



HIGH COURT OF AUSTRALIA

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**IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY**

NO M 28 OF 2020

BETWEEN: MINISTER FOR HOME AFFAIRS

First Appellant

COMMONWEALTH OF AUSTRALIA

Second Appellant

MARIE THERESA ARTHUR AS

AND: LITIGATION REPRESENTATIVE FOR

BXD18

Respondent

SUBMISSIONS OF THE APPELLANTS

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PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II ISSUES PRESENTED BY THE APPEAL

2. The issues that arise in this appeal correspond to those that arise in *Minister for Home Affairs v FRM17* (No M29 of 2020) (*FRM17*). In order to avoid repetition, to the extent possible these submissions adopt the appellants' submissions in that matter, and the same abbreviations are used. Accordingly, these submissions are confined to the application of the arguments developed in that appeal to the circumstances of this proceeding.

10 PART III SECTION 78B NOTICE

3. No notice need be given under s 78B of the *Judiciary Act 1903* (Cth).

PART IV REPORT OF DECISION BELOW

4. The judgment of the Full Court of the Federal Court has not been reported. Its medium neutral citation is *FRM17 v Minister for Home Affairs* [2019] FCAFC 148.

PART V FACTS

A. The case as "instituted"

- 20 5. On 13 April 2018, the respondent commenced proceedings against the appellants in the Federal Court by way of an originating application, statement of claim and an interlocutory application [Joint Appellants' Book of Further Materials (**ABFM**) 72-90].
6. The originating application relevantly sought injunctive and declaratory relief requiring the appellants to take all steps within their power to ensure that the respondent receive a particular standard of medical care or otherwise cease to stop breaching a duty of care by that omission. The interlocutory application relevantly sought an order in similar terms, namely that the respondent, her father and her brother be "immediately transfer[red] ... to a location where the [respondent] can receive the Specified Treatment", being "immediate comprehensive psychiatric assessment by a qualified specialist in child psychiatry", "treatment in an inpatient child mental health facility with appropriate supervision" and "an evaluation to clarify the [respondent's] diagnosis and specifically to assess any psychotic symptoms" together with "any associated or additional treatment which may be identified as necessary or desirable as a result of the carrying out of the

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foregoing treatment”.

7. In the accompanying statement of claim [ABFM 82-90], the respondent pleaded that she had been taken to Nauru pursuant to an exercise of power under s 198AD(2) of the Act and that the Minister and/or the Commonwealth had “continued to take actions, or cause actions to be taken in relation to the [respondent] under s 98AHA(2)(a) [*sic*] and (c) of the Act”.¹ By paragraph 9, she pleaded that the Commonwealth, “in the exercise of its powers under s 198AHA of the Act and/or s 61 of the Constitution”, had taken various actions in respect of regional processing in Nauru. Those included engaging contractors; building and operating regional processing centres; maintaining involvement in the “day to day healthcare, education, housing and welfare of the [respondent]”; arranging for the care and welfare of the respondent; paying for the respondent’s detention, care and maintenance; paying for the respondent’s accommodation and education; paying International Health and Medical Services to provide medical services; and assuming “responsibility for the applicant’s health and welfare since her arrival in Nauru”.

8. By paragraph 18, the respondent claimed that the Commonwealth, “in the exercise of its powers under s 198AHA and/or section 61 of the Constitution, has had, and continues to have, control over the manner, environment and place in which the [respondent] receives treatment for her mental health”. By paragraph 19, the respondent claimed that by reason of the matters pleaded, the Commonwealth had “assumed responsibility for the [respondent’s] health (including mental health) and welfare”. It also followed, by paragraph 20, that the Commonwealth owed her a duty of care to “exercise its statutory and non-statutory executive power” to take all reasonable steps to avoid harm to the respondent.

B. The case the respondent sought to “continue” at the time of the Full Court hearing

9. By amended statement of claim dated 27 August 2018 [ABFM 91-105], the respondent claimed damages and an injunction that the appellants resettle her and each member of her family in a country that was a signatory to the Refugee Convention, and in the meantime “requiring the [appellants] not to take any steps to remove the [respondent] and her family from Australia”. In the alternative, the respondent sought an injunction preventing the appellants from taking any steps to remove her to a regional processing country where she would be at risk of harm, or not to take any steps to remove the

¹ Statement of claim at [7]-[8] [ABFM 84-5].

respondent from Australia (other than to a country that was a signatory to the Refugees Convention) “until she has reached maximum medical improvement and provided that her psychiatric condition would not be at risk to again deteriorate”.

10. The respondent pleaded various actions taken by the Commonwealth in respect of her in Nauru,² concluding that the Commonwealth had assumed responsibility for her and each member of her family’s health and welfare since their arrival on Nauru.³ She also pleaded that the Commonwealth had agreed to contract with service providers to ensure access to health services for persons on Nauru, and to arrange for the transfer of persons to Australia to receive medical treatment.⁴ The respondent pleaded that she was dependant on the Commonwealth at all times for the provision of medical treatment, psychological treatment, and support, welfare and educational services.⁵ A duty of care was alleged to arise from these facts.
11. The respondent alleged that the appellants breached this duty of care by a failure to act with reasonable care, including by not removing her from Nauru, or continuing to keep the respondent and her family on Nauru while there were non-negligible risks of physical, emotional and child abuse and of psychiatric injury.⁶ The appellants were also said to have failed to ensure that service providers provided adequate care and supervision of the respondent.⁷
12. The respondent also filed an amended originating application, seeking relief reflecting the final relief in the amended statement of claim described at paragraph 9 above [**ABFM 106-111**].
13. By their defence, the appellants pleaded that the actions they took on Nauru, on which the respondent relied, were done pursuant to s 198AHA of the Act.⁸ The appellants also pleaded that agreements and actions taken by them were authorised by s 198AHA.⁹ They

² Amended statement of claim at [9] [**ABFM 95**].

³ Amended statement of claim at [9(1)] [**ABFM 96**].

⁴ Amended statement of claim at [10(a)-(b)] [**ABFM 96**].

⁵ Amended statement of claim at [12] [**ABFM 100-101**].

⁶ Amended statement of claim at [16]-[17] [**ABFM 102**].

⁷ Amended statement of claim at [19]-[21] [**ABFM 102-103**].

⁸ Defence at [9] [**ABFM 117-121**].

⁹ Defence at [9A] [**ABFM 121**].

denied the existence of a duty of care,¹⁰ denied breach,¹¹ and denied causation.¹² In particular, the appellants alleged that the imposition of a duty of care was inconsistent with ss 198AD, 198AE and 198B of the Act, and “the scheme of Subdivision B of Division 9 of Part 2 as a whole”.¹³ The appellants also alleged that the Federal Court did not have jurisdiction, by reason of s 494AB(1)(a), (ca) and (d).¹⁴

14. By her amended reply [**ABFM 128**], the respondent alleged that s 198AHA did not support the Commonwealth’s actions in Nauru, in respect of her and any detainee on Nauru who had been declared a refugee.¹⁵ The appellants joined issue on the point by way of rejoinder [**ABFM 131**].

C. The Full Court’s decision

15. The appellants set out a summary of the Full Court’s decision as relevant to these proceedings in paragraphs [18]-[20] of its submissions in *FRM17*. The appellants refer to and rely on that summary for the purposes of these submissions. It suffices for present purposes to summarise how the Full Court dealt with the present proceeding specifically.

16. *As to s 494AB(1)(ca)*, the Full Court held that s 494AB(1)(ca) did not apply to this proceeding either at its initiation or as continued in the Federal Court. The Full Court held that the respondent’s pleading did not refer to s 198AHA, and in any event s 198AHA did not engage s 494AB(1)(ca) given that s 198AHA conferred a mere capacity to take certain actions [**CAB 81-82 [231]**]. Moreover, a cause of action in negligence did not engage s 494AB(1)(ca) [**CAB 82 [232]-[233]**], and the relief she sought did not attract the bar [**CAB 82-83 [237]-[239]**].

17. *As to s 494AB(1)(a)*, the Full Court held that it did not apply “because [the respondent] did not in terms invoke [s 198B] or seek that it be exercised and did not obtain an order requiring the Commonwealth parties to exercise that power” [**CAB 94 [279]**].¹⁶ Moreover, the respondent “did not challenge any exercise of the power in s 198B or plead a case in negligence arising from a statutory duty conditioning the exercise of that power”

¹⁰ Defence at [13]-[14] [**ABFM 122**].

¹¹ Defence at [21] [**ABFM 123**].

¹² Defence at [22]-[26] [**ABFM 124**].

¹³ Defence at [14A] [**ABFM 122-123**].

¹⁴ Amended defence at [31]-[38] [**ABFM 125-126**].

¹⁵ Amended reply at [1] [**ABFM 129**].

¹⁶ See also [271], [278]-[279], [288]-[290].

[CAB 94 [279]].

18. *As to s 494AB(1)(d)*, the Full Court held that it did not apply at commencement because the proceeding “said nothing about the removal of [the respondent] from Australia” at that time [CAB 94 [281]]. However, the Full Court held that “the terms in which the matter is pleaded in [the respondent’s] amended statement of claim and amended originating application ... mean that these proceedings are proceedings relating to the removal of [the respondent] from Australia under the *Migration Act*” [CAB 94 [281]]. Section 494AB(1)(d) therefore applied to the proceeding’s continuation in the Federal Court.

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PART VI ARGUMENT

A. Application of s 494AB(1)(ca) – Ground 1

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19. In paragraphs [21] to [45] of the appellants’ submissions in *FRM17*, the appellants have identified errors in the Full Court’s construction of and approach to s 494AB(1)(ca), and the approach they submit should be taken to s 494AB as a whole. The appellants repeat and rely on those paragraphs, which are applicable to each proceeding.
20. It remains to address how those errors of construction then translated into the Full Court erroneously concluding that s 494AB(1)(ca) did not apply to this proceeding.
21. *First*, it was central to the Court’s conclusions in this matter that the respondent’s amended statement of claim made “no express or implicit reference to any of the statutory provisions in Subdiv B” [CAB 82 [231]]. However, her original statement of claim (that is, the claim at institution of the proceeding) did make such references. The Full Court did not address this pleading. The original statement of the claim was of course important given that s 494AB applies to the institution as well as the continuation of proceedings.
22. That the amended statement of claim inexplicably shed the original references to the Act does not change the position: a substance over form approach must be taken. Whether or not the respondent pleaded the actions that she relied upon as having been undertaken pursuant to ss 198AD and 198AHA, they were so undertaken. The amendments to the claim to remove these express statutory references did not alter its substance. Moreover,
- 30 the respondents’ defence pleaded, in a non-colourable way, the relevant provisions.
23. The Full Court erred in failing to find that the claim when instituted — and thereafter — related to s 198AHA and therefore came within s 494AB(1)(ca).

24. **Secondly**, consistently with its reasoning that a conferral of capacity or authority under s 198AHA did not intersect with s 494AB(1)(ca), the Full Court went on to hold that even if s 198AHA was relevant to the respondent's cause of action, then "this is insufficient to attract the [s 494AB(1)(ca)] bar when regard is had to the proper construction of that provision" [CAB 81-82 [231]]. For the reasons given in respect of the construction of s 494AB(1)(ca) in *FRM17*, that conclusion was wrong.
25. As the Full Court noted, the appellants expressly drew attention to s 198AHA as the statutory authority under which the Commonwealth took many of the impugned actions pleaded by the respondent [CAB 28 [57], 82 [231]]. That continued to be the case regardless of the amendments the respondent made to her statement of claim. Her case depended upon her removal to Nauru under s 198AD, and alleged actions taken by the Commonwealth thereafter for which s 198AHA provided essential support. These alleged actions were engaged in within the context of the regional processing regime in Subdivision B as a whole. Any duty of care to be imposed in offshore detention centres also had to be consistent with that regime. These points were critical to the determination of the respondent's claim. That was ample to support the conclusion that the proceeding "related to" Subdivision B so as to attract the bar in s 494AB(1)(ca).
26. **Thirdly**, the Full Court concluded that s 494AB(1)(ca) did not apply to the respondents' claim in negligence, because there was no inconsistency or incompatibility between the pleaded duty of care and the statutory regime in Subdivision B of Division 8 of Part 2 [CAB 82 [232]]. That conclusion was reached contrary to the Commonwealth's position but without full argument on the point, which was an erroneous approach for the reasons given in the appellant's submissions in *FRM17* at paragraph [48].
27. Further, the Full Court's failure to approach the characterisation of this proceeding by reference to what was claimed is especially evident in its treatment of an issue joined by the parties by way of amended reply and rejoinder as to the applicability of s 198AHA to the respondent after she was found by Nauru to be a refugee. The Full Court did not consider it necessary to determine that issue having regard to its interpretation of s 198AHA [CAB 74 [202]]. Yet the reply and rejoinder of the parties clearly joined issue on the construction of s 198AHA. Regardless of the interpretation of the statute preferred by the Full Court, the pleadings squarely raised an issue about the scope of s 198AHA and whether it could authorise actions taken in respect of persons removed to Nauru and

later found to be refugees. For that reason alone, the proceeding “relates to” s 198AHA so as to attract s 494AB(1)(ca).

28. **Fourthly**, in so far as the Full Court concluded that s 494AB(1)(ca) did not apply to this proceeding simply because it involved a claim in negligence, it erred for the reasons set out in the appellants’ submissions in *FRM17*.

D. Application of s 494AB(1)(a) – Ground 2

29. The appellants have set out at paragraphs [53]-[56] of their submissions in *FRM17* their submissions in respect of the proper construction and application of s 198B and s 494AB(1)(a). The appellants repeat and rely on those paragraphs.

- 10 30. At the time this proceeding was commenced, in substance the respondent was seeking orders that she be brought to Australia for medical treatment. The urgent medical care that she sought could only as a matter of substance be obtained in Australia in the timeframe sought. Unsurprisingly, it was to Australia that the appellants agreed to transfer her without the need for an interlocutory order to be made. Further, at the time of the Full Court’s decision, the amended statement of claim alleged that the appellants had a duty to remove the respondent from Nauru,¹⁷ and was in breach by failing to remove her from Nauru.¹⁸

- 20 31. As in *FRM17*, in this case the Full Court erred by giving determinative significance to the fact that the respondent “did not in terms invoke [s 198B] or seek that it be exercised and did not obtain an order requiring the Commonwealth to exercise that power” [CAB 94 [279]]. For the reasons advanced in *FRM17*, that approach was in error. The substance of the respondent’s claim was such as to require an exercise of power under s 198B to bring her to Australia. That was sufficient for this proceeding to “relate to” s 198B and therefore to engage s 494AB(1)(a).

E. Application of s 494AB(1)(d) – Ground 3

32. The Full Court held, in this case, that the proceedings did come within s 494AB(1)(d) at the time of the Full Court’s decision, but not at the time the proceeding was instituted

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¹⁷ Amended statement of claim at [14(c)] [ABFM 101].

¹⁸ Amended statement of claim at [16]-[18] [ABFM 102].

because the materials “said nothing about the removal of BXD18 from Australia” [CAB 94 [281]]. This again elevated form over substance.

33. While an injunction preventing removal was not sought in terms, as a matter of substance it is no different to a case where an express injunction was sought to prevent removal.¹⁹ That follows because, at the institution of this case, the relief sought would have required the respondent to be kept in Australia and not returned to a regional processing country under s 198AD.²⁰ For the reasons advanced in *FRM17* at paragraphs [57]-[58], that was sufficient to engage s 494AB(1)(d).

PART VII ORDERS SOUGHT

- 10 34. The appellants seek the orders in the notice of appeal.

PART VII ESTIMATE OF HOURS

35. The appellants estimate that up to 2.5 hours may be required to present oral argument (including reply) in this matter and the other three matters.

Dated: 8 May 2020



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¹⁹ See *Applicants WAIV v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1186 at [31] (French J).

²⁰ Statement of claim at [15.2(b)] [ABFM 88].

**IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY**

**ON APPEAL FROM
THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA**

BETWEEN: **MINISTER FOR HOME AFFAIRS**
First Appellant

COMMONWEALTH OF AUSTRALIA
Second Appellant

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**AND: MARIE THERESA ARTHUR AS
LITIGATION REPRESENTATIVE FOR
BXD18**
Respondent

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**ANNEXURE
A LIST OF STATUTES AND PROVISIONS REFERRED TO IN THE
APPELLANTS' SUBMISSIONS**

Constitution ss 61, 75 (as currently in force).

Acts Interpretation Act 1901 (Cth) s 11B (as currently in force).

Migration Act 1958 (Cth) ss 33, 42, 189, Part 2 Div 8 Subdiv B (ss 198AA-198AJ), 198B,
494AA, 494AB (Compilation No 137).

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Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001
(Cth) (as enacted).

Migration Amendment (Regional Processing Arrangements) Act 2015 (Cth) (as enacted).

Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012
(Cth) (as enacted).

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Migration Legislation Amendment (Transitional Movement) Act 2002 (Cth) Sched 1 item 6
(as enacted).

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