SGS v Minister for Immigration and Border Protection and Commonwealth of Australia [2015] NTSC 62

PARTIES:	SGS BY HER LITIGATION GUARDIAN SS v MINISTER FOR IMMIGRATION AND BORDER PROTECTION AND: COMMONWEALTH OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	47 of 2015 (21522763)
DELIVERED:	17 September 2015
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JUDGMENT OF:	HILEY J

CATCHWORDS:

COURTS – Supreme Court – jurisdiction – availability of injunctive relief – migration decision – jurisdiction "in relation to" migration decisions – exclusive jurisdiction of High Court, Federal Court and Federal Circuit Court – *Migration Act 1958* (Cth) s 484.

COURTS – Supreme Court – jurisdiction – availability of injunctive relief – proceedings relating to "transitory persons" – *Migration Act 1958* (Cth) s 494AB.

IMMIGRATION – Jurisdiction of Supreme Court – injunctive relief – jurisdiction "in relation to" migration decisions – proceedings relating to "transitory persons" – *Migration Act 1958* (Cth) ss 484, 494AB.

Migration Act 1958 (Cth), ss 4AA, 4(2), 5, 5AA, 5E, 197AB, 189, 189(1), 189(3), 196, 198AD, 198AD(2), 198AE, 198AE(1), 198AH, 198AH(1A), 198B, 474, 474(2), 474(3), 474(6), 476, 476(4), 476A, 476A(1), 476B, 477, 477(1), 477(2), 477A, 484, 486A, 494AA, 494AB.
Judiciary Act 1903 (Cth), ss 39, 67C.
Constitution (Cth) s 75(v).
Supreme Court Act 1979 (NT), s 14(1)(d)
Supreme Court Rules 1987 (NT), O 56.

Al-Kateb v Godwin (2004) 219 CLR 562*; Bodruddaza v Minister for Immigration and Multicultural affairs* (2007) 228 CLR 651, applied.

Tang v Minister for Immigration and Citizenship (2013) 217 FCR 55, distinguished.

Fernando v Minister for Immigration and Citizenship (2007) 165 FCR 471; *Melbourne Corporation v Barry* (1922) 31 CLR 174; *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601; *Plaintiff S156-2013 v Minister for Immigration and Border Protection* (2014) 309 ALR 29; *Plaintiff P1/2003 v Ruddock* (2007) 157 FCR 518; *Potter v Minahan* (1908) 7 CLR 277; *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115; *Travelex Ltd v Federal Commissioner of Taxation* (2010) 241 CLR 510, referred to.

REPRESENTATION:

Counsel:

Plaintiff:	J Lawrence SC
Defendant:	T Anderson

Solicitors:

Plaintiff:	Ward Keller Lawyers
Defendant:	Australian Government Solicitor

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

SGS v Minister for Immigration and Border Protection and Commonwealth of Australia [2015] NTSC 62
No. 47 of 2015 (21522763)

BETWEEN:

SGS BY HER LITIGATION GUARDIAN SS
Plaintiff

AND:

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Defendant

AND:

COMMONWEALTH OF AUSTRALIA
Second Defendant

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 17 September 2015)

Introduction

[1] The plaintiff SGS is a 5 year old girl who, by her litigation guardian SS, has brought proceedings in the Northern Territory Supreme Court for injuries allegedly suffered by her while she was in detention in the regional processing centre in the Republic of Nauru. She has sued in

negligence. In addition to seeking damages she is seeking an injunction restraining the defendants from returning her to the regional processing centre in Nauru.

[2] The defendants have contended that this Court does not have jurisdiction to grant such injunctive relief, because of various provisions of the *Migration Act 1958* (Cth) (the *Migration Act*).

[3] The parties have requested the Court to determine the following questions:

(i) Whether the effect of s 484 of the *Migration Act 1958* (Cth) is that the Supreme Court of the Northern Territory of Australia does not have jurisdiction to grant the injunctive relief sought by the plaintiff in the writ filed 20 May 2015?

(ii) If the answer to question i) is no, whether the effect of s 494AB of the *Migration Act 1958* (Cth) is that the Supreme Court of the Northern Territory of Australia does not have jurisdiction to grant the injunctive relief sought by the plaintiff in the writ filed 20 May 2015?

[4] These reasons relate to those questions.

Relevant background

[5] The main proceedings were commenced by Writ filed 20 May 2015. Also filed at the same time was an affidavit of Kevin Joseph

Kadirgamar sworn 20 May 2015. A supplementary affidavit of Kevin Joseph Kadirgamar sworn 21 May 2015 was filed the next day.

[6] The Writ was endorsed with a Statement of Claim (*the Statement of Claim*) which sought, inter alia, the following relief:

> 1. An injunction restraining the Defendants from returning the Plaintiff to the Regional Processing Centre in the Republic of Nauru, or causing the Plaintiff to be so returned.
>
> 2. Interim injunction restraining the Defendants from returning the Plaintiff to Nauru, or causing the Plaintiff to be returned while the matter is pending.
>
> 3. Damages.

[7] The application for the interim injunction was set down to be heard on 26 May 2015. However the hearing of that application did not proceed following an undertaking by the Minister that the plaintiff and her family would be placed in community detention and would not be returned to Nauru without notice. On 27 May 2015 the plaintiff and her family were moved into community detention in Brisbane, Queensland and currently remain there.

[8] The Statement of Claim, notionally amended to reflect some differences regarding dates and other relevant facts not in dispute for the purpose of this application,[1] includes the following allegations:

> 1. The Plaintiff … was born on 8 October 2009 …

[1] The changes are indicated by use of square brackets.

2. On 8 September 2013, the Plaintiff entered Australia by boat with her parents. She was taken to Christmas Island and was detained by and/or on behalf of the Second Defendant pursuant to s 189 of the *Migration Act 1958* ("the detention").

3. On [14] October 2013, the Plaintiff and her parents were taken from Christmas Island to the Regional Processing Centre in the Republic of Nauru (‘Nauru'), where they continued to be detained.

4. On 9 July 2014, while on Nauru, the Plaintiff exhibited sexualised behaviour, which was inconsistent with developmentally appropriate behaviour and exploration of body parts.

5. On [11] October 2014 the Plaintiff and her parents were brought to Darwin, Australia for the purpose of her father SS receiving medical treatment. [They were detained at Wickham Point Alternative Place of Detention (‘APOD’) until 6 January 2015.]

6. The Plaintiff and her parents were [then] detained at Bladdin Point [APOD], and [on 26] February 2015, they were transferred to the neighbouring Wickham Point [APOD].

7. The Plaintiff and her parents remain detained at Wickham Point [APOD], while SS continues to receive medical treatment in Darwin.

8. The Plaintiff has been assessed by various psychiatrists and psychologists in Darwin, and has been assessed as suffering from continuing mental illness and sequelae as follows ("mental illness"):

a. Depression

b. Ongoing Anxiety Disorder

c. Ongoing Post Traumatic Stress Disorder with high levels of anxiety triggering with any reminders of Nauru

d. Risks of self-harm

e. Withdrawals and nightmares

f. Day and night secondary eneuresis

g. Day and night ecopresis

> 9. The Plaintiff has relatives in New South Wales, namely SGS's uncles … who have offered to provide the Plaintiff and her parents with accommodation, and provide for their daily needs.
>
> 10. Officers of the Department of Immigration and Border Protection have advised the Plaintiff and her parents that they would be returned to Nauru upon completion of SS's medical treatment.
>
> 11. The Plaintiff and her parents are liable to be returned to Nauru at any time, pursuant to s198AD of the *Migration Act.*
>
> 12. The First Defendant is the Minister responsible for the administration of the *Migration Act 1958.*
>
> 13. The First Defendant holds the power pursuant to s198AE of the *Migration Act,* to make a determination that s198AD is not to apply to the [sic] Applicants, with the effect that they will not be returned to Nauru.
>
> 14. The First Defendant holds the power to make a residence determination pursuant to s197AB of the *Migration Act,* to the effect that the [sic] Applicants reside at a specified place, instead of being detained at an immigration detention centre ("residence determination").
>
> 15. On 24 April 2015, a request was made to the First Defendant to consider exercising the above-mentioned powers. The First Defendant has not exercised any of the above-mentioned powers.
>
> 16. On 21 April 2015, a request was made to officers of the Department of Immigration and Border Protection, requesting that they make a recommendation to the First Defendant to exercise the above-mentioned powers, and that they provide an undertaking that the Plaintiff and her family will not be returned to Nauru.
>
> 17. On 4 May 2015, the Department of Immigration and Border Protection advised that the requested undertaking will not be provided, and that the Plaintiff and her parents will remain in Australia while SS's medical treatment is ongoing.

[9] Paragraph 18 of the Statement of Claim alleges that the defendants

"held (and continue to hold) a duty of care (which is non-delegable) to

the plaintiff to ensure that reasonable care is taken to eliminate or reduce the risk that the circumstances of her detention might cause her injury, including mental illness."[2] Paragraph 19 alleges that her "mental illness has arisen, and continues, in [a variety of] circumstances" which are then set out. These circumstances include that she was detained in Nauru, that she remains in detention in Australia, that detention of a minor is to be a measure of last resort, and that the first defendant has the power to make a residence determination (under s 197AB of the *Migration Act*). Paragraphs 20 and 21 plead breaches and causation respectively.

[10] Paragraph 22 pleads that "in addition to the common law duty to take reasonable care, the defendants owe a duty to the plaintiff to only detain her as a measure of last resort." The plaintiff relies upon s 4AA of the *Migration Act*, and contends that the defendants "have failed to properly consider (or at all) whether the plaintiff's detention is a measure of last resort" and "have detained the plaintiff in circumstances where her detention is not a measure of last resort."

[11] The parties agree[3] that the plaintiff is:

(a) a "transitory person" and an "unlawful non-citizen" within the meaning of section 494AB of the *Migration Act*; and

[2] Statement of Claim [18].
[3] Statement of Agreed Facts dated 10 July 2015.

(b) a transitory person covered by subsection (1A) of section 198AH of the *Migration Act.*

[12] In their written submissions the defendants supplemented certain parts of the Statement of Claim with the additional detail set out in the next four paragraphs.

[13] Further to paragraph 2 of the Statement of Claim, the plaintiff (and her family) was taken into immigration detention on Christmas Island pursuant to s 189(3) of the *Migration Act*, having entered Australia's migration zone by sea after 13 August 2012 (see s 198AD of the *Migration Act* and the *Migration Legislative Amendment (Regional Processing and Other Measures) Act 2012* (Cth)). Christmas Island is an excised offshore place for the purposes of the *Migration Act* (see s 5 of the *Migration Act* and the *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth)). Thus, the plaintiff's mode of entry resulted in her being an 'unauthorised maritime arrival' as that term is defined by s 5AA of the *Migration Act*, see *Plaintiff S156-2013 v Minister for Immigration and Border Protection* (2014) 309 ALR 29; at [1].

[14] Further to paragraph 3 of the Statement of Claim, on 14 October 2013 the plaintiff and her family were taken from Christmas Island to the Republic of Nauru pursuant to s 198AD of the *Migration Act*. The Republic of Nauru is a 'regional processing country' for the purposes

of the *Migration Act* (see s 198AB of the *Migration Act* which was introduced by the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth)).

[15] Further to paragraph 5 of the Statement of Claim, on arrival in Darwin on 11 October 2014 the plaintiff and her family were taken into immigration detention pursuant to s 189 (1) of the *Migration Act*. The plaintiff and her family were brought to Australia from the Republic of Nauru pursuant to s 198B of the *Migration Act*.

[16] Further to paragraph 11 of the Statement of Claim the plaintiff is so liable (to be returned to the Republic of Nauru) pursuant to s 198AD of the *Migration Act* because she is a 'transitory person' covered by s 198AH of the *Migration Act*.

Submissions

[17] The defendants do not challenge the jurisdiction of this Court to hear the plaintiff's claims in tort and to grant the normal remedy of damages.[4] What they do challenge is the jurisdiction of this Court to grant injunctive relief of the kind sought here. They rely upon the *Migration Act*: s 484, alternatively s 494AB.

[18] It is common ground that there is no direct authority concerning the applicability of s 484 or 494AB to applications for injunctive relief.

[4] Defendants' Outline of Submissions filed 23 July 2015 [18].

[19] Counsel for the plaintiff relied heavily upon well-established principles of statutory interpretation concerning the abrogation or curtailment of fundamental common law rights, sometimes referred to collectively as the "principle of legality".[5]

[20] Those principles were referred to by Gleeson CJ in *Al-Kateb v Godwin* [2004] 219 CLR 562. That matter concerned the detention of an unlawful non-citizen under ss 189, 196 and 198 of the *Migration Act*. At [19] – [20]:

> 19. Where what is involved is the interpretation of legislation said to confer upon the Executive a power of administrative detention that is indefinite in duration, and that may be permanent, there comes into play a principle of legality, which governs both Parliament and the courts. In exercising their judicial function, courts seek to give effect to the will of Parliament by declaring the meaning of what Parliament has enacted. Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment. That principle has been re-affirmed by this Court in recent cases[6]. It is not new. In 1908, in this Court, O'Connor J referred to a passage from the fourth edition of *Maxwell on Statutes* which stated that "[i]t is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the

[5] See for example the discussion in Chapter 5 of Pearce & Geddes, *Statutory Interpretation in Australia* (Butterworths, 8th ed, 2014), titled "Legal Assumptions: Principle of Legality".
[6] *Coco v The Queen* (1994) 179 CLR 427; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 [30].

> general system of law, without expressing its intention with irresistible clearness"[7].
>
> 20. A statement concerning the improbability that Parliament would abrogate fundamental rights by the use of general or ambiguous words is not a factual prediction, capable of being verified or falsified by a survey of public opinion. In a free society, under the rule of law, it is an expression of a legal value, respected by the courts, and acknowledged by the courts to be respected by Parliament.

[21] Counsel acknowledged that the present matter concerns the curtailment of the plaintiff's rights to injunctive relief, rather than abrogation. Even if this Court does not have jurisdiction to grant such relief, it can be sought elsewhere, in the High Court and possibly the Federal Court and the Federal Circuit Court.[8]

[22] Counsel also referred to the oft cited passages in *Potter v Minahan*[9] and *Melbourne Corporation v Barry*[10] and referred to the following statement by Lord Hoffman in *R v Secretary of State for the Home Department; Ex parte Simms*:[11]

> The principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be the subject to the basic rights of the individual.

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[7] *Potter v Minahan* (1908) 7 CLR 277 at 304. See also *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539 at 587-589 per Lord Steyn; *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 131 per Lord Hoffmann.
[8] See for example s 484 of the *Migration Act*.
[9] (1908) 7 CLR 277 at 304.
[10] (1922) 31 CLR 174 at 206.
[11] [2000] 2 AC 115 at 131.

[23] Counsel for the plaintiff also stressed s 4AA of the *Migration Act* which states that "[T]he Parliament affirms as a principle that a minor shall only be detained as a measure of last resort." Whilst such a principle will often be relevant where the Minister or some other member of the Executive is exercising a discretionary power in relation to a minor, I have some difficulty seeing how it could be relevant to interpreting the statutory provisions subject of this application, there being no scope for distinguishing between how they might operate in relation to minors in particular.

[24] Counsel for the plaintiff submitted that "this is not an action taken pursuant to the *Migration Act* 'in relation to a migration decision' [s 484]. Nor is it an action taken in relation to the exercise or non-exercise of the Minister's powers under the *Migration Act* [s 494AB]."[12] Rather it is "a Supreme Court civil suit alleging the commission of a civil tort through negligence causing injuries and seeking appropriate redress and remedies attendant."[13]

Question (i)

[25] Section 484 is contained in Part 8 of the *Migration Act*. Part 8 comprises ss 474 to 484, and is headed "Judicial review". Section 474 contains a privative clause and defines "privative clause decision" and "non-privative clause decision". Sections 474A to 484 are contained in

[12] Plaintiff's Outline of Submissions filed 14 August 2015 [2].
[13] Plaintiff's Outline of Submissions filed 14 August 2015 [4].

Division 2 which is headed "Jurisdiction and procedure of courts". Many of these provisions, including s 476 (which concerns the jurisdiction of the Federal Magistrates Court), s 476A (which concerns the jurisdiction of the Federal Court), s 476B (which concerns remittal by the High Court), ss 477 & 477A (which concern time limits on applications to the Federal Magistrates Court and to the Federal Court) and s 484, were contained in the *Migration Litigation Reform Act 2005* (Cth), and replaced earlier versions.

[26] Section 484 is headed "Exclusive jurisdiction of High Court, Federal Court and Federal Magistrates Court". It relevantly provides:

> (1) Only the High Court, the Federal Court and the Federal Magistrates Court have jurisdiction in relation to migration decisions.
>
> (2) To avoid doubt, subsection (1) is not intended to confer jurisdiction on the High Court, the Federal Court or the Federal Magistrates Court, but to exclude other courts from jurisdiction in relation to migration decisions.
>
> (3) To avoid doubt, despite section 67C of the *Judiciary Act 1903*, the Supreme Court of the Northern Territory does not have jurisdiction in relation to migration decisions.

[27] The defendants contended that on its face s 484 of the *Migration Act* plainly prevents this Court from exercising any jurisdiction in relation to a migration decision. The critical question is whether the application for injunctive relief sought here is properly categorised as being 'in relation to' a 'migration decision'.

[28] In *Travelex Ltd v Federal Commissioner of Taxation*[14] French CJ and Hayne J observed (at [25]) that "the subject matter of the inquiry, the legislative history, and the facts of the case are all matters" which will bear upon the judgment whether one concept is "in relation to" another.

[29] The term "migration decision" is defined in s 5 of the *Migration Act* to mean a "privative clause decision" (defined in s 474(2)), a "purported privative clause decision" (defined in s 5E and includes anything listed in s 474(3)) and a "non-privative clause decision" (defined in s 474(6)).

[30] Privative clause decision includes a decision of an administrative character made, proposed to be made, or required to be made, under the Act other than a decision referred to in s 474(4) or (5), neither of which is relevant here.[15] It includes a decision of the Minister not to exercise, or not to consider the exercise, of the Minister's power under ss 197AB, 197AD or 198AE.[16] A reference in s 474 to a decision includes a reference to cancelling, revoking or refusing to give a consent or permission (s 474(3)(b)), doing or refusing to do any other act or thing (s 474(3)(g)) and a failure or refusal to make a decision (s 474(3)(j)).

[14] (2010) 241 CLR 510.
[15] s 474(2).
[16] s 474(7).

[31] The defendants contended that the plaintiff's claim for injunctive relief appears to rest on three premises. First, the failure by the Minister (the first defendant) to make a determination under s 198AE of the *Migration Act* that s 198AD is not to apply to the plaintiff and her family.[17] Secondly, the failure of the Minister to make a residence determination under s 197AB of the *Migration Act*.[18] Thirdly, the failure by officers of the Department of Immigration and Border Protection, and the Minister, to provide an undertaking not to remove the plaintiff and her family to the Republic of Nauru.[19]

[32] The defendants contended that each of the alleged failures is inimically related to the exercise of power by the Minister under the *Migration Act* and are 'migration decisions' as defined by the *Migration Act*. The alleged failures by the Minister to exercise power pursuant to the *Migration Act* are accompanied by assertions in the Statement of Claim which, presumably, are included to support argument in favour of the exercise of power by the Minister in the manner contended – an argument in a 'proceeding' which is not within the jurisdiction of this Court to entertain.

[33] The plaintiff responded to the defendants' contention set out in paragraph [31] above by submitting: "This is simply not the case." The plaintiff then referred to the fact that is a civil suit for negligence

[17] Statement of Claim [13], [15] & [16].
[18] Statement of Claim [14], [15] & [16].
[19] Statement of Claim [16] & [17].

seeking appropriate remedies.[20] This submission, and similar submissions advanced elsewhere by the plaintiff, ignores the fact that it is the remedy of injunctive relief, rather than the right to sue in tort for negligence, that is the focus of the present application.

[34] I expressed and continue to hold misgivings as to the ability of a court to assess and award damages which would normally take into account future vicissitudes and continuing loss and damage at the same time as granting injunctive relief designed to avoid such continuing damage. Putting those misgivings aside, I reject the plaintiff's contentions that because this is a civil claim in tort it is "simply not the case" that her claims for injunctive relief appear to rest on the failures pleaded in the Statement of Claim and outlined in paragraph [31] above. The plaintiff's request for injunctive relief is very much based upon the failures or refusals of the defendants to make the kind of migration decisions referred to in her Statement of Claim.

[35] Moreover, the granting of injunctive relief of the kind sought would have the effect of preventing the second defendant from performing its statutory obligations, for example under s 198AD(2), and the Minister from freely exercising or refusing to exercise certain powers and discretions, for example under s 198AE(1), and would have the same effect as a migration decision. Counsel for the plaintiff accepted this. Further, the plaintiff would remain in detention until and unless the

[20] Plaintiff's Outline of Submissions filed 14 August 2015 [4].

Minister exercised some other power such as the power to grant a visa under s 65 or to make a residence determination under s 197AB.

[36] The defendants contended that the powers relevantly capable of being exercised in relation to the plaintiff reside, exclusively, in the Minister. The *Migration Act* is the only source of the right of a non-citizen to enter or remain in Australia.[21]

[37] The High Court considered s 484 in another context in *MZXOT v Minister for Immigration and Citizenship*.[22] The Court held that ss 476, 476A, 476B and 484 of the *Migration Act*, when read in conjunction with the definition of "migration decision" in ss 5, 5E and 474, meant that the only court that could hear an application for the constitutional remedy of (amongst other things) an injunction against an officer of the Commonwealth in respect of a "primary decision" (namely certain "privative clause decisions" and "purported privative clause decisions")[23] is the High Court. Section 484 has not been considered otherwise.

[38] However the words "in relation to a migration decision" have been considered where they appear, elsewhere, in Parts 8 and 8A of the *Migration Act*.

[21] s 4(2).
[22] (2008) 233 CLR 601.
[23] See ss 474(2) and 476(4).

[39] In *Bodruddaza v Minister for Immigration and Multicultural Affairs*[24] (*Bodruddaza*), Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ rejected a contention that s 486A of the *Migration Act* (which imposed a time limit on applications to the High Court for "a remedy … in relation to a migration decision") applied to an action in tort against the Commonwealth for false imprisonment.[25] The Minister had contended that the phrase was sufficiently broad to encompass more than applications for judicial review and could also apply to an action against the Commonwealth for false imprisonment where an officer had detained the plaintiff as an unlawful non-citizen without the knowledge or reasonable suspicion stipulated by s 189 of the Act.[26]

[40] Their Honours rejected that contention. At [22]:

> Counsel for the plaintiff advanced cogent reasons why the phrase 'a remedy … in relation to a migration decision' should not be given a reading which would take s 486A beyond public law remedies and into the area of what might be called collateral attack upon migration decisions.

[41] First, counsel had emphasised the extensive scope of the definition of "migration decision" in s 5 and in particular the inclusion of "proposed decision" in the definition of "purported privative clause decision". Their Honours accepted the need for Parliament to make its intention clear if it was purporting to preclude an action in tort of the kind being

[24] (2007) 228 CLR 651.
[25] See [17] – [23].
[26] *Bodruddaza* at [21] referring to *Ruddock v Taylor* (2005) 222 CLR 612.

discussed.[27] Second was the fact that the perceived mischief to which the *Migration Litigation Reform Act 2005* was directed concerned the challenge by judicial review processes to migration decisions.[28] Both s 486A and s 484 were introduced by that Act.

[42] Accordingly the defendants did not contend that s 484 deprives this Court of jurisdiction to hear the plaintiff's claims in tort against the Commonwealth, notwithstanding that they might involve a "collateral attack upon migration decisions". The Federal Court would also have such jurisdiction (see *Fernando v Minister for Immigration and Citizenship*[29]*)*.

[43] The defendants contended however that the injunctive relief sought by the plaintiff in the present matter directly relates to one or more migration decisions, or non-decisions, and is therefore in the nature of the public law remedy referred to by the High Court in *Bodruddaza*. On the other hand the plaintiff contends that, consistently with the purpose of the *Migration Litigation Reform Act 2005* and the fact that s 484 appears in Part 8 which is headed "Judicial review", the words "in relation to a migration decision" should be confined to the judicial review of a migration decision.

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[27] at [23].
[28] at [24].
[29] (2007) 165 FCR 471).

[44] *Bodruddaza* was considered in *Tang v Minister for Immigration and Citizenship*[30] (*Tang FC*) where the Full Court of the Federal Court was called upon to consider the application of s 476A(1) of the *Migration Act* (at [2] to [11]).

[45] *Tang FC* also involved a situation where the applicant had applied for judicial review out of time. Mr Tang failed to apply to the Federal Circuit Court for judicial review of a migration decision by the Migration Review Tribunal within the 35 day time limit required under s 477(1) of the *Migration Act*. The Federal Circuit Court refused to extend time, on the basis that his application had no prospects of success. He then applied for relief in the High Court pursuant to s 75(v) of the *Constitution of the Commonwealth* (*the Constitution*) to quash the Federal Circuit Court's decision to refuse to extend time. The High Court remitted the application to the Federal Court where his application was heard and dismissed.[31] He appealed to the Full Court of the Federal Court. The Full Court held that the Federal Court did have jurisdiction to entertain the application, notwithstanding s 476A(1), but proceeded to dismiss the application on the basis that it had no reasonable prospects of success.

[46] Because of s 476A the Federal Court only had original jurisdiction if the proceeding before it was not "in relation to" a "migration

[30] (2013) 217 FCR 55.
[31] *Tang v Minister for Immigration and Citizenship* [2013] FCA 824.

decision". Although the decision of the Migration Review Tribunal was clearly a "migration decision" (ss 5 & 474) the decision of the Federal Circuit Court dismissing the application for the extension of time was not. The jurisdictional question was whether the proceeding to quash the orders of the Federal Circuit Court refusing to extend the time for the making of an application to quash the migration decision of the Tribunal was "in relation to" that migration decision. If it was then the Federal Court had no original jurisdiction.[32]

[47] The Full Court (constituted by Rares, Perram and Wigney JJ) noted that the expression "in relation to a migration decision" appears throughout Division 2 of Part 8, much of which relates to the circumscribed original jurisdiction of the Federal Court and of the Federal Circuit Court in relation to such matters, and stipulates time limits for the invoking of such jurisdiction. Their Honours said, at [7]:

> These time limits make little sense if proceedings "in relation to a migration decision" were to include collateral challenges to the underlying migration decision such as might occur in a case alleging false imprisonment. It is established, therefore, that such a challenge is not caught by s 486A of the Act: *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651. That decision does not directly govern this case because Mr Tang's proceeding does not involve a collateral challenge to the decision not to reinstate his visa…

[48] At [8] their Honours said:

[32] *Tang FC* [3].

> *Bodruddaza* does nevertheless establish, that "in relation to" has a narrower operation in the present context than its ordinary meaning might otherwise suggest.

[49] Their Honours referred to the passage at [22] of *Bodruddaza* where the distinction was made between public law remedies and collateral attacks upon migration decisions. They said that such distinction would not directly control the outcome of Mr Tang's matter because his application would be properly characterised as one which seeks a public law remedy, namely writs of mandamus and certiorari against an officer of the Commonwealth. Their Honours also noted that one of the reasons the High Court accepted the limitation on s 486A (at [24]) was that given in the Explanatory Memorandum for the *Migration Litigation Reform Bill 2005* (Cth), namely to impose uniform time limits for applications for the judicial review of migration decisions.

[50] At [9] their Honours said:

> That objective would not be served by extending the concept of proceedings "in relation to a migration decision" to include cases where judicial review is sought of orders made by the Federal Circuit Court in respect of an underlying migration decision. Although it is also true that the broader interpretation would not hinder the achievement of that objective we do not consider that it is the interpretation which would "best achieve the purpose or object of the Act": cf *Acts Interpretation Act 1901* (Cth), s 15AA. Consequently, we conclude that Div 2 of Pt 8 of the Act is confined by the use of the expression "in relation to a migration decision" to applications for direct judicial review of migration decisions and does not extend to ancillary judicial review proceedings in respect of orders made in proceedings of that kind.

[51] At [11] their Honours said:

> It follows that Mr Tang's proceeding to quash the orders made by the Federal Circuit Court is not "in relation to a migration decision" and s 476A(1) does not remove any original jurisdiction this Court otherwise had to hear his claim.

[52] The plaintiff in the present matter relies upon this result and upon the conclusion expressed in the last sentence [9] of *Tang FC* and contends that the expression "jurisdiction in relation to a migration decision" in s 484 is confined to applications for "direct judicial review" of a migration decision.

[53] I do not consider that part of that sentence to be an essential part of the ratio decidendi of *Tang FC*. The matter which the Court was considering was itself a judicial review, but of the Federal Circuit Court's refusal to extend time, as distinct from a judicial review of a migration decision. This was the point been made in that last sentence. Although that application for judicial review of the Federal Circuit Court's refusal to extend time if successful would have enabled Mr Tang to pursue his application for judicial review of the migration decision, that would only have been an indirect consequence of his successful application for extension of time. Such a consequence is not in any way inconsistent with Parliament's intention to limit the jurisdiction of the Federal Circuit Court in relation to migration

decisions, that Court having express power to grant an extension of time in certain circumstances in any event.[33]

[54] The main purpose of Part 8 Division 2, including those provisions considered in *Bodruddaza* and *Tang FC* and s 484, is to circumscribe the jurisdiction of all courts, including the High Court, the Federal Court and the Federal Circuit Court, to entertain applications which challenge migration decisions. Absent a statutory right of appeal or review, an application which seeks to challenge an administrative decision, including a migration decision, could usually only be brought by way of application for judicial review. The expression "judicial review" covers a range of remedies including the prerogative writs available in superior courts of record (certiorari, prohibition or mandamus and habeas corpus), the "constitutional writs" (mandamus, prohibition or injunction against an officer of the Commonwealth) available in the High Court under s 75(v) of the *Constitution* and in the Federal Court and Federal Circuit Court under s 39 of the *Judiciary Act 1903*, orders in the nature of prerogative writs available in most States and Territories (such as under s 14(1)(d) *Supreme Court Act 1979* (NT) and *Supreme Court Rules 1987* (NT) O 56) and judicial reviews available under statute such as the *Administrative Decisions (Judicial Review) Act 1975*. Needless to say, some care needs to be taken before relying too much upon the use of the expression "judicial review" in a

[33] Section 477(2).

heading within a statute or in an Explanatory Memorandum when construing provisions such as those in Part 8 Division 2, relevantly s 484.

[55] The *Migration Act* clearly identifies and limits those rights of appeal and judicial review which an applicant has when he or she is or is likely to be affected by a migration decision. Because judicial review is a remedy readily available in any superior court of record, legislatures frequently resort to privative clauses where they wish to limit the scope and exercise of such jurisdiction. In the present case, Parliament has clearly expressed its intention to confine any challenge to migration decisions to those mechanisms identified in the *Migration Act*, in particular in Part 8 Division 2.

[56] As I have already said, and counsel acknowledged, the granting of the injunctive relief sought by the plaintiff in the present matter would have the same effect as a migration decision. In addition to it effectively setting aside the Minister's failure to make migration decisions of the kind referred to in paragraphs 13 to 15 of the Statement of Claim (namely determinations under s 198AE and or s 197AB), such an injunction would effectively force the Minister to make one or both of those migration decisions in favour of the plaintiff in order to comply with the defendants' obligations under s 4AA of the *Migration Act*.

[57] It matters not that the injunctive relief is sought by way of remedy in a common law action in negligence as distinct from an application for judicial review. It would not be merely a "collateral challenge to a migration decision". It would be an exercise of jurisdiction in relation to a migration decision.

[58] Accordingly I answer question (i) as follows:

> Section 484 of the *Migration Act 1958* (Cth) results in the Supreme Court of the Northern Territory of Australia not having jurisdiction to grant the injunctive relief sought by the plaintiff in the writ filed 20 May 2015.

Question (ii)

[59] My answer to question (i) makes the answer to question (ii) unnecessary. However I shall answer that question to cover the possibility that my answer to question (i) is wrong.

[60] S 494AB of the *Migration Act* places a bar on certain legal proceedings relating to transitory persons. It relevantly provides:

> **Bar on certain legal proceedings relating to transitory persons**
>
> (1) The following proceedings against the Commonwealth may not be instituted or continued in any court:
>
> (a) proceedings relating to the exercise of powers under section 198B;
>
> (b) proceedings relating to the status of a transitory person as an unlawful non-citizen during any part of the ineligibility period;

(c) proceedings relating to the detention of a transitory person who is brought to Australia under section 198B, being a detention based on the status of the person as an unlawful non-citizen;

(ca) proceedings relating to the performance or exercise of a function, duty or power under Subdivision B of Division 8 of Part 2 in relation to a transitory person;

(d) proceedings relating to the removal of a transitory person from Australia under this Act.

(2) This section has effect despite anything else in this Act or any other law.

(3) Nothing in this section is intended to affect the jurisdiction of the High Court under s 75 of the Constitution.

[61] There is no dispute that the plaintiff is a "transitory person" and an "unlawful non-citizen" covered by s 494AB of the *Migration Act*, and that the first defendant falls within the definition of "Commonwealth".

[62] Section 494AA, which bears the heading "Bar on certain legal proceedings relating to unauthorised maritime arrivals", is in very similar terms to s 494AB. Paragraphs 494AA(1)(c) & (e) are very similar to paragraphs 494AB(1)(c) & (ca) respectively, except that they relate to unauthorised maritime arrivals as distinct from transitory persons.

[63] As he did in relation to s 484 counsel for the plaintiff stressed the need to construe s 494AB in favour of the preservation of common law rights. Counsel submitted that "there is nothing in this provision that says that this proceeding, namely a suit of negligence and injunction

relief is barred. It says the following proceedings under the rubrics stated, may not be instituted in any court. It does not say shall not."

[64] In the course of oral submissions counsel for the defendant referred to *Plaintiff P1/2003 v Ruddock*[34](*Ruddock*), a decision of Nicholson J delivered on 7 February 2007, and a few months before the High Court delivered its decision in *Bodruddaza*. *Ruddock* is the only decision to which I was referred which included reference to s 494AB. At the time of that decision s 494AB did not contain paragraph 494(1)(ca).

[65] The plaintiff in *Ruddock* commenced proceedings in the High Court seeking damages and other relief for torts including negligence, false imprisonment and misfeasance in public office during his detention under the *Migration Act*. He also sought other remedies relating to his detention including writs of mandamus, prohibition and injunction. After the proceedings were remitted to the Federal Court the plaintiff sought leave to amend his statement of claim by referring to events that occurred subsequent to the time when the proceedings were remitted. The defendant argued, unsuccessfully, that the Federal Court did not have the power to permit such amendment because ss 494AA(1) and 494AB(1) operated to exclude the Federal Court's jurisdiction to hear a new matter in relation to offshore entry persons.

[34] (2007) 157 FCR 518.

[66] At [92] Nicholson J referred to "a number of issues which do not arise because the parties are in agreement concerning them." One of them was that:

> with the enactment of ss 494AA and 494AB, the Federal Court would not have any jurisdiction to hear the claims the subject of this application for leave except as a consequence of remittal from the High Court.

[67] When I pointed out that this would seem to suggest that this court too would not have original jurisdiction, even in relation to the civil claim in tort, counsel for the defendant submitted that such a conclusion would no longer be correct following the High Court's decision in *Bodruddaza*. However, ss 494AA and 494AB were not considered in *Bodruddaza*, presumably because Mr Bodruddaza was not an "unauthorised maritime arrival" or a "transitory person".

[68] Although the defendants relied upon paragraphs 494AB(1)(c), (ca) and (da) of the *Migration Act* in their written submissions the main focus of their oral submissions was paragraph 494AB(ca).

[69] At first glance, these proceedings, like those in *Ruddock*, are proceedings relating to the detention of the plaintiff, (para 494AB(1)(c)) the "performance or exercise of a function, duty or power under Subdivision B of Division 8 of Part 2 in relation to" the plaintiff (para 494AB(1)(ca)) and proceedings relating to the removal

of the plaintiff from Australia under the *Migration Act* (para 494AB(1)(d)).

[70] In light of the defendants' concession that the plaintiff's tort claim is actionable in this Court, it is not necessary for me to consider the correctness of the passage from [92(a)] of *Ruddock* which I have quoted above in [66] at this stage of the proceedings. In any event, I do not consider that these proceedings fall within paragraphs 494AB(1)(c), (ca) or (d) insofar as they relate to the tortious conduct said to have occurred in Nauru. Each of those paragraphs apply to proceedings in relation to matters concerning the transitory person while he or she is in Australia.

[71] However, in so far as these proceedings seek injunctive relief of the kind sought by the plaintiff, I do consider that they fall within paragraphs 494AB(1) (ca) and (d). Once the plaintiff no longer needs to be in Australia for the temporary purpose of her father's medical treatment s 198AD will apply, by force of s 198AH(1A), unless the Minister makes a determination under s 198AE that s 198AD does not apply to her. Section 198AD(2) will then require an officer to take her to a regional processing country, thereby removing her from Australia.

[72] The power of the Minister to make a determination under s 198AE and the duty of an officer under s 198AD(2) are powers and duties under Subdivision B of Division 8 of Part 2. The granting of the injunction

sought would prevent such an officer from performing his or her statutory obligation to remove the plaintiff from Australia.

[73] Contrary to counsel's submission I consider that the words "may not" do mean "shall not". A fundamental purpose of s 494AB (and s 494AA) is the barring of certain legal proceedings relating to a particular category of persons.

[74] Question ii) should be answered as follows:

> Section 494AB of the *Migration Act 1958* (Cth) results in the Supreme Court of the Northern Territory of Australia not having jurisdiction to grant the injunctive relief sought by the plaintiff in the writ filed 20 May 2015.
