HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	M84/2022
File Title:	AZC20 v. Minister for Immigration, Citizenship, Migrant Serv
Registry:	Melbourne
Document filed:	Form 27F - Outline of oral argument
Filing party:	Appellant
Date filed:	11 May 2023

Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY M84 and M85 of 2022

BETWEEN:

AZC20
Appellant

and

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs
First Respondent

Commonwealth of Australia
Second Respondent

Secretary, Department of Home Affairs
Third Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: These submissions are in a form suitable for publication on the internet.

Part II: The propositions the Appellants intend to advance in oral argument

A. Ground 1i: There was no 'matter' before the FCAFC

1. The 'matter' requirement in Ch III of the Constitution is rooted in fundamental conceptions about judicial power.[1] It ensures that courts resolve controversies where there is 'the impact of actuality' in immediate view.[2] Where there is no controversy between the parties there is no matter.[3]
2. There was no 'matter' before the Full Federal Court in this case because there was no remaining controversy as to any 'immediate right, duty or liability to be established by the determination of the Court'.[4] Rather, the Court was indicating how it would rule in other proceedings with the same facts. This Court's analysis in *Mellifont v A-G (Qld)* does not suggest otherwise.[5]
3. The argument that there was some broader matter underlying both the FCAFC proceeding and the proceeding concerning s 198 is wrong. Those two proceedings concerned mutually exclusive statutory powers.[6] Equally, they concerned different factual contexts at different times – the s 198AD proceeding that Rangiah J determined concerned the time period up to

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[1] *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, 458 [241], [242] (Hayne J) **JBA tab 34 p 2204 (vol 6 part C)**, *Unions NSW v NSW* [2023] HCA 4, [14] (Kiefel CJ, Gageler, Gordon, Gleeson & Jagot JJ) **JBA tab 77 p 3232 (vol 9 part D)**.
[2] Felix Frankfurter, 'A Note on Advisory Opinions' (1924) 37 *Harvard Law Review* 1002, 1006; *Convention Debates*, Adelaide, 20 April 1897, 966–7 (Henry Higgins).
[3] *Commissioner of Taxation v Industrial Equity Ltd* (2000) 98 FCR 573, 576 [13] (the Court) **JBA tab 49 p 2720 (vol 8 part D)**.
[4] *In Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265 (Knox CJ, Gavan Duffy, Powers, Rich & Starke JJ) **JBA tab 32 p 1973 (vol 6 part C)**.
[5] *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289, 304 (Mason CJ, Deane, Dawson, Gaudron & McHugh JJ) **JBA tab 22 p 1240 (vol 4 part C)**.
[6] Act s 198(11) **JBA tab 5 p 462 (vol 1 part A)**.

when that provision was disapplied, whereas the still-unresolved s 198 proceeding concerns the time period since then and up to its resolution. There is no common substratum of facts.

4. The home detention order applications in each of those proceedings are parasitic on the orders for mandamus in respect of those duties, and each turns (or will turn) on the facts at the time of trial as to the Appellant's mental state and detention conditions. The factual underpinnings for those claims are therefore likewise separated by a temporal disjuncture and do not involve the same substratum of facts.
5. The fact that the appeals concerned the costs orders made at first instance when commenced did not mean that there continued to be a matter after that aspect of the appeal was abandoned.

Ground 1ii: FCAFC erred in granting leave to appeal primary order 3

6. The home detention order was interlocutory in nature. For over a century[7] and in this Court,[8] it has been accepted that a test for the grant of leave to appeal an interlocutory order involves an assessment of whether substantial injustice arises. The FCAFC did not consider this when determining whether to grant leave. That involved an error of the kind discussed in *Norbis v Norbis* (1986) 161 CLR 513 at 520 (Mason and Deane JJ) and 537 (Brennan J). The failure to be guided by the test indicates that the discretion was not soundly exercised.

C. Ground 2: Home detention order was within power

7. 'Detain' in the Act has flexibility embedded in the statutory text. The related statutory definition of 'immigration detention' permits detention 'in the company of, and restrained by' a person directed by the Secretary for that task. Properly understood, 'restrained' does not require 'constant, direct, physical restraint' and can include confinement, 'physically or by direction'.[9] The defined terms thus allow for tailoring of the circumstances of detention. The temporal and purposive limitations on para (a) discerned by the FCAFC are unsupported by the text and at odds with the statutory design. Neither that, nor the term 'restrained by', meant that the primary judge misapprehended the proper construction of para (a).
8. The order made by the primary judge was supported by s 23 of the *Federal Court of Australia Act 1976* (Cth). It was an order that was reasonably required or legally ancillary to ensuring that the Court's order for mandamus was effective according to its tenor.

Dated: 11 May 2023

Craig Lenehan Matthew Albert Julian R Murphy

[7] *Perry v Smith* (1901) 27 VLR 66 **JBA tab 68 p 3094 (vol 9 part D)**.
[8] *Bienstein v Bienstein* (2003) 195 ALR 225, [29] (the Court) **JBA tab 43 p 2585 (vol 8 part D)**.
[9] Primary judgment [136] **CAB p 48**, accepted by the FCAFC [94] **CAB p 101**.