FEDERAL COURT OF AUSTRALIA

AFX17 v Minister for Home Affairs (No 4) [2020] FCA 926

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| File number: |  |
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| Judge: | **FLICK J** |
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| Date of judgment: | 2 July 2020 |
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| Catchwords: | **MIGRATION** – order made requiring Minister to make a decision – repeated applications to vary the order **PRACTICE AND PROCEDURE** – inadequate explanation for further variation of orders – inadequacy of explanation provided by solicitor on instructions – contempt – potential need for personal explanation for any non-compliance – whether order should be made directing contempt proceedings prior to non-compliance  |
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| Legislation: | *Migration Act* *1958* (Cth) s 501A  |
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| Cases cited: | *AFX17 v Minister for Home Affairs* [2020] FCA 807*AFX17 v Minister for Home Affairs (No 2)* [2020] FCA 858*AFX17 v Minister for Home Affairs (No 3)* [2020] FCA 890*KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 108*Minister for Home Affairs v AFX17* [2020] FCA 903  |
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| Date of hearing: | 2 July 2020 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 9 |
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| Counsel for the Applicant: | Ms M Yu |
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| Solicitor for the Applicant: | Human Rights for All |
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| Solicitor for the Respondents: | Ms D Watson of Australian Government Solicitor |

ORDERS

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|  | NSD 550 of 2020 |
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| BETWEEN: | AFX17Applicant |
| AND: | MINISTER FOR HOME AFFAIRSFirst RespondentMINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRSSecond Respondent |

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| JUDGE: | FLICK J |
| DATE OF ORDER: | 2 JULY 2020 |

UPON THE APPLICATION OF THE FIRST RESPONDENT MADE ON 1 JULY 2020 AND WITH THE CONSENT OF THE APPLICANT, THE COURT NOTES:

1. The assurance of the First Respondent that the orders as sought to be varied permit adequate time in which proper and adequate consideration can be given to the application made by the Applicant for a Safe Haven Enterprise (Class XE) Visa (the “Applicant’s Visa Application”).

AND THE COURT ORDERS THAT:

1. *Order* 1 as made on 17 June 2020 and as varied on 24 June 2020 is further varied as follows:

“*On or before midday on 3 July 2020, the First Respondent is to either:*

* 1. *personally make a decision in respect to the Applicant’s Visa Application; or*
	2. *ensure that a decision in respect to the Applicant’s Visa Application is made by another portfolio Minister or a lawfully authorised delegate.*”
1. Nothing in *Order* 1 removes the personal responsibility of the First Respondent to ensure that a decision is made in respect to the Applicant’s Visa Application by midday on 3 July 2020.

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

REASONS FOR JUDGMENT

FLICK J:

1. This is yet a further decision made in this proceeding by the Court as presently constituted. The proceeding focusses upon an application first made by the Applicant in December 2016 for a protection visa.
2. The present application is again one seeking a variation of orders previously made.
3. In very summary form, the three earlier decisions which have been made by the Court as presently constituted are:
* a decision made on 10 June 2020 requiring the First Respondent, the Minister for Home Affairs, to make a decision “*within a reasonable time*”: *AFX17 v Minister for Home Affairs* [2020] FCA 807;
* a decision made on 17 June 2020 requiring the Minister to make a decision on or before 4.00pm on 26 June 2020: *AFX17 v Minister for Home Affairs (No 2)* [2020] FCA 858; and
* a decision made on 24 June 2020 varying the order previously made and extending the time within which a decision was to be made by the Minister to midday on 3 July 2020: *AFX17 v Minister for Home Affairs (No 3)* [2020] FCA 890.

The occasion for the last variation of the orders was the decision of the Full Court of this Court on 23 June 2020 in *KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 108 (“*KDSP*”). Given the change in the law effected by that decision, a change which went to part of the reasoning in the decisions made on 10 and 17 June 2020, it was manifestly appropriate to grant the Minister further time in which to assess the reasoning of the Full Court and thereafter make a decision. An appeal from the decision made on 10 June 2020, it may be noted, was filed on 12 June 2020. An application made to another Judge of this Court on 18 June 2020 to (*inter alia*) extend the time for compliance was refused: *Minister for Home Affairs v AFX17* [2020] FCA 903.

1. Relevantly, however, for present purposes, intervening between the first and second of these decisions was an email communication forwarded on behalf of the Minister stating as follows:

As the Minister has now appealed the judgment of Justice Flick, no decision will be made on your client’s visa application pending the outcome of the appeal. The Minister’s position is that s 501A is an available power in relation to your client’s visa application and that Justice Flick was in error in finding that the delay in making such a decision was unreasonable and that s 501A was not an available power in the circumstances of this matter. Any decision made prior to the resolution of the appeal as to whether BAL19 was wrongly decided would render the appeal moot.

It was that email which occasioned the necessity to make an order both requiring the Minister to make a decision and imposing a time by which the decision was to be made. In the absence of such an order being made, the email communication was readily susceptible of conveying the meaning:

In the absence of an order compelling me to do so, I am not going to comply with the law.

1. The matter now before the Court is a further application made by the Minister to vary the order made on 17 June and as varied on 24 June 2020. Why such an application was made fewer than two days prior to the time for compliance with the order, and some three weeks after the order as first made on 10 June 2020, was not satisfactorily explained. The present application was nevertheless again preceded by an email communication forwarded on 1 July 2020. The email referred to the fact that since the decision of the Full Court in *KDSP,* s 501A of the *Migration Act* *1958* (Cth) became a source of power available to the Minister and that the exercise of that power was “*non-compellable*”. The email went on to state in part as follows:

… We have also been advised that the Minister for Home Affairs is not available to make any such decision personally within the timeframe, and therefore request that the order reflect that such a decision may ultimately be made by any portfolio Minister …

That communication was readily susceptible of conveying the meaning:

Even though the liberty of a person is at stake and even though now ordered to do so, I am personally “*not available*” to comply with the law.

Why the Minister was “*not available*” and when he first became “*not available*” was not further satisfactorily explained. What the Minister had been doing in respect to the making of a decision in respect to the Applicant for at least the last two weeks and since 10 June 2020 was also not satisfactorily explained. Why the Minister has not given some priority to the making of a decision affecting the liberty of the Applicant was also not satisfactorily explained. He contented himself with the explanation: “*I am not available*”. As explained on his behalf during oral submissions this morning, it would seem to be the case that he is “*not available*” because he is (presumably) on holidays or – as was put on his behalf – he was “*on leave*”. If the taking of leave was presumably planned in advance, there was no evidence available to the Court as presently constituted to explain why that matter was not disclosed to the primary Judge on 18 June 2020 when an application was then being made to another Judge of this Court. Also not explained is why the Minister was “*available*” to give instructions in this proceeding yesterday and “*available*” to give instructions this morning to proffer the assurance now being given, but “*not available*” to make a decision.

1. The lack of candour on the part of this Minister in not frankly disclosing such matters to this Court, together with the past conduct of this Minister in this proceeding, has been the source of considerable hesitation in the making any further order – even with the consent of the Applicant.
2. It is only the consent of the Applicant to a variation of the order, and presumably his understandable wish to have a decision made after the unreasonable delay which has already occurred, which now occasions a variation. The explanation provided in the most recent email would of itself have been a manifestly deficient basis upon which to vary the order. Even if there be substance in the argument that s 501A is a “*non-compellable power*”, why another portfolio Minister can comply with the order as now varied, and why the Respondent Minister was asserting that the time remaining was insufficient, was a further matter left unexplained. Any party – including a Minister – who seeks to be excused from compliance with an order of this Court or seeking yet a further extension of time, it is respectfully considered, needs to provide a compelling reason to grant the indulgence sought. In the absence of the consent of the Applicant, no order would have been made granting any further variation of the order as previously made and as previously varied. But it is the consent of the Applicant alone which has swayed the balance in favour of again varying the order.
3. Given the lamentable background to this proceeding, it is prudent to observe that in the event of non-compliance with the order as now made, contempt proceedings will be instituted. It is, however, premature to now make the further order as sought by the Applicant directing the institution of contempt proceedings in the event of non-compliance. It is to be hoped that this Minister will comply with the order now made. In the absence of explanation, non-compliance with an order of this Court constitutes a serious contempt.
4. It may further be observed that it is deeply disturbing to realise that a Minister of the Crown who is charged with the responsibility for making decisions affecting the liberty of the subject – and on many occasions making assessments as to the consequences to be visited upon those visa applicants who have failed to comply with the law – is himself a person who has demonstrated an unapologetic reluctance to take personal responsibility for his own non-compliance with the law. If there be non-compliance with the order now made, statements made on instructions by those representing the Minister may well not be sufficient. Any explanation for non-compliance may well require an affidavit to be prepared by the Minister personally and for the Minister to make himself available to the Court for any cross-examination that may be appropriate or permitted.

## UPON THE APPLICATION OF THE FIRST RESPONDENT MADE ON 1 JULY 2020 AND WITH THE CONSENT OF THE APPLICANT, THE COURT NOTES:

1. The assurance of the First Respondent that the orders as sought to be varied permit adequate time in which proper and adequate consideration can be given to the application made by the Applicant for a Safe Haven Enterprise (Class XE) Visa (the “Applicant’s Visa Application”).

## THE COURT ORDERS THAT:

1. *Order* 1 as made on 17 June 2020 and as varied on 24 June 2020 is further varied as follows:

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* 1. *personally make a decision in respect to the Applicant’s Visa Application; or*
	2. *ensure that a decision in respect to the Applicant’s Visa Application is made by another portfolio Minister or a lawfully authorised delegate.”*
1. Nothing in *Order* 1 removes the personal responsibility of the First Respondent to ensure that a decision is made in respect to the Applicant’s Visa Application by midday on 3 July 2020.

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| I certify that the preceding nine (9) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Flick. |

Associate:

Dated: 2 July 2020