HIGH COURT OF AUSTRALIA

GLEESON J

SPALL APPLICANT

AND

MINISTER FOR HOME AFFAIRS RESPONDENT

[2024] HCASJ 18
Date of Judgment: 17 May 2024
M11 of 2023

ORDER

1. The application is dismissed.

Representation

The applicant is represented by Carina Ford Immigration Lawyers.

The respondent is represented by Australian Government Solicitor.

1 GLEESON J. On 5 January 2024, the applicant ("Mr Spall") discontinued his application for removal of Federal Court of Australia proceeding number VID750/2021 ("the Federal Court proceeding") into this Court under s 40 of the *Judiciary Act 1903* (Cth) ("the removal application"). Mr Spall now seeks an order under r 26.08.2 of the *High Court Rules 2004* (Cth) that there be no order as to costs in the proceeding, departing from the usual order that the discontinuing party pay the respondent's costs under that rule. The respondent ("the Minister") opposes Mr Spall's application.

2 In support of his application, Mr Spall relies upon: (1) an affidavit of his solicitor, Carina Ford, affirmed on 24 January 2024; and (2) written submissions. The Minister relies upon: (1) an affidavit of Michelle Elizabeth Stone, a lawyer in the employment of the Australian Government Solicitor, affirmed on 9 March 2023; and (2) written submissions.

3 Pursuant to r 13.03.1 of the *High Court Rules 2004* (Cth), I direct that the application for costs be determined without an oral hearing.

4 For the following reasons, the application should be dismissed.

Facts

5 Mr Spall obtained Australian citizenship by conferral in 1997. In 2018, he was sentenced by the County Court of Victoria to 12 months' imprisonment for conduct that occurred in 1995-1996. On 7 May 2020, the Minister decided under s 34(2)(b)(ii) of the *Australian Citizenship Act 2007* (Cth) ("the *Citizenship Act*") that Mr Spall's citizenship had ceased.

6 The Administrative Appeals Tribunal ("the Tribunal") affirmed the Minister's decision. On 14 December 2021, Mr Spall commenced the Federal Court proceeding, appealing from the Tribunal's decision. On 6 July 2022, Mr Spall filed a notice under s 78B of the *Judiciary Act 1903* (Cth) stating that the Federal Court proceeding involves a matter arising under the Constitution or involving its interpretation, namely whether s 34(2) of the *Citizenship Act* was invalid ("the constitutional question").

7 By letter dated 6 September 2022, the Australian Government Solicitor ("AGS"), acting for the Attorney-General of the Commonwealth ("the Attorney-General"), informed the solicitors for Mr Spall and the Minister that the Attorney-General had decided to apply to remove the Federal Court proceeding into this Court. By letter dated 7 September 2022 to AGS, Ms Ford requested that the Commonwealth agree to pay Mr Spall's reasonable costs in this Court. Ms Ford's letter also questioned whether the Federal Court proceeding was an appropriate vehicle for a challenge to the validity of s 34(2) of the *Citizenship Act*.

8 By letter dated 19 September 2022, AGS acting for both the Attorney-General and the Minister, declined Mr Spall's request for the Commonwealth to pay his costs

and stated that the Commonwealth considered that costs should be in the cause in any proceeding to decide the constitutional question. As to whether the Federal Court proceeding was a suitable vehicle, AGS responded as follows:

> "We consider there is a good argument that the proposed Ground 1A is a question of law that can be the subject of an appeal under 44 of the Administrative Appeals Tribunal Act 1975 (Cth). However, we acknowledge there is some prospect that the High Court might disagree.
>
> Given that your client is willing to commence separate proceedings in the original jurisdiction of the High Court of Australia to decide the constitutional question, we agree that is a practical way to avoid the risk identified above.
>
> If your client were to commence proceedings of this kind, confined to the constitutional question in proposed Ground 1A and on the basis of the facts as found in the AAT's decision, the Commonwealth would consent to the matter being referred to a Full Court of the High Court for decision."

9 By email dated 26 September 2022, Ms Ford told AGS that she was seeking Mr Spall's instructions on the 19 September 2022 letter.

10 There is no evidence of any further relevant communications until, on 9 February 2023, Mr Spall filed his removal application.

11 On 14 February 2023, AGS informed Ms Ford that they did not have any further instructions in the Federal Court proceeding "at this stage". On 15 February 2023, AGS informed Ms Ford that they had received instructions overnight "not to concede" the Federal Court proceeding but did not have instructions about the removal application. On the same day, Ms Ford asked AGS to "confirm if your client will support" the removal application and, if not, explain why not. Ms Stone acknowledged receipt of Ms Ford's communication and said that AGS would respond when instructions were received.

12 On 3 March 2023, Ms Stone wrote to the High Court Registry seeking an extension of time for the Minister to file a response to the removal application.

13 On 9 March 2023, the Minister filed his response to the removal application. In that response, the Minister opposed the removal application for two reasons. The first reason was that the constitutional question was already before the Court in *Jones v Commonwealth & Ors* (B47/2022). A writ of summons had been filed in that matter on 10 October 2022, and an order was made referring the matter to a Full Court of this Court on 23 February 2023. The second reason was that, as the Federal Court proceeding was an appeal from a decision of the Tribunal, the constitutional issue may not be reached.

14 Mr Spall now accepts that *Jones v The Commonwealth*[1] resolved the constitutional issue raised by him.

Costs where an application is discontinued

15 While r 28.08.2 provides a default rule that a discontinuing party must pay the respondent's costs of the discontinued application, the Court has a broad discretion to depart from that rule. In *Re Minister for Immigration & Ethnic Affairs; Ex parte Lai Qin,*[2] McHugh J stated:

> "If it appears that both parties have acted reasonably in commencing and defending the proceedings and the conduct of the parties continued to be reasonable until the litigation was settled or its further prosecution became futile, the proper exercise of the cost discretion will usually mean that the court will make no order as to the cost of the proceedings. This approach has been adopted in a large number of cases."

16 A similar discretion has been exercised in other Australian courts.[3]

17 However, in *ONE.TEL v Deputy Commissioner of Taxation,* Burchett J explained:[4]

> In my opinion, it is important to draw a distinction between cases in which one party, after litigating for some time, effectively surrenders to the other, and cases where some supervening event or settlement so removes or modifies the subject of the dispute that, although it could not be said that one side has simply won, no issue remains between the parties except that of costs. In the former type of case, there will commonly be lacking any basis for an exercise of the Court's discretion otherwise than by an award of costs to the successful party. It is the latter type of case which more often creates problems, since there may be difficulty in discerning a clear reason why one party, rather than the other, should bear the costs.

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1 [2023] HCA 34; (2023) 97 ALJR 936.

2 (1997) 186 CLR 622 at 625 (footnotes omitted).

3 See, e.g., *O'Neill v Mann* [2000] FCA 1680 [11]-[13], [20]; *Kennedy v Griffiths* [2014] QSC 43 at [68]; *Nichols v NFS Agribusiness Pty Ltd* [2018] NSWCA 84; (2018) 97 NSWLR 681 at 688 [30], 692 [54]; *Gibson v Minister for Home Affairs* [2022] FCAFC 94 at [19].

4 (2000) 101 FCR 548 at 552-553 [6]. See also *Edwards Madigan Torzillo Briggs Pty Ltd v Stack* [2003] NSWCA 302 at [5]*; Bitannia Pty Ltd v Parkline Constructions Pty Ltd* [2009] NSWCA 32 at [79]; *Kitay (as Liquidator of Computer Accounting & Tax Pty Ltd) v Frigger* [2021] WASCA 78 at [36]-[38].

Application

18 In support of Mr Spall's contention that he should not pay the Minister's costs of the removal application, Mr Spall advances a single submission, namely, that he was justified in filing the application in circumstances where: (1) the Attorney-General had intervened in in the Federal Court proceeding and procured an adjournment of that proceeding for the purpose of removing the matter into this Court; and (2) thereafter "there [had been] a stalling of [the] proceeding whilst the Commonwealth had identified another case, Mr Jones's case, as a preferable test case".[5]

19 This case is of the latter type identified by Burchett J in *ONE.TEL.*[6] While it was not unreasonable for Mr Spall to file the removal application, the application was filed after Mr Spall had been told that the Attorney-General intended to file a removal application but had not done so. There is no evidence that Mr Spall made any inquiry to find out why the Attorney-General had not done what he said he would do. In those circumstances, by filing the removal application, Mr Spall took the risk that there was some reason why the Attorney-General had failed to make his own removal application, which might affect the utility of a removal application filed by Mr Spall. Although not unreasonable, the removal application was incautious.

20 Furthermore, Mr Spall had raised the question of costs with the Commonwealth and was told that the Commonwealth considered that the costs of an application by Mr Spall in this Court's original jurisdiction should be costs in the cause, that is, costs should follow the event. AGS said nothing to indicate to Mr Spall that the Commonwealth would agree to bear its costs of any removal application brought by him. In those circumstances, I consider that the proper costs order is that Mr Spall should pay the Minister's costs of the discontinued application.

Disposition

21 The application is dismissed.

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5 Applicant's submissions at [5].

6 (2000) 101 FCR 548.