[2022] HCATrans 123

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Sydney

No S102 of 2022

B e t w e e n -

ENT19

Plaintiff

and

MINISTER FOR HOME AFFAIRS

First Defendant

COMMONWEALTH OF AUSTRALIA

Second Defendant

KEANE J

TRANSCRIPT OF PROCEEDINGS

AT CANBERRA AND BY VIDEO CONNECTION

ON MONDAY, 8 AUGUST 2022, AT 9.28 AM

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HIS HONOUR: In accordance with the Court's protocol when sitting remotely, I will announce the appearances for the parties.

MS L.G. DE FERRARI, SC appears with **MR J.D. DONNELLY** for the plaintiff. (instructed by Zarifi Lawyers)

MS A.M. HAMMOND appears for the first and second defendants. (instructed by Australian Government Solicitor)

HIS HONOUR: Ladies, I have read the amended application for a constitutional or other writ filed on 6 July 2022, the notice of a constitutional matter filed 6 July 2022, the affidavit of Ziaullah Zarifi filed on 6 July 2022, the application of the plaintiff filed 22 July 2022 and the affidavit of Ziaullah Zarifi filed 22 July 2022, the response to the application – which is dated 3 August 2022, the affidavit of Jonathon Charles Hutton filed 3 August 2022, the affidavit of Chelsea Marie Wood filed 3 August 2022, and just as I was coming into Court I was handed a document described as the plaintiff's proposed minutes of orders, and a consent and a copy of the Minister's decision record provided by the defendants, redacted on the basis of legal professional privilege, public interest immunity, and privacy. So, that is the material that I have, and I have read but not studied.

Subject to what might be said, obviously, I would not be inclined to order remittal of the matter to the Federal Circuit and Family Court unless it appears that there is some issue of fact that needs to be resolved before the matter can be dealt with by the Full Court. My principal concern is in relation to the fate of the application of 22 July and in relation to the factual basis on which the matter can be referred to a Full Court for final determination. My particular concern, so far as the facts are concerned, relate to the facts or the question whether there is an issue of fact about the Minister's purpose in relation to the 22 June decision, and whether there is any issue of fact in relation to the section 57 point.

Subject to what the parties have to say about that, and subject to the orders that need to be made in relation to the application of 22 July in relation to the production of documents, I would be hoping to be able to make orders to refer the matter to a Full Court, to determination by the Full Court, and, I suppose, in terms of efficient disposition of proceedings this morning, the first order of business is to understand what the parties have or have not agreed in relation to the interlocutory application of 22 July in relation to the production of documents. So, as to that, can you assist me, Ms De Ferrari, as to where we are on that?

MS DE FERRARI: Yes, your Honour. The documents that were sought under 1(b), they have been produced. The document that was sought under 1(a), which the plaintiff says is the – can your Honour hear me?

HIS HONOUR: I can, thank you.

MS DE FERRARI: Which the plaintiff says is the decision record. We have been given a copy, as your Honour has noted, with various redactions. The position appears to be that, first of all, that the Commonwealth does not intend to take an active role, it is submitting to jurisdiction, as we understand it, presents a submitting appearance.

MS HAMMOND: If could assist the Court, that is not correct. Both defendants have filed one notice of appearance, both are represented by the Australian Government Solicitor, neither has entered a submitting appearance . . . . . unsure why that is a note on the plaintiff's proposed orders. The response last week was filed on behalf of both defendants.

MS DE FERRARI: Thank you for that.

HIS HONOUR: Well, there you are, Ms De Ferrari, it does seem that both defendants are taking an active role in the case.

MS DE FERRARI: Thank you, your Honour. So, it is both respondents, then, that say, effectively, that is not a relevant document, that is not a relevant document because the decision is actually the reasons for decisions, so that is the issue. We say the decision is that record, and, effectively, in any judicial review matter and constitutional writs matter of this nature, it is the whole of the materials that were before the decision-maker that should be before the Court, in any event. That goes both to the constitutional point and to the section 57 point. So, the material has been - - -

HIS HONOUR: Well, if I can interrupt, hopefully to assist, ordinarily, of course, at least these days, the matter would come before a Full Court on a case stated where the facts are agreed. Here, I understand the plaintiff's preferred course is to proceed on the basis of an affidavit exhibiting the Minister's decisions, and to invite the Court to make findings about the purpose of the Minister's decision on the basis of that material.

MS DE FERRARI: Thank you, your Honour. Not necessarily, we just did not want to pre-empt how the matter might proceed. Our client's concern is that there be a hearing and determination as soon as possible, so we did not want to pre-empt that it might be decided by a single Justice, which would be possible to be done, or by a Full Court. Obviously, if it is going to go to a Full Court, I do know, I understand the usual way is to do it by a case stated, and we fully intend to work on preparing that as quickly as

possible. So, the reason why the matter is before your Honour in the way it is, is simply because of the urgency on our client's part to go to a decision on his matter.

HIS HONOUR: Well, I certainly understand that, but a – inevitably, I think – however it gets there, the matter will ultimately be decided by a Full Court, and it should be decided by a Full Court, having regard to the issues that are raised. So, my concern, then, is, are we really at a stage where the first order of business does, is, and needs to be, the resolution, the final resolution, of the interlocutory application of 22 July, insofar as the Commonwealth does appear to be asserting that some parts of the document that is produced are properly redacted, either by reason of considerations of the public interest, or legal professional privilege, or otherwise.

If the matter is to proceed, we really need to have everybody on the same page as to what the facts are. It would be preferable if everybody were on the same page about the primary facts, such as the facts relating to the Minister's purpose. There are findings that have been made in the Full Court, I appreciate, in relation to an earlier decision, but in relation to which, as your material itself suggests, Ms De Ferrari, reveals a process of reasoning and purposes that are the same as the reasons for the 22 June 2022 decision. Can I just ask what you say should be made of the findings, in the findings of Justices Collier and Wheelahan? I mean, do you accept those findings as findings of fact, or do you say that they are open, that the question of the Minister's purpose is at large? I mean, what is your case about that?

MS DE FERRARI: We do not accept those as findings of fact that, in a sense, estop or are relevant to this Court. It is – your Honour obviously appreciates, it is an entirely decision-maker - - -

HIS HONOUR: I do.

MS DE FERRARI: - - - and it is also a personal decision of the Minister under section - - -

HIS HONOUR: I do, it is just that, in your application, it is asserted that the substance of the decision is the same, and the purpose is the same.

MS DE FERRARI: Yes. Yes, your Honour. May I take one step back, and take it on notice? And I fully appreciate and understand the position that your Honour is putting, that is, we need to get to what the facts are or are not agreed as quickly as possible for a case stated. As I said, we have worked to bring the matter before the Court urgently today, not intending to be presumptuous about the matter going to a Full Court, particularly when the respondents were saying it should actually go back to the Federal

Circuit Court, but, given that it is going to go to the Full Court, your Honour is quite right, we need to work very quickly on seeing whether there is agreement or not.

We say, effectively, your Honour, to answer, with some delay, your Honour's questions, we say that the Minister was in a position where it could not be said that my client presented any risk to the Australian community. He had served his sentence for the offence of people-smuggling that the Act itself says is the consequence, and has done that, and the Minister, having run out of any options to refuse the visa, decided to rely on the national interest and say, I want to send a signal, which is what we say is deterrence, I want to send a signal that if you come to Australia – even if you have done the time that the Act itself says is the consequence of the manner in which you have come to Australia – even if that has happened, if you are a refugee, if you have been involved in people-smuggling, you will never get a visa.

We say, that is the purpose. It is clear, on the Minister's reasons. If I might say so, the Minister doubled down on that in the conclusive certificate, said it again. Your Honour would be aware that the Minister has issued a conclusive certificate about that matter as well, which means it is a primary decision that, but for the certificate, could have gone to the independent authority, but now could to the Federal Circuit Court.

HIS HONOUR: I understand what you are saying. Can I say, though – I think I understand – that, the purpose that you say is the unconstitutional purpose, it might be said that it is simply a purpose not contemplated by the statute, but your point is that it is unconstitutional rather than simply not contemplated by the statute.

MS DE FERRARI: In a sense that - - -

HIS HONOUR: But, insofar as that is your case, that – you say that case is apparent on the face of the decision. If that is so, what is the relevance of the document you seek by order 1(a)?

MS DE FERRARI: That is the decision itself. So, your Honour, we say, one of the relief we are seeking is the quashing of the decision, removal into this Court and the quashing of the decision.

HIS HONOUR: Yes.

MS DE FERRARI: The reasons are not the decision. That document, 1(a), is the decision record.

HIS HONOUR: Okay. All right. So, that does seem to be step one. I might just ask Ms Hammond – Ms Hammond, what is your position, or your clients' position, in relation to the factual bases on which the matter would proceed to a Full Court? Is your side content for it to proceed on the affidavits of – the two large affidavits that have been filed thus far, or – how does your side see the case proceeding to a Full Court where the facts, the actual primary facts, are not in dispute?

MS HAMMOND: Yes, your Honour. I think it is apparent from the plaintiff's application and what my learned friend has said this morning that the plaintiff's case is really premised on, in substance, a challenge to the reasoning and findings of the Full Court majority in relation to the prior decision, which the plaintiff, as your Honour has noted, relies on as being in substance the same reasoning and the same purpose, and the Full Court majority expressly found that that was not an unconstitutionally punitive purpose.

So, to the extent that there is a factual question about the Minister's purpose in making the decision, the defendant's position is that that purpose was not punitive, and that is consistent with the reasoning of the Full Court majority, and we would say there is no prospect of agreement being reached between the parties that the Minister's purpose was punitive, which the defendants apprehend to be the plaintiff's position. So, we think that there will be an outstanding question there about what the Minister's purpose in making the 27 June decision this year was, whether your Honour considers that that is a question appropriate for determination by the Full Court or whether that is a dispute that should be resolved prior to it going to the Full Court, but it is obviously a key issue.

HIS HONOUR: Well, it might be that what is between you and Ms De Ferrari is not so much what the Minister actually had in mind, but the true legal character of the decision, that, insofar as the Minister's decision expresses an intention to send a message or to deter or to maintain confidence in the system by responding to the plaintiff's application, by deciding that the Minister is not satisfied that, for those reasons, for reasons associated with sending a message and disincentivising people-smuggling, that the Minister is not satisfied that the national interest warrants the granting of the visa.

Maybe what is between you is really a question that is more of a legal question about the character, the character of that purpose, rather than what the Minister is seeking to achieve in that regard, the immediate result that the Minister is seeking to achieve. If it is a question of the legal characterisation of what the Minister has said, then – and we can take the Minister at her word – then we do not really have a factual problem, do we?

MS HAMMOND: That may well be right in relation to the Minister's decision, your Honour, there is certainly no dispute that the statement of the Minister's reasons are what they are, and they are before the Court in the Hutton affidavit. I should note, for completeness - - -

HIS HONOUR: We all take them seriously.

MS HAMMOND: Yes. And the defendants, I should note, they do not necessarily accept the summary that has been given of them by Ms De Ferrari this morning, they obviously stand on their own terms, but it will be important to look at precisely the language and the reasoning used by the Minister, but there is certainly no dispute about what that language in the statement of reasons is.

HIS HONOUR: So, Ms Hammond, it would not be necessary to try to get further agreement between the parties as to the facts relating to the Minister's purpose – I am just concerned that, if the matter gets before a Full Court, and my colleagues are confronted with an argument that there is something different to be said about the facts of the Minister's purpose, they are going to be very angry at me, and rightly so.

MS HAMMOND: Certainly – yes, your Honour.

HIS HONOUR: So, that is why I am being so - - -

MS HAMMOND: And if there was any sense, for instance, in which the plaintiff sought to go behind the Minister's statement of reasons, and, for instance, rely on other evidence as to the Minister's purpose, then that may well be a significant factual dispute, but at the moment it is not apparent to the defendants that the plaintiff is seeking to do that.

HIS HONOUR: Well, Ms De Ferrari, is that right? I mean, can we all proceed on the confident basis that there is not some intention on the plaintiff's part to add to the case of purpose by evidence, or by reference to evidentiary materials that might strengthen the inferences, and as an inference of fact, as opposed to characterising what the Minister has said as a matter of law as to what the legal purpose served by the decision is?

MS DE FERRARI: That is correct, your Honour, but that includes, though, looking at the actual decision record, because not everything relevant to the inferences – obviously, we are not seeking to ascertain what was subjectively in the Minister's mind at that precise moment, assuming it was possible, and the only way to do that would probably be to have the Minister on the stand, we are seeking to do that by reference to the documents, and they include – they are – the decision record and the reasons for decision and all the other attachments that went with the brief

and the reasons for decisions, which was the material that was before the decision-maker. So, I put it badly at the beginning, I think I did say that what we are seeking to do is run our case on a basis of all of the materials that were before the decision-maker when she made the decision.

MS HAMMOND: Your Honour, is it helpful if I address on this issue of what the decision record is, that has now been referred to in a number of - - -

HIS HONOUR: It may well be, Ms Hammond. It may be helpful.

MS HAMMOND: Thank you, your Honour. The defendant's position is that the decision record is the set of documents which are exhibit JCH-1 to the Hutton affidavit, those are the statement of reasons and each of the attachments to the statement of reasons. The fact that the statement of reasons in this case is also the decision is evident from page 14 of the Hutton affidavit, which is the signature page, and which records the Minister's decision that it is not in the national interest for the plaintiff to be granted a SHEV, and we say that that document, with its attachments, is the decision record. That has been produced with no redactions to the plaintiff.

The defendants accept that there is a separate document, which is the submission from the Department to the Minister. That is not the decision record. It is signed by the Minister, as can be seen in the version that the plaintiff has sent to the Court this morning, acknowledging the receipt of the submission, and what the submission does is it notes that the Minister is making a decision elsewhere. It cannot be the decision itself, because what it does is it notes the decision is being made elsewhere, which is embodied in the statement of reasons. There is no fundamental or logical problem with the statement of reasons and the decision being the same document, though in some cases such as the orders of a court and the reasons of a court, they are distinct.

The defendants accept that the ministerial submission was before the Minister at the time the 27 June 2022 decision was made. Indeed, page 14 of the decision record in the Hutton affidavit records that there was consideration of the submission, and in that sense, we accept that it is potentially relevant to the grounds before the Court, which is why it has been produced to the plaintiff. We would say it is not properly within 1(a) of the 22 July application by the plaintiff, but the defendants are not interested, really, in that semantic argument. We accept that if the plaintiff wants to rely on the ministerial submission as part of the grounds and wants to seek an unredacted copy of that, then there is a dispute about that which will need to be resolved.

The redactions to the ministerial submission are, at the moment, in three categories. There are some for legal professional privilege, some for public interest immunity, and some which relate just to the full names and the telephone numbers of departmental officers, so those are the privacy redactions. The defendants understand, from communications between the parties in the last few days, that there is no challenge to the legal professional privilege redactions or to the privacy redactions, the only challenge is to the public interest immunity redactions, so that appears, to the defendants, to be a dispute that will need to be resolved, probably before much other substantive timetabling in the matter could occur.

The defendants accept that, to maintain their claims, PII, in relation to those redacted portions of the document, they will need to put on evidence, obviously, and the defendants have made some inquiries and would seek a period of 14 days in order to file evidence in support of the PII claims. The defendants note that in the plaintiff's proposed orders they are seeking for us to do it within two business days. The 14 days, your Honour, is a considered and realistic estimate. That period of time will be necessary because it is necessary to obtain an affidavit from a sufficiently senior, and probably very senior, deponent within the Australian Border Force.

HIS HONOUR: Thanks, Ms Hammond. Ms De Ferrari, it does seem – well, what I should say first of all is I am not entirely clear what it is you seek to get out of this document or out of an unredacted version of the document. I mean, I can understand why you might hope that it gives you something more in terms of your argument about purpose, but insofar as you have articulated your case about purpose, then what Ms Hammond says about the decision record does seem to be sufficient for that case. Insofar as you want to have the possibility – and I am not saying you should not – you want to have the possibility of improving that case, or strengthening it, or whatever, as a matter of evidence, and that that is prompting the pursuit of this document, then I think, if that is to be pursued, then it probably is – it probably really is the first order of business to resolve this question, the question of the public interest immunity.

MS DE FERRARI: Correct, your Honour.

HIS HONOUR: So, if that is where we are, then I think what we do now is organise a timetable for the determination of that application. So, is that where we are?

MS DE FERRARI: Yes, your Honour. Substantially yes.

HIS HONOUR: Okay.

MS DE FERRARI: For the reasons that your Honour has identified, may I say, for the record, we dispute the characterisations of the reasons as a decision, but that can be left for another day.

HIS HONOUR: Yes. Okay. How long do you think we will take to determine this question?

MS DE FERRARI: We have proposed some very short turnaround orders for the determination. The first thing is for the senior officer of the Commonwealth to put on a basis for it, and so the first thing is how quickly that can be done. We can certainly turn around submissions in response to whatever the respondent - - -

HIS HONOUR: Well, Ms Hammond is saying that the Commonwealth needs two weeks, two weeks to put the affidavit on.

MS DE FERRARI: Well, they have been on notice about the fact that we were disputing PII for some time. I mean – we have been pressing - - -

HIS HONOUR: Yes. Look, I understand you are very anxious, and I understand your client's position, no doubt he is very, very anxious, but all I can do is just deal with what has been put, and Ms Hammond is saying, for reasons that do not seem to be silly, that a very senior person needs to be sat down and instructions taken to produce an affidavit, and they are asking for two weeks. I mean, it does not help me at all to say they have known about this for a long time.

MS DE FERRARI: No. And – one would have thought that, before they said that they were compelled to claim public interest immunity, then they would have got advice about why there was public interest immunity.

HIS HONOUR: And, Ms De Ferrari, they probably have, but now they have to prove it.

MS DE FERRARI: No – I do not seek to argue with the two weeks, your Honour.

HIS HONOUR: All right. So – I will just get my diary, and we will try to organise the direction with a view to working back from a possible hearing date. So, the idea would be that you get Ms Hammond's affidavit, and then there would be your submissions in support of your application for production, and then Ms Hammond's response, perhaps a reply from your side, and then a hearing. Are they the steps?

MS DE FERRARI: Happy to do so, your Honour. The reason for the production, effectively, that that is the record and that is the evidence of

everything that was before the decision-maker, so, in a sense, I have already made them, but we can make them in writing very quickly once we have got the affidavit.

HIS HONOUR: All right. So – no doubt the submissions will not take very long from either side. Is that a fair assumption, Ms Hammond?

MS HAMMOND: Yes, your Honour.

HIS HONOUR: All right.

MS HAMMOND: Subject to what the plaintiff says, but - - -

HIS HONOUR: Okay. So, two weeks from today is the 22nd. So, three days after that for your submissions, Ms De Ferrari?

MS DE FERRARI: Yes, your Honour. The submissions on an application - - -

HIS HONOUR: This is just on the application for production.

MS DE FERRARI: Yes – three days - - -

HIS HONOUR: This is just on your application of 22 July.

MS DE FERRARI: Yes, your Honour.

HIS HONOUR: Okay. Ms Hammond.

MS HAMMOND: Your Honour, if I could highlight – I know we do not want to have the semantic fight, but the defendant's position is that this particular document does not fall within the terms of the 22 July application, and what we have indicated in correspondence is we just think, as a matter of formality, the application should be amended to make clear that it is the ministerial submission being sought, just as a matter of good order, whether or not - - -

HIS HONOUR: Yes. Good order is important. I think, Ms De Ferrari, we can take your application to have been – to be amended to seek production of the unredacted copy of the submission dated – the clearance date is 22 June 2022. Is there any other identifying date on it?

MS DE FERRARI: No, your Honour. That is correct, we are happy with that. It has a reference number, PDMS Ref. Number, if the orders want to reflect that as well, for the - - -

HIS HONOUR: All right. Well – so, we will take the application to be for production of the submission for decision, PDMS Ref. Number MS22-001278, so that is – we take the application of the 22 July to be amended to seek production of that document.

MS HAMMOND: Your Honour, I am sorry for interrupting, I think it should be an unredacted copy of that document save for redactions for legal professional privilege and privacy, which I understand are not challenged.

HIS HONOUR: All right. Is that right, Ms De Ferrari, those grounds are not challenged?

MS DE FERRARI: Those grounds are not challenged, your Honour, no.

HIS HONOUR: All right. So, it is on that basis, it is an unredacted copy of that document, unredacted save for grounds of privacy and legal professional privilege, Ms Hammond. So, the defendants are sufficiently apprised of the document of which production is sought.

MS HAMMOND: Yes, your Honour.

HIS HONOUR: In terms of good order, we are all on the same page. The respondents will file an affidavit in support of their claim for redaction on the basis of public interest immunity on or before the close of business on 22 August 2022. The plaintiffs will file their written submission in support of their application for production on or before the close of business on Friday 26 August 2022. The respondents will file their submissions in response on or before the close of business on 31 August 2022. That does not give you much time, Ms Hammond, but you will have had a lot of time to think about it and no doubt address these matters when the affidavit is being prepared.

MS HAMMOND: Yes, your Honour.

HIS HONOUR: Then we will – I will adjourn the application of 22 July 2022 to a hearing at 9.30 am on Monday 5 September 2022. I propose to reserve today's costs.

MS HAMMOND: Your Honour - - -

HIS HONOUR: Yes, Ms Hammond.

MS HAMMOND: I am led in the matter by Stephen Lloyd of Senior Counsel. I have his available dates for September – I am afraid he is not available on the 5th, but would be available on the 8th or the 9th, but I understand the nature of the jurisdictions that - - -

HIS HONOUR: Yes, I am afraid there is absolutely no prospect of being able to accommodate Mr Lloyd's convenience. I am very sorry for that, but there is just no prospect of it. Ms De Ferrari, do those orders suit you?

MS DE FERRARI: Your Honour, I am also in a trial from the 5th to the 9th and then the 12th to the 16th, but I will make sure that I am available on the date that the Court has set.

HIS HONOUR: Okay. Very well, then, I will adjourn the application, the plaintiff's application of 22 July 2022 to a hearing at 9.30 am on Monday 5 September. The other directions that I have made I expect to be complied with, and I reserve today's costs. Are there any other orders?

MS DE FERRARI: No, your Honour.

HIS HONOUR: Adjourn the Court, please.

AT 10.08 AM THE MATTER WAS ADJOURNED