Ogawa v Carter (Delegate of Finance Minister) [2021] FCAFC 16

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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 entered into payment plan with appellant – whether decision-maker had authority to make the decision – where delegation made under the *Public Governance, Performance and Accountability Act 2013* (Cth) – whether decision-maker failed to take into account a relevant consideration – whether decision was legally unreasonable – where matter is subject to inexcusable delay – appeal dismissed  **PRACTICE AND PROCEDURE** – onus of proof – where appellant to prove occurrence of alleged jurisdictional error – where appellant could have delivered notice to admit under r 22.01 of *Federal Court Rules 2011* (Cth) – where appellant did not discharge onus of proof |
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| Legislation: | *Constitution* s 75  *Evidence Act 1995* (Cth) s 140  *Judiciary Act 1903* (Cth) s 39B  *Migration Act 1958* (Cth)  *Public Governance, Performance and Accountability Act 2013* (Cth) ss 63, 107, 110  *Federal Court Rules 2011* (Cth) r 22.01  *Migration Regulations 1994* (Cth) reg 1.09A |
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| Cases cited: | *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223  *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091  *Leung v Minister for Immigration and Multicultural Affairs* (1997) 79 FCR 400  *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24  *Minister for Home Affairs v DUA16* (2020) 95 ALJR 54  *Minister for Immigration and Border Protection v* *SZVFW* (2018) 264 CLR 541  *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332  *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594  *Minister for Immigration and Citizenship v SZIQB* [2008] FCAFC 20  *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597  *Plaintiff M64/2015 v Minister for Immigration and Border Protection (*2015) 258 CLR 173  *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355  *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 |
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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: | 60 |
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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 Respondents: | Ms B O’Brien |
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| Solicitor for the Respondents: | Australian Government Solicitor |

ORDERS

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|  | | QUD 189 of 2020 |
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| BETWEEN: | DR MEGUMI OGAWA  Appellant | |
| AND: | SANDRA CARTER OF THE DEPARTMENT OF HOME AFFAIRS AS THE SECOND DELEGATE OF THE FINANCE MINISTER  First Respondent  FINANCE MINISTER  Second 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 26 November 2016, Dr Megumi Ogawa notified an officer of the then Department of Immigration and Border Protection (**Department**) that she wished to apply to repay by instalments monies then owed by her to the Commonwealth of Australia (**Commonwealth**). Dr Ogawa’s indebtedness to the Commonwealth was a sequel to the quantification of amounts she owed pursuant to costs orders made against her in various proceedings instituted by her against the Commonwealth or its officers. At that time, her total indebtedness to the Commonwealth was $85,959.79 (**the debt**).
2. Dr Ogawa had at the time a very particular interest not only in entering into an arrangement with the Commonwealth for the repayment of the debt, but also in not questioning the validity of a decision on behalf of the Commonwealth to approve and enter into such an arrangement. She was then an applicant under the *Migration Act 1958* (Cth) for a Partner (Temporary) (Class UK) visa and a Partner (Residence) (Class BS) visa. The grant of these visas was subject to Public Interest Criterion 4004 in Sch 4 of the *Migration Regulations 1994* (Cth) (**Migration** **Regulations**), which required that:

The applicant does not have outstanding debts to the Commonwealth unless the Minister is satisfied that appropriate arrangements have been made for payment.

In terms of this visa criterion, approval of her application to repay the debt by instalments would have meant that there was a basis for Ministerial satisfaction that “appropriate arrangements” had been made for payment.

1. Initially, on 2 September 2016, Dr Ogawa submitted a “Statement of financial details” (in departmental form 1355) to the Department’s Debt Management Unit in conjunction with an application by her for deferral of the repayment of the debt. Her notification on 26 November 2016 modified that application so as to apply to repay the debt by instalments.
2. On 29 November 2016, in response to Dr Ogawa’s notification, the first respondent, Ms Sandra Carter, the officer in charge of that unit within the Department, at least purporting to act under s 63(1)(b) of the *Public Governance, Performance and Accountability Act 2013* (Cth) (**PGPA Act**), and at least purportedly pursuant to authority delegated to her by the Secretary to the Department in his capacity as a delegate of the second respondent, the Minister for Finance (**Minister**), approved a “repayment plan” (**repayment plan**). The repayment plan permitted Dr Ogawa to repay the debt by instalments. In essence, the repayment plan provided for an immediate payment of $2,000 and thereafter monthly instalments of $2,000 until the last, which was the residual amount necessary to repay the debt in full.
3. Ms Carter recorded her reasons for making this decision in a **file note** in the following terms:

1. Age of the debts – Debts date back to 2005 and up until November 2016 client had not demonstrated an attempt to repay these debts during this time. Client has previous completed the SFD but has always requested deferrals, even when employed.

2. Size of the debts - Debts total $85,959.79. Standard process is for instalments plans to not extend past 3 years, from when the debt occurred. Most of the debts are already more than 3 years overdue.

3. How the debts occurred - Debts related to the Refugee Review Tribunal and court imposed fees for unsuccessful cases. It was the client's decision to lodge applications with RRT and the courts and client should have considered how they were going to pay these costs if unsuccessful. Client works within the law sector so would have a good understanding of how court action and costs occur.

4. Likelihood of employment - client currently holds work rights, is well educated and has good communication skills. Chances of client obtaining work are high.

5. Financial status - Although the client has a low income, she was unable to demonstrate financial difficulty. Client is currently applying for a spouse visa, but she would not provide financial details for her spouse. As client is specifically applying for a spouse visa, this is particularly relevant.

1. Also on 29 November 2016, and related to Ms Carter’s decision, a letter was sent by the Department to Dr Ogawa which stated:

You have offered to enter into an arrangement to make repayments of your debt by an upfront payment of AUD $2,000.00, followed by monthly instalments of AUD $2,000.00.

This offer has been accepted providing you comply with the conditions in the attached undertaking [entitled “Instalment Undertaking”]. Please sign and return the undertaking with your first payment.

1. On 29 November 2016 Dr Ogawa signed and returned the **undertaking** (it was wrongly dated 29 November 2017).
2. Dr Ogawa made the required immediate payment of $2,000 (via an authorised debiting of her credit card) and a monthly instalment of that same amount at the end of December 2016. Thereafter, she defaulted in the making of the required monthly instalments. She did make three later payments of $100 but has made no payments at all since March 2017.
3. On 17 January 2017, Dr Ogawa asked Ms Carter to reassess the amount of her monthly repayments. Ms Carter declined to do so. On 24 January 2017, Dr Ogawa requested written reasons for this decision. On 26 January 2017, Ms Carter set out her reasons in substantially similar terms as those set out in the file note.
4. As long afterwards as 2 July 2019, Dr Ogawa filed an application in the Court’s original jurisdiction under s 39B of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) by which she sought the issue of a writ of certiorari quashing Ms Carter’s decision, a writ of prohibition prohibiting the Minister from acting upon that decision and a writ of mandamus requiring the Minister to repay to her amounts which she had paid pursuant to the repayment plan.
5. The apparent reason, so the learned primary judge found, for the then initiation of the judicial review application was that, on 21 June 2019, Ms Carter had told Dr Ogawa in a telephone conversation that she could apply for another repayment plan, but that, generally, multiple repayment plans would not be entered into if a previous repayment plan had been breached. As at that time, Dr Ogawa’s visa application was undecided. That was because, as Dr Ogawa had been advised, the Department was awaiting the determination of litigation challenging an unsuccessful petition which she had made to the Commonwealth Attorney-General by which she had sought either consideration by the Governor-General of a pardon or a reference by the Attorney to the Queensland Court of Appeal in respect of earlier convictions for certain federal offences and contempt of court.
6. Unsurprisingly, given the lapse of time, Dr Ogawa’s initial acceptance of the repayment plan and her initial payments pursuant to that plan, one of the bases upon which, in the original jurisdiction, Ms Carter and the Minister resisted the making of the orders sought by Dr Ogawa was that the granting of such relief was discretionary and that, whatever merit there might be in her grounds of review, relief ought in the circumstances to be refused and the proceeding consequentially dismissed as a matter of discretion.
7. The learned primary judge did order that the proceedings be dismissed but did so upon a consideration of the merits of the grounds of review as emerged at trial. Perhaps for that reason, his Honour did not go on to consider whether in any event relief ought to be refused on discretionary grounds. Though they contested the appeal on the merits, the respondents also repeated their submission that discretionary grounds provided a further or alternative basis upon which to dismiss the appeal. That alternative of dismissal on discretionary grounds is not without importance in the circumstances of the present case, for reasons which we discuss below. However, given the course adopted by the learned primary judge, it is desirable, if not necessary, also to address the grounds of appeal raised by Dr Ogawa. Her grounds of appeal reiterated grounds of review upon which she had contended at trial that the decision to approve the repayment plan was attended with jurisdictional error. Those grounds were:

(a) absence of lawful authority to make the decision;

(b) failure to take into account a relevant consideration namely, the debtor’s ability to repay; and

(c) unreasonableness.

The learned primary judge found no merit in any of these grounds. Neither do we. Subject to one necessary qualification, our reasons for concluding that the grounds of appeal lack merit accord with the reasons given by the learned primary judge as to why the corresponding grounds of review lacked merit. With one exception, they also accord with submissions made on the appeal by the respondents.

1. In her notice of appeal Dr Ogawa also complained that the primary judge should have recused himself for apprehended bias, although she had made no application that he do so. Dr Ogawa did not address the question in her written submissions and, sensibly, at the hearing of the appeal she did not press this ground.

#### Did Ms Carter lack lawful authority?

1. Section 63 of the PGPA 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.

It is the discretionary power to modify the terms and conditions on which an amount owing to the Commonwealth is to be paid to the Commonwealth, conferred on the Finance Minister by s 63(1)(b) of the PGPA Act, which is presently pertinent.

1. By s 107 of the PGPA Act, the Finance Minister is given authority to delegate his powers under the PGPA Act. Section 107 relevantly provides:

**107 Finance Minister**

*When Finance Minister may delegate*

(1) The Finance Minister may, by written instrument, delegate to the Finance Secretary, or an accountable authority or an official of a non-corporate Commonwealth entity, any of the Finance Minister’s powers, functions or duties under this Act or the rules.

…

*Directions by the Finance Minister about delegation*

(4) In exercising powers, performing functions or discharging duties under a delegation, the delegate must comply with any written direction given by the Finance Minister to the delegate.

1. In turn, an “accountable authority” is, by s 110 of the PGPA Act, granted a power, subject to conditions, of sub-delegation. Materially, s 110 provides:

**110 Accountable authority**

…

*Subdelegation of Finance Minister’s delegation*

(5) If the accountable authority of a non-corporate Commonwealth entity delegates to a person (the ***second delegate***) a power, function or duty that has been delegated by the Finance Minister to the accountable authority under subsection 107(1), then that power, function or duty, when exercised, performed or discharged by the second delegate, is taken for the purposes of this Act and the rules to have been exercised, performed or discharged by the Finance Minister.

(6) If the accountable authority of a non-corporate Commonwealth entity is subject to directions in relation to the exercise of a power, the performance of a function or the discharge of a duty, delegated by the Finance Minister to the accountable authority under subsection 107(1), then:

(a) the accountable authority must give corresponding written directions to the second delegate; and

(b) the accountable authority may give other written directions (not inconsistent with those corresponding directions) to the second delegate in relation to the exercise of that power, the performance of that function or the discharge of that duty.

(7) The second delegate must comply with any directions of the accountable authority.

1. The Secretary of the Department is one such “accountable authority” (PGPA Act, s 12(2); s 10(1) — “Commonwealth entity”; s 11(b) — “non-corporate Commonwealth entity”).
2. In evidence before the learned primary judge was an affidavit of Ms Carter to which was annexed an **instrument of delegation**: the *Public Governance, Performance and Accountability (Finance Minister to Accountable Authorities of Non-Corporate Commonwealth Entities) Delegation 2014* (Cth), dated 30 June 2014. By this instrument the Finance Minister relevantly delegated his power under s 63 of the PGPA Act to the Secretary (as ‘non-Finance accountable authority of a non-corporate Commonwealth entity’: see Div 1 of Pt 9 and cl 3 of Pt 1 of the instrument of delegation). Having regard to s 107 of the PGPA Act, that delegation was effective in law.
3. Also in evidence before the learned primary judge, again as an annexure to the affidavit of Ms Carter, was an **instrument of delegation and authorisation** dated 15 September 2016 under the hand of the Secretary. This instrument was effective under s 110 of the PGPA Act to empower the person, for the time being, holding the office in the Department held by Ms Carter to make a decision which, by s 110(5) of the PGPA Act, was taken to be made by the Finance Minister under s 63(1)(b) of that Act.
4. As s 107(4) of the PGPA Act contemplated and permitted, the Finance Minister issued directions to his delegates. These directions were incorporated into the instrument of delegation. In contrast, the Secretary did not incorporate into the instrument of delegation and authorisation either a corresponding requirement to comply with the Minister’s directions or any further, separate directions.
5. Dr Ogawa submitted that the decision to approve her repayment plan was invalid because Ms Carter had not been correspondingly required to comply with the Minister’s directions, as s 110(6)(a) of the PGPA Act specified.
6. In [28] of his reasons for judgment, the learned primary judge stated:

There were “Accountability Authority Instructions” issued by the Department on 4 April 2016, which directed a sub-delegate exercising power under s 63 of the Public Governance Act to, “comply with the directions in the delegation from the Finance Minister”. There was also a “Financial Management Directive” issued on 11 January 2015, which required sub-delegates to, “comply with the directions issued by the Finance Minister”.

1. With respect, this statement is not, as Dr Ogawa submitted and as the Minister fairly conceded, in accordance with the evidence that was before his Honour on the hearing of the judicial review application.
2. The documents to which his Honour referred to in [28], were annexed to a further affidavit of Ms Carter upon which the respondents had also sought to rely at the hearing. However, Dr Ogawa objected to the admission of this affidavit into evidence. His Honour upheld that objection. The respondents did not seek on the appeal to impeach the correctness of the ruling as to admissibility made by the learned primary judge. We have not therefore detailed the basis for the ruling.
3. It is evident that in the interval between reservation and publication of the judgment his Honour overlooked his ruling on this evidence. Without revoking that ruling, it was not open to his Honour to rely on those documents. In the appeal, that further affidavit had no role to play other than to confirm that it was the source for the findings made by his Honour in [28].
4. Nevertheless, it does not follow that the appeal should be allowed because Ms Carter lacked authority to make the decision.
5. In the judicial review proceeding which she instituted in the original jurisdiction, it was for Dr Ogawa, as the applicant, to prove the occurrence of the alleged jurisdictional error: *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594, at 616, [67], per Gummow J; *Plaintiff M64/2015 v Minister for Immigration and Border Protection (*2015) 258 CLR 173, at 185, [24], per French CJ, Bell, Keane and Gordon JJ. In elaborating on this onus of proof in *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091, at 1100, [38], Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ stated:

[L]eaving constitutional and legislative facts aside, it is the plaintiff in an application for judicial review of administrative action who has the onus of establishing on the balance of probabilities the facts on which a claim to relief is founded. To the extent that the factual basis for a claim to relief is sought to be founded on an inference to be drawn from a decision-maker’s statement of reasons, the appropriateness of drawing the inference falls to be evaluated having regard to two settled principles. One is that such a statement of reasons must be read fairly and not in an unduly critical manner. The other is that it must be read in light of the content of the statutory obligation pursuant to which it was prepared.

[Footnote references omitted.]

1. As s 107 of the PGPA Act permitted the Minister so to do in the instrument of delegation, s 110 of that Act likewise permitted the Secretary to incorporate into the instrument of delegation and authorisation a corresponding requirement to comply with the Minister’s directions and to give any further, separate directions. However, s 110 of the PGPA Act did not mandate that the Secretary could only give corresponding written directions to a “second delegate” in this way. It was lawfully possible for the instrument of delegation and authorisation to be in one document and a corresponding requirement to be in a separate document.
2. To make good her ground of review, Dr Ogawa had to prove that the Secretary had not given corresponding written direction to his “second delegate”, Ms Carter. Only if she did this would the necessary factual foundation be present for the consideration of her consequential legal submission that, as a matter of construction of s 110 of the PGPA Act, Ms Carter’s decision to approve the repayment plan was invalid. Yet Dr Ogawa did not prove that the Secretary had not given corresponding written directions to Ms Carter.
3. Ms Carter made no admission in her affidavit as to the absence of a corresponding requirement.
4. The proof of an absence of a corresponding requirement was by no means an impossible task for Dr Ogawa in the absence of an admission. But the case was conducted on pleadings, and Dr Ogawa did not plead that no corresponding written directions had been given by the Secretary. That issue was apparently raised later in the proceeding, and the learned primary judge obviously considered it necessary to address it, notwithstanding the omission to raise it on the pleadings. Be that as it may, while the absence of an allegation of the requisite material fact precluded proof by an admission on the pleadings, that did not preclude Dr Ogawa from delivering a notice to admit under r 22.01 of the *Federal Court Rules 2011* (Cth) (***Rules***). While there is no right under the Rules to discovery, viewed in combination, the presence of directions in the instrument of delegation and the absence of corresponding directions in the instrument of delegation and authorisation might well have been a persuasive basis upon which to order limited discovery of any separate corresponding directions. Dr Ogawa did not seek to avail herself of any of these means available under the Rules.
5. Looking to the evidence at trial, Ms Carter’s file note recording her decision, replicated in the reasons which she furnished to Dr Ogawa in response to her request, was tersely expressed. The reasons did not expressly indicate, one way or the other, whether Ms Carter had looked to directions which corresponded to, or required compliance with, those given by the Finance Minister to the Secretary.
6. The Minister’s Directions (**Directions**) to the Secretary as his delegate, as incorporated into the instrument of delegation, were in evidence. So, too, was the undertaking signed by Dr Ogawa on 29 November 2016. A comparison between the two is instructive. The provision in this case for a signed undertaking accords with a requirement in the practice specified by the Finance Minister in his Directions. The exchange of emails beforehand with Dr Ogawa discloses that Ms Carter also followed a practice ordained in the Directions, namely, requiring Dr Ogawa to provide evidence (by a statutory declaration or other means) sufficient to satisfy her that it would be unreasonable to require her to discharge the debt otherwise than by instalments or at a deferred date. An examination of the Directions and that undertaking discloses that the undertaking incorporates particular required features specified in the Directions ([9.3] and [9.4]):
   1. the amount owing to the Commonwealth is stated and acknowledged to be owing;
   2. the dates when payment of instalments are due is stated;
   3. the ability of a delegate to review the instalment arrangement taking into account any change in Dr Ogawa’s ability to pay is stated;
   4. it is made a condition that any default in adherence to the conditions may result in legal action being commenced to recover the amount owing; and
   5. confirmation in writing of acceptance of the conditions.

It is inherently unlikely that the correspondence between the requirements in the Directions and the features of the undertaking were coincidental. Thus, it would not have been possible at trial to draw any inference from the absence of reference to corresponding written directions in the file note or statement of reasons that there were no such directions.

1. Dr Ogawa was not obliged at trial to prove beyond reasonable doubt the absence of corresponding directions in order to provide a factual foundation for her legal argument, only to prove that absence on the balance of probabilities, the usual standard of proof applicable to proof of facts in to a civil proceeding (s 140, *Evidence Act 1995* (Cth)). For the reasons given, this she did not do.
2. It is therefore beside the point that the learned primary judge, at [28], based his findings on an affidavit that he had ruled inadmissible. On the admissible evidence at trial, Dr Ogawa did not discharge the onus that fell on her to prove the absence of corresponding directions.
3. This lends an academic quality to Dr Ogawa’s invalidity contention. As to that contention, and on the contingency that there was proof of an absence of a corresponding requirement, the respondents submitted, by reference to now well-known statements in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, at [91] – [93], that any such absence did not attend Ms Carter’s decision with invalidity.
4. The traditional approach in relation to the exercise of judicial power is only to determine those issues necessary in order to decide a particular case. There are good reasons to adopt that course in this instance. The first reason is that the invalidity point, if good, may have systemic ramifications in relation to Commonwealth public sector financial administration and debt management either generally or at least within the Department. Of course, that would be no reason not to determine the issue if it were essential to deciding this case. Here, however, it is not. The second reason is that discretionary considerations, discussed below, indicate that the challenge to the decision should have been dismissed in any event. We therefore refrain from deciding the alleged invalidity issue because it is unnecessary so to do.

#### Failure to take into account a relevant consideration – ability to pay?

1. A consideration will be relevant in the sense that a failure to take it into account in the exercise of a discretionary power conferred by statute is potentially productive of jurisdictional error only if that statute either expressly or by necessary implication requires it to be taken into account: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, at 39 – 41.
2. Only two considerations are made expressly relevant by s 63 of the PGPA Act in relation to the exercise of the power conferred by s 63(1)(b) to modify terms and conditions. They are: “an amount owing to the Commonwealth” and “any requirements prescribed by the rules” (none of the latter were relevant).
3. Beyond this, and for reasons already given, a second delegate exercising the power may have been obliged to take into account any corresponding requirement. Assuming this to be the case, and that there was a corresponding requirement ordaining compliance with the Minister’s Directions, it would have been necessary for Ms Carter, as a “second delegate”, to advert to the subject of ability to pay. Paragraph 9.3 of the Directions provided, materially:

…

*Cases of hardship*

(2) In a situation of *claimed hardship*, the delegate must:

(a) require the debtor to provide evidence (by a statutory declaration or other means) sufficient to satisfy the delegate that it would be unreasonable to require the debtor to discharge the debt otherwise than by instalments or at a deferred date; and ...

*Instalments*

(3) When allowing *payment by instalments*, the delegate must impose conditions on such payment with the object of ensuring that the Commonwealth recovers the amount as soon as is reasonably practicable, having regard to the debtor’s *ability to repay*.

*Interest*

(4) The delegate must:

(a) ordinarily impose interest at the 90 day bank-accepted bill rate (available from the Reserve Bank of Australia); and

(b) not impose interest at a higher rate than the 90 day bank-accepted bill rate; and

(c) if a lesser rate of interest, or no interest, is imposed - record in writing the reasons for doing so.

Note 1: A reason for not imposing interest, or imposing less than the specified rate, is that, in the particular case, the imposition of interest would cause *undue* *financial hardship.*

…

[emphasis added]

1. As mentioned, Ms Carter’s reasons were tersely stated. They were none the worse for that, however. They disclose on their face that she adverted to Dr Ogawa’s ability to pay: see Item 4, Likelihood of employment and Item 5, Financial status. These items in Ms Carter’s reasons are consistent only with her taking into account Dr Ogawa’s ability to pay. The repayment plan Ms Carter approved did not require repayment with interest. Inferentially, in not imposing any interest payment obligation as a condition of agreeing to repayment of the debt by instalments, Ms Carter made certain assumptions in relation to Dr Ogawa’s ability to pay which were beneficial, even sympathetic, to her. The evaluation of the factual merits of Dr Ogawa’s application to repay her debt by instalments was a matter for Ms Carter. The learned primary judge was correct to conclude that Ms Carter had not failed to take into account the subject of an ability to pay in deciding to approve the repayment plan.
2. Dr Ogawa’s submissions in relation to the alleged jurisdictional error of a failure to take into account a relevant consideration tended to conflate that jurisdictional error ground with unreasonableness. Whether or not, having taken into account ability to pay, either the related process of reasoning or the decision itself discloses unreasonableness in the jurisdictional error ground sense is a separate, although not unrelated question.
3. As to this, in *Peko-Wallsend*, at 41, Mason J (as his Honour then was), observed that, in the absence of a statutory indication as to the weight to be given to various considerations, “it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account”. Having so done, his Honour added, at 41, “I say, ‘generally’, because both principle and authority indicate that in some circumstances a court may set aside an administrative decision which has failed to give adequate weight to a relevant consideration of great importance, or has given excessive weight to a relevant factor of no great importance”. His Honour then stated that “[t]he preferred ground on which this is done, however, is not the failure to take into account relevant considerations or the taking into account of irrelevant considerations, but that the decision is ‘manifestly unreasonable’”. That is an apt note on which to consider whether Dr Ogawa has demonstrated error on the part of the learned primary judge in concluding that Ms Carter’s decision was not unreasonable.

#### Unreasonableness

1. It is helpful to commence consideration of whether this jurisdictional error ground was made out by recalling some of its features.
2. The observations made by Mason J in *Peko-Wallsend*, at 41, to which we have just referred have never been disapproved by the High Court. His Honour elaborated in retirement on his understanding of the unreasonableness jurisdictional error ground in an article, *The Scope of Judicial Review* (2001) 31 AIAL Forum 21 in which he expressed the opinion that proportionality was a concept which “should inform our understanding of *Wednesbury* unreasonableness”. The reference to “*Wednesbury*” was a reference to observations as to the content of this jurisdictional error ground made by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (***Wednesbury***). In *Wednesbury*, at 234, Lord Greene had allowed that an administrative decision might be set aside as unreasonable if an administrative decision-maker had “nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it”.
3. In *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 (***Li***), Hayne, Kiefel and Bell JJ made these statements:
   1. at [66]:

Properly applied, a standard of legal reasonableness does not involve substituting a court’s view as to how a discretion should be exercised for that of a decision-maker.

* 1. at [68]:

The legal standard of unreasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision – which is to say one that is so unreasonable that no reasonable person could have arrived at it – nor should Lord Greene MR be taken to have limited unreasonableness in this way in his judgment in *Wednesbury*. This aspect of his Lordship’s judgment may more sensibly be taken to recognise that an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified.

* 1. at [72] (and consistently with the observation of Mason J in *Peko-Wallsend*, at 41):

Whether a decision-maker be regarded, by reference to the scope and purpose of the statute, as having committed a particular error in reasoning, given disproportionate weight to some factor or reasoned illogically or irrationally, the final conclusion will in each case be that the decision-maker has been unreasonable in a legal sense.

* 1. at [76]:

Unreasonableness may be inferred where, even when reasons are provided, it is not possible for a court to understand how the decision was reached. “Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification”.

1. As later authority in the High Court confirms, statements made by Gageler J in his separate, concurring judgement in *Li*, at [108], [109] and [113], as to the stringency of the test for the establishment of the jurisdictional error ground of unreasonableness have been influential. See *Minister for Immigration and Border Protection v* *SZVFW* (2018) 264 CLR 541 (***SZVFW***), at [11] per Kiefel CJ; and note approval by Gageler J, at [52] of the description “extremely confined” with respect to the scope of “the standard of legal reasonableness in terms of the minimum to be expected of any ‘reasonable repository of the power’”. See also the emphasis in *Minister for Home Affairs v DUA16* (2020) 95 ALJR 54 (*DUA16*), at [26], on the “usually high” threshold for a conclusion as to unreasonableness.
2. *SZVFW*, at [29] – [34], is also important in the context of the present case for its confirmation that this Court must, in the exercise of its appellate jurisdiction, reach its own conclusion on an appeal by way of rehearing as to whether the jurisdictional error ground of unreasonableness is made out.
3. Dr Ogawa’s submission directed attention to the visa application context in which Ms Carter had made her decision. She submitted:

Since payment or an arrangement for the payment of Commonwealth debts is one of the conditions for the grant of a visa, the decision would lead to the refusal of the grant of a visa and the Appellant would lose her work rights together with her bridging visa as a consequence ensuring that the Commonwealth would never recover the Appellant’s Commonwealth debts. It would be difficult to justify how this consequence would be consistent with the purpose of the provision which is to ensure that the Commonwealth recovers the amount as soon as practicable.

1. We agree that an evaluation as to whether in outcome an administrative decision is unreasonable is always fact, including in that regard context, specific. The High Court recently made that very point in *DUA16,* at [26], in observing that an unreasonableness “conclusion is drawn ‘from the facts and from the matters falling for consideration in the exercise of the statutory power’”.
2. Consideration of context tells one that Ms Carter was not just making her decision in relation to a person who held a Bridging Visa the duration of which was necessarily linked to the fate of Dr Ogawa’s substantive visa application and related litigation. Ms Carter was making a decision which, by the instalments contemplated, would extend well into a period during which, if her visa application were successful, Dr Ogawa and prospective employers would enjoy greater certainty about her ability to live and work in Australia on an indefinite basis. Read in the context of the subsisting visa application, the email exchange which preceded the repayment plan decision and her reasons for that decision, all that Ms Carter did was to look to a period within which, in keeping with standard practice, a repayment of a debt by instalments should occur and to ask herself whether, given that Dr Ogawa possessed a high post-graduate qualification in law, there was a sufficient likelihood of her obtaining employment which would allow her to service the repayment of the debt by particular instalments. The last thing Dr Ogawa wanted Ms Carter to do in November 2016 was to assess her application to repay by instalments on the basis that her substantive visa application would fail. Neither could Dr Ogawa have had any reasonable expectation at the time that it would ever have been acceptable to the Finance Minister, his delegates and second delegates that a debt then due to the Commonwealth might be repaid by miniscule instalments over the balance of a lifetime. One clear import of a requirement to consider ability to pay when deciding whether to approve repayment by instalments was that, if there were no such ability apparent in the material when deciding the application then payment by instalments should be refused.
3. Ms Carter made her decision without the benefit of any information as to the financial support, if any, that Dr Ogawa might receive from her sponsoring partner. In relation to the classes of visa for which Dr Ogawa had applied and in the context of determining whether she was, as claimed, in a de facto relationship, reg 1.09A(3) of the Migration Regulations expressly made it relevant for the Minister or a delegate to consider financial aspects of the relationship in relation to the determination of that visa application. It is true that s 63 of the PGPA Act does not expressly make this kind of information relevant. It does not follow, however, that it was irrelevant to seek the same or similar information for the purpose of making the decision about whether to permit payment of the debt by instalments. Contrary to Dr Ogawa’s submission, seeking such information in no way sought to transfer liability or impose joint liability for the repayment of the debt to her partner. All that the details of the availability of financial support might have done is to give greater comfort as to the ability of Dr Ogawa, from her own financial resources, to service a repayment plan. That is because what might otherwise have been other calls on her own resources might have been met by financial support from her partner. As it was, and as her file note and subsequent reasons confirm, Ms Carter just made an assessment on a prediction as to Dr Ogawa’s future financial resources. However, as Ms Carter’s file note and reasons also reveal, that prediction was neither irrational nor illogical. Further, having regard to Dr Ogawa’s qualifications, it was a view which was reasonably open to Ms Carter. It was not unreasonable in the sense described in the joint judgement in *Li*. Some might say that Ms Carter’s prediction was optimistic, but that does not make it legally unreasonable. And neither does hindsight.
4. We feel obliged to add the following observation. Contrary to another submission made by Dr Ogawa, the evidence does not support a characterisation that another officer within the Department, a Mr Kelly, had made “threat[s]” to her that her visa would be refused if she did not have a repayment plan. To point out a criterion, satisfaction of which is necessary for the grant of a visa and the consequence of not satisfying that criterion, is not to make a threat. It is just to state the effect of the law.

#### Discretion

1. The judicial review jurisdiction conferred on the Court by s 39B(1) of the Judiciary Act is, subject to presently immaterial exceptions, the same as that conferred on the High Court by s 75(v) of the *Constitution*. It is settled that, in the exercise of that jurisdiction, the High Court has a discretion as to whether or not to grant relief by way of a constitutional writ or ancillary remedy: *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, per Gleeson CJ, at [5], Gaudron and Gummow JJ, at [53], Kirby J, at [148], Hayne J, at [172] and Callinan J, at [217].
2. One basis upon which relief might be refused is inexcusable delay: *Minister for Immigration and Citizenship v SZIQB* [2008] FCAFC 20. This is, and always was, with respect, such a case. Dr Ogawa was in November 2016 under no obligation to sign the undertaking related to the decision to approve the repayment plan. She might then have challenged that decision by way of judicial review on just the same grounds as she came to raise in this case in the original jurisdiction. She chose not to do this. Instead, she signed the undertaking and began to pay the required instalments. These actions may well have been motivated by an expectation that satisfaction of the criterion relating to a debt to the Commonwealth was the last obstacle to her securing a visa. That Dr Ogawa has later been disappointed in her expectation is no reason long after the event, to grant relief which, if jurisdictional error were shown, would attend that decision with invalidity.
3. Further, on the basis of the decision, and voluntarily, Dr Ogawa made payments in reduction of a debt which she then acknowledged she owed to the Commonwealth. Part of the consequential relief sought by Dr Ogawa in the present proceeding was a refund of these amounts. The repayments she made went, necessarily, into the Consolidated Revenue Fund of the Commonwealth. That they must have formed but a minute fraction of the revenues of the Commonwealth in that year is not to the point. What is relevant is that, in the absence of any notice of any challenge to the decision, they must, necessarily, have long since been lawfully appropriated and expended. Ms Carter’s repayment plan decision is one which has had what Finkelstein J termed in *Leung v Minister for Immigration and Multicultural Affairs* (1997) 79 FCR 400, at 413, in a passage cited with apparent approval by Gleeson CJ in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, at [12], “operational effect”.
4. Dr Ogawa raised many other issues in her submissions concerning the lengthy course of her dealings with the Department and others since her arrival in Australia. Some of these dealing reflect no credit on the government of our country. Some do not reflect well on Dr Ogawa, even allowing for the vexation and frustration of incorrect administration of the Act and inordinate delay in merits review. We have not detailed them because in the context of the present proceeding, they are distractions.

#### Conclusion

1. For these reasons, the appeal must be dismissed, with costs.
2. It was a concern of Dr Ogawa that her earlier default in complying with the repayment plan may mean that another is not approved and thus that an essential visa criterion may not be able to be satisfied (assuming she cannot now discharge in full at once whatever her present indebtedness to the Commonwealth may at the time be). There is nothing in s 63 of the PGPA Act which expressly precludes the making of a decision to allow payment by instalments where there has been a prior default. On the other hand, such an event could hardly be characterised as an “irrelevant consideration” in the sense described in *Peko-Wallsend*, at 39 – 41. The assessment on the merits as to whether, in a given case, there may be extenuating circumstances is a matter for those exercising power under s 63, not for this Court. The dismissal of this appeal would not preclude the approval under s 63 of a new repayment plan, subject, of course, to the impact of the costs order on the outstanding debt.

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| I certify that the preceding sixty (60) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Logan, Katzmann and Jackson. |

Associate:

Dated: 24 February 2021