



HIGH COURT OF AUSTRALIA

7 February 2018

FALZON v MINISTER FOR IMMIGRATION AND BORDER PROTECTION
[2018] HCA 2

Today the High Court unanimously upheld the validity of s 501(3A) of the *Migration Act* 1958 (Cth) ("the Act"). The High Court held that s 501(3A) does not authorise or require the detention of a non-citizen and does not confer upon the Minister for Immigration and Border Protection ("the Minister") the judicial power of the Commonwealth.

The plaintiff is a national of Malta who has resided in Australia since 1956. He arrived in Australia with his family at the age of three. He did not at any time obtain Australian citizenship. Until 10 March 2016, he held an Absorbed Person Visa and a Class BF Transitional (Permanent) Visa. In 2008, the plaintiff was convicted of trafficking a large commercial quantity of cannabis. He was sentenced to 11 years' imprisonment with a non-parole period of eight years. Four days before the expiration of the plaintiff's non-parole period, a delegate of the Minister cancelled his Absorbed Person Visa pursuant to s 501(3A) of the Act, with the effect that the Minister was taken to have decided to cancel the plaintiff's other visa. The plaintiff was taken into immigration detention upon being released from criminal custody. The plaintiff sought revocation of the decision to cancel his visa. The Assistant Minister decided not to revoke the decision.

Section 501(3A) relevantly provides that the Minister must cancel a visa that has been granted to a person if the Minister is satisfied that the person has a substantial criminal record and is currently serving a sentence of imprisonment on a full-time basis for an offence against a law of the Commonwealth, a State or a Territory. A cancellation decision under s 501(3A) has the immediate effect that the person's status is changed from lawful non-citizen to unlawful non-citizen. An unlawful non-citizen is liable to immigration detention.

The plaintiff commenced proceedings in the original jurisdiction of the High Court, challenging the validity of s 501(3A) on the ground that it purports to confer the judicial power of the Commonwealth on the Minister and thereby infringes Ch III of the Constitution. The plaintiff argued that, in its legal operation and effect, s 501(3A) further punished him for the offences he committed and that is its purpose. The plaintiff relied on the principle that the power to adjudge guilt of, or determine punishment for, breach of the law is a power exclusive to the Ch III judiciary.

The High Court unanimously dismissed the plaintiff's application. The Court held that s 501(3A) did not authorise or require the detention of the plaintiff. Section 501(3A) required that the Minister cancel the plaintiff's visa on account of his criminal history and his imprisonment. The purpose of the statutory scheme of which s 501(3A) forms a part is to regulate the presence in Australia of non-citizens, in the national interest, and to remove or deport from Australia non-citizens who, in the view of Parliament, should not be permitted to remain in Australia. The Court held that cancellation of a visa for that purpose does not involve any determination or punishment of criminal guilt and does not involve the exercise of judicial power.

- *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.*