Federal Court of Australia

Qalovaki v Minister for Immigration and Border Protection [2021] FCA 1058

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| File number(s): | NSD 345 of 2021 |
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| Judgment of: | **STEWART J** |
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| Date of judgment: | 1 September 2021 |
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| Catchwords: | **MIGRATION** – application for an extension of time to file an originating application to review a migration decision – where application was filed more than three years late – where applicant has an extensive, serious and violent criminal history – where applicant was incarcerated and is now in immigration detention – where applicant’s visa was mandatorily cancelled under s 501(3A) of the *Migration Act 1958* (Cth) – where applicant was unrepresented before the Tribunal and before this Court – whether it is established that it is in the interests of the administration of justice for time to be extended – whether the prospective review application has any prospects of success – application dismissed |
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| Legislation: | *Migration Act 1958* (Cth) ss 477A, 499, 501(3A), 501(6)(a), 501(7)(c), 501CA(4) |
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| Cases cited: | *SZRIQ v Federal Magistrates Court of Australia* [2013] FCA 1284; 236 FCR 442 |
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| Division: | General Division |
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| Registry: | New South Wales |
|  |  |
| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Number of paragraphs: | 28 |
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| Date of hearing: | 31 August 2021 |
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| Counsel for the Applicant: | The applicant appeared in person |
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| Solicitor for the First Respondent: | J Xiao of Clayton Utz |

ORDERS

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|  | | NSD 345 of 2021 |
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| BETWEEN: | JOSAIA QALOVAKI  Applicant | |
| AND: | **MINISTER FOR IMMIGRATION AND BORDER PROTECTION**  First Respondent | |
|  | **ADMINISTRATIVE APPEALS TRIBUNAL**  Second Respondent | |

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| order made by: | STEWART J |
| DATE OF ORDER: | 1 September 2021 |

THE COURT ORDERS THAT:

1. The application be dismissed with costs.

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

REASONS FOR JUDGMENT

STEWART J:

1. The applicant is a citizen of New Zealand. He visited Australia on a number of occasions prior to his last arrival in Australia in December 2008 when he was granted a Class TY Subclass 444 Special Category (Temporary) Visa. The applicant spent most of his life in New Zealand before moving to Australia when he was 19. He is now 33 years old.
2. The applicant has accumulated an extensive criminal history in Australia. He has committed and been found guilty and/or convicted of approximately 39 criminal offences receiving a total of seven prison sentences of 12 months or more. The offences include possession of dangerous drugs, receiving stolen property, assaults occasioning bodily harm, breaking and entering and committing an indictable offence, burglary and committing an indictable offence, unlawful possession of weapons, possession of an unauthorised firearm, supply of stolen firearm or firearm part, and reckless grievous bodily harm.
3. On 3 February 2017, the applicant’s visa was mandatorily cancelled under s 501(3A) of the *Migration* ***Act*** *1958* (Cth) by a delegate of the Minister for Immigration and Border Protection (now the **Minister** for Immigration, Citizenship, Migrant Services and Multicultural Affairs) on the basis that the applicant did not pass the character test. That is because he had a “substantial criminal record” within the meaning of s 501(7)(c) of the Act and was serving a sentence of imprisonment on a full-time basis in a custodial institution at the time.
4. The applicant made representations to the Minister seeking the revocation of the cancellation of his visa under s 501CA(4) of the Act. That request was refused by a delegate of the Minister on 19 September 2017.
5. The applicant applied to the Administrative Appeals **Tribunal** for review of the delegate’s decision not to revoke the visa cancellation decision. The applicant explained in oral submissions before me that he was represented in the AAT proceedings up until about a week and a half before the AAT hearing when he became unrepresented.
6. After finding that the applicant did not pass the character test on the basis of his “substantial criminal record” under ss 501(6)(a) and 501(7)(c) of the Act, the Tribunal turned to consider whether there was “another reason” why it should exercise the power under s 501CA(4) to revoke the visa cancellation decision. The Tribunal was guided in its decision-making by Ministerial **Direction** No 65, “Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA”. That is a direction by the Minister under s 499 of the Act. The Tribunal identified the following factors as weighing against revocation of the cancellation of the applicant’s visa:
7. The protection of the Australian community: given the brief and increasing seriousness of the applicant’s “extensive” criminal history, including numerous offences of a violent nature, the Tribunal concluded that the applicant poses a “significant risk” of substantial harm to the community which weighs heavily against him.
8. The expectations of the Australian community: the Tribunal noted that the applicant has repeatedly breached the trust of the Australian community by committing offences of a type that could endanger the safety of members of the community. It concluded that given the nature of the applicant’s offences, which involved serious violence, the Australian community would expect that the applicant should not hold a visa. The Tribunal acknowledged that the Australian community may afford a higher level of tolerance of criminal or other conduct by the applicant because he has lived in Australia for more than 10 years. The Tribunal nevertheless concluded that this primary consideration weighs heavily in favour of non-revocation.
9. The Tribunal identified the following other factors as weighing in support of revocation of the cancellation of the applicant’s visa:
10. The applicant’s ties to Australia: these include that many of his family members are in Australia and that he had made some positive contribution to the Australian community.
11. Impediments the applicant will face upon returning to New Zealand: the Tribunal considered that although the applicant would face “some initial difficulty re-establishing himself”, such impediments would not be insurmountable.
12. The Tribunal considered that other factors specified in the Direction, being the best interests of minor children in Australia, Australia’s international non-refoulement obligations, and impact on victims and Australian business interests, but concluded that they were not relevant in the case of the applicant.
13. Overall, the Tribunal concluded that the two “other” considerations weighing in favour of revocation of the cancellation were not sufficient to outweigh the two “primary” considerations in favour of non-revocation and that “the decision to not revoke the cancellation of the applicant’s visa is the correct decision”.
14. Accordingly, on 13 December 2017 the Tribunal affirmed the decision of the delegate under review. The decision records that the applicant was self-represented at the hearing.
15. In the present proceeding, the applicant seeks an extension of time in order to file an originating application seeking judicial review of the decision of the Tribunal. The application for an extension of time was filed more than three years after the 35 day time limit imposed by s 477A(1) of the Act for such a review. Section 477A(2) provides that the Court may, by order, extend the 35 day period as it considers appropriate if an application for such an extension has been made in writing specifying why the applicant considers that it is necessary in the interests of the administration of justice to make the order and the Court is satisfied as such.
16. Ordinarily, the factors the Court will consider in deciding on an application for an extension of time under s 477A(2) include the following (see *SZRIQ v Federal Magistrates Court of Australia* [2013] FCA 1284; 236 FCR 442 at [46]-[48]) :
17. the length of and explanation for the delay;
18. any prejudice to the respondent if an extension is granted; and
19. the merits of the proposed substantive application.
20. I am cognisant of the fact that the applicant is self-represented in the proceeding before me. For that reason I have explained the procedures of the Court to him and sought to understand from him the reasons for the delay, why he says that it is in the interests of the administration of justice to grant an extension and also what his criticisms of the Tribunal’s decision are.
21. The applicant’s supporting affidavit states the following:

I missed the 35 day timeframe because I was in gaol. I was unable to get support to file my documents.

Being my first time going through proceedings I was misinformed that worst case I could fight it with full support from a detention center. [sic]

1. Although it is stated in the application for an extension of time that the grounds for the application are set out in the accompanying affidavit, no proposed grounds of review of the decision of the Tribunal are identified in the affidavit. However, the applicant lodged with the registry a draft originating application for review of a migration decision. It identifies the following as the grounds of the application:
2. My lawyer could not represent me due to financial hardship and did not have enough time to get legal aid representation so appeared and got annihilated.
3. My traffic offences were brought were brought up and used as the final nail in my coffin. At the time traffic offences were a separate. [sic]
4. On 24 May 2021, the Court made orders relevantly directing the applicant to file and serve a draft originating application and any additional affidavit evidence sought to be relied on by 16 July 2021, and written submissions 10 business days before the hearing. Aside from the draft originating application already referred to, no such material has been filed by or received from the applicant.
5. At the hearing before me, which was conducted remotely with the applicant appearing from immigration detention, the applicant explained that after he received the decision of the Tribunal he “was moved around a lot”, and by the time he got hold of a welfare officer to assist him to challenge the decision of the Tribunal the 35 day period had already passed. Beyond being incarcerated, and the expected difficulties that that would present to anyone wishing to commence legal proceedings, the applicant did not identify further obstacles to him commencing the proceeding.
6. With regard to his grounds of review, the applicant said that he became unrepresented shortly before the hearing and he thus “turned up to the AAT just with a wish and a prayer” at the hearing. He said that if he had another opportunity for a hearing before the Tribunal he would be more prepared, he would have evidence to support his case including “personnel” (which I understood be a reference to witnesses) and documents. The applicant said, on enquiry, that he had asked for an adjournment before the Tribunal but that the Tribunal had said that a week and a half was long enough for him to prepare for the hearing.
7. With regard to the interests of the administration of justice, the applicant explained that his life is in Australia. He has lived here for approximately 15 years. He says that if he was given the opportunity of another hearing before the Tribunal he would have a “good go at it” with all the resources that he now has available to him. He said that his situation is no longer in flux; it is settled.
8. Although the applicant’s first complaint is that he was unrepresented, that on its own does not amount to a ground to review the Tribunal’s decision. It is common for unrepresented parties to appear before the Tribunal. I note that the applicant filed and relied on a substantial number of documents before the Tribunal, including a detailed statement from himself and a statement from his mother. It is apparent that the applicant was able to apply for an adjournment from the Tribunal, but that the Tribunal refused the adjournment. I am not able to identify or discern any reviewable procedural unfairness in the conduct of the hearing before the Tribunal as a consequence of the applicant having appeared there in person, or in the refusal of his adjournment application.
9. With regard to the proposed ground of review that references the applicant’s traffic offences, it is correct that the Tribunal mentioned the applicant’s traffic offences. It stated the following in that regard:

18. In addition to the applicant’s criminal history detailed in the National Police Certificate, the applicant’s Traffic Record from the Queensland Department of Transport and Main Roads records a number of driving offences spanning from 2008 to March 2016. Offences include driving whilst disqualified, driving whilst unlicensed, speeding and careless driving. Most significantly the applicant has committed two offences of driving whilst under the influence of alcohol. The first occurred on 17 July 2008 and the second on 9 July 2011.

1. In the following paragraph of its reasons, the Tribunal referred to the “breadth” of the applicant’s offences, which may be taken to include a reference to the traffic offences. The Tribunal’s focus was however on offences which were violent and/or violent in nature including a recent conviction involving physical violence.
2. The Tribunal did not otherwise mention the applicant’s traffic offences, and they seem to have played no role in the Tribunal’s weighing of the relevant factors and reaching its ultimate conclusion. There is accordingly no basis for any contention that too much weight was given to the traffic offences at all, let alone to such a degree as to amount to reviewable error. The applicant’s non-traffic criminal record is such that it is not likely that the traffic offences played any material role in the Tribunal’s decision.
3. I am not able to identify any error in the Tribunal’s reasoning process that might have reasonable prospects of being found to amount to jurisdictional error if this matter was to proceed further.
4. I accept that it would have been difficult for the applicant to have brought this application whilst in gaol, and some allowance might have been given for that if the application was nevertheless within a reasonable period after the expiry of the prescribed 35 day period. However, a period of three years is excessive and there is no substantive explanation for why it took the applicant that long. There is an important value in finality in processes such as this, and the Minister was entitled to treat the Tribunal’s decision as final once the 35 day period had passed – subject only to an extension of that period if such an extension was in the interests of the administration of justice.
5. Consideration of the interests of the administration of justice do not favour granting an extension of time in this case. Given the poor prospects of any application for review, consideration of the interests of the administration of justice count against the extension of time.
6. I accept that the applicant feels frustrated at not having presented as good a case before the Tribunal as he believes that he could now present, and that he is dismayed at the prospect of being removed from Australia which he now regards as home. However, I see no prospects of success in his proposed review application with the result that it cannot be in the interests of the administration of justice to grant him the extension of time that he seeks.
7. In the circumstances, the application must be dismissed with costs.

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| I certify that the preceding twenty-eight (28) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Stewart. |

Associate:

Dated: 1 September 2021