Supriadin v Minister for Immigration & Citizenship [2011] NTSC 45

PARTIES:	BALA SUPRIADIN, UMAR NASRUDIN, BATCO ALDI, BAMISE SEM, ARSYAO FAIZAL, DICKUAN DOMUN, SORU DITO, TONG ADENEO, UDIN, RASID MUHAMMAD, RANDIN RAMDAN, ARSAD MAU SYARIF, DARMANSYA, RANDY LAODE AND ABDULLAH MANCORA BY THEIR LITIGATION GUARDIAN SUZAN JANE COX v THE MINISTER FOR IMMIGRATION AND CITIZENSHIP
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	NO 51 OF 2011 (21114436)
DELIVERED:	24 JUNE 2011
HEARING DATES:	13 MAY 2011
JUDGMENT OF:	MILDREN J

CATCHWORDS:

HABEAS CORPUS – whether plaintiffs unlawfully detained – unlawful non-citizens held in detention in the migration zone – plaintiffs all infants – no

criminal charges laid – effect of stay certificates – no visas – whether plaintiffs have been detained too long – *Migration Act* (Cth) – applications dismissed

Acts Interpretation Act (Cth), s 33(2)
Law Officers Act, s 17(2)
Migration Act 1958 (Cth), s 5, s 14, s 147, s 147, s 150, s 162, s 172(1), s 189, s 193(1)(b), s 193(2)(b), s 194, s 195, s 196(1), s 196(3), s 198, s 250
Supreme Court Rules, O.57.02(2)

Cox v Minister for Immigration & Multicultural & Indigenous Affairs (2003) 13 NTLR 219, followed

REPRESENTATION:

Counsel:

Plaintiff:	S Lee
Defendant:	P d'Assumpcao

Solicitors:

Plaintiff:	Robert Welfare
Defendant:	Australian Government Solicitor

Judgment category classification:	A
Judgment ID number:	Mil11493
Number of pages:	11

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

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No 51 of 2011 (21114436)

BETWEEN:

BALA SUPRIADIN
UMAR NASRUDIN
BATCO ALDI
BAMISE SEM
ARSYAO FAIZAL
DICKUAN DOMUN
SORU DITO
TONG ADENEO
UDIN
RASID MUHAMMAD
RANDIN RAMDAN
ARSAD MAU SYARIF
DARMANSYA
RANDY LAODE and
ABDULLAH MANCORA

BY THEIR LITIGATION GUARDIAN SUZAN JANE COX
Plaintiffs

AND:

THE MINISTER FOR IMMIGRATION AND CITIZENSHIP
Defendant

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 24 June 2011)

[1] On the 13 May 2011, counsel for the plaintiffs made an application for an order for a Writ of Habeas Corpus directed to the defendant. The application was made on an urgent basis. I made orders dispensing with compliance with Rules 57.02(4)-(7) both inclusive. These rules require the application to be made on notice by summons. I directed that the writ be returned on 13 May at 10:00 am.

[2] On that date, after hearing submissions, I made orders removing Abdullah Mancora, Randin Ramdan, Soru Dito and Udin as plaintiffs. I have also ordered that the proceedings in relation to the Writ of Habeas Corpus be dismissed. I said I would publish my reasons at a later time. I now publish my reasons.

Facts

[3] Each plaintiff is an unlawful non-citizen within the meaning of s 5 and s 14 of the *Migration Act 1958* (Cth) (the Act). Each plaintiff is currently detained in the "migration zone", specifically the Northern Territory Immigration Detention Centre at Berrimah House in the Northern Territory. None of the plaintiffs had yet been charged with an offence under the Act. There was evidence that each of the plaintiffs was under the age of 18 and each had been on board a vessel that was used in connection with the commission of an offence against Australian law. Stay certificates had been issued by the Attorney-General for each of the plaintiffs pursuant to s 147 of the Act, except for the plaintiff Udin. The ages of the plaintiffs range from

12-16 or 17 years of age. Most of the plaintiffs arrived at Christmas Island at various dates between 14 August and 2 December 2010. The plaintiff Bamise Sem has not filed an affidavit, but there is evidence a person called Pamise Sem arrived in Australia on or about 24 March 2011. He appears to have arrived originally at Ashmore Reef.

[4] So far as Arsyao Faizal is concerned, he arrived in Australia on about 24 March 2010 and appears also to have arrived at Ashmore Reef. The records indicate that both of those plaintiffs were detained in Broome.

[5] So far as the plaintiff Randin Ramdan and Soru Dito are concerned, there is evidence that those plaintiffs no longer have criminal justice stay certificates in force and were scheduled to be removed from Australia on 18 May 2011. So far as the plaintiff Udin is concerned, there was no stay certificate in respect of him. He was tentatively scheduled for removal from Australia on 15 May 2011. For those reasons those plaintiffs did not seek to continue with their applications.

[6] So far as the plaintiffs Randy Laode and Abdullah Mancora are concerned, these plaintiffs were added at the hearing on 13 May. Because of the late notice of their joinder, the defendant did not have an opportunity to be prepared in respect of their applications. I treated their applications as an application for the issue of a writ pursuant to O.57.02(2) of the *Supreme Court Rules*. The affidavit of Randy Laode indicates that he is an Indonesian national born on 2 December 1995 on Roti Island in the Republic

of Indonesia. He claims now to be 15 years of age and normally is occupied as a fisherman. His normal place of residence is Roti Island. He was onboard a vessel containing 60 persons which was met at Ashmore Reef by the Australian Navy. Like many of the others, he was taken to Christmas Island and then transferred to Darwin in immigration detention on 6 May 2011.

[7] So far as the plaintiff Abdullah Mancora is concerned, he claims to have been born on 14 July 1998 on Roti Island and is presently aged 12. He usually lives on Roti Island where he is employed as a cook. He was also onboard a vessel on which there were about 50 people onboard. It is not clear where he was apprehended, but he claims to have been apprehended on the 11 December 2010. Subsequent to his detention, he spent five months on Christmas Island until he arrived in Darwin on Friday 6 May 2011.

[8] It is not in dispute that the question which I had to determine was whether or not the plaintiffs 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 an order that the plaintiffs be released from custody. In the case of Randy Laode and Abdullah Mancora, the question is similar, namely whether or not there was evidence that they had been unlawfully detained, 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.[1]

[9] Sub-section 189(1) of the Act provides that if an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person. Presently, each plaintiff is in the migration zone.

[10] Sub-section 196(1) of the Act provides that:

> (1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:
>
> (a) removed from Australia under section 198 or section 199;
>
> (b) deported under section 200;or
>
> (c) granted a visa.

[11] Sub-section 196(3) provides:

> (3) To avoid doubt, sub-section (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa.

[12] Sub-section 198(2) of the Act provides:

> (2) An officer must remove as soon as reasonably practicable an unlawful non-citizen:

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[1] See *Cox v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 13 NTLR 219 at 229 [35].

(a) who is covered by subparagraph 193(1)(a)(i), (ii) or (iii) or paragraph 193(1)(b), (c) or (d); and

(b) who is not subsequently been immigration cleared; and

(c) who either:

(i) has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; or

(ii) has made a valid application for a substantive visa that can be granted when the applicant is in the migration zone, that has been finally determined.

[13] Sub-section 193(1)(b) of the Act refers to a person detained under s 189(1) who has entered Australia after 30 August 1994 and has not been immigration cleared since last entering.

[14] The words "immigration cleared" are defined by s 5 to have the meaning given by s 172(1). The evidence does not support a finding that any of the plaintiffs have been immigration cleared.

[15] Furthermore, s 194 and s 195 do not apply to any of the plaintiffs by virtue of s 193(2)(b) of the Act with the consequence that an officer is not required to comply with s 194, i.e. to tell any of the plaintiffs of the consequences of his detention, or to tell any of them that they may apply for a visa under s 195.

[16] The consequences of the plaintiffs' detention is dealt with by s 250 of the Act which provides:

250 Detention of suspected offenders

(1) In this section:

suspect means a non-citizen who:

(a) travelled, or was brought, to the migration zone; and

(b) is believed by an authorised officer on reasonable grounds to have been on board a vessel (not being an aircraft) when it was used in connection with the commission of an offence against a law in force in the whole or any part of Australia.

(2) For the purposes of section 189, an officer has a suspicion described in that section about a person if, but not only if, the person is a suspect.

(3) A non-citizen detained because of subsection (2) may be kept in immigration detention for:

(a) such period as is required for:

(i) the making of a decision whether to prosecute the suspect in connection with the offence concerned; or

(ii) instituting such a prosecution; and

(b) if such a prosecution is instituted within that period—such further period as is required for the purposes of the prosecution.

(4) Without limiting the generality of paragraph (3)(b), the period that is required for the purposes of a prosecution includes any period required for:

(a) any proceedings in connection with the prosecution; and

(b) the serving of any custodial sentence imposed because of the prosecution; and

(c) the institution of, and any proceedings in connection with, any appeal from any decision in relation to the prosecution.

(5) If the period for which a person may be kept in immigration detention under subsection (3) ends, he or she:

(a) must, unless he or she has become the holder of a visa, that is in effect, to remain in Australia, be expeditiously removed from Australia under section 198; and

(b) may, at the direction of an authorised officer, continue to be detained under section 189 until so removed.

[17] As no proceedings have been instituted against any of the plaintiffs, each of the plaintiffs may be detained under s 250(3) for such a period as is required for the making of a decision whether to prosecute the suspect in connection with the offence concerned. Once that time has elapsed, s 250(5) requires that the person kept in immigration detention must, unless he or she has become the holder of a visa, be expeditiously removed from Australia under s 198 and may, at the direction of an authorised officer, continue to be detained under s 189 until so removed.

[18] No evidence has been brought before me to show at what stage the decision to prosecute has reached. At least one of the plaintiffs has been detained for well over a year. On the face of it, this seems rather an extraordinarily long time for a decision to prosecute to be made. However, these proceedings are

brought against the Minister who is not responsible for the decision to prosecute. That decision is with the Director of Public Prosecutions for the Commonwealth, or perhaps ultimately, the Attorney-General for the Commonwealth. In any event, as s 150 of the Act makes clear, whilst a criminal justice stay certificate about a non-citizen is in force, the non-citizen is not to be removed or deported.

[19] Section 162 of the Act provides, in effect, that if the presence in Australia of a non-citizen in respect of whom a criminal justice certificate has been given is no longer required for the purpose for which it was given, then the Attorney-General is to cancel it, but before doing so an adequate time must be given to inform the Secretary when it is to be cancelled, the expected whereabouts of the non-citizen when it is cancelled and the arrangements for the non-citizen's departure from Australia.

[20] It is plain that the effect of these provisions is that s 250(5)(a) cannot be engaged so long as a certificate is in force.

[21] No challenge was made to the validity of the certificates in this case. I note that in each case the certificate was not made by the Attorney-General personally, but by a delegate, or at least by a person purporting to be a delegate, of the Attorney-General. The Attorney-General has a power of delegation under the *Law Officers Act* s 17(2). It was not submitted that there was any legislative provision which precluded the Attorney from

delegating his power.[2] On the face of the certificate, it is valid, no challenge having been made to it.

[22] Counsel for the plaintiffs submitted that the powers contained in s 189, s 147 and s 250 are open ended. As the plaintiffs are all minors, decisions must be made promptly about whether to prosecute them or not. It was submitted that I should read s 250(3)(a) as requiring the making of a decision to prosecute within a reasonable time and that if the time was not reasonable, it was open to the Court to find that they should be expeditiously removed. Without deciding whether that is so or not, and accepting for the purposes of the argument Mr Lee's submission, there is simply no evidence upon which I could find that any of the plaintiffs have been detained for so long that a reasonable period for the making of a decision has now passed. I do not think that I can draw an adverse inference against the Minister, when the Minister is not responsible for the making of that decision, and neither party has sought to put before the Court any evidence concerning the stage at which enquiries have been made along the path towards a decision to prosecute. In this regard I note that neither the Attorney-General, nor for that matter, the Commonwealth Director of Public Prosecutions has been made a party to these proceedings; nor has any effort been made to serve any of these persons with subpoenas. In any event, even if I were to find that a sufficient time has passed for a decision to have been

[2] See *Acts Interpretation Act* (Cth), s 33(2).

made, whilst the Attorney-General's certificate is in force, the provisions of s 250(5) cannot operate.

[23] I am satisfied that each of the plaintiffs has been lawfully detained. No challenge is made to the constitutionality of the provisions of the *Migration Act* under which they are detained. In those circumstances, I am satisfied that no order can be made for them to be released from immigration detention. Accordingly, the application for their release must be refused and the application by the additional plaintiffs for a Writ of Habeas Corpus must also be refused.
