HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN:

MINISTER FOR IMMIGRATION, AND MULTICULTURAL AFFAIRS
First Appellant

SECRETARY, DEPARTMENT OF HOME AFFAIRS
Second Appellant

THE RELEVANT OFFICERS ACTING UNDER SECTION 198 OF THE MIGRATION ACT 1958
Third Appellant

and

MZAPC
Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE APPELLANTS AND THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

PART I: CERTIFICATION

This outline of oral submissions is in a form suitable for publication on the internet.

PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Whether duty to remove before injunction ordered

1. Once a procedural decision to consider making a substantive decision is made, the duty to remove is suspended or postponed or deferred for the period during which consideration takes place whether to make the substantive decision: *Plaintiff M61* (2010) 243 CLR 319 at [23]-[25], [35]-[36], [64]-[65], [71]; *Plaintiff S4* (2014) 253 CLR 219 at [27]-[28], [35], [58], [71] (**SJBA Vol 2, Tabs 6 and 7**). Alternatively, removal is not "reasonably practicable" for that period.

2. The making of a procedural decision is critical. That decision engages a statutory process (*SZSSJ* (2016) 259 CLR 180 at [54] (**SJBA Vol 2, Tab 5**)) and gives content to the length of time for which the removal duty is postponed or suspended or deferred.

3. On the respondent's argument, it is unclear: (a) what it means to bring a request to the Minister's attention; (b) why removal is only precluded in cases where a person has requested an exercise of power in their favour; (c) why there would be an exception for repeat requests; (d) what is to occur after a request is brought to the Minister's attention; and (e) why there is a duty on the Secretary to bring a request to the Minister's attention (contra *Davis* (2021) 288 FCR 23 at [257], [261]-[262], [268] (**SJBA Vol 3, Tab 10**)).

4. Absent an instruction, an officer's not bringing a request to the Minister's attention does not involve the officer usurping the Minister's choice whether to consider the case: cf *Davis* (2023) 97 ALJR 214 at [14]-[15], [18], [19], [29], [38] (**JBA Vol 7, Tab 39**).

Power of the Federal Court to protect its processes as a matter of principle

5. The Federal Court has power to grant an interlocutory injunction to preserve the status quo with respect to the rights and obligations of the parties which are in issue in the substantive proceedings (**AS [11]**). The present case is not of that kind because there is no doubt about whether the restrained party has authority to do what they propose to do: compare *Tait* (1962) 108 CLR 620 at 622-624 (**JBA Vol 6, Tab 33**) (**AS [12]**).

6. The Federal Court has power to grant interlocutory relief to prevent the frustration of that Court's proceedings (**AS [14]**). It is on this basis that the Full Court majority explained the primary judge's order. There are four difficulties with that explanation.

7. *First*, the power is not unlimited: *Patrick Stevedores* (1998) 195 CLR 1 at [27]-[28], [35] (**JBA Vol 5, Tab 25**). P21/2024

8. *Secondly*, the Federal Court has no power to excuse compliance with a valid statute: *Reid v Howard* (1995) 184 CLR 1 at 16 (**JBA Vol 6, Tab 30**) (**AS [15]-[16]**).

9. *Thirdly*, the power recognised by the majority of the Full Court is uncertain in its scope and application. A test of whether the Court thinks the suspension of the statute has a "reasonable justification", or is "appropriate", is uncertain. Further, how the court is to weigh the importance of compliance with an undisputed statutory duty as against other factors in the assessment of the balance of convenience is opaque.

10. *Fourthly*, the injunction ordered by the primary judge must persist in the event that a declaration is ordered, as otherwise the injunction will have lacked all utility. If it is to persist, it is not clear for how long. More fundamentally, an injunction that persists has the result that the interlocutory injunction in substance acts as a preclusion on removing the respondent until his request for exercise of a non-compellable power has been validly acted upon by the executive.

Authorities

11. *Simsek* (1982) 148 CLR 636 (**JBA Vol 6 Tab 31**) is entirely consistent with the Commonwealth parties' position that, to grant an interlocutory injunction restraining removal, it is necessary to establish a prima facie case to an entitlement not to be removed (see 637, 639, 641) (**AS [17(c)]; [19]**). The premise for the injunction in this case is the opposite.

12. In *Fejzullahu* (2000) 74 ALJR 830 (**JBA Vol 7 Tab 49**), the question whether an interlocutory injunction restraining removal could be granted was not argued or decided (at [7]-[8]) (**AR [14]**). The question of power would not have arisen in any event, as Gleeson CJ held that there was no prima facie case established on any of the relief sought (at [30]-[41]).

13. The observations in *Moana* (2019) 265 FCR 337 at [37] (**JBA Vol 7 Tab 43**) were directed to ensuring that persons in the position of the applicant in that case have a reasonable opportunity to approach the courts for interlocutory injunctive relief to restrain their removal pending determination of the question of the lawfulness of the removal at the hearing (**AS [28]; AR [9]**). The same may be said of the statements quoted at [42] from the decision in *SZSPI* (2014) 233 FCR 279 (**JBA Vol 8, Tab 52**).

14. *Attorney-General v Ray* (1989) 90 ALR 263 (**JBA Vol 7 Tab 35**) is distinguishable on two bases. *First*, in that case, the duty to remove was in fact not engaged at all (at 277, 280). *Secondly*, the conclusion in *Ray* turned on the fact that to remove the deportee would be a contempt, which could of course be restrained by injunction. That can no longer be maintained in light of s 153 of the Act (**JBA Vol 1, Tab 4, p 23**) (**AR [12]**). P21/2024

15. The Federal Court has previously rejected the prospect of an interlocutory injunction where the duty to remove was not impugned: see *P1* [2003] FCA 1029 at [45]-[51] (**JBA Vol 7, Tab 47**) and *CPK20* [2020] FCA 825 at [80] (**JBA Vol 7, Tab 38**) (**AS [17(a)**], **[18]; AR [14]**).

16. The Federal Court's decision in *Mastipour* (2004) 140 FCR 137 (**JBA Vol 7, Tab 41**) provides no support for the grant of an interlocutory injunction to restrain performance of an undisputed duty. The reasoning of Mansfield J at [33] – that the duty to remove had not fallen due for performance because of the proceeding – was not the basis upon which the Full Court decided the case below (**AS [17(b)]; AR [6]**).

17. The Full Federal Court's observations in *WKMZ* (2021) 285 FCR 463 at [107] (**JBA Vol 8, Tab 54**) say nothing about the court compelling deferral of removal by interlocutory injunction to allow a challenge to executive conduct connected in some way with consideration of the exercise of non-compellable powers.

The constitutional challenge to s 198(6)

18. Section 198(6) of the *Migration Act* does not, in its terms, prevent the Federal Court from doing anything (**AS [22]**). The ambit of the Federal Court's power to restrain that duty depends on established principles concerning interlocutory relief and the issues in dispute in any given case (**AS [23]**).

19. The Constitution does not mandate that the effectiveness of any remedy given by the Federal Court will always be unaffected by the surrounding legal context.

20. The Federal Court must act not only in accordance with the law governing the power, but in accordance with the law generally. That has a constitutional dimension – to confer power to act otherwise than in accordance with law would be alien to an exercise of judicial power: *Polyukhovich* (1991) 172 CLR 501 at 607 (**JBA Vol 5, Tab 27**) (**AS [25]-[26]; AR [21]**).

Dated: 13 November 2024

Perry Herzfeld Jackson Wherrett