



[2003] HCATrans 305

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Adelaide

No A206 of 2003

B e t w e e n -

MINISTER FOR IMMIGRATION AND
MULTICULTURAL AND
INDIGENOUS AFFAIRS

Applicant

and

AKRAM OUDA MOHAMMAD
AL MASRI

Respondent

Application for special leave to appeal

Office of the Registry
Adelaide

No A241 of 2003

B e t w e e n -

MINISTER FOR IMMIGRATION AND
MULTICULTURAL AND
INDIGENOUS AFFAIRS

Applicant

and

ABBAS MOHAMMAD HASAN
AL KHAFAJI

Respondent

Ex parte –

THE ATTORNEY-GENERAL OF THE
COMMONWEALTH

Office of the Registry
Adelaide

No A242 of 2003

B e t w e e n -

SHDB

Applicant

and

PHILIPPA GODWIN, DEPUTY
SECRETARY DEPARTMENT OF
IMMIGRATION AND
MULTICULTURAL AND
INDIGENOUS AFFAIRS

First Respondent

JULIE HELEN KEENAN, ACTING
DIRECTOR OF THE UNAUTHORISED
ARRIVALS SECTION IN THE
UNAUTHORISED ARRIVALS AND
DETENTION DIVISION OF THE
DEPARTMENT OF IMMIGRATION

AND MULTICULTURAL AND
INDIGENOUS AFFAIRS

Second Respondent

MINISTER FOR IMMIGRATION AND
MULTICULTURAL AND
INDIGENOUS AFFAIRS

Third Respondent

Ex parte –

THE ATTORNEY-GENERAL OF THE
COMMONWEALTH

Applications for removal pursuant to
section 40 of the *Judiciary Act* 1903

GUMMOW J
KIRBY J
HAYNE J

TRANSCRIPT OF PROCEEDINGS

AT ADELAIDE ON THURSDAY, 14 AUGUST 2003, AT 10.57 AM

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MR D.M.J. BENNETT, QC, Solicitor-General of the Commonwealth of Australia:
May it please the Court, I appear with my learned friend, **MS S.J. MAHARAJ**, in the
first of those matters, for the applicant; in the second matter, for the applicant
Attorney-General and the respondent Minister; in the third matter, for the applicant
Attorney-General and the three respondents to the appeal. (instructed by Australian
Government Solicitor)

MR S.W. TILMOUTH, QC: If the Court pleases, I appear in the first and second matters for the respondent with **MR H.M. HEUZENROEDER.** (instructed by Caldicott & Co)

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MS C.M. O'CONNOR: If the Court pleases, I appear for SHDB. (instructed by Hamdan Lawyers)

GUMMOW J: Yes, Mr Solicitor.

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MR BENNETT: May it please the Court. Your Honours, we have sought special leave in *Al Masri* and we have sought to remove the other two matters.

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GUMMOW J: If you are successful in the removals, there would be no utility in the leave application, would there?

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MR BENNETT: There is this utility, your Honour, that the three matters put a range of possible fact circumstances before the Court, and also the fact that - - -

KIRBY J: Yes, but you could refer to that in argument.

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GUMMOW J: You could refer to *Al Masri*.

KIRBY J: Mr Al Masri has left the country, has he not?

MR BENNETT: Yes, your Honour.

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KIRBY J: So why would we deal with his case? We do have quite a few migration matters, you know.

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MR BENNETT: Yes, I understand that, your Honour. Al Masri had left the country before the appeal to the Full Federal Court, and it took the view that it was not moot. We would respectfully remind your Honours of the decision of this Court in *Allen Commercial Constructions Pty Ltd v North Sydney Municipal Council* (1970) 44 ALJR 173. It was quoted in the decision below, but an erroneous reference was given – the CLR reference was given. This is a case where the High Court said:

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it must be in a rare case only that special leave to appeal should be granted where there remains nothing in the litigation except the question of costs. In the circumstances of this case however we think it desirable that the question of general interest should be determined - - -

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GUMMOW J: Yes, that is right, and the general interest here is dealt with by items 2 and 3.

50 **MR BENNETT:** Yes. Well, your Honour, the only other factor is this. There is first the factor that we get a spectrum of circumstances - - -

GUMMOW J: Well, we have that. We will be able to look at the judgment in *Al Masri*.

55 **MR BENNETT:** The second aspect is, your Honours, that *Al Masri* is a case which has generated a lot of controversy. Before it was decided, the - - -

60 **HAYNE J:** What does that matter at all, Mr Solicitor, if you are referring to controversy other than legal controversy?

MR BENNETT: No, I only mean legal - - -

65 **HAYNE J:** Yes. Well, the issue will arise in the section 40 removal cases, will it not?

MR BENNETT: It will, your Honour. There is always a risk in these cases that the person will be successfully removed before the hearing, as happened in *Al Masri*. That is one of the problems with just removing the other two, without the Court making it clear that they would determine the issue even if a person has been removed, which would be made clear if leave was granted in *Al Masri*. In my respectful submission, it is appropriate that special leave be granted in *Al Masri*, as well as the removals, but it is a matter for the Court.

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KIRBY J: Is there any point that will not arise, as a matter of law, or as a matter of reasonable argument, in the removal matters that would arise in the appeal from *Al Masri*?

80 **MR BENNETT:** No, your Honour, except that - - -

KIRBY J: The judges who take the view that *Al Masri* is clearly right or clearly wrong will take the same view about the issues debated in the other case.

85 **MR BENNETT:** They might not decide the same way on the particular facts, your Honours, but the issues of law would be the same. There might be a different result of applying the test in the different cases.

90 **KIRBY J:** Yes. I will just have to tell myself to put out of my mind, as an irrational consideration, the fact that, by reason of the legislation, we have

so many of these cases and to take on one where the person has left the country seems an excess of enthusiasm - - -

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MR BENNETT: Well, your Honour, it is an important - - -

KIRBY J: - - - when the matter can be argued fully in the matters to be removed.

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MR BENNETT: It does not add to the length, your Honour. My learned friend, Mr Tilmouth, appears for Al Masri, as well as for one of the other respondents. So it would make no difference to the length of the case. It would simply mean that the three matters were before the Court, rather than two, but I am in your Honours' hands on it. I do not want to say more about it.

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GUMMOW J: Thank you, Mr Solicitor.

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MR BENNETT: If the Court pleases.

GUMMOW J: We do not need to hear you, Mr Tilmouth, on the leave application, but in relation to matter 2, do you have anything to say there?

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MR TILMOUTH: Yes. Only that your Honours will have seen from the short submission we put we accept that the matter is well within the purview of removal. We just seek the condition as to the payment of costs in any event. That is paragraph 4 of our short written submission, your Honours.

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KIRBY J: Did you protest that it was moot?

MR TILMOUTH: We did, your Honour.

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KIRBY J: Yes, I think I read that.

MR TILMOUTH: Yes, in *Al Masri* we did and the Full Court dealt with it. What we put in our written submissions in *Al Masri* was still moot, because of the removal, and we suggested the appropriate vehicle was *Al Khafaji* and other cases which had been referred to in the appellate process in the *Al Masri* decision, towards the end of the judgment. Your Honours will remember there is a heading, other decisions of the court. We suggested the appropriate vehicle was one of those, including this matter of *Al Khafaji*.

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KIRBY J: Yes. That seems to entitle you to costs.

140 **MR TILMOUTH:** Yes. That, by the way, is on page 196 of the application book in *Al Masri*, where we put that submission.

GUMMOW J: In the removal application, you want a condition attached to the removal?

145 **MR TILMOUTH:** Yes, we do - - -

GUMMOW J: It is a removal as of right, you see.

MR TILMOUTH: Yes, I understand, but, if the Court pleases, as we read section 40, you can still attach a condition and we would submit it is perfectly proper in a case of this importance that there be - - -

150 **KIRBY J:** Surely, Mr Solicitor, if he wants to argue a matter of general principle, would not be resisting having the assistance of senior counsel here before the Court so that it can be properly argued, and that has a cost attached to it.

155 **MR TILMOUTH:** Yes. That is our submission, if the Court pleases.

GUMMOW J: We will hear what Ms O'Connor says and then we will come back to the Solicitor.

160 **MS O'CONNOR:** Thank you, your Honours. We agree, also, your Honours will see from the outline that we have filed, that the removal is by way of right; it clearly raises a constitutional issue. We did not put in our outline that we would want to make an application for costs, but we do, and I join with what Mr Tilmouth said about that.

165 **GUMMOW J:** Yes, thank you.

170 **MS O'CONNOR:** Thank you.

GUMMOW J: Yes, Mr Solicitor. Do you have anything to say on this costs condition?

175 **MR BENNETT:** No, your Honour, it is a matter for the Court, except that there may be a question as to whether there should be only one set of costs in the two matters, but that is a detail.

180 **GUMMOW J:** Yes. What do you say about that, Mr Tilmouth? They are going to be heard together.

MR TILMOUTH: Yes, as between 1 and 2?

185 **GUMMOW J:** No, as between 2 and 3.

KIRBY J: I think that is a bit mean. The Commonwealth usually turns up with three, possibly four, counsel, and here we are in this case where they are trying to stop somebody who is being brought into the Court to have their counsel and be represented. It seems, shall we say, less than usually generous on the part of the Commonwealth.

190 **MR TILMOUTH:** My short submission would be, your Honours, that that would be a taxation issue.

195 **GUMMOW J:** Yes, I think that is right. Now, have you framed the condition? Where do we see that? In the papers, have you framed the condition of costs?

200 **MR TILMOUTH:** Yes, we did, in paragraph 4, your Honour, of our written outline.

GUMMOW J: Just a minute.

205 **MR TILMOUTH:** The last two lines of paragraph 4. It was put in terms of an undertaking, but it could be an order. The only addition we would seek, your Honours, is there not be any set-off, if we were unsuccessful, against costs orders in the court below.

210 **KIRBY J:** But how could there be? It is a different person.

MR TILMOUTH: No, in the *Al Khafaji* matter, your Honour, he was successful before Justice Mansfield, and this one has been removed between Justice Mansfield and the Full Federal Court.

215 **GUMMOW J:** So you got your costs before Justice Mansfield?

MR TILMOUTH: Yes.

220 **GUMMOW J:** And you want a condition of the removal that that costs order be not disturbed in any event?

MR TILMOUTH: If the Court pleases, yes, in addition to the orders.

225 **GUMMOW J:** You also want the condition that, in this Court, the Commonwealth will bear in any event your reasonable costs.

MR TILMOUTH: Yes, if the Court pleases.

GUMMOW J: I think Ms O'Connor joins in that, in matter No 3 - - -

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MS O'CONNOR: I do.

GUMMOW J: - - - as to how the condition should be expressed. Is that right?

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MR TILMOUTH: Yes, if the Court pleases.

GUMMOW J: All right.

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MR BENNETT: Your Honour, the only other matter is that, as a matter of form, I submit, the condition should be against the Commonwealth, rather than the Attorney.

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GUMMOW J: Yes, that is right. Now, if later in the day you can come back with a reformulated set of conditions which takes into account all that we have just articulated, Mr Tilmouth, we will make the orders with those conditions.

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MR TILMOUTH: If the Court pleases.

GUMMOW J: But we need to have it on paper, so that it is quite clear.

MR TILMOUTH: Yes. I am obliged to the Court.

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GUMMOW J: So there will be orders in matter No 2, that is the matter A241 of 2003, on the notice of motion dated 9 July 2003, there will be an order that the whole of the cause constituted by proceedings S250 of 2002, pending in the Full Court of the Federal Court of Australia, be removed into this Court. There will be attached to that order a condition that will be formulated later in the day.

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There will be an order in matter No 3, on the motion also dated 9 July 2003 that the whole of the cause constituted by proceedings S445 of 2003, pending in the Full Court of the Federal Court of Australia, be removed into this Court, likewise, with the condition as indicated.

In matter No 1, the application for special leave, the application for special leave is refused with costs.

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Now, Mr Solicitor, I understand there is also pending in the Court a matter that comes here not by our grant of leave, but by virtue of a certificate under the *Family Law Act*, which you managed to obtain. That usefully can be joined with these matters, I think. It raises a different question, does it not?

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MR BENNETT: It does raise a different question - - -

280 **GUMMOW J:** Of the intersection between the *Family Law Act* and the *Migration Act*.

MR BENNETT: It raises a very different question and a much longer question, your Honour, although the decision of the Full Court of the Family Court followed the decision of *Al Masri*, in one aspect.

285 **GUMMOW J:** Yes, that is right. So they are entangled to a degree. It would be of utility if both sets of matters – the family law matter and the ones we have just removed – could be got ready for hearing in November.

290 **MR BENNETT:** Well, your Honour, there is an urgency with the family law matter - - -

GUMMOW J: I know. That is what I am saying. That is the earliest time we can do it.

295 **KIRBY J:** November is urgent.

MR BENNETT: I understood, your Honour, it had been set down for 30 September, for one day.

300 **GUMMOW J:** Are you sure?

MR BENNETT: Yes, your Honour. The degree of intersection is actually quite small, because most of the issues in the family law matter are issues separate from the *Al Masri* decision.

305 **KIRBY J:** Was that by order of a Justice, expediting the matter to that degree?

310 **MR BENNETT:** I am not sure of that, your Honour. It is simply the date we have been advised.

KIRBY J: I can only say that I am surprised.

315 **GUMMOW J:** Is this set down for Tuesday, 30 September, is it?

MR BENNETT: That is my understanding, your Honour.

320 **GUMMOW J:** Yes. Well, some consideration may have to be given to that, to connect it with this matter. We will look at that.

MR TILMOUTH: If the Court pleases, could I advise I am also counsel in that matter. The same solicitor as in the first matter is also my solicitor in that matter, so there is that connection as well.

325 **GUMMOW J:** Well, there is nothing more I can do about that at the moment, but if you send your junior back at a suitable stage in the proceedings with this draft condition.

330 **MR TILMOUTH:** I shall, your Honour. He is junior before the other panel in a matter which hopefully will be heard soon. If the Court pleases.

GUMMOW J: All right. Thank you.

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**AT 11.12 AM THE MATTERS WERE ADJOURNED
UNTIL LATER THE SAME DAY**

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UPON RESUMING AT 2.19 PM:

345 **GUMMOW J:** Yes, Mr Tilmouth.

350 **MR TILMOUTH:** Your Honours, in the second matter, *Al Khafaji*, we present a draft minutes of order setting out the conditions we are seeking. I understand that the applicant, or the appellant, rather, consents to those conditions on the removal.

GUMMOW J: Yes, thank you. What about the other matter? Have you something, Ms O'Connor?

355 **MS O'CONNOR:** Yes, I have. Likewise, we have also drafted draft minutes of order in relation to the matter of *SHDB* and I understand that the applicant in the matter before the Court consents to the orders that we are seeking.

360 **GUMMOW J:** Are they in the same form as Mr Tilmouth's are?

MS O'CONNOR: Similar. It was not - - -

365 **GUMMOW J:** You had better hand them up.

MS O'CONNOR: We did not get exactly the same orders from the court.

GUMMOW J: No, that is all right. You have three copies?

370 **MS O'CONNOR:** Yes.

GUMMOW J: The costs situation below is the other way around.

375 **MS O'CONNOR:** It is.

GUMMOW J: In matters Nos 2 and 3, we will make orders in accordance with the draft minutes which counsel has handed up, which I have initialled, dated and placed with the papers in the respective matters.

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AT 2.21 PM THE MATTERS WERE CONCLUDED