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 Applicant

COMMONWEALTH OF AUSTRALIA

Second Applicant

AND: **DJA18 AS LITIGATION REPRESENTATIVE FOR DIZ18**

Respondent

SUBMISSIONS OF THE APPELLANTS IN REPLY

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PART I FORM OF SUBMISSIONS

1. This reply is in a form suitable for publication on the internet.

PART II REPLY TO THE SUBMISSIONS OF THE RESPONDENT

2. This reply adopts the submissions in reply in the *BXD18* proceeding. In those submissions, the appellants emphasised that the examples which the respondents raised to test the appellants' construction (in **BXD18 RS [36]**) should not distract from close consideration of the circumstances of the present proceedings. It is useful to highlight the relevant features of this proceeding.

3. At institution, the statement of claim pleaded that the Commonwealth owed, and owes, the respondent a duty of care to exercise its statutory powers vested in the Minister and non-statutory executive power to do certain things.[1] That must impliedly include s 198AHA. The foundation of that duty was said to lie in the appellants' exercise of control over, and assumption of responsibility for, the respondent's medical care. That must be pursuant to the arrangements made by the appellants including under s 198AHA.[2]

4. By the time of the Full Court hearing, the respondent had pleaded by way of reply that s 198AHA did not apply to authorise action in relation to the respondent [cf **RS [41]-[42], [44], [59]**].[3] The respondents in this proceeding and the *BXD18* proceeding now suggest that this "was artificial and inconsequential" [**BXD18 RS [59]**] in each case, but this should be rejected. Further, the amended statement of claim alleged a duty of care that was dependent on the appellants exercising control over, and assuming responsibility for, the respondent's medical care.[4] Again, that must be pursuant to the arrangements made by the appellants including under s 198AHA.[5]

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1 Statement of claim at [23] [**BFM 150**].

2 Statement of claim at [9]-[10] [**BFM 147-148**].

3 Reply at [1] [**BFM 186-187**]; Rejoinder at [2] [**BFM 191-192**].

4 Amended statement of claim at [30] [**BFM 163-164**].

5 Amended statement of claim at [8] [**BFM 156**], [10] [**BFM 156-157**], 11 [**BFM 157**], [21]-[24] [**BFM 161-162**].

PART III CROSS-APPEAL

5. In so far as the respondent's cross-appeal depends upon her preferred construction of s 494AB, it should be dismissed for the reasons given by the appellants in their submissions in reply on the notice of contention and cross-appeal in the *BXD18* proceeding at [16]-[17]. It is necessary simply to add or emphasise the following.

6. *First*, the respondent submits that "other powers [in addition to s 198B] were available to comply with the Court's order (and the Appellants had not submitted to the contrary)" [**RS [25]**]. This submission must be treated with caution. The only alternative identified by the appellants was the grant of a special purpose visa. If granted, that would dramatically alter the status of the respondent from an unlawful non-citizen to a lawful non-citizen with a right to reside in the Australian community. It could not credibly be said that in order to comply with an interlocutory injunction (or an undertaking given to avoid the making of an order), the appellants should be required or expected to grant a visa where that would have defeated the evident purpose of the transitory person provisions. For that reason, the fact that there was power to grant a visa does not deny that – in reality – this proceeding related to the exercise of power under s 198B for the simple reason that that was the power the Parliament enacted for the very purpose of allowing transitory persons to be brought to Australia without altering their legal status.

7. *Second,* **RS [33]-[34]** suggest that "the relief sought by the Respondent did not require her to be kept in Australia at all". That cannot stand with the paragraph of her amended statement of claim that would, if established, entitle her to to an injunction rather than confine her to damages. At paragraph 34, she pleaded that "[b]y reason 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" (emphasis added).[6] One could not comply with an injunction issued upon the respondent establishing this allegation by taking her to some other country. **RS [37]** is thus wrong in seeking to distinguish *SGS v Minister for Immigration and Border Protection*.[7]

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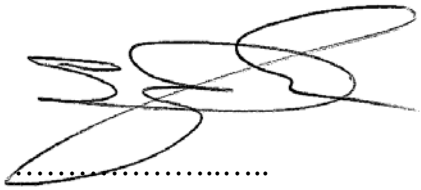
6 **BFM 166**.

7 (2015) 34 NTLR 224.

8. *Third*, it is not to the point that the appellants had not yet taken steps to remove the respondent from Australia [cf **RS [35]-[36]**]. It is evident that the appellants would have done so but for this litigation. As **RS [9]** notes, "the Appellants determined to take the Respondent back to Nauru … This catalysed the commencement of proceedings in the Federal Court". Moreover, it was plain on the face of the pleadings that the respondent sought to prevent her removal from Australia. Given that s 494AB operates at the institution of proceedings and while they continue, there is no reason to confine its effect to occasions when removal is "imminent". It applies where preventing removal is part of the relief sought.

10 **Dated: 26 June 2020**



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