

FEDERAL CIRCUIT COURT OF AUSTRALIA

*KAUTOGA v MINISTER FOR IMMIGRATION
& ANOR*

[2015] FCCA 1534

Catchwords:

PRACTICE AND PROCEDURE – Application for recusal – bias – application dismissed.

PRACTICE AND PROCEDURE – Application for an adjournment – whether appropriate to grant an adjournment is in the interests of justice – application granted.

Legislation:

Federal Circuit Court Act 1999 s.17A

Federal Circuit Court Rules 2001 rr.13.10, 44.11, 44.12

Migration Act 1958 s.476

Cases cited:

Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337

Johnson v Johnson (2001) 201 CLR 488

Minister for Immigration & Multicultural Affairs v Jia Legeng (2001) 205 CLR 507

Applicant:

RATU PIO TIKOVAKAYALEWA
KAUTOGA

First Respondent:

MINISTER FOR IMMIGRATION &
BORDER PROTECTION

Second Respondent:

MIGRATION REVIEW TRIBUNAL

File Number:

SYG 1092 of 2015

Judgment of:

Judge Street

Hearing date:

3 June 2015

Date of Last Submission:

3 June 2015

Delivered at:

Sydney

Delivered on: 3 June 2015

REPRESENTATION

Counsel for the Applicant: Mr N. Poynder

Counsel for the Respondent: Ms K. Hooper

Solicitors for the Respondent: DLA Piper

ORDERS

- (1) The application for recusal be dismissed.
- (2) 1. The Orders 1,2, and 3 of the Orders made on 28 May 2015 are varied as follows:
 - “1. The matter be fixed for hearing at 2:15pm on 17 June 2015.
 2. The extended time for filing any affidavit evidence or any amended application upon which the applicant wishes to rely together with submissions on or before the 12 June 2015.
 3. The First Respondent file and serve any affidavit in response and any submissions on or before the 16 June 2016.”

**FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT SYDNEY**

SYG 1092 of 2015

RATU PIO TIKOVAKAYALEWA KAUTOGA
Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. This is an interlocutory application relating to a matter within the Court's jurisdiction, under s.476 of the *Migration Act 1958*, in respect of which the applicant is seeking Constitutional writs in respect of a decision of the Tribunal made on 24 March 2015 which was filed at the Court on 22 April 2015 and identified a time and date for hearing, being 28 May 2015, 9.30 am. Under First Court Date, the application relevantly records:

All parties or their legal representatives should attend this hearing. Default orders may be made if any party fails to attend. The Court may hear and determine all interlocutory and all final issues or may give directions for the future conduct of the proceedings.

2. The applicant had ticked a box in respect of requiring an extension of time under s.477 of the *Migration Act*, although it does appear that the application was, in fact, filed within the 35-day period and that an

extension of time is not necessary. The grounds of the application are identified as follows:

I, Ana Kautoga hereby make the submission that the Federal Circuit Court please allow us all extension of time to submit our application to review the decision of the MRT to affirm the cancellation of my husbands – Mr Ratu Pio T Kautoga and subsequently mines as a dependent.

We had prepared to submit the documents for review but without warning the Deparmtnet of Immigration removed my husband from Villawood Immigration Detention Centre to the Melbourne Immigration Detention Centre.

This was done last Wednesday is 15 April 2015.

Given that he is the main applicant to the submission if review and given the fact he is not in Sydney to complete the signing if the farms for review I am humbly asking the Court to allow us more time so I can try and get my husband back to Sydney and also for him to sign the applications.

Your kind and favourable consideration will be much appreciated please.

3. It is clear that those grounds do not disclose any jurisdictional error.
4. The interlocutory application is one in which Mr Poynder, of counsel, asks the Court to recuse itself on the grounds of alleged actual bias or alleged apprehended bias. The grounds were identified orally as being conduct prior to the application and conduct during these proceedings. In respect of conduct prior to the application, Mr Poynder relied on two affidavits, both by Mr Kline, an editor of the Federal Court Reports and Federal Law Reports.
5. Mr Kline identified that he undertook a review between 27 and 29 May 2015 of all judgments handed down in the Federal Circuit Court, by this Court, available in the unreported judgments section of Westlaw Au website.
6. In respect of that review, Mr Kline noted the appointment commenced on 1 January 2015 and identified decisions up to 29 May, numbering 226. Mr Kline identified that 213, or 94.24 per cent, were in the area of immigration law. Mr Kline identified that 213 of the immigration

judgments were or appeared to be delivered extempore. Mr Kline noted that, in one judgment, (0.4 per cent of the 223 immigration judgments), there was a finding in favour of the applicant against the respondent. Mr Kline attached a summary spreadsheet in respect of those judgments identified.

7. Mr Kline identified the annual report of the Migration Review Tribunal/Refugee Review Tribunal, specifically in relation to table 6, which provides as follows:

TABLE 6 – JUDICIAL REVIEW APPLICATIONS AND OUTCOMES

	MRT			RRT		
	2013–14	2012–13	2011–12	2013–14	2012–13	2011–12
Tribunal decisions	24,729	15,590	8,011	3,585	3,757	2,804
Court applications	1,575	770	263	1,101	949	695
% of tribunals decisions	7.4%	4.9%	3.3%	30.7%	25.3%	24.8%
Applications resolved	517	675	259	237	720	687
Decision upheld or otherwise resolved	461	602	219	208	611	601
Set-aside by consent or judgment	56	73	40	29	109	86
Set-aside decisions as % of judicial applications resolved	10.8%	10.8%	15.4%	12.2%	15.1%	12.5%
Set-aside decisions as % of decisions made	0.3%	0.5%	0.5%	0.8%	2.9%	3.1%

8. Page 35 of that report has a notation:

Less than one per cent of Tribunal decisions made in 2013 to 2014 have been set aside or quashed by the Courts.

9. Mr Kline's second affidavit identified that of 212 immigration judgments, he concluded that in a minimum of 145, or 68.39 % of cases, a decision to dismiss the application was made at the first Court date. Mr Kline said that this was at a minimum because in perhaps another dozen cases it was possible that the application had been summarily dismissed, but one could not ascertain from the terms of the judgment.
10. Mr Kline identified that two applications had been summarily dismissed at the first Court date by reference to the body of the judgment and otherwise made his conclusions by reference to the catchwords or orders on the cover sheets and in another seven or eight cases by reference to r.44.12 or reference to the fact that the applicant failed to disclose an arguable case and annexed a spreadsheet in respect

of those decisions. That is the whole of the evidence advanced by the respondent in support of the application for recusal on the basis of alleged conduct prior to the application.

11. Mr Poynder prepared some written submissions and in response to the invitation to develop his written submissions, indicated that he did not seek to develop any further argument and relied entirely on his written submissions. Mr Poynder's written submissions fail to identify any specific fact or reasoning that should be gleaned from the affidavit of Mr Kline beyond the generalised assertion that the Court was predisposed to view the applications in migration matters as being without merit.
12. That submission has no factual foundation. The conduct identified does not support any such conclusion. There has not been identified any proper basis upon which there is conduct prior to this application that is capable of giving rise to a fair-minded observer forming the view that the Court might not bring an independent and impartial mind to the determination of the matter before the Court on its merits.
13. The material identified by Mr Kline, are judgments delivered identifying reasons for the exercise of the judicial power of the Commonwealth in respect of the orders made. In addition to the Court's powers in respect of case management, r.44.11 and r.44.12 in relation to applications for a Constitutional writ under s.476 relevantly provide:

Rule 44.11 - First court date

Without limiting rule 10.01, at the first court date for an application for an order to show cause, the Court or a Registrar may give orders or directions for any of the following:

(a) an immediate hearing under rule 44.12; (emphasis added)

(b) a future listing for a hearing under rule 44.12;

(c) dispensing with a hearing under rule 44.12 and listing the matter for final hearing on the grounds set out in the application;

(d) a stay or interim order;

- (e) an extension of time for the application;*
- (f) an amendment of the application;*
- (g) the provision of particulars, or further and better particulars, of a ground in an application or response;*
- (h) the filing of further affidavits by the applicant;*
- (i) the filing by a respondent or other person of a relevant document or other evidence;*
- (j) the filing of affidavits by a respondent.*

Rule 44.12 - Show cause hearing

(1) At a hearing of an application for an order to show cause, the Court may:

- (a) if it is not satisfied that the application has raised an arguable case for the relief claimed--dismiss the application; or*
- (b) if it is satisfied that the application has raised an arguable case for the relief claimed--adjourn the proceeding and order a respondent to show cause at a final hearing why an order for the relief claimed should not be made on such of the grounds mentioned in the application as are specified by the Court; or*
- (c) without making an order under paragraph (b), make final orders in relation to the claims for relief and grounds mentioned in the application.*

(2) To avoid doubt, a dismissal under paragraph (1)(a) is interlocutory.

14. Where there is no arguable case, the Court also has powers under s.17A and r.13.10 which provides as follows:

Section 17A- Summary judgment

(1) The Federal Circuit Court of Australia 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 prosecuting the proceeding or that part of the proceeding; and*

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

(2) The Federal Circuit Court of Australia 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 Federal Circuit Court of Australia has apart from this section.

Rule 13.10 - Discontinuance

The Court may order that a proceeding be stayed, or dismissed generally or in relation to any claim for relief in the proceeding, if the Court is satisfied that:

(a) the party prosecuting the proceeding or claim for relief has no reasonable prospect of successfully prosecuting the proceeding or claim; or

(b) the proceeding or claim for relief is frivolous or vexatious; or

(c) the proceeding or claim for relief is an abuse of the process of the Court.

Note: For additional powers of the Court in relation to family law proceedings that are frivolous or vexatious, see sections 102QB and 118 of the Family Law Act.

15. The disposition of proceedings by this Court by reference to numbers or percentages does not identify any proper basis upon which any evidentiary inference could be drawn that the Court had brought a closed mind to the determination of any matter in the exercise of the judicial power of the Commonwealth.
16. The statistics and numbers and matters disposed of do not establish a lack of impartiality by the Court or a lack of neutrality in the disposition of matters before the Court. The Court has taken into account the principles identified in the *Minister for Immigration & Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, relevantly:

35. French J said that actual bias, within the meaning of s 476. “must be a pre-existing state of mind which disables the decision-maker from undertaking or renders him unwilling to undertake any or any proper evaluation of the materials before him or her which are relevant to the decision to be made.”

69. It was not argued, either in the Federal Court or in this Court, that the Minister’s decision in either case constituted an abuse of power in the form of a deliberate refusal to follow the provisions of the statute. The arguments on bias were expressed in terms of prejudgment, and contended, or found, that the Minister had determined that, notwithstanding the provisions of s 501, he would exercise his statutory powers, regardless of his views of the character of Mr Jia or Mr White, simply on the basis that they had been convicted of serious offences. Some of the arguments, and some of the findings, carried a suggestion of that; but if any such submission were to be advanced, or any such conclusion reached, the allegation would have to be distinctly made and clearly proved.

127. Nevertheless, because of the seriousness of the alleged wrong-doing, that the Minister had, in effect, given away to his animosity against Mr Jia and people like him or acted upon a prejudgment of his case, it is clear law that such allegations will only be upheld by a court where the accusations are distinctly made and clearly proved). In short, the accusation of such bias must be “firmly established.” At first the accusation of such bias must be “firmly established” (108). At first instance, French J declined to draw that conclusion in Mr Jia’s case. He recognised the stringent standard of proof required and held that, to make out such a case, Mr Jia had to prove that, at the time of the decision, the Minister had “a closed

mind to the issues raised and was not open to persuasion by the applicant's case."

17. There is no basis for any finding that this Court has a pre-existing state of mind which disables the decision-maker from undertaking or rendering the Court unwilling to undertake a proper evaluation of the materials before the Court relevant to the decision to be made. The material referred to in respect of alleged prior conduct fails to establish any fact from which such serious allegation could be proved.
18. Further, insofar as it is alleged that the prior conduct give rise to an apprehension of bias, I take into account the principles identified in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6], [8], [19]-[23]. The material from Mr Kline establishes any fact, of the kind required of a kind to identify that the Court will decide an immigration matter other than on its legal and factual merits.
19. Further, there is no logical connection between the statistics and numbers identified by Mr Kline and any material deviation from the course of justice by this Court and the course of deciding each case on its merits. I do not accept that the evidence of Mr Kline gives rise to any conduct by reason of which a fair-minded observer might believe that the Court would fail to bring an impartial and independent mind to the determination of this matter by these applicants on its merits. Accordingly, the application for recusal in respect of alleged conduct prior to the application has not been proven.
20. In respect of the allegation of conduct during these proceedings, Mr Poynder again advises an allegation of actual and apprehended violence. On the first hearing date after matter number 2 was called in which Mr Poynder appeared and was adjourned for an hour the following exchanges in transcript took place:

MR N. POYNDER: Mr Poynder: Your honour while I'm on my feet I have another matter this morning. Matter number 18 Kautoga.

HIS HONOUR: There's a court book in this matter, is there? There's a court book that has been filed, is that right?

MR N. POYNDER: It hasn't been delivered yet, your Honour. The Minister has provided some suggested consent orders in which the court book is proposed to be provided by 11 June.

HIS HONOUR: The application doesn't identify any jurisdictional error.

MR POYNDER: Yes. My instructions, at this stage, are limited to advising on the merits of the case. I can't advise on the merits of the case until I've seen the court book. I was instructed on this last night at about 6 o'clock.

HIS HONOUR: What's the respondent's position?

MS WONG: Your Honour, the first respondent's position is that this should be listed for a final hearing in the future, your Honour.

HIS HONOUR: What's the issue that the first respondent says arises?

MS WONG: Your Honour, I – this is not my matter and I've only been advised to attend the directions hearing. However, I am instructed that it raises an arguable case for the relief claimed and it

HIS HONOUR: There's nothing in the application that identifies any ground.

MS WONG: Your Honour, all I have before me is actually the proposed short minutes of order. I don't actually have the file as I was asked just to attend the directions hearing.

HIS HONOUR: Have you seen the court book, Mr Poynder?

MR POYNDER: I haven't, your Honour. I only received instructions at 6 o'clock last night.

HIS HONOUR: I fix the matter for hearing at 9.30 am on Tuesday, 12 June – sorry – Tuesday, 9 June – 9.30 on Tuesday, 9 June

MR POYNDER: Well, your Honour, that's not going to give the applicant any time to prepare for the case. We don't get the court book until the 11th. So there's a chance we won't be in a position to proceed on that date.

HIS HONOUR: Well, you better be ready, Mr Poynder

MR POYNDER: Well

HIS HONOUR: because I won't adjourn it.

MR POYNDER: your Honour, there is a

HIS HONOUR: Mr Poynder, you

MR POYNDER: Your Honour, there are procedural

HIS HONOUR: Mr Poynder

MR POYNDER: requirements to have the matter ready for hearing

HIS HONOUR: Mr Poynder, sit down, please.

MR POYNDER: Well, for the transcript, your Honour

HIS HONOUR: No, no. Sit down

MR POYNDER: I think it's important

HIS HONOUR: sit down – sit down, Mr Poynder

MR POYNDER: that your Honour takes note

HIS HONOUR: Mr Poynder, sit down.

MR POYNDER: of the procedural requirements in this court.

HIS HONOUR: Mr Poynder, if you engage in talking over me again, I will have you removed. Sit down.

MR POYNDER: I will indicate to the court that

HIS HONOUR: No. Please, Mr Poynder, comply

MR POYNDER: an application will be made for an

HIS HONOUR: with what I've said

MR POYNDER: adjournment on that day.

HIS HONOUR: Sit down, Mr Poynder, now. Please.

MR POYNDER: Yes. That was for the transcript, your Honour.

HIS HONOUR: Sit down now, please, Mr Poynder. Your repeated raising to your feet and not complying with my

directions is a contempt of court. If you engage in it again, I will have you dealt with for contempt. Do you understand that?

MR POYNDER: May it please your Honour.

HIS HONOUR: I direct the applicant to file and serve any amended application and any affidavit evidence upon which the applicant wishes to rely, together with submissions, by 2 June. The respondent is to file any affidavit in reply and any submissions in which it wishes to rely by 7 June.

MS WONG: If the court pleases.

HIS HONOUR: Mr Poynder, this is a very busy list. It requires counsel, solicitors and applicants to assist the court in dealing with the list. I really won't tolerate the behaviour that you've engaged in just recently. You must cooperate with the court. I understand your desire to advance your client's case but you must do so consistently with the directions made by the court.

MR POYNDER: Can I be heard on that, your Honour?

HIS HONOUR: No.

21. The orders made by the Court on 28 May 2015 were as follows:

- 1. The matter be fixed for hearing on 9 June 2015 at 9:30am.*
- 2. The applicant file and serve any amended application or any affidavit evidence upon which the applicant wishes to rely upon on together with submissions or before 2 June 2015.*
- 3. The first respondent file and serve any affidavit in response and any submissions by the 7 June 2015.*
- 4. There be liberty to apply on 2 days' notice.*

22. The matter is also one in respect of which there are communications to the Court prior to the hearing date. Relevantly, from the applicant's wife, 27 May 2015 at 4.51 pm, identifying the applicant who is in custody would be relocated from Sydney to Melbourne and saying:

*We have not had time to hire an immigration lawyer to go represent us properly as we are sure there is a case to be heard. **Our immigration lawyer has said he will wait for the files to be submitted from Immigration then he will make the detailed submission.***(emphasis added)

23. It is apparent from the correspondence that was marked as exhibit B that there were communications taking place to arrange a video appearance, following which an email communication was sent from Michelle Stone of DLA Piper to the Court, identifying that arrangements were being made to appear by video link and stating that the parties have agreed to propose short minutes of order, which were attached, and the email noted that the applicant's wife had been copied in to the email as indicated and that the applicant does not wish to attend Court tomorrow, concluding:

Given the applicant has indicated that he does not wish to attend tomorrow, we respectfully request that his Honour consider these orders in chambers, and vacate the first Court date.

24. The response filed by the respondent provided as follows:

1 The application filed on 22 April 2015 seeks judicial review of a decision of the Migration Review Tribunal (MRT) dated 23 March 2015.

2 The first respondent notes that although the applicant has applied for an extension of time, it is not required as the application has been filed within the prescribed 35 day period.

*3 **The application pleads no grounds of review.** The submissions attached to the application provide submissions as to the grant of an extension of time, and make no allegations of error on the part of the MRT. **The application fails to raise any arguable case of jurisdictional error on the part of the MRT.** The first respondent opposes all orders sought by the application on this basis. (emphasis added)*

25. In response to that communication at 4.36pm there was sent a communication from the Court:

Please be advised that the matter remains listed. The Court intends to consider whether the matter should be dealt with under r.44.12.

If you have any queries, please do not hesitate to contact chambers.(emphasis added)

26. This is a matter in which a hard copy Court book had been provided prior to the directions hearing to the Court. The proposed Court orders identified a timetable for filing and serving the Court book by 11 June

2015, filing and serving additional affidavit evidence and an amended application by 25 June 2015, response by way of affidavit by 9 July 2015, a timetable for written submissions to be provided 14 days before a hearing date by the applicant and then submissions seven days prior to that date by the respondent.

27. This is a case where it is clear that the applicant is in detention, that the application failed to disclose any jurisdictional error and that notice had been given that the Court intended to consider whether the matter should be dealt with under r.44.12. It was in the above circumstances that Mr Poynder of counsel appeared on the first return date and the above exchange occurred. Mr Poynder twice informed the Court that he only received instructions at about 6 o'clock last night. I infer from the email dated 27 May 2015 at 4.51 pm that it was Mr Poynder, who is the Immigration lawyer, who had said he will wait for the files to be subpoenaed from Immigration, then he will make the detailed submissions.
28. Mr Poynder's submissions failed to identify how the above conduct gives rise to any basis upon which a finding could be made that the Court had a closed mind in this matter or that the Court was acting otherwise than in a neutral role.
29. There is no proper basis for any adverse finding by reference to the communications that occurred and/or by reference to the exchange recorded in the transcript to conclude that the Court had a pre-existing state of mind which disabled the decision maker from undertaking or rendering the Court unwilling to undertake any proper evaluation of the materials before the Court that are relevant to the decision to be made. There is no basis from the material identified upon which any case of actual bias has been proved.
30. Insofar as the allegation of apprehended bias in respect of the conduct during the proceedings, including the fixing of the matter for hearing and a strict timetable in respect of an applicant in detention, a fair-minded observer would not believe that the Court might fail to bring an impartial and independent mind to the determination of the matter on its merits. There was no submission developed by Mr Poynder as to any fact to be gleaned from the correspondence or from the transcript, and Mr Poynder declined the opportunity to present further argument

in support of his application for recusal beyond his written submission. The written submission fails to identify any conduct in these proceedings by reason of which a fair-minded lay observer might reasonably apprehend the Court would not bring an impartial and unprejudiced mind to the resolution of the question the Court is required to decide in this matter.

31. In this regard I take into account principles to which I have referred to above as well as in *Johnson v Johnson* (2001) 201 CLR 488 at [493]; *Michael Wilson & Partners Limited v Nicholls* (2011) 244 CLR 427 at [31] and [33]-[37]; *NADH of 2001 v the Minister of Immigration, Multicultural and Indigenous Affairs* (2005) 214 ALR 264 at [20]-[21] and [33].
32. Further, I do not accept that cumulatively the matters referred to by Mr Poynder of counsel would give rise to any basis by reason of which a fair-minded lay observer might reasonably apprehend the Court might not bring an impartial and independent mind to the resolution of the question the Court is required to decide in these proceedings.
33. Insofar as Mr Poynder made an oral application seeking an adjournment, the applicant is in detention, and it is in those circumstances appropriate for the matter to be dealt with at the earliest practical time for the Court. There has been no proper case made out for an adjournment of the proceedings. I note, however, that the time by which any amended application or any affidavit evidence upon which the applicant wished to rely expired on 2 June, although no application is made for an extension.

34. The Court had not appreciated at the time when the orders were made that 7 June was a Sunday and had not taken into account that the Monday, 8 June, was a bank holiday. It is in those circumstances, notwithstanding the absence of any proper affidavit evidence to support an adjournment, I accept that it is appropriate, in the interests of justice, to adjourn the matter to 17 June 2015 for hearing at 9.30 am and to extend the time for filing and serving any amended application and any affidavit evidence upon which the applicant wishes to rely.

I certify that the preceding thirty-four (34) paragraphs are a true copy of the reasons for judgment of Judge Street

Associate:

Date: 9 June 2015