

CHAN

v.

THE COMMONWEALTH OF AUSTRALIA

I propose to accede to this application for an interlocutory injunction and to enjoin the Defendants from continuing to detain the plaintiff in custody in Pentridge Gaol.

The use of injunctive relief for such a purpose is unusual, but this in itself provides no ground for withholding that relief if jurisdiction is made out and if I am satisfied that as a matter of discretion an injunction ought to go.

Section 31 of the Judiciary Act confers jurisdiction generally in this area - Beecham Group Ltd v. Bristol Laboratories Pty Ltd. (1968) 118 C.L.R. 618 at p. 622, and Order 49, rule 12 (1) of the Rules of this Court are applicable. It was not suggested in argument that because the present injunctive relief is directed to securing the plaintiff's release from custody this in itself was enough to deny him the remedy sought.

It was said on the Defendants' behalf that s.39 (8) of the Migration Act confers an exclusive power to order the release of the plaintiff. I regard that sub-section as

directed to a very different situation to the present; one in which there has been a curial decision that a deportation order is invalid. It does not, I think, give rise to any inference as to want of jurisdiction in the present case nor do I regard the general power conferred by the Judiciary Act to have been rendered inapplicable by any specific provision of the Migration Act.

The jurisdiction is discretionary, I intend to exercise my discretion in accordance with the judgment of this Court in the Beecham Group case. I have accordingly looked at two questions: the establishment of a prima facie case as that term is there explained and the balance of hardship or injury.

I do not propose to discuss the several grounds upon which the plaintiff, in his statement of claim, attacks the legality of his present imprisonment and proposed deportation; to do so would in this case be very much to "undertake a preliminary trial." I have heard argument concerning these grounds, not of course in the detail which will be required in due course but at sufficient length to enable me to appreciate the substance of each ground and of what is urged against it; I am indebted to Counsel in this respect for the clarity and conciseness of their submissions. I had previously heard something of the plaintiff's contentions upon the hearing of an earlier application made on his behalf.

It is, I think, enough that I say that I have concluded that there exists, on one or other of the several grounds urged by the plaintiff, a sufficient probability of success as that term is explained in the Beecham Group case at pp.622-623. In saying this I have had regard to "the nature of the rights which he asserts and the practical consequences likely to flow from the order he seeks." I should, in this connexion, describe in very brief outline the plaintiff's circumstances, so far as they presently appear.

Since March 1980, that is for some eight and one half months, he has been held in custody in Pentridge Gaol. Until his arrest as a prohibited immigrant he had lived, and apparently worked in steady employment without coming to police attention, in Melbourne for almost five years following his arrival in Australia from Timor. He fled Timor in face of the arrival there of Indonesian forces in August 1975, arriving in this country with a boat-load of other refugees. On his arrival he was permitted to enter Australia. To put it neutrally, he failed at the time to reveal to the Australian authorities that he had been convicted of manslaughter in Macao and that in consequence he had been serving a prison sentence in Timor when Indonesian forces landed there. It seems that he had been released from gaol by the Portugese authorities on

the arrival of the Indonesians, thus enabling him to join the group of refugees who sailed to Australia. In September 1976 it is said that, in common with other refugees from Timor, he was accorded some permanent right to remain in Australia. It is said that he applied for Australian citizenship in 1980 before his arrest. As to the immediate future, unless the order sought is made the plaintiff will certainly have to remain in gaol for many months, perhaps for considerably more than another year, before there can be a final resolution of the issues raised in the present litigation.

This very brief account of the circumstances brings to light the facts most relevant to the second inquiry which is called for, that relating to the nature of hardship or injury. On the one hand there is the prospect of continued imprisonment, in conditions apparently no different from those of a convicted criminal, for what may amount to a total of at least a year, perhaps as much as two years. Were the plaintiff, in the ultimate outcome, to succeed in establishing that he was at no time an immigrant to whom the Migration Act applies this lengthy imprisonment will have worked a grievous injustice. If he succeeds on other grounds he still will have suffered great hardship. The fact that he apparently becomes liable for each day of imprisonment to a charge of \$35 to the

Commonwealth is a further factor of little additional weight if its emotive qualities be ignored. It is said that if he be at large there is no suggestion that he will be of any danger to the public, his former employer is anxious to take him back and has offered to put up a substantial sum by way of improvised surety. The Timorese community in Victoria regards him as a member of that community, although he is not, of course, Timorese and is anxious to assist him in his rehabilitation should he be released from custody. To release him will, it is said, restore the status quo ante his arrest.

On the other hand Counsel for the Minister correctly points out that all that the Minister has done to date has, on the view of the law taken to date, been in accordance with the law and, needless to say, in entire good faith. He rightly points to the high responsibility imposed upon the Minister to act in the public interest, which should not lightly be interfered with, and to the clear policy of the Act, that those who are prohibited immigrants should not be at large in the community. To this may be added that although the plaintiff appears to have lived as an entirely law abiding citizen for almost five years in Australia, he did on any view commit a most serious crime of violence in Macao some eight years ago.

Unlike the ordinary situation of release on bail pending trial, what is to be feared is not that the plaintiff will abscond in the sense of departing for overseas. Were he to do so he would in a sense accomplish the very object of the proposed deportation. It is, rather, that he will merge into the Australian community and evade detection should he, in the outcome, be found to be a prohibited immigrant who ought to be deported.

It is after weighing as best I can these competing considerations that I have concluded that, in what I regard as a difficult case, I should grant the injunction sought. I have, in effect, found the discretionary balance to come down in favour of the Plaintiff. I have had particular regard to the fact that he will otherwise serve a lengthy term of imprisonment, such as might be served by one convicted of a serious crime committed in this country, when he has committed no crime in Australia, did not enter this country by stealth but as a recognized refugee and may conceivably not even have intentionally misled the immigration authorities. The need to ensure that, if he is ultimately to be deported, his whereabouts will be known can to a degree be assured by imposing conditions as the price of an injunction. The other consideration, that he may be a threat to the community at large, was not urged before me and is in part belied by his record in Australia and the support of his community.

However I will only grant an injunction upon the plaintiff giving suitable undertakings as to regular reporting. The terms of these should now be discussed. Whatever they may prove to be it should be made perfectly clear to the plaintiff that upon any breach of them the injunction may, upon ex parte application by the defendants, be dissolved.