FEDERAL CIRCUIT COURT OF AUSTRALIA

FGS20 v Minister for Home Affairs [2021] FCCA 653

File number(s):	SYG 2917 of 2020
Judgment of:	**JUDGE DRIVER**
Date of judgment:	3 August 2021
Catchwords:	**MIGRATION** – Application for release from detention – applicant brought to Australia from a regional processing centre for the temporary purpose of medical treatment – whether the applicant still needs to be in Australia and whether the respondents are under an obligation to remove him from Australia considered – lawfulness of the applicant's detention considered – application dismissed in part.
Legislation:	*Migration Act 1958* (Cth) ss 198AD, 198AH, 198E
Cases cited:	*AOU21 v Minister for Home Affairs* [2021] FCAFC 60 *Commonwealth of Australia v AJL20* [2021] HCA 21 *FDT20 v Minister for Home Affairs* [2021] FCCA 711
Number of paragraphs:	27
Date of last submission/s:	6 July 2021
Date of hearing:	14 April 2021
Place:	Sydney
Solicitors for the Applicant:	Mr D Taylor, with Ms N Harendran of Sydney West Legal and Migration
Counsel for the Respondents:	Mr P Knowles, with Ms C Roberts
Solicitors for the Respondents:	Australian Government Solicitor

ORDERS

SYG 2917 of 2020

BETWEEN:	**FGS20** Applicant
AND:	**MINISTER FOR HOME AFFAIRS** First Respondent
	MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS Second Respondent
	COMMONWEALTH OF AUSTRALIA (and others named in the Schedule) Third Respondent

ORDER MADE BY:	**JUDGE DRIVER**
DATE OF ORDER:	**3 AUGUST 2021**

THE COURT DECLARES THAT:

1. The applicant no longer needs to be in Australia for the temporary purpose for which he was brought to Australia.
2. All of the pre-conditions in s 198AH(1A) of the *Migration Act 1958* (Cth) are met in respect of the applicant.
3. Section 198AH(1) applies to the applicant.

THE COURT ORDERS THAT:

1. The applicant's claims for:
   (a) a declaration that his detention is unlawful; and
   (b) an order in the nature of the writ of *habeus corpus* requiring his release from detention forthwith

   are dismissed.
2. The matter is referred under Part 27 of the *Federal Circuit Court Rules 2001* (Cth) to a registrar of the Court for a mediation, including but not limited to questions of:

(a) to which regional processing country the applicant will be removed as soon as reasonably practicable and, when such removal will occur;

(b) whether the parties seek to have the question of relief by way of mandamus re-agitated before the Court in this proceeding, on the existing evidence or with new evidence; and

(c) which parties should pay the costs of this proceeding.

3. The parties have liberty to apply for further orders or directions on three days notice.

REASONS FOR JUDGMENT

JUDGE DRIVER:

INTRODUCTION AND BACKGROUND

1 By application filed on 21 December 2020, the applicant seeks declarations that his detention was not authorised by the *Migration Act 1958* (Cth) (Migration Act) or any other power and is therefore unlawful. He seeks an order that he be released from detention forthwith. The particularised ground in the application is:

> 1. The detention is unlawful because the Defendant is unwilling or unable to remove the Applicant to Papua New Guinea as required by ss.198(1) and 198(1A) of the Migration Act 1958;
>
> Particulars.
>
> i. The applicant made oral requests for removal to PNG.
>
> ii. The applicant made a written request for removal to Papua New Guinea by depositing in the ABF drop box in the detention facility requests for removal to Papua New Guinea, on 20th April 2020, 7th December 2020, and 12 December 2020.
>
> iii. The Defendants have not taken reasonable and necessary steps to carry into effect their obligation to remove the applicant to Papua New Guinea as soon as reasonably practicable as required by s.198(1A) and s.198AD(2) of the Migration Act 1958.
>
> iv. The detention of the applicant is not supported by any lawful purpose as required by the Migration Act 1958.
>
> iv. The Defendants through the Department have not assessed the applicant against the s.46 or s.195A Ministerial Intervention guidelines

2 In an affidavit made on 16 December 2020 and filed with the application, the applicant states that he had asked to be sent back to Papua New Guinea (PNG) eight months prior and had spoken to his case manager many times about his wish to go back to PNG. Annexed to the affidavit are three written requests for removal apparently made on 20 April 2020, 7 December 2020 and 12 December 2020.

3 A court book was filed on behalf of the respondents on 25 March 2021.

4 For the purposes of the final hearing of the application on 14 April 2021, I also received the following evidence:[1]

[1] I also received all evidence in a prior Application in a Case heard on 31 March 2021

(a) an affidavit by the applicant made on 4 April 2021 in which he details his migration history to Australia and in PNG and his more recent travel to Australia for medical treatment. The applicant deposes that he came to Australia from Afghanistan and was recognised as a refugee in PNG, which was confirmed on 27 January 2015;

(b) an affidavit by the applicant made on 5 April 2021 in which he provides further details of his health status and medical care;

(c) an affidavit by Alana Sullivan made on 9 April 2021 in which she deposes as to the arrangements for removal of transitory persons to PNG and the steps that were taken in response to the applicant's requests for such removal;

(d) an affidavit by Gregory Weigh made on 9 April 2021 in which he deposes as to his dealings concerning the applicant in his capacity as status resolution officer for him;

(e) a further affidavit filed by the applicant on 11 May 2021[2] in which he provides further details concerning his health and his desire to be removed to PNG; and

(f) an affidavit by Brooke Marie Griffin made on 11 April 2021 in which she deposes as to enquiries made about services available on Nauru to treat the applicant's medical conditions.

5 On 11 May 2021, a further affidavit by the applicant was filed in which he deposes as to his removal to Melbourne from Brisbane. I do not regard the material in that affidavit as relevant to the issues to be decided in this case. On the same day, a further affidavit by the applicant was filed in which he describes a particular incident on 10 May 2021. Relevantly, he deposes that he will not accept further medical treatment from the Australian government. I have considered that affidavit.

6 At the trial on 14 April 2021 the applicant sought leave to file and rely upon an Application in a Case directed to the proposition that a direction purportedly made by the Minister under s 198AD(2) of the Migration Act dealing with alternative removal to an alternative offshore processing centre (Nauru) is invalid. After hearing argument from the parties' representatives, I refused leave because no issue of removal of the applicant to Nauru was in prospect. The applicant had not requested to be removed to Nauru (indeed he was opposed to such a course) and the Minister's position was (and remains) that the applicant needs to remain in Australia for medical treatment.

[2] The affidavit was unsigned and dated 9 May 2021

7 On 15 June 2021, the applicant's solicitor emailed to my chambers a proposed Application in a Case seeking interlocutory orders in the form of a writ of *habeas corpus* on the grounds that the applicant no longer needs to be in Australia for the temporary purpose of medical treatment and that the respondents had abandoned the purpose of the applicant's detention. In accompanying email correspondence, the solicitor referred to his client's concerns about the deteriorating security situation in Afghanistan. I declined to list the interlocutory application because it raised essentially the same issues on which the Court was reserved on a final basis. Further, in June 2021 the Minister undertook not to remove a group of named applicants (including this applicant) from Australia in matters where the Court had reserved judgment, until judgment was delivered.

8 At the interlocutory stage of these proceedings, I did deal with an Application in a Case filed on 26 March 2021 in which the applicant sought an injunction restraining the respondents from failing to provide halal food to him at appropriate times. That proceeding was resolved by the Minister giving specific undertakings concerning the provision of halal food to the applicant and the arrangements for doing so.

CONSIDERATION

9 The statutory regime bearing upon this case and the legal principles relating to that regime have been dealt with at length in other proceedings. I referred to the relevant authorities and the legal principles in *FDT20 v Minister for Home Affairs*[3] and I do not need to repeat them here. The issues to resolve are whether the applicant needs to remain in Australia and, if not, whether the respondents have breached their duty to remove him, or at least to take adequate steps in an attempt to do so.

10 I accept from the affidavit of Mr Weigh that the applicant arrived at Christmas Island by boat as an unauthorised maritime arrival on 12 October 2013. On 15 October 2013, he was taken to the Manus Island regional processing centre pursuant to s 198AD of the Migration Act.

11 On 18 July 2019, the applicant was transferred to Australia under the now repealed s 198E of the Migration Act for medical treatment. Annexed to the affidavit of Mr Weigh is a clinical advisory team opinion dated 24 March 2021 concerning the applicant. The author of that opinion noted that a Commonwealth medical officer had opined on 28 June 2019 that transfer of the applicant to Australia on medical grounds was not then indicated and that is was unclear

[3] [2021] FCCA 711

why the applicant was transferred on 18 July 2019. There is an assumption that the issue concerned episodes of aggression suggesting a psychiatric condition but there were also references to infections, gastro intestinal issues, neurological issues and otorhinolaryngological, cardiovascular, urological and dental concerns.

12 The author of the clinical advisory team opinion states that the applicant continues to have outstanding health concerns relating to those clinical issues. He voluntarily presented to Prince Charles Hospital for a mental health assessment on 13 March 2021 but was discharged the following day. He was scheduled to attend an optometrist for the purpose of investigation of an optical cause of ongoing headaches he was experiencing. The applicant also had multiple dental concerns (which might logically also have an impact on headaches). He was scheduled for a dental appointment on 12 May 2021.

13 An International Health and Medical Services (IHMS) report concerning the applicant prepared on 23 March 2021 suggests in my view that all of the applicant's medical issues other than his dental issues and headaches had been completed.

14 The applicant was found to have had a broken tooth which was recommended for removal, which the applicant refused on the basis that he wanted his teeth repaired rather than removed. As noted above, a further dental appointment was scheduled for 12 May 2021 but I have no evidence as to what occurred.

15 Based upon these medical records, Mr Weigh expresses the opinion that the applicant still needs to be in Australia for the purpose of receiving medical treatment. In my view, that assessment is questionable.

16 I accept from the applicant's evidence that he has made three requests for removal to PNG. The first was a written request made on 20 April 2020. There is no evidence of any action taken by the respondents in relation to that request. The applicant was cross-examined on his affidavits, including in relation to that request, and he was unshaken in his evidence.

17 Ms Sullivan deposes as to the steps taken in relation to the second and third written requests made by the applicant. I accept that enquiries were made from December 2020 through to April 2021 both in relation to a transfer to PNG and a transfer to Nauru. It appears that the latter enquiry was made in the light of advice from the PNG authorities pausing returns from Australia because of the COVID-19 pandemic.

18 It was apparent from the affidavit of Ms Sullivan that the steps taken by the respondents in response to his request for removal were of a preliminary nature and were not pursued because of the assessment that the applicant still needed to be in Australia for medical treatment.

19 As was found by the Full Federal Court in *AOU21 v Minister for Home Affairs*,[4] the question whether an applicant still needs to remain in Australia for the purposes of the legislative scheme is an objective one for the Court. The applicant's current conditions which would appear to require attention are his teeth problems and his chronic headaches, which could well be related. However, in an opinion dated 29 March 2021, Dr Robert Henderson, a neurologist, opines that the applicant's headaches are unlikely to resolve in the circumstances of his detention.[5] The applicant gave both written and oral evidence that his health problems are caused or exacerbated by the stress of living in detention. The fact of being in detention is no doubt stressful for the applicant, having undergone the same experience in PNG and having to join legal proceedings in the PNG Supreme Court to obtain his release following the recognition of his refugee status.

20 Annexed to the affidavit of Ms Griffin is an email from the co-ordinating registered nurse of IHMS. The nurse states that the applicant could not receive the dental treatment he requires in Nauru. She says nothing about the availability of appropriate dental treatment in PNG. Importantly, the nurse also ventures the opinion that the applicant's headache problems could not be resolved either in Nauru or while he remains in the detention environment in Australia because that detention is a contributing factor to his headaches.

21 I have no evidence that the applicant could not receive appropriate medical treatment for his outstanding conditions in PNG. I have evidence that the applicant and the respondents are in dispute over his dental plan in Australia. I have evidence that the applicant's headaches are exacerbated by his detention. As at 11 May 2021, the applicant was refusing any further medical treatment from the Australian government.

22 These facts lead me to the conclusion that the applicant no longer needs to be in Australia for medical treatment or for any other reason. He is a refugee and requires resettlement. It appears that Australia is not an available option to him for resettlement. Having been recognised as a refugee, the applicant was free in the community in PNG prior being brought to Australia for

[4] [2021] FCAFC 60
[5] See applicant's unsigned affidavit filed on 11 May 2021 and dated 9 May 2021

medical treatment. The applicant has made three requests to be returned to PNG and those requests should be acted upon.

CONCLUSION

23 The applicant was lawfully placed in immigration detention when he first arrived in Australia and he was lawfully placed in detention when he was brought to Australia for the temporary purpose of medical treatment. It is clear, at least since 11 May 2021, that the applicant no longer needs to be in Australia and, having requested removal to PNG, that request should be acted upon. It does not follow, however, that the applicant's current detention is unlawful. Like in *AOU21*, and *Commonwealth of Australia v AJL20*,[6] the applicant's current detention is justifiable to ensure he is available to be removed from Australia, in his case, to a regional processing country.

24 On the evidence before me, I find that the applicant has established on the balance of probabilities that:

(a) the three pre-conditions in s 198AH(1A) of the Migration Act are met; and

(b) the duty in s 198AD(2) is engaged.

25 As in *AOU21*, that is sufficient for the grant of declaratory relief in favour of the applicant. The applicant sought a declaration in different terms but I will make a declaration that the applicant no longer needs to be in Australia for the temporary purpose for which he was brought to Australia.

26 It is premature to grant other relief. The necessary facts to establish that the applicant no longer needs to be in Australia are quite recent. On the evidence before me, it is premature to make any order in the nature of mandamus requiring the respondents to remove the applicant. I am not satisfied, on the balance of probabilities, that it is currently reasonably practicable to remove the applicant to a regional processing country. The applicant does not want to be removed to Nauru, and until PNG changes its public health advice, it is not practicable to remove him to PNG.

27 The circumstances are thus similar to those confronting the Full Federal Court in *AOU21*. The appropriate course, as in *AOU21*, is to direct that the parties seek to resolve the remaining

[6] [2021] HCA 21

issues between them by mediation before a registrar of the Court. If those issues cannot be resolved, then a continuation of this proceeding may be necessary.

I certify that the preceding twenty-seven (27) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Driver.

Associate:

Dated: 3 August 2021

SCHEDULE OF PARTIES

SYG 2917 of 2020

Respondents

Fourth Respondent:	SECRETARY, DEPARTMENT OF HOME AFFAIRS