HIGH COURT OF AUSTRALIA

10 May 2024

ASF17 v COMMONWEALTH OF AUSTRALIA
[2024] HCA 19

Today, the High Court unanimously dismissed an appeal from a decision of the Federal Court of Australia. The appeal concerned the principles identified in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 which held that the continuing detention under ss 189(1) and 196(1) of the *Migration Act 1958* (Cth) ("the Act") of an alien required to be removed from Australia under s 198(1) or s 198(6) of the Act exceeds the temporal limitation on the valid application of those provisions imposed by Ch III of the *Constitution* if and for so long as there is no real prospect of removal of the alien from Australia becoming practicable in the reasonably foreseeable future. The appeal concerned the application of those principles to a case in which an alien detainee who claims that their continuing detention exceeds the constitutional limitation identified in *NZYQ* has refused to cooperate in the undertaking of administrative processes necessary to facilitate their removal from Australia.

ASF17 is a citizen of Iran and arrived in Australia in 2013. Except for a period between 2013 and 2014 during which he held a bridging visa, he has been in immigration detention continuously since his arrival. While in detention, ASF17 applied for a Safe Haven Enterprise Visa ("SHEV"). The application was refused by a delegate of the Minister for Immigration and Border Protection. The final determination of the application, which occurred upon the dismissal of an appeal by ASF17 to the Federal Court in 2018, engaged the duty imposed on officers of the Department of Home Affairs ("the Department") by s 198(6) of the Act to remove ASF17 from Australia as soon as reasonably practicable. During regular interviews conducted by officers of the Department from 2018 for the purpose of facilitating his removal, ASF17 consistently told officers that he would not voluntarily return to Iran and refused to engage with Iranian authorities. Iranian authorities have a policy of not issuing travel documents to involuntary returnees. ASF17 told officers of the Department that he would agree to be sent to any country other than Iran. The refusal of ASF17 to cooperate in facilitating his removal to Iran, combined with his failure to identify any third country to which he might be removed, resulted in an impasse.

In 2023, a week after the pronouncement of the orders in *NZYQ*, ASF17 applied to the Federal Court for a writ of habeas corpus on the basis that his continuing detention exceeded the constitutional limitation identified in those orders. ASF17 filed affidavits deposing to his reasons for refusing to return to Iran, including that he feared being harmed in Iran because of his bisexuality. That claim was not made in his SHEV application and the Minister's delegate had therefore not considered it. The Commonwealth contended that the continuing detention of ASF17 did not exceed the constitutional limitation identified in *NZYQ* on the basis that he could be removed to Iran were he to cooperate in returning voluntarily. The primary judge dismissed ASF17's application for a writ of habeas corpus. An appeal from that decision to the Full Court of the Federal Court was removed into the High Court.

The High Court held that ASF17's continuing detention under ss 189(1) and 196(1) of the Act does not exceed the constitutional limitation identified in *NZYQ*. The non-punitive statutory purpose of removing an alien detainee from Australia under s 198(1) or s 198(6) of the Act remains a non-punitive purpose that is reasonably capable of being achieved if and for so long as removal could be achieved in the reasonably foreseeable future were the detainee to decide to cooperate in the undertaking of administrative processes necessary to facilitate that removal.

This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.

Please direct enquiries to Ben Wickham, Executive Registrar & Head of Public Affairs
Telephone: (02) 6270 6893 Fax: (02) 6270 6868
Email: enquiries@hcourt.gov.au Website: www.hcourt.gov.au