FEDERAL COURT OF AUSTRALIA

CLM18 v Minister for Home Affairs (No 2) [2019] FCAFC 194

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| Appeal from: | *CLM18 v Minister for Home Affairs* [2019] FCCA 1106  |
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| File number: | NSD 728 of 2019 |
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| Judges: | **PERRAM, ROBERTSON AND ABRAHAM JJ** |
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| Date of judgment: | 7 November 2019 |
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| Catchwords: | **MIGRATION** – appropriate orders to give effect to earlier reasons of the Full Court  |
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| Legislation: | *Migration Act 1958* (Cth) s 46A  |
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| Cases cited: | 1. *CLM18 v Minister for Home Affairs* [2019] FCAFC 170
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| Date of hearing: | Determined on the papers |
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| Date of last submissions: | 6 November 2019 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | Catchwords |
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| Number of paragraphs: | 10 |
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| Counsel for the Appellant: | Mr JF Gormly |
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| Solicitor for the Appellant: | Hall & Wilcox |
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| Counsel for Respondents: | Mr SB Lloyd SC with Ms JE Davidson |
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| Solicitor for the Respondents: | Australian Government Solicitor |
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ORDERS

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|  | NSD 728 of 2019 |
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| BETWEEN: | CLM18Appellant |
| AND: | MINISTER FOR HOME AFFAIRSFirst RespondentINFORMED REFFERAL TO STATUS RESOLUTION OFFICERSecond Respondent |

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| JUDGES: | PERRAM, ROBERTSON AND ABRAHAM JJ |
| DATE OF ORDER: | 7 NOVEMBER 2019 |

THE COURT ORDERS THAT:

In place of orders 2 and 3 made by the primary judge on 7 May 2019:

1. The decision of the second respondent dated 2 March 2018 be set aside.
2. The first respondent, by himself, his officers, delegates or agents be restrained from relying on the decision referred to in order 1.
3. The first respondent pay the appellant’s costs of the proceedings in the Federal Circuit Court of Australia, as agreed or assessed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1. On 8 October 2019 the Full Court made the following orders:

1. The appeal be allowed with costs.

2. Orders 2 and 3 made by the Federal Circuit Court of Australia on 7 May 2019 be set aside.

3. The parties bring in short minutes of order to give effect to these reasons within 21 days.

1. The period of 21 days was extended so that the Minister’s proposed orders and short submissions in support and the appellant’s proposed orders and short submissions in support were filed on 6 November 2019.
2. These reasons should be read with the primary judgment: *CLM18 v Minister for Home Affairs* [2019] FCAFC 170.
3. The Minister identified four areas of disagreement between the parties’ respective proposals. These were:

a) determination of the application to the FCC, particularly insofar as it concerned the exercise of the revocation power under s 46A(2C) of the *Migration Act 1958* (Cth) (**the Act**) on 19 September 2017 that was the subject of grounds 1 and 2 of the appeal;

b) the characterisation of the Minister’s “personal procedural decision” of 19 September 2017 in relation to the “non-lodger cohort” in the proposed declaration;

c) the scope of the proposed injunction; and

d) costs of the FCC proceedings.

1. In our opinion, the approach of the parties is overly complicated. The appellant succeeded in his appeal although he failed on grounds 1 and 2. He succeeded in his contention that the second respondent, in reaching the conclusion on 2 March 2018 that Australia did not have any non-refoulement obligations with respect to him, did not afford him procedural fairness.
2. It is sufficient, in our view, that that decision of the second respondent be set aside. It is not necessary to specify in the orders, because it is apparent from the reasons of the Full Court, that the appellant did not succeed on his ground of appeal that he was denied procedural fairness in respect of the Minister’s exercise of his power on 19 September 2017 under s 46A(2C) of the *Migration Act 1958* (Cth), although he did succeed in his submission that that exercise of power was subject to a requirement of procedural fairness.
3. Further, because both sides agree that there should be an injunction but differ only as to its scope, the appropriate course is to restrain the Minister from relying on the decision of the second respondent dated 2 March 2018. It is not presently appropriate to go further than to restrain the Minister from acting on the basis of the decision the Full Court has held to be invalid.
4. As to the costs of the proceedings in the Federal Circuit Court of Australia, we do not consider this to be a case where it is appropriate to proceed by reference to issues. This is implicit in order 1 made by the Full Court on 8 October 2019 in relation to costs in this Court and applies also to the proceedings below. Although if the appellant had succeeded in relation to s 46A(2C) of the *Migration Act* he would not have needed to succeed, as he did, in relation to the decision of the second respondent on 2 March 2018, we consider that the “event” for the purposes of exercising the Court’s discretion in relation to the costs of the proceedings below, the substance of the proceedings, was the appellant’s status within the respondents’ decision-making processes.
5. Neither party suggested that the appellant’s successful application before the primary judge for an extension of time should affect the exercise of the discretion as to costs.
6. For these reasons the additional orders we will make to give effect to our reasons dated 8 October 2019 are as follows:

In place of orders 2 and 3 made by the primary judge on 7 May 2019:

1. The decision of the second respondent dated 2 March 2018 be set aside.

2. The first respondent, by himself, his officers, delegates or agents be restrained from relying on the decision referred to in order 1.

3. The first respondent pay the appellant’s costs of the proceedings in the Federal Circuit Court of Australia, as agreed or assessed.

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| I certify that the preceding ten (10) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Perram, Robertson and Abraham. |

Associate:

Dated: 7 November 2019