

Judgment

Williams J.

This is an application by Monsieur Lancial the Acting Consul General for the Government of France in Australia and the 8 Frenchmen mentioned in Par. 4 of ~~this~~ affidavit for a rule nisi for a writ of habeas corpus directed against the Honourable F.M. Forde Minister for the Army and Major Miles Camp Commandant Liverpool Internment Camp on the ground the 8 applicants are unlawfully detained in that camp. Assuming that M. Lancial's affidavit is sufficient evidence of the matters to which it refers, I am of opinion that it does not disclose any facts which give this Court original jurisdiction and as this Court can only issue a writ of habeas corpus where it has original or appellate jurisdiction the application must fail.

Mr. Starke first submitted ~~to~~ the Court had original jurisdiction because it was an action against the Commonwealth or ~~against suing~~ a person suing or being sued on behalf of the Commonwealth; this ground appears to me to be untenable. In so far as an application for a writ of habeas corpus is an action, it is an action between the persons unlawfully detained and the person who is detaining them. The only evidence of detention is that the applicants are being detained by Major Miles. There is not sufficient evidence implicating the Minister for the Army, but, even if there was, neither of them are being sued on behalf of the Commonwealth. The application is ^{made} against them personally. They are at most officers of the Commonwealth, in which case this Court would only have jurisdiction where a writ of mandamus or prohibition or injunction was being sought against them.

Mr. Starke next submitted that it was a matter arising under the Extradition Treaty between Great Britain and France ¹⁸⁷⁸ and therefore within the exclusive jurisdiction of this Court. Under this treaty each of the contracting parties has a right to extradite persons who have taken refuge in the country of the other, ~~and~~ are being proceeded against or have been convicted of certain crimes committed in its territory, and who shall be found

within the territory of the other party. Political offences are expressly excepted. The contention ^{is} that the 8 Frenchmen have at most committed a political crime ⁱⁿ Noumea and so cannot be extradited from the Commonwealth to French Equatorial Africa, the Free French who control both these territories being still bound by the rights and obligations under the Treaty. Assuming this contention is correct, the question whether they can be so extradited would not arise under the Treaty but under the British Extradition Act as amended 1870/(adopted by the Commonwealth Extradition Act 1903-1934) sec. 3 (1) of which provides that a fugitive criminal shall not be surrendered if the offence in respect ^{of} which his surrender is demanded is one of a political character. The legal position is that the 8 Frenchmen, having arrived in Australia, are entitled to their liberty, unless they can be legally detained under some Australian law. Where an application is made for Extradition the procedure is laid down by the Extradition Act, and as there is no evidence at present that any application is being made under this Act, I am not prepared to assume that it is proposed to deport the Frenchmen in breach of ~~other~~ ^{its} provisions. The probabilities are that they have been detained under the provisions of some Commonwealth Statute, possibly the National Security Act 1939-1940, and some Regulation made thereunder. But until the writ is issued by a competent Court and a return is made to it, it is only guess work to try and ascertain under what right Major Miles claims to detain the applicants. If on the return to the writ it appears that ~~the~~ ^{their} applicants rights depend upon a matter which arises under the treaty a further application can be made to this Court.

But for the reasons already mentioned I am of the opinion that the present evidence is not sufficient to show this Court has jurisdiction to issue the writ, ~~and the application must be refused.~~

*If I was
this action
in breach
of the
statute
would not
give the
court
jurisdiction*