

CPCF v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR (S169/2014)

Date writ of summons filed: 7 July 2014

Date special case referred to Full Court: 21 August 2014

The plaintiff is a Tamil Sri Lankan who claims to have refugee status. He and several family members of his were among 157 people (“the detainees”) aboard a vessel (“the Indian vessel”) that was intercepted by a border protection vessel (“the Australian vessel”) on 29 June 2014. That interception occurred in the Indian Ocean near Christmas Island, in the “contiguous zone” to Australia’s territorial sea. After the Indian vessel later became unseaworthy, the detainees were transferred to the Australian vessel and were then detained aboard it.

Section 72 of the *Maritime Powers Act* 2013 (Cth) (“Maritime Powers Act”) makes provision for the detention and movement of persons on a vessel detained by maritime officers (which include members of the Australian Defence Force and Customs officers). Section 72(4) provides as follows:

A maritime officer may detain the person and take the person, or cause the person to be taken:

(a) to a place in the migration zone; or

(b) to a place outside the migration zone, including a place outside Australia.

On 1 July 2014 the National Security Committee of Cabinet decided that the detainees should all be taken to India. This was in accordance with a government policy of intercepting and removing from Australian waters any person without a visa who attempts to enter Australia by boat. The detainees remained aboard the Australian vessel while it travelled through international waters and later waited near India while diplomatic negotiations took place.

The first respondent (“the Minister”) then decided to take the detainees into Australia’s migration zone instead of to India. The detainees remained aboard the Australian vessel until 27 July 2014, when they were taken to the Cocos (Keeling) Islands. They were then detained under s 189(3) of the *Migration Act* 1958 (Cth).

By that time the plaintiff had commenced proceedings in this Court against both the Minister and the Commonwealth of Australia (together, “the defendants”). The plaintiff challenges the lawfulness of his detention outside of Australia and Australia’s contiguous zone. He seeks damages for wrongful imprisonment.

A Notice of a Constitutional Matter was filed by the plaintiff on 24 July 2014. At the time of writing, no Attorney-General had informed the Court of an intention to intervene in these proceedings. Applications for leave to appear as *amicus curiae* have been made by both the United Nations High Commissioner for Refugees and the Australian Human Rights Commission (the latter seeking such leave in the alternative to leave to intervene in the proceedings).

The parties filed a special case, the following questions in which were stated by Justice Hayne for the opinion of the Full Court:

- (1) Did s 72(4) of the Maritime Powers Act authorise a maritime officer to detain the plaintiff for the purpose of taking him, or causing him to be taken, to a place outside Australia, being India:
 - (a) whether or not the plaintiff would be entitled by the law applicable in India to the benefit of the non-refoulement obligations;
 - (b) in implementation of a decision by the Australian Government that the plaintiff (and others on the Indian vessel) should be taken to India without independent consideration by the maritime officer of whether that should be so; and
 - (c) whether or not, prior to the commencement of the taking of the plaintiff to India, an agreement or arrangement existed between Australia and India concerning the reception of the plaintiff in India?
- (2) Did s 72(4) of the Maritime Powers Act authorise a maritime officer to:
 - (a) take the steps set out in paragraph 20 in implementing the decision to take the plaintiff to India;
 - (b) detain the plaintiff for the purposes of taking the plaintiff to India?
- (3) Did the non-statutory executive power of the Commonwealth authorise an officer of the Commonwealth to:
 - (a) take the steps set out in paragraph 20 for the purpose of preventing the plaintiff from entering Australia;
 - (b) detain the plaintiff for the purposes of taking the plaintiff to India?
- (4) Was the power under s 72(4) of the Maritime Powers Act to take the plaintiff to a place outside Australia, being India, subject to an obligation to give the plaintiff an opportunity to be heard about the exercise of that power and, if so, was that obligation breached?
- (5) Was any non-statutory executive power of the Commonwealth to take the plaintiff to a place outside Australia, being India, for the purpose of preventing the plaintiff from entering Australia, subject to an obligation to give the plaintiff an opportunity to be heard about the exercise of that power and, if so, was that obligation breached?
- (6) Was the detention of the plaintiff unlawful at any, and if so what period, from 1 July 2014 to 27 July 2014 and if so are they entitled to claim damages in respect of that detention?
- (7) Who should pay the costs of this special case?
- (8) What if any order should be made to dispose of the proceeding or for the conduct of the balance (if any) of the proceeding?