HIGH COURT OF AUSTRALIA

HAYNE J

PLAINTIFF M13/2011 PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND CITIZENSHIP DEFENDANT

Plaintiff M13/2011 v Minister for Immigration and Citizenship
[2011] HCA 23
23 June 2011
M13/2011

ORDER

1. *The times fixed by s 486A(1) of the* Migration Act *1958 (Cth) and by r 25.06.1 of the High Court Rules 2004 as times within which the plaintiff may apply for the relief sought in her application for an order to show cause filed on 9 February 2011 (as subsequently amended by leave granted on 16 June 2011) are extended to 10 February 2011.*

2. *A writ of certiorari issue to remove into this Court, for the purpose of its being quashed, the decision made by a delegate of the defendant and dated 14 July 2009 to refuse to grant the plaintiff a Protection (Class XA) visa.*

3. *The defendant pay the plaintiff's costs.*

Representation

N P Karapanagiotidis for the plaintiff (instructed by Asylum Seeker Resource Centre)

C J Horan for the defendant (instructed by DLA Piper Australia)

CATCHWORDS

Plaintiff M13/2011 v Minister for Immigration and Citizenship

Immigration – Refugees – Well-founded fear of persecution – Relocation – Plaintiff applied for and delegate of defendant refused to grant Protection (Class XA) visa – Delegate found plaintiff's fear not well-founded due to possibility of relocation within country of residence – Delegate made no finding of where plaintiff had been resident or to where plaintiff could relocate – Delegate did not consider whether relocation was reasonable or practicable for plaintiff – Whether delegate required to consider particular circumstances of plaintiff and impact upon plaintiff of relocation.

Practice and procedure – High Court of Australia – Original jurisdiction – Extension of time for commencing proceeding – Plaintiff sought writ of certiorari to quash decision of delegate of defendant – Proceeding commenced outside period prescribed by s 486A(1) of *Migration Act* 1958 (Cth) and r 25.06.1 of High Court Rules 2004 – Section 486A(2) of Act allowed extension of time where "necessary in the interests of the administration of justice" – Whether time for commencing proceeding should be extended.

Words and phrases – "jurisdictional error", "necessary in the interests of the administration of justice", "particular circumstances", "relocation".

Migration Act 1958 (Cth), ss 48B, 486A(1), (2).
High Court Rules 2004, r 25.06.1.

1 HAYNE J. In February 2011, the plaintiff began a proceeding in the original jurisdiction of this Court claiming among other relief certiorari to quash the decision of a delegate of the defendant Minister, made in July 2009, to refuse to grant the plaintiff a Protection (Class XA) visa. For reasons that will be explained later, the plaintiff did not apply within the time fixed by the *Migration Act* 1958 (Cth) ("the Act") for a review of that decision by the Refugee Review Tribunal.

Extension of time

2 The proceeding in this Court was instituted well outside the period of 35 days fixed by s 486A(1) of the Act and well outside the period of six months fixed by r 25.06.1 of the High Court Rules 2004 as the time within which application for certiorari should be made. The Minister submitted that it is not shown to be "necessary in the interests of the administration of justice"[1] to make an order extending the period fixed by s 486A(1) of the Act. The Minister pointed out that the application to this Court was made approximately 18 months after the date of the relevant decision (14 July 2009) and that, although the plaintiff was pursuing other avenues of redress for some of the intervening period, the last of those steps was completed on 15 November 2010, over 12 weeks before the application was filed. Having regard to the length of the delay, and what the Minister submitted to be the absence of any arguable case for the grant of the relief which the plaintiff sought, the Minister submitted there should be no extension of time.

3 It is necessary to describe the course of events more fully than by the bare recitation of dates. On 18 May 2009, a little over a month after the plaintiff had arrived in Australia (on a visa that permitted her to remain in this country until 9 July 2009), she applied for a protection visa. She prepared the application herself, with the assistance of a friend, but without any legal advice. At the time she lodged her application for a protection visa, the plaintiff was living in Myrtleford. A few weeks later, on 10 June 2009, she moved to Melbourne. Not only was she having difficulty paying her rent, she was being harassed at her residence in Myrtleford.

4 On 14 July 2009, a delegate of the Minister decided to refuse the plaintiff's application for a protection visa and a letter notifying the plaintiff of the decision was sent to her address in Myrtleford. That letter did not come to the attention of the plaintiff and it was not returned to the Department until 19 August 2009.

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1 *Migration Act* 1958 (Cth), s 486A(2).

5 In the meantime, the plaintiff had attempted suicide. On 24 July 2009, she was admitted as an inpatient to the psychiatric unit at the Alfred Hospital and remained in hospital for a week. She was later diagnosed as suffering from a severe depressive illness and post-traumatic stress disorder.

6 The plaintiff first learned that her application for a protection visa had been refused when, in August 2009, the Department telephoned her and told her that she would have to leave Australia. She at once sought legal representation at the Asylum Seeker Resource Centre, a not-for-profit community legal centre. She was obviously distressed and still receiving psychiatric treatment. The time for her to seek review by the Refugee Review Tribunal of the refusal to grant her a protection visa had expired.

7 These matters having been drawn to the attention of the Department, the Department "renotified" the plaintiff, in September 2009, of the refusal of her application for a protection visa. This step was taken in the belief that if the Department "renotified" the plaintiff of the decision she would be able to seek review of the decision by the Tribunal. The plaintiff lodged an application for review but on 18 November 2009 the Tribunal decided that the application for review was made out of time and that the Tribunal therefore had no jurisdiction to consider the application. In December 2009, the plaintiff filed a proceeding in the Federal Magistrates Court seeking relief in respect of the Tribunal's refusal to deal with her application. The plaintiff sought and, on 10 September 2010, obtained leave to discontinue her proceeding in the Federal Magistrates Court. It was said that she did this having regard to the decision of the Federal Court of Australia in *SZOFE v Minister for Immigration and Citizenship*[2].

8 On 6 October 2010, the plaintiff asked the Minister to determine (under s 48B of the Act) that s 48A of the Act did not apply to prevent her making a further application for a protection visa. That application was refused on 15 November 2010. As has already been pointed out, the plaintiff did not commence her proceeding in this Court until 9 February 2011.

9 In a statutory declaration which the plaintiff made for the purposes of the Minister considering her request under s 48B she spoke of her activities in Australia, and her engagement with the community, in a way that suggested that her psychiatric difficulties had by then diminished considerably. If this were right, and there was nothing to suggest to the contrary, it would follow that her psychiatric condition provided no sufficient explanation for more than 12 weeks elapsing between rejection of her request under s 48B and her institution of proceedings in this Court. The plaintiff pointed, however, to other reasons for her taking time to institute proceedings in this Court. In particular, she relied on

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2 (2010) 185 FCR 129.

the evidence of her solicitor, an employee of the Asylum Seeker Resource Centre, who explained that the plaintiff had been unable to pay the reduced fee of $691 payable on filing in this Court an application for an order to show cause. (The plaintiff was said to be "without income and reliant on charities".) The Asylum Seeker Resource Centre made various inquiries about having the fee waived or further reduced but, in the end, paid the fee on the plaintiff's behalf.

10 If allowing 12 weeks to elapse was, as the Minister submitted, to be treated as an unwarranted delay in the plaintiff's instituting proceedings, that characterisation would not of itself determine whether it is in the interests of the administration of justice that she should now be permitted to prosecute the claim she seeks to make in this Court. Consideration must be given to the merits of the case which she would seek to mount here.

Merits

11 In order to assess the merits of the plaintiff's case, it is necessary to say more about the claims that she made in her application for a protection visa. It is convenient to do that largely by reference to the findings that the Minister's delegate made. It will then be necessary to consider the delegate's reasons for decision.

12 The plaintiff was born in December 1955 in Malaysia. She claims to be of Tamil ethnicity and a Hindu. The delegate described the plaintiff's claims as being that "she has been persecuted due to her religion, Hinduism, and claims to fear harm from her ex-partner and estranged son and daughter-in-law. She claims that the police will not protect her because she cannot afford to bribe them and because she is a Hindu."

13 When about 19 years of age, the plaintiff met and formed a relationship with a Muslim man. She became pregnant to him and was "thrown out of home because the Hindu community would not accept a woman who became pregnant before she was married".

14 The father of her child already had a wife and two children. He became seriously violent and abusive towards the plaintiff. He spread malicious rumours about her.

15 The plaintiff raised her son on her own, neglected, if not ostracised, by both the Muslim and Hindu communities. By the time the son was 18 years of age, the father had turned the son against his mother to the point that he too began to abuse her. The father arranged the son's marriage to a Muslim girl. The young couple attempted to poison the plaintiff. She was admitted to hospital. Her complaint to police was not investigated. According to the plaintiff this was because she was Hindu and had no money to bribe the police. She fears further serious harm if she returns to Malaysia.

16 The delegate accepted that the plaintiff's religion was the "primary reason" for the harm that she feared. In addition, the delegate said that he believed "factors relating to membership of a particular social group, that is, those who enter into culturally inappropriate relationships and those that have children outside of marriage, may be relevant to the harm feared" by the plaintiff. Accordingly, the delegate found that "religion and membership of a particular social group are the essential and significant reasons for the harm feared" by the plaintiff. The delegate was "prepared to accept that the harm feared may involve serious harm and systematic and discriminatory conduct as outlined in subdivision AL [of Div 3 of Pt 2] of the *Migration Act*" and that the harm feared amounted to persecution for the purposes of those provisions.

17 Having considered some country information and a relevant decision of the Federal Court of Australia[3], the delegate said that he was "prepared to … accept that the [plaintiff] has been persecuted by elements within her local community and there is a real chance of persecution occurring should [she] return to Malaysia, based on her religion". He went on to say, however, that he also found "that this fear is likely to be greatly reduced should she relocate", a subject with which he dealt further in his reasons for decision.

18 In the course of considering whether the plaintiff belonged, or was perceived to belong, to a particular social group the delegate said that "[w]hile the [plaintiff] has not declared where she was residing before departing Malaysia, I can find no reason as to why she would not be able to relocate within Malaysia in order [to] seek greater anonymity, distance from her aggressors, and adequate protection". And under the heading "Relocation within Malaysia" the delegate concluded that:

> "There is no country information or evidence available to me indicating that the [plaintiff] will encounter the same problems she previously experienced if she was to relocate elsewhere within Malaysia. The [plaintiff] is a 53 year old female. I can find no reason as to why she would not be able to relocate within Malaysia in order [to] seek greater anonymity, distance from her aggressors, and adequate protection."

19 Two points may be made at once about the delegate's statement of reasons. First, the delegate expressly stated that he did not know where the plaintiff had been living before she left Malaysia. The question of "relocation" was treated as a possibility to be determined without regard to where the plaintiff had previously been living. And a place *to* which the plaintiff could relocate was

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3 *Prashar v Minister for Immigration and Multicultural Affairs* [2001] FCA 57.

not identified in the delegate's reasons, beyond the delegate saying that such a place would need to be "in a larger community, such as Kuala Lumpur".

20 The second point to notice about these aspects of the delegate's reasons is that, whether for want of sufficient basic information about the circumstances in which the plaintiff had been living in Malaysia or for other reasons, the delegate did not refer at all to whether or how it would be reasonable or practicable for the plaintiff to live in "greater anonymity" or move to a place more distant from "her aggressors", whether by living in a large city like Kuala Lumpur or by some other means.

21 Consideration may be given to the possibility of a claimant for protection relocating in the country of origin if relocation is a reasonable (in the sense of practicable) response to the fear of persecution[4]. As three members of this Court pointed out in *SZATV v Minister for Immigration and Citizenship*[5], "[w]hat is 'reasonable', in the sense of 'practicable', must depend upon the particular circumstances of the applicant for refugee status and the impact upon that person of relocation of the place of residence within the country of nationality".

22 When the delegate's reasons are read as a whole, it is evident that the particular circumstances of the plaintiff were not considered by the delegate in forming the opinion that she could relocate to avoid the risk of persecution. So much follows from the delegate not knowing from where the plaintiff would have to relocate. The particular circumstances of the plaintiff not having been considered, the delegate did not correctly identify a question that had to be answered in determining whether there was a real risk of the plaintiff suffering persecution on account of her religious beliefs if she were to return to Malaysia. By not correctly identifying the relevant question, the delegate made a jurisdictional error.

23 The Minister submitted that, even if the delegate erred in considering the question of relocation, the decision to refuse a protection visa should not be quashed because the delegate gave an alternative and sufficient reason for refusing to grant the plaintiff that visa. In particular, the Minister submitted, the delegate had concluded that there was "no impediment to the [plaintiff] accessing adequate state protection in Malaysia should she choose to do so".

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4 *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437.

5 (2007) 233 CLR 18 at 27 [24] per Gummow, Hayne and Crennan JJ; [2007] HCA 40. See also at 48-49 [100]-[102] per Kirby J, 49 [105] per Callinan J.

24 The delegate identified the plaintiff's claim in this regard as being that she could not "seek state protection because of her religion and inability to pay a bribe to engage their [scil police] protection, or effectively, due to her status" as a woman who had had a culturally inappropriate relationship and a child outside marriage. The delegate accepted the plaintiff's claim that elements of the police force in Malaysia are corrupt but said that he had "found no evidence to suggest the police would unanimously withhold their protection". There was, so the delegate continued, "no evidence available to me that indicates that corruption within the Royal Malaysian Police is solely or more frequently encountered by particular groups". Yet he accepted that the plaintiff's "reluctance" to approach police for protection "may be based on a credible perception of mistrust".

25 Noting that country information suggested that violence against women remained a problem in Malaysia, the delegate referred to other steps that had been taken to deal with domestic violence including the establishment of "centralised hospital-based care centres referred to as One-Stop Crisis Centres". The delegate said that there was "no evidence to suggest that these centres are open to corruption or have bias against particular persons or groups" and that "[i]n the absence of evidence to the contrary" it was "reasonable to assume that people accessing such services are by their very nature the vulnerable, disadvantaged, and from varying ethnic and religious backgrounds".

26 Against this background, the delegate concluded this portion of his reasons by saying:

> "It is not sufficient for an applicant's claims to merely reflect a lack of resourcing or maladministration of a state service. While no state can guarantee the protection of all citizens and residents from all forms of harm at all times, country information shows the Malaysian government provides a widespread protection service for women subject to abuse and violence. I find that there is no impediment to the [plaintiff] accessing adequate state protection in Malaysia should she choose to do so."

27 This finding of the delegate must be read in the context of the whole record of his decision. In particular, the significance that is to be attached to the delegate's conclusion about the availability of adequate state protection must, in this case, be judged having regard to what the delegate had said on the subject of relocation. Relocation was treated by the delegate as directly connected with the availability of "adequate protection" for the plaintiff. Twice in his reasons the delegate had said that he could "find no reason as to why she would not be able to relocate within Malaysia in order [to] seek greater anonymity, distance from her aggressors, *and adequate protection*" (emphasis added).

28 Accordingly, contrary to the Minister's submissions, the delegate's reasons are not to be read as providing two separate and distinct reasons for concluding that the plaintiff was not entitled to the protection visa which she sought. The

availability of "adequate protection" for the plaintiff against persecution for a Convention reason was treated, by the delegate, as directly related to her relocating within Malaysia.

29 The plaintiff having established that the delegate made the jurisdictional error that has been identified, it is not necessary to consider any of the other ways in which she alleged that the delegate fell into jurisdictional error.

Conclusion and orders

30 In the circumstances it is in the interests of the administration of justice that the plaintiff should have the extensions of time necessary to institute proceedings in this Court seeking the relief which she does. The Minister's delegate having made the jurisdictional error which has been identified, the plaintiff is entitled to certiorari to quash the delegate's decision. Although she would be entitled to mandamus requiring the Minister to determine her application for a Protection (Class XA) visa, the Minister accepted that it was not necessary to grant that relief and that her application for a protection visa would be reconsidered. The Minister must pay the plaintiff's costs.

31 There will be orders that:

1. The times fixed by s 486A(1) of the *Migration Act* 1958 (Cth) and by r 25.06.1 of the High Court Rules 2004 as times within which the plaintiff may apply for the relief sought in her application for an order to show cause filed on 9 February 2011 (as subsequently amended by leave granted on 16 June 2011) are extended to 10 February 2011.

2. A writ of certiorari issue to remove into this Court, for the purpose of its being quashed, the decision made by a delegate of the defendant and dated 14 July 2009 to refuse to grant the plaintiff a Protection (Class XA) visa.

3. The defendant pay the plaintiff's costs.