Federal Court of Australia

Montgomery v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2) [2021] FCA 1444

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| File number(s): |  |
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| Judgment of: | **SC DERRINGTON J** |
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| Date of judgment: | 22 November 2021 |
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| Catchwords: | **COSTS** – where applicant detained under s 189(1) of *Migration Act 1958* (Cth) – where constitutional question of applicant’s status removed to High Court – where applicant nonetheless succeeded in Federal Court in application for habeas corpus and certiorari on administrative law grounds – where applicant made offers to respondent to concede matters on grounds which ultimately succeeded – whether costs to be awarded on indemnity basis |
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| Legislation: | *Constitution* s 51(xix)  *Federal Court of Australia Act 1976* (Cth) s 43  *Judiciary Act 1903* (Cth) ss 39B, 40(1)  *Migration Act 1958* (Cth) ss 189(1), 196, 476A, 501CA |
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| Cases cited: | *Aldi Foods Pty Ltd v Transport Workers’ Union of Australia* [2020] FCAFC 231; 282 FCR 174  *Associated Steamships Pty Ltd v Seafarers Safety, Rehabilitation and Compensation Authority (No 2)* [2020] FCA 853  *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 223; 358 ALR 405  *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)* [2020] FCA 843  *Montgomery v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1423  *Tregida v Pasma Holdings Pty Limited (No 2)* [2021] FCA 1439  *Trustee for The MTGI Trust v Johnston (No 2)* [2016] FCAFC 190 |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: |  |
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| Number of paragraphs: | 22 |
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| Date of last submission/s: | 18 November 2021 |
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| Date of hearing: | 22 November 2021 |
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| Counsel for the Applicant: | Ms E Tadros |
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| Solicitor for the Applicant: | Russell Kennedy Lawyers |
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| Counsel for the Respondents: | Mr P Knowles |
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| Solicitor for the Respondents: | Australian Government Solicitor |

ORDERS

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|  | | NSD 500 of 2020 |
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| BETWEEN: | SHAYNE PAUL MONTGOMERY  Applicant | |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS  First Respondent  MINISTER FOR HOME AFFAIRS  Second Respondent | |

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| order made by: | SC DERRINGTON J |
| DATE OF ORDER: | 22 NOVEMBER 2021 |

THE COURT ORDERS THAT:

1. The respondents pay the applicant’s costs, such costs to be assessed by a Registrar if not agreed.

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

REASONS FOR JUDGMENT

Revised from the transcript

SC DERRINGTON J:

1. On Monday 15 November 2021, the Court made orders on the substantive issues that had been argued on 27 and 28 October and 12 November 2021. The reasons for judgment were published last Monday: ***Montgomery*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1423.
2. As I noted in those reasons, at [7], this matter began on 5 May 2020 as an application seeking a writ of mandamus brought pursuant to s 39B of the ***Judiciary Act*** *1903* (Cth) requiring the **Department** of Home Affairs and the **Minister** for Home Affairs to consider and determine the revocation of the mandatory cancellation of Mr Montgomery’s visa made by a Request for Revocation dated 12 July 2018. The Minister’s decision not to revoke the cancellation of the visa was made on 7 May 2020, following which Mr Montgomery amended his application to seek judicial review of that decision, made under s 501CA of the *Migration Act,* under s 476A(1)(c) of the *Migration Act* and s 39B of the *Judiciary Act.* There have been several amendments to the originating application first filed on 5 May 2020.
3. On 2 July 2020, Mr Montgomery filed an amended originating application by which he raised his Aboriginality and the consequence of this status on his removal or the Minister’s power to remove him if he was determined to be a ‘non-citizen non-alien’.
4. A further amended originating application was filed on 9 November 2020 by which Mr Montgomery sought a writ of habeas corpus, a declaration that he is not an ‘alien’ within the meaning of s 51(xix) of the *Constitution* and an order requiring that he not be detained under ss 189 and 196 of the *Migration Act*, an order that the Minister’s decision be quashed and a writ of mandamus directed to the Minister requiring her to determine the application according to law. This further amended application contained nine grounds of review.
5. At a case management hearing on 10 September 2021, this Court was informed that the Attorney-General for the Commonwealth proposed to make an application for an order under s 40(1) of the *Judiciary Act* removing the constitutional aspects of the proceeding to the High Court, those aspects being Mr Montgomery’s application for a writ of habeas corpus, for a declaration that he is not an alien within the meaning of s 51(xix) of the *Constitution*, and an order requiring that he not be detained under ss 189 and 196 of the *Migration Act*, to the extent that the relief is sought on the basis of grounds 8 and 9 of the further amended originating application.
6. On 11 October 2021, Keane J made that order. The administrative issues remained in this Court.
7. On 19 October 2021, Mr Montgomery sought leave, by interlocutory application, to rely on a second further amended originating application which narrowed the grounds of judicial review to three, and to rely on an entirely new ground. Mr Montgomery continued to press his application for a writ of habeas corpus only this time limited to the determination of the lawfulness of his detention under s 189 of the *Migration Act*.
8. Mr Montgomery was largely successful in the proceedings before this Court. Mr Montgomery contends that he should have all of his costs of the proceedings on an indemnity basis. He submitted that an award of costs on an indemnity basis was justified because of the offers to resolve the matter made on 24 September 2020, 24 December 2020, and 19 July 2021. These letters are annexures AC-1, AC-3, and AC-5 to the Affidavit of Arti Chetty affirmed 18 November 2021.
9. The letter of 24 September 2020 was expressed to be ‘Without prejudice save as to costs’. It invited the Minister to concede that he had not engaged with the representations made in relation to Mr Montgomery’s Aboriginality, particularly those contained in the HR4A Letter (being a letter dated 28 April 2020 from Ms Alison Battisson to the Australian Government Solicitor). The letter of 24 December 2020 sought Mr Montgomery’s immediate release from detention but said nothing that could be considered an offer of compromise. There was no reference to costs. Similarly, the letter of 19 July 2021 cannot be construed as an offer of compromise. It did, however, indicate that the letter would be brought to the Court’s attention in relation to costs. In relation to the first letter, that of 24 September 2020, I accept that in some respects an offer of compromise was made in the sense that Mr Montgomery indicated that his application would no longer be pursued if he were released immediately from detention.
10. It is said, inter alia, that ‘the correspondence was received by the Respondent before substantial costs had been incurred in the proceeding by either party but after the determinative judgments of this Court in the matter of [*McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 223; 358 ALR 405] *McHugh* and [*McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)* [2020] FCA 843] *McHugh (No 2)*  had been handed down’. The correspondence did not foreshadow an application for indemnity costs.
11. Mr Montgomery also contends that it is appropriate to award costs on an indemnity basis because ‘this was a case about deprivation of liberty’ and because the respondents are all expected to be model litigants and therefore should have dealt in more detail with the submissions that were put to the Minister in that correspondence.
12. The Minister submits that Mr Montgomery should have his costs of the proceedings incurred after 10 September 2021, being the date on which the bifurcation of the proceedings was foreshadowed to this Court. The Minister contends, however, that the costs of the proceedings incurred prior to that date should be reserved because a significant proportion of those costs relate to the constitutional aspects of the case, which are yet to be determined by the High Court. The Minister submits that it might be appropriate to apportion the costs incurred prior to 10 September 2021 depending on whether or not Mr Montgomery succeeds before the High Court.
13. The principles relevant to an award of costs are well settled. First, this Court has a broad discretion under s 43 of the *Federal Court of Australia Act 1976* (Cth) to award costs. Secondly, costs usually follow the event. And thirdly, while the discretion to award costs is unconfined, it must be exercised judicially, consistently with the purpose of power in taking account of relevant facts and circumstances at the litigation. I refer in particular to *Aldi Foods Pty Ltd v Transport Workers’ Union of Australia* [2020] FCAFC 231; 282 FCR 174 at page 174, in particular at paragraphs [86]-[88].
14. Now, as counsel for each party has pointed out, a party seeking an order for indemnity costs must point to some ‘special or unusual feature in the case’ to justify an indemnity costs order. I rely on *Trustee for The MTGI Trust v Johnston (No 2)* [2016] FCAFC 190 at paragraph [17] which has been recently cited in two decisions of this Court; *Associated Steamships Pty Ltd v Seafarers Safety, Rehabilitation and Compensation Authority (No 2)* [2020] FCA 853 at [20]; and *Tregida v Pasma Holdings Pty Limited (No 2)* [2021] FCA 1439 at [12].
15. In my view, the principles in *Calderbank v Calderbank* [1975] 3 All ER 333 are not relevant in the present circumstances. It is not merely that this is a public interest case. I accept the submissions for Mr Montgomery that that is not sufficient to displace those principles. But, in all the circumstances of this case, there was not a genuine offer to compromise in the sense as it is understood in private litigation on which those principles are based.
16. Until 10 September 2021, the parties and the Court were proceeding on the basis that Mr Montgomery was seeking in *this* Court, a writ of habeas corpus and, or alternatively, a declaration that he is not an alien within the meaning of s 51(xix) of the *Constitution* because he is an Aboriginal. Substantial costs had been incurred prior to that date. All of the affidavits of the lay and expert witnesses on which Mr Montgomery sought to rely were incurred prior to the letter of 19 July 2021. That is not surprising given the track the proceedings had been on until 10 September 2021.
17. It is not possible to speculate as to the likely outcome had the matter continued before this Court as it was originally cast given that, in respect of some issues at least, this Court would have been bound by High Court and Full Court authority. It was not Mr Montgomery’s choice to bifurcate the proceedings. Nevertheless, the bifurcation will enable Mr Montgomery’s substantive issue, being the determination of his Aboriginality according to Constitutional principles, to be determined without having to consider the prospect of an appeal to an intermediate court of appeal.
18. Given Mr Montgomery’s success in this Court he should have his costs of these proceedings
19. Mr Montgomery points to the deprivation of his liberty and the model litigant principles as special factors whichshould weigh in his favour with respect to costs. The procedural history of this matter demonstrates that Mr Montgomery had some difficulty in framing the case in the manner in which it ultimately proceeded. This is not to imply any criticism, but the Minister has had to respond to various iterations of Mr Montgomery’s case right up to the week before trial. Mr Montgomery was deprived of his liberty because he is a non-citizen whose visa was cancelled on character grounds. Until 10 September 2021, he was pursuing a declaration in this Court as to his Aboriginality, a matter on which, as he has framed his case, is not yet authoritatively settled. The prolongation of the litigation cannot be attributed solely to one side of the record.
20. The fact that there are live constitutional questions that have been removed to Australia’s highest court belies any assertion that Mr Montgomery’s prospects of success were so certain that it was unreasonable for the Minister to concede the point at an earlier point in time and to accede to Mr Montgomery’s offers to resolve the matter at earlier points in time.
21. For that reason, it is inappropriate to order costs on an indemnity basis.
22. The Court orders: The respondents should pay the applicant’s costs of the proceedings, to be assessed by a Registrar if not agreed.

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| I certify that the preceding twenty-two (22) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice SC Derrington. |

Associates:

Dated: 22 November 2021