Cox v Minister for Immigration Multicultural & Indigenous Affairs & Ors
[2003] NTSC 111

PARTIES:	COX, Susan Jane (in her capacity as the Director of the NT Legal Aid Commission) v MINISTER FOR IMMIGRATION MULTICULTURAL & INDIGENOUS AFFAIRS AND CAPTAIN OF HMAS GEELONG AND COMMONWEALTH OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	172 of 2003 (20323795)
DELIVERED:	20 November 2003
HEARING DATES:	6 & 7 November 2003
JUDGMENT OF:	MILDREN J

CATCHWORDS:

ADMINISTRATIVE LAW

Habeas Corpus – prevention of non-citizens on ship from landing in Australia – whether amendment to Migration Regulation applied – whether non-citizens were arrested or detained – whether court had the power to issue a writ of Habeas Corpus.

Acts Interpretation Act 1901 (Cth), s 48
Migration Act 1958 (Cth, s 189, s 193, s 195, s 196, s 245F and s 256
Legal Aid Act 1990 (NT), s 8, s 12 and s 26
Supreme Court Rules 1987 (NT), O 57

Clark, D and McCoy G "Habeas Corpus", pp 138-140; 212-213
Sharpe, RJ "The Law of Habeas Corpus" 2nd Ed pp 222-224

Ex parte John Doe (1974) 46 DLR (3d) 547, applied.
Owen v South Australia (1996) 85 A Crim R 28 at 33; *Ruddock v Vadarlis* (2001) 110 FCR 491, followed.
Chin Yow v The United States (1908) 208 US 8; *re Klimowicz* (1954) unreported cited in 11 Halsbury (4th Ed) par 1482 footnote 2; *Somerset's case* (1772) 20 St Tr 1, referred to.

REPRESENTATION:

Counsel:

Plaintiff:	C McDonald QC & M Cvjeticanin
1st & 3rd Defendants:	D Bennett QC & B O'Donnell

Solicitors:

Plaintiff:	NTLAC
1st & 3rd Defendants:	Attorney General's Dept

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Cox v Minister for Immigration Multicultural & Indigenous Affairs & Ors
[2003] NTSC 111
No. 172 of 2003 (20323795)

BETWEEN:

SUSAN JANE COX (in her capacity as the Director of the NT Legal Aid Commission)
Plaintiff

AND:

MINISTER FOR IMMIGRATION MULTICULTURAL & INDIGENOUS AFFAIRS
First Defendant

AND:

CAPTAIN OF HMAS GEELONG
Second Defendant

AND:

COMMONWEALTH OF AUSTRALIA
Third Defendant

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 20 November 2003)

[1] This is an application for a writ of habeas corpus ad subjiciendum made pursuant to O 57 of the Supreme Court Rules against the first and third

named defendants only, the second defendant not having been served with the summons.

The plaintiff has standing

[2] The plaintiff brings this application in her capacity as Director of the Northern Territory Legal Aid Commission. Section 8(h) of the Legal Aid Act provides that in the performance of its functions the Commission shall make its services available to persons eligible for legal assistance by establishing such local offices, and by making such other arrangements, as it considers appropriate. Legal assistance may be provided to a person if the person is in need of assistance because the person is unable to afford the cost of obtaining from private legal practitioners the legal services in which legal aid is sought and if it is reasonable in all the circumstances to provide legal assistance: see s 26. The Commission has a history of providing advice and assistance to asylum seekers who have come to the Northern Territory.

[3] Under Legal Aid guidelines made pursuant to s 12 of the Legal Aid Act, priority in the provision of legal assistance is given to those classes of persons whose individual liberty is threatened by legal process. Second in order of priority are persons who would be more severely disadvantaged than others if legal aid is not provided (whether such disadvantage is expressed in terms of one or more economic, linguistic, educational, geographic or other factors). Fifth in order of priority are persons who have

a special need for legal aid because they have recently arrived in Australia and/or have difficulty in understanding the English language or the content and effect of Australian or Territory laws.

[4] On Wednesday 5 November 2003 the plaintiff read a report in the *Northern Territory News* that a fishing boat carrying asylum seekers from Turkey had arrived on Melville Island on 4 November and that subsequently the Navy patrol boat *HMAS Geelong* had been sent to the Island to take the asylum seekers to Nauru or Papua New Guinea to be processed.

[5] At 10.29am on 5 November 2003 Ms Cox sent a facsimile letter to the Director of the Darwin office of the Department for Immigration and Multicultural Indigenous Affairs (DIMIA) requesting that the Commission be given immediate access to the alleged asylum seekers. No response having been given, Ms Cox followed the matter up with telephone calls and a further fax at 4.15pm on the same day. As at the time of swearing her affidavit no response had been received.

[6] On 6 November 2003 the plaintiff arranged for a solicitor employed by the Commission, Ms Jennifer Devlin, to contact the Department to obtain information as to the location of the alleged asylum seekers and as to whether the Commission would be allowed access to them in order to ascertain whether they wished to obtain legal advice.

[7] Ms Devlin in her affidavit has sworn to the fact that she spoke to Angela Nauman, the Deputy Director of the Darwin office of the Department who

advised her that she was not in a position to provide any information as to the whereabouts of the alleged asylum seekers or of the Department's proposed course of action. Ms Nauman advised her that she would be in a position to give further advice the following morning. On the morning of 6 November a number of telephone messages were left by Ms Devlin for Ms Nauman to return her call. At approximately 9.15am Ms Nauman rang Ms Devlin to advise that that matter was being looked after by the central office in Canberra and she advised Ms Devlin to contact a Mr Walker, the Secretary of the Visa Framework Division. As a consequence of that Ms Devlin attempted to contact Mr Walker but was advised by his secretary that he was not in his office. She was directed to call Mr Steven Larkin, the Director of Policy. Ms Devlin then spoke to Mr Larkin and was advised by him that he was not in a position to provide her with any information as to what the Department intended to do. He suggested that Ms Devlin contact a Mr Jim Williams of the Entry Operation Area. At approximately 9.30am she rang Mr Williams who advised that he was not able to inform her as to the decision the Commonwealth had made regarding its plan to manage the situation.

[8] At approximately 9.50am Ms Nauman telephoned Ms Devlin to state that the contact person in Canberra had changed and that she was to contact Mr John Eyers, Assistant Secretary of the Legal Services and Litigation Area. Ms Devlin left a message with Mr Eyers to return her call. As at the time of swearing her affidavit her call had not been returned.

[9] Ms Devlin also attempted to contact Mr Damon Hunt the Media Advisor for the Minister for Immigration, but despite leaving two messages her calls were not returned.

[10] It is plain from this and also from the evidence of Mr Eyers, as well as other matters of evidence to which I will come, that the policy of the government was to operate as clandestinely as possible and to provide no access to the plaintiff or her officers and no information to the plaintiff or to the public through the media to the extent that this could be avoided. Not only were the plaintiff and her officers deliberately given the run around by the first and third defendants, but attempts to prevent the media from coming anywhere near the vessel were made by the imposition of a 3,000 metre exclusion zone over the Island and the closing of the airport to prevent the media as well as others from getting to the Island. Behaviour of this kind usually implies that there is something to hide. Even to this Court the information provided by Mr Eyers who was effectively the spokesman for the first and third defendants was quite minimal. All evidence has to be judged according to who has the capacity to call evidence. I bore that heavily in mind when considering my findings relevant to the question as to whether or not I should order that the writ should issue.

[11] No challenge was made by the Solicitor-General for the Commonwealth, Dr Bennett QC, who appeared for the 1st and 3rd defendants as to the plantiff's standing to sue. There is no doubt that an application for a writ of habeas corpus may be made by a person other than the person or persons

allegedly imprisoned unlawfully where the captor or captors are closely confined and cannot bring their own application: see R J Sharpe, "The Law of Habeas Corpus", 2nd Ed, at pp 222-224; Halsbury, 4th Ed, Vol 11, para 1476; D Clark and G McCoy, "Habeas Corpus", pp 138-140; 212-213; Supreme Court Rules, O 57.02(3) and O 57.02(7). In *Ex parte John Doe* (1974) 46 DLR (3d) 547, an application was brought by counsel who was not even able to determine the name of the detainee. That is this case.

The Evidence

[12] As to the evidence before me in relation to the alleged illegal immigrants, I am satisfied that at about 11.45am on Tuesday 4 November 2003 a twelve metre type III Indonesian fishing boat named the *Minasa Bone* arrived at Snake Bay on Melville Island with a crew of four Indonesians and 14 male passengers on board claiming Turkish nationality. The vessel is registered in Ujung Pandang and reportedly embarked its passengers from there.

[13] At a point about one kilometre away from the shore the vessel revved its engines so as to enable it to pick up speed. When it was about 60 metres from the shore the motor shut down and the vessel kept going until it struck the shore. This was at exactly 12.24pm Northern Territory time.

[14] Six males alighted from the vessel onto the beach. They were approached by a Mr Leslie Woodbridge who operates his own business as Top End Sport Fishing Safaris at Snake Bay. He approached the men and asked them who they were and what they were doing there. He said that they did not appear

to understand him, but instead pointed to their chests and said: "Turk, Turk, Turk". According to Mr Woodbridge these men could not speak English and appeared disorientated and kept pointing to their mouths. He ordered the men back onto the boat using hand gestures. The men who appeared to be all Europeans returned to the boat. Mr Woodbridge called out for the Captain. An Indonesian male came out from the wheelhouse and said in broken English "The motor broken. Australia, Australia?" Mr Woodbridge said, "Yes this is Australia". All on board the vessel then cheered.

[15] At this time a Mr Brown, the CEO of the Snake Bay Council was passing by in a small fishing boat. Mr Woodbridge instructed Mr Brown to tow the vessel back into deeper water. In the meantime Mr Woodbridge obtained his own boat and towed the vessel to a point about 400 metres offshore into eight fathoms of water. He cast off the towline and told the others to drop anchor which they did.

[16] He then gave them water filled with ice and a number of cold soft drinks.

[17] Also present at this time was Mr Gibson Farmer, the Chairman of the Milikarpiti Community Council who reported the landing to Customs.

[18] According to the affidavit of Mr Eyers, once Customs were advised they:

> "… initiated a response by border control agencies comprising, Customs, Australian Federal Police (AFP), DIMIA and Australian Quarantine and Inspection Service (AQIS) to fly to Melville Island to confirm the information and determine the status of the vessel. That team arrived at Melville Island at approximately 1645 Canberra time

on 4 November 2003. No member of this team boarded the vessel or spoke with any of the passengers or crew of the vessel."

[19] A boarding party from *HMAS Geelong* boarded the vessel in Australian waters on 4 November 2003 and a detention notice under s 245F of the Migration Act 1958 (Cth) was served on the Master of the vessel in English and Indonesian at or about 2110 Darwin time. The detention notice was issued by Lieutenant A P Staker, an officer of the Royal Australian Navy and alleged to be an "officer" for the purposes of s 245 of the Migration Act 1958. At some stage the vessel was taken in tow to a holding position 14 nautical miles north, northeast of Cape Laury with *HMAS Launceston* in support. The power which allegedly authorised this was s 245F(8) of the Migration Act. There the vessel remained for the next 37 hours until about 0100 hours on the morning of 7 November 2003 when *HMAS Geelong* commenced towing the vessel away from Australia. At the time of the hearing the vessel was under tow and on the high seas.

[20] Whilst the vessel was in the holding position, members of the Royal Australian Navy assessed the vessel as being seaworthy although some sabotage had apparently occurred with both engines and the steering had been damaged. That damage was repaired by the Navy on the early afternoon of 5 November. The vessel was assessed as being seaworthy and had the required safety gear, food and water on board. The passengers and crew had been checked by a Defence Force medical officer and on 5 November an Australian Federal Police/DIMIA team went on board and

conducted interviews with the crew and passengers to "elicit intelligence information regarding possible people smuggling".

[21] In cross-examination Mr Eyers confirmed that so far as he knew all 14 Turks and the four Indonesian crew were still on board the vessel and were not under arrest. The vessel at the time of the hearing had a boarding party from *HMAS Geelong* on board to ensure no further sabotage took place on the vessel.

[22] Mr Eyers in his affidavit said this:

> "14. If the person or persons in charge of the vessel requested to be detached from the towline in order to proceed anywhere in the world except Australia, subject to the Commander of the HMAS GEELONG being satisfied of the bona fides of that intention and subject to his being satisfied in relation to his obligations concerning the safety of life at sea, the towline will be detached and the vessel permitted to leave.
>
> 15. No person has been arrested under section 245F(3)(f) of the *Migration Act* 1958 or otherwise."

[23] Mr Eyers was not able to confirm that this information had been conveyed to anyone on board the vessel. Nor was Mr Eyers able to advise whether or not any interpreters in either Turkish or Indonesian had been employed at any time either by the Navy or by the Australian Federal Police/DIMIA team.

[24] Mr Eyers was asked specifically why Ms Cox's request to seek access to those on board the vessel was not acceded to. He replied that it was normal procedure that unless a person requested legal assistance it is not provided. He said that he did not know whether any of the persons concerned had

asked for legal assistance or not and did not know whether any of them had asked for asylum. Even allowing for the urgency under which this affidavit was sworn I found it incredible that the 1st and 3rd defendants' principal witness could not answer these questions.

Procedure

[25] The position of Dr Bennett QC for the first and third defendants was that the application was untenable and should be dismissed forthwith. Initially it was put that because the men were on the high seas the court had no jurisdiction to issue habeas corpus in respect of them, secondly that in any event the writ would not issue in respect of an illegal immigrant who was not in Australia, and thirdly, they were not in any event in detention. Following some preliminary submissions I adjourned the proceedings until the following day to enable the defendants to place some evidence before me.

[26] The position of counsel for the plaintiff was that there was a prima facie case that those on board the vessel were illegally detained, and that I should order the writ to issue (see O 57.03(1)(a)) and determine the issues finally on the return of the writ: see O 57.07.

[27] I have a discretion to deal with the matter if it can be disposed of without ordering the writ to issue: see *Owen v South Australia* (1996) 85 A Crim R 28 at 33 per Debelle J. However, I would only refuse to issue the writ if the plaintiff's claim was untenable and must be dismissed.

[28] Having heard the evidence on 7 November and the submissions of the parties, I dismissed the summons. I said that I would provide reasons at a later time. These are those reasons.

Excised off shore places

[29] On November 2003 an amendment was made to the Migration Amendment Regulations by Migration Amendment Regulation 2003 (No 8). The effect of that Regulation was to prescribe inter alia all islands that form part of the Northern Territory as an "excised offshore place" as defined by s 5(1) of the Migration Act 1958. The purpose of that regulation was clearly intended to effect the question of whether or not the Turkish non-citizens had to be placed into immigration detention. Counsel for the plaintiff, Mr McDonald QC submitted that the regulation had no application to the facts of this case because the regulation did not operate retrospectively. It is in my view unnecessary for me to decide this question in order to dispose of this application. However, I was prepared to accept that Mr McDonald QC's argument was probably correct for the purposes of deciding whether to in effect summarily dismiss the application.

[30] Mr McDonald QC submitted that s 5(1) of the Act provided that the regulation had the effect of excising the islands as from the time when the regulation commenced: see the definition of "Excision time" in s5(1). The regulation was gazetted in Special Gazette No S408 on 4 November 2003 and came into effect on that date. Pursuant to s 3(2) of the Acts

Interpretation Act 1901 (Cth), the effect of the gazettal is that the amending regulation came into operation immediately on the expiration of 3 November 2003. Section 48(2) of the Acts Interpretation Act 1901 provides that a regulation has no effect if it would take effect before the date of notification and as a result affect the rights of any person to the disadvantage of that person as at the date of notification.

[31] The plaintiffs' argument was that at the time of landing those who actually landed on the shore at Snake Bay did so at a time when the regulation had no effect. Therefore they were not then in "an excised offshore place".

[32] Consequently, so the submission went, there was a requirement by the Commonwealth under s 189(1) of the Migration Act 1958 to detain those persons. That in turn gave rise to the right to be told of the provisions of ss 195 and 196 of the Act and that in turn meant that the detainee had to be told that he had the right to apply for a visa. Furthermore, so the argument went, the detainees were then entitled under s 256 of the Migration Act 1958 to:

> "all reasonable facilities for … obtaining legal advice or taking legal proceedings in relation to his or her immigration detention".

[33] However, as Dr Bennett QC submitted, s 193 of the Migration Act 1958 provides that ss 194 and 195 do not apply to a person who entered Australia after 30 August 1994 and has not been immigration cleared since last entering.

[34] Furthermore, s 193(2) provides that apart from s 256 nothing in the Act required the Minister or any officer to give a person covered by s 193(1) an application form for a visa or to advise that person as to whether or not he may apply for a visa or to give that person an opportunity to apply for a visa or to allow such a person access to advice whether legal or otherwise in connection with applications for visas.

[35] Mr McDonald QC submitted that the government's attempt to affect the outcome by the passage of the Migration Amendment Regulations 2003 (No 8) was an attempt to thwart the ordinary process as contemplated by the Act. In my opinion the correctness or otherwise of Mr McDonald's submission has no relevance to whether or not the writ should lie. Whether or not unlawful non-citizens should have been detained under the Act is not a question which is relevant to the relief sought. On the contrary, the question which I have had to determine is whether or not there was evidence that the immigrants had been unlawfully detained or unlawfully arrested or imprisoned or in some other way had their freedom of movement unlawfully restricted such as to warrant the issue of the writ.

Have the crew and passengers on board the Minasa Bone been unlawfully detained or arrested?

[36] Leaving aside the provisions of s 245F(8) of the Migration Act 1958, there was ample evidence to show a prima facie case that the occupants of the vessel had been detained. They were on a vessel which was under tow by a ship from the Royal Australian Navy. There were crew members from

HMAS Geelong on board. The vessel was also guarded by another Navy patrol boat. An inference can be drawn from the cheering when the vessel arrived and those on board were told that they had arrived in Australia, the fact that a number of persons on board came ashore together with the fact that efforts had been made to damage the vessel's motor and steering, that the passengers on the vessel at least had sought to enter Australia for the purposes of applying for a protection visa of some kind.

[37] There is in my view no doubt that a writ of habeas corpus may lie where the form of detention involves no more than that a person has been detained upon a ship: see *Somerset's case* (1772) 20 St Tr 1; *re Klimowicz* (1954) unreported, cited in 11 Halsbury (4th Ed) par 1482 footnote 2; *Chin Yow v United States* (1908) 208 US 8.

[38] It was submitted, however, that the detention in this case was plainly lawful. Dr Bennett QC referred me to s 245F(8A) of the Migration Act 1958 which provides as follows:

> "If an officer detains a ship or aircraft under this section, any restraint on the liberty of any person found on the ship or aircraft that results from the detention of the ship or aircraft is not unlawful, and proceedings, whether civil or criminal, in respect of that restraint may not be instituted or continued in any court against the Commonwealth, the officer or any person assisting the officer in detaining the ship or aircraft."

[39] Notwithstanding the latter part of that section, I consider that it is open for this Court to decide whether or not the officer has detained a ship under the section and that of course must mean whether or not the detention of the

ship under the section was a lawful one. The difficulty I have is that it seems to me that s 245F may not apply to the circumstances of this case.

[40] Section 245F(1) provides:

> "(1) This section applies to a ship that is outside the territorial sea of a foreign country if:
>
> (a) a request to board the ship has been made under section 245B; or
>
> (b) the ship is a foreign described in subsection 245C(3) (which allows foreign ships on the high seas to be chased); or
>
> (c) the ship is an Australian ship.
>
> However, this section does not apply to a ship if a request to board the ship has been made under subsection 245B(6) or (7) (certain ships on the high seas), unless an officer is satisfied under subsection 245G(3) that the ship is an Australian ship."

[41] I am prepared to accept that there is evidence that the ship is outside the territorial sea of a foreign country. There is, however, no evidence that a request to board the ship had been made under s 245B. There is no evidence that the ship is a foreign ship described in s 245C(3). Such evidence, if it was available, was peculiarly within the knowledge of the 1st and 3rd defendants. There is evidence that the ship is a foreign ship and not an Australian ship. That being so, I am far from satisfied that the detention was lawful because it was a detention by an officer "under this section" (to quote the wording of s 245F(8A)).

Jurisdiction

[42] It was submitted initially that I did not have jurisdiction to issue a writ of habeas corpus because none of the persons in respect of whom the writ is sought to be issued were within Northern Territory waters. I do not consider that this is a valid answer to the question of jurisdiction. The court has got jurisdiction over the first and third defendants and it is alleged that they are the persons ultimately responsible for the custody of the persons concerned. I consider that this is sufficient to grant jurisdiction for the granting of a writ in this case: see R J Sharp, "The Law of Habeas Corpus", 2nd Ed at p 199.

The persons are aliens

[43] There is no doubt that a writ will issue in favour of an alien where the alien is being unlawfully held by someone who is subject to the court's jurisdiction. Indeed there are many cases where the validity of immigration detention has been tested by way of habeas corpus: see Halsbury supra at par 1467; Clark and McCoy, "Habeas Corpus" at p 145; R J Sharpe, "The Law of Habeas Corpus" 2nd Ed at p 172 – 173 and *Chin Yow v The United States* (1908) 208 US 8.

[44] However, there is a distinction in immigration cases between those aliens who are already physically within the jurisdiction of the court and those who are not. On the one hand an applicant may claim to have a lawful right of entry. In such a case there is authority that the writ will lie whether or not

the appellant is physically within the jurisdiction and notwithstanding that the immigration authorities are claiming that he has no lawful right of entry: see *Chin Yow v The United States*, supra. However, that is not this case. In the instant case there is no suggestion that any of the persons on board the vessel claim a right of entry under the Migration Act 1958 either because they are Australian citizens or have been already granted Australian residency or for any other just cause.

[45] That being so, as Dr Bennett QC submitted, the writ cannot lie for three reasons. First because the courts will not allow its processes to be used to cause those who plainly have no right of entry to be brought into the country; secondly because the moment the persons concerned are brought into the country they would be placed in immigration detention anyway; and thirdly because the relief that is being sought is not release from custody but the issue of a writ so as to enable the plaintiff to obtain instructions as to whether or not the applicants wish to apply for visas as refugees. In *Ruddock v Vadarlis* (2001) 110 FCR 491 the majority of the Full Court of the Federal Court held that in such circumstances the writ will not lie: see at 519 – 521 per Beaumont J and at p 548 per French J.

[46] In my opinion I consider that I ought to follow the decision of the majority in *Ruddock v Vadarlis* on this issue (which I respectfully consider to be correct). It is well established that the purpose of the writ is to secure the release of those unlawfully detained: see, for example, Halsbury, 4th Ed, Vol

11, para 145Z. As this is not sought and cannot be achieved in the circumstances of this case, the writ does not lie.

[47] These are the reasons for rejecting the plaintiff's application and for the dismissal of the summons. I will hear the parties as to costs.
