HIGH COURT OF AUSTRALIA

5 March 2025

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS & ORS v MZAPC
[2025] HCA 5

Today, the High Court dismissed an appeal from a judgment of the Full Court of the Federal Court of Australia. The issue was whether, in a proceeding for a declaration that a departmental officer had exceeded the executive power of the Commonwealth of Australia in declining to refer to the Minister for Immigration and Multicultural Affairs a request by an unlawful non-citizen who is in immigration detention for an exercise of the Minister's personal and non-compellable power under s 195A of the *Migration Act 1958* (Cth), the Federal Court can make an interlocutory order restraining officers from removing the unlawful non-citizen, notwithstanding the duty imposed on officers by s 198(6) to remove the unlawful non-citizen as soon as reasonably practicable, where the proceeding does not challenge the valid application of s 198(6) to the unlawful non-citizen.

In August 2023, the respondent, an unlawful non-citizen, sought an interlocutory injunction restraining the Minister, the Secretary of the Department of Home Affairs, and the relevant officers acting under s 198(6) (together, the appellants) from removing him from Australia pending the final determination of the proceeding he filed in the Federal Court seeking declaratory and related relief.

The primary judge granted the interlocutory injunction. Having found that there was a serious question to be tried existed, in assessing the balance of convenience his Honour found that the duty to remove the respondent under s 198(6) would frustrate the Court's processes. The Full Court, by majority, dismissed the appeal. The majority on that appeal found that an injunction may be granted by the Court to restrain the performance of a clear statutory duty (such as the duty to remove under s 198(6)), but it will only do so to preserve the subject matter of the proceedings and the integrity of its own procedures. On that basis they concluded that the primary judge had not erred in granting the interlocutory injunction.

The High Court, by majority, dismissed the appeal. In the exercise of its power to protect the integrity of its own processes, including by preserving any subject matter pending a decision and by ensuring the effective exercise of the jurisdiction invoked, the Federal Court has power to make an interlocutory order which restrains officers from removing an unlawful non-citizen, whether the proceeding challenges the valid application of s 198(6) to the unlawful non-citizen or not. It is not the case that the power of a court to make an interlocutory order, including to grant an interlocutory injunction, is confined to an order (albeit on an interim basis) to the same effect as the final order sought. The power and the duty of an officer to remove an unlawful non-citizen from Australia as soon as reasonably practicable in s 198(6) is to be construed as accommodating the power of the Federal Court to grant an interlocutory injunction restraining officers from removing an unlawful non-citizen. To comply with the injunction is not to breach the statutory duty.

This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.

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