Ogawa v Finance Minister [2021] FCAFC 149

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| Appeal from: |  |
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| File number(s): | QUD 62 of 2021 |
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| Judgment of: | **LOGAN, FARRELL AND ANDERSON JJ** |
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| Date of judgment: | 19 August 2021  |
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| Catchwords: | **ADMINISTRATIVE LAW –** judicial review – whether appellant afforded procedural fairness – whether the primary judge misconceived the appellant’s claim –  whether the primary judge did not consider the appellant’s actual claim when making the decision to refuse the appellant’s act of grace payment, resulting in judicial error – appeal dismissed with costs  |
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| Legislation: | *Australian Human Rights Commission Act 1986* (Cth) – s 29International Covenant on Civil and Political Rights*Public Governance, Performance and Accountability Act 2013* (Cth) – s 65*International Covenant on Civil and Political Rights.*Opened for signature 16 December 1966. 999 UNTS 171 Arts 2, 9. (entered into force 23 March 1976) - Arts 2(3), 9 and 9(5) |
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| Cases cited: | *CPJ16 v Minister for Home Affairs* [2020] FCAFC 212 *International Finance Trust Company Limited v New South Wales Crime Commission* (2009) 240 CLR 319; [2009] HCA 49 *Ogawa v Finance Minister* [2021] FCA 59 |
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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: | 30 |
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| Date of hearing: | 13 August 2021 |
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| Counsel for the Appellant: | The Appellant appeared on her own behalf. |
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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 62 of 2021 |
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| BETWEEN: | DR MEGUMI OGAWA Appellant |
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| AND: | FINANCE MINISTER Respondent |

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| order made by: | LOGAN, FARRELL AND ANDERSON JJ |
| DATE OF ORDER: | 19 AUGUST 2021  |

THE COURT ORDERS THAT:

1. The appeal is dismissed.
2. The appellant pay the respondent’s costs of the appeal.

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

REASONS FOR JUDGMENT

THE COURT:

# INTRODUCTION

1. The appellant (**Dr Ogawa**) appeals from the judgment of the primary judge delivered on 5 February 2021 in *Ogawa v Finance Minister* [2021] FCA 59 (**Reasons**), whereby her application for judicial review of a decision of the respondent (**Minister**) not to authorise an “act of grace payment” under s 65 of the *Public Governance, Performance and Accountability Act 2013* (Cth) (***PGPA Act***) was dismissed.

# background

1. In 2014, pursuant to s 29 of the *Australian Human Rights Commission Act 1986* (Cth) (***AHRC Act***) the Australian Human Rights Commission (**AHRC**) published a report recommending that Dr Ogawa be paid compensation of $50,000 in respect of a period in 2006 when she was detained in immigration detention (**AHRC Report**). The AHRC considered that Dr Ogawa’s detention was arbitrary within the meaning of Article 9 of the International Covenant on Civil and Political Rights (**ICCPR**) because she ought to have been placed in a less restrictive form of detention.
2. In 2019, Dr Ogawa applied to the Minister under s 65(1) of the *PGPA Act* for an act of grace payment of $50,000 (**AOG Application**).
3. Section 65(1) confers a broad discretionary power on the Minister to authorise a payment to a person if it is considered appropriate to do so because of “special circumstances”. Section 65(1) provides:

**65 Act of grace payments by the Commonwealth**

(1) The Finance Minister may, on behalf of the Commonwealth, authorise, in writing, one or more payments to be made to a person if the Finance Minister considers it appropriate to do so because of special circumstances.

Note 1: A payment may be authorised even though the payment or payments would not otherwise be authorised by law or required to meet a legal liability.

Note 2: Act of grace payments under this section must be made from money appropriated by the Parliament. Generally, an act of grace payment can be debited against a non-corporate Commonwealth entity’s annual appropriation, providing that it relates to some matter that has arisen in the course of the administration of the entity.

…

1. On 21 May 2020, the Minister’s delegate (**Delegate**) made a decision declining to authorise an act of grace payment to Dr Ogawa and gave written reasons (**Decision**). That Decision summarises, at pp 3-6, Dr Ogawa’s claims including her reference to Article 2(3) of the ICCPR and her claim that “the act of grace payment is the only way for Australia to adhere to the ICCPR” in her case.
2. On 28 May 2020, Dr Ogawa applied to this Court to judicially review the Decision.
3. On 5 February 2021, the primary judge dismissed Dr Ogawa’s application for judicial review. By consent of the parties, that application was determined on the papers after written submissions were provided. That was because the trial, which had originally been listed to be heard on 26 August 2020, could not physically take place in Court at the Victorian Registry of this Court due to the second wave of COVID-19 in Victoria. As a consequence, the parties agreed to have the judicial review determined on the papers without the benefit of oral argument.
4. The primary judge considered the five grounds of review listed at [33] of the Reasons that Dr Ogawa relied upon and provided reasons for dismissing each ground at [35] to [98] of the Reasons. The primary judge confined himself to consideration of the five grounds of review and the written submissions of the parties.
5. On 27 February 2021, Dr Ogawa commenced this appeal and filed written submissions on 27 February 2021 and reply submissions on 29 July 2021. A supplementary notice of appeal was filed on 8 March 2021 which refers to a single ground of appeal, being that the primary judge failed to afford procedural fairness by misconceiving the claim and failing to consider the actual claim.
6. On the hearing of this appeal, Dr Ogawa appeared for herself. Ms O’Brien of counsel appeared on behalf of the Minister. In hearing this appeal, this Full Court, had an advantage not afforded to the primary judge, namely hearing the parties’ oral arguments. In particular, the submissions of Dr Ogawa, which were more focused on the contended error of the Delegate’s Decision.

## Dr Ogawa’s Submissions

1. Dr Ogawa submits that the primary judge misconceived her claim and considered each ground of her application based on the misconceived claim rather than the *actual* claim she advanced.
2. Dr Ogawa submits that, whilst the primary judge acknowledged that the Minister was required to observe procedural fairness, she was denied procedural fairness due to the Minister failing to consider the claim that was *actually* advanced by her.
3. Dr Ogawa submits that the Delegate, in his Decision, failed to have regard to the findings of the AHRC Report that Dr Ogawa’s detention was arbitrary under Article 9 of the ICCPR. Dr Ogawa submits that the Commonwealth of Australia, by its executive government, subscribes to the ICCPR, and that the *AHRC Act* established the AHRC as an independent statutory organisation to, among other things, investigate claims in relation to alleged violations of the ICCPR. In Dr Ogawa’s submission, the Delegate was required to take into account the findings that were made in the AHRC Report, that Dr Ogawa’s detention was arbitrary under Article 9 of the ICCPR and then to take into account the recommendation in the AHCR Report to make an *ex gratia* payment and apology to her for what it described as “arbitrary detention”. Dr Ogawa submits that it was not open to the Delegate to simply reject the findings and recommendations in the AHRC Report and to do so would result in the Commonwealth of Australia being in breach of Article 2(3) of the ICCPR. That, in Dr Ogawa’s submission, was the actual claim advanced by her before the primary judge.
4. Dr Ogawa submits that the primary judge failed to consider this claim made by Dr Ogawa and as a consequence made an appellable error.
5. Dr Ogawa further submits that the primary judge made an appellable error in his Reasons by deciding the application for judicial review on a misconceived premise. This misconceived premise, in Dr Ogawa’s submission, was that her complaint centred on the Minister’s failure to take into account the alleged breach of Article 2(3) of the ICCPR by failing to make an *ex gratia* payment, rather than the Minister’s failure to take into account that the Commonwealth of Australia would be in breach of Article 9(5) of the ICCPR.

## Minister’s Submissions

1. The Minister submits that it is uncontroversial that the primary judge was required to afford procedural fairness to Dr Ogawa. In the circumstances, that required the primary judge to be, and appear to be, impartial and to provide Dr Ogawa with an opportunity to be heard by allowing her to advance her case and answer the case made against her: *International Finance Trust Company Limited v New South Wales Crime Commission* (2009) 240 CLR 319; [2009] HCA 49, per French CJ at [54].
2. The Minister submits that there is no suggestion in Dr Ogawa’s Submissions that the primary judge did not provide her with an opportunity to be heard or lacked impartiality. In particular, there was no complaint advanced by Dr Ogawa that her application was determined on the papers.
3. The Minister submits that Dr Ogawa’s complaint is that the primary judge misconceived her claim and did not consider her actual claim. Dr Ogawa’s complaint was that the primary judge failed to consider her claim that the Minister made a jurisdictional error by failing to consider that unless an act of grace payment was approved, the Commonwealth of Australia would be in breach of Article 2(3) of the ICCPR. In addition, Dr Ogawa complains the primary judge misunderstood the obligation created by Article 2(3) of the ICCPR.
4. The Minister submits that the Delegate did not fail to consider Dr Ogawa’s claim that, unless an act of grace payment was approved, the Commonwealth of Australia would be in breach of Article 2(3) of the ICCPR. At p 3 of the Decision, the Delegate referred to that claim.
5. The Minister submits that the Delegate had regard to the findings and recommendations set out in the AHRC Report, in particular, the finding that Dr Ogawa’s detention was arbitrary under Article 9 of the ICCPR and that Dr Ogawa be compensated in the amount of $50,000 and offered an apology.
6. The Minister submits that the Delegate made findings, which were open to be made, that Dr Ogawa’s detention was lawful and not arbitrary and, accordingly, that there was no basis for compensation.
7. The Minister submits that it was open to the Delegate to conclude that there were no special circumstances justifying an act of grace payment in circumstances where Dr Ogawa refused to cooperate with the Department of Home Affairs to regularise her immigration status.
8. The Minister submits that in reaching those findings and the conclusion which the Delegate did, the Delegate directed his mind to Dr Ogawa’s claim about the ICCPR but did not accept it. The Minister submits that the Delegate was not compelled to consider the implications of an alleged breach of the ICCPR or of consequent remedial measures in circumstances where the Delegate did not consider any such breach had occurred.
9. The Minister submits that the primary judge did not misunderstand Article 2(3) of the ICCPR in the context of consideration of the Decision. That was so, in the Minister’s submission, because the primary judge specifically referred, at [27] of the Reasons, to Dr Ogawa’s claim regarding Article 2(3) and noted at [43] of the Reasons that Dr Ogawa’s complaint appeared to be that the Delegate did not accept the AHRC’s findings. The primary judge, in the Minister’s submission, considered Dr Ogawa’s contention regarding compliance with the ICCPR but properly considered that the Decision turned upon the exercise of the Minister’s discretion under s 65(1) of the *PGPA Act*, as opposed to conformity with the ICCPR.
10. Finally, the Minister submits that Dr Ogawa’s Submissions misconceive the content and enforceability of the ICCPR. Consistent with the primary judge’s Reasons at [53], Article 2(3) provides for processes to secure remedies (if granted) for breaches of substantive rights in the ICCPR. The Minister submits that, in this case, the Delegate concluded in effect that there was no breach of the ICCPR substantive rights such as Article 2(3). That finding, in the Minister’s submission, was within the scope of the Delegate’s jurisdiction. In any event, the Minister submits, that if Article 2(3) was breached, it is not enforceable under the domestic law of Australia: *CPJ16 v Minister for Home Affairs* [2020] FCAFC 212 at [69]. Further, the Minister submits that the recommendations of the AHRC, under s 29 of the *AHRC Act,* do not give rise to any rights or entitlements. As a consequence, there was no error in the Delegate’s Decision that the AHRC’s recommendation of compensation “does not give rise to an entitlement.”

## Consideration

1. The sole ground of appeal must be rejected as there is no substance to the allegation that the primary judge failed to afford procedural fairness to Dr Ogawa by misconceiving Dr Ogawa’s claim and not considering the actual claim advanced by Dr Ogawa. That is so for the reasons that follow.
2. First, it is apparent from p 3 of the Decision that the Delegate did refer to Dr Ogawa’s claim that unless an act of grace payment was approved, the Commonwealth of Australia would be in breach of Article 2(3) of the ICCPR. The Delegate, at pp 5 and 7 of the Decision, made specific reference to the findings and recommendations set out in the AHRC Report, including that Dr Ogawa’s detention was arbitrary under Article 9(1) of the ICCPR and that Dr Ogawa be compensated in the amount of $50,000 and offered an apology. The Delegate, at pp 6 and 7 of the Decision, referred to the submissions made by the Department of Home Affairs, that Dr Ogawa’s detention was lawful and a correct and proportionate measure and there were no special circumstances warranting an act of grace payment. The Delegate also observed, at p 8 of the Decision, that notwithstanding the recommendation of compensation made by the AHRC, a recommendation by the AHRC does not give rise to an entitlement. The Delegate, at pp 7 and 8 of the Decision, made findings that Dr Ogawa’s detention was lawful and not arbitrary and that, as a consequence, there was no basis for compensation. The Delegate concluded that there were no special circumstances justifying payment where Dr Ogawa had refused to cooperate with the Department of Home Affairs, notwithstanding requests by the Department for her to regularise her immigration status. It is apparent from the Delegate’s Decision, that the Delegate directed his mind to Dr Ogawa’s claim about Article 2(3) of the ICCPR but did not accept it.
3. Second, there is no substance to the submission made by Dr Ogawa that the primary judge did not understand Article 2(3) of the ICCPR in the context of considering the Decision of the Delegate. The primary judge’s Reasons demonstrate that his Honour had regard to Dr Ogawa’s claim regarding Article 2(3) of the ICCPR at [27] of the Reasons and noted, at [43] of the Reasons, that Dr Ogawa’s complaint appeared to be that the Delegate did not accept the AHRC’s findings. The primary judge referred specifically to the submissions advanced by Dr Ogawa regarding Article 2(3) of the ICCPR at [49]-[54] of the Reasons. The primary judge considered, at [52] of the Reasons, Dr Ogawa’s contention relating to Australia’s compliance with the ICCPR, and her assertion that Article 2(3) imposes upon the Commonwealth of Australia the requirement to make an act of grace payment in these circumstances. The primary judge correctly found that the decision to award an act of grace payment turned upon the exercise by the Delegate of the Minister of his discretion, whether there were special circumstances that warranted the making of a payment under s 65(1) of the *PGPA Act*, as opposed to any supposed requirements set out in the ICCPR.
4. The touchstone for the favourable exercise of the Minister’s discretion under s 65(1) of the *PGPA Act* is not whether any supposed requirements with the ICCPR had been met, but rather whether a payment is considered “appropriate”, because of “special circumstances”. So broad is this touchstone that lawful occasion for the making of an act of grace payment might have been found by the Delegate in acceptance of the recommendation in the AHRC Report. But the Delegate was not bound to accept that recommendation. The Delegate was entitled to reach his own conclusion as to whether there existed special circumstances, including whether there had been any unlawful or arbitrary detention of Dr Ogawa. In so doing, the Delegate expressly considered the claim as made by Dr Ogawa concerning her detention and the ICCPR. He was not bound to accept that claim. In turn, the primary judge addressed the challenge made by Dr Ogawa to the Delegate’s decision. We see no error in the primary judge’s reasoning. This appeal must be dismissed as there was no failure by the primary judge to consider Article 2(3) or error in the primary judge’s consideration of Article 2(3) in the context of determining the application for judicial review regarding the Delegate’s decision not to authorise the act of grace payment.

# disposition

1. For the reasons given, the appeal will be dismissed with costs.

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| I certify that the preceding thirty (30) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Logan, Farrell and Anderson. |

Associate:

Dated: 19 August 2021