HIGH COURT OF AUSTRALIA

NETTLE J

DBE17 (BY HIS LITIGATION GUARDIAN
MARIE THERESA ARTHUR) PLAINTIFF

AND

COMMONWEALTH OF AUSTRALIA DEFENDANT

DBE17 (by his litigation guardian Marie Theresa Arthur) v Commonwealth of Australia
[2019] HCA 47
Date of Hearing: 8 & 22 November 2019
Date of Judgment: 6 December 2019
M124/2019

ORDER

1. *The proceeding be remitted to the Victoria District Registry of the Federal Court of Australia.*

2. *The proceeding continue in the Federal Court as if the steps taken in the proceeding in this Court had been taken in that Court.*

3. *The Registrar of this Court forward to the proper officer of the Federal Court photocopies of all documents filed in this Court.*

4. *The costs of the proceeding in this Court be costs in the cause in the Federal Court.*

Representation

B F Quinn QC with M W Guo for the plaintiff (instructed by Maurice Blackburn) at the hearing on 8 November 2019

B F Quinn QC with M L L Albert, M W Guo and S Zeleznikow for the plaintiff (instructed by Maurice Blackburn) at the hearing on 22 November 2019

A M Dinelli for the defendant (instructed by Australian Government Solicitor) at the hearing on 8 November 2019

N J Williams SC with A M Dinelli for the defendant (instructed by Australian Government Solicitor) at the hearing on 22 November 2019

CATCHWORDS

DBE17 (by his litigation guardian Marie Theresa Arthur) v Commonwealth of Australia

Immigration – Representative proceedings – Where plaintiff brought representative proceeding in High Court for damages for false imprisonment – Where claimed that Group Members purportedly detained under ss 189 and 196 of *Migration Act 1958* (Cth) – Where claimed that detention for purpose of receiving, investigating or determining application for visa, or determining whether to permit valid application for visa to be made, or of removing relevant Group Member from Australia to regional processing country – Where claimed that detention lawful only for period during which purposes pursued and carried into effect as soon as reasonably practicable and capable of fulfilment – Where claimed that detention unlawful because purposes not carried into effect as soon as reasonably practicable or because detention continued at times during which purposes not capable of fulfilment – Where plaintiff applied for order remitting proceeding to Federal Court of Australia pursuant to s 44(2A) of *Judiciary Act 1903* (Cth) – Where s 476B(1) of *Migration Act* provided that High Court must not remit matter "that relates to a migration decision" to court other than Federal Circuit Court – Where s 468B(1) and (2) provided that representative proceeding not permitted where proceeding would "raise an issue in connection with visas ... or removal of unlawful non-citizens" – Whether proceeding related to migration decision – Whether proceeding raised issue in connection with visas or removal of unlawful non-citizens.

Words and phrases – "class actions", "in relation to", "migration decision", "raises an issue in connection with", "relates to", "representative proceeding".

Judiciary Act 1903 (Cth), s 44.
Migration Act 1958 (Cth), ss 476A, 476B, 486A, 486B, 486C.

NETTLE J.

The nature of the proceeding

1 This proceeding is a representative proceeding[1] instituted in the original jurisdiction of this Court by writ of summons by the plaintiff (by his litigation guardian) representing himself and every other person who is a "Group Member" as defined in the writ of summons. The claim is for damages for false imprisonment constituted of allegedly unlawful detention of the plaintiff and each other Group Member. The plaintiff claims that he, and each other Group Member, was purportedly detained pursuant to ss 189 and 196 of the *Migration Act 1958* (Cth) while the Commonwealth received, investigated and determined the plaintiff's (or other Group Member's) application for a visa to enter and remain in Australia, or determined whether to permit a valid application for a visa to be made ("the visa purposes"), and that, subject to certain exceptions, the detention of the plaintiff and of each other Group Member for the visa purposes "was only lawful for the period of time for which one of the visa purposes was being pursued and carried into effect as soon as was reasonably practicable". It is further claimed that, to the extent that the Commonwealth detained the plaintiff and each other member of the subgroup of Group Members who arrived in Australia after 12 August 2012 ("Subgroup Members") otherwise than for the visa purposes, the purpose of the detention of the Subgroup Member was that of removing him or her from Australia to a regional processing country pursuant to Pt 2 Div 8 Subdiv B of the *Migration Act*, being Papua New Guinea or Nauru ("the removal purpose") and that detention for the removal purpose "was only lawful for so long as the removal purpose was ... pursued and carried into effect by the Commonwealth as soon as reasonably practicable [and/or] capable of fulfilment".

2 On that basis, it is claimed that, because the plaintiff "and the [other] Group Members were detained for the visa purposes and/or the removal purpose, and for no other purpose", and because the plaintiff and the other Group Members were purportedly detained for the visa purposes and/or the removal purpose for longer than was reasonably necessary to pursue and give effect to those purposes, or at a time or times during which the purposes were not capable of fulfilment, the plaintiff and each other Group Member was unlawfully imprisoned and that, by reason of the unlawful imprisonment, each suffered loss and damage.

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1 In accordance with r 21.09.1 of the *High Court Rules 2004* (Cth).

The application

3 This is an application by summons filed on 29 October 2019 for an order, by consent, that the matter be remitted to the Federal Court of Australia pursuant to s 44(2A) of the *Judiciary Act 1903* (Cth). Section 44(2A) provides, so far as is relevant and in substance, that, where a matter in which the Commonwealth is a party is at any time pending in this Court, the Court may, upon the application of a party or the Court's own motion, remit the matter to the Federal Court. The application was listed for hearing because, at first sight, it appeared that s 476B of the *Migration Act* might preclude this Court from remitting the proceeding to the Federal Court or that s 486B(4) of that Act might render the proceeding incompetent in its present form.

Section 476B

4 Section 476B(1) of the *Migration Act* provides, so far as is relevant, in substance that, subject to s 476B(3), this Court must not remit a matter "that relates to a migration decision" to any court other than the Federal Circuit Court. Section 476B(3) provides, however, in substance that the Court may remit to the Federal Court a matter that relates to a migration decision "in relation to which" the Federal Court has jurisdiction under s 476A(1)(b) or (c) of the *Migration Act*.

5 Two questions therefore arise: first, whether this proceeding is a matter "that relates to a migration decision" within the meaning of s 476B; and, secondly, if so, whether it is a proceeding "in relation to which" the Federal Court has jurisdiction under s 476A(1)(b) or (c). For reasons which will become apparent, it is convenient to deal first with construction of s 476A(1).

6 Section 476A of the *Migration Act* is titled "Limited jurisdiction of the Federal Court" and provides that:

> "(1) Despite any other law, including section 39B of the *Judiciary Act 1903* and section 8 of the *Administrative Decisions (Judicial Review) Act 1977*, the Federal Court has original jurisdiction in relation to a migration decision if, and only if:
>
> (a) the Federal Circuit Court transfers a proceeding pending in that court in relation to the decision to the Federal Court under section 39 of the *Federal Circuit Court of Australia Act 1999*; or
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> (b) the decision is a privative clause decision, or a purported privative clause decision, of the Administrative Appeals Tribunal on review under section 500; or

(c) the decision is a privative clause decision, or purported privative clause decision, made personally by the Minister under section 501, 501A, 501B, 501BA, 501C or 501CA; or

(d) the Federal Court has jurisdiction in relation to the decision under subsection 44(3) or 45(2) of the *Administrative Appeals Tribunal Act 1975*.

...

(2) Where the Federal Court has jurisdiction in relation to a migration decision under paragraph (1)(a), (b) or (c), that jurisdiction is the same as the jurisdiction of the High Court under paragraph 75(v) of the Constitution.

..."

7 It is not suggested that this proceeding is one which matches any of the descriptions in s 476A(1)(a)-(d).

8 A "migration decision" is defined by s 5(1) of the *Migration Act* to mean:

"(a) a privative clause decision; or

(b) a purported privative clause decision; or

(c) a non-privative clause decision; or

(d) an AAT Act migration decision."

9 A "privative clause decision" is defined by s 474(2) of the *Migration Act* to mean:

"a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether in the exercise of a discretion or not), other than a decision referred to in subsection (4) or (5) [a 'non-privative clause decision']".

10 Section 474(3) provides, so far as is relevant, in substance that a reference in s 474(2) to a "decision" includes granting, giving, suspending, cancelling, revoking or refusing to give a certificate, direction, approval, consent or permission (including a visa). A decision to grant or to refuse to grant a visa is not a non-privative clause decision or an AAT Act migration decision. Consequently, a decision to grant or to refuse to grant a visa is a privative clause decision and, therefore, a migration decision as defined.

11 Uninformed by context and without the benefit of authority, it might be supposed that a claim for damages for false imprisonment the result of the Commonwealth taking longer than is reasonably necessary to receive, investigate and determine a claim for a visa, or to determine whether a valid application for a visa could be made, is one in relation to granting, giving or refusing to give a visa and, so, therefore, a claim "in relation to a migration decision" within the meaning of s 476A(1) of the *Migration Act*.

12 Seen, however, in context and with the benefit of authority it is apparent that the converse is the case. Dealing first with authority, although the reach of s 476A has not previously been considered by this Court, in *Bodruddaza v Minister for Immigration and Multicultural Affairs* this Court considered[2] the reach of s 486A of the *Migration Act*, which provides, in substance, that an application to this Court for a remedy to be granted in exercise of the Court's original jurisdiction "in relation to a migration decision" must be made to the Court within a specified number of days[3] of the date of the migration decision. Despite the apparent breadth of the phrase "in relation to" in s 486A, the Court held[4] that the expression "a remedy … in relation to a migration decision" in that context is limited to remedies by way of judicial review and so does not limit the time in which an action may be brought in the original jurisdiction of this Court against the Commonwealth in tort for false imprisonment the result of an officer having detained the claimant as an unlawful non-citizen without the level of knowledge or reasonable suspicion stipulated in s 189 of the Act.

13 Three reasons were given for that conclusion. First, it was considered[5] possible that tortious conduct completing a cause of action in tort for false imprisonment might not take place until after the end of the period stipulated in s 486A. If so, and if s 486A applied to claims for damages in tort, it would have the effect of barring causes of action not yet accrued at the expiration of the stipulated period. The Court reasoned[6] that such a "draconian, if not irrational",

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2 (2007) 228 CLR 651.

3 At the time of the decision in *Bodruddaza*, "within 28 days of the actual ... notification of the decision"; now, "within 35 days of the date of the migration decision".

4 *Bodruddaza* (2007) 228 CLR 651 at 662 [21] per Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ, 676 [79] per Callinan J.

5 *Bodruddaza* (2007) 228 CLR 651 at 662 [23] per Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ, 676 [79] per Callinan J.

6 *Bodruddaza* (2007) 228 CLR 651 at 662 [23] per Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ, 676 [79] per Callinan J.

legislative scheme should not be attributed to the Parliament in the absence of clear words. Secondly, as appeared from the Explanatory Memorandum on the Bill for the *Migration Litigation Reform Act 2005* (Cth) ("the 2005 Act"), s 486A was one of several provisions amended by the 2005 Act with the specific objective of "impos[ing] uniform time limits for applications for judicial review of migration decisions in the [Federal Magistrates Court], the Federal Court (in the limited circumstances that migration cases will be commenced in that Court) and the High Court"[7]. That supported the conclusion that "application ... for a remedy" in s 486A(1) should be construed as meaning an application for a remedy by way of judicial review; specifically in a s 75(v) matter[8]. Thirdly, it was regarded as implicit in the text of s 486A that it is directed not to the conferral of validity upon, but rather to the denial of competency of, applications to this Court not commenced within the stipulated period[9].

14 Logically, similar considerations apply to s 476A – and that is the view that has consistently been taken in the Federal Court since *Bodruddaza* was decided. In *Fernando v Minister for Immigration and Citizenship*, Siopis J held[10] that s 476A does not deny the Federal Court jurisdiction to determine a claim for damages for false imprisonment comprised of allegedly unlawful detention under the *Migration Act*. In *Tang v Minister for Immigration and Citizenship*, the Full Court of the Federal Court (Rares, Perram and Wigney JJ) held[11], citing *Bodruddaza*, that s 476A(1) is strictly confined to jurisdiction to determine an application for "direct judicial review" of a migration decision and, so, does not preclude the Federal Court entertaining an application for judicial review of a decision of the Federal Magistrates Court (now the Federal Circuit Court) not to grant an extension of time in which to file an application for judicial review of a migration decision. More recently still, in *Okwume v The Commonwealth*, Charlesworth J held[12] that s 476A does not preclude bringing a proceeding in the

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7 *Bodruddaza* (2007) 228 CLR 651 at 663 [24] per Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ, 676 [79] per Callinan J.

8 *Bodruddaza* (2007) 228 CLR 651 at 662-663 [24] per Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ, 676 [79] per Callinan J.

9 *Bodruddaza* (2007) 228 CLR 651 at 664 [30] per Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ, 676 [79] per Callinan J.

10 (2007) 165 FCR 471 at 476 [22].

11 (2013) 217 FCR 55 at 58 [9].

12 [2016] FCA 1252 at [28].

Federal Court for damages for false imprisonment, misfeasance in public office and negligence arising out of the making of migration decisions.

15 With respect, I agree with their Honours. It should be accepted that the reach of s 476A is confined to applications for public law remedies in the nature of judicial review of migration decisions and so does not deprive the Federal Court of original jurisdiction in relation to a claim in tort against the Commonwealth for false imprisonment the result of the Commonwealth allegedly taking too long in making a migration decision to grant or refuse a visa.

16 That leaves s 476B for consideration. Of itself, the fact that s 476A does not deprive the Federal Court of original jurisdiction to deal with the matter is not determinative. Section 44(3) of the *Judiciary Act* relevantly "operates to confer jurisdiction upon [the Federal Court] ... upon fulfilment of a condition in the particular case, namely, the making by this Court of an order of remitter under s 44(2) or (2A)"[13]; and where this Court makes an order of remitter under s 44(2A), the Federal Court "relevantly stands in the jurisdictional shoes of this Court"[14]. Nevertheless, s 476B provides that this Court must not remit a matter that *relates to* a migration decision to the Federal Court unless the Federal Court has jurisdiction in relation to the matter under s 476A(1)(b) or (c). And as has been seen, the Federal Court does not. Thus arises the question of whether this matter *relates to* a migration decision within the meaning of s 476B.

17 As was earlier observed, if s 476B stood alone, it might be concluded that a claim for false imprisonment the result of the Commonwealth taking longer than was reasonably necessary to receive or process a claim for a visa, or to determine whether a valid application for a visa could be made, would be one that *relates to* a migration decision within the meaning of the provision. Viewed, however, in the context of s 476A and the other provisions of Pt 8 of the *Migration Act* (ss 474-484), it can be seen that s 476B, like the other provisions of Pt 8, is concerned solely with proceedings for judicial review of migration decisions, and for that reason does not affect the ability of this Court to remit this matter to the Federal Court.

18 Part 8 is headed "Judicial review". Section 474A, which defines "AAT Act migration decision", is concerned with AAT decisions which may be the subject of judicial review. Section 476 confers the same jurisdiction on the

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13 *Re Jarman; Ex parte Cook* (1997) 188 CLR 595 at 633 per Gummow J.

14 *McCauley v Hamilton Island Enterprises Pty Ltd* (1986) 61 ALJR 235 at 238 per Mason J; 69 ALR 270 at 275-276; see also *Re Jarman; Ex parte Cook* (1997) 188 CLR 595 at 613 per Toohey and Gaudron JJ, 633 per Gummow J.

Federal Circuit Court as this Court has under s 75(v) of the *Constitution*. The limited reach of s 476A has already been mentioned. Section 477 imposes time limits on applications to the Federal Circuit Court in that Court's original jurisdiction to review migration decisions. Section 477A imposes corresponding time limits on applications to the Federal Court for a remedy to be granted in that Court's original jurisdiction under s 476A(1)(b) or (c). Sections 478-482 provide for procedures which are apt for judicial review proceedings and s 484 provides that this Court and the Federal Court and Federal Circuit Court are the only courts which have jurisdiction "in relation to migration decisions". There is no reason to suppose that s 476B was intended to deal with any different or broader subject matter.

19 Accordingly, I conclude that 476B does not prevent this Court remitting this matter to the Federal Court under s 44(2A) of the *Judiciary Act*.

Section 486B

20 Section 486B of the *Migration Act* provides, so far as is relevant, as follows:

> "**Multiple parties in migration litigation**
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> *Application of section*
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> (1) This section applies to all proceedings (***migration proceedings***) in the High Court, the Federal Court or the Federal Circuit Court that raise an issue in connection with visas (including if a visa is not granted or has been cancelled), deportation, taking, or removal of unlawful non-citizens.
>
> *Consolidation of proceedings*
>
> (2) Consolidation of any migration proceeding with any other migration proceeding is not permitted unless the court is satisfied that:
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> (a) the consolidation would otherwise be permitted under other relevant laws (including Rules of Court); and
>
> (b) the consolidation is desirable for the efficient conduct of the proceedings.
>
> (3) No appeal lies from a decision by the court not to consolidate proceedings under subsection (2).

Other joint proceedings etc

(4) The following are not permitted in or by a migration proceeding:

(a) representative or class actions;

(b) joinder of plaintiffs or applicants or addition of parties;

(c) a person in any other way (but not including as a result of consolidation under subsection (2)) being a party to the proceeding jointly with, on behalf of, for the benefit of, or representing, one or more other persons, however this is described.

Relationship with other laws

(5) This section has effect despite any other law, including in particular:

(a) Part IVA of the *Federal Court of Australia Act 1976*; and

(b) any Rules of Court.

..."

The statutory context

21 Section 486B is one of six provisions comprising Pt 8A of the *Migration Act* and was originally inserted into the *Migration Act* by the *Migration Legislation Amendment Act (No 1) 2001* (Cth) ("the 2001 Act"). The other provisions of Pt 8A are:

(1) s 486A, which provides that an application to this Court for "a remedy to be granted in exercise of the court's original jurisdiction in relation to a migration decision" (as inserted into the Act, the provision referred to an application "for a writ of mandamus, prohibition or certiorari or an injunction or a declaration in respect of a [stipulated decision]") has to be made to this Court within a specified period of the date of notification of the decision;

(2) ss 486AA and 486AB, which respectively provide for intervention by the Attorney-General in a proceeding resulting from an application referred to in s 486A and that the making of an application referred to in s 486A does not affect the operation of the decision, prevent the taking of action to implement the decision or prevent the taking of action in reliance on the making of the decision;

(3) s 486C, which specifies the persons who may commence or continue certain kinds of judicial review proceedings in the Federal Circuit Court or the Federal Court that "raise[] an issue ... in connection with visas" and relate to the validity, interpretation or effect of a provision of the Act or the *Migration Regulations 1994* (Cth); and

(4) s 486D, which provides that a person may not commence a judicial review proceeding in relation to a tribunal decision in the Federal Circuit Court or the Federal Court or this Court without disclosing any judicial review proceeding already brought by the person in any court in relation to the decision.

22 As appears from the speech on the second reading of the *Migration Legislation Amendment Bill (No 2) 1999 [2000]* (Cth), and is confirmed by the Explanatory Memorandum on the *Migration Legislation Amendment Bill (No 2) 2000* (Cth) ("the 2000 Bill"), the insertion of Pt 8A into the *Migration Act* "flow[ed] from the government's stated policy to restrict access to judicial review in visa related matters 'in all but exceptional circumstances'", and more specifically was to address "a disturbing trend which has seen court challenges in migration matters being made by way of class or otherwise grouped actions"[15].

23 It is further apparent from the context in which that latter observation sits in the speech that the "class or otherwise grouped actions" referred to were class or otherwise grouped judicial review proceedings under Pt 8 of the *Migration Act*. Thus:

> "Since October 1997, 14 class actions have been taken out, allowing significant numbers of people to obtain bridging visas to remain in Australia until the courts determined the matter. All 10 of the class actions decided so far – involving about 4,000 participants – have been dismissed by the courts."[16]

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15 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 14 March 2000 at 14622-14623; see also Australia, House of Representatives, *Migration Legislation Amendment Bill (No 2) 2000*, Explanatory Memorandum at 2.

16 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 14 March 2000 at 14623; see also Australia, House of Representatives, *Migration Legislation Amendment Bill (No 2) 2000*, Explanatory Memorandum at 2.

This had given rise to a concern that:

> "class actions are being used to encourage large numbers of people to litigate with the view to obtaining a visa – not because they have a lawful entitlement to be here but in effect a bridging visa. In fact, there are examples of advertisements placed in ethnic community newspapers using the eligibility for a bridging visa as a selling point for joining the class action.
>
> ...
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> Overall, this is a disturbing trend given the government's policy objective to restrict access to judicial review in all but exceptional circumstances."[17]

And:

> "While the much needed [*Migration Legislation Amendment (Judicial Review) Bill 1998*] has not attracted the support of non-government senators, the judicial review amendments contained in the Migration Legislation Amendment Bill (No 2) 2000 are not – I repeat not – a substitute for those in the judicial review bill. Members opposite will have to make their minds up on that issue in a substantive way when it is dealt with before the Senate."[18]

Construction of s 486B

24 The question of construction which then arises under s 486B is whether the plaintiff's claim for damages for false imprisonment constituted of being kept in immigration detention while the Commonwealth allegedly took longer than was reasonably necessary to receive or process the plaintiff's (or other Group Member's) claim for a visa, or to determine whether a valid application for a visa could be made, or at a time or times during which the visa and removal purposes were not capable of fulfilment, is a claim that raises *an issue in connection with visas* or *an issue in connection with removal of unlawful non-citizens*, and therefore whether s 486B precludes the plaintiff from bringing the claim as a class action or representative proceeding, as it is framed. More specifically, should s 486B be construed, like s 486A, as limited in its application to public

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17 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 14 March 2000 at 14623.

18 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 14 March 2000 at 14622.

law proceedings in the nature of judicial review, or does it extend to other kinds of proceedings?

25 Notably, the expression "proceedings ... that raise an issue in connection with visas ... or removal of unlawful non-citizens" in s 486B is different from, and prima facie of significantly wider prospective connection than, the expression "remedy ... in relation to a migration decision" in s 486A. It suggests a less rigid or direct connection between the nature of the claim and visas or removal than between the remedy and decision under s 486A. Textually, it accords with the natural and ordinary meaning of the relational[19] descriptor "proceedings ... that raise *an issue in connection with visas*" to conceive of this proceeding as one that raises issues in connection with visas.

26 It is also notable that s 494AA of the *Migration Act* – which was inserted into Pt 9 of the Act at the same time as s 486B was inserted into Pt 8A, albeit by a different Act[20] – provides that "proceedings relating to an unauthorised entry by an unauthorised maritime arrival"; "the status of an unauthorised maritime arrival"; "the lawfulness of the detention of an unauthorised maritime arrival"; "the exercise of powers under repealed section 198A"; or "the performance or exercise of a function, duty or power ... in relation to an unauthorised maritime arrival", are "not [to] be instituted or continued in any court". It may be, as the Commonwealth submitted in effect, although for present purposes it is unnecessary to decide, that the effect of the provision is to deprive all courts, except this Court in exercise of its jurisdiction under s 75(v) of the *Constitution* (which is expressly excepted), of jurisdiction to determine any sort of claim in relation to the designated subject matters, whether by way of judicial review proceedings or otherwise. And on one view, the descriptor "proceedings relating to" is also narrower than "proceedings ... that raise an issue in connection with" as it appears in s 486B.

27 But as against that, once it is accepted that Pt 8 is concerned with judicial review proceedings; that s 486A is concerned with public law remedies in the nature of judicial review (as was established in *Bodruddaza*); and that s 486A is the first and in that sense leading provision of Pt 8A, it strongly suggests that Pt 8A as a whole, like Pt 8, is limited to public law remedies in the nature of

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19 *R v Khazaal* (2012) 246 CLR 601 at 613 [31] per French CJ. See also *Workers' Compensation Board (Q) v Technical Products Pty Ltd* (1988) 165 CLR 642 at 653-654 per Deane, Dawson and Toohey JJ; *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356 at 376 per McHugh J.

20 *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth).

judicial review. And that impression is strengthened by the fact that s 486A (as it was construed in *Bodruddaza*), and, by parity of reasoning, ss 486AA, 486AB, 486C and 486D, are all, textually, confined to public law remedies in the nature of judicial review.

28 Moreover, as has been seen, it is apparent from the Second Reading Speech that the principal mischief or purpose of the 2001 Act (as was the case with the 2005 Act, considered in *Bodruddaza*) was to limit the possibilities for public law judicial review of migration decisions. There is no suggestion in the speech of an intention to extend the operation of any of the proscriptive provisions to other kinds of proceedings. The Explanatory Memorandum on the 2000 Bill states in terms that the concern was judicial review proceedings and, specifically, notes that the purpose of the clause ultimately enacted as s 486B(7)(a) was to ensure that family members not be prevented "from being applicants *in an application for judicial review*"[21].

29 Construed against that background, the variations in language as between "in relation to" in s 486A and "an issue in connection with" in ss 486B and 486C may be understood as the result of the drafters adopting what they considered were the clearest means of delineating the different aspects or applications of public law remedy proceedings, and not as a means of extending the prohibitory effects of Pt 8A to other kinds of proceedings.

30 True it is, as the Commonwealth submitted, that the expressed legislative purpose of restricting judicial review in visa related matters in all but exceptional circumstances would not necessarily be inconsistent with a wider legislative policy of preventing class actions of other kinds in relation to migration decisions that raise issues in connection with visas. And it may be accepted that such a policy would be consistent with the reality that the highly fact-specific nature of migration decisions to grant, give, suspend, cancel, revoke or refuse visas or permission to apply for visas[22] means that representative or class action proceedings are frequently an unsuitable vehicle for determination of issues arising from such decisions[23].

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21 Australia, House of Representatives, *Migration Legislation Amendment Bill (No 2) 2000*, Explanatory Memorandum at 6 (emphasis added).

22 *Plaintiff M96A/2016 v The Commonwealth* (2017) 261 CLR 582 at 593 [21] per Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ.

23 See and compare *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384, esp at 410, per French J.

31 But it remains, for the reasons stated, that the structure of Pt 8A as a whole presents as directed to, and the Explanatory Memorandum and Second Reading Speech leave very little doubt that the legislative concern was with, restricting the availability of judicial review proceedings in relation to migration decisions. There is no suggestion in any of the extrinsic materials of any executive concern about proceedings brought after the grant or refusal of a visa, or permission to apply for a visa, for damages in tort, whether for false imprisonment or otherwise. And there is no apparent reason why proceedings of that kind would be thought to warrant the need for restriction.

32 Most persuasively, however, as the plaintiff submitted, if s 486B(4), upon its proper construction, did extend to proceedings other than judicial review proceedings, it would mean that, although a claimant would be prohibited from instituting a representative proceeding raising an issue in connection with visas in the High Court, the Federal Court or the Federal Circuit Court, and would also be prohibited from obtaining an order for consolidation of such a proceeding with another proceeding in any of those courts, that claimant would nevertheless remain free to institute such a proceeding or to obtain an order for consolidation of such proceedings in the Supreme Court of a State. It is difficult to suppose that that was the legislative objective. To borrow from *Bodruddaza*, such a "draconian, if not irrational"[24], legislative scheme should not be attributed to the Parliament in the absence of clear words.

33 By contrast, if s 486B, upon its proper construction, is confined to judicial review proceedings that, one way or another, raise an issue in connection with visas – bearing in mind that proceedings for judicial review of migration decisions cannot be brought in State courts[25] – the result accords with a legislative concern to restrict the availability of judicial review of migration decisions, and in particular to restrict its availability in relation to or in connection with a migration decision to grant or refuse or withhold a visa or permission to apply for a visa or to remove an unlawful non-citizen from Australia. That is consistent with the extrinsic materials.

34 Accordingly, having regard to the legislative history of s 486B(1), the statutory purpose of Pt 8A as revealed by both the text of the bulk of its provisions and the extrinsic materials, and the seemingly irrational consequences

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24 (2007) 228 CLR 651 at 662 [23] per Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ, 676 [79] per Callinan J.

25 *Migration Act*, s 484.

that would follow if s 486B(1) extended beyond judicial review proceedings[26], I conclude that the preferable constructional choice is that the expression "all proceedings" in s 486B(1) means "all *judicial review* proceedings", and, therefore, that it does not extend to an action for damages in tort.

35 Finally, it is to be observed that the expression "raises an issue ... in connection with visas" in s 486C entails a further constructional issue: as to whether it limits the operation of s 486C to judicial review proceedings for review of decisions to grant, give, suspend, cancel, revoke or refuse visas, or whether it reaches beyond that to judicial review of decisions other than decisions to grant, give, suspend, cancel, revoke or refuse visas – decisions that are, however, concerned with issues connected with decisions to grant, give, suspend, cancel, revoke or refuse visas. There are some observations of the Federal Court which suggest that the former may be the preferable construction[27]. But for present purposes it is not a question that needs to be decided. It is sufficient for the disposition of this matter that, upon its proper construction, s 486C of the *Migration Act* is limited to judicial review proceedings and so does not apply to this proceeding.

Conclusion

36 For the reasons given, I do not consider that s 476B of the *Migration Act* prohibits this Court from remitting the matter to the Federal Court or that s 486B renders the proceeding incompetent in its present form. I order accordingly, by consent, that the matter be remitted to the Federal Court.

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26 See and compare *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 304 per Gibbs CJ, 321 per Mason and Wilson JJ; Pearce and Geddes, *Statutory Interpretation in Australia*, 8th ed (2014) at [2.38].

27 See for example *NAMU of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 124 FCR 589 at 592 [4] per Black CJ, Sundberg and Weinberg JJ; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54 at 63 [23] per Black CJ, Sundberg and Weinberg JJ.