appeals relating to migration matters. The Court may grant leave if some point that was not taken below, but which clearly has merit, is advanced, and there is no real prejudice to the respondent in permitting it to be agitated. Where, however, there is no adequate explanation for the failure to take the point, and it seems to be of doubtful merit, leave should generally be refused….

1. See also *DKY22* at [28]-[29].
2. In determining whether leave ought be granted to the appellant to rely on ground of appeal 2, we make the following findings.
3. First, the appellant has not provided an adequate explanation – or, indeed, any explanation – for his failure to raise this ground in the Federal Court before the FCA Primary Judge. We note in particular that the FCA Primary Judge was prepared to conduct the proceedings as an application for judicial review rather than an appeal (which would have been incompetent). The logical inference to draw is that the appellant did not raise this issue before the FCA Primary Judge because it was not an issue.
4. Second, we are not satisfied that this ground has merit such as to warrant the grant of leave.
5. The gravamen of ground 2 is that the FCCA Judge “ignored the relevant information that [*the appellant*] was in depression”. However, the appellant has not pointed to any submissions he made to the Federal Circuit Court concerning depression being a reason for the delay in seeking review of the Tribunal’s decision, or to any material other than the general references in the affidavit to which we have referred (and which made no specific connection with the delay). To that extent there is no material before us which could support a finding that the FCCA Judge “ignored … relevant information”.
6. As we have already observed, the decision of the FCCA Judge was particularly shaped by the length of the delay on the part of the appellant in seeking review, which his Honour found at [17] was “inexcusable”. It was open to the FCCA Judge to form that view, noting the length of that delay.
7. In our view it is appropriate to refuse leave to the appellant to rely on ground of appeal 2.

# CONCLUSION

1. The appeal is dismissed. The appellant is to pay the costs of the Minister of and incidental to the appeal, on a party-party basis.

|  |
| --- |
| I certify that the preceding forty-three (43) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Acting Chief Justice Collier and the Honourable Justices Goodman and Meagher. |

Associate:

Dated: 13 June 2024