FEDERAL COURT OF AUSTRALIA

Chamoun v Commonwealth of Australia [2021] FCA 740

File number(s):	NSD 394 of 2021
Judgment of:	**KATZMANN J**
Date of judgment:	2 July 2021
Catchwords:	**MIGRATION** – objection to competency of proceeding – application by non-citizen in detention for writ of mandamus under s 39B of the *Judiciary Act 1903* (Cth) to compel Commonwealth to remove him from Australia to his country of citizenship – where s 476A(1) of the *Migration Act 1958* (Cth) limits the Court's original jurisdiction in relation to migration decisions despite any other law, including s 39B of the *Judiciary Act*, and where none of the circumstances listed in s 476A(1) applies, whether application is "in relation to a migration decision"
Legislation:	*Federal Circuit Court of Australia Act 1999* (Cth) s 39 *Judiciary Act 1903* (Cth) s 39B *Migration Act 1958* (Cth) ss 5, 5E, 13, 14, 198, 474, 476, 476A, 477, 486A, 486B *Migration Litigation Reform Act 2005* (Cth) *Federal Court Rules 2011* (Cth) r 31.24 Explanatory Memorandum to the Migration Litigation Reform Bill 2005 (Cth)
Cases cited:	*AFX17 v Minister for Home Affairs* [2020] FCA 807 *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 *Chamoun v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)* [2019] FCA 1520 *Chamoun v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 276 FCR 75 *Chamoun v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] HCASL 200 *DBE17 v The Commonwealth of Australia* (2019) 266 CLR 156 *Dunn v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 488 *Fernando v Minister for Immigration and Citizenship*

	(2007) 165 FCR 471 *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 146 *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 223; 385 ALR 405 *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL* [2020] FCA 394 *Mokhlis v Minister for Home Affairs* [2020] HCA 30; 382 ALR 1; 94 ALJR 843 *Okwume v Commonwealth of Australia* [2016] FCA 1252 *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 *Sebastian v State of Western Australia* [2008] FCA 926 *Tang v Minister for Immigration and Citizenship* (2013) 217 FCR 55
Division:	General Division
Registry:	New South Wales
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	72
Date of last submission:	11 June 2021
Date of hearing:	Determined on the papers
Counsel for the Applicant:	Dr J Donnelly
Solicitor for the Applicant:	Scott Calnan Lawyer
Solicitor for the Respondent:	Australian Government Solicitor

ORDERS

NSD 394 of 2021

BETWEEN:	**DORI CHAMOUN** Applicant
AND:	**COMMONWEALTH OF AUSTRALIA** Respondent

ORDER MADE BY:	**KATZMANN J**
DATE OF ORDER:	**2 JULY 2021**

THE COURT ORDERS THAT:

1. The application be dismissed as not competent.

2. The applicant pay the respondent's costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

KATZMANN J:

1 Dori Chamoun is an "unlawful non-citizen" within the meaning of that term in the ***Migration Act 1958*** (Cth), who has been held in immigration detention for over two years and who has repeatedly asked to be removed from Australia.

2 On 1 May 2021 he filed in this Court an originating application under s 39B of the ***Judiciary Act*** *1903* (Cth) seeking a writ of mandamus directing the Commonwealth to remove him from Australia to his country of citizenship. Apart from costs, no other relief is sought.

3 The application is based on s 198 of the Migration Act, which relevantly provides:

> *Removal on request*
>
> (1) An officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed.

4 "Remove" means "remove from Australia": Migration Act, s 5(1). An unlawful non-citizen is a non-citizen in the migration zone who does not hold a visa that is in effect: see Migration Act, ss 13 and 14. In substance, the "migration zone" is defined in s 5(1) of the Act to mean Australia and Australian resource and sea installations.

5 Mr Chamoun also relied on s 198(6), but that subsection has no bearing on his case. It is concerned with unlawful non-citizens who have applied for visas while in the migration zone but have been refused and whose applications have been finally determined. Mr Chamoun is not such a person. Rather, he is an unlawful non-citizen who held a visa but whose visa was cancelled.

6 The Commonwealth filed a notice of objection to the competency of the application. The question raised by the objection is whether the application is "in relation to a migration decision". If it is, the effect of s 476A of the Migration Act is that this Court lacks jurisdiction to hear and determine it.

7 Mr Chamoun carries the burden of establishing the competency of his application: *Federal Court Rules 2011* (Cth) (**FCR**), r 31.24(2). If the Court decides that an application is not competent, the application is dismissed: r 31.24(5).

8 The application was supported by an affidavit affirmed by Mr Chamoun's solicitor, Ziaullah Zarifi. The affidavit discloses that Mr Chamoun was a permanent visa holder who was refused Australian citizenship and whose permanent visa was subsequently cancelled by the Minister on character grounds. Mr Chamoun sought judicial review of the cancellation decision but his application was dismissed: *Chamoun v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)* [2019] FCA 1520. An appeal from that judgment was unsuccessful (*Chamoun v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 276 FCR 75), and the High Court refused special leave to appeal (*Chamoun v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] HCASL 200).

9 The affidavit also discloses that Mr Chamoun has made a number of written requests (both directly and through his legal representatives) that he be removed from Australia, first nominating Lebanon as his preferred destination and, after the Lebanese Embassy declined to issue him with a Lebanese travel document, Syria. Thus far, it appears from the affidavit, neither he nor Departmental authorities have been able to establish that he is a citizen of either Lebanon or Syria or, for that matter, any other country, or that he has a right to reside in either country or anywhere else.

10 The present application is brought in the Court's original jurisdiction.

11 Section 39B of the Judiciary Act relevantly provides that:

> (1) Subject to subsections (1B), (1C) and (1EA), the original jurisdiction of the Federal Court of Australia includes jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth.
>
> (1A) The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter:
>
> …
>
> (c) arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.
>
> Note: Paragraph (c) does not prevent other laws of the Commonwealth conferring criminal jurisdiction on the Federal Court of Australia

12 In relation to a "migration decision", however, this Court's jurisdiction is strictly limited by s 476A of the Migration Act.

13 Section 476A was part of a suite of amendments introduced by the *Migration Litigation Reform Act 2005* (Cth) (**2005 Act**). They included amendments to s 5, the insertion of s 5E, the repeal of ss 475A and 476 and their replacement by a new s 476 and s 476A. The new s 476 gave the Federal Magistrates Court the same jurisdiction as the High Court under s 75(v) of the Constitution. The 2005 Act also introduced uniform time limits in all migration cases. The purpose of these amendments, according to the **Explanatory Memorandum** to the Migration Litigation Reform Bill 2005 (Cth) (**2005 Bill**), was "to improve migration litigation". One way it sought to achieve that purpose was to direct migration cases to the Federal Magistrates Court (now the Federal Circuit Court) "for more efficient handling".

14 Section 476A relevantly provides as follows:

> **Limited jurisdiction of the Federal Court**
>
> (1) Despite any other law, including section 39B of the *Judiciary Act 1903* and section 8 of the *Administrative Decisions (Judicial Review) Act 1977*, the Federal Court has original jurisdiction in relation to a migration decision if, and only if:
>
> (a) the Federal Circuit Court transfers a proceeding pending in that court in relation to the decision to the Federal Court under section 39 of the *Federal Circuit Court of Australia Act 1999*; or
>
> (b) the decision is a privative clause decision, or a purported privative clause decision, of the Administrative Appeals Tribunal on review under section 500; or
>
> (c) the decision is a privative clause decision, or purported privative clause decision, made personally by the Minister under section 501, 501A, 501B, 501BA, 501C or 501CA; or
>
> (d) the Federal Court has jurisdiction in relation to the decision under subsection 44(3) or 45(2) of the *Administrative Appeals Tribunal Act 1975*.
>
> ...
>
> (2) Where the Federal Court has jurisdiction in relation to a migration decision under paragraph (1)(a), (b) or (c), that jurisdiction is the same as the jurisdiction of the High Court under paragraph 75(v) of the Constitution.

15 "Migration decision" is defined in s 5 of the Migration Act to mean a "privative clause decision"; "a "purported privative clause decision"; "a non-privative clause decision"; or "an AAT Act migration decision".

16 A "privative clause decision" is defined in s 474(2) to include, with exceptions not presently relevant "a decision of an administrative character made, proposed to be made, or required to

be made, as the case may be under [the Migration] Act or under a regulation or other instrument made under [the] Act (whether in the exercise of a discretion or not)".

17 A "purported privative clause decision" is defined in s 5E(1) to mean "a decision purportedly made, proposed to be made, or required to be made under [the] Act or under a regulation or other instrument made under [the] Act (whether in purported exercise of a discretion or not) that would be a privative clause decision" if there were not a failure to exercise jurisdiction or an excess of jurisdiction in the making of the decision.

18 Section 5E(2) provides that "decision" includes anything listed in subsection 474(3).

19 As Mortimer J observed in ***McHugh*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 223; 385 ALR 405 at [180], s 474(3) provides a broad and inclusive definition of "decision". Section 474(3) is in the following terms:

> A reference in this section to a decision includes a reference to the following:
>
> (a) granting, making, varying, suspending, cancelling, revoking or refusing to make an order or determination;
>
> (b) granting, giving, suspending, cancelling, revoking or refusing to give a certificate, direction, approval, consent or permission (including a visa);
>
> (c) granting, issuing, suspending, cancelling, revoking or refusing to issue an authority or other instrument;
>
> (d) imposing, or refusing to remove, a condition or restriction;
>
> (e) making or revoking, or refusing to make or revoke, a declaration, demand or requirement;
>
> (f) retaining, or refusing to deliver up, an article;
>
> (g) **doing or refusing to do any other act or thing**;
>
> (h) conduct preparatory to the making of a decision, including the taking of evidence or the holding of an inquiry or investigation;
>
> (i) a decision on review of a decision, irrespective of whether the decision on review is taken under this Act or a regulation or other instrument under this Act, or under another Act;
>
> (j) **a failure or refusal to make a decision**.
>
> (Emphasis added.)

20 The Minister submits that Mr Chamoun's application is "in relation to a migration decision" within the meaning of s 476A(1) because it seeks a writ of mandamus against the

Commonwealth for refusing to remove Mr Chamoun despite his written request or for failing or refusing to make a decision on his removal.

21 On the face of things, the Minister's objection is well founded. Removing or refusing to remove an unlawful non-citizen under s 198 constitutes a "privative clause decision for the purpose of the Act": ***M38/2002*** *v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 146 at [88] (Goldberg, Kenny and Weinberg JJ).

22 In his submissions in chief Mr Chamoun accepted that his application does not fall within any of the four categories listed in s 476A(1). He submitted, however, that the Court has jurisdiction because s 39B(1) of the Judiciary Act provides that the original jurisdiction of the Court includes jurisdiction concerning any matter in which a writ of mandamus is sought against an officer or officers of the Commonwealth and s 39B(1A)(c) provides that it also includes jurisdiction in any matter arising under a law of the Parliament and the Migration Act is a law of the Parliament. He contended that there is nothing in s 476A to abrogate the Court's original jurisdiction under s 39B(1).

23 These submissions must be rejected. They fly in the face of the opening words of s 476A(1): "Despite any other law, including section 39B of the *Judiciary Act 1903* ..." They are also at odds with the decision in ***Mokhlis*** *v Minister for Home Affairs* [2020] HCA 30; 382 ALR 1; 94 ALJR 843, upon which the Minister relies.

24 In *Mokhlis* at [12] Edelman J held that relief sought in relation to a decision required to be made under s 198(1) was a "migration decision".

25 Mr Chamoun submitted that *Mokhlis* provides little support for the Commonwealth's position because:

(1) it says nothing about whether this Court has original jurisdiction to entertain an application in relation to s 198;

(2) it did not determine whether an application by a non-citizen seeking a writ of mandamus relating to the duty in s 198 was concerned with "judicial review proceedings"; and

(3) it was a decision about an application by the Minister to remit the matter to the Federal Circuit Court, not about whether this Court has jurisdiction to resolve an application for mandamus with respect to s 198.

26 Each of these proposition is correct. But they do not gainsay the Minister's point.

27 In *Mokhlis* the applicant applied for a variety of remedies for harm he claimed to have suffered as a result of his prolonged period in immigration detention. The relief he sought included an injunction preventing his continued detention and a declaration that his detention had been unlawful at least since he had requested removal to Papua New Guinea. He relied on s 198(1) of the Migration Act. While it is true that in *Mokhis* the Minister was applying to remit the matter to the Federal Circuit Court, the application was opposed. Whether the High Court could remit the application to the Federal Circuit Court turned on the construction of s 476B(2) of the Act, which precludes the High Court from remitting to the Federal Circuit Court "a matter, or any part of a matter, that relates to a migration decision" unless that court has jurisdiction in relation to the matter, or that part of the matter, under s 476. It was therefore critical to his Honour's decision to determine whether the matter before him related to a migration decision and whether the Federal Circuit Court has jurisdiction in relation to that matter. His Honour observed at [10] that s 476 contains two relevant jurisdictional hurdles: the need for a "migration decision" and the fact that the Federal Circuit Court's jurisdiction is limited to the jurisdiction of the High Court under s 75(v) of the Constitution, namely, original jurisdiction in matters "in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth".

28 Edelman J held at [12]:

> The relief sought by the plaintiff concerns two migration decisions. One relevant decision that was made (not in the exercise of a discretion), which involved "doing ... any ... thing", was the detention of the plaintiff under s 189(1) of the *Migration Act*. Another is a decision which is required to be made under s 198(1) involving the act of removing an unlawful non-citizen as soon as reasonably practicable after that person asks the Minister, in writing, to be so removed.

29 The question whether this Court has original jurisdiction in the present case depends on whether the present proceeding is "in relation to a migration decision". The answer to that question similarly rests on whether a failure or refusal to discharge the duty imposed by s 198 is a migration decision. If relief is sought in relation to a migration decision, whether under s 39B of the Judiciary Act or any other Act, s 476A provides that this Court has no original jurisdiction.

30 Mr Chamoun submitted that the essence of the Commonwealth's argument was rejected in a similar context by Flick J in ***AFX17*** *v Minister for Home Affairs* [2020] FCA 807.

31 In *AFX17*, in reliance on s 39B of the Judiciary Act, an application was filed in this Court seeking, amongst other things, a writ of mandamus against two Ministers requiring them or their delegates to determine his application for a Safe Haven Enterprise Visa (**SHEV**) "on the basis that ss 501(1) and 501A(2)(a) of the [Migration] Act do not empower the refusal of the application". Unsurprisingly, his Honour did not issue a writ of mandamus, although he did make a declaration that the respondents had failed to make a decision with respect to the SHEV within a reasonable time.

32 Flick J rejected an argument advanced by the Ministers in reliance on s 476A(1)(c) that the Court had no jurisdiction to order mandamus to require the Minister to make a decision under s 65 of the Act (to grant or refuse a visa). His Honour acknowledged (at [39]) that a decision made under s 65 is not among the four classes of decision listed in s 476A(1). Noting the observation by Mason J in *Fountain v Alexander* (1982) 150 CLR 615 at 629, however, that the phrase "in relation to" is one "of wide and general import" and "should not be read down in the absence of some compelling reason for so doing", his Honour held (at [39]) that there was no compelling reason in that case to do so. His Honour also held (at [41]) that the question whether a matter is "in relation to a migration decision" is a question of fact, requiring "a factual analysis as to the manner in which a statutory power is sought to be exercised".

33 On the particular facts before him, Flick J determined (at [40] and [42]) that the decision to be made with respect to the application for a SHEV and an earlier decision made pursuant to s 501A(2) were "inextricably linked". He did so because AFX17 had been informed in writing that the power conferred by that section was to be exercised by the Minister personally at the same time as he considered whether to set aside a decision of the Administrative Appeals Tribunal in his favour in relation to the SHEV application.

34 His Honour's construction of the phrase "in relation to" is contrary to the construction given to it by the High Court in *Minister for Immigration and Border Protection v* ***SZSSJ*** (2016) 259 CLR 180. In *SZSSJ* the Court was concerned with the extent of the jurisdiction of the Federal Circuit Court, which is the subject of s 476. Section 476 relevantly provided that:

> (1) Subject to this section, the Federal Circuit Court has the same original jurisdiction **in relation to migration decision**s as the High Court has under paragraph 75(v) of the Constitution.
>
> (2) The Federal Circuit Court has no jurisdiction in relation to the following decisions:

…

(d) a privative clause decision or purported privative clause decision mentioned in subsection 474(7).

(Emphasis added.)

35 In the joint judgment at [60] all seven justices of the Court said:

> Conferral of that statutory jurisdiction on the Federal Circuit Court "in relation to migration decisions" is in a statutory context in which "migration decision" is defined to include a "privative clause decision" and a "purported privative clause decision" and in which s 474(1) operates to render a privative clause decision incapable of being called into question in any court other than for jurisdictional error. **Understood within that statutory context, the words "in relation to" are not words of expansion. They are words which connect the particular relief sought in a matter to a particular migration decision which is relevantly either a privative clause decision (because it is unaffected by jurisdictional error) or a purported privative clause decision (because it is affected by jurisdictional error).**
>
> (Emphasis added.)

36 I am unable to see why a different approach should be taken to the use of the same expression in s 476A. The statutory context is substantially the same. The High Court's construction must prevail over the construction given in *AFX17*.

37 In any event, the facts in the present case are far removed from the facts in *AFX17*. As the Commonwealth submitted, and contrary to Mr Chamoun's submission, the failure or refusal of the Commonwealth to remove him is not linked in any way to the Minister's decision to cancel his visa.

38 Mr Chamoun also submitted that s 476A(1) is only concerned with applications for judicial review.

39 He pointed out, correctly, that in ***Fernando*** *v Minister for Immigration and Citizenship* (2007) 165 FCR 471 at [22] Siopis J held that s 476A(1) is to be read as if the words "an application for judicial review of" were inserted between the words "in relation to" and "a migration decision".

40 *Fernando* was a claim for damages for the tort of false imprisonment brought by a person who had been held in immigration detention after his visa was cancelled. As in this case, the Minister filed a notice of objection to competency based on s 476A. His Honour held that the application was competent because a claim for damages is not an application for judicial review of a migration decision.

41 Similarly, in *Okwume v Commonwealth of Australia* [2016] FCA 1252 at [28] Charlesworth J held that s 476A did not stand in the way of an application for damages for false imprisonment, misfeasance in public office and negligence arising out of the making of migration decisions.

42 In *Tang v Minister for Immigration and Citizenship* (2013) 217 FCR 55 at [7] the Full Court (Rares, Perram and Wigney JJ) held that the expression "in relation to a migration decision" in Div 2 of Pt 8 of the Act, which includes s 476A, does not capture collateral challenges to an underlying migration decision, "such as might occur in a case alleging false imprisonment". The Full Court held at [9] that s 476A(1) is confined to jurisdiction to determine an application for "direct judicial review" of a migration decision and so does not prevent this Court from entertaining an application for judicial review of a decision of the Federal Magistrates Court (now the Federal Circuit Court of Australia) not to grant an extension of time to file an application for judicial review of a migration decision.

43 In ***DBE17*** *v The Commonwealth of Australia* (2019) 266 CLR 156 at [15] Nettle J, sitting alone, agreed. *DBE17* was a case about the scope of s 486B of the Migration Act, which is in Pt 8A of the Act, which also includes s 486A, and is concerned with restrictions on court proceedings. Section 486B(1) states that the section applies to "all proceedings" in the High Court, this Court and the Federal Circuit Court. Amongst other things, s 486B prohibits representative or class actions "in or by a migration proceeding". Nettle J held (at [34]) that the reference to "all proceedings" in s 486B means "all *judicial review* proceedings" and therefore did not extend to an action for damages in tort.

44 In all these cases the courts applied the reasoning in ***Bodruddaza*** *v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651. *Bodruddaza* was concerned with the scope of s 486A of the Migration Act, which then provided that:

> (1) An application to the High Court for **a remedy** to be granted in exercise of the court's original jurisdiction **in relation to a migration decision** must be made to the court within 28 days of the actual (as opposed to deemed) notification of the decision.
>
> (1A) The High Court may, by order, extend that 28 day period by up to 56 days if:
>
> (a) an application for that order is made within 84 days of the actual (as opposed to deemed) notification of the decision; and
>
> (b) the High Court is satisfied that it is in the interests of the administration of justice to do so.
>
> (2) Except as provided by subsection (1A), the High Court must not make an order

allowing, or which has the effect of allowing, an applicant to make an application mentioned in subsection (1) outside that 28 day period.

(3) The regulations may prescribe the way of notifying a person of a decision for the purposes of this section.

(Emphasis added.)

45 In that form (it was amended after *Bodradazza*, which held (at [60]) that it was invalid), s 486A was the result of amendments made by the 2005 Act. It was this Act that inserted s 476A and also s 476B, which was the subject of the decision in *DBE17*.

46 In *Bodradazza* at [22]–[25] the High Court upheld the plaintiff's argument that "the phrase 'a remedy … in relation to a migration decision' should not be given a reading which would take s 486A beyond public law remedies and into the area of what might be called collateral attack upon migration decisions". Two reasons were given by the plaintiff in support of that construction which the Court described as cogent.

47 The first was the extensive scope of the definition of "migration decision" in s 5(1) and, in particular, the inclusion of proposed decisions in the definition of "purported privative decision" in s 5E. The Court said at [23]:

> The tortious conduct completing a cause of action might well take place after the end of the eighty-four day period stipulated in s 486A by reference to actual notification of a migration decision. Such a draconian, if not irrational, legislative scheme should not be attributed to the Parliament in the absence of clear words.

48 The second reason set out at [24]:

> [T]he perceived mischief to which the 2005 Act was directed concerned the challenge by judicial review processes to migration decisions. The application to this Court identified in s 486A(1) is "for a remedy" by way of judicial review, specifically in a s 75(v) matter. The Explanatory Memorandum on the Bill for the 2005 Act circulated by the authority of the Attorney-General to the House of Representatives is instructive in this respect. Section 486A was one of several provisions included in the 2005 Act amendments with the avowed objective "to impose uniform time limits for applications for judicial review of migration decisions in the [Federal Magistrates Court], the Federal Court (in the limited circumstances that migration cases will be commenced in that Court) and the High Court".

49 Last year the Full Court in *McHugh* held that this Court has both jurisdiction and power to entertain and issue a writ of habeas corpus or make an order in the nature of habeas corpus. Allsop CJ, with whom Besanko J agreed at [74], said at [15]:

> The phrase "in relation to" has a meaning derived from *Bodruddaza v Minister for Immigration and Multicultural Affairs* [2007] HCA 14; 228 CLR 651 at 662–663, esp

> [22] and [25]. *Bodruddaza* concerned s 486A (in Pt 8A), but the Full Court in *Tang v Minister for Immigration and Citizenship* [2013] FCAFC 139; 217 FCR 55 at 57–58, esp [8]–[9], applied it to s 476A. *Tang* has the support of Nettle J (sitting as a single Justice) in *DBE17 v Commonwealth of Australia* [2019] HCA 47; 266 CLR 156 at 164 [14]–[15]. From these authorities, and having regard to the terms of the Explanatory Memorandum for the *Migration Litigation Reform Bill 2005* (Cth) discussed in *Tang* at 217 FCR 58 [8], the phrase "jurisdiction in relation to a migration decision" can be taken to be no wider than jurisdiction in public law remedies of direct judicial review of a migration decision. The phrase "in relation to" has no width or flexibility in this context beyond that. It does **not** include what might be called collateral attack upon a migration decision: *Bodruddaza* 228 CLR at 662 [22], such as a claim for false imprisonment available within jurisdiction under s 39B(1A)(c) and s 75(iii) of the Constitution by s 32(1) of the *Federal Court of Australia Act 1976* (Cth): *PCS Operations Pty Ltd v Maritime Union of Australia* [1998] HCA 29; 153 ALR 520 at 523–526 [6]–[13]. See also *Commonwealth v Okwume* [2018] FCAFC 69; 263 FCR 604; and *DBE17 v Commonwealth* [2019] HCA 47; 266 CLR 156.
>
> (Emphasis in original.)

50 His Honour observed at [16] that "in other contexts … habeas corpus can properly be described as a species of judicial review" but that in the context of s 476A(1) the writ is "to be more narrowly conceived" and does not involve direct judicial review of any decision.

51 None of these cases assist Mr Chamoun. That is because this proceeding is quintessentially an application for (direct) judicial review. An application for a writ of mandamus to require the Commonwealth (or an officer of the Commonwealth) to perform a statutory duty is precisely that. A writ of mandamus is one of the remedies for which s 75(v) of the Constitution provides. In ***Plaintiff S157/2002*** *v Commonwealth of Australia* (2003) 211 CLR 476 at 513 the High Court described s 75(v) as "an entrenched minimum provision of judicial review". Allsop CJ recognised this in *McHugh,* remarking at [18] that:

> The effect of s 476A(1) is that the Court has no jurisdiction in (that is, no authority to decide) direct judicial review of the decision to take Mr McHugh into detention under s 189 or any decision to continue or maintain his detention.

52 Mr Chamoun also relied on *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL* [2020] FCA 394, a judgment of Wigney J. In that case, the Minister argued that the Court had no jurisdiction to entertain an application for a writ of habeas corpus brought by a non-citizen in immigration detention by reason of s 476A(1) of the Migration Act, presumably on the ground that the matter was "in relation to a migration decision" of a kind not listed there. As his Honour put it, the Minister's argument was based on the fact that "some hypothetical officer somewhere in the Commonwealth must have made a decision to detain PDWL" (at [62]).

53 The matter came before his Honour on an urgent basis while he was duty judge. In an *ex tempore* decision his Honour rejected the argument. He did so for a number of reasons.

54 First, his Honour observed that there was no evidence that an officer had made a decision under s 189(1) of the Migration Act to detain the applicant (at [62]) and held that the mere fact that he was detained did not mean that a decision had been made by an officer to detain him (at [63]).

55 Second, his Honour held (at [65]) that an application to review a decision to detain a person under s 189(1) is not an application in relation to a migration decision for the purposes of s 476A.

56 Third, and in any case, his Honour said that PDWL's claim to be unlawfully detained had nothing to do with any migration decision (at [63]). Rather, his Honour considered that the application was properly characterised as an application for relief against an officer or officers of the Commonwealth for unlawful detention, in the nature of a mandatory injunction to compel the officer or officers to release him from detention, and would be within the Court's jurisdiction conferred by s 39B(1) of the Judiciary Act. Later, at [69] his Honour wrote that, "[e]ven if [the application] could be said to relate in some way to a hypothetical decision by an officer to detain PDWL under s 189(1) of the Migration Act, the most that could be said is that it involves a collateral challenge to that decision".

57 It does not seem that his Honour's attention was drawn to the extended meaning of "decision" in s 474(3). No mention was made of s 474 in the reasons. Be that as it may, as the Full Court recently confirmed in *McHugh*, this Court has jurisdiction to hear and determine an application for habeas corpus. The problem for Mr Chamoun is that the present application is not of this kind. Nor does it involve a collateral challenge to a migration decision. As I have already observed, it is a direct challenge by means of an application for judicial review.

58 Mr Chamoun highlighted a statement made in the Explanatory Memorandum to the 2005 Bill that applications for judicial review of migration decisions must be made within 28 days of a person having received actual notice of the decision he or she seeks to review. Mr Chamoun argued that it was "readily apparent" that he had not received actual notice of the Commonwealth's "deemed decision". He submitted that this circumstance supported his argument that his application does not involve direct judicial review. "Without notification of the deemed decision", he continued, "non-citizens are placed in a difficult position in

identifying the date of the migration decision to comply with prescriptive time limits". He contended that this would "tend to undermine two important objectives of the [Bill]", mentioned by the Attorney-General in his second reading speech: "to improve the overall efficiency of migration litigation" and to introduce time limits to "provide a balance between giving applicants an opportunity to seek judicial review of migration decisions and ensuring timely handling of these applications".

59 These submissions overlook the terms of s 477 of the Migration Act in which the time limits on applications to the Federal Circuit Court are imposed. Section 477(3) provides for a situation in which no notice of the decision has been given. It gives the court a discretion to decide on an appropriate date from which time should run. Whatever one might think of the merits of such an approach, it demonstrates that Parliament has taken into account the extended meaning of "decision". Section 477 provides:

> (1) An application to the Federal Circuit Court for a remedy to be granted in exercise of the court's original jurisdiction under section 476 in relation to a migration decision must be made to the court within 35 days of the date of the migration decision.
>
> (2) The Federal Circuit Court may, by order, extend that 35 day period as the Federal Circuit Court considers appropriate if:
>
> (a) an application for that order has been made in writing to the Federal Circuit Court specifying why the applicant considers that it is necessary in the interests of the administration of justice to make the order; and
>
> (b) the Federal Circuit Court is satisfied that it is necessary in the interests of the administration of justice to make the order.
>
> (3) In this section:
>
> ***date of the migration decision*** means:
>
> (a) in the case of a migration decision made under subsection 43(1) of the *Administrative Appeals Tribunal Act 1975*—the date of the written decision under that subsection; or
>
> (b) in the case of a migration decision made by the Administrative Appeals Tribunal in the exercise of its powers under Part 5—the day the decision is taken to have been made under subsection 362C(3), 368(2) or 368D(1); or
>
> (c) in the case of a migration decision made by the Administrative Appeals Tribunal in the exercise of its powers under Part 7—the day the decision is taken to have been made under subsection 426B(3), 430(2) or 430D(1); or
>
> (ca) in the case of a migration decision made by the Immigration

Assessment Authority—the date of the written statement under subsection 473EA(1); or

(d) **in any other case**—the date of the written notice of the decision or, **if no such notice exists, the date that the Court considers appropriate.**

(Emphasis added.)

60 Mr Chamoun appeared to contend that, if the Court were to find that this was a proceeding in relation to a migration decision, the Court should also find that it fell within the terms of s 476A(1) because the previous proceedings before the Court were "inextricably linked" and therefore "in relation to", the Minister's decision to cancel his visa. He pointed to the fact that in his reasons the Minister found that Mr Chamoun was not stateless because, on information provided by the Department of Home Affairs, Mr Chamoun would be eligible to apply for citizenship in the country in which his father was born, which was either Lebanon or Syria. Evidently, I interpolate, Mr Chamoun had given differing accounts of his parents' birthplace.

61 If this is a correct interpretation of that contention, it must be rejected. Whether it is reasonably practicable to remove a person from Australia at the time of a detainee's written request does not turn on the Minister's findings in his cancellation decision. For the reasons given in *SZSSJ* at [60] (cited above at [35]), the relevant relationship is between the relief sought in the present proceeding and the decision the subject of the review.

62 In any case, for the reasons given earlier, no matter how broadly one might interpret the phrase "in relation to", the failure or refusal to remove an unlawful non-citizen under s 198 or the failure or refusal to decide to do so is not a decision in relation to the Minister's decision to cancel a visa.

63 Mr Chamoun's submission was that, since he was not removed from Australia after his previous proceedings in this Court and, noting the relief he now seeks, "it is clear that the whole controversy has not been resolved between the parties". He argued that "[t]here is no reason, in principle, to think that this Court does not retain the power to make supplemental orders to resolve the whole controversy between the parties".

64 This submission was based on ***Sebastian*** *v State of Western Australia* [2008] FCA 926 at [26]-[27] in which Gilmore J said that superior courts of record do not become *functus officio* merely upon the making and entry of the judgment or order that determines the rights of the parties but retain the power to make supplemental orders not limited to orders in aid of the

enforcement and working out of the order determining the rights of the parties. Mr Chamoun also referred to the authorities his Honour cited, including the observation by Drummond J in *Australian Competition and Consumer Commission v The Shell Company of Australia Limited* (1997) 72 FCR 386 at 395, mentioned in *Sebastian,* that the Court's ancillary powers flow from the authority conferred by ss 22 and 23 of the *Federal Court of Australia Act 1976* (Cth) to resolve the whole of the controversy between the parties.

65 Mr Chamoun did bring an action in the Court's original jurisdiction in relation to a migration decision which was a privative clause decision or a purported privative clause decision made personally by the Minister under s 501 of the Migration Act and therefore within the terms of s 476A(1)(c). But the principle *Sebastian* is not to the point as Mr Chamoun is not seeking relief in that suit. This is a different proceeding. The previous proceeding was brought against the Minister. In that proceeding Mr Chamoun was challenging the Minister's decision to cancel his visa and the Minister's decision that he be transferred from one immigration detention centre to another. He applied for a writ of certiorari to quash the decisions. His principle purpose, no doubt, was to stay in Australia. In contrast, the present proceeding is brought against the Commonwealth. It is concerned only with the conduct of the Commonwealth. The Minister is not a party. His present purpose, at least ostensibly, is to be removed from Australia. Moreover, the orders Mr Chamoun seeks in the present proceeding are not "supplemental" to the orders made in the previous proceeding.

66 Besides, the subject of the present proceeding was not in controversy at the time of the previous proceeding. Until or unless Mr Chamoun made a written request of an officer to be removed from Australia and removal is reasonably practicable, s 198 is not engaged. No duty to remove an unlawful non-citizen arises when removal is not reasonably practicable: *M38/2002* at [64]. Whether in any particular case removal is reasonably practicable may depend on whether there is another country that will admit the unlawful non-citizen; if there is no such country, then his or her removal will not be reasonably practicable: *M38/2002* at [68].

67 Mr Chamoun also submitted that the exercise of power under s 198(1) does not involve the making of a decision. He contended that the exercise of power depended on an officer forming a state of satisfaction that it was reasonably practicable to remove the person and that once that state of satisfaction was formed, the officer was required to remove the person from Australia. He submitted that in those circumstances, there is no decision made by the officer, citing ***Dunn v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*** [2021]

FCA 488 at [20]. In *Dunn* at [20] Colvin J held that where the Minister reaches a state of satisfaction that a visa holder does not pass the "character test", s 501(3A) imposes a statutory requirement for the Minister to cancel the visa and that as a result, no decision is made by the Minister.

68 *Dunn* is irrelevant. Mr Chamoun takes the remarks of Colvin J out of context. In fact, the Migration Act treats the exercise of the power to cancel a visa under s 501(3A) as a decision: see, for example, s 501CA(1). His Honour's remarks were made in the context of describing the Minister's statutory task when deciding whether to cancel a visa. Besides, as his Honour acknowledged at the beginning of the paragraph, the Act itself refers to the process under s 501(3A) as a "decision". More relevantly, the question here is whether the application is made in relation to a "migration decision". As I have already observed, that term has a defined meaning which includes the failure or refusal to make a decision about removing a detainee or a refusal to remove a detainee.

69 There may be a factual question about whether the Commonwealth has actually refused to remove Mr Chamoun or refused to make a decision on his removal within the meaning of s 474(3)(g) or (j) respectively. But a failure to make a decision is a "decision" within s 474(3)(j). And because s 198 leaves it to the officer on whom the duty to remove would fall to consider whether removal is reasonably practicable in the circumstances of the case, the officer must make a decision on this question: *M38/2002* at [67]. Moreover, as Edelman J held in *Mokhilis*, a decision which is required to be made under s 198(1) involves the act of removing an unlawful non-citizen as soon as reasonably practicable after that person asks the Minister, in writing, to be so removed. An application for a writ of mandamus to require the discharge of a duty under s 198(1) is an application in relation to such a decision.

70 It follows that the present proceeding is in relation to a migration decision which is outside the scope of s 476A(1) and therefore beyond the jurisdiction of this Court.

71 For completeness, I note that in *obiter dicta* in *M38/2002* at [93] the Full Court expressed the view that, because of the construction given to s 474 by the High Court in *Plaintiff S157/2002,* it would be open to a person facing removal under s 198(6) who sought to impugn the failure or constructive failure of an officer to discharge his or her duty to seek relief by way of mandamus in this Court. Since the 2005 amendments to the Migration Act, however, that course is no longer open. Relief of that kind can only be sought and granted in the High Court

under s 75(v) of the Constitution or in the Federal Circuit Court under s 476 of the Migration Act unless an application is made to the Federal Circuit Court and transferred to this Court under s 39 of the *Federal Circuit Court of Australia Act 1999* (Cth). Neither the observations of the Full Court in *M38/2002* at [93] nor the reasons in *Plaintiff S157/2002* at [95]–[96] upon which the Full Court relied have been followed since the amendments introduced by the 2005 Act.

72 For all these reasons I find that the application is not competent and, in accordance with FCR r 31.24(5), it is dismissed. Costs should follow the event.

I certify that the preceding seventy-two (72) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Katzmann.

Associate:

Dated: 2 July 2021