FALZON v MINISTER FOR IMMIGRATION AND BORDER PROTECTION (S31/2017)

Date application for an order to show cause filed: 14 February 2017

Date application referred to Full Court: 11 April 2017

Mr John Falzon migrated to Australia from Malta with his parents in 1956, at the age of three. He has never become an Australian citizen. From 1 September 1994 however he held an absorbed person visa, by the operation of s 34 of the Migration Act 1958 (Cth) ("the Act").

In June 2008 Mr Falzon pleaded guilty to a charge of trafficking a large commercial quantity of cannabis. He was then sentenced (by the County Court of Victoria) to imprisonment for 11 years, with a non-parole period of eight years.

On 10 March 2016, while Mr Falzon was still in prison, a delegate of the defendant ("the Minister") cancelled Mr Falzon's visa on character grounds, under s 501(3A) of the Act ("the cancellation decision"). This was on the basis that Mr Falzon had been sentenced to a term of imprisonment of 12 months or more.

Mr Falzon later applied for revocation of the cancellation decision, under s 501CA of the Act. On 10 January 2017 the Assistant Minister for Immigration and Border Protection decided not to revoke the cancellation decision.

Mr Falzon then commenced proceedings in this Court by application for an order to show cause, seeking the quashing of the cancellation decision. On 11 April 2017 Justice Keane referred Mr Falzon's application to the Full Court for hearing.

The grounds on which Mr Falzon claims relief include:

- Section 501(3A) is invalid because it purports to confer the judicial power of the Commonwealth on the Minister. That is so, inter alia, because:

    a) the legal criteria enlivening the duty in s 501(3A) are exclusively or primarily that a person has committed an offence or offences and is serving a custodial sentence for an offence;

    b) s 501(3A) is not subject to a duty to afford procedural fairness;

    c) s 501(3A), in its legal or practical operation, by reason of s 189 of the Act, exposes a person to extra-judicial detention;

    d) the extrinsic materials to the Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) evidence an intention that the purpose of s 501(3A) was to "ensure that the non-citizen remains in criminal detention or, if released from criminal custody, in immigration detention while revocation is pursued";

e) the detention to which the person is so exposed exceeds or may exceed the period which a court has deemed appropriate for the offence for which the person was imprisoned and on which s 501(3A)(b) operates;

f) in exercising the s 501(3A) power, the Minister is not obliged or empowered to have regard to the protection of the Australian community or any other protective consideration;

g) the Minister is not obliged to exercise the s 501(3A) power for a protective purpose;

h) there is no duty to revoke a s 501(3A) decision even if the Minister is satisfied that the person does not pose a risk to the Australian community;

i) s 501(3A) does not rationally or proportionately pursue a protective purpose. The offence upon which s 501(3A)(a) operates may be stale. The section applies to persons who have fully rehabilitated. It applies to persons who the courts or executive believe pose no risk to the community. The connection between the seriousness of offending and the fact that a person is serving a full-time sentence of imprisonment is no more than arbitrary;

j) s 501(3A) is properly characterised as authorising the Minister to impose punishment for a breach of the law;

k) further, s 501(3A) is punitive and/or pursues a punitive purpose.