Ogawa v Finance Minister [2021] FCAFC 17

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| Appeal from: |  |
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| File number: |  |
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| Judgment of: | **LOGAN, KATZMANN AND JACKSON JJ** |
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| Date of judgment: | 24 February 2021 |
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| Catchwords: | **ADMINISTRATIVE LAW** – appeal from decision of Federal Court of Australia dismissing the appellant’s application for judicial review – where Minister did not waive debt of appellant – whether decision was legally unreasonable – where AHRC recommended compensation – appeal dismissed  **PRACTICE AND PROCEDURE** – where appellant granted leave at first instance to amend originating application to include additional grounds of review – where appellant did not include grounds in originating application – where appellant seeks to raise similar grounds in appeal – where appellant self-represented |
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| Legislation: | *Constitution* s 75  *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5  *Judiciary Act 1903* (Cth) s 39B  *Migration Act 1958* (Cth)  *Public Governance, Performance and Accountability Act 2013* (Cth) s 63 |
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| Cases cited: | *AAL19 v Minister for Home Affairs* [2020] FCAFC 114  *Attorney-General (NSW) v Quin* (1990) 170 CLR 1  *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424  *Coulton v Holcombe* (1986) 162 CLR 1  *Flightdeck Geelong Pty Ltd v All Options Pty Ltd* (2020) 147 ACSR 227  *Latoudis v Casey* (1990) 170 CLR 534  *Marbury v Madison* 5 US (1 Cranch) 137 (1803)  *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427  *Minister for Home Affairs v Ogawa* (2019) 269 FCR 536  *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541  *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332  *Ogawa v Carter* *(Delegate of Finance Minister)* [2021] FCAFC 16  *Ogawa v Finance Minister* [2020] FCA 829  *University of* *Wollongong v Metwally* *(No 2)* (1985) 59 ALJR 481 |
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| Division: | General Division |
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| Registry: | Queensland |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Number of paragraphs: | 26 |
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| Date of hearing: | 17 November 2020 |
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| Counsel for the Appellant: | The Appellant 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 208 of 2020 |
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| BETWEEN: | DR MEGUMI OGAWA  Appellant | |
| AND: | FINANCE MINISTER  Respondent | |

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| order made by: | LOGAN, KATZMANN AND JACKSON JJ |
| DATE OF ORDER: | 24 FEBRUARY 2021 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the respondent’s costs of and incidental to the appeal, to be fixed by a registrar if not agreed.

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

REASONS FOR JUDGMENT

THE COURT:

1. On 21 June 2019, Dr Megumi Ogawa (**Dr Ogawa**) applied to the respondent Minister for Finance (**Minister**) to exercise the power conferred on him by s 63(1)(a) of the *Public Governance, Performance and Accountability Act 2013* (Cth) (**PGPA Act**) to waive a debt in the total amount of $46,461.89 which she then owed to the Commonwealth. The debt had various components. In part, it comprised an outstanding filing fee in respect of a review proceeding in the Administrative Appeals Tribunal (**Tribunal**). Overwhelmingly however, it was comprised of the net amount which, on balance of account as between quantified costs orders adverse to or in favour of Dr Ogawa in relation to a plethora of civil litigation, was owed by Dr Ogawa to the Commonwealth. It is not necessary to detail that litigation. Neither is it necessary to detail litigation in the criminal jurisdiction to which Dr Ogawa was a party, to which some of that civil litigation related.
2. That application remained undecided by the Minister, his delegates or second delegates (as to the provision in the PGPA Act for sub-delegation, see *Ogawa v Carter* *(Delegate of Finance Minister)* [2021] FCAFC 16 (***Ogawa v Carter***)) until 2 March 2020. That was the day prior to the date appointed by this Court for the hearing in the original jurisdiction of an application by Dr Ogawa under s 39B(1) of the *Judiciary Act 1903* (Cth) and s 5(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) for an order requiring the Minister to make a decision in respect of her waiver application. That decision (non-waiver decision) was adverse to Dr Ogawa.
3. Over five years before the non-waiver decision was made, the then Commonwealth Attorney-General, Senator the Honourable George Brandis QC, had received a report from the then President of the Australian Human Rights Commission, Professor Gillian Triggs, pursuant to s 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth): [2014] AusHRC 69 (**AHRC Report**). That report was in respect of a complaint which Dr Ogawa had made about the nature of her detention between May and July 2006 pursuant to the *Migration Act 1958* (Cth). Professor Triggs’ finding and related recommendation in respect of the payment of compensation were as follows:

*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.

[ICCPR = International Covenant on Civil and Political Rights]

[VIDC = Villawood Immigration Detention Centre]

As Professor Triggs had highlighted in her covering letter to the Attorney-General of 27 February 2014, the Secretary of the Department of Immigration and Citizenship (**Secretary**) had not accepted that the detention was arbitrary or that compensation was payable. In the result, the Commonwealth did not pay the recommended compensation of $50,000 to Dr Ogawa.

1. The recommendation made in the AHRC Report was one of a number of features of Dr Ogawa’s dealings with various Commonwealth departments and agencies and of related civil litigation which she had highlighted in her application for waiver of the debt.
2. One sequel before the Court on 3 March 2020, to the non-waiver decision, might have been the dismissal of the judicial review application on the basis that the relief which it sought was no longer necessary, in short, that the proceeding had been overtaken by events. That is not what occurred. Instead, as the reasons of the learned primary judge reveal, at the hearing on 3 March 2020, Dr Ogawa sought and was granted leave to amend her originating application to challenge the non-waiver decision. The learned primary judge dismissed the application as amended but made no order as to costs: *Ogawa v Finance Minister* [2020] FCA 829. His Honour concluded that there should be no order as to costs because, in his view, both Dr Ogawa and the Minister had acted unreasonably in relation to the proceeding and the costs additionally occasioned by the amendment were minimal.
3. As noted by the learned primary judge, Dr Ogawa’s amended originating application asserted that the non-waiver decision was so unreasonable that no reasonable person could have exercised the power under s 63(1)(a) of the PGPA Act in that way. His Honour also recorded, at [26], that, “[a]lthough 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”. In addition, his Honour recorded, at [26], that “Dr Ogawa did not address those grounds in her submissions”. Accordingly, his Honour proceeded to determine the proceeding on the basis that they were no longer pursued.
4. The conclusion reached by the learned primary judge was that the jurisdictional error ground of unreasonableness was not made out. The correctness of this conclusion was challenged by Dr Ogawa in her grounds of appeal.
5. The grounds pleaded in Dr Ogawa’s notice of appeal go well beyond a challenge to the rejection by the learned primary judge of the unreasonableness case which she had advanced at trial. Instead, Dr Ogawa seeks to advance allegations of a denial of procedural fairness, and that the decision-maker failed to take into account relevant considerations and took into account irrelevant considerations. These are the very kind of allegations in respect of which, as already noted, Dr Ogawa was granted leave in the original jurisdiction to amend her originating application so as to advance them as grounds of review. This she never did. Now that she has invoked the appellate jurisdiction, Dr Ogawa requires a grant of leave to raise these additional grounds for the first time. To grant such leave would be most exceptional. In *University of* *Wollongong v Metwally* *(No 2)* (1985) 59 ALJR 481, at [7], Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ stated:

It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case has been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had and opportunity to do so.

See also *Coulton v Holcombe* (1986) 162 CLR 1, at 7, and *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424, at [37] and [38].

1. The only explanation advanced by Dr Ogawa for her failure in the original jurisdiction to take up the grant of leave to amend was that she was an unrepresented litigant. She also asserted that “failure, if any, of presenting legal argument does not rectify the jurisdictional error made by the delegate”.
2. In Dr Ogawa’s case, the honorific “Dr” is extended to her as a result of her having completed post-graduate studies in law at doctoral level. Of course high academic attainment in legal studies is not necessarily to be assimilated with ability in the practice of law. Nonetheless, Dr Ogawa’s high academic attainment means she is hardly a typical self-represented litigant. Even so, she was self-represented and that did carry with it certain obligations on the part of the learned primary judge. Authorities bearing on the nature and extent of those obligations were helpfully surveyed by the Full Court last year in *Flightdeck Geelong Pty Ltd v All Options Pty Ltd* (2020) 147 ACSR 227. The points made by the Full Court may be summarised as follows:
   1. at [54]:

The assistance provided to a litigant-in-person must … be limited to that which is necessary to diminish the disadvantage which he or she will ordinarily suffer, and the Court should be wary to avoid placing a litigant-in-person in a position of advantage or privilege over a represented opponent.

* 1. at [56]:

The duty of the Court does not extend to providing judicial advice, counselling a litigant on how to exercise their rights, or conducting the case on their behalf.

* 1. at [57]:

[T]he extent of the Court’s obligation to assist an unrepresented litigant is factually idiosyncratic and, significantly, depends upon ‘the litigant, the nature of the case, and the litigant’s intelligence and understanding of the case’.

The overarching obligation is that the judicial officer must remain an impartial adjudicator. Further, the nature of our system of justice is adversarial, not inquisitorial.

1. In our respectful view, the learned primary judge did all that might reasonably be expected of a judicial officer by granting Dr Ogawa leave to pursue additional grounds of review by amendment if she chose. As she had exercised a forensic choice not to pursue those grounds, his Honour was neither obliged nor entitled to revisit the wisdom of that choice and to explore for himself whether or not there may be other jurisdictional errors. Subject to one exception arising from the explicit taking into account by the Assistant Secretary of the Department of Finance (**Assistant Secretary**) of departmental guidelines termed “RMG 401”, discussed below, the making of that forensic choice by a litigant well read in law also tells against any grant of leave to pursue these same grounds on appeal. So, too, does the fact that the primary judge had refused the Minister’s requests for an adjournment or the opportunity to put on further evidence.
2. In addition, Dr Ogawa raised in her notice of appeal an allegation that the learned primary judge ought to have disqualified himself, because there existed a reasonable apprehension of bias. That was said to be found in his Honour’s participation in the joint majority judgment in *Minister for Home Affairs v Ogawa* (2019) 269 FCR 536 and in observations made, at [137], as to what might be the fate of any Attorney-General’s reference to the Queensland Court of Appeal in relation to convictions earlier recorded against Dr Ogawa. We did not understand Dr Ogawa to press this allegation in oral submissions on the hearing of the appeal. It had not been raised before the learned primary judge, when, consistently with the general rule, it ought to have been if the objection were not to be regarded as having been waived: *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 (***Michael Wilson***), at [76]. Further, and in any event, there is nothing in his Honour’s participation in the joint majority judgment in that case in the Full Court remotely capable of giving rise to a reasonable apprehension that his Honour might not have brought an impartial and unbiased mind to the resolution of the issues raised in the original jurisdiction in the present proceeding. That is the relevant test: *Michael Wilson*, at [31], and the authorities cited at fn 27.
3. As a result, and subject to a further (and possibly different) point we address below, the basis on which Dr Ogawa may advance her appeal in this court is to argue that the primary judge ought to have found that the non-waiver decision was legally unreasonable. The case for waiver which Dr Ogawa made to the Minister, ultimately considered and determined by an Assistant Secretary, presumably as the Minister’s delegate or second delegate, was comprehensively and fairly summarised by the learned primary judge in his judgment, at [7] – [24] under the heading, “The decision”. We adopt but do not repeat that summary. The elements of that case featured in Dr Ogawa’s submissions to the learned primary judge in relation to why the non-waiver decision was said to be unreasonable, as they did before us on the hearing of the appeal to the end of demonstrating error on his Honour’s part.
4. Our duty, in the exercise of appellate jurisdiction in an appeal by way of rehearing is to reach our own conclusion as to whether the jurisdictional error ground of unreasonableness is made out: *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 (***SZVFW***). Although there were evaluative qualities to the conclusion reached by the learned primary judge, we are not, as to this jurisdictional error ground, reviewing the exercise of a discretion by his Honour. The non-waiver decision was either unreasonable or it was not.
5. In *Ogawa v Carter*, at [46] – [48], and with particular reference to *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 and *SZVFW*, we advert to certain key features of the jurisdictional error ground of unreasonableness. We adopt but do not repeat what is there stated.
6. It is by no means impossible, surveying as a whole the case for waiver advanced to the Minister, how, reasonably, a different, perhaps more sympathetic, decision might have been made. That, however, is not to the point in the present proceeding. Under the PGPA Act, the making of evaluative decisions on the factual merits of waiver applications is consigned to the Minister and his delegates, not to the judiciary. Within the limits of their several jurisdictions, and s 75(v) of the *Constitution* creates an irreducible minimum in relation to the High Court of Australia, courts exercising federal jurisdiction are concerned in judicial review only with the legality of decisions made by ministers and officers of their departments, not with the factual merits of those decisions, and then only if that jurisdiction is invoked. As the Full Court observed in *AAL19 v Minister for Home Affairs* [2020] FCAFC 114, at [49], “[t]he injustice rectified by judicial review of an administrative action or inaction is material illegality of commission or omission, not a disagreement with the merits of an administrator’s factual evaluation.” Necessarily, that requires the adoption of a principled restraint in the exercise of judicial power in cases such as the present, lest the proper role of a reviewing court, as described by Sir Gerard Brennan in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, at 35, with particular reference to *Marbury v Madison* 5 US (1 Cranch) 137 (1803), at 177, be exceeded. Such is the nature of the separation of powers for which the Constitution provides.
7. These features of the *Constitution* and of the exercise of judicial power thereunder may seem trite but they are basal. We have highlighted them because, of all of the jurisdictional error grounds, none is more fraught with the possibility of impermissible transgression by the judicial branch into the constitutional remit of the executive branch than unreasonableness. Equally, once the content of that jurisdictional error ground is understood, a judicial conclusion that it is not made out carries with it no element of agreement with the merits of an administrator’s decision, only recognition after evaluation thereof that the process by which it was reached was reasonable and that the conclusion reached was one reasonably open on the material before the administrator.
8. The only considerations made expressly relevant by s 63(1)(a) of the PGPA Act in relation to the waiver of an amount owing to the Commonwealth are the existence of such an amount and any requirements prescribed by the rules made under s 101 of that Act (none were applicable). In addition, a delegate exercising power under s 63(1)(a) of the PGPA Act would be obliged by s 107(4) of that Act to comply with any written direction given by the Minister in relation to the exercise of that power. Any such direction would therefore also be a relevant consideration. For like reasons, a second delegate exercising that power would be obliged by s 110(6) of the PGPA Act to comply with corresponding requirements and any other directions given by the accountable authority who has sub-delegated that power. These corresponding requirements and any other directions would also be relevant considerations for a second delegate.
9. Beyond these considerations, what a delegate or second delegate might permissibly take into account is limited only by the subject matter, scope and purpose of the PGPA Act and the waiver power. The effect of this was that it was permissible for each of the considerations forcefully advanced by Dr Ogawa as a reason for waiver to be taken into account. Regard to the reasons given by the Assistant Secretary for the non-waiver decision, as the summary offered by the learned primary judge reveals, discloses that each of these considerations was taken into account. Contrary to Dr Ogawa’s submission both in the original jurisdiction and on appeal, neither taken individually nor collectively did those considerations dictate that the only reasonable conclusion was to waive the debt which she owed to the Commonwealth.
10. The Assistant Secretary adverted to guidelines termed “RMG 401” in making the non-waiver decision. The learned primary judge recorded, at [11], this in his summary of the reasons for the non-waiver decision but, reflecting the way in which Dr Ogawa put her case before him, did not further refer to those guidelines. In developing her submission on the appeal that the non-waiver decision was unreasonable, Dr Ogawa put forward that the inevitable result of taking into account these guidelines was the making of an illogical or irrational decision.
11. The precise status of “RMG 401” was not, on the evidence before the learned primary judge and as his Honour, at [11], found, explained. In particular, it was not established whether or not they were Ministerial directions given under s 107, corresponding requirements or other directions given by an accountable authority under s 110, or just guidelines formulated for the purpose of consistency in public administration decision-making. Given that they were taken into account by the Assistant Secretary in any event, this imprecision as to their status is of no present moment. Further, even though the unreasonableness argument was not developed by reference to them below, the point was fully argued on appeal and its consideration entails no prejudice to the Minister. In these circumstances, we consider that the interests of justice are best served by addressing the impact of adverting to these guidelines in the context of our consideration of the alleged jurisdictional error of “unreasonableness”, understood in relation to this further point to refer to illogicality or irrationality.
12. In the letter conveying the non-waiver decision and the reasons for that decision, the Assistant Secretary cited “RMG 401”, at [36]:

There are some circumstances where the standard considerations listed above would not be relevant, and the debt would be unlikely to be waived. These include:

* debts that have been *established* by a judicial decision of a court, which are separate from the decisions of the executive arm of the Commonwealth

[emphasis added]

1. Contrary to Dr Ogawa’s submission, this excerpt from RMG 401 does not carry with it any notion that a debt resulting from litigation responsive to a decision which the “executive branch causes, originates, registers or by whatever means [makes]” is “established” by the executive. It is tolerably clear that all that the guideline counsels in its reference to “established” is that a debt the liability for which has been vindicated by judicial determination is qualitatively different from one which has not been so determined and which, for that reason, may be controversial. A costs order is made in the exercise of a judicial discretion. The precise amount of the liability so created is delineated by agreement between the parties to the litigation or by the taxing or fixing of costs by a registrar. Scope exists for the review by a judge of a registrar’s decision. It is no stretch of language to regard debts so created and quantified as “established” by a decision of a court. That is so even where the court decision is made in a proceeding concerning an administrative act or omission. To put to those making a decision under s 63(1)(a) of the PGPA Act that such a debt liability is qualitatively different from a debt liability the existence of which has not been judicially determined is not conducive to illogical or irrational administrative decision making, rather the reverse. Further, as the Minister submitted, this guideline is not prescriptive. It does not direct that there can be no waiver of a debt so “established”. If it did so, a very real question would be raised not as to logicality or irrationality but rather whether the discretion to waive had impermissibly been fettered.
2. That part of the balance of account as between Dr Ogawa and the Commonwealth represented by an unpaid filing fee was referable to a decision by Dr Ogawa to exercise a right to make an application to the Tribunal. There was a fee payable to the Commonwealth entailed for the exercising of that right. The remaining part of the indebtedness was the result of litigation unsuccessfully pursued by Dr Ogawa where, unremarkably, a judicial discretion had been exercised to make an order that costs follow that event. The purpose of the costs orders concerned was compensatory, not punitive: *Latoudis v Casey* (1990) 170 CLR 534, at 543, per Mason CJ; at 566 – 567, per McHugh J. In this case and to the extent costs came to be taxed or fixed in amount, those orders indemnified the Commonwealth in respect of the public monies expended in successfully resisting particular claims made by Dr Ogawa.
3. The reasons given by the Assistant Secretary for the non-waiver decision are not irrational nor illogical. Put simply, it was uncontroversial that, on balance of account, Dr Ogawa owed the Commonwealth money. The recommendation made in the AHRC Report did not change that position. The reasons disclose that the Assistant Secretary took in to account that recommendation and made a permissible value judgment that the debt on balance of account should not be waived. Unreasonableness is not to be found in disagreement with that value judgment. In the result therefore, the conclusion we reach is the same as that of the learned primary judge.
4. The appeal should be dismissed, with costs.

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| I certify that the preceding twenty-six (26) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Logan, Katzmann and Jackson. |

Associate:

Dated: 24 February 2021