HIGH COURT OF AUSTRALIA

EDELMAN J

HAKIM ULLAH MOKHLIS PLAINTIFF

AND

MINISTER FOR HOME AFFAIRS & ANOR DEFENDANTS

Mokhlis v Minister for Home Affairs
[2020] HCA 30
Date of Judgment: 1 September 2020
S92/2020

ORDER

1. *The proceeding be remitted to the Sydney Registry of the Federal Circuit Court of Australia pursuant to s 44(1) of the* Judiciary Act 1903 *(Cth).*

2. *The proceeding continue in the Federal Circuit Court of Australia as if any steps taken in the High Court of Australia had been taken in the Federal Circuit Court of Australia.*

3. *The Registrar of the High Court of Australia is to forward to the proper officer of the Federal Circuit Court of Australia a copy of all documents filed in the High Court of Australia.*

4. *The costs of the proceeding in the High Court of Australia be costs in the cause in the Federal Circuit Court of Australia.*

CATCHWORDS

Mokhlis v Minister for Home Affairs

Administrative law – Migration – Application for constitutional or other writ – Where plaintiff transferred to Australia from Manus Island for medical treatment – Where plaintiff unlawful non-citizen – Where plaintiff held in immigration detention – Where plaintiff alleges he requested removal from Australia – Where plaintiff seeks declarations, injunctions and writ of habeas corpus in original jurisdiction of the High Court in relation to his detention – Whether remitter to Federal Circuit Court available pursuant to s 44(1) of *Judiciary Act 1903* (Cth) – Whether Federal Circuit Court has jurisdiction in relation to relief sought – Where jurisdiction conferred is the same as the original jurisdiction of the High Court "under paragraph 75(v) of the Constitution" – Whether application relates to a "migration decision" for the purposes of s 476(1) of *Migration Act 1958* (Cth) – Whether remitter appropriate in these circumstances.

Words and phrases – "ancillary or incidental remedies", "dispute of fact", "instituted or continued", "migration decision".

Constitution, s 75(v).
Federal Circuit Court of Australia Act 1999 (Cth), s 10(1).
Judiciary Act 1903 (Cth), s 44(1).
Migration Act 1958 (Cth), ss 14(1), 189, 196, 197AB, 197AC, 198, 474, 476, 476B, 494AB.

EDELMAN J.

Introduction

1 The plaintiff is from Afghanistan and came to Australia in July 2013. He was subsequently transferred to Manus Island in Papua New Guinea. On 5 September 2019, he was transferred from Manus Island to Australia for the purposes of receiving medical treatment pursuant to s 198C(2) of the *Migration Act 1958* (Cth) as it then stood. The defendants' evidence is that the plaintiff has received, and is receiving, medical treatment in Australia, although the plaintiff disputes that he has received medical treatment in Australia.

2 Given that the plaintiff does not hold a visa, he is an unlawful non-citizen pursuant to s 14(1) of the *Migration Act*. Sections 189 and 196 therefore require that he be held in immigration detention whilst he is in Australia, and he has been so held since his arrival in September 2019. Section 197AB(1) of the *Migration Act* empowers the Minister to make a residence determination that would allow a person such as the plaintiff to reside at a specified place rather than in immigration detention. If that determination is made, s 197AC(1) provides that the *Migration Act* applies "as if the person were being kept in immigration detention".

3 Neither of the defendants has considered whether or not to exercise the power under s 197AB to make a residence determination. On 6 September 2019, the administrative process of consideration of the *Guidelines on the Minister for Immigration and Border Protection's residence determination power under section 197AB and section 197AD of the Migration Act 1958* was finalised without any referral of the plaintiff's case for consideration by the defendants.

4 The plaintiff alleges that he is suffering severe mental and physical harm as a result of his detention. He argues that his continued detention therefore constitutes a breach of the duty of care owed to him by the defendants. He seeks a range of remedies in this Court to prevent his ongoing detention and the harm that he alleges results therefrom, including a declaration that his detention has been unlawful, at least since the date of his request to be removed to Papua New Guinea; a writ of habeas corpus; a declaration that his detention is causing him severe mental and physical pain or suffering; and injunctions preventing the defendants from continuing to cause severe mental harm to him and preventing the defendants from continuing to hold him in immigration detention on the basis that this is causing him severe mental harm. The plaintiff also seeks a declaration that it is in the public interest for the Minister to consider exercising the power in s 197AB of the *Migration Act*.

5 But for one issue, I would have concluded that the plaintiff's application is hopeless and falls to be dismissed for the same reasons as in *Kazemi v Minister for*

Home Affairs[1]. The issue that prevents this course concerns the plaintiff's first ground of relief. In his affidavit the plaintiff says that in January 2020 he requested in writing to be removed from Australia to Papua New Guinea but has not received a response to his request. Section 198(1) of the *Migration Act* provides that "[a]n officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed". The plaintiff's first ground of relief seeks a declaration that his detention "at least since his request for removal to Papua New Guinea has been unlawful".

6 The affidavit evidence filed on behalf of the defendants asserts that the plaintiff had expressed an interest in returning to Papua New Guinea during a conversation with his Status Resolution Case Manager but that the plaintiff had made no written request. In light of the dispute of fact on this issue, and in circumstances in which most of the relief claimed in the application is interrelated, the primary submission of the defendants is that this application should be remitted to the Federal Circuit Court of Australia. Neither party to this application addressed the nature or consequences of a duty to remove under s 198(1) or the relationship between the general provision for removal on request in writing in s 198(1) and the specific provision in s 198(1A) concerning removal of an unlawful non-citizen "who has been brought to Australia under ... section 198C for a temporary purpose" where "the person no longer needs to be in Australia for that purpose (whether or not the purpose has been achieved)". There is no present need to discuss those issues[2].

Whether this Court can remit this matter to the Federal Circuit Court of Australia

Jurisdictional requirements

7 The plaintiff submits that s 494AB of the *Migration Act* has the effect that only this Court has jurisdiction over this matter. Section 494AB provides that a number of categories of proceedings against the Commonwealth, "relating to" particular issues, "may not be instituted or continued in any court". Even if it be assumed that this provision is properly interpreted as a jurisdictional requirement, which need not be decided here, it is arguable that this proceeding does not involve any issues that fall within, or relate to, any of those categories. However, in any event, s 494AB(3) provides that "[n]othing in this section is intended to affect the jurisdiction of the High Court under section 75 of the Constitution" and a provision

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1 [2020] HCATrans 124.

2 See *Plaintiff M96A/2016 v The Commonwealth* (2017) 261 CLR 582 at 595 [26]-[27].

to this effect has been held not to limit the power of this Court to remit matters to the Federal Circuit Court despite a provision that those matters were not to be "instituted or continued" in that Court[3].

8 Section 44(1) of the *Judiciary Act 1903* (Cth) empowers this Court to remit this matter to the Federal Circuit Court if that Court has jurisdiction with respect to the subject-matter and the parties. Section 476B(2) of the *Migration Act* precludes this Court from remitting a matter, or any part of a matter, that relates to a migration decision to the Federal Circuit Court unless that Court has jurisdiction in relation to the matter, or that part of the matter, under s 476.

9 Section 10(1) of the *Federal Circuit Court of Australia Act 1999* (Cth) provides for original jurisdiction of the Federal Circuit Court including where that jurisdiction is conferred by express provision of a law made by the Commonwealth Parliament. Section 476(1) of the *Migration Act* provides that, subject to certain exceptions, the Federal Circuit Court has "the same original jurisdiction in relation to migration decisions as the High Court has under paragraph 75(v) of the Constitution".

10 There are two relevant jurisdictional hurdles contained in s 476(1). The first is the need for a "migration decision". The second is that the original jurisdiction of the Federal Circuit Court is limited to that which s 476(1) describes the High Court as having "under paragraph 75(v) of the Constitution": original jurisdiction "in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth".

A "migration decision"

11 A "migration decision" is defined in s 5(1) to include a "privative clause decision". A privative clause decision, by ss 5(1) and 474(2) with exceptions that are not relevant here, includes "a decision of an administrative character made, proposed to be made, or required to be made ... under [the *Migration Act*] (whether in the exercise of a discretion or not)". Section 474(3) provides that a "decision" in relation to s 474(2)[4] includes a wide range of conduct including "doing or refusing to do any other act or thing".

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3 *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 at 41-42 [20]. Applied in relation to s 494AB in *Mohebi v Minister for Home Affairs* [2020] HCATrans 098 (17 July 2020).

4 *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at 202-203 [65]-[66], [68].

12 The relief sought by the plaintiff concerns two migration decisions. One relevant decision that was made (not in the exercise of a discretion), which involved "doing ... any ... thing", was the detention of the plaintiff under s 189(1) of the *Migration Act*[5]. Another is a decision which is required to be made under s 198(1) involving the act of removing an unlawful non-citizen as soon as reasonably practicable after that person asks the Minister, in writing, to be so removed.

The original jurisdiction of the High Court under s 75(v) of the Constitution

13 Section 476(1) of the *Migration Act* confers upon the Federal Circuit Court, subject to exceptions, the same original jurisdiction in relation to migration decisions "as the High Court has under paragraph 75(v) of the Constitution". Although s 75(v) might more appropriately be described as confirming or entrenching jurisdiction to exercise the named prerogative and equitable remedies rather than creating a new species of power[6], the reference to "under paragraph 75(v)" in s 476(1), in context, must have been to all remedies exercisable by the High Court which relate to s 75(v), not merely those named in s 75(v). When the *Migration Litigation Reform Act 2005* (Cth) repealed the existing s 476 and inserted s 476(1) in its current form[7], the Explanatory Memorandum provided that the purpose of the amendments was to "direct nearly all migration cases to the [Federal Circuit Court], to limit the Federal Court's original jurisdiction in relation to migration cases, and to direct migration cases remitted by the High Court to the appropriate lower court"[8].

14 Section 476(1) must have been intended not merely to pick up claims for writs of prohibition and mandamus and injunctions which are mentioned in s 75(v) but also to pick up those remedies which, at the time s 476(1) was introduced, had been described by this Court as "ancillary" or "incidental", at least in the sense of

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5 See also *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 416 at [73].

6 See *Smethurst v Commissioner of the Australian Federal Police* (2020) 94 ALJR 502 at 528 [97], 537 [144], 555 [229]-[230]; 376 ALR 575 at 599, 611, 634.

7 With the references to the Federal Magistrates Court now to be read as the Federal Circuit Court of Australia. See also *Federal Circuit Court of Australia (Consequential Amendments) Act 2013* (Cth), Sch 1 item 333, Sch 2 item 1.

8 Australia, House of Representatives, *Migration Litigation Reform Bill 2005*, Explanatory Memorandum at 12.

being necessary for the effective operation of s 75(v) remedies[9] and potentially available even if none of the relief in s 75(v) was granted[10]. It suffices, in the absence of any controversy, to proceed upon two assumptions: first, that jurisdiction for the claim for a writ of habeas corpus, which could have been otherwise brought as an application for an injunction and in the words of Mr Barton might be "equally necessary"[11], is implied on the basis that the writ is ancillary or incidental to the effective exercise of jurisdiction to order an injunction against an officer of the Commonwealth under s 75(v)[12]; and secondly, that the declarations sought can also be seen as ancillary or incidental remedies to the injunctions. Indeed, as Leeming JA has observed extra-judicially, the likely reason for the omission of "declaration" from the enumerated remedies in s 75(v) is simply that the "renaissance enjoyed by that remedy" in the United States or in Anglo-Australian law had not commenced at Federation[13].

15 One possible exception to this jurisdiction of the Federal Circuit Court concerns para 8 of the plaintiff's application. The relief sought in that paragraph, which is identical to the relief sought in para 7 of the application which I considered in *Kazemi v Minister for Home Affairs*, is as follows:

> "A declaration that it is in the public interest for the Minister to consider exercising the s.197AB residence determination power in respect of the plaintiff."

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9 *R v Cook; Ex parte Twigg* (1980) 147 CLR 15 at 26, citing *Pitfield v Franki* (1970) 123 CLR 448. See also *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 90-91 [14]; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 393-394 [19], 440-441 [176]; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 507 [80].

10 *Re JJT; Ex parte Victoria Legal Aid* (1998) 195 CLR 184 at 195-196 [27], 230-231 [152], [157]. Compare *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 74 ALJR 405 at 411 [29]-[31]; 168 ALR 407 at 415.

11 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 31 January 1898 at 320.

12 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 105 [161].

13 Leeming, *Authority to Decide: The Law of Jurisdiction in Australia*, 2nd ed (2020) at 247.

16 An exception to the jurisdiction conferred upon the Federal Circuit Court by s 476(1) of the *Migration Act* is a "privative clause decision or purported privative clause decision mentioned in subsection 474(7)". Section 474(7) includes a "decision of the Minister not to exercise, or not to consider the exercise, of the Minister's power under ... [s] 197AB". Hence, "[a] challenge to a decision made by the Minister personally not to exercise a non-compellable power can only be heard and determined by this Court under s 75(v) of the *Constitution*"[14]. In circumstances in which the point was not argued, I am content to proceed on the basis that the proposed declaration in para 8 of the plaintiff's application does not involve a *decision* not to consider the exercise of the Minister's power so that it would not be caught by the exception to the jurisdiction of the Federal Circuit Court.

Whether remittal is appropriate

17 It is appropriate that this application be remitted to the Federal Circuit Court for determination for three reasons.

18 First, the defendants do not suggest that the first claim for relief by the plaintiff, seeking declaratory relief concerning the unlawfulness of his detention since his alleged written request for removal, can be disposed of without a hearing, which will involve contested facts. The power of remitter is designed to avoid this Court adjudicating upon issues of this nature, including factual disputes, if they are capable of resolution by a trial court[15]. As McHugh J said in *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham*[16], the conferral of power by Parliament upon this Court to remit matters within its original jurisdiction to other courts generally enables this Court "to confine itself to constitutional and important appellate matters".

19 Secondly, the first claim for relief in the plaintiff's application may not be wholly independent of the remaining claims. Those remaining claims might be the subject of amendment and clarification. For instance, the plaintiff's application asserts a number of medical consequences from his "indefinite restraint ... in held custody". It is unclear precisely how this submission relates to the relief sought, since the proposed injunctions do not appear to contemplate the imposition of any particular terms upon the manner of the plaintiff's detention as opposed to release

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14 *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at 204 [71].

15 *Ravenor Overseas Inc v Readhead* (1998) 72 ALJR 671 at 672 [5]; 152 ALR 416 at 417.

16 (2000) 74 ALJR 405 at 407 [11]; 168 ALR 407 at 410.

of the plaintiff from his place of detention in Australia or removal to Papua New Guinea.

20 Thirdly, the defendants sought remitter and the plaintiff did not oppose it if the Federal Circuit Court had jurisdiction for the remitter. The plaintiff was given the opportunity of making written submissions as to whether there were any reasons why this Court could not, or should not, remit this matter to the Federal Circuit Court. He did not do so. I am sufficiently satisfied that this Court has jurisdiction and power to remit this matter and it is appropriate that it be remitted. Indeed, although the point need not be decided, it may be that many, or all, of the remaining issues raised by the plaintiff could have been initiated in the Federal Circuit Court.

21 For these reasons, the orders of the Court are as follows:

1. The proceeding be remitted to the Sydney Registry of the Federal Circuit Court of Australia pursuant to s 44(1) of the *Judiciary Act 1903* (Cth).

2. The proceeding continue in the Federal Circuit Court of Australia as if any steps taken in the High Court of Australia had been taken in the Federal Circuit Court of Australia.

3. The Registrar of the High Court of Australia is to forward to the proper officer of the Federal Circuit Court of Australia a copy of all documents filed in the High Court of Australia.

4. The costs of the proceeding in the High Court of Australia be costs in the cause in the Federal Circuit Court of Australia.