FEDERAL COURT OF AUSTRALIA

Ogawa v Finance Minister [2020] FCA 829

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| File number: | QUD 663 of 2019 |
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| Judge: | **RANGIAH J** |
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| Date of judgment: | 16 June 2020 |
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| Catchwords: | **ADMINISTRATIVE LAW** – application for judicial review of decision to decline to waive debt – whether decision was unreasonable – application dismissed**COSTS** – unreasonable conduct by both parties – each party to bear its own costs |
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| Legislation: | *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5*Judiciary Act 1903* (Cth) s 39B*Public Governance, Performance and Accountability Act 2013* (Cth) s 63*Federal Court Rules 2011* (Cth) r 9.05*Migration Regulations 1994* (Cth) |
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| Cases cited: | *Minister for Home Affairs v Ogawa* [2019] FCAFC 98*Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541*Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332*ONE.TEL Ltd v Commissioner of Taxation* (2000) 101 FCR 548*Re Minister for Immigration and Ethnic Affairs; Ex Parte Lai Qin* (1997) 186 CLR 622 |
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| Date of hearing: | 3 March 2020 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | Catchwords |
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| Number of paragraphs: | 46 |
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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 |
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| Solicitor for the Administrative Appeals Tribunal: | Ms J Forsyth of Mills Oakley Lawyers |

ORDERS

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|  | QUD 663 of 2019 |
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| BETWEEN: | MEGUMI OGAWAApplicant |
| AND: | FINANCE MINISTERRespondent |

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

THE COURT ORDERS THAT:

1. The interlocutory application filed on 5 December 2019 is dismissed.
2. The amended originating application is dismissed.
3. Each party is to bear its own costs of the proceeding.

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

REASONS FOR JUDGMENT

RANGIAH J:

1. On 2 March 2020, a delegate of the respondent (the **Minister**) made a decision under s 63(1) of the *Public Governance, Performance and Accountability Act 2013* (Cth) (the **Public Governance Act**) declining to waive a debt owed by the applicant, Dr Megumi Ogawa, to the Commonwealth.
2. By an amended originating application, Dr Ogawa applies for orders that the Minister’s decision be quashed or set aside and for other orders. The application is made pursuant to s 39B of the *Judiciary Act 1903* (Cth) and s 5(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).
3. The application has come about in unusual circumstances. On 21 June 2019, Dr Ogawa applied for waiver of the debt and, on 29 October 2019, she filed an originating application seeking relief in respect of what she alleged was the Minister’s unreasonable delay in making the decision. That application was set down for hearing on 3 March 2020.
4. On 2 March 2020, the day before the hearing, the Minister’s delegate made a decision to decline to waive the debt. At the hearing, Dr Ogawa applied for leave to amend her originating application to challenge that decision. The Minister neither consented to, nor opposed, the amendment. Dr Ogawa indicated that she was in a position to proceed with the hearing of the amended originating application that day. The Minister submitted that the hearing should be adjourned to another date.
5. I granted Dr Ogawa leave to amend the originating application. I decided to proceed with the hearing of the amended originating application immediately. Dr Ogawa was ready to proceed with the hearing. The hearing of the originating application as originally framed was no longer necessary, but the remainder of the day had already been set aside for a hearing and would otherwise have been wasted. I was not satisfied that the Minister had provided any adequate explanation for why the decision had not been made until the day before the hearing. I considered that postponing the hearing could result in further wastage of the resources of the parties and the Court. I decided that it would be best to proceed with the hearing and leave the Minister to apply for any adjournment after having heard Dr Ogawa’s arguments.

## The legislation

1. Section 63 of the Public Governance Act provides:

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

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

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

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

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

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

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

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

## The decision

1. The reasons for the decision of the Minister’s delegate to decline to waive the debt owed by Dr Ogawa are contained in a letter dated 2 March 2020. The letter noted that Dr Ogawa had sought waiver of debts owing to the Department of Home Affairs. It is convenient to refer in these reasons to the Department of Home Affairs and its predecessors as “the Department”.
2. The Department had advised that her debt was $45,271.89 owed to the Department, resulting from costs orders made against her in various courts. The Administrative Appeals Tribunal (the **AAT**) had also indicated that Dr Ogawa owed the AAT $1,400.00. The delegate considered waiver of the combined amount of $46,461.89.
3. The delegate noted that Dr Ogawa had previously submitted applications for waiver of her debts and now sought reconsideration of the earlier decisions on the basis that the debts arose from an anomaly in the *Migration Regulations 1994* (Cth) (the **Regulations**) impacting upon her ability to reapply for a student visa and that the Department had ignored recommendations from the Commonwealth Ombudsman and Australian Human Rights Commission (the **AHRC**). The delegate stated that Dr Ogawa had not provided additional information, but had highlighted that she had successfully defended an appeal brought by the Minister for Home Affairs in the Full Court (*Minister for Home Affairs v Ogawa* [2019] FCAFC 98) and now needed to resolve the issue of Commonwealth debts urgently in order to facilitate her visa application. She had also provided several decisions involving litigation she had commenced.
4. The delegate stated that he had reviewed the Department’s previous decisions and had also considered a submission from the Department, a submission from the AAT and Dr Ogawa’s email in response to the AAT’s submission. The delegate noted that decisions had previously been made by delegates of the Minister for Finance on 21 March 2007, 12 October 2016 and 2 March 2018 rejecting her applications for waiver of the debts.
5. The delegate stated that he had regard to paragraphs 34 and 35 of “RMG 401”. That expression was not explained, but I infer that it refers to a guideline for delegates when considering whether to waive a debt to the Commonwealth.
6. The delegate stated that Dr Ogawa’s debt, apart from the $1,400 owed to the AAT, had arisen from legal action she had instigated in the Federal Court. The delegate noted that the guideline indicated that debts would be unlikely to be waived where they had been “established” by a judicial decision of a court. The delegate also said that it was not appropriate to waive the debt to the AAT as she had instigated the action in that tribunal and therefore knowingly incurred those costs.
7. The delegate noted Dr Ogawa’s comments regarding the asserted anomaly in the Regulations. The delegate noted that at the time her visa was cancelled, she was not enrolled in any course of study, but that the Department had previously advised her to resolve her visa status by enrolling in a course of study, applying for another visa or departing Australia. The delegate gave considerable weight to the fact that Dr Ogawa had been given that advice and that, as a visa holder, it was her responsibility to ensure that she met the eligibility requirements to hold a student visa. The delegate considered that her detention and the subsequent litigation commenced by her were as a result of her failure to address her immigration status. The delegate found that the debts arose from her choice to commence legal action and not as a direct outcome of any anomaly in the legislation.
8. The delegate addressed Dr Ogawa’s claim that the Department had failed to put her case to the Minister for Ministerial intervention. The delegate noted a submission from the Department dated 23 September 2015 which addressed various requests for Ministerial intervention. The Department had advised that Dr Ogawa’s case did not meet the relevant criteria under the Minister’s public interest guidelines for referral to the Minister, that a number of requests were treated as withdrawn by her and others were not put to the Minister as the Department deemed the requests inappropriate to consider as she had unfinalised judicial review applications on foot. The delegate noted that the Minister had chosen to intervene on 25 June 2007 and had granted her a student visa. The delegate did not consider that this supported Dr Ogawa’s claim that she “had to keep litigating against the Minister”, and considered that the instigation of legal action in each case was her own choice, which had, in a number of instances delayed or precluded consideration of her requests for Ministerial intervention.
9. The delegate reviewed the Commonwealth Ombudsman’s report of 20 March 2007 and noted that the Ombudsman had not recommended that her debts be waived, but noted deficiencies in the submissions made to the Department of Finance. Subsequently, there were further detailed submissions from the Department of Immigration and Border Protection. The delegate considered that the Ombudsman’s recommendations had been acted upon.
10. The delegate noted that the AHRC had recommended that Dr Ogawa be paid $50,000 by way of compensation in respect of her immigration detention. The delegate said that the recommendation did not give rise to an entitlement. The Department had not accepted the recommendation, particularly because it considered that the detention was lawful and not arbitrary. The Department had also noted that Dr Ogawa had refused to co-operate with attempts to assist to regularise her status. The delegate considered that the Department acted lawfully and that Dr Ogawa had been given the opportunity to take action to avoid detention. The delegate gave no weight to the AHRC’s recommendation.
11. The delegate noted that Dr Ogawa had been successful before the Full Court and that she had been awarded costs. The delegate said that those costs had been offset against her current debt.
12. The delegate considered the four judgments provided by Dr Ogawa including the parts of the texts she had highlighted. The delegate noted that in each case, the Court had ordered costs against her.
13. The delegate said he understood that the grant of a permanent visa to Dr Ogawa would depend upon waiver of her debts. However, he did not consider that was sufficient justification for waiver.
14. The delegate said that the creation of the debts resulted from actions initiated by Dr Ogawa and that there were options available to her to reduce that debt without recourse to waiver. The delegate noted that Dr Ogawa’s bridging visa enabled her to seek employment which would assist her in repaying the debts.
15. The delegate noted that the Department had advised that on 25 June 2019, Dr Ogawa had applied for an instalment plan and provided a Statement of Financial Details. Her offer to repay the debt at $1 per month had been rejected. She was advised of that decision on 26 August 2019 and asked to reconsider the monthly amount she was willing to pay or to consider a deferral for a period of time. She had not responded to that correspondence.
16. The delegate concluded that he had given significant weight to the fact that the Department’s debts had been established, for the most part, by judicial decisions of courts where costs had been awarded against her. The delegate considered that there was no basis to deviate from the guidance in the guidelines that debts “established” as a result of judicial decisions should not generally be waived. The delegate also found that there was no basis to waive the AAT’s fee, since the debt arose due to her lack of success in her proceeding.
17. The delegate accepted that Dr Ogawa’s income was limited and her visa status had impacted upon her ability to find employment. However, the delegate was not satisfied that a bridging visa completely prevented her from gaining sustainable employment in the future and repaying the debt. The delegate also noted that the Department had attempted to negotiate payment plans with her on numerous occasions.
18. The delegate found that a waiver of the Commonwealth debt would not be appropriate and decided not to authorise waiver of her debt.

## Consideration

1. Dr Ogawa’s amended originating application asserts that the delegate’s decision was so unreasonable that no reasonable person could have exercised the power in that way.
2. Although Dr Ogawa was given leave to amend her originating application to include grounds that there was a denial of procedural fairness, and that the decision-maker failed to take into account relevant considerations and took into account irrelevant considerations, those grounds have not been included. Dr Ogawa did not address those grounds in her submissions. I will proceed on the basis that they are no longer pursued.
3. The amended originating application retains the allegation contained in the original that there was unreasonable delay in making the decision. However, that allegation was only relevant to Dr Ogawa’s application for orders requiring the Minister to make a decision. That part of the application has been overtaken by the decision having been made on 2 March 2020. Accordingly, that part of the application falls away.
4. In written submissions filed on 2 March 2020, Dr Ogawa said that the case raises only one question, namely:

Is it reasonable for the Respondent to decide that an overseas student from a non-English speaking country, studying on scholarship, with no legal qualification or training in this country should be responsible for the whole consequences of the anomaly in Commonwealth legislation, the failure of a Commonwealth quasi-judicial institution to make a decision within the timeframe and the maladministration of a Commonwealth Department (of Immigration) in handling the Applicant’s case, while the Commonwealth including the Respondent has done nothing to rectify those Commonwealth’s mistakes?

1. In oral submissions, Dr Ogawa said that the original debt concerned her dispute against the University of Melbourne. She asserted that the Department had wrongly cancelled her visa, and she went to the Migration Review Tribunal (the **MRT**), which made a decision in her favour. She said that in the meantime, her student visa had expired. She said that the Regulations now allow a new application for a visa to be made within 28 days of the decision of the AAT, but at that time there was no equivalent provision. She said that was an anomaly which meant that she could not get her student visa back and caused the litigation and her immigration detention. She said that the Courts were unable to fix the problem caused by the anomaly, but had recognised it in their decisions.
2. Dr Ogawa said that she had applied for another student visa but it was not granted because of the outstanding Commonwealth debt. She submitted that her difficulties existed because of the Commonwealth debt, and the Commonwealth debt existed due to the anomaly in the Regulations and the failure of the MRT to make a decision quickly.
3. Dr Ogawa argued that while the delegate said that it was her decision to litigate, without the litigation she would have been detained and deported. She submitted that the Commonwealth Ombudsman made a recommendation to waive the debt and the AHRC had tried to reduce the debt.
4. Dr Ogawa said that the costs she was awarded by the Full Court should not have been set off against her debt to the Commonwealth. She said that by setting off the debt, the lawyers who acted for her had not been paid.
5. The Minister submitted that the delegate’s decision was open on the material before the delegate and was not legally unreasonable.
6. The delegate’s decision was made under the discretionary power conferred upon the Minister by s 63(1)(a) of the Public Governance Act. The sole ground of review relied upon is that the delegate’s decision was legally unreasonable.
7. In *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, Hayne, Kiefel and Bell JJ held at [63] that the legislature is taken to intend that a discretionary power, statutorily conferred, will be exercised reasonably.
8. In *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, Kiefel  CJ succinctly explained the ground of legal unreasonableness:

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

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

1. The delegate decided not to waive the debt because he considered, inter alia, that debts “established” by an order of a Court should not ordinarily be waived; that the debt resulted from Dr Ogawa’s choice to engage in litigation; that her detention and the associated litigation had resulted from her own conduct in failing to take steps to regularise her visa status; and that she had the capacity to obtain employment which would allow her to pay off the debt.
2. It is not enough for Dr Ogawa to merely assert that a different decision should have been made by arguing, as she has, that particular factors should have been interpreted differently, assessed differently, or weighted differently. Based on the material before the delegate, his findings and the ultimate decision were logical and rational. It has not been demonstrated that the delegate’s exercise of discretion lacked an evident and intelligible justification. Further, it has not been demonstrated that the decision was one which no reasonable person could have made.
3. The ground of legal unreasonableness cannot succeed. The amended originating application must be rejected.

## Joinder

1. Dr Ogawa filed an interlocutory application seeking joinder of the AAT to the proceeding. The basis of the joinder was said to be that the AAT had made a recommendation that the Minister not waive the debt referrable to the AAT.
2. The AAT opposed its joinder on the basis that it did not make any relevant decision. I accept that submission. While the AAT recommended that “the fee be recovered”, the decision not to waive the debt was made by the Minister’s delegate.
3. There has been no basis established under r 9.05 of the *Federal Court Rules 2011* (Cth) for joinder of the AAT.

## Costs

1. The Minister submits that he should be awarded his costs of the proceeding.
2. Where judicial review proceedings have been rendered futile, but the parties have acted reasonably, the usual order is that each party bear its own costs: see *Re Minister for Immigration and Ethnic Affairs; Ex Parte Lai Qin* (1997) 186 CLR 622 at 625; *ONE.TEL Ltd v Commissioner of Taxation* (2000) 101 FCR 548 at 552–554. In this case, there was unreasonable conduct by both parties. Dr Ogawa’s proceeding for orders compelling the Minister to make a decision was commenced prematurely on 29 October 2019. She did not provide the last of her material in support of her application for waiver until 31 August 2019. However, no decision had been made over four months later. The only substantial explanation offered for the delay in making the decision — that the Department of Home Affairs was dilatory in providing its comments about the application for waiver — is unsatisfactory. In the circumstances, there should be no order as to the costs of the original proceeding.
3. Any additional costs occasioned to the Minister as a result of Dr Ogawa being granted leave to amend her originating application and advancing her argument that the decision was unreasonable are insignificant. It is only a matter of an additional hour spent in Court and the reading of a couple of documents.
4. It is appropriate that each party bear its own costs of the proceeding.

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| I certify that the preceding forty-six (46) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rangiah. |

Associate:

Dated: 16 June 2020