PLAINTIFF M47/2018 v MINISTER FOR HOME AFFAIRS & ANOR (M47/2018)

Date Special Case referred to the Full Court: 21 November 2018

The Plaintiff has been restrained in immigration detention by the Commonwealth in Australia for almost nine years. He seeks release from that detention. He contends that he is stateless. The Defendants are not satisfied as to the Plaintiff's identity and do not accept that he is stateless. It is common ground that there is currently no country willing to accept him as a national or as a person with a right of entry.

The Plaintiff (then about 20 years of age) arrived in Australia by aeroplane from Belgium in January 2010, travelling on a Norwegian passport in the name of "MB", date of birth 11 October 1990. Shortly after arriving at Melbourne Airport, the Plaintiff destroyed the passport and presented himself to immigration officers as "Ye-Y", a "citizen" of West Sahara. He was detained under s 14 of the *Migration Act 1958* (Cth) ("the Act") as an 'unlawful non-citizen.' At all relevant times since then, he has been detained by officers of the Commonwealth in reliance on ss 189 and 196 of the Act. Section 189(1) provides an officer "must" detain a person where the "officer knows or reasonably suspects that [the] person [is] in the migration zone… [and] is an unlawful non-citizen". Section 196 establishes the duration of the required detention. It provides, in effect, that detention "must continue until removal, deportation, or the grant of a visa".

Before his arrival in Australia in 2010, the Plaintiff lived as an undocumented immigrant in various places in North Africa and Europe and (from about 2004) in Norway pursuant to a temporary residence permit. At the time of his arrival in Australia, the Plaintiff still held that permit. On 23 February 2010, the Plaintiff lodged a protection visa application in the name of "Ya-Y" (as opposed to "Ye-Y"), born on 11 October 1992. In March 2010, the Plaintiff made a written request that he be removed from Australia to Norway, and shortly thereafter withdrew his protection visa application. The Defendants unsuccessfully liaised with the Norwegian authorities to facilitate return of the Plaintiff to Norway. In the event, the Plaintiff was not removed to Norway, his permit having expired on 24 September 2010, and his request to renew the permit having been unsuccessful.

The Plaintiff has lodged two more protection visa applications and a Safe Haven Enterprise ("SHE") application since June 2010. In those and in the course of investigations as to his identity over the last nine years the Plaintiff has made several different and inconsistent claims about his identity, date and place of birth and relatives' whereabouts as well as admissions about multiple occasions on which he travelled on false passports.

The Plaintiff commenced proceedings in the High Court in April 2018 seeking declarations that his continued detention was unlawful and that he was not liable to

detention under ss 189 and 196 of the Act and writs of mandamus and habeas corpus compelling the defendants to release him.

The Plaintiff argues that there is no real possibility, prospect or likelihood that he will be removed from Australia during the course of his natural life as there is no country willing to accept him. It follows that, as there is no real possibility that he will be removed from Australia, the powers conferred by ss 189, 196 and 198 to authorise his detention have been spent. The Plaintiff has exhausted his appeal and review rights under Australian law with respect to his unsuccessful applications for a protection visa and SHE visa. Further, he has not been the subject of any adverse security assessment by any Australian security agency. Nor has he, at any time since his arrival in Australia, been the subject of any criminal proceeding or been detained as a consequence of, or pursuant to, any Court order.

The Defendant has made numerous unsuccessful attempts to ascertain the Plaintiff's identity over the almost 9 years of the Plaintiff's detention. The Defendant has also made numerous enquiries of various countries to ascertain whether they might be prepared to accept the Plaintiff, notwithstanding that the Plaintiff has no country willing to accept him as a national or as a person with a right of entry. Thus far these attempts have also been unsuccessful. The Defendant however submits that investigations into the Plaintiff's identity are ongoing, as are attempts to negotiate his acceptance as either a Moroccan or Algerian citizen with the representatives of those countries and attempts to identify third countries that might accept him, whether or not he has any rights of entry into those countries.

The Defendant argues that the circumstances of this case do not support an inference that there is "no real possibility… that the Plaintiff will be removed from Australia during the course of his natural life" or even that he will not be removed in the "reasonably foreseeable future". Therefore ss 189 and 196 of the Act, properly construed, undoubtedly authorise the present detention of the Plaintiff and are not contrary to Chapter III of the Constitution.

The questions of law stated by the parties for the opinion of the High Court are as follows:

1. On their proper construction, do ss 189 and 196 of the *Migration Act 1958* (Cth) authorise the present detention of the Plaintiff?

2. If so, are those provisions beyond the legislative power of the Commonwealth insofar as they apply to the Plaintiff?

3. What relief, if any, should issue to the Plaintiff?

4. Who should pay the costs of and incidental to this Special Case?

The Plaintiff filed a Notice of a Constitutional Matter. None of the Attorneys-General has intervened in response to that Notice.

The Australian Human Rights Commission has filed submissions in support of its application for leave to appear as amicus. It addresses the first question and submits, in support of the Appellant, that the answer to that question should be “no”.