



HIGH COURT OF AUSTRALIA

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

NO M 30 OF 2020

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

COMMONWEALTH OF AUSTRALIA
Second Appellant

AND: **DJA18 AS LITIGATION**
REPRESENTATIVE FOR DIZ18
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 ISSUE PRESENTED BY THE APPEAL

2. The issue that arises in this appeal is one of the issues 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 3. The sole issue in this appeal is whether s 494AB(1)(ca) applied to this proceeding at the time it was instituted and/or at the time of the Full Court's decision. No issue arises as to s 494AB(1)(a) and (d), both of which were held to apply [**CAB 97-98 [289]-[292]**].

PART III SECTION 78B NOTICE

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

PART IV REPORT OF DECISION BELOW

5. 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.

20 PART V FACTS

A. The case as "instituted"

6. The respondent was born in Nauru. Several years after her birth, she was transferred to a health clinic in Nauru, and then to the Republic of Nauru Hospital, with a fever that was not responding to treatment, before being transferred to a hospital in Papua New Guinea for further treatment, where she remained for several weeks. This proceeding was commenced when the appellants determined that she would be taken back to Nauru from Papua New Guinea [**CAB 29-30 [69]-[74]**].
- 30 7. On 29 June 2018, the respondent commenced proceedings against the appellants by filing in the Federal Court an originating application, statement of claim and an interlocutory

application [Joint Appellants' Book of Further Materials (**ABFM**) 136-152].

8. The originating application sought an injunction requiring the respondent to be transferred “to a location in Australia” where she could receive particular medical care, as well as alternative injunctive relief and a declaration. The interlocutory application sought an interlocutory order to similar effect as the primary injunction sought in the originating application, namely an order that she and her mother be brought to “a location in Australia” where she could receive particular medical care, and an order that her father also be brought to the same location.
9. In the accompanying statement of claim, the respondent alleged that the appellants had carried out a range of actions in Papua New Guinea, including involvement in the day-to-day activities of regional processing, engagement of contractors to provide services in Papua New Guinea, maintained involvement in the day-to-day healthcare, education, housing and welfare of the respondent, had funded International Health and Medical Services to provide medical services, and assumed “responsibility for the applicant’s health and welfare since her arrival in Papua New Guinea”.¹ The respondent pleaded that the Commonwealth at all times had “control over the manner, enforcement and place in which the [respondent] receives treatment”.² As a result, the respondent alleged that the appellants had assumed responsibility for her health and welfare.³
10. The statement of claim alleged that the appellants owed, and continue to owe, the respondent “a duty of care to exercise its statutory powers (as vested in the Minister) and non-statutory executive power” to take reasonable steps to procure reasonable and adequate health care for the respondent, and to avoid or minimise the risk of the respondent suffering certain pleaded harm.⁴ She alleged that “[a]n adequate and reasonable standard of care for the [respondent] is not available in Nauru”.⁵ The respondent sought injunctions to ensure the appellants provided reasonable care to the

¹ Statement of claim at [9] [**ABFM 147**].

² Statement of claim at [21] [**ABFM 149**].

³ Statement of claim at [22] [**ABFM 150**].

⁴ Statement of claim at [23] [**ABFM 150**].

⁵ Statement of claim at [19] [**ABFM 149**].

respondent, and alleged that any transfer of the respondent to Nauru without the consent of one of her parents would constitute a battery.⁶

11. On 3 July 2018, orders were made requiring that, as soon as reasonably practicable, the respondent be brought to Australia. That occurred the following day [CAB 30 [74]-[75]].

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

12. By amended statement of claim dated 1 March 2019 [ABFM 153-167], the respondent claimed damages and an injunction that the appellants “take and continue to take all steps within their power to ensure that the [respondent] receives treatment including long-term care and follow up, in a location with access to quality, multi-disciplinary specialist pediatric care”.

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13. The respondent maintained the pleadings mentioned in paragraph 9 above in respect of the Commonwealth’s involvement in regional processing in Nauru, where the respondent and her family had initially been detained.⁷ The respondent also pleaded an agreement between the Commonwealth and Nauru, that persons contracted by the Commonwealth would ensure access to adequate health care for the respondent, and that the Commonwealth would arrange the transfer of persons to Australia to enable receipt of medical treatment.⁸

14. The respondent pleaded that the Commonwealth had assumed responsibility for requirements imposed by Nauru and Papua New Guinea in respect of a proposed transfer of the respondent from Nauru to Papua New Guinea.⁹ The respondent pleaded that she was dependant on the appellants at all times for the provision of medical treatment, and that the appellants had assumed responsibility for her health and welfare.¹⁰ A duty of care was alleged to arise as a result.¹¹

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15. The respondent alleged that the appellants breached this duty of care by a failure to meet

⁶ Statement of claim at [27] [ABFM 151].

⁷ Amended statement of claim at [10] [ABFM 156-157].

⁸ Amended statement of claim at [11] [ABFM 157].

⁹ Amended statement of claim at [21]-[22] [ABFM 161].

¹⁰ Amended statement of claim at [30.1]-[30.2] [ABFM 163].

¹¹ Amended statement of claim at [30.3] [ABFM 163-164].

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the requirements of the standard of care imposed in respect of the respondent's medical treatment.¹² The respondent alleged that she had suffered loss and damage as a result.¹³ The respondent also alleged that, because of her injuries, she "requires and will require long term rehabilitation, specialist review and follow up with her treating practitioners in Australia, this standard of care not being available in Nauru".¹⁴

16. By their defence, the appellants pleaded that the actions they took on Nauru and Papua New Guinea, including the transfer of the respondent between those places, were done pursuant to s 198AHA of the Act.¹⁵ They denied the existence of a duty of care,¹⁶ denied breach¹⁷ and denied causation.¹⁸ 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".¹⁹ The appellants also alleged that the Federal Court did not have jurisdiction, by reason of s 494AB(1)(a), (ca) and (d).²⁰

17. By her reply, 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.²¹ The appellants joined issue on the point by way of rejoinder [**ABFM 190-194**].

C. The Full Court's decision

18. 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.

19. *As to s 494AB(1)(ca)*, the Full Court held that it did not apply to this proceeding either at

¹² Amended statement of claim at [31], [32] [**ABFM 164-166**].

¹³ Amended statement of claim at [33] [**ABFM 166**].

¹⁴ Amended statement of claim at [34] [**ABFM 166**].

¹⁵ Defence at [10], [10A], [21.4], [22.3], [23.3], [24.3] [**ABFM 172-176**].

¹⁶ Defence at [30], [31.1] [**ABFM 179-180**].

¹⁷ Defence at [31]-[32] [**ABFM 179-180**].

¹⁸ Defence at [33] [**ABFM 180**].

¹⁹ Defence at [31.2], [36]-[37] [**ABFM 179-180**].

²⁰ Defence at [38]-[44] [**ABFM 180-182**].

²¹ Reply at [1] [**ABFM 186-187**].

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 intersect with s 494AB(1)(ca) [CAB 84-285 [242]]. Moreover, a cause of action in negligence did not engage s 494AB(1)(ca) [CAB 85 [243]-[245]], and the relief she sought did not attract the bar [CAB 85-86 [247]-[250]].

20. *As to s 494AB(1)(a)*, the Full Court held that it did apply because the respondent “expressly sought in her interlocutory application an order requiring the Commonwealth parties to transfer DIZ18 and her mother to a location in Australia for the purpose of her obtaining medical treatment and an order was made to that effect” [CAB 97 [289]].
21. *As to s 494AB(1)(d)*, the Full Court held that it did apply, having regard to the respondent's allegation that the appropriate standard of care is not available in Nauru and her claim for an injunction that that standard of care be met [CAB 98 [291]-[292]].

PART VI ARGUMENT

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

22. 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.
23. 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.
24. *First*, it was central to the Court's conclusions that the respondent in this case made “no express or implicit reference to any of the statutory provisions in Subdiv B” [CAB 84 [242]]. But that is of no moment: 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. Moreover, the appellants' defence pleaded, in a non-colourable way, the relevant provisions.
25. *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 held that even if s 198AHA was relevant to the 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 84-85 [242]]. For the reasons given in respect of the construction of s 494AB(1)(ca) in *FRM17*, that conclusion was wrong. Section 198AHA provided the statutory authority pursuant to which the Commonwealth took many of the impugned actions pleaded by the respondent. Further, any duty of care to be imposed in offshore detention centres had to be consistent with that regime in Subdivision B of Division 8 of Part 2. That was sufficient to engage s 494AB(1)(ca) in this case.

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 [CAB 85 [243]-[244]]. 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. 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 between the parties about the applicability of s 198AHA. That issue was summarised in Part 5 above at paragraph [17]. 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*.

PART VII ORDERS SOUGHT

29. The appellants seek the orders in the notice of appeal.

PART VII ESTIMATE OF HOURS

30. 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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**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: **DJA18 AS LITIGATION
REPRESENTATIVE FOR DIZ18**
Respondent

ANNEXURE

20 **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).

30 *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).

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

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