

Valu v Minister for Immigration and Multicultural Affairs (No 2)

Rania Skaros



2025

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FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

Valu v Minister for Immigration and Multicultural Affairs (No 2) [2025] FedCFamC2G 95

File SYG 1768 of 2020
number(s):

Judgment of: **JUDGE SKAROS**

Date of 31 January 2025
judgment:

Catchwords: **MIGRATION** – Legal Practitioners–
conduct of legal practitioner before the
Court - citation of cases and quotes from
Tribunal decision which do not exist – case
citations generated by an artificial
intelligence program – practitioner afforded
an opportunity make submissions as to why
he should not be referred to the Office of
the NSW Legal Services Commissioner –
Referral made

Legislation: *Legal Profession Uniform Law* (NSW)
2014 ss 296, 297, 298

Legal Profession Uniform Australian Solicitors' Conduct Rules 2015 (NSW) r 19.1, 22.5,

Cases cited: *Dayal* [2024] FedCFamC2F 1166

Mata v Avianca Inc, 678 F Supp 3d 443 (S.D.N.Y. 2023)

Division: Division 2 General Federal Law

Number of 38
paragraphs:

Date of 10 December 2024
hearing:

Place Parramatta

Solicitor for The applicant was represented by a solicitor the Applicant whose name has been anonymised. The applicant's solicitor was represented by Mr George.

Counsel for Mr Reilly
the First
Respondent:

Solicitor for Minter Ellison
the First
Respondent:

Counsel for Submitting appearance save as to costs.
the Second
Respondent:

ORDERS

SYG 1768 of 2020

**FEDERAL CIRCUIT AND FAMILY COURT OF
AUSTRALIA (DIVISION 2)**

BETWEEN: FINAU SOSIFA VALU

Applicant

**AND: MINISTER FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS**

First Respondent

**ADMINISTRATIVE
TRIBUNAL**

APPEALS

Second Respondent

ORDER JUDGE SKAROS

MADE BY:

DATE OF 31 JANUARY 2025

ORDER:

THE COURT DIRECTS THAT:

1. The Principal Registrar of the Court or his delegate refer this matter to the Office of the NSW Legal Services Commissioner (OLSC) for consideration of the conduct of the applicant's legal representative (the ALR), providing copies of the following:

- (a) A copy of the reasons for the direction;
- (b) A copy of the judgment in the related substantive judicial review proceedings;
- (c) The ALR's affidavit filed 2 December 2024;
- (d) The ALR's submissions filed 2 December 2024 as to whether the ALR ought to be referred to the OLSC;
- (e) The First Respondent's submissions filed 5 December 2024 as to whether the ALR ought to be referred to the OLSC;
- (f) The Applicant's submissions filed 25 October 2024;
- (g) The Application filed 23 October 2024; and
- (h) The Amended Application filed 3 December 2024.

Note: The form of the order is subject to the entry in the Court's records.

Note: The Court may vary or set aside a judgment or order to remedy minor typographical or grammatical errors (r 17.05(2)(g) *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to r 17.05 *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth).

REASONS FOR JUDGMENT

JUDGE SKAROS

INTRODUCTION

1 This judgment concerns the conduct of the applicant's legal representative (the ALR) which involved the filing of submissions with the Court that contained citations of authorities and quotes alleged to be from a decision of the Administrative Appeals Tribunal (the Tribunal) (as it then was) which do not exist. The judgment also concerns the ALR's ex parte communication with the Court.

BACKGROUND

2 On 22 July 2020 an originating application was filed in this Court seeking judicial review of a decision of the Tribunal dated 18 June 2020. The applicant was represented in relation to the judicial review application by his legal representative (the ALR).

3 In compliance with orders made by a Registrar of this Court on 3 October 2024, the applicant filed an amended application on 23 October 2024. An outline of submissions was also filed on behalf of the applicant on 25 October 2024. Both documents contained citations to cases and alleged quotes from the Tribunal's decision which were non-existent.

4 On 11 November 2024, the Minister filed their outline of submissions with the Court. The Minister noted at [21] that:

The applicant's submissions ... refer to "Murray v Luton [2001] FCA 1245", "Mackinlay v MIMA [2002] FCA 953", "Bavinton v MIMA [2017] FCA 712", "Gonzalez v MIBP [2018] FCA 211", "Seng v MIAC [2013] FCA 1279", "Kahawita v MIEA [1993] FCA 870", "MIAC v Thiyagarajah [2016] FCA 19", "Heath v MIMA [2001] FCA 700", "Mitsubishi Motors Australia Ltd v AAT [2004] FCA 1241", "MIMA v Ameer [2004] FCA 276", "Woods v MIMA [2001] FCA 294", "MIAC v Wu [2015] FCA 632", "Drummond v MIMA [2008] FCA 1774", "Walters v MIBP [2016] FCA 953", "Lao v MIMA [2002] FCA 1234", "Alfaro v MIBP [2016] FCA 1156" and "Wai v MIBP [2016] FCA 1157", but none of these decisions exist. They also in paras 1.2, 2.2, 3.1, 4.1, 5.1, 5.2, 6.1 and 6.2 provide alleged quotes from the Tribunal's decision which also do not exist.

5 On 19 November 2024, the ALR sent the Court an email, without copying in the other party or seeking their consent to send the correspondence, which attached an amended submission that had removed the citations to the non-existent case law and the purported quotes from the Tribunal's decision. Without alteration, the email stated the following:

I am forwarding herewith an amended submission for the Applicant.

I acknowledge the errors identified by the respondent regarding the case law citations and purported quotes from the tribunal's

decision in my submission dated 25 October 2024. These errors were unintentional, and I deeply regret them.

Despite these mistakes, they do not affect the substantive issues raised in the application for judicial review, which reveals significant flaws in the AAT's decision-making process. This attached amended submission has corrected my original submission dated 24 October 2024.

Could you please confirm if His Honor is willing to accept this amended submission or If I should seek leave from His Honor to file it on the hearing date that is scheduled On the 25 November 2024. Upon acceptance of this amended document I will notify the respondent's Solicitors accordingly.

I do apologise for submitting this late amended submissions.

Your assistance in this matter is very much appreciated.

6 On 19 November 2024, my Associate emailed the parties explaining that it was not appropriate for a party or their legal representative to communicate with the Court without the consent of the other party, nor was it appropriate for a party or legal representatives to communicate with the Court without copying in the other party.

7 In response, the ALR emailed the Court apologising and stating that the error was unintentional.

8 The final hearing, which was initially scheduled for 25 November 2024, had to be vacated and a directions hearing was instead listed to raise with the parties the Court's

concerns about the conduct of the ALR and to discuss with the parties an achievable timetable to progress the substantive judicial review proceedings.

9 At the directions hearing, on 25 November 2024, the ALR appeared on behalf of the applicant. The applicant appeared over Microsoft Teams and was assisted by an interpreter in the Tongan and English languages. Ms Pieri, a solicitor, appeared on behalf of the Minister.

10 Relevantly, the Court inquired as to whether the written submissions provided by ALR had been generated using an artificial intelligence (AI) program. The ALR stated that he had used AI to identify Australian cases, but it provided him with non-existent case law. The Court expressed its concern about the ALR's conduct and his failure to check the accuracy of what had been filed with the Court, noting that a considerable amount time had been spent by the Court and my Associates checking the citations and attempting to find the purported authorities.

11 The Court made orders which, inter alia, required the ALR to file and serve an affidavit addressing how the submissions filed 25 October 2024 were generated, including a full explanation as to why the submissions contained references to fictional authorities and purported quotations from the Tribunal's decision. The orders provided for the ALR to file and serve written submissions as to why he should not be referred to the Office of the

NSW Legal Services Commissioner (OLSC). The orders also provided for the Minister to file and serve any written submissions about whether the ALR should be referred to the OLSC.

12 In accordance with the orders, on 2 December 2024, the ALR filed an affidavit, with annexures, and written submissions. On 5 December 2024, the Minister filed written submissions.

13 On 10 December 2024, the final hearing for the substantive matter was held at the Parramatta Registry of the Court.

14 After the proceedings in respect of the substantive judicial review applications had been completed, the Court invited the ALR to make submissions as to why he should not be referred to the OLSC. The ALR was represented by counsel who made submissions on his behalf. The Minister was also represented by counsel.

15 For reasons that follow, the Court will direct the Principal Registrar of the Court to refer the conduct of the ALR to the OLSC.

CONSIDERATION

16 The OLSC is an independent statutory body to whom complaints about legal practitioners in New South Wales (NSW) can be made. The NSW Legal Services

Commissioner (the LSC) has the power to investigate complaints, including those which allege unsatisfactory professional conduct or professional misconduct by a legal practitioner: ss 296 and 297 of the *Legal Profession Uniform Law* (NSW) 2014 (LPUL).

17 Conduct which can constitute unsatisfactory professional conduct or professional misconduct includes, but is not limited to, contravention of the *Legal Profession Uniform Australian Solicitors' Conduct Rules* 2015 (NSW) (Conduct Rules): s 298 of the LPUL.

18 The conduct of the ALR, in filing an application and submissions which contained citations to Federal Court of Australia cases which do not exist and alleged quotes from the Tribunal's decision which do not exist, falls short of the standard of competence and diligence that the applicant in the substantive proceedings was entitled to expect from his legal representative. The conduct also falls short of a legal practitioner's duty to the Court, including the duty to ensure that the Court is not deceived or misled, even if unintentionally: r 19.1 of the Conduct Rules.

19 After receiving the Minister's submissions, which brought to the attention of the Court the false case citations and quotes, the ALR sent an email to my Associate (without the consent of, or copying in, the Minister's lawyers) enclosing an amended submission without the false case citation and paragraphs from the Tribunal's decision. This

conduct, which the Court considers falls short of the standard expected of a legal practitioner, was in contravention of r 22.5 of the Conduct Rules which required the ALR to ensure they do not communicate with the Court concerning matters of substance in connection with the proceedings in the absence of their opponent.

20 In considering whether the ALR's conduct should be referred to the OLSC, the Court has had regard to the evidence of the ALR and to the written and oral submissions made on behalf of the ALR and the Minister.

21 In his affidavit, the ALR expressed his sincere apology to the Court for his conduct, stating he understands that as a solicitor he had a duty to deliver legal services competently, diligently and promptly. He said he also understands that he has a duty to the Court. The ALR accepted he may have breached his obligations and explained that it was the product of inadvertence, that the conduct had never previously occurred and that it would not occur again. The ALR provided details of his professional background which indicates that he has been admitted as a solicitor since 1997. The ALR provided details and supporting evidence of his health issues, which he said affects his concentration and ability to sit for long periods of time.

22 The ALR explained that due to time constraints and his health issues, he decided to use AI, which had been promoted by reputable legal services such as LEAP and

Lexis Nexis as being of assistance in legal practices. He accessed the site known as ChatGPT, inserted some words and the site prepared a summary of cases for him. He said the summary read well, so he incorporated the authorities and references into his submissions without checking the details.

23 The ALR referred to the Practice Note regarding Generative AI issued by the Chief Justice of the Supreme Court of New South Wales on 21 November 2024, which he said post-dated his submissions. The ALR said if he had access to the Practice Note at the time he drafted the submissions, he would not have incorporated the material generated by AI. The ALR expressed his commitment to upholding the highest standards of practice.

24 In his written submissions, the ALR repeated much of what he had said in his affidavit about his professional background and health issues. The ALR provided details of a spinal surgical procedure that he must undergo in the near future and said he wished to diligently complete his obligations to his clients prior to his hospitalisation.

25 In seeking to explain the reason for emailing the amended submissions to my Chambers without the consent of (or copying in) the Minister's lawyers, the ALR said that this was due to time constraints and that he was simply following the advice of my Chambers (in an earlier email) which requested all future correspondence relating to the

matter be sent to the Associate's email address. The ALR explained that it was not his intention to circumvent the established protocols and that if his interpretation of the advice in the email from my Associate was mistaken then he deeply regrets his actions. The Court accepts that the ALR did not deliberately intend to exclude his opponent from communication with the Court and that the oversight likely arose from his lack of familiarity with litigation procedure and the Conduct Rules.

26 The ALR sought the Court's leniency having regard to his long-standing service (of 27 years) to the legal profession, his current health difficulties and his advancing age. He said the prospect of facing formal repercussions weighed heavily on him, particularly as he prepares for major surgery which may impact his ability to practice law.

27 At the hearing, counsel for the ALR referred the Court to the Guide on use of Generative AI Tools by Court Users issued by the Supreme Court of Singapore, which provides a helpful explanation of how generative AI tools work. Counsel submitted that these tools provided a seductive output tailored to the user's prompts and that the ALR was seduced by these fake cases or 'hallucinations' produced by AI.

28 Counsel submitted that the ALR was at the end of his legal career and had experienced a range of health issues that deteriorated or affected his performance. Counsel

implored the Court to distinguish *Dayal* [2024] FedCFamC2F 1166 (*Dayal*) on the basis that, in the present case, the fake cases were not referenced in the final hearing as the ALR had filed an amended application and outline of submissions. Counsel submitted that the ALR was profoundly embarrassed by the conduct and had taken steps to improve his knowledge of AI.

29 Counsel further submitted that the Practice Note issued by the Supreme Court of NSW has provided clarity on the subject of AI, and that people would not be assisted by another reexamination of the ALR's case which would only serve to embarrass him, even if he is not personally identified.

30 The Minister submitted that the ALR had failed to exercise adequate care in allowing submissions which contained false citations and false quotes to be filed. The Minister referred to the matter of *Dayal* in which her Honour Judge A Humphreys directed the referral of the solicitor in that matter to the Victorian disciplinary authorities in similar circumstances. It was submitted that the same course should follow in the present case. The Minister submitted that the misuse of artificial intelligence in legal proceedings was a matter of current public interest. It was submitted that such misuse would likely be a matter of increasing concern in future, and there was a public interest in ensuring the OLSC is aware of the misuse of AI in cases as they arise.

31 In oral submissions, the Minister submitted that *Dayal* should not be distinguished and that the conduct of the ALR, in providing fake quotes from the Tribunal's decision as well as fake case citations to the Court, went beyond the conduct of the solicitor in *Dayal*. It was submitted that such conduct would continue to occur and must be "nipped in the bud".

32 The Court notes that in *Dayal*, the solicitor in that matter provided the Court with a list of fictional authorities and case summaries which had been generated using an AI tool within the LEAP Practice Management Software. Her Honour, citing the USA District Court case of *Mata v Avianca Inc*, 678 F. supp. 3d 443 (S.D.N.Y. 2023), set out the potential harms that could result from the filing of submissions which contain false information. Her Honour referred to the duties of legal practitioners and considered that the solicitor in that matter had breached the professional standards expected of them. Her Honour accepted that the solicitor's apology was genuine and that the conduct would unlikely be repeated, but nevertheless considered it in the public interest that the relevant regulatory authority (the Victorian Legal Services Board and Commissioner) was made aware of the professional conduct issues that arose in that matter given the increased use of AI tools by legal practitioners in litigation.

33 The circumstances of the present matter raise similar issues to those in *Dayal*.

34 The Court accepts that the ALR genuinely regrets his conduct. He acknowledged that the provision of false case citations and quotes alleged to be from the Tribunal's decision was in breach of his duty to his client and to the Court. The Court accepts that the conduct will not be repeated and that the ALR has undertaken to further his knowledge and understanding of the risks of using generative AI tools.

35 The Court accepts that the ALR, as soon as becoming aware of the non-existent case citations and Tribunal quotes in the submissions, took steps to provide amended submissions. However, by the time this occurred, the Court and the Associates had already spent a considerable amount of time attempting to locate the cases and enquiring as to whether the correct Tribunal decision had been filed with the Court. The Minister had also prepared their submissions in reply and filed them. As a consequence of the ALR's conduct, the matter could not conveniently proceed, and further timetabling was required to facilitate the proper filing of an amended application and submissions on behalf of the applicant. The ALR's conduct created unnecessary additional work for the Court and the Minister. The ALR acknowledged the inconvenience to the Court (and the Minister) caused by his conduct and was apologetic.

36 The Court accepts that the ALR is deeply embarrassed by his conduct, and it is certainly not the Court's intention to embarrass him any further by referring the conduct to the

OLSC. The Court has anonymised the name of the ALR to protect his identity. If the Court refers the conduct to the OLSA, a preliminary assessment will be undertaken to ascertain whether any further action or investigation is warranted. In making its assessment, the OLSA will take into account the ALR's experience as a legal practitioner, his advancing age, his significant health issues, and the regret and remorse he has expressed for his conduct. Consideration of these factors and whether they mitigate the ALR's conduct will of course be a matter for the OLSA.

37 There is a strong public interest in referring this conduct to the regulatory authority in NSW given the increased use of generative AI tools by legal practitioners. The use of generative AI in legal proceedings is a live and evolving issue. While the Supreme Court of NSW has issued guidelines around the use of generative AI, other Courts, including this Court, are yet to develop their guidelines. The Court agrees with the Minister that the misuse of generative AI is likely to be of increasing concern and that there is a public interest in the OLSA being made aware of such conduct as it arises.

38 Having regard to all the circumstances, the Court considers it in the public interest to refer the ALR's conduct to the OLSA and will so direct that the Principal Registrar of this Court to refer the matter accordingly, and to provide the OLSA with a copy of the Court's reasons for the direction, a copy of the judgment in the substantive

proceedings, the ALR's affidavit, the written submissions of the parties and the amended applications filed 3 December 2024.

I certify that the preceding thirty-eight (38) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Skaros.

Associate:

Dated: 31 January 2025



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