[2003] HCATrans 523

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Melbourne

No M216 of 2003

B e t w e e n -

APPLICANT M38/2002

Applicant

and

MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

Respondent

Application for special leave to appeal

GLEESON CJ
McHUGH J

TRANSCRIPT OF PROCEEDINGS

AT MELBOURNE ON FRIDAY, 12 DECEMBER 2003, AT 10.17 AM

MR J.W.K. BURNSIDE, QC: If the Court pleases, I appear with my learned friend, **MR S.D. HAY**, for the applicant. (instructed by Maurice Blackburn Cashman)

MR A.L. CAVANOUGH, QC: If the Court pleases, I appear with my learned friend, **MR C.J. HORAN**, for the respondent. (instructed by Australian Government Solicitor)

GLEESON CJ: Yes, Mr Burnside.

MR BURNSIDE: Your Honours, the respondent intends to return the applicant to Iran where, on the facts which have to be assumed in a strike-out application, he faces a real risk of being tortured, imprisoned or killed for Convention reasons – the torture not for Convention reasons - - -

GLEESON CJ: He has been found not to be a refugee, is that right?

MR BURNSIDE: He has been found not to be a refugee, yes, because - - -

GLEESON CJ: And so the facts alleged simply assert that the finding was wrong.

MR BURNSIDE: They would involve contradicting the findings, that is true, your Honour. The torture ground, of course, does not involve that same challenge to the findings, because Article 3 of the Torture Convention, which prohibits refoulement, does not depend on a person being a refugee. The question is whether the power to remove conferred by section 198 is unlimited and whether it embraces a power to send a person to their death or torture. The Full Court dealt with the question as if the content of the power was clear and the question was whether there were circumstances in which the power might not be exercised.

GLEESON CJ: Are you talking about section 198(6)?

MR BURNSIDE: Yes.

GLEESON CJ: What you call a power is a duty, is it not?

MR BURNSIDE: It is both. It both authorises and requires.

GLEESON CJ: It says "must remove".

MR BURNSIDE: The question is what the word "remove" means. The section both confers a power and imposes a duty. They arise identically. The word has to be understood, it has to be given some content, and the

question is whether removal means removal in all circumstances, that is to say removal from Australia without any limitations, or whether it contains some implicit limitation.

Now, there are in theory a number of ways in which a person might be removed from Australia, thus meeting the apparent meaning of the word. They could be taken beyond territorial limits and left on a rock in the middle of the ocean. They would undoubtedly have been removed from Australia. They could be taken beyond territorial limits and left on a raft, or put on a iceberg off the Antarctic waters. They will have been removed from Australia. Equally they could, as is intended in this case, be taken to the hands of an executioner or torturer in Iran. They would still have been removed from Australia. Instinct rebels against the idea that a person could be removed from Australia simply by dropping them in the middle of the ocean. And the question is why that would not be removal, if it can be removal, to hand them over to an executioner or torturer.

In our submission, the word "remove" is ambiguous, contrary to the finding of the Full Court. The power to remove, in our submission, is constrained by ways referable to ordinary standards of common decency, so you do not place a person in circumstances where they will, naturally, perish. Equally, it is constrained by the limitations this country has adopted voluntarily by entering the Refugees Convention and the Torture Convention. If it is not the law that removal permits you to kill by exposing a person to the forces of nature, then, in our submission, it equally prevents this country from killing at one remove by handing over to an executioner or a torturer.

The matter can be tested in an interesting way by asking: if it be supposed that there were two countries equally willing to receive a person who is about to be removed, one of them offered safety and the other offered the certainty of torture or persecution on Convention grounds, would it be equally open to an officer to send the person to the hands of the executioner? Again, instinct rebels against that conclusion and, in our submission, the way it is prevented and made unavailable is by reading the content of the power to remove as constrained by our obligations under the Refugees Convention and the Torture Convention.

Now, if it is the case that the power to remove does not go so far as to permit returning a person to a place of torture or execution, then, in circumstances where it is established that that would be the consequence, there is no power to remove because removal is not possible because what was intended would not constitute removal. That person would then not be removable because it is not yet reasonably practicable to do so. If there is nowhere they can be removed to, then they cannot yet be removed.

It all hinges on the content of the power to remove. In our submission, Parliament cannot be taken to have intended that an officer of the Commonwealth should become an executioner at one remove or a torturer at one remove. And yet, if the power to remove from the country extends so far as to permit and require removal to a place of execution or torture, then, in our submission, that is precisely what the Act would be doing.

Accordingly, in our submission, you read down the content of the power to remove by reference to our Convention obligations. If that is so, then the Court always has jurisdiction to control the exercise of the power and to prevent its exercise, if the exercise intended would involve exceeding the power granted. If the power granted does not permit a person to be handed over to a torturer, then what is intended in this case is beyond the power granted. If that is the claim which is made, then the Court, in our submission, has jurisdiction to investigate the facts to see whether that is the circumstance in which the power is intended to be exercised.

The Full Court dealt with the matter on a different basis. The Full Court dealt with the matter as if the officer had to reconsider the refugee claim. In every place where the Full Court, and for that matter the primary judge, dealt with the power to remove, they dealt with it as if its content was clear and fixed and they never, we submit, grappled with the question whether the power to remove is constrained in the way that we contend for. Now, it would be enough for our case to accept that the power to remove given by the section would not permit a person to be dumped in the ocean beyond the territorial limits because if that is not permissible, then the word "remove" is ambiguous and the ambiguity has to be resolved.

The Full Court, in addition to treating the appeal on the footing that it required an officer to reconsider the refugee claim, simply did not deal with the claim that removal of the sort that was intended would involve handing over the applicant to a torturer. They did not deal with the torture claim at all, although they referred to it on a number of occasions. An alternative approach to the question, which we submit is also open to the Court, is this. If the power to remove is a power that is entirely unconstrained by reference to our Convention obligations or ordinary considerations of human decency, then the question arises whether it is reasonably practicable to return a person in the circumstances pleaded. Reasonable practicability can involve a constraint on what is capable of being done by reference either to practical considerations or to normative considerations.

In our submission, what is practicable is that which is able to be done. What is reasonably practicable is more limited. Where do the limits come from? The limits might come from a perception that the officer doing

the removing would face a personal risk if carrying out the task. Equally, we would submit that reasonable practicability involves a normative consideration, which is to say that it is not reasonably practicable to return a person – even though it can be done physically, it would not be reasonably practicable to do so if to do so would make the officer, in effect, a torturer or murderer at one remove.

For those reasons, and given that these questions involve the consideration of a provision which is of general application, and inevitably there are a number of cases, especially Iranian cases, which give rise to this problem, in our submission, the case is one suitable for the grant of special leave.

GLEESON CJ: Thank you. Yes, Mr Cavanough.

MR CAVANOUGH: If your Honours please, it is respectfully submitted that the decision of the Full Court below is plainly correct. There is no sufficient reason to doubt its correctness.

GLEESON CJ: I gather from what appears on page 18 of the application book, line 45, that this is an issue that has already been considered by Justice Hayne?

MR CAVANOUGH: Yes, in the matter of *SE*, which is in the folder of authorities that, I gather, has been provided to the Court. Do your Honours have that?

GLEESON CJ: Yes.

MR CAVANOUGH: It is No 1, a decision given on 25 November 1998. The relevant part commences at the third page of the Internet copy; it is part of paragraph 5(b), which sets out the argument that was put to his Honour. It commences:

> The delivery of a non-citizen to a country which is in a state of civil war and lawlessness –

do your Honours have that?

GLEESON CJ: Yes.

MR CAVANOUGH: Then his Honour deals with it, commencing at paragraph 14, under the heading "Removal to Somalia unreasonable". Your Honours will see how his Honour restated the submission, assuming the worst, if you like, against the Minister.

GLEESON CJ: The argument that was rejected appears in paragraph 18, is that right?

MR CAVANOUGH: Yes, that is right, your Honour. Indeed, his Honour said it was "not arguable" in paragraph 19.

GLEESON CJ: And that is the same as the argument we are considering today?

MR CAVANOUGH: Perhaps my learned friend would seek to distinguish it. I think in his outline he says that there is a difference. It has escaped me at the moment just what it was. There was not such clear reliance or emphasis on the particular Convention provisions in this case as my learned friend places in the present case, but nonetheless his Honour Justice Hayne said expressly that the return of a person pursuant to section 198(6) would not be prevented, notwithstanding:

> Australia's obligations under various international instruments concerning human rights –

and the footnote seems to be a reference to *Teoh*, which is, again, the case my learned friend relies on. So it is very close to the same argument but not exactly the same argument.

The other case, if your Honours happen to have the folder present, which supports our submissions, in my respectful submission, and which also supports what the Full Court did is *Brind* [1991] 1 AC 696, the decision of the House of Lords, which was the case relating to the ban on allowing representatives of the IRA to be heard on the BBC at a time of tension in England in 1991. It was said that that ban was in contravention of the European Convention provisions guaranteeing freedom of speech, a treaty that England had acceded to but which was not any part of the domestic law of England. Their Lordships held that there was no ambiguity sufficient in the provisions conferring power on the Secretary of State to issue the directives as would enable that power to be constrained by that treaty.

First of all, if I could take the Court to the sections which are in broad language similar to section 198(6), or we would say comparable to section 198(6) of the Act that we are concerned with – that is at page 716 of the report of the House of Lords decision. Your Honours will see about halfway down the page that the two empowering provisions are set out. Then the matter is dealt with firstly by Lord Bridge at page 747 to 748F, the point being that it is one thing to use an international treaty to resolve an ambiguity in a statute; it is another thing to use it to cut down the scope of a

discretionary power, or we would say to cut down the scope of a duty or the terms of a duty.

Then, if I could take the Court to Lord Ackner's speech at pages 760 to 761, it is really the whole of those two pages, but most particularly at 761F. Your Honours see the passage commencing:

> Mr Lester contends that section 29(3) is ambiguous or uncertain. He submits that although it contains within its wording no fetter upon the extent of the discretion it gives to the Secretary of State, it is accepted that that discretion is not absolute. There is however no ambiguity in section 29(3). It is not open to two or more different constructions. The limit placed upon the discretion is simply that the power is to be used only for the purposes for which it was granted by the legislation –

et cetera. We would say those observations apply precisely here. There is no relevant ambiguity here and the attempt to make use of international treaties in this way is impermissible. It would be, as I think one of their Lordships said, back door incorporation of the provisions of the treaties into domestic law.

Parliament has specified precisely how far those treaties are to be incorporated into our domestic law with respect to the Refugees Convention to a degree, and the matter has been dealt with accordingly, pursuant to the Act, to the extent that it does reflect the provisions that Parliament saw fit to incorporate. The Torture Convention has not been incorporated into our domestic law at all.

If I could make this other general response to what my learned friend said, it is simply not a justiciable question whether a person is a refugee and subject to refoulement. The question of refoulement is a term that arises in the Convention but it is not a matter that arises in our domestic law. One asks who would determine whether the applicant were a refugee? Are the courts of this country now to have jurisdiction at first instance to determine every refugee claim? That is, in effect, the consequence of my learned friend's submission.

Whether the allegation is of fear of death or serious injury or economic discrimination or whatever, the argument must be as good for one as for any other type of refugee claim or protection visa type claim. It would mean that the administrative mechanism set up by Parliament would be set at nought. It would just be a preliminary skirmish if it was to be used at all. For those reasons, we say it is simply not arguable.

GLEESON CJ: Thank you. Yes, Mr Burnside.

MR BURNSIDE: In our submission, Justice Hayne's decision in *SE* really does not deal with the question we seek to agitate. His Honour did not investigate the content of the power but only the circumstances in which the power might be exercised. This case concerned the content of the power. In our submission, the grant of a power to remove is ambiguous and if it does not contemplate the possibility that a person could be dropped in the middle of the ocean where they would perish, then the ambiguity is apparent. The question is how the ambiguity is to be resolved. That question simply was not touched in *SE*.

Second, our learned friend says that the case is not justiciable. In our submission, if there is a constraint on the power and a threat to exceed the power conferred, that is a question which is always justiciable in these courts. The reference to refoulement is simply a convenient shorthand for introducing an idea which has a well-identified content by reference to the relevant Conventions.

McHUGH J: But your point must come to this, that there is no power to remove a person to any place where that person might be persecuted for a Convention reason, for example.

MR BURNSIDE: I hesitate to use the word "remove" in that formulation of the question because it begs the question of what removal means, but we would say the power to remove does not go so far as to permit return to persecution on Convention grounds and it does not permit return to torture. The mechanism by which you find that constraint is by resolving the ambiguous content of a power to remove by reference to Convention obligations.

McHUGH J: There is no ambiguity, Mr Burnside. "Remove from Australia" is not ambiguous. It may have terrible consequences if it is exercised in a particular way but it is not ambiguous.

MR BURNSIDE: If it is not ambiguous, your Honour, then it would seem to follow that the officer could, and perhaps must, take the person beyond the territorial limits and leave them to perish.

McHUGH J: Well, that is so, and if somebody does that, then the government is answerable to the people of this country. But there is no ambiguity about it.

MR BURNSIDE: In our submission, it diminishes Australia's status as a decent nation if the power to remove includes a power to send a person to their death or to certain torture. If the Court pleases.

GLEESON CJ: The applicant seeks special leave to appeal from a decision of the Full Court of the Federal Court given by Justices Goldberg, Weinberg and Kenny, who in turn upheld a decision of Justice Marshall at first instance in the Federal Court. We are of the view that there are insufficient reasons to doubt the correctness of the decisions of the Federal Court to warrant a grant of special leave.

The application is refused with costs. We will adjourn for a short time to reconstitute.

AT 10.39 AM THE MATTER WAS CONCLUDED