



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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Details of Filing

File Number: S65/2021
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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

SAFWAT ABDEL-HADY

Plaintiff

and

COMMONWEALTH OF AUSTRALIA

Defendant

PLAINTIFF'S OUTLINE OF ORAL SUBMISSIONS

This outline is in a form suitable for publication on the internet.

1. This matter raises a question as to the policy of the law as to who should bear the cost of a tort committed because of an erroneous interpretation of a statute, as between the tortfeasor, their employer, and the victim. That question is raised in circumstances where: (1) the erroneous nature of the interpretation could not be known at the time of the commission of the tort; (2) the tortfeasor was the executive government of the Commonwealth (or an employee acting in the course and scope of their duties); and (3) the tort is false imprisonment, attracting the severe view the common law takes of the deprivation of liberty.

There is no relevant parallel between this matter and Stradford

2. The defence of justification for tortious acts undertaken in the performance of a duty of executing or enforcing a warrant or order of a court (**Defence**), as recognised by this Court in *Stradford*, has the same rationale as the judicial immunity from which it stems. That rationale is the preservation of the authority and integrity of judicial proceedings (**PS [7]-[14]**).

3. A judicial order creates a duty for those who are charged with enforcing it. The essence of that duty is the compulsion the order exerts to act in accordance with a judicially determined obligation such as of those imposed by statute. Even the availability of an appeal does not normally alleviate that significant social norm (**PS [11]**). The same is not true for legislation, where a law thought to be invalid can be disregarded (**PS [24]**). Even if such a law should be obeyed while it is thought to be valid, and even if there is a public interest in compliance by the executive with purportedly valid legislation, that is not the same as the immediate compulsion with which a judicial order is attended (**PS [24]-[27]**).
4. The source of authority to detain the plaintiff was sections 189(1) and 196(1) of the *Migration Act*, not the decision of this Court in *Al-Kateb* (**PS [15]**). It follows that the rationale for the Defence has no application in the present matter (**PS [16]-[20]**).
5. The rule of law, which requires the executive government to comply with declarations of this Court, does not accommodate, let alone require, an immunity for the Commonwealth (cf **DS [32]-[37]**; **DR [6]-[8]**). The rule of law is preserved by the courts both in exercising their supervision of executive action, and by the possibility of the executive seeking declaratory relief to clarify any doubt as to the meaning of a law.
6. The justification offered by the Commonwealth for the extension of the Defence to this matter is untenable (**PS [22]-[23]**). There is no stable principle that would limit the Defence to High Court authority not yet overruled (cf **DS [17]**).
7. This Court should not disturb one of the fundamental tenets of the judicial power, that it can only operate retrospectively. The recognition of the Defence in this matter would operate in effect to do just that (**PS [17]-[20]**).

Authority in both New South Wales and England and Wales supports the Plaintiff

8. The decisions of *Cowell* and *Evans (No 2)* both denied the extension of the judicial immunity to detaining officers, as members of the executive, obeying legislative commands (**PS [28]-[30], [47]-[48]**).

The purported Defence is inconsistent with s 64 of the Judiciary Act

9. Section 64 of the *Judiciary Act* will prevent the recognition of the purported Defence in this case because the Commonwealth cannot rely on a defence it would enjoy only by virtue of its position as the Crown. That is because only the polity has the power of detention (**PS [31]-[32], [39]**). That is so even if subjects exercising that power on behalf of the Commonwealth may also have the benefit of the Defence (cf **DR [11]**).

The avenues of liability

10. The Commonwealth can be directly liable for the tortious acts of the detaining officer. First, because the detaining officer was acting as agent of the Commonwealth, and because the detaining officer was exercising a power of the Commonwealth: eg, *Zachariassen v The Commonwealth* (1917) 24 CLR 166 at 179. Second, because the Commonwealth promoted and caused the plaintiff's detention when the Minister cancelled the plaintiff's visa (**PS [34]-[40]**).
11. There is no requirement that the Commonwealth only be held vicariously liable, for the liability of the detaining officer. That requirement only applies where officers of the Commonwealth are performing acts where the duty falls not on the Crown, but on the officer personally (**PS [41]-[43]**).
12. The independent discretionary function principle raised by the defendant in reply has no application in the present matter (cf **DR [21]-[22]**). The detaining officer had no discretion in performing his or her duty, but rather, having formed the state of satisfaction required by the Act (not itself a discretionary outcome), was then compelled to detain the plaintiff.
13. If the policy of the law is such that the detaining officer is able to benefit from the Defence contemplated by the Commonwealth, there is no reason to extend that protection to the Commonwealth itself. The elements of the tort having been made out before the application of the supposed Defence, the Commonwealth should nonetheless be vicariously liable (**PS [45]-[46]**).

11 November 2025



Bret Walker