Federal Court of Australia

Ogawa v Finance Minister [2022] FCAFC 145

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| Appeal from: |  |
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| File numbers: | QUD 450 of 2021  QUD 6 of 2022 |
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| Judgment of: | **CHARLESWORTH, THAWLEY AND GOODMAN JJ** |
|  |  |
| Date of judgment: | 31 August 2022 |
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| Catchwords: | **ADMINISTRATIVE LAW** – appeal from orders dismissing an application for judicial review of a decision of the Finance Minister – Finance Minister refusing to waive a debt owed by the appellant to the Commonwealth – whether primary judge erred in refusing to hear arguments about earlier waiver requests and litigation that had not been raised before the Finance Minister in support of the waiver request – whether primary judge erred in concluding that the Finance Minister understood and had regard to the appellant’s arguments – whether primary judge failed to afford the appellant procedural fairness – whether the appellant should be permitted to raise arguments concerning prior waiver requests and subsequent litigation on appeal – appeal dismissed |
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| Legislation: | *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ss 5, 6  *Federal Court of Australia Act 1976* (Cth) ss 24, 25  *Judiciary Act 1903* (Cth) s 39B  *Migration Act 1958* (Cth)  *Public Governance, Performance and Accountability Act 2013* (Cth) ss 63, 64  *Federal Court Rules 2011* (Cth) r 4.12 |
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| Cases cited: | *Charisteas v Charisteas* [2021] HCA 29; 393 ALR 389  *Ogawa v Finance Minister* [2020] FCA 829  *Ogawa v Finance Minister* [2021] FCA 1666  *Ogawa v Finance Minister* [2021] FCAFC 17  *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476  *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: |  |
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| Number of paragraphs: | 62 |
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| Date of hearing: | 1 August 2022 |
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| Counsel for the Applicant: | The Applicant appeared in person |
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| Counsel for the Respondent: | Ms B O’Brien |
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| Solicitor for the Respondent: | Australian Government Solicitor |

ORDERS

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|  | | QUD 450 of 2021 |
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| BETWEEN: | MEGUMI OGAWA  Applicant | |
| AND: | FINANCE MINISTER  Respondent | |

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| order made by: | CHARLESWORTH, THAWLEY AND GOODMAN JJ |
| DATE OF ORDER: | 31 AUGUST 2022 |

THE COURT ORDERS THAT:

1. The applicant has leave to appeal.
2. The grounds of appeal be those set out in annexure MO5 to the affidavit of the appellant filed on 20 February 2022.
3. The appeal is dismissed.
4. The applicant pay the respondent’s costs of the application for leave to appeal and of the appeal, as agreed or taxed.

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

ORDERS

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|  | | QUD 6 of 2022 |
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| BETWEEN: | MEGUMI OGAWA  Appellant | |
| AND: | FINANCE MINISTER  Respondent | |

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| order made by: | CHARLESWORTH, THAWLEY AND GOODMAN JJ |
| DATE OF ORDER: | 31 AUGUST 2022 |

THE COURT ORDERS THAT:

1. The appeal is dismissed.
2. The appellant pay the respondent’s costs as agreed or taxed.

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

REASONS FOR JUDGMENT

THE COURT

1. The appellant, Dr Megumi Ogawa, owes debts to the Commonwealth totalling at least $46,461.89 (Debt).
2. The Debt is comprised of a series of costs orders made against Dr Ogawa in litigation spanning more than 10 years, largely concerning her attempts to secure a student visa under the ***Migration Act*** *1958* (Cth) or otherwise concerning her immigration status.
3. Section 63(1)(a) of the *Public Governance, Performance and Accountability Act 2013* (Cth) (PGPA Act) confers on the Finance **Minister** a discretionary power to authorise the waiver of an amount owing to the Commonwealth. Dr Ogawa has made repeated applications to the Minister for such a waiver. In these reasons it is necessary to refer to two of them, described below as the First Request and the Second Request.
4. The First Request was made on 21 June 2019 and refused on 2 March 2020 (First Decision). Prior to 2 March 2020, Dr Ogawa had commenced proceedings for judicial review to obtain orders compelling the Minister to make a decision (Action QUD 663/2019). After the First Decision was made, Dr Ogawa amended her originating application in that action so as to seek judicial review of the First Decision under s 39B of the ***Judiciary Act*** *1903* (Cth) and s 5(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act). The amended application was dismissed:  *Ogawa v Finance Minister* [2020] FCA 829 (First Judgment). Dr Ogawa’s appeal from the First Judgment was also dismissed:  *Ogawa v Finance Minister* [2021] FCAFC 17 (Logan, Katzmann and Jackson JJ) (*Ogawa Full Court*).
5. Dr Ogawa made the Second Request about four weeks later. It was refused by a delegate of the Minister on 13 April 2021 (Second Decision). Dr Ogawa commenced an application for judicial review of the Second Decision on 30 May 2021 (Action QUD 204/2021).
6. Within that proceeding, Dr Ogawa filed an interlocutory application by which she sought orders to the effect that evidence and submissions filed in numerous earlier proceedings (including proceedings following the First Decision) be admitted in evidence on her application for judicial review. She also sought an order to the effect that the Registrar be directed to accept for filing affidavit material that she had lodged electronically outside of the case management timeframes ordered by the primary judge.
7. The primary judge granted Dr Ogawa an extension of time to commence the application and leave to amend her originating application. His Honour dismissed the originating application (as amended), as well as the interlocutory application:  *Ogawa v Finance Minister* [2021] FCA 1666 (Reasons).
8. Dr Ogawa now appeals from the judgment (Action QUD 6/2022). She has also commenced an application for leave to appeal from the dismissal of the interlocutory application (Action QUD 450/2021).
9. The grounds of appeal in QUD6/2022 are set out at [21] below. They include a contention that the materials Dr Ogawa had sought to rely upon at first instance were relevant on her application for judicial review, such that the primary judge failed to afford her procedural fairness and otherwise committed appealable error by characterising them as irrelevant and refusing to consider them.
10. The order dismissing Dr Ogawa’s interlocutory application was plainly interlocutory in nature. However, it is not necessary for Dr Ogawa to commence a separate appeal from that order or to seek leave to do so. She may found her appeal from the final judgment dismissing her application for judicial review on the asserted errors affecting the interlocutory order:  *Federal Court of Australia Act 1976* (Cth) (FCA Act), s 24(1E)(a). This Court is not prevented from taking into account the interlocutory order in determining the appeal from the final judgment dismissing the originating application:  FCA Act, s 24(1E)(b). The application for leave to appeal from the order dismissing the interlocutory judgment will nonetheless be granted, so as to ensure that all of the materials filed in that action are read and any discrete grounds of appeal relating to the interlocutory judgment are considered.
11. For the reasons given below, the grounds of appeal have no merit.
12. Accordingly, there will be orders dismissing each of the appeals.

# THE SECOND DECISION

1. The Second Request expressly sought waiver of a debt owed by Dr Ogawa to the Commonwealth in the amount of $46,461.89.
2. As was the case with the First Request, the Second Request was founded on circumstances arising from Dr Ogawa’s detention under the Migration Act between May and July 2006. That period of detention was the subject of a report to the then Commonwealth Attorney-General from the President of the Australian Human Rights Commission (AHRC Report) containing the following finding and recommendation:

7.3 Recommendation that compensation be paid

81. I find that the failure to place Dr Ogawa in community detention or another less restrictive form of detention was arbitrary and inconsistent with the right to liberty in article 9 of the ICCPR. She was detained for 68 days.

82. I note that at the time of her detention at VIDC, Dr Ogawa had not previously lost her liberty and she experienced the detention as humiliating and distressing.

83. I consider that the Commonwealth should pay to Dr Ogawa an amount of compensation to reflect the loss of liberty caused by her detention at VIDC.

84. Assessing compensation in such circumstances is difficult and requires a degree of judgment. Taking into account the guidance provided by the decisions referred to above, I consider that payment of compensation in the amount of $50 000 is appropriate.

1. The ICCPR, referred to in that extract, is the International Covenant on Civil and Political Rights to which Australia is a signatory. The VIDC is the Villawood Immigration Detention Centre.
2. The communication to the Attorney-General noted that the Secretary of the Department of Immigration and Citizenship had not accepted the findings expressed in the AHRC Report. The Commonwealth has not paid the recommended compensation of $50,000.00 to Dr Ogawa. It is plain enough that a payment of compensation to Dr Ogawa in the amount of $50,000.00 would put her in sufficient funds to pay the Debt. More will be said about that at the conclusion of these reasons.
3. The materials provided to the delegate in support of the Second Request included letters from concerned Australian citizens. The letters are expressed in the same or similar terms. The citizens describe Dr Ogawa’s prior detention as wrongful. They refer to the recommendation of the AHRC that the Commonwealth pay compensation to Dr Ogawa and to the circumstance that the compensation has not been paid. They express the opinion that it is unfair to require Dr Ogawa to pay $46,461.89 while the recommended compensation of $50,000.00 remains unpaid by the Commonwealth. They express concerns that the failure to pay compensation constitutes a breach of Australia’s international law obligations and so adversely affects Australia’s international reputation.
4. The delegate provided written reasons for the Second Decision dated 13 April 2021, expressed as follows:

I refer to your request for a waiver of debt, received by the Department of Finance (Finance) on 29 March 2021 and your further correspondence of 9 April 2021. The request relates to a debt you have incurred by the Commonwealth Government and you have argued the request should be considered as a new application on the basis that Australian citizens consider it is unfair for the Commonwealth to require you to pay the debts, and that Australian citizens wish their Government to observe international law in order to avoid tarnishing their reputation.

I have examined the documentation in relation to your matter, including your previous application to waive the debt made on 21 June 2021, the Department’s decision to decline the waiver made on 2 March 2020 and the new information you have provided. I note the decision to decline to waiver has also been considered and upheld by the Federal Court in *Ogawa v Minister for Finance* [2020] FAC 829 (sic).

Decisions on waiver of debt application are only reconsidered where a serious factual error in the decision is identified, or relevant and significant new information is provided. The letters you have provided do not change the … nature or basis of the debt or give rise to any factual error in the decision. Judgments about the fairness of laws are the exclusive domain of the citizenry, in its entirety, through the electoral process. I note that the effect of laws can be considered unfair by some yet not be unintended, anomalous, inequitable or otherwise unacceptable.

I do not consider that the additional information provided provides any appropriate basis on which to reconsider your matter, particularly in light of the significant consideration already provided by both the Department and the Federal Court. I have therefore closed your request for a reconsideration.

Further correspondence on this matter will be filed but may not be responded to.

1. It was and remains Dr Ogawa’s view that the delegate had misunderstood the nature of the request that she had made and the import of the letters from the Australian citizens. After notification of the Second Decision, she continued to remonstrate with the delegate in correspondence to the effect that the nature and scope of the Second Request had been misunderstood. That correspondence post-dates the written reasons for the Second Decision. It does not form a part of the material before the delegate at the time that the Second Decision was made.

# REASONS OF THE PRIMARY JUDGE

1. To succeed on her application for judicial review under the Judiciary Act, the onus was on Dr Ogawa to show that the Second Decision was affected by jurisdictional error:  *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476. On her application for review under the ADJR Act, Dr Ogawa bore the onus of establishing one or more grounds for review in s 5 or s 6.
2. Dr Ogawa’s grounds for judicial review (as amended) were as follows:

**Grounds of application**

1. There has been unreasonable delay in making the decision,

or in the alternative,

a breach of the rules of natural justice occurred in connection with the making of the decision,

the decision involved an error of law,

the decision was made by taking an irrelevant consideration into account, and/or

the decision was made by failing to take a relevant consideration into account.

**Particulars**

a) The Respondent made the decision of 13 April ~~March~~ 2021 based on the misconceived facts that the Applicant’s claim is that Australian citizens considered the provision of an Act, namely, s 65 of the *Public Governance Performance and Accountability Act 2013* (‘PGPA Act’), was unfair while in fact the Applicant’s claim is that Australian citizens considered the Respondent’s failure to give effect to s 65 of the PGPA Act was unfair and that Australian citizens wished their Government to observe international law but the Respondent has not responded to the Applicant’s email in which she corrected his misconception and requested a decision based on her correct claim.

b) The Respondent made the decision of 13 April ~~March~~ 2021 without considering the Australian citizens’ view that refusing to waive the Applicant’s debts was unfair in circumstances where the Australian Human Rights Commission determined that the Commonwealth should pay $50,000.00 as compensation to the Applicant which the Commonwealth had not paid while the Applicant’s outstanding debts to the Commonwealth was $46,461.89.

c) The Respondent made the decision of 13 April 2021 based on the misconception that the Respondent’s decision dated 2 March 2020 2021 [sic] had been made lawfully.

d) The Respondent made the decision of 13 April 2021 without taking account of the Applicant’s claims put to the Respondent in the Applicant’s previous applications and the Respondent’s decisions in respect of those applications.

2. Such and other grounds that the Court thinks fit.

1. The primary judge gave particulars (a) and (b) short shrift (at [14]):

It will be apparent as a matter of ordinary English comprehension, on the face of the reasons given by the delegate in respect of the decision under present review, that this particular feature of Dr Ogawa’s reconsideration request was expressly addressed by the delegate.

1. The primary judge observed (at [8]) that Dr Ogawa had sought to rely upon a large number of affidavits some of which had not been accepted for filing by a Registrar of the Court. Those that had not been accepted for filing had been lodged outside of a case management deadline fixed by the Court.
2. The primary judge noted Dr Ogawa’s submission that she was not seeking to subvert the principles of finality discussed in *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 “by advancing a plethora of alleged further jurisdictional errors” in relation to the First Decision. His Honour continued:

24 …  Had she articulated all of these in her reconsideration request then the breadth of the zone of discretion afforded in relation to waiver by the PGPA Act would have left the delegate with a choice. The delegate might have done nothing more than note that each of these was a ground which could have been advanced in the earlier Federal Court proceedings in relation to the 2 March 2020 decision, was not, and in light of the finality, was not going to address further those grounds.

25 Alternatively, it would theoretically, have been, possible for the delegate to have noted the finality but also the breadth of the zone of discretion and chosen to address on the merits these particular features. Either path would have involved addressing a claim as made.

26 The difficulty for Dr Ogawa in relation to various further asserted errors is that none of these, at all, on any fair reading of her reconsideration application, featured as clearly articulated arguments. They were not integers of a reconsideration request. The delegate was not required to gaze into some crystal ball and endeavour to discern error of law in circumstances where, at an earlier phase of the administrative continuum, a challenge on that basis had been made and failed.

1. His Honour observed that Dr Ogawa had sought to supplement material contained in the Court Book, which was limited to the material Dr Ogawa had put before the delegate in support of the Second Request.
2. The primary judge concluded that the further affidavits were not relevant as a corollary of his earlier finding that the arguments sought to be advanced by Dr Ogawa had not been clearly articulated to the delegate in the Second Request, and so dismissed the interlocutory application. His Honour said that there was no point in granting an extension of time to file the belated affidavit material because it was not relevant on the application for judicial review.

# GROUNDS OF APPEAL

1. The grounds of appeal in QUD6/2022 are contained in five paragraphs of a Further Amended Supplementary Notice of Appeal dated 20 May 2022.
2. The first paragraph alleges that that the primary judge erred in finding that the Minister had considered Dr Ogawa’s “claim”. Particulars of that broad contention are given in the paragraphs that follow.
3. Paragraph 2 alleges that the primary judge erred in finding that the Minister had expressly made a decision concerning the view of Australian citizens evidenced in the correspondence provided in support of the Second Request. It raises what will be referred to as the “citizen issue”.
4. Paragraphs 3 and 4 are expressed as follows:

3. The primary judge erred in finding that the Respondent had been entitled to consider that the Respondent’s decision dated 2 March 2020 had been made lawfully because the finality principle applied not only to the grounds which had been advanced in the Full Court in *Ogawa v Finance Minister* [2021] FCAFC 17 but also to the grounds which could have been advanced but were not in the Full Court in *Ogawa v Finance Minister* [2021] FCAFC 17.

4. The primary judge erred in finding that the Respondent was only required to take account of the Appellant’s claims in the present application and was not required to take account of the Appellant’s claims put to the Respondent in the Appellant’s previous application dated 21 June 2019, the Respondent’s decision dated 2 March 2020 and the Full Federal Court decision in *Ogawa v Finance Minister* [2021] FCAFC 17.

1. Those grounds raise what will be referred to as the “finality issue”.
2. Paragraph 5 alleges that the primary judge failed to afford Dr Ogawa procedural fairness in several respects. The alleged errors broadly fall within three categories.
3. First, it is alleged that the primary judge wrongly ruled as irrelevant (and so did not read) material that was relevant on the application for judicial review. This category of error is closely related to the citizen issue and will be considered in that context. It encompasses the issues raised in QUD450/2021.
4. Second, it is alleged that the primary judge deprived Dr Ogawa of a fair hearing, including by:
5. refusing Dr Ogawa’s request for an adjournment to enable her to complete written submissions;
6. repeatedly interrupting her oral submissions and otherwise cutting her oral submissions short, notwithstanding that there was ample to time for the conduct of the hearing; and
7. refusing to adjourn the hearing to provide Dr Ogawa with a fair opportunity to prepare submissions in response to questions the primary judge asked about the principles of res judicata, issue estoppel and Anshun estoppel.
8. To that list may be added an allegation that the manner in which the proceedings were conducted gave rise to an apprehension of bias on the part of the primary judge – that allegation forming a part of the grounds relied upon in QUD450/2021.
9. These allegations raise what will be referred to as the “fair hearing issue”.
10. Third, it is contended that the primary judge reviewed a decision of a different delegate made on 8 April 2021, rather than the Second Decision made on 13 April 2021 forming the subject of the application for judicial review. That contention may be shortly disposed of. There is nothing on the face of the Reasons to suggest that the primary judge failed to correctly identify the decision subject to the judicial review application. The reasons for the Second Decision are extracted in full in the Reasons, and the grounds for judicial review are addressed by reference to them.
11. In addition to the above mentioned grounds, Dr Ogawa sought leave to advance an argument on the appeal that had not been advanced at first instance, at least not in the same way. She contended that there had been an unreasonable delay in making “a” decision on her Second Request. The effect of that contention was that the delegate’s failure to understand and properly consider the Second Request had the consequence that the Second Decision was void or otherwise of no force and effect. Dr Ogawa submitted that, as a consequence, her Second Request remained undecided and there was an unreasonable delay in making a valid decision.
12. Leave will be granted to advance that argument, on the basis that it asserts a legal consequence that would follow if the errors otherwise alleged at first instance to affect the Second Decision are established. The grant of leave is not an occasion for Dr Ogawa to introduce additional allegations of error affecting the Second Decision not advanced at first instance, nor is it an occasion for Dr Ogawa to allege error affecting any prior judgment or decision referred to in the reasons for the Second Decision. The new argument should be rejected as a consequence of our rejection of the other grounds of appeal attacking the validity of the Second Decision.
13. The grounds of appeal in QUD450/2021 are largely repetitive of the grounds in QUD6/2022. Our consideration of them is subsumed in the pages that follow.

# THE FINALITY ISSUE

1. Paragraph 3 of Dr Ogawa’s grounds of appeal misstates the effect of the reasoning of the primary judge. The primary judge did not state that the finality principle necessarily precluded the delegate who made the Second Decision from considering whether the First Decision was lawfully made. The primary judge recognised (correctly) that the delegate had in fact asked whether the First Decision was affected by serious factual error, and had accepted that the First Decision might be reconsidered in light of new information. The primary judge was correct to find that, in the absence of clearly articulated arguments, the delegate was under no obligation to revisit the material provided in support of the First Request in search of vitiating error that had not already been considered in the First Judgment and *Ogawa Full Court*. His Honour stated (again correctly) that if arguments concerning the correctness of the First Decision had been advanced, the delegate who made the Second Decision would have been presented with a choice. In that event, it would have been open to the delegate to refuse to waive the debt on the basis that the arguments could have been advanced in the earlier litigation (or were advanced but rejected). There is no error disclosed in that reasoning.
2. As to [4] of the Notice of Appeal, the primary judge was correct to conclude that the Second Request gave rise to no obligation to have regard to the matters raised by Dr Ogawa in support of the First Request. In the absence of clearly articulated arguments, the delegate did not commit reviewable error by proceeding on the basis that the First Request was lawfully made.
3. Dr Ogawa did not otherwise demonstrate that the documents constituting the Second Request in fact contained any argument or supporting evidence going to the matters she had sought to raise before the primary judge. It follows that Dr Ogawa has not established error in the primary judge’s decision to dismiss the interlocutory application on that basis.

# CITIZENS

1. The first paragraph of the reasons given by the delegate make it plain that the delegate fairly understood that the letters from the Australian citizens were put forward as a basis for reconsidering the First Decision. That paragraph contains a correct summary of the effect of the letters. In the final paragraph of the reasons, the delegate expressed the view that the additional information did not provide “any appropriate basis on which to reconsider” Dr Ogawa’s matter. The delegate referred to the significant consideration that had already been given by “the Department and the Federal Court” in respect of earlier requests for waiver. The reasons in that respect are brief. They do not reveal any misunderstanding about the nature of the evidence put forward by Dr Ogawa. The primary judge did not err in his conclusion that the delegate had expressly considered the Australian citizens’ views. The conclusion that the citizens’ views did not provide a basis to reconsider Dr Ogawa’s matter is shortly stated, but the grounds of review do not assert that it was not open to the delegate to form or express that opinion.
2. The grounds raising the citizen issue must therefore be rejected.

# PROCEDURAL FAIRNESS

1. Dr Ogawa did not take this Court to material which demonstrated that the hearing was conducted in a way that was procedurally unfair.
2. We will proceed on the assumption that the primary judge cut Dr Ogawa short in her submissions concerning the additional affidavit evidence upon which she sought to rely. That is a specific allegation made by Dr Ogawa in her written submissions filed in action QUD450/2021. Even if that occurred, we are not satisfied that interruption of Dr Ogawa’s oral submissions, or any refusal to permit further written submissions, constituted a breach of the rules of procedural fairness.
3. The rules of procedural fairness require that a party be afforded a fair opportunity to present his or her case. They do not require that the party be afforded as much time as he or she subjectively desires. The amount of time that might reasonably be required for a party to present his or her case must of course depend upon the subject matter of the dispute and other facts and circumstances particular to the case and the individual litigant. In the ordinary course, the status of a person as an unrepresented litigant may justify a greater allocation of time than might otherwise be afforded in the case of a represented party.
4. If the relevance of a submission is not apparent to the presiding judge, the judge is entitled to interrupt the submissions to enquire how the arguments might bear on an issue to be decided, whether or not the litigant is legally represented. The submitting party should be afforded a fair opportunity to explain the relevance of an argument if its relevance is not immediately apparent. If no satisfactory explanation is given, there is no obligation to permit submissions on an apparently irrelevant topic to continue.
5. On this appeal, Dr Ogawa has the onus of demonstrating that her oral submissions were interrupted in a way that deprived her of a fair opportunity to present submissions that were material to the issues the primary judge was required to decide. That onus is not discharged simply by asserting, or establishing, that submissions were interrupted. Dr Ogawa has not demonstrated that her submissions were interrupted in a way which deprived her of a fair opportunity to make material submissions.
6. This issue is linked to Dr Ogawa’s allegation of apprehended bias. The principles with respect apprehended bias in judicial proceedings are well established. They are conveniently summarised by the High Court in *Charisteas v Charisteas* [2021] HCA 29; 393 ALR 389 (at [11]):

Where, as here, a question arises as to the independence or impartiality of a judge, the applicable principles are well established, and they were not in dispute. The apprehension of bias principle is that ‘a judge is disqualified 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”. The principle gives effect to the requirement that justice should both be done and be seen to be done, reflecting a requirement fundamental to the common law system of adversarial trial—that it is conducted by an independent and impartial tribunal. Its application requires two steps: first, ‘it requires the identification of what it is said might lead a judge … to decide a case other than on its legal and factual merits’; and, second, there must be articulated a ‘logical connection’ between that matter and the feared departure from the judge deciding the case on its merits. Once those two steps are taken, the reasonableness of the asserted apprehension of bias can then ultimately be assessed.

(footnotes omitted)

1. The grounds alleging apprehended bias concern the manner in which the primary judge dismissed Dr Ogawa’s interlocutory application. Dr Ogawa alleged that the apprehension of bias arose by virtue of the conduct of the primary judge in refusing to permit her to rely on the additional materials and to complete her submissions in relation to them. Her written submission is that “it is difficult to believe that a fair-minded and informed observer would consider that the primary judge had not made a pre-judgement when he dismissed the Applicant’s Interlocutory Application seeking an order to file the Applicant’s Affidavits”.
2. We do not accept that submission. As has been mentioned in relation to the grounds alleging denial of procedural fairness, the primary judge was under no obligation to permit Dr Ogawa to advance submissions at length concerning the materials that his Honour had correctly determined to be irrelevant. Without more, the cutting short of Dr Ogawa’s submissions is not suggestive of pre-judgment. Rather, by cutting short Dr Ogawa’s submissions the primary judge would be understood to have made a ruling that the material upon which she sought to rely was irrelevant to the issues arising for consideration and resolution of her application for judicial review. The primary judge was entitled to reach a concluded view on an interlocutory question of that kind in the course of the hearing of the application for judicial review, to make that view known, and to preclude further submissions in relation to it. We are not satisfied that a fair-minded and informed observer would conclude from what occurred that the primary judge was not bringing, or might not bring, an impartial mind to the resolution of the questions the judge was required to decide.
3. Even if (which is not the case) the ruling concerning the relevance of material was shown by Dr Ogawa to be affected by error, it does not follow that the fact of the adverse ruling necessarily gives rise to an apprehension of bias, either in respect of that issue or the substantive issues arising on the application for judicial review.

# NEW ARGUMENTS

1. Dr Ogawa submitted that this Court had the discretionary power to hear and resolve arguments she had not previously raised in her application for judicial review of the First Decision or in her unsuccessful appeal to the Full Court culminating in *Ogawa Full Court*. The arguments were wide ranging. Much of Dr Ogawa’s submissions on the appeal were devoted to allegations of error and wrongdoing affecting or arising out of her past litigation, including the First Judgment. Dr Ogawa made no attempt to establish that the particular arguments she advanced in oral submissions were arguments she had articulated to the delegate in support of the Second Request. Dr Ogawa submitted that it would be just and expedient for this Full Court to entertain and resolve those arguments because she could and would in any event make a further waiver request under the PGPA Act and then seek judicial review of any subsequent decision that was unfavourable to her. She submitted that that would only result in further costly litigation in which the allegations of past error must necessarily be considered.
2. We reject the invitation to consider the array of issues traversed in Dr Ogawa’s submissions (other than those properly bearing on the grounds of appeal) for two reasons.
3. First, the Court’s appellate jurisdiction is that conferred under s 25 of the FCA Act. In exercising that jurisdiction, the function of the Court is to discern appealable error in the judgment or order appealed from. The new arguments sought to be raised by Dr Ogawa did not inform the question of whether the primary judge committed appealable error nor do they inform the question of whether the delegate committed jurisdictional error. For the reasons given above, it formed no part of the task of the primary judge to entertain arguments that had not been raised before the delegate as the original decision-maker and it forms no part of the task of this Court to entertain them either.
4. Second, whilst it may conceivably be open to Dr Ogawa to put forward arguments concerning the validity of the First Decision (or for that matter the Second Decision) in support of yet further waiver requests ad infinitum, the delegates receiving any such requests would be entitled to proceed on the basis that the arguments could and should have been advanced in the litigation following each past decision. In that event, any application for judicial review of any third decision would not present an occasion to review the substantive merits of the kind of arguments Dr Ogawa now seeks to advance before this Full Court.
5. Before concluding, it is apt to mention a particular argument raised by Dr Ogawa concerning the Debt. At the outset of these reasons, the amount of the Debt was said to be “at least $46,461.89”. That is an amount arrived at after the Commonwealth set off against that amount a debt owed by a Commonwealth agency to Dr Ogawa. Were it not for that set-off, the amount owing by Dr Ogawa would instead be $85, 560.00 as at 1 March 2022. The set-off amount was attributable to a costs order made in Dr Ogawa’s favour in proceedings in this Court in which she had been provided assistance by Counsel acting under a certificate for legal assistance issued under r 4.12 of the *Federal Court Rules 2011* (Cth). Dr Ogawa complained that the Commonwealth was not entitled unilaterally to set-off the costs amount against the debt she then owed to the Commonwealth. She submitted that the amount should have instead been paid to the barrister acting pursuant to the certificate. She submitted that the practical effect of the set-off was that no pro-bono lawyer would then act for her because any favourable costs outcome would not result in the lawyer being recompensed for his or her efforts. That state of affairs was said to give rise to an injustice in subsequent legal proceedings in which Dr Ogawa appeared as a self-represented litigant. This argument was not put to the delegate in support of the Second Request (assuming for present purposes that it is a relevant matter to raise).
6. Given that the argument advanced by Dr Ogawa concerns the administration of justice in this Court it is appropriate to identify it and explain why this Court will not allow her to rely on it. As Dr Ogawa acknowledged, the question of whether the Commonwealth was entitled to set-off a debt in the nature of a costs liability against other debts owed to the Commonwealth without an order authorising it to do so has been the subject of a prior complaint by Dr Ogawa. In response to her complaint, a justice of this Court issued a further certificate under r 4.12 to assist Dr Ogawa to prepare and advance arguments concerning the set-off in the proceedings in which the costs order against the Commonwealth had been made. Had that argument proceeded to a hearing, it no doubt would have been necessary to consider the applicability of s 64 of the PGPA Act which appears to provide a possible answer. However, the matter (important as it may have been) did not proceed to a hearing because (as Dr Ogawa disclosed), she had withdrawn the point and not pursued it upon receiving legal advice.
7. Moreover, the Second Request was based on the Debt in the amount arrived at after applying the set-off, no doubt because it was less than the compensation amount and so enabled Dr Ogawa to argue (including by relying on the letters from concerned Australian citizens) that if the compensation were paid, she would be in a financial position to discharge the Debt. Dr Ogawa’s arguments surrounding the set-off reinforce our conclusion that she should not be permitted to re-agitate issues that she had every opportunity to agitate but chose to abandon.
8. Both appeals should be dismissed with costs.

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| I certify that the preceding sixty-two (62) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Charlesworth, Thawley and Goodman. |

Associate:

Dated: 31 August 2022