FEDERAL COURT OF AUSTRALIA

Verrill v Minister for Immigration, Citizenship and Multicultural Affairs [2024] FCA 802

File number(s):	NSD 100 of 2024
Judgment of:	**THAWLEY J**
Date of judgment:	19 July 2024
Catchwords:	**MIGRATION** – application for extension of time to bring an application for judicial review of a decision of the Administrative Appeals Tribunal affirming a decision of a delegate of the Minister not to revoke the cancellation of the applicant's visa under s 501CA(4) of the *Migration Act 1958* (Cth) – whether necessary in interests of justice to grant extension – extension of time granted **MIGRATION** – application for judicial review – whether Tribunal overlooked a clearly articulated submission with respect to the impact of the visa cancellation on Australian business interests – whether Tribunal failed to consider impact of the visa cancellation on Australian business interests – whether applicant was denied procedural fairness in failing to inform the applicant of his right to invoke the privilege against self-incrimination in relation to questions asked by the Tribunal and the respondent – Tribunal overlooked clearly articulated submission – not necessary to determine whether denial of procedural fairness – application allowed
Legislation:	*Migration Act 1958* (Cth) *Federal Court Rules 2011* (Cth)
Cases cited:	*Arachchi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 1311 *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 *In re Genese; Ex parte Gilbert* (1886) 3 Morr 223 *Nathanson v Minister for Home Affairs* [2022] HCA 26; 276 CLR 80 *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17; 275 CLR 582 *Singh v Minister for Home Affairs* [2019] FCA 905 *Sorby v Commonwealth of Australia* [1983] HCA 10; 152

	CLR 280 *Tabuarua v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCA 748 *Tonga v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1179 *Tu'uta Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] HCA 28; 96 ALJR 819
Division:	General Division
Registry:	New South Wales
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	40
Date of hearing:	19 July 2024
Counsel for the Applicant:	J Donnelly
Solicitor for the Applicant:	Zarifi Lawyers
Counsel for the First Respondent:	G Johnson
Solicitor for the First Respondent:	Sparke Helmore Lawyers
Counsel for the Second Respondent:	The Second Respondent filed a submitting notice

ORDERS

NSD 100 of 2024

BETWEEN:	**DAVID VERRILL** Applicant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent

ORDER MADE BY: **THAWLEY J**

DATE OF ORDER: **19 JULY 2024**

THE COURT ORDERS THAT:

1. The time to bring an application for judicial review be extended under s 477(2) of the *Migration Act 1958* (Cth) until today.
2. The applicant is granted leave to file the amended originating application for review of a migration decision annexed to the affidavit of Mr Zarifi affirmed 6 March 2024 and that application be taken as filed.
3. The application be allowed.
4. There issue absolute in the first instance:
   (i) a writ of certiorari directed to the second respondent quashing the decision of 16 November 2023; and
   (ii) a writ of mandamus directed to the second respondent to determine the applicant's application to the second respondent according to law.
5. The first respondent pay the applicant's costs.

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

REASONS FOR JUDGMENT

THAWLEY J

BACKGROUND

1 The applicant applies for an extension of time to lodge an application for judicial review of a decision of the Administrative Appeals **Tribunal**. The applicant has identified three proposed grounds of judicial review on which he intends to rely if the extension is granted.

2 The applicant is a citizen of the United States. He arrived in Australia in 1978, at the age of 6. He has a lengthy criminal history in Australia, including a number of domestic violence related offences.

3 On 3 February 2023, the applicant's Class BF transitional (permanent) visa was cancelled under s 501(3A) of the *Migration **Act** 1958* (Cth). The applicant applied for revocation of the cancellation decision. On 24 August 2023, a delegate of the Minister for Immigration, Citizenship and Multicultural Affairs decided under s 501CA(4) of the Act not to revoke the cancellation decision.

4 The applicant filed an application for review of the delegate's decision in the Tribunal on 25 August 2023. The Tribunal heard the application on 30 October 2023. The applicant was unrepresented at the hearing. On 16 November 2023, the Tribunal affirmed the delegate's decision not to revoke the cancellation decision. This was the 84th day after the delegate's decision was notified to the applicant, the significance of which lies in s 500(6L)(c) of the Act. That provision deems the decision under review to be affirmed if the Tribunal has not made a decision within the period of 84 days after the day on which the person was notified of the decision.

5 Written reasons for the Tribunal's decision were given on 21 December 2023, 35 days after the decision was made. This was the last day on which the applicant could file an application for judicial review of the decision made on 16 November 2023, because s 477A(1) requires such an application to be brought within 35 days of the date of the decision.

6 The applicant filed his application for an extension of time under r 31.23 of the *Federal Court Rules 2011* (Cth) on 4 February 2024.

APPLICATION FOR AN EXTENSION OF TIME

7 Section 477A(2) empowers the Court to extend the 35 day period. That section provides:

> (2) The Federal Court may, by order, extend that 35 day period as the Federal Court considers appropriate if:
>
> (a) an application for that order has been made in writing to the Federal Court specifying why the applicant considers that it is necessary in the interests of the administration of justice to make the order; and
>
> (b) the Federal Court is satisfied that it is necessary in the interests of the administration of justice to make the order.

8 In *Tu'uta Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] HCA 28; 96 ALJR 819 at [12], the plurality stated (footnotes omitted):

> On its face, the power conferred by s 477A(2) is unfettered except by the requirements of a written application in conformity with s 477A(2)(a) and the Court's satisfaction that an order extending time "is necessary in the interests of the administration of justice". Other than the "interests of the administration of justice", there are no mandatory relevant considerations, whether express or to be implied from the "subject-matter, scope and purpose" of the Act. The focus of s 477A(2)(b) is not on the interests of the applicant, but the broader interests of the administration of justice. So framed, the paragraph allows the Court to look at a myriad of facts and circumstances, including the length of the applicant's delay, reasons for the delay, prejudice to the respondent, prejudice to third parties and the merits of the underlying application. The level of satisfaction for the Court to reach is not low: the Court must be satisfied not just that an extension of time is desirable, but that it is needed in the interests of the administration of justice.

9 There is some delay, but account should be taken of the fact that the Tribunal's written reasons only became available 35 days after its decision was made. One of the primary purposes of a statement of reasons is to enable determination of whether a decision is affected by error – see the observations of Meagher JA in ***Beale*** *v Government Insurance Office of NSW* (1997) 48 NSWLR 430 at 441-442 which, although made by reference to the judicial obligation to provide reasons, apply equally to the statutory obligation to provide reasons in the administrative context. The absence of written reasons, even where oral reasons have earlier been given, hinder the ability to give meaningful consideration to a challenge to the decision. Where oral reasons have not earlier been given, it is next to impossible to give meaningful consideration to a challenge.

10 There are other purposes to preparing reasons for a decision. One, also referred to by Meagher JA in *Beale* at 442, is to promote the objective of the decision-maker making a considered and rational decision, by identifying and addressing the relevant facts and issues.

11 The process of preparing written reasons promotes: the identification of the correct legal and factual issues; the identification and evaluation of the arguments which have been made; the identification and appropriate weighing of the relevant evidence or other material; an examination of the merit, rationality and logic of any initial views formed; the ultimate decision reaching the correct outcome or the preferable outcome where different outcomes are open. A decision-maker's views can change during the course of preparing written reasons, both in relation to the outcome and the reasons for that outcome. For this reason, whilst it is not always possible to provide written reasons at the time of making a decision, particularly in circumstances of urgency, it is generally preferable to do so provided they can be adequately expressed given the relevant time constraints.

12 I do not wish to suggest that this happened in the present case, but it should be observed that it would not be appropriate to make a decision because of a statutory time constraint of a kind such as that contained in s 500(6L)(c) without in fact going through the intellectual process of reviewing the decision under review according to the express and implicit requirements of the statute, even though written reasons were not able to be provided until some later time. A decision must be one which is made as a consequence of the exercise of the jurisdiction to review. In a case such as the present, the exercise of the jurisdiction to review required the Tribunal to read, identify, understand and evaluate the representations – see: ***Plaintiff M1****/2021 v Minister for Home Affairs* [2022] HCA 17; 275 CLR 582.

13 The applicant, who was not legally represented, sought legal advice on 18 December 2023, but was not able to provide the lawyer he contacted with the reasons for the decision which had been made. Obviously, that lawyer was unlikely to have been able to form a view about the prospects of an application for judicial review and was unlikely to have been able to make the certification contemplated by s 486I of the Act. That section provides:

> **486I Lawyer's certification**
>
> (1) A lawyer must not file a document commencing migration litigation, unless the lawyer certifies in writing that there are reasonable grounds for believing that the migration litigation has a reasonable prospect of success.
>
> (2) A court must refuse to accept a document commencing migration litigation if it is a document that, under subsection (1), must be certified and it has not been.

14 It follows that the lawyer would not have been able to file an application within time, unless the applicant was able to identify to the lawyer some jurisdictional error apparent otherwise than from an examination of the reasons for decision. The applicant attempted to file an

application four or five times from 18 December 2023, but made various mistakes such that, by the time he got the relevant forms correct, he needed instead to apply for an extension of time.

15 Quite properly, the Minister did not oppose an extension of time, although I did not understand him to consent to the extension. In any event, the Court must be satisfied that it is necessary in the interests of the administration of justice to make the order extending time. For reasons given below, the proposed application for judicial review has merit and should be allowed. The extension of time to bring the application is granted.

APPLICATION FOR REVIEW

Grounds of application

16 As mentioned, the applicant identifies three grounds of review in a proposed amended originating application. In summary, these were that the Tribunal:

(1) "failed to complete the exercise of its jurisdiction" by overlooking and failing to engage with the "business interests claim", by which the applicant contended – in relation to paragraph 9.4 of *Direction No 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (**Direction 99**) – that remaining in Australia would have a positive impact on his son's roofing business, for which he intended to work;

(2) "failed to complete the exercise of its jurisdiction" by failing to consider the mandatory consideration provided for in paragraph 9.4 of any impact of its decision on Australian business interests; and

(3) denied the applicant procedural fairness in failing to inform the applicant of his right to invoke the privilege against self-incrimination in relation to questions asked by the Tribunal and in cross-examination by the Minister's representative.

Grounds 1 and 2

17 The first and second grounds are conveniently addressed together. Paragraph 9.4 of *Direction 99*:

> **9.4 Impact on Australian business interests**
>
> (1) Decision-makers must consider any impact on Australian business interests if the non-citizen is not allowed to enter or remain in Australia, noting that an employment link would generally only be given weight where the decision

> under section 501 or 501CA would significantly compromise the delivery of a major project, or delivery of an important service in Australia.

18 The Tribunal addressed this consideration at [118] of its reasons, stating:

> **Other consideration (d): Impact on Australian business interests**
>
> The Applicant does not claim, and there is otherwise nothing on the material to suggest, that a non-revocation decision would significantly compromise the delivery of a major project or important service in Australia. Overall, I find that this Other Consideration (d) is of neutral weight.

19 Paragraph 9.4 requires the decision-maker to consider "any impact on Australian business interests if the non-citizen is not allowed to enter or remain in Australia". Paragraph 9.4 does not apply only to an impact upon a "major project" or "important service" – see: *Singh v Minister for Home Affairs* [2019] FCA 905 at [10] and [11] (Middleton J); *Arachchi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 1311 at [71] (Rangiah J); *Tonga v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1179 at [34] (SC Derrington J). As Rangiah J observed in *Tabuarua v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCA 748 at [102]:

> Accordingly, where there is a clearly articulated submission that the removal of the person from Australia will have an impact on even a small business, the Tribunal is required to consider any such impact.

20 The applicant submitted that, before the Tribunal, he made the following contentions:

- he had organised a future employment program with his son;
- he would be working with his son's business in Mackay, specialising in roofing;
- he would be able to assist in his son's roofing business and the business would substantially benefit from his employment;
- the business was involved in the regional construction sector;
- the business covers a large area in Queensland;
- the business has a significant contract; and
- the non-revocation decision would impact the business by affecting its capacity to maintain itself and expand.

21 The applicant submitted that:

(a) the Tribunal only addressed the second part of paragraph 9.4 which concerned whether the non-revocation decision would significantly compromise the delivery of a major project or delivery of an important service;

(b) the Tribunal did not address the first part of paragraph 9.4 and his business interests claim as it emerged on the material and during the course of the hearing; and

(c) the natural inference from the absence of a reference or engagement with his business interests claim was that the Tribunal overlooked the claim.

22 The Minister submitted that there was no error in the Tribunal's conclusion at [118] of its reasons and that the applicant did not advance any substantial and clearly articulated representations for the Tribunal's consideration about impact on business interests. The Minister submitted:

> [10] …The applicant gave evidence that he had a "future employment program" with his son. He said that the business would "substantially benefit" without providing any detail, or explaining what he meant. It was not for the Tribunal to ask for further representations from the applicant or to make inquiries into the representations he had made: *Minister for Immigration and Border Protection v Maioha* (2018) 267 FCR 643; [2018] FCAFC 216, [48] (Rares and Robertson JJ). The applicant also gave a brief explanation of the nature of his son's company, and said that "I'll be able to assist him in that". The Tribunal then put to the applicant, that "you would say then that there is an impact on Australian business interests" being the "capacity of this regional construction business to maintain itself and expand", to which he responded "yes".
>
> [11] Notwithstanding the leading question the Tribunal asked about impact on Australian business interests, in response to which the applicant again provided no detail or explanation, the applicant made no representations at all about the impact a non-revocation decision would have on his son's business. That the applicant said that he had future employment lined up, and that he could assist in that business, were not (substantial and clear) representations about the impact his absence from Australia would have on the business.

23 The business interests claim was put to the Tribunal in the following way the course of the applicant's oral submissions (Transcript (**T**) 99.39-100.25, emphasis added):

> MEMBER: And the final one that's in the direction 99 which is impact on Australian businesses business interests I should say is there anything that you want to say to me based on, you know, your skills and experience and your capacity to - - -
>
> MR D VERRILL: Well, I do have a future employment program organised with my son.
>
> MEMBER: Yes.
>
> MR D VERRILL: Both sons. But I'll be endeavouring the one at Mackay with the roofing. And his business would substantially benefit.

> MEMBER: So, regional construction is the kind of sector you're talking about?
>
> MR D VERRILL: Yes. Yes. Regional construction. As stated, he does have the whole area from Airlie Beach south to pretty much Sarina down to Mount (indistinct). But the contract now is just huge. He's yes, so I'll be able to assist him in that, which would also have a secondary assistance of a family member being still within his life.
>
> MEMBER: So you would then say that there is an impact on Australian business interests, that is, the capacity of this regional construction business to maintain itself and expand.
>
> MR D VERRILL: That's correct, yes.
>
> MEMBER: Okay.
>
> MR D VERRILL: And there also was a submission of a document from Stoddart Construction Company outlining the definite continuation of work. Because he is the major roofer for the whole of Stoddart Constructions Central Queensland.

24 The Minister submitted that this was not a substantial, clearly articulated claim because it was not sufficiently directed to the question of *impact* on Australian business interests. I do not accept that submission. It is true that the submission was not lengthy, and that it could have been more detailed, but its import was clear enough. Indeed, in the passage extracted above, the Tribunal expressly asked the applicant whether he claimed that there was an impact on Australian business interests for the purposes of *Direction 99*. The applicant indicated that he did make such a claim and explained what the claim was. He claimed that the business would substantially benefit from his involvement. This amounted to the identification of a positive impact if the applicant remained in Australia. The Tribunal asked the applicant whether the impact was "the capacity of this regional construction business to maintain itself and expand", to which the applicant answered that it was. This amounted to the identification of a negative impact if the applicant were unable to be involved with the business because of the visa cancellation. The applicant then referred to "a document from Stoddart Construction Company outlining the definite continuation of work". This was a reference to a letter from Ashley Blom from Stoddart Group SE Queensland which included:

> Stoddart Group SE Queensland has multiple roofing Projects lined up, providing ample opportunities for growth and expansion for Zachery Verrill[']s roofing construction company. With a consistent flow of projects in the foreseeable future, there will be a constant demand for skilled roofing professionals, potentially leading to the employment of extra employees such as David Verrill. This collaboration between the two companies promises to bring mutual benefits and long-term success.

25 The applicant confirmed that he would be working for his son's roofing company and that he had previously worked with him (during the period 2015 to 2020) for a total of about three or four years: T11. Mr Alfred Davis, a friend of the applicant, stated that the applicant intended

to work with his son's big roofing business in Mackay: T49. Mr Zachery Verill confirmed that he had provided a written offer of employment: T76. He also confirmed that the applicant had worked for him in the past and provided information about the nature of his business and the work that the applicant might undertake in the business: T79.

26 Not only did the Tribunal understand that a claim was made, but the Minister's representative understood that a claim was made, although the Minister's submissions tended to focus on the second part of paragraph 9.4 rather than the actual primary consideration set out in the first part of paragraph 9.4. The mandatory consideration is that the Tribunal "*must* consider *any* impact on Australian business interests if the non-citizen is not allowed to enter or remain in Australia". The Minister's submissions included (at T108):

> Impact on victims, Member, weighs neutrally. We also say that about the impact on Australian business interests. It's important to bear in mind for this consideration that the impact will generally only be given weight where it will significantly compromise the deliver[y] of a major project or delivery of an important service in Australia. There was no evidence from the applicant's son that he's – even if you were to accept that his roofing business is a major project or delivery of an important service – there's no evidence that the applicant being returned means that the business falls over or those services aren't able to be provided.

27 The Tribunal then stated:

> I'm just cognisant of a recent decision by her Honour, Justice Derrington in the Federal Court that seemed to expand our understanding of what that consideration requires. I'm not sure whether you're familiar with the decision I'm referring to. I don't immediately have the name of the decision in front of me. But that was partially the reason why I was asking questions with Mr Verrill around that.

28 The Minister's representative responded (at T109):

> And, Member, certainly those representations that have been made around his employment and how that and his participation in delivering that service in what the evidence seems to suggest is quite a large area of far north Queensland, it's certainly still something that you'll need to consider and take into account.

29 The Tribunal's reasons at [118] state that the applicant "does not claim, and there is otherwise nothing on the material to suggest" that a non-revocation decision would significantly compromise the delivery of a major project or important service in Australia. That comment is strictly accurate. But there is no mention of the fact that the applicant did expressly claim, by reference to *Direction 99*, that the non-revocation decision would have an impact on Australian business interests. As mentioned earlier, the Tribunal's decision was made on 16 November 2023, but the date of the written reasons was 21 December 2023. I infer from the terms of [118] of the decision that the Tribunal overlooked the claim which had been made,

both at the time it made the decision on 16 November 2023 and at the time it came to record its reasons for the decision which it had earlier made. I also infer that it failed to "evaluate" the claim in the sense described in *Plaintiff M1* at [24] to [27].

30 The applicant has therefore demonstrated a jurisdictional error on the part of the Tribunal.

Ground 3

31 It is strictly unnecessary to consider Ground 3. Nevertheless, I make the following observations.

32 The applicant submitted that: (a) he was asked by the Tribunal and in cross-examination about his use of illicit drugs in Australia; and (b) he was not warned that he could invoke the privilege against self-incrimination before answering those questions.

33 The applicant submitted that this failure to warn occasioned a practical injustice because the Tribunal's decision could have been different if he had been notified about the existence of the privilege and his right to invoke it. The applicant submitted that the Tribunal took his use of illicit substances into account when considering the cumulative effect of repeated offending by the applicant in Australia. There was, on the applicant's submission, a realistic possibility that the Tribunal could have drawn a different conclusion had the applicant been warned of his right to exercise the privilege.

34 The Minister submitted that, properly analysed, the applicant did not say anything which he had not already volunteered to the Department or that was otherwise in the materials already before the Tribunal. The Minister also submitted that no practical injustice was occasioned by the questioning as to the applicant's illicit drug use because his history of illicit substance use was uncontroversial.

35 Jurisdictional error (a breach of procedural fairness) may be established where a Tribunal, or a cross-examiner, asks a question in circumstances which give rise to a right to refuse to answer on the basis of the privilege against self-incrimination and a sufficient explanation of the existence of the right to refuse to answer is not given.

36 A careful analysis of the facts in any given case might be required to assess whether the privilege actually arises. Questioning about events which have been the subject of charges and convictions might not give rise to the possibility of self-incrimination, such that the right to refuse to answer the question does not arise – see: *Sorby v Commonwealth of Australia* [1983]

HCA 10; 152 CLR 280 at 290 (Gibbs CJ), citing *In re Genese; Ex parte Gilbert* (1886) 3 Morr 223.

37 It is also relevant to inquire whether the evidence is something more than what was already known on the available material. A breach of procedural fairness does not give rise to jurisdictional error unless the breach is material: *Nathanson v Minister for Home Affairs* [2022] HCA 26; 276 CLR 80 at [1]

38 In cases such as the present, which necessarily involve an examination of past criminal conduct and the likelihood of such conduct recurring, it would generally be desirable to inform an unrepresented litigant of the existence of the privilege.

39 It is unnecessary to reach a conclusion in the present case about whether there was a breach of procedural fairness or whether it was material given the application must be allowed for the reasons identified earlier.

CONCLUSION

40 Time should be extended and the application for judicial review allowed.

I certify that the preceding forty (40) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Thawley.

Associate: Annie Willox

Dated: 19 July 2024