

HIGH COURT OF AUSTRALIA

GLEESON CJ

RE THE MINISTER FOR IMMIGRATION
AND MULTICULTURAL AFFAIRS

RESPONDENT

EX PARTE MEVLUD FEJZULLAHU & ORS

PROSECUTORS

AND TWENTY-TWO RELATED MATTERS

Re The Minister for Immigration and Multicultural Affairs;
Ex parte Fejzullahu [2000] HCA 23
10 April 2000
S51-S73/2000

ORDER

In the case of each summons, the application is dismissed with costs.

Representation:

R R S Tracey QC with G A Mowbray for the respondent (instructed by Australian Government Solicitor)

A M Flower for the prosecutors (instructed by Basil Nuredini Barristers & Solicitors)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

1 GLEESON CJ. Twenty-three summonses seeking urgent injunctive relief were filed in the Sydney registry of the Court at about midday on Friday 7 April 2000. By consent, they were made returnable at 2.15 pm on the same day. The applicants sought to restrain the respondent, the Minister for Immigration and Multicultural Affairs ("the Minister"), until further order, from taking steps to remove them from Australia. The reason for the urgency will appear below. The application was fully argued. Argument concluded at about 5.15 pm on 7 April. I reserved my decision until today. The Minister undertook not to take any steps to remove the applicants in the meantime.

2 Each of the applicants for injunctive relief is a Kosovar of Yugoslav nationality. There are 81 applicants¹. They have, between them, issued 23 summonses. It is immaterial to examine the basis upon which they have been arranged in groups for that purpose. Each summons seeks interlocutory relief in the context of proceedings brought against the Minister pursuant to s 75(v) of the Constitution ("the principal proceedings").

Nature of the proceedings

3 It is necessary to explain, first, the nature of the principal proceedings and, secondly, the nature of the applications presently before the Court.

4 In each of the principal proceedings, the Minister is named as respondent. The draft order nisi states the order sought as follows:

"The respondent DO SHOW CAUSE WHY A WRIT OF MANDAMUS and an INJUNCTION should not issue out of this Court directed to the respondent directing him to consider and determine according to law the application of the prosecutors for the respondent to exercise his discretion under s 91L of the Migration Act 1958 upon the grounds that:

- (a) the decision of the respondent made 3 April 2000 ("the decision") is so unreasonable that no reasonable person exercising his or her discretion according to law could have made the decision.
- (b) the respondent failed to consider relevant matters in making the decision, namely the matters referred to in the United Nations High Commission for Refugees Report dated 27 March 2000.

1 Counsel for the applicants said there were 81. The names of only 79 appear on the summonses. It is assumed, from the evidence, that the names of Zaide Iseni and Biondina Iseni were accidentally omitted from the summons in S67/2000.

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(c) the respondent failed to accord to the prosecutors natural justice and/or procedural fairness."

5 Section 75(v) of the Constitution gives the Court jurisdiction to direct a writ of mandamus to, or to grant an injunction against, an officer of the Commonwealth. The Minister is such an officer. The injunction sought is in the nature of a mandatory injunction. What is claimed in each case is an order directing the Minister to consider and determine according to law an application under s 91L of the *Migration Act* 1958 (Cth) ("the Act"). The nature of the power given to the Minister by s 91L will be considered below.

6 Under s 75(v) of the Constitution, the Court is empowered, in the exercise of its responsibility to maintain the rule of law, to make orders of specified kinds aimed at ensuring observance of the law by officers of the Commonwealth. It is not invested with an appellate jurisdiction, enabling the Court to set aside decisions, lawfully and regularly made, upon the ground that the Court disagrees with such decisions. The rule of law is not maintained by subverting the democratic process. The Constitution, which is the instrument of government of a democratic, and therefore political, society, has not substituted general judicial review for political accountability. The question raised by the principal proceedings is whether the Minister has acted according to law; not whether his decisions are wise, or humane, or in the public interest.

7 The proceedings presently before the Court, that is to say, the applications for urgent injunctions, invoke the Court's power, in an appropriate case, to make an interim order which will, in practical effect, preserve the subject matter of a dispute pending its final resolution, or otherwise maintain the status quo so as to enable a court to do justice between the parties. The principles according to which such a power will be exercised are well established. As Mason ACJ pointed out in *Castlemaine Tooheys Ltd v South Australia*², the principles which are to be applied in the exercise of the discretionary power to grant or refuse an interlocutory injunction in private law cases are also applied in public law cases, notwithstanding that different factors may arise for consideration in giving practical effect to those principles. The applicants must show that there is a serious question to be tried in the principal proceedings, and that the balance of convenience favours the granting of an injunction.

8 The main subject of debate on the hearing of the applications was whether it has been shown, by evidence and argument, that there is a serious question to be tried in the principal proceedings. For the reasons that follow, that has not been shown. On that ground, these applications must fail.

2 (1986) 161 CLR 148 at 153.

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- 9 The starting point for a consideration of the applicants' case against the Minister must be the terms of the legislation under which he was requested to act.

The legislation

- 10 The applicants were amongst a large group of Kosovars who came to Australia on various dates between 6 May 1999 and 22 July 1999 on temporary safe haven visas (subclass 448). As will appear, those visas were issued for limited periods, but were extended, ultimately until midnight on 8 April 2000. It is the response of the Minister to attempts made by or on behalf of the applicants to obtain other visas enabling them to remain in Australia which is the subject of the litigation.

- 11 The legislation governing that matter is in Subdiv AJ of Div 3 of Pt 2 of the Act. It is as follows:

"91H This Subdivision is enacted because the Parliament considers that a non-citizen who holds a temporary safe haven visa, or who has not left Australia since ceasing to hold such a visa, should not be allowed to apply for a visa other than another temporary safe haven visa. Any such non-citizen who ceases to hold a visa will be subject to removal under Division 8.

91J This Subdivision applies to a non-citizen in Australia at a particular time if, at that time, the non-citizen:

- (a) holds a temporary safe haven visa; or
- (b) has not left Australia since ceasing to hold a temporary safe haven visa.

91K Despite any other provision of this Act but subject to section 91L, if this Subdivision applies to a non-citizen at a particular time and, at that time, the non-citizen applies, or purports to apply, for a visa (other than a temporary safe haven visa), then that application is not a valid application.

91L(1) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to a particular non-citizen, determine that section 91K does not apply to an application for a visa made by the non-citizen in the period starting when the notice is given and ending at the end of the seventh working day after the day that the notice is given.

- (2) The power under subsection (1) may only be exercised by the Minister personally.

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- (3) If the Minister makes a determination under subsection (1), he or she is to cause to be laid before each House of the Parliament a statement that:
 - (a) sets out the determination; and
 - (b) sets out the reasons for the determination, referring in particular to the Minister's reasons for thinking that his or her actions are in the public interest.
- (4) A statement under subsection (3) is not to include:
 - (a) the name of the non-citizen; or
 - (b) any information that may identify the non-citizen; or
 - (c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned – the name of that other person or any information that may identify that other person.
- (5) A statement under subsection (3) is to be laid before each House of the Parliament within 15 sitting days of that House after:
 - (a) if the determination is made between 1 January and 30 June (inclusive) in a year – 1 July in that year; or
 - (b) if the determination is made between 1 July and 31 December (inclusive) in a year – 1 January in the following year.
- (6) The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any non-citizen, whether he or she is requested to do so by the non-citizen or by any other person, or in any other circumstances."

12 Four things in particular may be noted.

13 First, s 91H contains a statement of the purpose of the legislative scheme.

14 Secondly, what engages the Minister's power to make a determination under s 91L is the Minister's view of what is in the public interest.

15 Thirdly, s 91L imposes a direct and specific form of political accountability upon the Minister, requiring a Minister who makes a determination under s 91L

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to explain himself or herself to Parliament in a certain manner and within a certain time.

- 16 Fourthly, s 91L(6) provides that a Minister does not have a duty to consider whether to exercise the power under s 91L(1). If, contrary to the view of the facts I have formed, the evidence in the present case had supported the grounds relied upon by the applicants, that provision would have constituted a substantial obstacle to relief of the kind they seek in the principal proceedings.

The evidence

- 17 The Australian Government responded to a request in 1999 from the United Nations High Commission for Refugees ("UNHCR") to provide safe haven for Kosovars who had fled into the Former Yugoslav Republic of Macedonia ("FYROM"). In April 1999 Australia agreed to take up to 4,000 Kosovars from camps in FYROM. All the people selected agreed that they would come to Australia on a temporary basis. Each person over the age of 16 signed an undertaking to that effect, the terms of which are in evidence. Between May and July 1999, 3,924 Kosovars came to Australia. They were issued with visas pursuant to the legislation set out above.

- 18 In June 1999, following the signing of an agreement that ended the conflict in Kosovo, repatriation of Kosovars housed in camps in neighbouring countries commenced. On 12 July 1999, UNHCR announced that the security situation had improved sufficiently for it to coordinate organised voluntary repatriation.

- 19 In July 1999, the Department of Immigration and Multicultural Affairs ("DIMA") began arranging returns of Kosovars from Australia. All returns were voluntary. The visas of those who did not wish to return were extended on a number of occasions, as noted above.

- 20 On 28 October 1999, the Minister wrote to all remaining Kosovar evacuees asking them to set out in writing any reasons they wished to advance as to why they should be permitted to stay longer in Australia. He said that each individual case would be examined.

- 21 In early November 1999, the Minister and the solicitor for the present applicants met. The Minister told the solicitor that:

- (1) the Minister would entertain submissions from each of the solicitor's clients (who included a substantial number of people who are not presently applicants) and would deal with each application under s 91L individually;

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- (2) the solicitor should write to UNHCR setting out the grounds on which each of his clients claimed entitlement to a protection visa or a favourable exercise of discretion on other grounds;
- (3) the Minister would consult with UNHCR and take its recommendations into account.

22 The above account of the meeting is taken from an affidavit of the applicants' solicitor. The Minister agreed to take the recommendations of UNHCR into account. He did not agree to abide by them. Having regard to his statutory obligations, it may be doubted that he could lawfully have agreed to do so. Nor did he agree not to receive information, or take advice, from other sources as well. In that connection, it is to be noted that, under the legislation, the Minister's concern is the public interest. That is not necessarily the way in which the primary concern of UNHCR would be characterised.

23 The Minister, by media release, publicly announced a timetable, and a process, for dealing with individual applications. Advice was taken from UNHCR.

24 In March 2000, UNHCR published a "policy paper" regarding the return of Kosovo Albanians. That paper said:

"6. In these circumstances, most Kosovo Albanians remaining in asylum countries no longer have immediate protection needs and therefore should be able to return home in safety."

25 However, this statement was qualified in two respects.

26 First, certain categories of people were said to face serious problems if they were to return. The paper recommended that those falling into such categories "should be carefully and individually considered in order to ascertain the need for international protection."

27 Secondly, other categories of people, although not having the status of people with "protection needs", were said to be "vulnerable" and should be allowed to prolong their stay on humanitarian grounds until special arrangements could be put in place to facilitate their return. They included, for example, the unaccompanied elderly, or handicapped people.

28 Evidence was admitted, without objection, on information and belief, that the Minister "considered each Kosovar evacuee case individually on its merits, having regard to the individual material lodged by, or on behalf of, each Kosovar family together with relevant medical and trauma counsellor reports, DIMA interview reports, UNHCR reports and assessments and material, and DIMA assessments and recommendations". Having regard to the extreme sensitivity of

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the subject, the national and international attention being paid to his decisions, and the political accountability involved, it would have been surprising had the Minister done otherwise. There is nothing in the material to suggest that the Minister had any reason not to consider and deal with each individual case on its merits.

- 29 In the result, the Minister decided to exercise his power under s 91L to allow applications for other classes of visa made by 112 persons, to extend the temporary safe haven visas of 130 persons, and to decline to exercise his power under s 91L in relation to 259 people. The present 81 applicants are amongst the lastmentioned group. That decision was announced on 3 April 2000.

The grounds for relief in the principal proceedings

- 30 The three grounds in the draft order nisi are set out above.

- 31 As to the first ground, argument proceeded upon the assumption that, in a case where the evidence supports it, it is a ground available for prerogative relief under s 75(v) of the Constitution in circumstances such as the present. That being the common assumption of the parties, I am prepared to accept it, without further examination of the legal issues³.

- 32 There is no foundation in the evidence for the contention advanced in the first ground. As to those applicants who sought to bring themselves within the categories of "people with protection needs", the UNHCR policy paper did not say that it would necessarily be unreasonable to return them. It said that their individual circumstances should be carefully considered, and explained the potential problems for them. As to the needs of people who relied upon humanitarian considerations, the facts and circumstances of individual cases were such as required, and, according to the evidence, received, subjective evaluation. There is no basis for concluding that the outcome of such evaluation was unreasonable to the degree asserted or at all.

- 33 There is an additional difficulty in the way of the applicants. The material examined by the Minister is described above. It includes, for example, medical and trauma counsellor reports, and DIMA assessments. No attempt has been made to put all that material before this Court.

- 34 The nature of the issues raised for the Minister's consideration by the applicants was such that the possibility of different assessments being reasonably open is evident.

3 cf *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 73 ALJR 746 at 767-768 per Gummow J; 162 ALR 577 at 605-606.

35 Of primary importance, however, is the nature of the issue which the legislation required the Minister to consider. As was noted above, the exercise of the power under s 91L depends upon the Minister coming to a view as to the public interest. The proposition for which each applicant contends is that the Minister's failure to be satisfied that it was in the public interest to make a determination that s 91K did not apply to that person's visa application could be categorised as in the first ground of the application. Considerations of public interest that would be open for the Minister to take into account may extend beyond the personal circumstances of individual applicants. There is no basis, demonstrated either by evidence or by argument, for a case that the Minister's assessment of the public interest was not one that was reasonably available.

36 As to the second ground, nothing has been shown to support an argument that the Minister failed to take into account any matter he was obliged to take into account. An attempt was made in argument to suggest that the Minister had committed himself to follow the recommendations of UNHCR. The evidence shows that the most he agreed to do was to take those recommendations into account. The evidence also shows that he did so.

37 The argument on the third ground was that, by reason of the events outlined above, procedural fairness required that, in any case where the Minister did not apply a recommendation of UNHCR to an applicant, the Minister would notify the applicant of that possibility before making a final decision, and give the applicant a further opportunity to be heard.

38 The evidence as to the dealings between the Minister, the applicants, and their solicitor, provides no foundation for such a contention.

39 Furthermore, the argument involves an erroneous characterisation of what UNHCR said. In the case of what UNHCR described as "individuals with protection needs", the recommendation was for careful assessment, on a case by case basis. According to the evidence, that is what occurred. As to categories of "vulnerable" people, the evidence is that they were individually assessed, and medical and trauma counselling reports were considered.

Conclusion and orders

40 The material before the Court does not show that there is a serious question to be tried in the principal proceedings.

41 In the case of each summons, the application is dismissed with costs.