Invalidating the Malaysian Solution

Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship (2011) 122 ALD 237

This high-profile decision of the High Court deserves attention not only for its significance within the current political climate but also for the administrative law and statutory construction principles addressed within it.

The facts giving rise to the litigation are well-known and may be briefly stated. On 25 July 2011, Australia and Malaysia entered into an agreement under which asylum seekers arriving illegally into Australia by sea would be transferred to Malaysia, where assessment of their claims for protection as refugees would be carried out. The purported source of power for the plaintiffs' removal from Australia to Malaysia in this case was s 198A of the Migration Act. Section 198A(1) provided that an officer may take an offshore entry person (as defined) from Australia to a country in respect of which a declaration is in force under subsection (3). Subsection (3)(a) relevantly provides as follows:

> (3) The Minister may:
>
> (a) declare in writing that a specified country:
>
> (i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and
>
> (ii) provides protection for persons seeking asylum, pending determination of their refugee status; and
>
> (iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and
>
> (iv) meets relevant human rights standards in providing that protection;…

On 25 July 2011, the minister for immigration and citizenship declared Malaysia to be a country under s 198A(3)(a).

The plaintiffs' case

In the proceedings, the plaintiffs claimed that s 198A(1) was the sole source of power under which the Commonwealth of Australia could remove them from Australia to Malaysia, and that that power depended upon the minister making a valid declaration under s 198A(3). They claimed that the declaration purportedly made under s 198A(3) was not validly made because the four criteria set out in s 198A(3)(a)(iv) to (iv) are jurisdictional facts which did not exist, or alternatively, that they are facts the existence of which the minister had to be satisfied before making a declaration, and that he was not so satisfied because he misconstrued the criteria. They also claimed that the exercise of the discretionary power conferred by s 198A(1) miscarried in relation to the plaintiff M70 and would miscarry in relation to the plaintiff M106 because his discretion was, or would be, unlawfully fettered by a ministerial direction dated 25 July 2011 to all officers exercising that power, and the decision-maker failed or would have failed to consider the individual circumstances of M70 in relation to his liability for prosecution in Malaysia for an offence against Malaysian immigration law.

Finally, M106 (a minor) submitted that the minister's statutory responsibilities as his guardian under s 6 of the *Immigration (Guardianship of Children) Act 1946* (IGOC Act) required that the minister consider the exercise of his powers under ss 46A and 195A of the Migration Act to allow M106 to apply for a visa, and also submitted that the minister's consent in writing was required pursuant to s 6A of the IGOC Act before M106 could be removed from Australia.

Four separate judgments were delivered, Heydon J being the sole dissenter. The majority granted the relief sought by the plaintiffs.

French CJ

After examining the legislative history of s 198 and s 198A of the Migration Act, French CJ addressed the contention of the defendants that, contrary to the plaintiffs' submission, s 198(2) was an additional source of the Commonwealth's power to remove the plaintiffs to Malaysia. That subsection provides that an officer must remove as soon as reasonably practicable an unlawful non-citizen (as defined) who meets the conditions set out at paragraphs (a) to (c) therein. The defendants argued that s 198A could limit the power conferred by s 198(2) only if both provisions were properly characterised as conferring the same power, on the basis that when a specific power in a statute is granted prescribing the mode of exercise and the limits within which it must be observed, it excludes the operation of general provisions which might otherwise be relied upon.[1] French CJ found the principle underpinning that submission must be applied subject to the particular text, context and purpose of the statute

to be construed.[2] His Honour accepted the plaintiffs' submissions that the mechanism of which s 198A formed part was a specific one pertaining to offshore entry persons whose claims are not to be considered in Australia, differing from the mechanism under s 198.[3]

His Honour rejected the plaintiffs' submission that the criteria set out in s 198A(3)(a) were jurisdictional facts. His Honour found that the absence of clear language in the statute meant that the section should not be construed as conferring upon courts the power to substitute their own judgment for that of the minister.[4] His Honour did find, however, that the minister did not properly construe the criteria under s 198A(3)(a) in failing to focus upon the laws in effect in Malaysia, as opposed to what the minister described as the 'practical reality'.[5] His Honour found that the minister was required to ask himself questions about whether access and protection are provided, and human rights standards are met, by reference to the domestic laws of Malaysia and its international legal obligations, finding that the terms used in the statute were indicative of 'enduring legal frameworks'.[6] His Honour did not address the other contentions of the plaintiffs, but agreed with the reasons in the joint judgment in respect of M106's argument concerning the IGOC Act, and the orders proposed by the joint judgment.

The joint judgment

In a joint judgment, Gummow, Hayne, Crennan and Bell JJ first addressed the plaintiffs' contention that s 198A was the sole source of the minister's power to remove them. Their honours emphasised the importance of context in considering the duty and power to remove persons from Australia under s 198 read in light of s 198A. Two considerations in particular were held to be relevant: the fact that the Migration Act contains provisions directed to the purpose of responding to Australia's international obligations under the Refugees Convention and Refugees Protocol,[7] and relevant principles of international law concerning the movement of persons from state to state.[8] Bearing in mind these two considerations, their honours found that the proper construction of the two provisions was that the power conferred by s 198 must be confined by reference to the restrictions set out in s 198A, reinforced by the legislative history of both provisions.[9]

In addressing the plaintiffs' submission that the

Photo: Department of Immigration and Citizenship.

declaration was invalidly made, their honours found it necessary to consider only whether the access and protections set out in s 198A(3)(a)(i) to (iii) are those which the country is legally bound to, but does not, provide.

Their honours found that the criteria in s 198A(3)(a)(i) to (iv) are jurisdictional facts, and to read otherwise would pay insufficient regard to the text, context and evident purpose of the provision, which pointed to the need to identify the relevant criteria with particularity.[10]

Their honours rejected the defendants' argument that the matters described in those subparagraphs go to the practical reality of the protection afforded by a country.[11] On the contrary, their honours found that a country 'provides access' to effective procedures for assessing the need for protection of asylum seekers, and provides the relevant protections if its domestic law provides such procedures or if has binding international law obligations to that effect.[12] The majority rejected the defendants' submission that the fact that s 198A was enacted with a view to declaring that Nauru is a country specified for the purposes of s 198A and that it was known before that enactment that Nauru was not a signatory to the Refugees Convention or Protocol, meant that the provision did not require countries so declared to be signatories. Their honours noted that such a submission merely put forward the hopes or intentions of those promoting the legislation, but found that 'those hopes or intentions do not

bear upon the curial determination of the question of construction of the legislative text'.[13] Secondly, their honours found that the arrangements made with Nauru were distinguishable from the present fact scenario, particularly because in the case of the Nauru proposal, Australia was to carry out the assessment and provide the access and protections in question (rather than Nauru).[14]

Their honours therefore found that the jurisdictional facts necessary to making a valid declaration under s 198A(3)(a) were not, and could not, be established, and therefore the minister's decision was made beyond power. Their honours also found that removal of M106 without consent by the minister under s 6A of the IGOC Act would be unlawful, and the power to take a person to another country under s 198A(1) could be exercised only if that taking was not otherwise unlawful.

Heydon J

Heydon J, in dissent, found that a removal under s 198A(1) did not depend upon a valid declaration under s 198A(3), for several reasons.

First, there is no express provision in s 198A(3)(a) that the validity of the declaration depends upon proof of the four conditions as a matter of fact, and the language of the power ('may declare') points to a view that the process of assessment is for the minister personally, provided he takes into account the four conditions.[15]

Secondly, the statutory language does not refer to legal obligations, but rather connotes notions of practicality.[16] His Honour stated that what matters is 'the achievement of results in fact, not the identification of formal structures conforming to the ideal standards of an Abbé Sieyès which may or may not achieve them'.[17] Thirdly, his Honour noted that a decision under s 198A(3)(a) pertains to matters within the province of the executive, and it is not for courts to intrude into those dealings, unless it could be shown that the minister had not decided that what he declared was true, after asking the correct questions. Only then could he be accountable to courts of law.[18] Fourthly, the subject matter of the four conditions suggested that the subject matter of the declaration was for ministerial judgment.[19] Fifthly, the continuing law surrounding the legislation was relevant, and suggested that the meaning of s 198A(3) turned upon a test of 'practical reality and fact'.[20]

Heydon J unreservedly rejected the plaintiffs' argument that the word 'protection' in s 198A(3) included Article 33 protection against removal of claimants for refugee status to a country where a person fears persecution on a Refugees Convention ground, describing their contention that 'protection' was a legal term of art, as 'so ambitious a submission as to cast doubt not only on its own validity, but also on the validity of other arguments advanced to support the construction of s 198A which the plaintiffs advocated.'[21] His Honour also found that the true interpretation of s 198A(3) depends upon the meaning of the words as they were used at the time of its enactment, and that language had at that time applied to the Republic of Nauru, despite the fact that it was not party to the relevant treaties and its domestic law did not contain any protections for asylum seekers. His Honour noted that the Statement of Principles agreed between Australia and Nauru did not refer to international law obligations, nor did it say that Australia would meet the s 198A(3) criteria rather than Nauru.[22]

His Honour also rejected the plaintiffs' submissions that the minister asked the wrong questions,[23] that s 198A(1) was incorrectly applied,[24] and that the minister fettered the discretion of officers under s 198A(1).[25]

Finally, his Honour rejected the IGOC Act arguments of the second plaintiff (although not before noting that they were very detailed and sophisticated arguments[26]), finding that the minister is not obliged to consider exercise of the powers under ss 46A and 195A of the Migration Act, that the powers conferred by s 6 of the IGOC Act do not extend to interference with the minister in carrying out his specific statutory functions under the Act,[27] and that s 6A does not apply to the operation of any other law regulating the departure of persons from Australia, including s 198A.[28]

Kiefel J

In considering the purpose and context of s 198A(3)(a), Kiefel J found that a central question was whether, and to what extent, that provision 'reflects a continuing commitment to Australia's obligations under the convention'.[29] Although her Honour noted that obligations arising under the convention do not automatically have the status of a domestic law, her Honour found that provisions of the Migration Act reflect an acceptance of those obligations.[30]

Her Honour found that s 198(2) expressed a general power of removal, and s 198A(1) expressed a particular power, directed to a particular set of circumstances, where the country to which an asylum-seeker is to be sent is taken to be assessed as to whether it meets the criteria in subsection (3). Accordingly, s 198(2) could not be relied upon, unless each plaintiff's status as a refugee is considered and rejected.[31]

In the view of Kiefel J, s 198A(3)(a)(i) required that the declared country itself recognise refugee status and provide protection against persecution, and the legislature intended that the minister have this level of assurance before making such a declaration, by reason of Australia's obligations under the convention.[32] Her Honour found that a practical assessment of a country's ability to protect and provide for refugees cannot replace the requirement that the country has obliged itself to make such recognition and protection through its laws.[33] Her Honour preferred this construction as it most closely accorded with the fulfilment of Australia's convention obligations.[34]

Her Honour found that the facts necessary for the making of a declaration under s 198A(3)(a) did not exist, and thus there was no power to make the declaration. Her Honour also found that the minister did not address the correct questions, and the decision was therefore attended by jurisdictional error.[35] Her Honour agreed with the joint reasons in respect of the IGOC Act argument.[36]

By Victoria Brigden

Endnotes

1. The defendants' submissions referred to *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7 and *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 589.
2. At [50].
3. At [52] – [56].
4. At [58].
5. At [65].
6. At [65] – [66].
7. Their honours referred to *Plaintiff M61/2010E v The Commonwealth* (2010) 85 ALJR 133 at 139 – 140.
8. At [91].
9. At [95] – [96].
10. At [109].
11. At [121] – [123].
12. At [125] – [126].
13. At [128].
14. At [128].
15. At [161].
16. At [162].
17. At [162].
18. At [163].
19. At [163].
20. At [165].
21. At [166] – [167].
22. At [169].
23. At [171] – [175].
24. At [176] and following.
25. See [188] – [190].
26. At [192].
27. At [195].
28. At [198].
29. At [211].
30. At [218].
31. At [237] – [239].
32. At [243].
33. At [245].
34. At [246].
35. At [256].
36. At [257].