FEDERAL COURT OF AUSTRALIA

Kant v Australian Information Commissioner [2024] FCA 599

File number:	VID 829 of 2023
Judgment of:	**SNADEN J**
Date of judgment:	11 June 2024
Catchwords:	**ADMINISTRATIVE LAW** – review of a decision of a registrar – review of decision to dismiss application seeking interlocutory relief – hearing de novo – decision affirmed
Legislation:	*Federal Court of Australia Act 1976* (Cth) s 35A *Judiciary Act 1903* (Cth) s 39B *Privacy Act 1988* (Cth) ss 6, 15, 80W *Regulatory Powers (Standard Provisions) Act 2014* (Cth) ss 121, 122
Cases cited:	*Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 *Totev v Sfar and Anor* (2008) 167 FCR 193 *Zdrilic and Anor v Hickie and Anor* (2016) 246 FCR 532
Division:	General Division
Registry:	Victoria
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	28
Date of hearing:	Determined on the papers
Counsel for the Applicant:	The applicant was self-represented
Counsel for the Respondent:	Ms K McInnes
Solicitor for the Respondent:	Australian Government Solicitor

ORDERS

VID 829 of 2023

BETWEEN:	**JAN MAREK KANT** Applicant
AND:	**THE AUSTRALIAN INFORMATION COMMISSIONER** Respondent

ORDER MADE BY: **SNADEN J**

DATE OF ORDER: **11 JUNE 2024**

THE COURT ORDERS THAT:

1. The orders of Registrar Luxton that are the subject of the applicant's interlocutory application originally filed 23 December 2023 be affirmed.
2. The applicant's interlocutory application originally filed 23 December 2023 otherwise be dismissed.
3. The applicant pay the respondent's costs of and pertaining to that interlocutory application, to be assessed in default of agreement in accordance with the court's Costs Practice Note (GPN-COSTS).

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

REASONS FOR JUDGMENT

SNADEN J:

1 On 6 October 2023, the applicant, Mr Kant, filed an originating application seeking relief against the respondent pursuant to s 39B of the *Judiciary Act 1903* (Cth). It has since been amended. In its current form, the further amended originating application discloses that the relief that is sought is:

(1) an investigation by the respondent into "interference, by multiple regulated entities, with my rights as prescribed by the *International Covenant on Civil and Political Rights* (ICCPR)…by public officials and other persons in conspiracy to hide evidence of corruption";

(2) that the respondent "find, secure, and make discoverable for relevant court proceedings all information" about said interference, as coordinated with various other federal and state government bodies;

(3) orders that the respondent "refrain from taking action [pursuant to] (1) and (2), unless and until the Applicant requests the [respondent] to commence doing so";

(4) damages, including exemplary damages, in respect of tortious conduct; and

(5) "[f]urther damages in lieu of costs".

2 On 22 November 2023, Mr Kant filed an interlocutory application seeking an injunction against the respondent as follows (emphasis and citations corrected):

> The Applicant seeks an injunction under 80W(1) of the *Privacy Act 1988* (Cth) and orders commanding the Respondent to produce to the Applicant all information about him as is reasonably accessible to the Office of the Australian Information Commissioner.

3 On 26 November 2023, Mr Kant filed a second interlocutory application, by which he "urgently" sought a suppression order under pt VAA of the *Federal Court of Australia Act 1976* (Cth) (hereafter, the "**FCA Act**") in relation to certain material. At a case-management hearing held on 20 December 2023, Registrar Luxton considered both interlocutory applications.

4 The registrar dismissed the 22 November 2023 interlocutory application on the grounds that it was, in truth, an application for discovery and, in any case, comprised a "fishing expedition" (within the well-known and accepted meaning of that term).

5 The registrar also dismissed the 26 November 2023 interlocutory application on the grounds that there were no matters disclosed in the relevant material that justified the making of a suppression order.

6 On 23 December 2023, Mr Kant filed an interlocutory application (which he sought to amend on 14 February 2024 by filing an "amended interlocutory application" dated 27 December 2023), by which he moves for review of the registrar's decisions pursuant to s 35A of the FCA Act. It is that application (hereafter, the "**Application**") to which these reasons pertain.

7 The Application moves for orders:

(1) "[a]ffirming the [dismissal of the interlocutory application filed on 26 November 2023]"; and

(2) "granting the relief sought [in the interlocutory application filed on 22 November 2023]".

8 By written submissions dated 16 April 2024, Mr Kant states (reference omitted):

> The Respondent and Applicant are in agreement that the dismissal of the 26 Nov 2023 interlocutory application should be affirmed.

9 Thus, the only question that falls to be decided in this Application is whether the registrar was right to dismiss the interlocutory application dated 22 November 2023.

10 The bases upon which Mr Kant seeks relief are as follows, namely that:

(1) under sch 1 of the *Privacy Act 1988* (Cth) (hereafter, the "**Privacy Act**"), he has a right to costs-free access to information that the respondent holds about him;

(2) that right is enforceable by means of injunctive relief granted pursuant to s 80W(1) of the Privacy Act;

(3) the information sought will inform further steps in the substantive proceedings; and

(4) obtaining the information under the Privacy Act would lessen the need for discovery in the substantive proceedings.

11 Mr Kant proposed that the matter should be decided "on the papers". The respondent agreed to that course and, in the absence of some obvious reason not to, I indulged that joint preference.

12 Mr Kant relies on 33 affidavits that he has affirmed in this proceeding to date—specifically:

(1) an affidavit that he affirmed on 7 October 2023;

(2) two affidavits that he affirmed on 9 October 2023;

(3) an affidavit that he affirmed on 24 January 2024;

(4) an affidavit that he affirmed on 5 January 2024;

(5) two affidavits that he affirmed on 24 January 2024;

(6) twelve affidavits that he affirmed on 31 January 2024;

(7) an affidavit that he affirmed on 1 February 2024;

(8) an affidavit that he affirmed on 12 February 2024;

(9) an affidavit that he affirmed on 15 February 2024;

(10) an affidavit that he affirmed on 20 February 2024;

(11) four affidavits that he affirmed on 26 February 2024;

(12) an unsworn affidavit dated 12 February 2024, which was filed 27 February 2024 and to which is annexed an affidavit that he affirmed on 12 February 2024 in a proceeding before the Supreme Court of Victoria;

(13) an affidavit that he affirmed on 1 March 2024;

(14) an affidavit that he affirmed 4 March 2024;

(15) an affidavit that he affirmed 8 March 2024;

(16) an affidavit that he affirmed 12 March 2024; and

(17) an affidavit that he affirmed 13 March 2024.

13 On 23 February 2024, the respondent filed a tender bundle of documents, consisting predominantly of correspondence between the parties concerning the relief that Mr Kant seeks by his originating application. The parties also filed helpful written submissions, by which the court has been greatly assisted.

SHOULD THE COURT GRANT THE INJUNCTION SOUGHT?

14 A review conducted pursuant to s 35A(6) of the FCA Act is conducted by way of a hearing *de novo*: *Totev v Sfar and Anor* (2008) 167 FCR 193, 197 [14]-[15] (Emmett J, with whom

Bennett J agreed); *Zdrilic and Anor v Hickie and Anor* (2016) 246 FCR 532, 540-541 [28]-[29] (Katzmann, Farrell and Markovic JJ). The court must determine afresh whether the relief that Mr Kant seeks by means of the interlocutory application dated 22 November 2023 should be granted. If I am inclined to dismiss that application, Registrar Luxton's orders should be affirmed. Conversely, if I am persuaded to grant the relief for which Mr Kant moves, then those orders should be set aside.

15 Section 80W of the Privacy Act provides as follows:

> **80W Injunctions**
>
> *Enforceable provisions*
>
> (1) The provisions of this Act are enforceable under Part 7 of the Regulatory Powers Act.
>
> Note: Part 7 of the Regulatory Powers Act creates a framework for using injunctions to enforce provisions.
>
> *Authorised person*
>
> (2) For the purposes of Part 7 of the Regulatory Powers Act, each of the following persons is an authorised person in relation to the provisions mentioned in subsection (1):
>
> (a) the Commissioner;
>
> (b) any other person.
>
> *Relevant court*
>
> (3) For the purposes of Part 7 of the Regulatory Powers Act, each of the following courts is a relevant court in relation to the provisions mentioned in subsection (1):
>
> (a) the Federal Court;
>
> (b) the Federal Circuit and Family Court of Australia (Division 2).
>
> …

16 The "Regulatory Powers Act" is defined to mean the *Regulatory Powers (Standard Provisions) Act 2014* (Cth): Privacy Act, s 6. Part 7 of that Act includes ss 121 and 122, which provide as follows:

> **121 Grant of injunctions**
>
> *Restraining injunctions*
>
> (1) If a person has engaged, is engaging or is proposing to engage, in conduct in contravention of a provision enforceable under this Part, a relevant court may,

on application by an authorised person, grant an injunction:

(a) restraining the person from engaging in the conduct; and

(b) if, in the court's opinion, it is desirable to do so—requiring the person to do a thing.

Performance injunctions

(2) If:

(a) a person has refused or failed, or is refusing or failing, or is proposing to refuse or fail, to do a thing; and

(b) the refusal or failure was, is or would be a contravention of a provision enforceable under this Part;

the court may, on application by an authorised person, grant an injunction requiring the person to do that thing.

122 Interim injunctions

Grant of interim injunctions

(1) Before deciding an application for an injunction under section 121, a relevant court may grant an interim injunction:

(a) restraining a person from engaging in conduct; or

(b) requiring a person to do a thing.

…

17 The principles that govern the court's discretion to grant interlocutory or interim injunctive relief are well-settled and not in dispute. In order to qualify for the relief that he seeks, Mr Kant must demonstrate that he has a *prima facie* case for the orders that he seeks, and that the balance of convenience favours granting them: *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, 81-84 [65]-[72] (Gummow and Hayne JJ, with whom Gleeson CJ and Crennan J agreed).

18 I turn first to consider whether there exists a *prima facie* case for injunctive relief.

19 Mr Kant asserts that he has a right to costs-free access to information about him under sch 1 of the Privacy Act. Schedule 1 of the Privacy Act is titled "AUSTRALIAN PRIVACY PRINCIPLES". It sets out various "principles" that govern how "APP entities" are to deal with "personal information". The Australian Privacy Principles are given force of law by s 15 of the Privacy Act, which provides that APP entities must not do any act, or engage in a practice, that breaches an Australian Privacy Principle.

20 Australian Privacy Principle 12 contains clause 12.1, which (subject to certain exceptions) provides:

> **Access**
>
> 12.1 If an APP entity holds personal information about an individual, the entity must, on request by the individual, give the individual access to the information.

21 Clause 12.4 sets out how an APP must deal with such requests:

> **Dealing with requests for access**
>
> 12.4 The APP entity must:
>
> a. respond to the request for access to the personal information:
>
> i. if the entity is an agency — within 30 days after the request is made; or
>
> ii. if the entity is an organisation — within a reasonable period after the request is made; and
>
> b. give access to the information in the manner requested by the individual, if it is reasonable and practicable to do so.

22 Clause 12.7 provides that if the APP entity is an agency, it must not charge for the making of the request or for the giving of access to the personal information. An "APP entity" means an agency or organisation as defined within s 6(1) of the Privacy Act.

23 In summary, then, the Privacy Act grants individuals a right to *request* information from an APP entity, which in turn imposes an obligation to deal with such requests in accordance with Australian Privacy Principle 12.

24 In order that he might found his claim to relief under s 80W of the Privacy Act, Mr Kant must demonstrate that the respondent has done or is doing something that is contrary to the Australian Privacy Principles. Insofar as concerns access to information, that endeavour requires that he first establish that he has made a request for information.

25 It is on that front that the respondent's opposition to the present Application is founded. There is no evidence before the court that Mr Kant has made a valid request of the respondent for information pursuant to Australian Privacy Principle 12. In the absence of such a request, the respondent does not labour under any obligation pursuant to clause 12.4. Absent an obligation of that kind, it cannot be said that the respondent has done or is doing anything that is contrary

to the Australian Privacy Principles; and the jurisdiction conferred upon the court by s 80W of the Privacy Act is not enlivened.

26 There is, then (at least on the current state of the evidence), no *prima facie* case for the relief that Mr Kant seeks. The balance of convenience is not such as might warrant the granting of relief regardless. On the contrary, to impose upon the respondent the burden of providing information now in the absence of some statutory obligation—and in circumstances where the benefit to be realised by Mr Kant is anything but clear—would be an undue imposition.

27 Furthermore, the registrar was correct when he said that "in substance, [the interlocutory application of 22 November 2023] really seems to me to be an application for discovery" and "[a]s presently cast, it is exceedingly broad [and] appears that in effect [it is] being used … as a means of recasting …the application". To the extent that the interlocutory application of 22 November 2023 should be treated as an application for discovery, it would, as Registrar Luxton concluded, unambiguously constitute a fishing expedition.

DISPOSITION

28 Mr Kant has not made out a *prima facie* case for the granting of interlocutory injunctive relief and the balance of convenience is not such as to warrant any. There is no occasion presently for the court to grant the injunctive relief that Mr Kant has sought. Respectfully, Registrar Luxton was correct to dismiss the interlocutory application of 22 November 2023. That dismissal is hereby affirmed. The Application is otherwise dismissed. Mr Kant should pay the respondent's costs of and pertaining to it. There shall be orders accordingly.

I certify that the preceding twenty-eight (28) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Snaden.

Associate: 

Dated: 11 June 2024