Federal Court of Australia

AZO24 v Commonwealth [2024] FCA 218

|  |  |
| --- | --- |
| File number: | NSD 1036 of 2023 |
|  |  |
| Judgment of: | **KENNETT J** |
|  |  |
| Date of judgment: | 12 March 2024 |
|  |  |
| Catchwords: | **HIGH COURT AND FEDERAL COURT** – Application for disqualification of judge on basis of apprehended bias – where applicant alleges serious misconduct by all Australian Prime Ministers and federal Attorneys-General since 2017 – where judge’s appointment to Federal Court of Australia by Governor-General on recommendation of current federal government – reasonableness of apprehension of bias – application refused |
|  |  |
| Cases cited: | *AZC20 v Secretary, Department of Home Affairs* [2023] FCA 1252  *QYFM**v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor*[2023] HCA 15; 97 ALJR 419  *Re JRL; Ex parte CJL* (1986) 161 CLR 342  *SZQYM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 779; 169 ALD 579 |
|  |  |
| Division: |  |
|  |  |
| Registry: | New South Wales |
|  |  |
| National Practice Area: | Federal Crime and Related Proceedings |
|  |  |
| Number of paragraphs: | 14 |
|  |  |
| Date of hearing: | 7 March 2024 |
|  |  |
| Counsel for the Applicant: | The applicant appeared in person. |
|  |  |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | NSD 1036 of 2023 |
|  | | |
| BETWEEN: | AZO24  Applicant | |
| AND: | COMMONWEALTH OF AUSTRALIA  First Respondent  STATE OF NEW SOUTH WALES  Second Respondent | |

|  |  |
| --- | --- |
| order made by: | KENNETT J |
| DATE OF ORDER: | 12 MARCh 2024 |

THE COURT ORDERS THAT:

1. The application for disqualification is refused.

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

REASONS FOR JUDGMENT

KENNETT J:

1. The applicant seeks declarations that the respondents have acted illegally and in breach of her rights under various international instruments. She also seeks a range of other relief. These claims arise from what the applicant claims is a concerted program of surveillance and harassment of her, by the respondents and various corporate parties, since around 2017. For present purposes it is not necessary to go into the details of the allegations or express any opinion about the prospects of their being made out.
2. The respondents have not yet been served with the Originating Application or the Statement of Claim and have not filed notices of appearance. On 20 October 2023 the applicant was directed by a Registrar to serve these documents on the respondents at least five days before a case management hearing which was listed on 9 November 2023. That listing was subsequently vacated at the applicant’s request. The applicant has expressed reluctance to serve her originating documents on the respondents without first redacting her name and address from those documents.
3. The applicant has also raised a number of issues in email correspondence with the Registry. I formed the view that the best course was to list the matter for case management, even though the respondents are not on the record, in order to discuss whether and how the proceeding might move forward. The proceeding thus came before me for case management on 7 March 2024.
4. One of the matters raised by the applicant was an application for me to disqualify myself from hearing the proceeding. This was pressed orally at the case management hearing.
5. I refused the application. These are my reasons for doing so.
6. The application was advanced on the basis that I was appointed to the Court by the Governor-General acting on the advice of the current federal government, and in particular on the advice of the current Attorney-General. This, the applicant said, gave rise to an apprehension of bias. The same objection would apply to any other judge appointed to the Court since the current government took office. The same objection would also apply to any judge appointed since 2017, given the pleaded duration of the alleged conduct.
7. The apprehension of bias is said to arise, not because the Commonwealth is a party to the proceeding, but because the applicant makes allegations that each of the Prime Ministers and Attorneys-General who have held office since 2017 has been personally involved in decisions to take unlawful actions against her and has done so for improper purposes. Again, it is not necessary to go into the details. To understand the applicant’s point, it is sufficient to note that the judge who hears the case (if it goes to a final hearing) may have to decide whether to make findings of serious misconduct against persons who hold and have held office as Prime Minister and as Attorney-General. Her argument is that it is unsatisfactory for those matters to be decided by a judge who was appointed on the advice of any of those persons.
8. The test for an apprehension of bias requiring disqualification of a judicial officer is well established. In *AZC20 v Secretary, Department of Home Affairs* [2023] FCA 1252 at [10]-[11] I encapsulated it as follows.

A reasonable apprehension of bias requires that there be a possibility, real and not remote, that a fair-minded and appropriately informed lay observer might reasonably apprehend that the decision-maker might not bring a fair, impartial and independent mind to the determination of the matter on its merits. Recently in *QYFM**v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor*[2023] HCA 15; 97 ALJR 419 at [38] [***QYFM***], Kiefel CJ and Gageler J identified the inquiry as involving the following steps:

Application of the criterion was identified in *Ebner*, and has been reiterated, logically to entail: (1) identification of the factor which it is said might lead a judge to resolve the question other than on its legal and factual merits; (2) articulation of the logical connection between that factor and the apprehended deviation from deciding that question on its merits; and (3) assessment of the reasonableness of that apprehension from the perspective of a fair-minded lay observer.

It is important to note that “It is an open, and not an empty, mind that must be kept”: *SZQYM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 779; 169 ALD 579 at [102] (Allsop CJ). Thus, preliminary views—even fairly strong ones—about the merits of an issue do not found a reasonable apprehension of bias. To put it another way, an apprehension that the decision maker is likely to come to a certain conclusion is not an apprehension of bias in the relevant sense. What must be shown is a reasonable apprehension that the decision maker might not resolve the question on its merits.

1. Partly because the hypothetical observer is “fair minded”, and partly for institutional reasons, the outcome of the analysis should not be determined by faint or theoretical possibilities. It has been said that a judge should generally discharge their duty to sit and not yield too readily to suggestions of appearance of bias: *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 352 (Mason J). This consideration deserves attention in circumstances where, if the argument for disqualification is accepted, the pool of judges available to hear the case will be quite small. (In the present case, according to publicly available information, 36 out of the 54 judges of the Court were appointed in 2017 or later and would *prima facie* be disqualified if the applicant’s argument were accepted.)
2. In what follows I will adopt the analytical steps identified the in the quotation from *QYFM* set out above.
3. First, “the factor which it is said might lead a judge to resolve the question other than on its legal and factual merits” is that, in the case of any judge of this Court appointed since 2017, the judge was appointed to their judicial office on the advice of individual Ministers against whom serious allegations are made.
4. Secondly, as I understand it, “the logical connection between that factor and the apprehended deviation from deciding that question on its merits” is that the judge may be reticent about making findings of serious impropriety against a Minister or former Minister, when one of that Minister’s decisions was the decision to advise the Governor-General to appoint the judge.
5. Thirdly, as to the reasonableness of an apprehension that the judge might therefore decide the case otherwise than on its merits, the following points need to be noted.
6. The hypothetical observer is appropriately informed. They must therefore be taken to know that judicial appointments are not made by individual Ministers, but by the Governor-General with the advice of the Executive Council, usually (at least) following a decision by the Cabinet.
7. The hypothetical observer must also be taken to understand that judges of this Court have security of tenure up to the age of 70 years, subject only to removal on an address by both Houses of Parliament for proved misbehaviour or incapacity (Constitution, s 72(ii)), but cannot hold office after turning 70. Leaving aside specific personal issues (none of which were suggested here), a judge therefore has no incentive to try to protect the interests of Ministers involved in their appointment.
8. Further, appointment of a judge on the advice of a particular Minister does not create any ongoing connection between the judge and the Minister that might lead to awkwardness or discomfort in making findings against the Minister (in contrast to, for example, a friendship or familial relationship).
9. The judge may hold a private view that the decision to recommend their appointment demonstrated wisdom and perspicacity, and may therefore be slow to accept that the makers of that decision have been involved in misconduct. However, this possibility falls into the category of preliminary views on an issue rather than something pointing to a potential inability to decide the issue on its merits.
10. What is left is the possibility that, as a result of good will or gratitude towards those responsible for their appointment, the judge may find it hard to make serious findings against those persons. To the extent that this goes beyond a preliminary view, and suggests the possibility of an improper fetter on the judge’s capacity to decide the case on its merits, my view is that the hypothetical observer would not regard it as a realistic possibility. Of course, the case might take on a quite different appearance if the judge had some specific personal connection or affinity with the Minister concerned. However, it has not been suggested that that is the case here.
11. For these reasons I was not persuaded that a fair-minded and appropriately informed lay observer might reasonably apprehend that I might not bring a fair, impartial and independent mind to the determination of this matter on its merits. Accordingly I dismissed the disqualification application.

|  |
| --- |
| I certify that the preceding fourteen (14) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Kennett. |

Associate:

Dated: 12 March 2024