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Benchmark

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Weekly Immigration Law Review

Editor: Oliver Jones, Barrister, Four Selborne

A Weekly Bulletin listing Decisions of Superior Courts of Australia covering immigration

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Executive Summary (One Minute Read)

Minister for Home Affairs v BRO18 (FCAFC) - Minister's error in relying convictions previously relied upon by delegate in relation to cancellation of visa not material

DKY22 v Minister for Immigration, Citizenship and Multicultural Affairs (FCAFC) - leave refused to rely on grounds not raised at first instance

AKW22 v Commonwealth of Australia (FCAFC) - appeal unsuccessful against striking out of claim for false imprisonment and refusal to enjoin the Commonwealth from removing the applicant from Australia

BZG18 v Minister for Immigration, Citizenship and Multicultural Affairs (FedCFamC2G) - Authority erred by failing to consider a complementary protection claim that was unarticulated but clearly emerged from the materials

ACN23 v Minister for Immigration, Citizenship and Multicultural Affairs (FedCFamC2G) - extension of time granted to seek judicial review, even though unsatisfactory explanation for delay

Park v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2) (FedCFamC2G) - invalid notification of delegate's decision with result Tribunal had jurisdiction

Temple v Minister for Immigration, Citizenship and Multicultural Affairs (FedCFamC2G) -

legally unreasonable for Tribunal not to adjourn decision where applicant's student enrolment expired

HABEAS CANEM

Expectant

Summaries With Link (Five Minute Read)

Minister for Home Affairs v BRO18 [2024] FCAFC 27
Full Court of the Federal Court of Australia
Bromwich, Derrington, & Snaden JJ
Migration - protection visa - Minister personally cancelled visa due to criminal convictions - Raper J of Federal Court held that Minister erred in relying on 2008 convictions for failure of character test, where delegate had already relied on those convictions for same purpose in 2009 and had decided not to revoke visa - Raper J further found error material - Minister appealed to Full Court on ground of materiality alone - error not material - appeal allowed.
Minister for Home Affairs v BRO18
[From Benchmark Friday, 15 March 2024]

DKY22 v Minister for Immigration, Citizenship and Multicultural Affairs [2024] FCAFC 24
Full Court of the Federal Court of Australia
Sarah C Derrington, Goodman, & Raper JJ
Migration - humanitarian visa - visa cancelled due to criminal convictions - delegate decided not to revoke cancellation - Administrative Appeals Tribunal affirmed - Feutrill J of Federal Court dismissed application for judicial review - appellant sought leave to amend notice of appeal to raise grounds not raised below, all concerning failure to comply with Direction 90 - no reasonable prosects of success - failure to raise at first instance unexplained - leave refused - appeal dismissed.
DKY22
[From Benchmark Friday, 15 March 2024]

AKW22 v Commonwealth of Australia [2024] FCAFC 22
Full Court of the Federal Court of Australia
Sarah C Derrington, Goodman, & Raper JJ
Migration - skilled independent visa - visa cancelled due to criminal convictions - Colvin J of Federal Court struck out statement of claim seeking damages for false imprisonment, and refused to enjoin the Commonwealth from removing applicant from Australia - appellant did not plead that his imprisonment was unlawful and conceded that he was not able to plead any probable cause or basis for unlawfulness of his detention - no basis for impugning primary judge's exercise of discretion regarding enjoining Commonwealth - not necessarily contempt of court to remove person from Australia while habeas corpus proceedings pending - leave to appeal refused.
AKW22
[From Benchmark Friday, 15 March 2024]

BZG18 v Minister for Immigration, Citizenship and Multicultural Affairs [2024] FedCFamC2G 212
Federal Circuit and Family Court of Australia (Division 2)

Judge Ladhams
Migration - protection visa - delegate refused to grant visa - Immigration Assessment Authority affirmed - Authority erred by failing to consider a complementary protection claim that was unarticulated but that clearly emerged from the materials - materiality - concept of risk under s36(2B)(c) of Act in light of *BCX16 v Minister for Immigration* [2019] FCA 465; 164 ALD 313 - application allowed.
BZG18
[From Benchmark Friday, 15 March 2024]

ACN23 v Minister for Immigration, Citizenship and Multicultural Affairs [2024] FedCFamC2G 189
Federal Circuit and Family Court of Australia (Division 2)
Judge Forbes
Migration - safe haven enterprise visa - delegate refused to grant visa - Immigration Assessment Authority affirmed - application for judicial review filed 556 days outside the 35-day time limit - applicant's phone was lost and replaced and a new email and phone number set up before the Authority's decision, but the applicant did not inform the Department, so that did not in itself justify the delay - inadequacy of the excuse did not outweigh justice of allowing the judicial review application to be heard and determined - Authority arguably erred by not attempting to contact Applicant - exceptional case - extension of time granted.
ACN23
[From Benchmark Friday, 15 March 2024]

Park v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2) [2024] FedCFamC2G 233
Federal Circuit and Family Court of Australia (Division 2)
Judge D Humphreys
Migration - Temporary Activity (Religious work) visa - delegate refused to grant visa - Administrative Appeals Tribunal dismissed application for review on ground out of time - delegate's notification letter was materially indistinguishable from the notification that was found to not satisfy s66(2)(d)(ii) of the *Migration Act 1958* (Cth) in *Sandor v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 434 - failure properly to identify the date on which the applicant was taken to have received it - no time limit on application to Tribunal for review - Tribunal had jurisdiction - application allowed.
Park
[From Benchmark Friday, 15 March 2024]

Temple v Minister for Immigration, Citizenship and Multicultural Affairs [2024] FedCFamC2G 214
Federal Circuit and Family Court of Australia (Division 2)
Judge Laing
Migration - student visa - delegate refused to grant visa - Administrative Appeals Tribunal

affirmed - Tribunal had dismissed application for review under s359C of *Migration Act 1958* (Cth) where applicant had responded late to request for evidence of student enrolment - Tribunal had discretion to adjourn review and give applicant opportunity to provide further evidence - student enrolment had expired - Tribunal mistaken about date by which Applicant had responded to request for evidence of enrolment - response less late than Tribunal apprehended - no evident and intelligible justification for proceeding to a decision instead of adjourning or allowing additional evidence - application allowed.

Temple

[From Benchmark Friday, 15 March 2024]

Executive Summary and (One Minute Read)

Smith v Fonterra Co-Operative Group Ltd et al (NZSC) - Supreme Court of New Zealand rejects attempt to strike out claim in tort relating to damage caused by climate change. Court affirms that principles of Maori customary law (tikanga Maori) inform the common law of New Zealand

Summaries With Link (Five Minute Read)

Smith v Fonterra Co-Operative Group Ltd et al [2024] NZSC 5
Supreme Court of New Zealand
Winkelmann CJ, Glazebrook, Ellen France, Williams, & Kos JJ
Mr Michael Smith as an elder and as a climate changes spokesperson for the Iwi Chairs Forum, a national forum of tribal leaders, brought suit against Fonterra and other large New Zealand corporations that were engaged in mining or manufacturing. Seeking an injunction, he raised three tort causes of action: public nuisance, negligence, and a new tort - damage to the climate system. All three counts were stricken by the Court of Appeal. In reversing this decision, the Supreme Court examined both climate change as well as legal remedies available in New Zealand. The Court was very clear that it was appropriate for the traditional or customary Maori law (tikanga Maori) to be considered in formulating the common law of New Zealand. The Court accepted as indisputable that climate change threatens human well-being and planetary health and that the evidence was unequivocal that humans had warmed the atmosphere principally through the emission of Green House Gasses (GHG). The Court also reviewed treaty obligations and New Zealand's comprehensive legislation - the *Climate Change Response Act 2002* (NZ) (CCRA). Mr Smith alleged that the defendants were responsible for more than one-third of New Zealand's GHG emissions. Mr Smith relied on the principles of tikanga Maori that establish various obligations and relationships with respect to land, the environment and that a breach creates a hara (issue) requiring utu (compensatory action) to restore ea (a state of harmony). The relief sought for all of the causes of action was an injunction requiring the defendants to reduce net emissions annually under supervision of the Court to achieve zero-net emissions by 2050. After rejecting the defendants' claim that the tort claims were excluded by the CCRA, the Court engaged in a comprehensive review of the law of nuisance as it developed in New Zealand, the UK, Canada, and the USA, and found that the claim had evolved with the passage of time. However, to maintain a claim, the plaintiff must establish that the harm was a reasonably foreseeable consequence of defendant's conduct, and that the defendant's act must unreasonably interfere with public rights. The Court held that the standard required to strike out a claim had not been met and that Mr Smith was entitled to bring his case to trial

where he would have an opportunity to present full evidence. As to claims arising from climate change, the Court found that these were in principle in accord with traditional nuisance cases where one party contaminated a water course to the detriment of the public and private parties. The Court said, 'climate change engages comparable complexities [of proof], albeit at a quantum leap scale enlargement'. As to liability of a single party where multiple parties contribute to the harm, the Court stated that it was no defence to creating a nuisance that others were engaged in the same conduct - it is unnecessary that the defendant be the sole polluter, only that the defendant was a significant cause of the harm - all questions of fact. Relying on Canadian and American decisions, the Supreme Court adopted the view that everyone who contributes to a nuisance is liable providing that in the aggregate a nuisance is proven. The Supreme Court reinstated all three claims for trial where questions include: (1) whether New Zealand's law of public nuisance should sanction GHG emissions - And (2) whether the actions of the corporate respondents amounted to a substantial and unreasonable interference with public rights? The Court added that the likely legal battleground would involve: causation, substantiality, unreasonableness, and remedy. With respect to the nuisance cause of action, the Court concluded that the principles governing public nuisance ought not to stand still in the face of massive environmental challenges attributable to human economic activity. The Common law, where it is not clearly excluded, responds to challenge and change in a considered way, through trials involving the testing of evidence. As the Court allowed the claim for nuisance to survive for trial, the Supreme Court declined to rule on the remaining claims for negligence and the proposed new climate change tort. The Court found that ruling on these claims was unnecessary because the same evidence supported all claims and that they all should go to trial where they could be fully developed. As to the effect of tikanga on the common law of tort, the Supreme Court rejected the Court of Appeal decision that the CCRA statutory scheme satisfied tikanga Maori. Instead, the Supreme Court held that the trial court must engage with tikanga because part of Mr Smith's loss is based on tikanga. The Court added that tikanga has been applied to common law tort actions since 1840. For example, the Court cited to a 2003 Court of Appeal decision affirming that Maori land rights derived from tikanga were cognisable at common law. The Court reiterated the continued vitality of tikanga in New Zealand: To summarise the essential conclusions reached, tikanga was the first law of New Zealand, and it will continue to influence New Zealand's distinctive common law as appropriate according to the case and to the extent appropriate in the case. Inasmuch as the plaintiff Mr Smith is acting not only in individual capacity but also on behalf of traditional entities, the Supreme Court held that the trial court must consider tikanga concepts of loss that are neither physical nor economic.

Smith

Poem for Friday

Near Avalon

By: William Morris (1834-1896)

A ship with shields before the sun,
Six maidens round the mast,
A red-gold crown on every one,
A green gown on the last.

The fluttering green banners there
Are wrought with ladies' heads most fair,
And a portraiture of Guenevere
The middle of each sail doth bear.

A ship with sails before the wind,
And round the helm six knights,
Their heaumes are on, whereby, half blind,
They pass by many sights.

The tatter'd scarlet banners there
Right soon will leave the spear-heads bare.
Those six knights sorrowfully bear
In all their heaumes some yellow hair.

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