HIGH COURT OF AUSTRALIA

BEECH-JONES J

PLAINTIFF S127/2025 PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS DEFENDANT

[2025] HCASJ 31
Date of Judgment: 3 September 2025
S127 of 2025

ORDER

1. The Court declines to hear the urgent application filed on 2 September 2025 pending the departure of the plane by which the plaintiff is being removed from Australia.

Representation

The plaintiff is represented by Heretic Law

In the absence of the defendant

1 BEECH-JONES J. At 9.51am on 2 September 2025, the plaintiff's legal representatives uploaded to this Court's electronic filing system an application for a constitutional or other writ, which named the Minister for Immigration and Multicultural Affairs as the defendant ("the Writ Application"). Also filed was an "Urgent Application" seeking to restrain the defendant and its officers from removing the plaintiff from Australia until the determination of the Writ Application, and an unsworn affidavit identifying the plaintiff's solicitor as the deponent. The sworn version was uploaded at 9.59am ("the Affidavit"). The Court was informed that at the time of the upload of the Urgent Application the defendant had not been notified that it would be made.

2 The proceedings could not be remitted to another court because the principal relief sought in the Writ Application was an order quashing a decision of the delegate of the defendant to refuse the plaintiff's application for a protection visa.[1]

3 The Affidavit specified that the plaintiff was to be removed from Australia at 10.30am on 2 September 2025. At around the time of uploading the documents noted above, the plaintiff's legal representatives informed a Deputy Registrar of this Court that the plaintiff was due to be removed on a flight departing at 10.30am.

4 The matter was approved for filing at 10.07am. At around 10.18am the Urgent Application was referred to me as the practice list judge. I read the materials. I then advised the Deputy Registrar to inform the plaintiff's legal representatives that, having read the materials, I was not prepared to entertain the Urgent Application while the plane was awaiting take off. My reasons for doing so are as follows.

5 The exhibits to the Affidavit indicate that the plaintiff is a citizen of another country who arrived in Australia lawfully in 1997 at the age of 15. He appears to have lived in Australia since then. According to the delegate, the plaintiff travelled to his country of origin on ten occasions between 2009 and 2019. The plaintiff has family ties to Australia, including a daughter. Between 2022 and 2024 he served a term of imprisonment following his conviction for offences of violence. His Resident Return subclass BB-155 visa was cancelled following those convictions.[2] At some point he was taken into immigration detention.

6 On 9 January 2025, the plaintiff made an application for a protection visa. That application was refused by a delegate of the defendant on 11 June 2025. On 4 July 2025, the plaintiff sought review of that decision by the Administrative Review Tribunal ("the ART"). On 10 July 2025, the ART wrote to the plaintiff and

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1 *Migration Act 1958* (Cth), s 476B(2).

2 *Migration Act*, s 501BA.

advised him that his application for review may not have been valid as it was not lodged within the relevant time limit and invited his comment. The ART wrote to him again on 26 August 2025 and sought his comment on a further issue that had arisen that was relevant to whether the application was made within time. The materials do not indicate what transpired in relation to the application for review by the ART after that point. Nonetheless, attached to the Affidavit was a letter dated 26 August 2025 advising the plaintiff of his intended removal from Australia on 2 September 2025.

7 In the Affidavit, the plaintiff's solicitor recounts the plaintiff's instructions that the plaintiff only realised on the evening of 1 September 2025 that he was to be removed from Australia the following day after being placed in a holding cell pending removal, and states that the plaintiff only then provided instructions to his solicitor. However, as stated, the evidence suggests that the removal date was notified to the plaintiff earlier and the potential for removal must have been apparent to the plaintiff and the lawyers who previously acted for him for some time. The materials indicate that the plaintiff had other lawyers acting for him at least up until 13 June 2025.

8 The basis for the principal relief sought by the plaintiff was an alleged jurisdictional error on the part of the delegate in refusing the application for a protection visa. In particular it was contended that the delegate fell into jurisdictional error in stating that so much of the plaintiff's application that concerned his mental health conditions, and the alleged "stigma" that people with those mental health conditions experience in his country of origin, did "not relate to any of the reasons in s 5J(1)(a)" of the *Migration Act* 1958 (Cth). Section 5J(1)(a) refers to a fear of persecution "for reasons of race, religion, nationality, membership of a particular social group or political opinion". The delegate nevertheless assessed whether the plaintiff's claims, including his claims with respect to his mental health conditions, meant that the plaintiff established so-called complementary protection;[3] that is, the delegate assessed whether the delegate was satisfied that there were "substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm".[4] The delegate was not so satisfied.

9 As noted, I declined to conduct a hearing while the plaintiff was on a plane with other passengers on the tarmac at the airport. I did so conscious that the effect of doing so was likely to render the proceedings futile. Even so such a hearing was likely to be prolonged with delay while the defendant was notified and lawyers were properly instructed. The application could not realistically have proceeded

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3 *Migration Act*, s 36A(1)(b).

4 *Migration Act*, s 36(2)(aa).

ex parte, especially as it was not known whether the plaintiff or other passengers could be lawfully and safely removed from the aircraft pending the outcome of the hearing. If apprised of the hearing, it is likely that the airport authorities may have felt some pressure to delay the plane's departure. To conduct a hearing in these circumstances posed a potential risk to the safety of the travelling public and to the proper conduct of airport operations, potentially affecting many persons and entities.

10 In circumstances where the materials indicated that the plaintiff had previously retained lawyers, had sufficient advance notice of his removal from Australia to approach this Court at an earlier time, had previously travelled to his country of origin on numerous occasions and the delegate had rejected the likelihood of him suffering significant harm on his return for any of the reasons he nominated, I declined to hear the Urgent Application while the departure of the plane was pending.