**IN THE SUPREME COURT OF NEW ZEALAND**

**SC 15/2018**
**[2018] NZSC 26**

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| BETWEEN | NOBILANGELO CERAMALUS<br>Applicant |
| AND | CHIEF EXECUTIVE OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT<br>First Respondent |
| | THE MINISTER OF IMMIGRATION<br>Second Respondent |

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| Court: | Elias CJ, William Young and O'Regan JJ |
| Counsel: | Applicant in person<br>I M G Clarke for Respondents |
| Judgment: | 27 March 2018 |

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**JUDGMENT OF THE COURT**

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**A The application for leave to appeal is dismissed.**

**B The applicant is to pay costs of $2,500 to the respondents.**

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**REASONS**

## High Court proceedings

[1] The applicant commenced proceedings in the High Court seeking judicial review of two decisions of Immigration New Zealand (a section of the Ministry of Business, Innovation and Employment) declining applications made by a friend of his, Ms Agcaoili, a citizen of the Philippines, for a temporary entry class visa to allow her to enter New Zealand. The application for judicial review also encompassed other matters arising from the interaction between the applicant and Immigration

New Zealand relating to his efforts to have the decisions reversed so that Ms Agcaoili could enter New Zealand. The respondents applied to have the proceedings struck out.

[2] Woodhouse J found that all of the causes of action pursued by the applicant were untenable and struck out the proceeding.[1] The applicant applies for leave to appeal directly to this Court against the High Court decision.

**Relevant statutory provisions**

[3] The respondents argue that, as s 69(c) of the Senior Courts Act 2016 makes it clear that this Court has no jurisdiction to hear and determine an appeal against a High Court decision that is a "decision … made on an interlocutory application", the application must be dismissed for want of jurisdiction.

[4] If the Court does have jurisdiction to hear and determine an appeal against the High Court decision, it may grant leave only if satisfied that the criteria for leave to appeal set out in s 74 of the Senior Courts Act are met and, in addition, that "there are exceptional circumstances that justify taking the proposed appeal directly to [this] court".[2]

**Jurisdiction**

[5] The respondents' argument that s 69(c) of the Senior Courts Act applies is based on the contention that a decision to strike out a proceeding is a decision made on an interlocutory application. The respondents point to the definition of "interlocutory order" in r 1.3 of the High Court Rules 2016, which includes "an order striking out the whole … of a pleading". The argument is that if the order made was an interlocutory order, then the decision must be a decision made on an interlocutory application for the purposes of s 69(c) of the Senior Courts Act. Counsel for the respondents cites as authority for this approach the leave decisions of this Court in *M v Minister of Immigration* and *Peterson v Attorney-General*.[3]

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1 *Ceramalus v Chief Executive of the Ministry of Business, Innovation and Employment* [2018] NZHC 45.

2 Senior Courts Act 2016, s 75.

3 *M v Minister of Immigration* [2011] NZSC 154; and *Peterson v Attorney-General* [2015] NZSC 154.

[6] We accept that *M v Minister of Immigration* and *Peterson v Attorney-General* support the respondents' approach.

[7] In our view, the reliance on the definition of "interlocutory order" in the High Court Rules in those cases (and in the respondents' submission) is wrong. Rather, the reference to "interlocutory application" in s 69(c) refers to the definition of that term in s 65 of the Senior Courts Act. That definition is:[4]

> **interlocutory application**—
>
> (a) means an application in a proceeding or an intended proceeding for—
>
> (i) an order or a direction relating to a matter of procedure; or
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> (ii) in the case of a civil proceeding, for relief ancillary to the relief claimed in the proceeding; and
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> (b) includes an application for a new trial; and
>
> (c) includes an application to review a decision made on an interlocutory application

[8] We have not had argument on the question of whether a decision striking out a proceeding, and therefore bringing it to an end, is a decision on an interlocutory application as defined in s 65.[5] We would not be prepared to find that it is without having had full argument on the point. We propose, therefore, to consider the present application for leave to appeal on its merits. As we conclude that the grounds for the granting of leave are not made out in this case, it is not necessary for us to finally decide the jurisdictional question. However, the decisions of this Court in *M v Minister of Immigration* and *Peterson v Attorney-General* should not be considered to resolve the issue definitively.

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4 This definition mirrors the equivalent definition in s 4 of the Supreme Court Act 2003. A slightly different definition of the same term appears in s 4 of the Senior Courts Act, but the s 65 definition is the one that is relevant in the present case.

5 The equivalent provisions in the Senior Courts Act relating to appeals to the Court of Appeal can be contrasted with s 69. Section 56(3) provides that appeals from High Court decisions on interlocutory applications can be commenced only by leave of the High Court. But this is subject to s 56(4) which allows appeals as of right against High Court decisions striking out a proceeding or granting summary judgment. The applicant therefore had an appeal as of right to the Court of Appeal if he had exercised that right within time.

**Leave application**

[9] The applicant sets out 30 proposed grounds of appeal, many of which overlap with each other. His complaints centre on the provisions of the Immigration Act 2009 that stood in the way of his judicial review application and the complaints and feedback process of Immigration New Zealand, which did not provide an avenue for challenging the decisions to refuse Ms Agcaoili's applications.

[10] The relevant provisions of the Immigration Act are s 186 and s 247.

[11] Section 186(1) provides that there is no right of appeal against a decision of the Minister or an immigration officer in relation to an application for a visa of the kind sought by Ms Agcaoili. In addition, s 186(3) gives a right to bring review proceedings in respect of certain decisions relating to temporary entry class visas, but expressly rules this out in relation to a refusal to grant such a visa to an applicant who is outside New Zealand (as Ms Agcaoili was). Thus, Woodhouse J found that s 186 prevented Ms Agcaoili from challenging the refusal of a visa either in appeal or review proceedings, and was therefore a bar to the review proceedings which the applicant sought to pursue on Ms Agcaoili's behalf.[6]

[12] Section 247 provides that any judicial review proceedings in respect of any statutory power of decision arising under the Immigration Act must be commenced not later than 28 days after the date on which the person was notified of the decision unless the High Court decides, by reason of special circumstances, that further time should be allowed. In the present case the proceeding was commenced well outside that time limit and, although the applicant was invited to apply for an extension of time, he did not do so. So, even if s 186 did not stand in the way of the applicant's judicial review proceeding, his application was made outside the statutory deadline.

[13] The applicant wishes to argue that ss 186 and 247 are inapplicable because they are contrary to s 27 of the New Zealand Bill of Rights Act 1990 and also to certain

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6 *Ceramalus v Chief Executive of the Ministry of Business, Innovation and Employment,* above n 1, at [18].

imperial enactments that are in force in New Zealand and are listed in sch 1 to the Imperial Laws Application Act 1988.[7]

[14] Woodhouse J found this argument was untenable: the courts do not have power to strike down legislation and none of the statutes identified by the applicant purport to give the courts such a power.[8] There is nothing in the extensive material provided to the Court by the applicant that shows any realistic argument against the correctness of the High Court decision to justify the granting of leave on this issue.

[15] The same applies to the argument the applicant wishes to make about the complaints and feedback policy which, as Woodhouse J found, is designed to enable complaints to be made of a customer service nature, not to provide a basis for challenging the merits of decisions made.[9]

[16] In terms of the primary test for the granting of leave in s 74, the application does not give rise to any point of public importance that is open to argument. In terms of the specific test in relation to leapfrog appeals set out in s 75, there is clearly no reason for a direct appeal to this Court. The only reason put forward by the applicant was that the arguments he wishes to raise have been rejected in the past by the Court of Appeal. That is not, in itself, a proper basis for bypassing the normal appellate process involving appeals from the High Court to the Court of Appeal.

[17] The application for leave to appeal is therefore dismissed. We award costs of $2,500 to the respondents.

Solicitors:
Crown Law Office, Wellington for Respondents

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7 The Imperial enactments identified by the applicant as applicable in this case are the first seven enactments set out in sch 1 to the Imperial Laws Application Act 1988, including the Magna Carta and relevant provisions of the Bill of Rights 1688.

8 *Ceramalus v Chief Executive of the Ministry of Business, Innovation and Employment,* above n 1, at [18]–[20].

9 At [22].