

SHORT PARTICULARS OF CASES
APPEALS

ADELAIDE
AUGUST 2024

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**MINISTER FOR IMMIGRATION, CITIZENSHIP AND
MULTICULTURAL AFFAIRS & ORS v MZAPC (P21/2024)**

Court appealed from: Full Court of the Federal Court of Australia
[2024] FCAFC 34

Date of judgment: 18 March 2024

Special leave granted: 9 May 2024

The respondent entered Australia in 2006 on a student visa which expired in March 2008. Before that expiry date, the respondent unsuccessfully applied for a Skilled Migration visa. He later applied for a protection visa, which was refused. His appeal to the High Court in respect of that refusal was dismissed in May 2021. Since his first visa refusal the respondent had held a bridging visa. That visa was cancelled in November 2015 following his conviction for drug-related charges. The respondent unsuccessfully sought review of the decision to cancel his visa in the Administrative Appeals Tribunal. His application to the Federal Circuit and Family Court of Australia was discontinued. He has exhausted all rights of review and appeal in relation to his immigration status and has no extant visa application. He has been in immigration detention since 2016, following his release from prison.

In August 2023, the respondent filed an originating application in the Federal Court of Australia. The asserted ground of review was that the second and third appellants had exceeded the executive power of the Commonwealth, in making a number of decisions in purported compliance with ministerial guidelines, in respect of requests the respondent made for the Minister to consider exercising powers under sections 195A and 417 of the *Migration Act 1958* (Cth) (“the Act”), and also under ss 48B and 351 of the Act, to grant him a visa. The respondent also applied for an interlocutory injunction on the basis that he was liable to be removed from Australia at any time after 6 July 2023. The primary judge found that there was a serious question to be tried in the substantive application and granted the interlocutory injunction.

The appellants sought leave to appeal in the Full Court of the Federal Court. It was not disputed that in the circumstances there was a duty imposed by s 198(6) of the Act to remove the respondent from Australia as soon as reasonably practicable. The injunction granted by the primary judge restrained the performance of that duty. The appellants submitted that the Court had no power to prevent the performance of the duty under s 198(6) in circumstances where the duty to remove was not being challenged by the respondent in his substantive application. A majority of the Full Court (Colvin & Jackson JJ; SC Derrington J dissenting) granted leave to appeal, but dismissed the appeal on the basis that the Court has the power to grant interlocutory relief to preserve the subject matter in dispute and to enable it to perform its function as a court.

The respondent has filed a notice of a constitutional matter and a notice of contention. The Attorney-General of the Commonwealth has intervened in the proceeding in support of the appellants.

The sole ground of appeal is:

- The Full Court of the Federal Court of Australia erred in concluding that the primary judge had power to grant an interlocutory injunction restraining the respondent's removal from Australia.

**STATE OF QUEENSLAND v MR STRADFORD (A PSEUDONYM)
& ORS (S24/2024);
COMMONWEALTH OF AUSTRALIA v MR STRADFORD
(A PSEUDONYM) & ORS (C3/2024);
HIS HONOUR JUDGE SALVATORE PAUL VASTA v
MR STRADFORD (A PSEUDONYM) & ORS (C4/2024)**

Causes removed from: Full Court of the Federal Court of Australia

Date causes removed: 8 February 2024

On 6 December 2018, Judge Salvatore Paul Vasta (“Judge Vasta”), constituting the Federal Circuit Court (as it was then known) in Brisbane, declared a litigant known by the pseudonym of “Mr Stradford” in contempt of certain orders made by the Court and sentenced him to a period of imprisonment of 12 months. A written order was issued which was attached to a Warrant of Commitment. MSS Security Pty Ltd (“MSS”) was engaged by the Commonwealth to provide security-related services at the Federal Circuit Court in Brisbane. Two guards employed by MSS took custody of Mr Stradford for around 30 minutes until he was handed over to Queensland Police officers. Mr Stradford was then taken by Queensland Police officers to the Roma Street Watchhouse until 10 December, when he was delivered to the Brisbane Correctional Centre and into the custody of the Commissioner of Queensland Corrective Services. On 12 December 2018, Mr Stradford was released from custody when the imprisonment order and warrant were stayed (by Judge Vasta), pending an appeal to the Full Court of the Family Court of Australia (as it was then known). In February 2019, the Full Court allowed Mr Stradford’s appeal.

Mr Stradford then sued Judge Vasta, the Commonwealth and the State of Queensland (“Queensland”) in the Federal Court, alleging that Judge Vasta had committed the torts of false imprisonment and collateral abuse of process and that the Commonwealth and Queensland were vicariously liable for the actions of their officers in detaining him.

At trial, Queensland argued that no liability attached to either the Queensland Police Service or Queensland Corrective Services (and therefore to Queensland) because the common law did not impose tortious liability on persons acting in obedience to a Warrant of Commitment and imprisonment; and further, that section 249 of the *Criminal Code* (Qld) (“the Qld Code”) rendered the conduct of the officers lawful and so provided a statutory defence.

The primary judge held Queensland liable for false imprisonment, finding that no defence was available to the Queensland officers at common law and that s 249 of the Qld Code did not apply to warrants issued by federal courts, so that the statutory defence provided by s 249 was not available to them.

The Commonwealth submitted that on the proper construction of s 17(1) of the *Federal Circuit Court of Australia Act 1999* (Cth) (“the FCCA Act”), Judge Vasta’s orders provided the necessary authority for the MSS guards to detain Mr Stradford. This was because, although those orders were affected by serious errors, they were valid until set aside and they had not been set aside at the time the detention by MSS occurred. The primary judge concluded that s 17 did not give contempt orders of the Federal Circuit Court the attribute of being valid until set aside.

When staying the orders pending an appeal to the Full Court, Judge Vasta effectively conceded that he had erred both in finding Mr Stradford was in contempt and in sentencing him to imprisonment. Before the primary judge in the false imprisonment claim, Judge Vasta submitted that he was protected by judicial immunity and that the Court should hold that there was no difference between the judicial immunity afforded to inferior and superior court judges.

The primary judge held that Judge Vasta had committed a number of errors and that he was not protected by judicial immunity. The primary judge found that because the contempt orders were made by an inferior court, they could not be considered as valid until such time as they might be set aside. He held that s 17 of the FCCA Act did not apply and that in any event it did not make the orders valid until set aside, or confer the judicial immunity of a superior court judge on Judge Vasta.

Each of the respondents to Mr Stradford's claims in the Federal Court filed a notice of appeal in the Full Court of the Federal Court. Applications for removal into the High Court of those three pending appeals were filed by the Attorney-General of the Commonwealth and the Attorney-General of the State of Queensland respectively. Orders for removal were made in each matter.

The Attorney-General for the State of South Australia has been granted leave to intervene in each appeal, generally in support of Queensland and the Commonwealth.

In the appeal brought by Queensland, the grounds of appeal include:

- The Primary Judge erred in not finding that the State of Queensland and its agents were afforded protection at common law from civil liability, in circumstances in which they acted in obedience to an order for imprisonment and a warrant issued by the Federal Circuit Court, and both the order and warrant appeared lawful on their face.
- The Primary Judge erred in holding that, as a matter of construction, s 249 of the *Criminal Code* (Qld) did not apply to a warrant issued by the Federal Circuit Court.

In the appeal brought by the Commonwealth, the grounds of appeal include:

- The primary judge erred:
 - in concluding that orders of an inferior court affected by jurisdictional error were invalid *ab initio* for all purposes;
 - in concluding that s 17 of the *Federal Circuit Court of Australia Act*, if available, did not confer a power to make orders which were valid until set aside;
 - in failing to conclude that Judge Vasta's orders were "valid" prior to being set aside, at least to the extent of supplying a defence to the Commonwealth's asserted torts;

- in concluding that there was no common law defence available to those who commit a tort in the course of executing an apparently valid order of an inferior court;
- in failing to conclude that the Commonwealth had a defence against the specific tort alleged by Mr Stradford arising from the fact that the court security officers committed the tort in the course of executing an apparently valid order and Warrant of Commitment of the Federal Circuit Court and pursuant to a direction from Judge Vasta;
- in concluding that a judge of an "inferior court", who has subject matter jurisdiction in a particular matter, is not immune from suit in respect of the exercise of that jurisdiction where the judge:
 - (i) commits a gross and obvious irregularity in procedure or breach or a breach of the rules of natural justice, other than a merely narrow technical breach;
 - (ii) acts in excess of jurisdiction by making an order or imposing a sentence for which there was no proper foundation in law because a condition precedent to the making of the order or sentence has not been made out;
- in concluding that there was a distinction, material in the facts and circumstances of this case, between the immunity of judges of superior courts and the immunity of judges of inferior courts.

In the appeal brought by Judge Vasta, the grounds of appeal include:

- The learned primary judge erred by:
 - failing to hold that s 17 of the *Federal Circuit Court of Australia Act 1999* (Cth) was engaged by, and/or a source of power for, the orders made by Judge Vasta on 6 December 2018 declaring that Mr Stradford was in contempt and sentencing him to imprisonment ("Contempt Orders"); and
 - failing to conclude that Judge Vasta was invested with the judicial power of the Commonwealth in relation to the making of the Contempt Orders.
- By reason of the errors above, the learned primary judge erred in failing to hold that:
 - the Contempt Orders were valid until set aside; and
 - Judge Vasta had the same judicial immunity as a superior court judge with respect to the making of the Contempt Orders.

**BOGAN & ANOR v THE ESTATE OF PETER JOHN SMEDLEY
(DECEASED) & ORS (M21/2024)**

Cause removed from: Supreme Court of Victoria Court of Appeal

Date cause removed: 7 March 2024

The applicants commenced representative proceedings in the Supreme Court of Victoria in August 2020, alleging amongst other things, misleading or deceptive conduct by the respondents, contrary to the *Corporations Act 2001* (Cth) (“the Corporations Act”). The group or class comprises people who acquired an interest in Arrium Ltd through shares between August 2014 and April 2016. The first to fourth respondents (“the director respondents”) were directors of Arrium Ltd during the relevant period and the fifth respondent (“KPMG”) had been retained by Arrium Ltd during the relevant period as its auditor.

As of 1 July 2020, the *Supreme Court Act 1986* (Vic) (“the Supreme Court Act”) was amended to introduce the concept of a ‘group costs order’ (“GCO”), which applies in group proceedings and allows the Court to order that the legal costs payable to a law practice in a group proceeding may be calculated as a percentage of the amount of any award or settlement recovered (also referred to as contingency fees). Such fees are otherwise prohibited throughout Australia. Justice John Dixon in the Supreme Court of Victoria made a GCO, setting the legal costs payable to the solicitors for the applicants at 40 per cent of the amount of any award or settlement recovered. There is no appeal possible from that GCO. The respondents applied by summons to have the group proceeding transferred to the Supreme Court of New South Wales, pursuant to an express statutory power in the Corporations Act on the ground that the Supreme Court of New South Wales is the more appropriate forum. Questions arose as to whether, in determining the transfer application, the fact that a GCO had been made is relevant to the exercise of the transfer power and, if the proceeding were transferred, whether the GCO would apply in New South Wales thereafter. New South Wales prohibits lawyers charging contingency fees and makes no exception for group proceedings, so had the group proceeding been brought in New South Wales there would have been no power to make a GCO.

Justice Nichols of the Supreme Court of Victoria reserved three questions for the consideration of the Court of Appeal (which are set out below as the questions reserved in this Court). The Court of Appeal found that because a GCO had been made, the litigation funder involved would probably not continue to fund the proceeding without the GCO; and because the GCO could not “travel” to New South Wales, the GCO in effect tied the proceeding to Victoria and no transfer should be ordered. The Court indicated they would answer the questions as follows:

1. Yes;
2. (a) No;
2. (b) Does not arise; and
3. No.

The Court did not make orders reflecting their reasons. Had any orders been made embodying those answers, they may not have been appealable by virtue of section 1337R(a) of the Corporations Act. Upon the application of KPMG, the proceedings have been removed into the High Court.

KPMG challenges the correctness of each of the Court of Appeal's conclusions. KPMG submits that having removed the proceedings, the High Court may do whatever is necessary for the complete adjudication of the cause, including giving answers to the reserved questions which are different to those given by the Court of Appeal. The director respondents generally support KPMG, including that the questions reserved are to be reconsidered *de novo*. The applicants however submit that this Court should not depart from the reasons of the Court of Appeal unless it finds error.

The applicants have filed a notice of a constitutional matter and the Attorney-General of the Commonwealth has intervened, generally in support of the respondents. The Attorney-General of the Commonwealth has also filed an additional notice of a constitutional matter.

The applicants also seek to contend that the decision of the Court below should be affirmed on the basis of the additional grounds identified in their document.

The questions reserved are:

1. In exercising the discretion to transfer proceedings to another court under s 1337H(2) of the Corporations Act, is the fact that the Supreme Court of Victoria has made a GCO under s 33ZDA of the Supreme Court Act relevant?
2. If the proceedings are transferred to the Supreme Court of New South Wales:
 - (a) will the GCO made by the Supreme Court of Victoria on 3 May 2022 remain in force and be capable of being enforced by the Supreme Court of New South Wales, subject to any order of that Court; and
 - (b) if the GCO will remain in force, does the Supreme Court of New South Wales have power to vary or revoke the GCO?
3. Should this proceeding (S ECI 2020 03281) be transferred to the Supreme Court of New South Wales pursuant to s 1337H of the Corporations Act?