



HIGH COURT OF AUSTRALIA

17 August 2017

PLAINTIFF S195/2016 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION (CTH) & ORS
[2017] HCA 31

Today the High Court unanimously held that certain past and potential future actions of the Commonwealth, its officers, and the Minister for Immigration and Border Protection ("the Minister") were not invalid or precluded under the Constitution or under the *Migration Act* 1958 (Cth) ("the Act") by reason of the decision of the Supreme Court of Papua New Guinea in *Namah v Pato* (2016) SC1497 ("the *Namah* decision").

On 9 October 2012, the Minister designated Papua New Guinea ("PNG") a "regional processing country" under the Act ("the Ministerial Designation"). The plaintiff is an Iranian national who arrived in Australia at Christmas Island on 24 July 2013. As an "unauthorised maritime arrival" ("UMA"), he was taken to PNG on 26 August 2013 pursuant to a direction made by the Minister ("the Ministerial Direction"). The plaintiff has since resided at the Manus Regional Processing Centre ("the Manus RPC"), which has at all relevant times been operated by Broadspectrum (Australia) Pty Ltd ("Broadspectrum") in accordance with an agreement between Broadspectrum and the Commonwealth ("the Broadspectrum contract"). Following an unsuccessful application by the plaintiff to be recognised as a refugee under PNG law, the relevant PNG Minister ordered the plaintiff's removal from PNG and the plaintiff remains in custody pending removal.

On 26 April 2016, the Supreme Court of PNG delivered the *Namah* decision, finding that treatment of UMAs at the Manus RPC contravened provisions of the PNG Constitution and was unsupported by PNG law.

In the High Court, the parties stated questions of law in the form of a special case, asking whether certain actions of the Commonwealth, its officers, and the Minister were invalid or precluded in light of the *Namah* decision. Those actions included: the making of the Ministerial Designation; the entry by the Commonwealth into a "Regional Resettlement Arrangement" and associated agreements with PNG, including a Memorandum of Understanding ("MOU") regarding the transfer, processing and resettlement of UMAs; the entry by the Commonwealth into the Broadspectrum contract; the making of the Ministerial Direction; the taking of the plaintiff to PNG; and future actions the Commonwealth and its officers might take to assist PNG in removing the plaintiff from PNG and keeping him in custody pending removal. The parties also stated a more general question as to whether the Commonwealth's authority under s 198AHA of the Act to undertake conduct in respect of regional processing arrangements in PNG depended upon whether those arrangements were lawful under the law of PNG.

The plaintiff submitted that the Constitution denies to the Commonwealth any legislative or executive power to authorise or take part in activity in another country which is unlawful according to the domestic law of that country. The plaintiff also submitted that the effect of the *Namah* decision was to deny to the MOU and the Regional Resettlement Arrangement the character of an "arrangement" within the meaning of s 198AHA of the Act, with the result that the Commonwealth's actions were not supported by s 198AHA.

The High Court held that neither the legislative nor the executive power of the Commonwealth is constitutionally limited by any need to conform to the domestic law of another country and that the past and future actions challenged by the plaintiff were not invalid or precluded. The Court also held that, even if the MOU and the Regional Resettlement Arrangement were beyond the power of PNG under its Constitution, each remained an "arrangement" within the scope of s 198AHA because the authority conferred by that section does not depend upon the lawfulness of government action under the law of a foreign country. The Court answered the questions stated in the special case adversely to the plaintiff.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*