Capacity of an unlawful non-citizen to cooperate with their removal

ASF17 v Commonwealth of Australia [2024] HCA 19

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The High Court has held unanimously that the continuing detention of the appellant, an alien under the *Migration Act 1958* (Cth) (*'Migration Act'*), was lawful where the appellant had refused to cooperate in facilitating his removal from Australia. In so holding, the High Court clarified the principle expressed in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 (*'NZYQ'*), where the High Court held relevant provisions of the *Migration Act* invalid insofar as they required the continuing detention of an unlawful non-citizen in respect of whom there is no real prospect of removal becoming practicable in the reasonably foreseeable future.[1]

Background

The appellant, an Iranian citizen, arrived in Australia as an unlawful non-citizen in 2013 and had been in immigration detention continuously since 2014. In 2015, while in detention, the appellant applied for a Safe Haven Enterprise Visa ('SHEV').

That application was rejected by a delegate of the Minister for Immigration and Border Protection. The appellant's appeal against the decision of the delegate was ultimately dismissed by the Federal Court of Australia in 2018.[2]

The final determination of the appellant's application for a SHEV considered the duty imposed on officers of the Department of Home Affairs ('the Department') by s 198(6) of the *Migration Act* to remove the appellant from Australia 'as soon as reasonably practicable'.

For the purpose of facilitating removal of the appellant from Australia, officers of the Department conducted regular interviews with him from 2018. Throughout those interviews, he consistently told the officers that he would not voluntarily return to Iran. He consistently refused to sign a request for removal or to engage with Iranian authorities in planning for his removal. He repeatedly told the officers that he would agree to be sent to any country other than Iran. However, he did not suggest that there was any country to which he might be removed other than Iran. The appellant's refusal to cooperate in facilitating his removal to Iran, combined with his failure to identify any third country to which he might be removed, resulted in an impasse.

In 2023, a week after the pronouncement of the orders in *NZYQ*, the appellant applied to the Federal Court of Australia for a writ of habeas corpus on the basis that his continuing detention exceeded the constitutional limitation identified in those orders. The appellant filed evidence deposing to his reasons for refusing to return to Iran, including that he feared being harmed there because of his bisexuality, a claim that was not made in his SHEV application. The primary judge dismissed his application and an appeal from that decision to the Full Court of the Federal Court of Australia was removed to the High Court.

The High Court unanimously dismissed the appellant's appeal.

Joint judgment

In a joint judgment, Gageler CJ, Gordon, Steward, Gleeson, Jagot, and Beech-Jones JJ, held that the appellant's continuing detention under the *Migration Act* did not exceed the constitutional limitation identified in *NZYQ*. Their Honours explained that removal is practicable in the reasonably foreseeable future where:

1. there is a country to which the unlawful non-citizen might be removed, and their removal to that country is permissible under the *Migration Act*: at [35]; and
2. there are steps that can practically be taken that would realistically result in the unlawful non-citizen's removal in the reasonably foreseeable future: at [41]. These steps are practically available even where the unlawful non-citizen refuses to cooperate in the undertaking of administrative processes necessary to facilitate that removal: at [41].

Their Honours stated further that 'continuing detention for a non-punitive purpose that is occurring because of a voluntary decision of the detainee cannot be characterised as penal or punitive': at [42].

In this case, their Honours found (at [46]) that the appellant's removal from Australia was required by s 198(6) of the *Migration Act* as the appellant was a detained unlawful non-citizen whose application for a substantive visa was rejected and finally determined. Further, it was found that in the absence of an extant protection finding, which would engage the operation of s 197C(3) (which applies to a person in respect of whom Australia has non-refoulement obligations pursuant to the *Migration Act*), his removal to Iran was permissible under s 198(6).

Critically, their Honours held (at [48]–[49]) that the appellant could be removed to Iran if he cooperated in the process of obtaining the requisite travel documents from Iranian authorities. The appellant decided not to cooperate. He had the capacity to change his mind and chose not to do so. On those undisturbed findings of primary fact, the plurality held that the appellant's continuing detention under ss 189(1) and 196(1) of the *Migration Act* did not exceed the constitutional limitation identified in *NZYQ*.

Justice Edelman

Edelman J stated (at [108]) that continuing detention could still be considered necessary for the purpose of removing an unlawful non-citizen who might refuse to assist with their removal. In this case, Edelman J found (at [126]) that the appellant was capable of providing assistance required to remove him and he had been found by a delegate of the Minister for Immigration and Border Protection not to have a genuine and well-founded fear of persecution of Iran. Thus, the appellant could be removed to Iran in the reasonably foreseeable future if he consented to that removal. BN

ENDNOTES

1 See Megan Caristo, 'Indefinite detention no more: the High Court overturns the constitutional holding in *Al-Kateb'* [2024] (Autumn) *Bar News*, 19–21.

2 *ASF17 v Minister for Immigration and Border Protection* [2018] FCA 1149.