

PLAINTIFF S195/2016 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION (CTH) & ORS (S195/2016)

Amended application for an order to show cause filed: 11 January 2017

Special case referred to Full Court: 13 March 2017

The Plaintiff is an Iranian citizen who, around 21 July 2013, was on board a vessel that was intercepted at sea by officers of the Commonwealth of Australia (“the Commonwealth”). He was taken to Christmas Island on 24 July 2013 and was then considered to have entered the “migration zone” as defined by s 5 of the *Migration Act 1958* (“the Act”). The Plaintiff did not hold a visa upon entering the migration zone and accordingly he became an “unlawful non-citizen” as defined in s 5AA of the Act and was consequently detained. On 26 August 2013 the Plaintiff was transferred to Papua New Guinea (“PNG”) pursuant to s 198AD(2) of the Act.

The Plaintiff, who claims to be a refugee, applied to the Immigration and Citizenship Service of PNG to be recognised by PNG as a refugee under the PNG Migration Act. On 1 July 2016 he was the subject of an initial negative assessment and he did not apply for merits review of that assessment. The Plaintiff also did not participate in the assessment of his refugee claims in PNG. This was because he feared reprisals if he remained in PNG after giving evidence (in PNG) as an eyewitness against the perpetrators of the murder of Reza Barai. (The perpetrators were later convicted and sentenced to substantial terms of imprisonment.)

On 12 December 2016 the relevant PNG Minister made a final ministerial determination, finding that the Plaintiff was not a refugee. On that date the PNG Minister also ordered the removal of the Plaintiff from PNG, along with his detention pending that removal. For its part, Iran has a longstanding policy of not cooperating on involuntary returns to that country. While that policy is in place, PNG will be unable to remove the Plaintiff to Iran without his approval.

While in PNG the Plaintiff has been residing at the Manus Island Regional Processing Centre (“Manus RPC”). (Pursuant to a series of contracts with the Commonwealth of Australia, Broadspectrum Pty Ltd runs the Manus RPC and the East Lorengau Refugee Transit Centre.) Since about May 2016 however, the Plaintiff has been able to come and go from the Manus RPC subject to certain conditions. At the time of writing, no steps have been taken to detain the Plaintiff pursuant to the 12 December 2016 Ministerial order.

On 26 April 2016 the Supreme Court of Justice of PNG delivered judgment in *Belden Norman Namah v Hon. Rimbink Pato, Minister for Foreign Affairs* (“the Namah Decision”). In that case, the Court considered whether the bringing into PNG (by the Commonwealth government) and the detention of asylum seekers at Regional Processing Centres was contrary to their constitutional rights of personal liberty guaranteed by s 42 of the Constitution. On that question, the Court held that the arrangements (between the Commonwealth and PNG governments) leading to the forceful bringing into and detention of asylum

seekers in Regional Processing Centres was unconstitutional and therefore illegal.

On 13 March 2017 Justice Bell referred a special case containing the following questions to the Full Court for its consideration:

1. Was the designation of PNG as a regional processing country on 9 October 2012 beyond the power conferred by s 198AB(1) of the Act by reason of the *Namah Decision*?
2. Was entry into:
 - a) the 2013 Memorandum of Understanding;
 - b) the Regional Resettlement Arrangement;
 - c) the 2014 Administrative Arrangements; and
 - d) the Broadspectrum Contract,beyond the power of the Commonwealth conferred by s 61 of the Constitution and/or s 198AHA of the Act by reason of the *Namah Decision*?
3. Was the direction made by the Minister on 29 July 2013 beyond the power conferred by s 198AD(5) of the Act by reason of the *Namah Decision*?
4. Was the taking of the Plaintiff to PNG on 21 August 2013 beyond the power conferred by s 198AD of the Act by reason of the *Namah Decision*?
5. Is the authority for the Commonwealth to undertake conduct in respect of regional processing arrangements in PNG conferred by s 198AHA of the Act dependent on whether those arrangements are lawful under the law of PNG?
6. Is the Commonwealth precluded from assisting PNG to take action pursuant to the orders outlined at paragraph 35 [of the special case] by reason of the *Namah Decision*?
7. Who should pay the costs of the special case?

The parties agree that questions 1 to 4 and 6 do not raise any questions as to the validity of the actions referred to other than by reason of the *Namah Decision*.