Federal Court of Australia

Ogawa v Finance Minister [2021] FCA 1666

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| File number: | QUD 204 of 2021 |
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| Judgment of: | **LOGAN J** |
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| Date of judgment: | 13 December 2021 |
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| Catchwords: | **ADMINISTRATIVE LAW** – application for judicial review of Minister’s delegate’s refusal to waive the applicant’s indebtedness to the Commonwealth – where applicant had previously made a similar application for waiver – where application to Minister was an application for reconsideration supported by a number of letters from Australian public expressing support for the applicant – whether Minister’s delegate erred in not making reference to the additional information constituted by those letters – where reasons of Minister’s delegate addressed the claim as made – whether the delegate erred in not considering claims made by the applicant in Federal Court proceedings concerning the previous application – where applicant did not submit this to the delegate – where delegate part of administrative continuum – where delegate entitled to proceed on basis that earlier decision was lawful – application dismissed |
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| Legislation: | *Public Governance, Performance and Accountability Act 2013* (Cth) s 63 |
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| Cases cited: | *AAL19 v Minister for Home Affairs* (2020) 277 FCR 393  *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088  *Frugtniet v Australian Securities and Investments Commission* (2019) 266 CLR 250  *Jebb v Repatriation Commission* (1998) 8 AAR 285  *Ogawa v Finance Minister* [2020] FCA 829  *Ogawa v Finance Minister* [2021] FCAFC 17  *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589  *Re Easton and Repatriation Commission* (1987) 6 AAR 558  *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Number of paragraphs: | 30 |
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| Date of hearing: | 13 December 2021 |
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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 204 of 2021 |
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| BETWEEN: | MEGUMI OGAWA  Applicant | |
| AND: | FINANCE MINISTER  Respondent | |

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| order made by: | LOGAN J |
| DATE OF ORDER: | 13 DECEMBER 2021 |

THE COURT ORDERS THAT:

1. An extension of time be granted to the applicant to 30 May 2021 for the filing of her originating application.
2. The applicant be granted leave to amend her originating application in terms of the amended originating application as annexed to the affidavit of the applicant filed on 25 July 2021.
3. The Registrar file the applicant’s written outline of submissions on the Court file.
4. The originating application as so amended be dismissed.
5. The applicant pay the respondent’s costs to be fixed by a Registrar if not agreed. In the fixing of those costs, the Registrar is not to allow to the respondent the costs of and incidental to the notice of objection to competency.

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

REASONS FOR JUDGMENT

(REVISED FROM TRANSCRIPT)

LOGAN J:

1. On 21 June 2019, the applicant, Dr Megumi Ogawa (Dr Ogawa), applied to the Finance Minister (Minister) for the exercise of a power conferred on the Minister by s 63(1)(a) of the *Public Governance, Performance and Accountability Act 2013* (Cth) (the PGPA Act) to waive indebtedness by her to the Commonwealth. On 2 March 2020, a delegate of the Minister, for reasons given to Dr Ogawa, decided not to waive her indebtedness as ascertained by that delegate for the purposes of that waiver application. As so ascertained, the amount of that indebtedness was $46,461.89. That reflected, in the assessment of the delegate, a balance of account as between the Commonwealth and Dr Ogawa, taking into account costs orders which had been made in her favour.
2. That waiver decision, or that refusal to waive decision, was the subject of challenge in the original jurisdiction of this Court in judicial review proceedings. The challenge in the original jurisdiction failed: see *Ogawa v Finance Minister* [2020] FCA 829. A subsequent appeal against the order of dismissal by Dr Ogawa was dismissed by the Full Court on 24 February 2021: see *Ogawa v Finance Minister* [2021] FCAFC 17.
3. The following month, Dr Ogawa made a further application to the Minister seeking the waiver of an indebtedness to the Commonwealth of $46,461.89. That application was received by the Minister’s department the following day, 29 March 2021. It came to be supported by further correspondence from Dr Ogawa on 9 April 2021. On 13 April 2021, a delegate of the Minister decided to refuse that fresh application for reconsideration.
4. On 30 May 2021, Dr Ogawa filed an application for the judicial review of the Minister’s delegate’s refusal to waive the indebtedness in response to her application for reconsideration. The Minister was disposed to oppose an extension of time within which to make that judicial review application. Consideration of that opposition to the granting of an extension ought necessarily have entailed a consideration, at least in a preliminary way, of the merits of the proposed grounds of review, along with, of course, whether there was an acceptable explanation of delay. Dr Ogawa did have her reasons for pausing the initiation of a judicial review proceeding. Further, consideration substantively of the merits of those grounds ought have entailed, and indeed did entail, no more devotion of judicial time than that which would have been entailed in consideration of whether or not to grant an extension.
5. The case is one in respect of which there is a perfectly rational occasion for Dr Ogawa to be aggrieved by the continuing failure on the part of the Minister and the Minister’s delegates not to waive the specified indebtedness. That occasion for grievance is to be found in a compensation recommendation made to the Commonwealth by the Human Rights and Equal Opportunity Commission (Human Rights Commission), the nature of which is detailed in earlier judgments. To recognise that the occasion for grievance is rational is in no way to go beyond the remit of the judicial branch, which is manifestly not to make a decision on the merits of waiver.
6. It seems to me that the interests of justice overwhelmingly favour the granting of an extension of time to Dr Ogawa so that the merits of her case are dealt with substantively.
7. Dr Ogawa sought to amend the grounds of review in July this year. The means by which she sought to do that were unorthodox, in the sense that a proposed amended originating application formed part of an omnibus document filed on 25 July 2021. Once again, it is in the interests of justice that her application, as amended, be dealt with by the Court. Insofar as the same may be necessary. I therefore grant her leave to amend the originating application. As so amended, the grounds of review are these:

**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 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. In support of the grounds, as amended, Dr Ogawa sought to rely upon a large number of affidavits, some filed, some not accepted for filing. The latter because they were sought to be filed outside case management direction times. These affidavits were sought to be filed in supplementation of the material contained in the court book, which sets out the material before the decision maker at the time when the refusal to reconsider decision was made on 13 April 2021. The occasion for the reception of this large body of affidavit material was said, by Dr Ogawa, to lie in its relevance to particular legal error grounds, the nature of which I shall describe shortly.
2. The reception of that material was opposed by the Minister. The basis of that opposition will be apparent enough from the way in which I deal with the grounds of review as enlarged upon by Dr Ogawa in oral submissions.
3. Turning to the grounds of review, ground 1 pleads, on its face, an unreasonable delay in the making of the decision. In fairness to Dr Ogawa, she did not seek to develop this particular ground in her oral submissions. It is quite plain from the chronology that I have recited that the Minister’s delegate, on this occasion, made the reconsideration decision in a very timely way indeed. On no view, could the lapse of time between the making of the reconsideration application and its determination be regarded, in the circumstances, as unreasonable.
4. The alternative basis upon which ground 1 is put, is that a breach of the rules of natural justice occurred. Lurking behind that ground – and also, for that matter, grounds 1(c) and (d) – was a submission that the Minister’s delegate ought to have accepted that the earlier waiver refusal decision of 2 March 2020 was attended with a myriad of jurisdictional errors, the nature and extent of which were mentioned by Dr Ogawa in her oral submissions today.
5. It is convenient before dealing with these aspects of Dr Ogawa’s challenge first to address ground 1(b). In order to address ground 1(b) it is necessary to set out the reasons which were given to Dr Ogawa by the Minister’s delegate on this occasion in refusing to reconsider her request for waiver. The delegate stated in the refusal letter:

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.

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 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. Dr Ogawa had supported her application for reconsideration by enclosing a number of letters signed by various Australian citizens, each of whom expressed disquiet, in terms of Australia’s international reputation, by a failure on the part of the earlier delegate in March 2020 to act upon the recommendation from the ombudsman based on a Human Rights Commission recommendation that there ought to be a payment to Dr Ogawa, having regard to the particular circumstances of earlier detention.
2. 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.
3. The power conferred by s 63(1)(a) of the PGPA Act grants to the Minister and the Minister’s delegates a considerable “zone of discretion” in relation to the waiver of debts owed to the Commonwealth. That discretion is guided by guidelines developed within the Department. But it is plain enough that, on this occasion, this delegate has appreciated that there was a feature which was new in relation to the reconsideration request and has considered whether or not to grant waiver taking into account that new feature.
4. Such is the breadth of the zone of discretion conferred by the PGPA Act, it would have been lawful for the delegate to have decided to waive the specified indebtedness. But that delegate was not bound to do this. It was a matter for deliberate value judgement. Had the delegate not appreciated this feature of the reconsideration request then the delegate would have failed to have addressed a substantial, clearly articulated argument in the reconsideration request in the sense described in *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 (*Dranichnikov*).
5. Another way, as *Dranichnikov* also highlights, of describing an error that would have been made, would be to say that the delegate had denied Dr Ogawa procedural fairness. If that be what lurks behind the allegation of a breach of the rules of natural justice then it has, in the circumstances of this case, no merit. At the risk of repetition, that is because the claim as made on its face was addressed.
6. The balance of the grounds of review depend upon a characterisation of exactly what Dr Ogawa requested, or more particularly, exactly what grounds she advanced for reconsideration.
7. In the delegate’s reasons the delegate made reference to the decision of 2 March 2020 and stated that no error was apparent in that. This delegate was part of what in earlier authorities has been described as an administrative continuum: see *Frugtniet v Australian Securities and Investments Commission* (2019) 266 CLR 250, at [53], in the joint judgment of Bell, Gageler, Gordon and Edelman JJ. The place of an administrator in an administrative continuum has many ramifications in the context of judicial review of merits review and other administrative decisions.
8. A root authority in this regard is *Re Easton and Repatriation Commission* (1987) 6 AAR 558, at 561, in which it was stated:

The ambit of a review by the [Tribunal] is necessarily influenced by the ambit of the steps and proceedings that have taken place prior to its review, for the function of the [Tribunal] is to review a decision.

1. That statement was later endorsed by Davies J in *Jebb v Repatriation Commission* (1998) 8 AAR 285, at 289, and, in turn, by Kirby J in *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, at [45], and for that matter, by a Full Court of this Court in *AAL19 v Minister for Home Affairs* (2020) 277 FCR 393, at [24].
2. By the time when this delegate made the refusal to reconsider decision, a challenge by Dr Ogawa to the legality of the decision of 2 March 2020 had been heard and determined to finality by an exercise of Commonwealth judicial power, which culminated in the judgment of a Full Court of this Court. That gave finality both to the grounds which were advanced as well as those which could have been advanced in those proceedings. Absent any submission by Dr Ogawa, as part of her reconsideration request, that the delegate take into account other jurisdictional error grounds which could have been argued but were not in relation to the 2 March 2020 decision, the delegate, on this occasion, as part of the administrative continuum, was entitled to proceed on the basis that the earlier decision was lawful.
3. As it happens, the delegate chose, as the reasons reveal, to examine whether or not there was some feature of the conclusion reached which entailed an error, but that did not involve the delegate exploring jurisdictional error grounds unarticulated by Dr Ogawa. It is apparent enough, on the face of the reasons, that all the delegate did was to satisfy herself that the outcome was in accordance with procedure and entailed no factual error.
4. Dr Ogawa’s submission was that she was not seeking to subvert any principle of finality or Anshun estoppel– see, *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 2 March 2020 decision. 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.
5. 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.
6. 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.
7. A corollary of this is that all the supporting affidavit material for these further asserted jurisdictional errors is just not relevant. To the extent that the affidavit material is already on the court file and sought to be read, the Minister’s objection to relevance is a sound one. To the extent that it is not on the court file as yet and the subject of an application for it to be permitted to be filed and read, the objection goes to the granting of an extension of time within which to file material. There is no point in granting an extension of time to file affidavit material which is just not relevant.
8. This is one of those cases where, as I have observed earlier in these reasons for judgment, there is a perfectly rational occasion for Dr Ogawa to feel aggrieved by the way in which both the delegate on 2 March 2020 and the new delegate on reconsideration in April this year dealt with her request for waiver. On analysis, each of those decisions concerned the same debt. It was a case which might have persuaded a delegate to grant waiver but there was no obligation so to do. Dr Ogawa herself recognised the breadth of the discretion afforded to the delegate by the PGPA Act in her submissions.
9. Indeed, the breadth of that discretion informed her submission that all of the various additional jurisdictional error grounds should have been taken into account. The difficulty with that submission, and the reason why the balance of ground 1 has no merit, is that there is no source for the stream in respect of those submissions. The source for these additional alleged error grounds had to be found in a feature of her reconsideration application.
10. For these reasons then, though Dr Ogawa should be granted an extension of time to 30 May 2021 for the filing of her originating application and leave to amend that in terms of the amended application which formed part of the omnibus document filed on 25 July 2021, the originating application, as so amended, must be dismissed.

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| I certify that the preceding thirty (30) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Logan. |

Associate:

Dated: 10 February 2022