

Friday, 30 August 2024

## Weekly Immigration Law Review

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

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### Executive Summary (One Minute Read)

**AZR20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs** (FCAFC) - primary judge correctly found that the Tribunal had not unlawfully fettered its discretion and had properly engaged with the appellant's representations regarding non-refoulement obligations

**RDYQ v Minister for Immigration, Citizenship and Multicultural Affairs** (FCAFC) - primary judge correctly found no jurisdictional error by the Tribunal regarding its assessment of the likelihood of the appellant re-offending for the purposes of Direction 90

**AYX18 v Commonwealth of Australia** (FCA) - Court again approved settlement of negligence claim by infant held in immigration detention

**FBV18 v Commonwealth of Australia** (FCA) - Court approved settlement of negligence claim by infant held in immigration detention

**DXP18 v Minister for Immigration, Citizenship and Multicultural Affairs** (FedCFamC2G) - Authority erred by considering the genuineness of new claims at a preliminary stage, rather than as part of the deliberative process, and in failing to obtain a new DFAT country report

**ACN23 v Minister for Immigration and Multicultural Affairs (No 2)** (FedCFamC2G) - Authority unreasonably proceeded on the information before it without inviting the applicant to provide further information based on supposed unsuccessful attempts to contact the applicant

## HABEAS CANEM

### McGregor the puppy



# Benchmark

## Summaries With Link (Five Minute Read)

### **AZR20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2024] FCAFC 107**

Full Court of the Federal Court of Australia

O'Bryan, Jackson, & Hespe JJ

Migration - Refugee Visa - visa cancelled after criminal convictions - delegate refused to revoke cancellation - Administrative Appeals Tribunal affirmed - Federal Court dismissed application for judicial review - primary judge correctly found that the Tribunal did not misconceive its statutory function by unlawfully fettering its discretion by proceeding on the incorrect basis that it was required to expedite its review and so could not conduct a full assessment of the appellant's protection claims - primary judge correctly found that the Tribunal did not fail properly to engage with the appellant's representations in relation to being owed non-refoulement obligations - appeal dismissed.

[AZR20](#)

[From Benchmark Friday, 30 August 2024]

### **RDYQ v Minister for Immigration, Citizenship and Multicultural Affairs [2024] FCAFC 108**

Full Court of the Federal Court of Australia

Murphy, Abraham, & McEvoy JJ

Migration - partner visa - visa cancelled after criminal convictions - delegate refused to revoke cancellation - Administrative Appeals Tribunal affirmed - Federal Court dismissed application for judicial review - primary judge correctly found that the Tribunal had not failed to complete its statutory task of evaluating the likelihood of the appellant re-offending in accordance with para 8.1.2(2)(b) of Direction 90 - appeal dismissed.

[RDYQ](#)

[From Benchmark Friday, 30 August 2024]

### **AYX18 v Commonwealth of Australia [2024] FCA 974**

Federal Court of Australia

Button J

Migration - protection visa - applicant in similar position to FBV18 (above) - settlement again approved, and confidentiality order made.

[AYX18](#)

[From Benchmark Friday, 30 August 2024]

### **FBV18 v Commonwealth of Australia [2024] FCA 947**

Federal Court of Australia

Button J

Migration - protection visa - second applicant and his family held in immigration detention on Christmas Island and Nauru - alleged negligence in off-shore treatment of significant mental health disorders - parties settled, which required Court approval - proposed settlement was in

the best interests of the second applicant - settlement approved, and confidentiality order made until further order as there are about 50 similar cases about to be mediated.

[FBV18](#)

[From Benchmark Friday, 30 August 2024]

## **DXP18 v Minister for Immigration, Citizenship and Multicultural Affairs [2024]**

### **FedCFamC2G 774**

Federal Circuit and Family Court of Australia (Division 2)

Judge Ladhams

Migration - protection visa - delegate refused to grant visa - Immigration Assessment Authority affirmed - Authority made a jurisdictional error in its assessment of new information (Facebook posts and photos of the applicant with alcohol) under s473DD of the *Migration Act 1958* (Cth) by considering the genuineness of the new claims at a preliminary stage, when that was a question for the deliberative process of the review - Authority also acted unreasonably in failing to exercise, or consider exercising, its discretion under s473DC to obtain the 2018 DFAT report on Iran, published about one month before it made its decision - both errors were material - application allowed.

[DXP18](#)

[From Benchmark Friday, 30 August 2024]

## **ACN23 v Minister for Immigration and Multicultural Affairs (No 2) [2024] FedCFamC2G 755**

Federal Circuit and Family Court of Australia (Division 2)

Judge Blake

Migration - safe haven enterprise visa - delegate refused to grant visa - Immigration Assessment Authority affirmed - extension of time granted to apply for judicial review (see Weekly Immigration Benchmark, 15 March 2024) - the Authority's conclusion that there had been repeated unsuccessful attempts by both the department and the Authority to contact the applicant, and it should therefore proceed on the information before it without inviting the applicant to provide further information, lacked evident and intelligible justification and was unreasonable - this error was material - application allowed.

[ACN23](#)

[From Benchmark Friday, 30 August 2024]



# Benchmark

## INTERNATIONAL LAW

### Executive Summary and (One Minute Read)

**Manchester Ship Canal Co v United Utilities Water Ltd (UKSC)** - Manchester Ship Canal company was not barred from bringing a common law damages claim for trespass and nuisance against a public utilities company that discharged raw, untreated and foul sewage into the canal from outfalls lawfully maintained by the sewerage authority

### Summaries With Link (Five Minute Read)

**Manchester Ship Canal Co v United Utilities Water Ltd [2024] UKSC 22**

Supreme Court of the United Kingdom

Lord Reed, Lord Hodge, Lord Lloyd-Jones, Lord Burrows, Lord Stephens, Lady Rose, Lord Richards

In a declaratory ruling, the Supreme Court was asked to decide whether the Manchester Ship Canal Company could bring a claim against the statutory sewerage authority for discharges of foul sewage into the canal. The defendant, United Utilities, was the statutory sewerage authority for North West England and owned about 100 outfalls from which treated sewage was discharged into the canal. However, sometimes untreated sewage was discharged into the canal as well. No allegation was made that the discharge of untreated sewage was caused by negligence. However, it could have been avoided through improved infrastructure. The High Court, upheld by the Court of Appeal, found that a canal owner could not bring a claim based on nuisance or trespass against a sewerage operator unless the discharge was the result of negligence or deliberate wrongdoing. The Supreme Court unanimously allowed the Canal Company's appeal. Sewerage is regulated by the *Water Industry Act 1991* and the Supreme Court held that nothing in the legislation permitted or authorised a sewerage authority to discharge foul water through outfalls. Inasmuch as the statute did not authorise the activity, common law remedies were available. The Court rejected the defence that the only way to avoid fouling the canal would be to construct sewerage infrastructure and that was a matter for Parliament. The Court found that there was nothing in the legislation indicating that Parliament intended to extinguish common law rights of action. While an injunction against further discharge presented questions relating to the process of regulatory approval for capital expenditures by the sewerage authority, that did not mean that common law-based awards for damages for invasion of property rights were precluded.

[Manchester Ship Canal Co](#)



## Poem for Friday

**i carry your heart with me**

**by e.e. cummings (1894-1962)**

i carry your heart with me (i carry it in  
my heart) i am never without it (anywhere  
i go you go, my dear; and whatever is done  
by only me is your doing, my darling)

i fear

no fate (for you are my fate, my sweet) i want  
no world (for beautiful you are my world, my true)  
and it's you are whatever a moon has always meant  
and whatever a sun will always sing is you

here is the deepest secret nobody knows  
(here is the root of the root and the bud of the bud  
and the sky of the sky of a tree called life; which grows  
higher than soul can hope or mind can hide)  
and this is the wonder that's keeping the stars apart

i carry your heart (i carry it in my heart)

**Edward Estlin Cummings (e.e. cummings)**, an American poet, essayist and playwright was born on 14 October 1894 in Cambridge Massachusetts. His parents encouraged his creativity, and included in their circle of friends artists, philosophers and writers. Cummings's father was a professor at Harvard, and later a minister of the Unitarian church. Cummings wrote poetry from the age of 8. Cummings was an ambulance driver during the first world war. He was interned in a camp in Normandy in the first world war, for having expressed anti-war sentiments. During his life he wrote about 2900 poems. He returned to Paris many times throughout his life. It has been written of Cummings that "No one else has ever made avant-garde, experimental poems so attractive to the general and the special reader," and "Cummings is a daringly original poet, with more vitality and more sheer, uncompromising talent than any other living American writer."

Read by **Colin McPhillamy**, actor and playwright. Colin was born in London to Australian parents. He trained at the Royal Central School of Speech and Drama in London. In the



UK he worked in the West End, at the Royal National Theatre for five seasons, and extensively in British regional theatre. In the USA he has appeared on Broadway, Off-Broadway and at regional centres across the country. Colin has acted in Australia, China, New Zealand, and across Europe. Colin is married to Alan Conolly's cousin Patricia Conolly, the renowned actor and stage actress: [https://en.wikipedia.org/wiki/Patricia\\_Conolly](https://en.wikipedia.org/wiki/Patricia_Conolly) and <https://trove.nla.gov.au/newspaper/article/47250992>.

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