Federal Court of Australia

Przybylowski v Australian Human Rights Commission [2021] FCA 1398

|  |  |
| --- | --- |
| File number(s): | NSD 38 of 2021 |
|  |  |
| Judgment of: | **CHEESEMAN J** |
|  |  |
| Date of judgment: | 11 November 2021 |
|  |  |
| Catchwords: | **PRACTICE AND PROCEDURE –** application for summary judgment under r 26.01of the *Federal Court Rules 2011* (Cth) – where applicant seeks judicial review of a decision of the Australian Human Rights Commission under s 20(2)(ba) of the *Australian Human Rights Commission Act 1986* (Cth) not to inquire into his complaint – where applicant seeks review of issues litigated unsuccessfully in the Federal Circuit Court – where the applicant seeks relief that is non-justiciable – whether the applicant has reasonable prospects of success – whether the application discloses a reasonable cause of action – whether the proceedings are an abuse of process – Held: application successful, proceedings dismissed.  **PRACTICE AND PROCEDURE** – orders sought seeking substitution of the Attorney-General of the Commonwealth of Australia as the second respondent in these proceedings – Held: orders made |
|  |  |
| Legislation: | *Administrative Decisions (Judicial Review) Act 1977* (Cth), ss 6(1)(a), (c) and (g)  *Australian Human Rights Commission Act 1986* (Cth),  ss 8(6A), 19(1), 20(2)(ba)  *Judiciary Act 1903* (Cth), s 78B  *Federal Court Rules 2011* (Cth), rr 9.11, 26.01 |
|  |  |
| Cases cited: | *ASZ21 v Commissioner of Taxation* [2021] FCA 1304  *FEY17 v Minister for Home Affairs* [2020] FCA 1014 *FKV17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1950  *Glennan v Commissioner of Taxation* [2013] HCA 31; (2003) 198 ALR 250  *Luck v Secretary, Department of Human Services* [2017] FCA 540; (2017) 72 AAR 219  *Przybylowski v Australian Human Rights Commission (No 2)* [2018] FCA 473  *Przybylowski v Australian Human Rights Commission* [2020] FCA 198  *R v Australian Broadcasting Tribunal; Ex Parte Hardiman* [1980] HCA 13; (1980) 144 CLR 13  *Re Culleton* [2017] HCA 3; (2017) 340 ALR 550  *Spencer v Commonwealth of Australia* [2010] HCA 28; (2010) 241 CLR 118 |
|  |  |
| Division: | General Division |
|  |  |
| Registry: | New South Wales |
|  |  |
| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Number of paragraphs: | 46 |
|  |  |
| Date of hearing: | 25 June 2021 |
|  |  |
| Counsel for the Applicant: | The applicant appeared in person |
|  |  |
| Counsel for the First Respondent: | Ms A Stomo (solicitor) |
|  |  |
| Solicitor for the First Respondent: | Australian Human Rights Commission |
|  |  |
| Counsel for the Second Respondent | Mr J Hutton (solicitor) |
|  |  |
| Solicitor for the Second Respondent: | Australian Government Solicitor |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | NSD 38 of 2021 |
|  | | |
| BETWEEN: | MIROSLAW PRZYBYLOWSKI  Applicant | |
| AND: | AUSTRALIAN HUMAN RIGHTS COMMISSION  First Respondent  ASSISTANT MINISTER TO THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA  Second Respondent | |

|  |  |
| --- | --- |
| order made by: | CHEESEMAN J |
| DATE OF ORDER: | 11 NOVEMBER 2021 |

THE COURT ORDERS THAT:

1. Pursuant to rule 9.11 of the *Federal Court* ***Rules*** *2011* (Cth), the Attorney-General of the Commonwealth of Australia be substituted for the Assistant Minister to the Attorney-General of the Commonwealth of Australia as the second respondent to these proceedings.
2. The whole of the application for judicial review is dismissed pursuant to rule 26.01 of the Rules.
3. There be no order as to costs.

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

REASONS FOR JUDGMENT

CHEESEMAN J:

1. These reasons address an application for summary judgment brought by the Attorney-General in respect of judicial review proceedings commenced by the applicant, Miroslaw Przybylowski, under ss 6(1)(a), (c) and (g) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**) in respect of a decision of the Australian Human Rights **Commission** not to inquire into a complaint made by him. Mr Przybylowski is self-represented.
2. The Commission is the first respondent and has indicated that it will submit to such orders as the Court may make save as to costs: see *R v Australian Broadcasting Tribunal; Ex Parte Hardiman* [1980] HCA 13; (1980) 144 CLR 13 at 35-36 (Gibbs, Stephen, Mason, Aickin and Wilson JJ). The **Assistant Minister** to the Attorney-General of the Commonwealth was granted leave to intervene in the proceedings under r 9.12 of the *Federal Court* ***Rules*** *2011* (Cth) andwas joined as the second respondent in accordance with orders made on   
   22 April 2021.
3. At the hearing of the present application, the Attorney-General sought to be substituted as the second respondent on the basis of the relevant allocation of responsibilities within the   
   Attorney-General’s portfolio. Notwithstanding that Mr Przybylowski expressed opposition to the substitution, I am satisfied that it is appropriate to make an order under r 9.11 of the Rules that the Attorney-General be substituted in place of the Assistant Minister as the second respondent. For simplicity in these reasons, I will treat the application for summary judgment as if it were made by the Attorney-General from inception.
4. The Attorney-General moves for summary judgment under r 26.01 of the Rules on the grounds that:
5. Mr Przybylowski has no reasonable prospect of successfully prosecuting the proceeding (r 26.01(a));
6. no reasonable cause of action is disclosed (r 26.01(c)); or
7. the proceeding is an abuse of process of the Court (r 26.01(d)).
8. For the reasons which follow, I will make an order dismissing the application for judicial review pursuant to r 26.01 of the Rules.

# Applicable Principles

1. The applicable principles in relation to summary dismissal were recently summarised in *ASZ21 v Commissioner of Taxation* [2021] FCA 1304 (Moshinsky J) at [27] – [33] as follows:

27 Section 31A of the *Federal Court of Australia Act* provides in part:

(2) The Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:

(a) the first party is defending the proceeding or that part of the proceeding; and

(b) the Court is satisfied that the other party has no reasonable prospect of successfully prosecuting the proceeding or that part of the proceeding.

(3) For the purposes of this section, a defence or a proceeding or part of a proceeding need not be:

(a) hopeless; or

(b) bound to fail;

for it to have no reasonable prospect of success.

(4) This section does not limit any powers that the Court has apart from this section.

28 Rule 26.01 of the *Federal Court Rules 2011* provides in part:

**26.01 Summary judgment**

(1) A party may apply to the Court for an order that judgment be given against another party because:

(a) the applicant has no reasonable prospect of successfully prosecuting the proceeding or part of the proceeding; or

(b) the proceeding is frivolous or vexatious; or

(c) no reasonable cause of action is disclosed; or

(d) the proceeding is an abuse of the process of the Court; or

…

(4) If an order is made under subrule (1) dismissing part of the proceeding, the proceeding may be continued for that part of the proceeding not disposed of by the order.

29 Section 31A was discussed by the High Court in *Spencer v Commonwealth* (2010) 241 CLR 118 (***Spencer***). In that case, Hayne, Crennan, Kiefel and Bell JJ stated at [53]:

… s 31A departs radically from the basis upon which earlier forms of provision permitting the entry of summary judgment have been understood and administered. Those earlier provisions were understood as requiring formation of a certain and concluded determination that a proceeding would necessarily fail. That this was the basis of earlier decisions may be illustrated by reference to two decisions of this Court often cited in connection with questions of summary judgment: *Dey v Victorian Railways Commissioners* and *General Steel Industries Inc v Commissioner for Railways (NSW)*.

(Footnotes omitted.)

30 Their Honours continued at [56] and [58]-[60]:

56 Because s 31A(3) provides that certainty of failure (“hopeless” or “bound to fail”) need not be demonstrated in order to show that a plaintiff has no reasonable prospect of prosecuting an action, it is evident that s 31A is to be understood as requiring a different inquiry from that which had to be made under earlier procedural regimes. It follows, of course, that it is dangerous to seek to elucidate the meaning of the statutory expression “no reasonable prospect of successfully prosecuting the proceeding” by reference to what is said in those earlier cases.

…

58 How then should the expression “no reasonable prospect” be understood? No paraphrase of the expression can be adopted as a sufficient explanation of its operation, let alone definition of its content. Nor can the expression usefully be understood by the creation of some antinomy intended to capture most or all of the cases in which it cannot be said that there is “no reasonable prospect”. The judicial creation of a lexicon of words or phrases intended to capture the operation of a particular statutory phrase like “no reasonable prospect” is to be avoided. Consideration of the difficulties that bedevilled the proviso to common form criminal appeal statutes, as a result of judicial glossing of the relevant statutory expression, provides the clearest example of the dangers that attend any such attempt.

59 In many cases where a plaintiff has no reasonable prospect of prosecuting a proceeding, the proceeding could be described (with or without the addition of intensifying epithets like “clearly”, “manifestly” or “obviously”) as “frivolous”, “untenable”, “groundless” or “faulty”. But none of those expressions (alone or in combination) should be understood as providing a sufficient chart of the metes and bounds of the power given by s 31A. Nor can the content of the word “reasonable”, in the phrase “no reasonable prospect”, be sufficiently, let alone completely, illuminated by drawing some contrast with what would be a “frivolous”, “untenable”, “groundless” or “faulty” claim.

60 Rather, full weight must be given to the expression as a whole. The Federal Court may exercise power under s 31A if, and only if, satisfied that there is “no reasonable prospect” of success. Of course, it may readily be accepted that the power to dismiss an action summarily is not to be exercised lightly. But the elucidation of what amounts to “no reasonable prospect” can best proceed in the same way as content has been given, through a succession of decided cases, to other generally expressed statutory phrases, such as the phrase “just and equitable” when it is used to identify a ground for winding up a company. At this point in the development of the understanding of the expression and its application, it is sufficient, but important, to emphasise that the evident legislative purpose revealed by the text of the provision will be defeated if its application is read as confined to cases of a kind which fell within earlier, different, procedural regimes.

(Footnotes omitted.)

31 See also *Spencer* at [24] per French CJ and Gummow J and *Trkulja v Google LLC* (2018) 263 CLR 149 at [22] per Kiefel CJ, Bell, Keane, Nettle and Gordon JJ.

32 Turning to the principles relating to abuse of process, in *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507, French CJ, Bell, Gageler and Keane JJ stated at [25] that “abuse of process is capable of application in any circumstances in which the use of a court’s procedures would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute”.

33 In *Victoria International Container Terminal Ltd v Lunt* (2021) 388 ALR 376, Kiefel CJ, Gageler, Keane and Gordon JJ (with whom Edelman J agreed) stated at [18]:

The fundamental responsibility of a court is to do justice between the parties to the matters that come before it. In the performance of that function, the doing of justice may require the court to protect the due administration of justice by protecting itself from abuse of its processes. The power to stay, or summarily dismiss, proceedings because one party has abused the processes of the court is concerned to prevent injustice, and that power is properly exercised where the conduct of the moving party is such that the abuse of process on its part may prevent or stultify the fair and just determination of a matter.

(Footnotes omitted.)

1. The applicable principles were also set out in ***Przybylowski*** *v Australian Human Rights Commission* ***(No 2)*** [2018] FCA 473 at [7] (Perry J) and in ***Przybylowski*** *v Australian Human Rights Commission* [2020] FCA 198 at [11] (Flick J).
2. The Attorney-General bears the burden of satisfying the Court that the proceedings should be summarily dismissed. Finally, I note the discretion conferred by s 31A of the *Federal Court of Australia Act 1976* (Cth) and r 26.01 of the Rules must be exercised with caution: *Spencer v Commonwealth of Australia* [2010] HCA 28; (2010) 241 CLR 118 at 131 – 132 [24] (French CJ and Gummow J).

# Background

1. The hearing was conducted remotely. As noted above Mr Przybylowski was self-represented. He clearly speaks, reads and understands English to a degree but it is not his first language.   
   Mr Przybylowski had the assistance of an interpreter at the hearing of the application.   
   Mr Przybylowski chose to participate in the proceedings by sometimes availing himself of the services of the interpreter and sometimes addressing and following the proceedings in English.
2. In support of the interlocutory application the Attorney-General relied on the affidavit of Hongyi Gao, a solicitor in the employ of the Australian Government Solicitor, affirmed 7 June 2021 and the affidavit of Anastasia Stomo, a solicitor employed by the Commission, affirmed 7 June 2021. The Attorney-General tendered parts of the Court Book which included the decision under review, the material before the Commission and the documents filed in these proceedings. The Attorney-General also tendered a letter from Mr Przybylowski to the President of the Commission dated 25 June 2019 which contained Mr Przybylowski’s “complaints against Australia” which, amongst other things, alleges fraud and deceit on the part of the President. This letter is central to the complaint that Mr Przybylowski made to the Commission.
3. In opposing the application, Mr Przybylowski relied on his affidavit affirmed 22 June 2021 and several other documents contained in the Court Book. The affidavit read and materials tendered by Mr Przybylowski were admitted subject to relevance and with a limitation, where appropriate, that they be received by way of submission.
4. Before turning to the decision the subject of the substantive review proceedings, I note that the present proceedings are one of a number of judicial review applications Mr Przybylowski has pursued in this Court. The applications instituted by Mr Przybylowski may be traced back to the marriage of Mr Przybylowski in Poland and his subsequent divorce in Australia in 2002. A Polish Court has made orders requiring Mr Przybylowski to pay his former wife spousal support and child support (together, the **Polish Orders**). The Polish Orders were each, respectively, registered in 2014. Following a decision made on 10 January 2014 by the Child Support **Registrar,** **Department** of Human Services (Child Support), Mr Przybylowski sought review of the Registrar’s decision in the Social Security Appeals Tribunal (**SSAT**) (now the Social Services division of the Administrative Appeals Tribunal (**AAT**)) on 17 June 2014. The SSAT affirmed the decision of the Registrar on 27 August 2014 (**2014 SSAT decision**).
5. I interpolate to note that an aspect of Mr Przybylowski’s grievance in relation to the Polish Orders is that for a period the spousal maintenance orders were treated as having no end date and as a result the Department continued to accrue Mr Przybylowski’s liability for spousal maintenance. It was not until August 2016 that the Department was informed by the relevant Polish authority that Mr Przybylowski’s liability for spousal maintenance ended on   
   17 May 2011. Upon obtaining this information the Department credited $4,548.46 to   
   Mr Przybylowski’s account. This had the effect of reducing the amount owed by   
   Mr Przybylowski.
6. I stress that this issue is but one aspect of Mr Przybylowski’s grievance in relation to the issues connected with the Polish Orders. Another aspect of Mr Przybylowski’s grievance at a general level is that having obtained a divorce from the **Family Court** of Australia in February 2002, he regards himself as having a contract with the Family Court and/or the judiciary that precludes any liability he would otherwise have for spousal maintenance under the Polish Orders to the period preceding the entry of orders in the Family Court proceeding.
7. Mr Przybylowski has initiated a number of proceedings appealing or seeking various administrative decisions be made in respect of, or relating to, the Polish Orders. It is necessary to briefly describe each of those proceedings.
8. Mr Przybylowski appealed the SSAT’s decision to the Federal Circuit Court (**FCC**) in September 2014. Mr Przybylowski did not enumerate the grounds of appeal and instead relied on a document in which, under the heading “questions of law”, he claimed that the decision was made by fraud, the court in Poland lacked jurisdiction to make an order for spousal maintenance and that he had been the subject of financial and procedural bullying. He sought relief in the form of dismissal of the registration of spousal maintenance, a return of the amounts paid in spousal maintenance, his “court costs” in the amount of $40,000 and compensation for bullying. In May 2015, the FCC found that the appeal was “misconceived and entirely lacking in merit” and dismissed the application as incompetent (**2015 FCC Judgment**).
9. In mid-2016, Mr Przybylowski made a complaint to the Family Court in relation to the FCC proceedings. It is not necessary for the purpose of this application to recount that complaint.
10. Mr Przybylowski applied to this Court seeking review of a decision made by the Commission on 12 May 2017 not to inquire into four separate complaints made by him. The substance of the complaints is summarised in *Przybylowski (No 2)* at [14] – [16] and comprise of two complaints in respect of various decisions of the Department in relation to child support and spousal maintenance and a complaint which made allegations against the Family Court. The then Attorney-General was granted leave to intervene and moved for summary judgment on the same grounds as set out in paragraph 4 of these reasons. The Attorney-General’s application was heard by Perry J who dismissed the proceedings on the basis that the application failed to disclose any reasonable cause of action and had no reasonable prospects of success: *Przybylowski (No 2)* at [32] – [41].
11. Mr Pzybylowski next brought proceedings in this Court for review of a decision of the Commission made on 13 June 2019 not to continue to inquire into his complaint. A summary of the complaint is extracted at [4] of *Przybylowski*:

4 The complaint to the Commission which gives rise to the present proceeding is to be found in complaint forms lodged with the Commission on 1 and 7 December 2018. The reasons of the President summarise these complaints as follows:

Summary of your current complaint

The following claims can be discerned from the complaint forms and associated documents and submissions you provided to the Commission:

* You claim the Commission did not revise its decision even though you say you proved that the Commission’s ‘boss’ is responsible for the *United Nations Convention on the Recovery Abroad of Maintenance* (UNCRAM).
* You claim the Commission did not disclose information to you about the UNCRAM and the Attorney-General’s responsibilities.
* You claim the Commission has twice breached its independence and impartiality by politically motivated decisions.
* You say that Poland has denied sending any maintenance request for any child support/spousal maintenance after your maintenance obligations ended on 21 June 2013 and the registration of the maintenance order is corruption.
* You claim the Commission misled the FCA that Complaint 207-01021 was under the ICCPR when in fact it was under the *Age Discrimination Act,* 2004 (Cth)(ADA).
* You are unable to enter or live in Poland, the country of your birth, because of the inaction of the Commission.
* You claim the Commission has breached Article 12 of the ICCPR from 2014.
* You have requested that all the documents you provided to the Commission in relation to Complaint 2017-01021 and Complaint 2018-10660 also be considered in relation to your complaint.

The then Attorney-General intervened in the proceedings and moved for summary dismissal under rr 26.01(a) and (c) of the Rules. Justice Flick heard the application concurrently with an application filed by Mr Przybylowski for a stay “*until Poland will [be] assessed under the EU Law Regulations*”. His Honour dismissed the proceedings on the basis that the arguments sought to be advanced by Mr Przybylowski were either non-justiciable or lacking in substance, the end result being that his application had no reasonable prospects of success. His Honour also dismissed Mr Przybylowski’s interlocutory application as the relief sought was not apparent and in any event fell away upon the dismissal of the proceedings: *Przybylowski* at [22] – [24]. Mr Przybylowski filed an application seeking leave to appeal from Flick J’s judgment. The application for leave to appeal has not been heard.

1. The present proceedings are the third judicial review proceedings in this Court brought by Mr Przybylowski in relation to matters broadly related to spousal maintenance and child support required to be paid following registration of the Polish Orders. The genesis of the complaint in the present proceedings is the refusal of the AAT to “re-open” or “re-decide” the issues determined in the 2014 SSAT decision, in circumstances where an appeal from that decision to the FCC was dismissed in 2015. That refusal by the AAT is alleged by Mr Przybylowski to amount to a breach of his human rights, thus the complaint to the Commission that gives rise to the present proceedings.

# The delegate’s decision

1. The relevant decision in the present proceedings was made by a delegate of the President of the Commission. It was a decision not to inquire into a complaint made by   
   Mr Przybylowski against the AAT. The delegate was authorised pursuant to ss 8(6A) and 19(1) of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) to make the decision that is the subject of this review. The decision was made pursuant to s 20(2)(ba) of the AHRC Act which provides:

(2) The Commission may decide not to inquire into an act or practice, or, if the Commission has commenced to inquire into an act or practice, may decide not to continue into the act or practice, if:

…

(ba) the Commission is satisfied, having regard to all the circumstances, that an inquiry, or the continuation of an inquiry, into the act or practice is not warranted;

1. Section 20(2)(ba) of the AHRC Act must be read in the context of the statutory scheme. I note in this regard that s 11(1)(f) of the AHRC Act provides that the function of the Commission includes:

(f) to:

(i) inquire into any act or practice that may be inconsistent with or contrary to any human right; and

(ii) if the Commission considers it appropriate to do so—endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry;

## Complaint by Mr Przybylowski to the Commission

1. On 26 November 2020, Mr Przybylowski made the complaint to the Commission that is the subject of the delegate’s decision under s 20(2)(ba) of the AHRC Act. The complaint is specifically directed at the decision of the President of the AAT in November 2020 not to   
   “re-open” or to “re-decide” the 2014 decision of the SSAT. In an email dated   
   25 November 2020, sent in response to Mr Przybylowski’s letter to the President of the AAT dated 19 November 2020, Mr Przybylowski was informed as follows:

…Once the Tribunal has delivered its decision and reasons, it cannot revisit or reconsider the substance of a matter. The determinative function is at an end. Section 34(1) of the AAT Child Support Review Directions prohibits any further explanation of the decision where we have provided a statement of reasons for the Tribunal’s decision.

As you were advised in the letter that accompanied the decision and reasons for the decision in 2014, you may appeal the AAT’s decision on a question of law to the Federal Circuit Court of Australia. There are time limits for the filing of an application for review or an appeal (28 days after giving of the document setting out the terms of the AAT’s decision).

1. Mr Przybylowski set out the details of his complaint in a complaint form emailed to the Commission on 26 November 2020, a letter dated 5 December 2020 and an email dated 10 December 2020 which attached a further letter dated 2 December 2020.
2. The delegate summarised Mr Przybylowski’s complaint in a letter sent to   
   Mr Przybylowski on 17 December 2020 (**the natural justice letter**). By this letter, the delegate informed Mr Przybylowski that the delegate was considering exercising the power under   
   s 20(2)(ba) not to inquire into his complaint. The delegate summarised Mr Przybylowski’s complaint in the following terms:

* In November 2020, the President of the AAT refused to remake a decision by the Social Security Appeals ((SSAT) – now the AAT) that was ‘*made by fraud*’ in the case 2014/SC005301 which was decided on 27 August 2014.
* This was even though you sent him the reasons for the judgement of the Polish order dated 28 September 2006 and the Polish determination for the judgement of 17 May 2006, which was made again on 22 September 2020.
* You also sent him the Polish note dated 21 June 2016 to prove that the Polish order of 28 September 2006 was non-justiciable in Australia from 17 May 2011.
* The money paid to Poland was not returned to your son Matthew.
* The AAT has breached Article 14 of the International Covenant on Civil and Political Rights (ICCPR).
* Before you request that the United Nations bring a case against Australia and Poland to the International Court of Justice (ICJ) you request to be compensated by the AAT.
* You are giving the Commonwealth of Australia a second chance by bringing this case against the AAT to the Commission.

1. In the natural justice letter, the delegate set out her ‘current assessment’ of Mr Przybylowski’s complaint. The delegate noted that despite the fact that Mr Przybylowski had ticked boxes nominating the claims of victimisation and age discrimination as part of his complaint, these claims had not been substantiated. Accordingly, the Commission informed Mr Przybylowski that his complaint would only be considered as a complaint alleging a breach of human rights under Art 14 of the International Covenant on Civil and Political Rights (**ICCPR**).
2. The delegate then informed Mr Przybylowski of the terms of s 20(2)(ba) and that the delegate’s current assessment indicated that it may exercise the power under s 20(2)(ba) not inquire into the complaint because of the lack of merit of the claim, the availability of other remedies and the lack of prospects of a practical outcome. Mr Przybylowski was invited to respond.
3. Mr Przybylowski made two further submissions on 18 December 2020, and another submission on 20 December 2020. On 21 December 2020, the delegate advised Mr Przybylowski that it did not need any further information from him.
4. In sum, Mr Przybylowski in his submissions requested that the Commission and/or the AAT dismiss the SSAT’s decision of 27 August 2014; that payments made by way of spousal maintenance be returned from Poland on account of his son; that he receive compensation in the amount of $25,000 (which he referred to as his court costs) and a review under Regulation 36 of the *Family Law Regulations 1984* (Cth) by transfer from the AAT to an Australian court or otherwise to the International Court of Justice (**ICJ**). Regulation 36 requires that any application to vary an overseas maintenance order or liability be made to a court having jurisdiction under the *Family Law Act 1975* (Cth).
5. Mr Przybylowski then made a number of requests for the Commission to translate a document written in the Polish language. The Commission requested that Mr Przybylowski clarify how the Polish material was relevant to the specific complaint that it was considering. In reply Mr Przybylowski advised that the material included evidence that “the spousal maintenance up to 17 May 2011 is not registrable in liability”. The Commission understood Mr Przybylowski to be submitting that the document was relevant to Mr Przybylowski’s desire to challenge the validity of the decisions of the Department and the subsequent decision of the SSAT if the AAT had power to re-open or re-decide those matters. The Commission took the view that in all circumstances, an assessment of the correctness of those decisions was beyond its jurisdiction and declined to translate the Polish material on the basis that it was irrelevant to its task. The Commission’s conclusion in this regard was communicated in its reasons for deciding not to inquire further into Mr Przybylowski’s complaint.

## Decision of the delegate

1. On 14 January 2021, the delegate decided, pursuant to s 20(2)(ba) of the AHRC Act, not to inquire into Mr Przybylowski’s complaint and provided the following reasons for making that decision.
2. *First*, there was no merit to the complaint for a number of reasons:
3. Article 14 of the ICCPR deals with the right to equality before courts and tribunals, including the right of access to a fair and public hearing by a competent, independent and impartial tribunal established by law. However, it is not an absolute right and limitations may be imposed if they are considered compatible with the right, including limitations that pursue a legitimate aim. The delegate further noted that in accordance with the Statement of Human Rights Committee, General Comment No. 32 that “the right of equal access to a court, embodied in article 14, paragraph 1, concerns access to first instance procedures and does not address the issues of the right to appeal or other remedies”.
4. Mr Przybylowski had already exercised through the appropriate mechanisms the available avenues to review first, the Registrar’s decision, and secondly, the 2014 SSAT decision. In those circumstances the delegate was satisfied that notwithstanding that Mr Przybylowski disagreed with the outcome of his earlier challenges to the decisions, the AAT’s decision in November 2020 not to review or re-decide the 2014 SSAT decision was consistent with the relevant regulations and the legitimate public policy objective of not allowing parties to repeatedly litigate matters that have already been finally determined.

Accordingly, the delegate concluded that the information provided by Mr Przybylowski did not support a conclusion that there had been a breach of Art 14 of the ICCPR.

1. *Secondly*, if Mr Przybylowski wished to pursue a complaint about the AAT in respect of the decision not to “re-visit” or “re-open” the 2014 SSAT decision there was an available avenue. Namely, the complaint process established under the AAT’s service charter which culminates in a complaint to the Commonwealth Ombudsman in respect of the services provided by the AAT.
2. *Thirdly*, the delegate considered that it was highly unlikely that Mr Przybylowski could obtain the relief he sought from the Commission (dismissal of the AAT decision, the AAT’s agreement to remake the 2014 decision of the then SSAT, repayments of his spousal support, compensation for previous court costs, or an order from the ICJ). In this context, the delegate expressly stated in the natural justice letter:

Firstly, as explained previously, your claim regarding a breach of human rights appears to be misconceived and/or lacking in substance. Further, even where the Commission is of the view that there has been a breach of human rights, the Commission does not have the ability to require a respondent to take particular action or provide a particular remedy to a complainant.

While the Commission can, where appropriate, assist the parties to resolve a complaint through conciliation, the circumstances of this matter suggest it is highly unlikely that the AAT would agree to provide you with the remedies you seek in the context of any conciliation.

# Grounds and relief sought

1. Mr Przybylowski filed an application for judicial review on 20 January 2021. He purports to identify three grounds of review. Those grounds merely repeat ss 6(1)(a), (c) and (g) of the ADJR Act. In terms of relief, Mr Przybylowski seeks an order ‘from the ICJ’ and an order that this Court transfer the matter to the ICJ.

# Notices issued under s 78B of the Judiciary Act 1903

1. Mr Przybylowski has filed five notices under s 78B of the *Judiciary Act 1903*. The section 78B notices should not be considered part of Mr Przybylowski’s pleadings: *Przybylowski (No 2)* at [24]. At their highest, they are notices to the Commonwealth and State Attorneys-General about the existence of a constitutional matter. The constitutional matter must be found in terms in Mr Przybylowski’s ‘pleadings’. Here, no “real and substantial” constitutional issue is raised by Mr Przybylowski’s pleadings, and so s 78B of the *Judiciary Act 1903* is not engaged: *Re Culleton* [2017] HCA 3; (2017) 340 ALR 550 at [29] (Gageler J); *Glennan v Commissioner of Taxation* [2013] HCA 31; (2003) 198 ALR 250 at [14] (Gummow, Hayne and Callinan JJ); *Luck v Secretary, Department of Human Services* [2017] FCA 540; (2017) 72 AAR 219 at 225 [31] - [32] (Kerr J). For completeness, I note that there has been no indication in the response to the notices which have been served that the Commonwealth or State Attorneys-General wish to be heard in the proceedings on the purported constitutional issues.

# Consideration

1. Mr Przybylowski has not particularised the grounds of review set out in his Originating Application. When offered the opportunity to amend his Originating Application, he refused to do so. In the substantive application, the onus is on Mr Przybylowski to demonstrate a relevant error. In that context, I note that a failure to provide particulars is a sufficient basis to dismiss an application for judicial review: *FEY17 v Minister for Home Affairs* [2020] FCA 1014 at [90] (Greenwood J); *FKV17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1950 at [45] (Collier J).
2. Having regard to the need to exercise caution in exercising the power of summary dismissal, I have attempted to address the substance of Mr Przybylowski’s submission in respect of the bare grounds of review as best I am able to understand them.
3. The first ground is an assertion of a breach of procedural fairness: ADJR Act, s 6(1)(a). Mr Przybylowski has not established a breach of procedural fairness in relation to the decision that is the subject of his complaint. In the natural justice letter, Mr Przybylowski was advised of concerns the delegate had about his complaint and he was given an opportunity to, and did, respond. His responses were taken into account by the delegate. Although the delegate wrote to Mr Przybylowski on 21 December 2020 to advise Mr Przybylowski that the Commission did not require any further information from him, this was simply acknowledging that he had commented on the matters raised in the natural justice letter and that the Commission was in a position to make its decision on the material which it had.
4. The delegate proceeded to make her decision on 14 January 2021. Mr Przybylowski continued to correspond with the Commission about the translation of the Polish documents but at no stage did he indicate that he intended providing any further response to the natural justice letter (rather his email of 18 December 2020 and letter dated 17 December 2020 proceeded on the basis that it was his entire response). For instance, Mr Przybylowski’s letter of   
   17 December 2020 (which appears to be erroneously dated in the year 2000) notes in the subject line that it is the “complainant response to the AHRC Assessment dated 17 December 2020”. In further email correspondence sent on 18 December 2020, Mr Przybylowski also sought confirmation from the Commission that they have received his “complainant response” being the letter of 17 December 2020 and its attachments.
5. The second ground alleges that the person who made the decision did not have jurisdiction to make the proposed decision: ADJR Act, s 6(1)(c). This ground must fail. A decision under   
   s 20(2) of the AHRC Act is to be made by ‘the Commission’. The reference to ‘the Commission’ is to be read as a reference to ‘the President’: AHRC Act, s 8A(7). At all relevant times the decision-maker was a delegate of the President of the Commission pursuant to s 19(1) of the AHRC Act.
6. The third ground alleges fraud: ADJR, s 6(1)(g). It does not identify who committed the fraud, what actions or omissions constitute the fraud or how the fraud affected the decision. Fraud is a serious allegation which must be distinctly pleaded (see r 16.42 of the Rules) and proved. The bare allegation of fraud is not properly made and is not properly particularised, even having regard to the material on which Mr Przybylowski relies. Mr Przybylowski relied on letters of complaint he had written to the Prime Minister of Australia. These letters were treated as submissions on the present application. In these letters Mr Przybylowski repeats and enlarges bare allegations of fraud against a variety of people and organisations and otherwise seeks to argue the merits of the original registration of the Polish Orders, the 2014 SSAT decision and the 2015 FCC Judgment.
7. For these reasons, I am satisfied that the Attorney-General has established that each limb of Mr Przybylowski’s application should be summarily dismissed under rr 26.01(a) and (c) of the Rules.
8. The Attorney-General also relies on r 26.01(1) of the Rules, contending that the application is an abuse of process. As noted above, on 27 February 2020, Flick J gave summary judgment against Mr Przybylowski in an earlier proceeding: *Przybylowski*. In that proceeding,   
   Mr Przybylowski sought to obtain an order from this Court referring the matter to the ICJ. It appears that in the present proceedings, Mr Przybylowski is again seeking to have this Court make orders referring his complaints to the ICJ. In his Originating Process Mr Przybylowski seeks an order as follows:

**Orders sought**

1. Applicant request an order from the ICJ after transfered [sic] the AHRC whole material including with the complaint ref : 2020-15540 under the Article 16 of the applicable CONVENTION by the Federal Court of Australia to the ICJ, in which will be decided:

about the Polish Judgment for the Australian Divorce Order ZP 3933/01 dated 14 January 2002 which Australia and the Republic of Poland must accept and obey under the UN Treaty - the Convention on the Recovery Abroad of Maintenance. Done at New York, on 20 June 1956:

a. the one of ref: XIII Co 39/04 dated 22 September 2020, **accepted by the Polish Judiciary finally,** which recognising the Australian Divorce Order ZP 3933/01 dated 14 January 2002 in Polish law from 15 February 2002

b. the one of ref : 111 RC 76/06 dated 28 September 2006, **accepted by the Commonwealth of Australia Judiciary finally**, which recognising the Australian Divorce Order ZP 3933/01 dated 14 January 2002 in Australian law from 17 May 2006 as says the Australian Human Rights Commission's decision in page 5 -

"*You then appealed the SSAT's decision of 27 August 2014 to the Federal Circuit Court of Australia (FCCA) and in May 2015 your appeal was rejected*".

(emphasis in original)

1. In doing this Mr Przybylowski is seeking to have this Court consider and revisit matters which were the subject of the 2014 SSAT decision and 2015 FCC Judgment in order to pursue relief that is non-justiciable: *Przybylowski* at [14]. Mr Przybylowski seeks to do so in circumstances where he is well beyond the time limit imposed on an appeal from the 2015 FCC Judgment. There is a public interest that inheres in preventing individuals from repeatedly litigating matters that have been the subject of determination by a Court. Mr Przybylowski’s attempt to mount a collateral challenge to the 2015 SSAT decision and the 2015 FCC Judgment in these proceedings is at best unorthodox but in the context of the whole of the broader procedural history I am satisfied that it amounts to an abuse of process. Accordingly, I am satisfied that an additional basis on which these proceedings ought to be summarily dismissed is in reliance on r 26.01(d) of the Rules.

# Conclusion

1. The proceedings for judicial review is dismissed on a summary basis pursuant to r 26.01 on the basis that each of the criteria in rr 26.01(a), (c) and (d) is established. The Attorney-General does not seek an order for her costs and accordingly I make no order as to costs.

|  |
| --- |
| I certify that the preceding forty-six (46) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Cheeseman. |

Associate:

Dated: 11 November 2021