HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **MINISTER FOR HOME AFFAIRS**
First Appellant

COMMONWEALTH OF AUSTRALIA
Second Appellant

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and

DJA18 as litigation representative for DIZ18
Respondent

RESPONDENT'S SUBMISSIONS

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Part I. Form of submissions

1. These submissions are in a form suitable for publication on the internet.

Part II. Issues presented by the appeal

2. In their submissions in this proceeding,[1] the Appellants adopt their submissions in proceeding M29 of 2020, *Minister for Home Affairs v FRX17 as litigation representative for FRM17*.[2]

3. The Appellants submit that the only issue that arises in this appeal is the issue in relation to s 494AB(1)(ca) of the *Migration Act 1958* (Cth) ("**Act**"). Nevertheless, issues about the construction and application of s 494AB(1)(a) and (d) arise by reason of the Respondent's cross-appeal (**CAB 149**), as addressed below in Part VI.

4. In relation to the framing of the s 494AB(1)(ca) issue in the FRM Submissions, the Respondent adopts the submissions of the Respondent in matter M28 of 2020, *Minister for Home Affairs v Marie Theresa Arthur as litigation representative for BXD18 ("**BXD18**")*, so that the issue raised by the appeal is as follows:

> "[D]id s 494AB(1)(ca) apply to this proceeding at the time it was instituted and/or at the time of the Full Court's decision."

5. In the Respondent's submission, this question would be answered, "no."

Part III. Section 78B notice

6. It is not necessary to give notice under section 78B of the *Judiciary Act 1903* (Cth).

Part IV. Contested material facts set out in Appellants' narrative or chronology

A. The case as "instituted"

7. As to **AS [6]**, the Respondent was born on Nauru on 5 June 2016 (**ABFM 325 [21]**), was recognised as a refugee on 22 November 2016 (**ABFM 326 [31]**), and was transferred to a Nauru health clinic on 11 June 2018 when she was just over two years old (**ABFM 326 [34]**).

8. **AS [6]** omits relevant agreed matters. By 12 June 2018, the Appellants' advice was that the Respondent needed to be urgently evacuated to a first-world tertiary hospital and/or a centre with specialist paediatric intensive care unit (**ABFM 326 [35]**). The

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1 Dated 8 May 2020. References will take the form "**AS [X]**" or "**DIZ Submissions**".
2 References will take the form "**FRM AS [X]**", or "**FRM Submissions**".

Appellants did not follow this advice; rather, they did not evacuate her for several days (until 14 June 2018), when they took her to the Pacific International Hospital in Papua New Guinea ("**PIH**"), which was not a first-world hospital and did not have a specialist paediatric intensive care unit (**ABFM 326 [36]–[38]**).

9. On around 27 June 2018, the Appellants determined to take the Respondent back to Nauru (**ABFM 327 [40]**). This catalysed the commencement of proceedings in the Federal Court (**ABFM 327 [41]**).

10. The "particular medical care" referred to at **AS [8]** was an MRI head scan and specialist paediatric treatment (**ABFM 139 [1]**).

11. The Statement of Claim, described at **AS [9]–[10]**, contained no reference to any particular provision of the Act (save the fact of designation of Nauru as a regional processing country under s 198AB (**ABFM 146 [6]**)). It alleges, beyond what the Appellants describe, that the medical advice provided to them on 12 June 2018 was that the Respondent had a "history of clinical features of severe sepsis, and concerns of a central nervous system source (meningo-encephalitis)" (**ABFM 148 [13.1]**).

B. The case the Respondent sought to "continue" as at the Full Court hearing

12. The Amended Statement of Claim, like the Statement of Claim, contained no reference to any particular provision of the Act (save the fact of designation of Nauru as a regional processing country under s 198AB (**ABFM 155 [6]**)).

13. Further matters as to the Respondent's medical history were pleaded and particularised including that, on 12 June 2018, a report of an IHMS doctor recorded that she had deteriorated over 24–48 hours and had required "significant resuscitation", and that she had received fluid resuscitation into her bone marrow, but that it had been necessary to remove this intraosseous needle and she no longer had "IV access" (**ABFM 158 [14]**). It was pleaded that no facility on either Nauru, or the PIH, had facilities of the kind described in medical advice to the Appellants (**ABFM 159 [18]**), and that they knew that in transferring the Respondent to PIH, the Appellants were not complying with their medical advice and were not acting in DIZ18's best medical interests (**ABFM 159 [19]**).

14. It was alleged that while at PIH, the Respondent was treated for herpes simplex virus encephalitis (**ABFM 162 [26]**), but did not undergo an electroencephalogram or brain magnetic resonance imaging, and was not reviewed or treated by a specialist paediatric neurologist (**ABFM 162 [27]**).

15. It was alleged that, by reason of the Respondent's injuries, she required and would require long-term rehabilitation, specialist review and follow-up with treating practitioners in Australia—which is where she was at the date of the Amended Statement of Claim—this standard of care being not available in Nauru (**ABFM 166 [34]**). She sought, "[a]n injunction requiring the [Appellants] to take and continue to take all steps within their power to ensure that the [Respondent] receives treatment, including long-term care and follow-up, in a location with access to quality, multi-disciplinary specialist paediatric care", and damages (**ABFM 166–167 [A]**).

16. **AS [16]–[17]** are accurate.

10 **C. The Full Court's decision**

17. **AS [18]** incorporates **FRM AS [18]–[20]**. The Respondent adopts the responsive submissions of the Respondent in *BXD18*.

18. As to **AS [19]**, the Appellants are wrong to submit that the Full Court held that "a cause or action in negligence did not engage s 494AB(l)(ca). It did not say this in construing s 494AB(1)(ca), and it did not say it at **CAB 85 [243]–[245]**, which the Appellants cite. In those paragraphs, having outlined the particular way that the Respondent pleaded her case and in particular the alleged duty of care, the Full Court said that the "pleaded duty of care" was not inconsistent with provisions of the Act (**CAB 85 [243]–[244]**), and that "the bar in s 494AB(1)(ca) does not apply to DIZ18's pleaded case in
20 negligence" (**CAB 85 [245]**, emphasis added). Nothing in this constitutes a finding that s 494AB(1)(ca) can never apply to a negligence claim.

19. **AS [20]–[21]** are accurate.

Part V. Argument on appeal

A. Application of s 494AB(1)(ca)—Ground 1

20. **AS [22]** adopts **FRM AS [21]–[45]**. The Respondent adopts the responsive submissions of the Respondent in *BXD18*.

21. The submissions at **AS [24]–[28]** are respectively addressed by paragraphs 56–59 of the Respondent's submissions in *BXD18*, and the Respondent adopts those submissions.

Part VI. Argument on cross-appeal

22. The cross-appeal involves the Respondent advancing again the construction of s 494AB(1)(a), (ca), and (d) which she pressed below, and which the Full Court rejected at **CAB 67–68 [185]**.

23. The Respondent adopts the Respondent's submissions in *BXD18* in relation to the notice of contention and cross-appeal in that matter.

A. Application

Section 494AB(1)(ca)

24. The Respondent adopts the Respondent's submissions in *BXD18* at paragraphs 77–79. Those submissions provide an additional reason, beyond that given by the Full Court, why s 494AB(1)(ca) did not apply to the Respondent's proceeding either at its institution or in its continuation.

Section 494AB(1)(a)

25. The Full Court found that it sufficed to attract s 198B that the Respondent sought to be transferred to Australia and an order was made to that effect (**CAB 97 [289]**), and that, as a matter of fact (inferred), s 198B was the power used to bring her to Australia (**CAB 97–98 [290]**). This was notwithstanding that the Respondent had not sought an exercise of that power (**CAB 97 [289]**), no order was made by the Federal Court directed at that power (**CAB 97 [289**]), and other powers were available to comply with the Court's order (and the Appellants had not submitted to the contrary) (**CAB 97 [289]**).

26. On the basis of the construction of s 494AB(1)(a) outlined in the Respondent's submissions in *BXD18* at paragraphs 65–76, this approach was erroneous. On its proper construction, s 494AB(1)(a) is addressed at proceedings involving a challenge to an actual or threatened exercise of (or failure to exercise) the power conferred by s 198B. This was not such a proceeding. It was completely agnostic to what power or capacity the Appellants used to procure a transfer to Australia. No issue about the scope or construction of s 198B arose. An actual or apprehended breach of a common law duty of care was the foundation for the order sought and made, and not anything in s 198B or any other provision of the Act.

27. If the Appellants chose to use the power in s 198B to comply with an interlocutory order relating to an actual or apprehended breach of a common law duty of care, that still does not convert a proceeding that is, in substance and reality, about loss or

damage sustained as a result of a breach of a duty of care into a proceeding "relating to" an exercise of power under s 198B.

28. In these circumstances, there was no meaningful connection between the Respondent's proceeding and the exercise of power under s 198B, whether at institution or during its continuation. The Full Court erred in holding the contrary.

Section 494AB(1)(d)

29. At **CAB 98 [291]**, the Full Court held that, by reason of [34] of the Amended Statement of Claim and the claim for injunctive relief (in paragraph A of the prayer for relief), the Respondent's case as by then pleaded related to the removal of a transitory person from Australia under the Act. This was notwithstanding that no issue of removal had arisen and the proceedings did not challenge any determination under (*e.g.*) s 198AH(1A)(c) (**CAB 98 [292]**).

30. On the basis of the construction of s 494AB(1)(d) outlined in the Respondent's submissions in *BXD18* at paragraphs 65–76, this approach was erroneous. On its proper construction, s 494AB(1)(d) is addressed at proceedings involving a challenge to an actual or threatened removal of, or failure to remove, a transitory person from Australia under the Act, through one of the powers by which officers (as defined in s 5(1) of the Act) may effect that removal. The Respondent's case involved no such challenge.

31. Paragraph 34 of the Amended Statement of Claim pleaded that the Respondent required and would require long-term rehabilitation, specialist review and follow-up with treating practitioners in Australia—which is where she was at that date—this standard of care being not available in Nauru (**ABFM 166 [34]**). The relief to which the Full Court referred was, "[a]n injunction requiring the [Appellants] to take and continue to take all steps within their power to ensure that the [Respondent] receives treatment, including long-term care and follow-up, in a location with access to quality, multi-disciplinary specialist paediatric care", and damages (**ABFM 166–167 [A])**.

32. For these reasons the Full Court's conclusion was affected by error.

33. *First*, the relief sought by the Respondent did not require her to be kept in Australia at all. It would have been possible to comply with an injunction to that effect even by returning the Respondent to Nauru (or to a different RPC), provided that she had access to treatment of the kind there specified. Accordingly, nothing in the relief sought prevents removal.

34. *Second*, the relief sought by the Respondent could also have been complied with by removing her to another country which was not a RPC. There are various ways, consistently with s 198AD, for the Respondent to have been removed from Australia otherwise than to a regional processing country (see ss 198AE–198AG).

35. *Third*, in any event, as the Full Court rightly observed, no issue of removal had yet arisen, because it was not suggested by any party to the proceeding that s 198AD required, or had required at any relevant time, the Respondent's removal from Australia. A proceeding cannot relate to "the removal of a transitory person from Australia" if the removal of the transitory person from Australia is not envisaged.

36. This distinguishes *Applicants WAIV v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1186. In that case, removal of the persons seeking the order was imminent (see at [6]). And, in that case there was no basis upon which it was said that the applicants' continued presence was lawful under the Act. In this case, since the Full Court had inferred that the Respondent was brought to Australia under s 198B, her presence in Australia was lawful at least until a determination was made that she no longer needed to be in Australia for the relevant temporary purpose (s 198AH(1A)(c)).

37. *SGS v Minister for Immigration and Border Protection* (2015) 34 NTLR 224 is also distinguishable. In contrast to the present case, the applicant in *SGS* had sought a permanent restraint on removal from Australia to Nauru (see at 228–229 [6] (Hiley J)). Relief of that kind might be thought to involve pre-emptive challenge to the exercise of any statutory power which might authorise removal of the transitory person from Australia, and thus be within s 494AB(1)(d)). Relief of the kind that the Respondent here sought is of a different kind, as outlined above.

38. For these reasons the Full Court erred in holding that the continuation of the Respondent's proceeding was prohibited by s 494AB(1)(d) (**CAB 98 [291]–[292]**). It does not appear separately to have held that the institution of the proceeding was also prohibited, but if it did so hold it was in error.

Part VII. Estimate of hours

39. The Respondent estimates that 1.25 hours will be required to present oral argument in this appeal together with the appeal in BXD18.

Dated: 5 June 2020

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BETWEEN: **MINISTER FOR HOME AFFAIRS**
First Appellant

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and

DJA18 as litigation representative for DIZ18
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ANNEXURE

A LIST OF STATUTES AND PROVISIONS REFERRED TO IN THE RESPONDENT'S SUBMISSIONS

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Migration Act 1958 (Cth) ss 198AB, 198AD–198AH, 198B, 494AA, 494AB (Compilation No 137)