HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY **NO M 27 OF 2020**

BETWEEN: **MINISTER FOR HOME AFFAIRS**

First Appellant

COMMONWEALTH OF AUSTRALIA

Second Appellant

SECRETARY OF THE DEPARTMENT OF HOME AFFAIRS

Third Appellant

AND: **DLZ18**

First Respondent

FZR18

Second Respondent

SUBMISSIONS OF THE APPELLANTS

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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. The issues that arise in this appeal correspond to those that arise in *Minister for Home Affairs v FRM17* (No M29 of 2020) (***FRM17***). In order to avoid repetition, to the extent possible these submissions adopt the appellants' submissions in that matter, and the same abbreviations are used. Accordingly, these submissions are confined to the application of the arguments developed in that appeal to the facts of this proceeding.

PART III SECTION 78B NOTICE

3. No notice need be given under s 78B of the *Judiciary Act 1903* (Cth).

PART IV REPORTS OF DECISIONS BELOW

4. The judgment of the Full Court of the Federal Court has not been reported. Its medium neutral citation is *FRM17 v Minister for Home Affairs* [2019] FCAFC 148.

PART V FACTS

A. The case as "instituted"

5. On 4 July 2018, the then single respondent, DLZ18, by her litigation representative commenced proceedings against the appellants by originating application filed in the Federal Court. The indorsement on the originating application was four paragraphs long [Joint Appellants' Book of Further Materials (**ABFM**) **195-201**].

6. By paragraph one, it claimed that the second appellant (the Commonwealth), "in exercise of its powers under s198AHA of the *Migration ACT 1958* and/or s 61 of the Constitution owes a duty of care to [DLZ18]". This was because the Commonwealth "transferred [DLZ18] from Australia to Nauru pursuant to s198AD and 198AHA of the Migration Act 1958 (Cth)", "maintains a significant involvement in the day-to-day operation of regional processing activities in Nauru in respect of [DLZ18]" and "maintans a significant involvement in the day-to-day health care, education, housing and welfare of [DLZ18]".

7. By paragraph two, it claimed that the Commonwealth was in breach because it had "failed to provide [DLZ18] with access to safe and appropriate medical facilities and treatment".

By paragraph three, it claimed that, as a result, she was "suffering significant harm and is at immediate risk and is exposed to the risk of further serious harm including significant psychiatric and psychological harm and death". And by paragraph four, it claimed that she "should be granted injunctive relief applied for to remedy the breach".

8. The prayer for relief included interlocutory orders that the appellants be restrained from "[d]etaining [DLZ18] and her mother and sister on Nauru or at any other off-shore processing centre not within Australia" (paragraph 3.a) and from "[n]ot permitting [DLZ18] from travelling to another country for the purpose of obtaining urgent psychiatric medical attention" (paragraph 3.b). Final injunctive relief was sought requiring the appellants to discharge their duty to obtain certain medical care for DLZ18 otherwise than "in Nauru or in any other off-shore environment" (paragraph 4). It also sought an order that the appellants "provide on an ongoing basis the psychiatric and medical care to [DLZ18] as shall be clinically recommended by treating child psychiatrists or suitably qualified medical practitioners who are providing ongoing care to [DLZ18]" (paragraph 5).

9. DLZ18 also filed an interlocutory application [**ABFM 202-205**]. Among other things, DLZ18 sought an order that she and her mother and father be "immediately transfer[red] … to a location where the [appellants] can obtain for [DLZ18] urgent pediatric physical and psychiatric care that is clinically recommended, where that care is not provided to [DLZ18] in Nauru or in any other off-shore environment" and where the care was consistent with medical reports filed by DLZ18 (order 3).

B. The case the respondent sought to "continue" at the time of the Full Court hearing

10. The respondents (DLZ18 and her mother FZR18) filed a statement of claim on 28 November 2018, in which they claimed damages (but not injunctive relief) [**ABFM 211-236]**. Their cause of action was in the tort of negligence.

11. Relevantly, the respondents alleged that the Commonwealth owed a duty of care "the content of which changed over time".[1] While no basis for the alleged duty was expressly pleaded, it is apparent that it was said to arise from a number of factors:

(a) the appellants caused them to be removed to Nauru under s 198AD;[2]

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1 Statement of claim at [72] [**ABFM 232**]

2 Statement of claim at [21]-[22] [**ABFM 216**].

(b) the appellants' involvement in regional processing, including because the Commonwealth "owned or controlled" areas in which the respondents were accommodated and it owned or controlled premises at which International Health and Medical Services provided medical services;[3] and

(c) the appellants provided food, water, clothes, access to education and direct financial assistance.[4]

12. The respondents also relied on contracts with service providers entered into by the Commonwealth "in the exercise of its powers under s 198AH [*sic*] of the Act",[5] and alleged knowledge about the risk of psychological harm arising from detention in immigration detention.[6]

13. The respondents alleged that the appellants owed the respondents a duty to take reasonable care of them, including in respect of the conditions in which they were detained on Nauru and the provision of appropriate medical treatment.[7] Additional duties were alleged based on the knowledge that the appellants had or should have had in respect of the respondents' psychological conditions.[8] The respondents alleged that the appellants had failed to take action to move the DLZ18 from Nauru to "a place with the appropriate medical facilities or where appropriate medical treatment could be administered".[9] It was also alleged, in respect of FZR18, that appropriate medical facilities and treatment were not available for her psychological condition on Nauru, and that FZR18's psychological condition was getting worse.[10]

14. The respondents then alleged that the appellants breached the alleged duty of care by failing to protect them from unreasonable risks of harm, including psychological harm, following their removal from Christmas Island to Nauru; and in failing to provide

3 Statement of claim at [29] [**ABFM 217**].
4 Statement of claim at [29]-[31] [**ABFM 217-218**].
5 Statement of claim at [34] [**ABFM 218-219**].
6 Statement of claim at [39] [**ABFM 221-222**] .
7 Statement of claim at [74] [**ABFM 232-234**] .
8 Statement of claim at [75]-[78] [**ABFM 233**]
9 Statement of claim at [49] [**ABFM 227**].
10 Statement of claim at [69]-[70] [**ABFM 231-232**].

appropriate medical treatment and family reunification for the respondents.[11] The respondents alleged, apparently based on the facts pleaded but without direct reference, that they had suffered psychological injury caused by the appellants' actions as pleaded.[12]

15. By a defence filed on 19 December 2018, the appellants denied the existence of a duty while the respondents were on Nauru,[13] and denied breach[14] and causation.[15] In addition, the appellants alleged that the allegations made involved the impermissible application of negligence to decisions of high government policy, and that the imposition of a duty of care was incompatible with the duty to have the respondents taken to Nauru under s 198AD.[16] The appellants also alleged that the Federal Court did not have jurisdiction, by reason of s 494AB(1)(a) and (ca).[17]

C. The Full Court's decision

16. The appellants set out a summary of the Full Court's decision as relevant to these proceedings in paragraphs [18]-[20] of its submissions in *FRM17*. The appellants refer to and rely on that summary for the purposes of these submissions. It suffices for present purposes to summarise how the Full Court dealt with the present proceeding specifically.

17. ***As to s 494AB(1)(ca)***, the Full Court held that s 494AB(1)(ca) did not apply to this proceeding either at its commencement or as currently on foot in the Federal Court. The Full Court held that the respondents' pleading did not refer to s 198AHA, and in any event s 198AHA did not engage s 494AB(1)(ca) given that s 198AHA conferred a mere capacity to take certain actions [**CAB 80-81 [225]**]. Moreover, a cause of action in negligence did not engage s 494AB(1)(ca) [**CAB 81 [226]-[228]**], and the Full Court held that the relief they sought did not attract the bar [**CAB 81 [230]**].

18. ***As to s 494AB(1)(a)***, the Full Court held that s 494AB(1)(a) did not apply because the respondents "did not in terms invoke [s 198B] or seek that it be exercised and did not obtain an order requiring the Commonwealth parties to exercise that power" and no interlocutory orders were in fact made [**CAB 92 [271]**].[18] Moreover, the respondents "did

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11 Statement of Claim at [79] [**ABFM 233-234**].
12 Statement of Claim at [80]-[82] [**ABFM 234-235**].
13 Defence at [72]-[78] [**ABFM 237-258**].
14 Defence at [79] [**ABFM 253**].
15 Defence at [82] [**ABFM 254**].
16 Defence at [84.4]-[84.5] [**ABFM 254-255**].
17 Defence at [85]-[89] [**ABFM 256-257**].
18 See also [271], [278]-[279], [288]-[290].

not challenge any exercise of the power in s 198B or plead a case in negligence arising from a statutory duty conditioning the exercise of that power" [**CAB 92 [271]**].

19. ***As to s 494AB(1)(d)***, the Full Court held that this had not been pleaded by way of defence and thus it did not need to be considered [**CAB 92 [272]**].

PART VI ARGUMENT

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

20. In paragraphs [21] to [45] of the appellants' submissions in *FRM17*, the appellants have identified errors in the Full Court's construction of and approach to s 494AB(1)(ca), and the approach they submit should be taken to s 494AB as a whole. The appellants repeat and rely on those paragraphs, which are applicable to each proceeding.

21. It remains to address how those errors of construction then translated into the Full Court erroneously concluding that s 494AB(1)(ca) did not apply to this proceeding.

22. ***First***, it was central to the Court's conclusions in this matter that the respondents' statement of claim made "no express or implicit reference to any of the statutory provisions in Subdiv B" [**CAB 80 [225]**]. That statement was incorrect because the statement of claim did refer to s 198AHA as supporting the Commonwealth's exercises of power in Nauru.[19] Further, the respondents' original originating application made extensive references to the statutory scheme, which the Full Court did not address. This court document was important given that s 494AB applies to the institution as well as the continuation of proceedings.

23. That the statement of claim, once filed, inexplicably shed most of the references to the Act does not change the position: a substance over form approach must be taken. Whether or not the respondents pleaded the actions that they relied upon as having been undertaken pursuant to ss 198AD and 198AHA, they were so undertaken. The amendments to the claim to remove these express statutory references did not alter the substance of the claim. Moreover, the appellants' defence pleaded, in a non-colourable way, the relevant provisions.

24. The Full Court erred in failing to find that the claim when instituted — and thereafter — related to s 198AHA and therefore came within s 494AB(1)(ca).

[19] Statement of claim at [34] [**ABFM 218-219**].

25. ***Secondly***, consistently with its reasoning that a conferral of capacity or authority under s 198AHA did not intersect with s 494AB(1)(ca), the Full Court held that even if s 198AHA was relevant to the respondents' cause of action, then "this is insufficient to attract the [s 494AB(1)(ca)] bar when regard is had to the proper construction of that provision" [**CAB 80-81 [225]**]. For the reasons given in respect of the construction of s 494AB(1)(ca) in *FRM17*, that conclusion was wrong.

26. As the Full Court noted, the appellants expressly drew attention to s 198AHA as the statutory authority under which the Commonwealth took many of the impugned actions pleaded by the respondents [**CAB 26 [46], CAB 80 [225]**]. That continued to be so even though some of the references to the Act made in the originating application were not repeated in the statement of claim. The respondents' case depended upon their removal to Nauru under s 198AD, and alleged actions taken by the Commonwealth thereafter for which s 198AHA provided essential support. These alleged actions were engaged in within the context of the regional processing regime in Subdivision B of Division 8 of Part 2 as a whole. Any duty of care to be imposed in offshore detention centres also had to be consistent with that regime. These points were critical to the determination of the respondents' claim. That was ample to support the conclusion that the proceeding "related to" Subdivision B so as to attract the bar in s 494AB(1)(ca).

27. ***Thirdly***, the Full Court concluded that s 494AB(1)(ca) did not apply to the respondents' claim in negligence, because there was no inconsistency or incompatibility between the pleaded duty of care and the statutory regime in Subdivision B of Division 8 of Part 2. That conclusion was reached contrary to the Commonwealth's position but without full argument on the point, which was an erroneous approach for the reasons given in the appellants' submissions in *FRM17* at paragraph [48].

28. ***Fourthly***, in so far as the Full Court concluded that s 494AB(1)(ca) did not apply to this proceeding simply because it involved a claim in negligence, it erred for the reasons set out in the appellants' submissions in *FRM17*.

B. Application of s 494AB(1)(a) – Ground 2

29. The appellants have set out at paragraphs [53]-[56] of their submissions in *FRM17* their submissions in respect of the proper construction and application of s 198B and s 494AB(1)(a). The appellants repeat and rely on those paragraphs.

30. As in *FRM17*, in this case the Full Court erred by giving determinative significance to the fact that the respondents "did not in terms invoke [s 198B] or seek that it be exercised and did not obtain an order requiring the Commonwealth to exercise that power" [**CAB 92 [271]**]. That approach was in error. As a matter of substance, at institution, the then sole respondent, DLZ18, sought to have herself and her family brought to Australia. She sought that in terms by way of originating application and interlocutory application that referred to one or both of Australia and a prohibition upon care in Nauru or any other off-shore environment. The only thing missing was an express reference to s 198B. Yet s 198B was necessarily implicated by these claims.

31. It is not to the point that no interlocutory orders were made [**CAB 92 [271]**]. The proceeding as instituted plainly related to the orders that were sought, whether or not those orders were ultimately made. Further, the originating application remained on foot, and continued to seek orders for DLZ18's removal to and ongoing presence in Australia for medical treatment.

32. In disregarding these matters, the Full Court's conclusion that the respondents' claim did not "in terms" invoke s 198B emphasised form over substance. The Full Court erred as a result. The substance of the respondents' claim included a claim for an order to require an exercise of power under s 198B to bring DLZ18 to Australia. That was sufficient for this proceeding to "relate to" s 198B and therefore to engage s 494AB(1)(a).

C. Application of s 494AB(1)(d) – Ground 3

33. The Full Court did not consider s 494AB(1)(d) because it was not raised by the appellants [**CAB 92 [272]**]. While no criticism can be made of the Full Court for the understandable course which it took, the point not having been pleaded or taken, nonetheless jurisdictional issues must be determined by the Court in the exercise of its first duty to be assured of its own jurisdiction. That was so whether or not the point was taken by the appellants.[20]

34. Ground 3 raises an issue similar to that raised in Ground 2. That is, properly construed, s 494AB(1)(d) is enlivened if the form of interlocutory or final relief seeks, in substance,

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[20] See generally *Hazeldell Ltd v Commonwealth* (1924) 34 CLR 442 at 446 (Isaacs ACJ); *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Proprietary Co LTd* (1911) 12 CLR 398 at 415 (Griffith CJ); *Fingleton v The Queen* (2005) 227 CLR 166 at [196]; *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2012) 247 CLR 240 at [16].

to prevent the removal of the respondents from Australia.[21] For that reason, the question whether a proceeding "relates to" the removal of the respondents from Australia cannot be answered by focusing only on the express terms of the relief sought.

35. At the commencement of this case, the relief sought (as described in paragraph 8 above) would have required DLZ18 and her family to be kept in Australia and not returned to a regional processing country. For the reasons advanced in *FRM17* at paragraphs [57]-[58], that was sufficient to engage s 494AB(1)(d).

PART VII ORDERS SOUGHT

36. The appellants seek the orders in the notice of appeal.

PART VII ESTIMATE OF HOURS

37. The appellants estimate that up to 2.5 hours may be required to present oral argument (including reply) in this matter and the other three matters.

Dated: 8 May 2020

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[21] *Applicants WAIV v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1186 at [31] (French J).

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

ON APPEAL FROM
THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

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

COMMONWEALTH OF AUSTRALIA
Second Appellant

SECRETARY OF THE DEPARTMENT OF HOME AFFAIRS
Third Appellant

AND: **DLZ18**
First Respondent

FZR18
Second Respondent

ANNEXURE

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

Constitution ss 61, 75 (as currently in force).

Acts Interpretation Act 1901 (Cth) s 11B (as currently in force).

Migration Act 1958 (Cth) ss 33, 42, 189, Part 2 Div 8 Subdiv B (ss 198AA-198AJ), 198B, 494AA, 494AB (Compilation No 137).

Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 (Cth) (as enacted).

Migration Amendment (Regional Processing Arrangements) Act 2015 (Cth) (as enacted).

Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 (Cth) (as enacted).

Migration Legislation Amendment (Transitional Movement) Act 2002 (Cth) Sched 1 item 6 (as enacted).