Behrooz v. Secretary of the Department of Immigration and Multicultural and Indigenous Affairs

[2004] HCA 36; 219 CLR 486; 208 ALR 271; 78 ALJR 1056

Country: Australia
Region: Oceania
Year: 2004
Court: High Court
Health Topics: Prisons
Human Rights: Freedom from torture and cruel, inhuman or degrading treatment, Right to due process/fair trial, Right to liberty and security of person

Facts

Mr. BehroozÂ (â€œthe Appellantâ€•) arrived in Australia without a visa and was taken into immigration detention at the Woomera Immigration Reception and Processing Centre (â€œWoomeraâ€•) in accordance with the Migration Act 1958 (â€œthe Actâ€•).Â The Appellant later escaped Woomera before being taken back into custody and charged with an offence under s. 197A of the Act, which states:
â€œA detainee must not escape from immigration detention.

Penalty: Imprisonment for 5 years.â€•
S 5(1) of the Act defines â€œimmigration detentionâ€• as:
â€œâ€¦ being held by, or on behalf of, an officer â€¦ in a detention centre established under this Actâ€•.
The Appellant submitted that if harsh conditions at Woomera rendered the detention punitive, then the detention was not â€œimmigration detentionâ€• as authorized by the Act and the Appellant could not be charged with escaping â€œimmigration detentionâ€•.Â This argument was based on the constitutional requirement that punitive detention can only be prescribed by the judiciary, not by the executive.

Counsel for the Appellant obtained witness summonses for the production of extensive evidentiary material relating to conditions at Woomera.

The Secretary of the Department of Immigration and Multicultural and Indigenous Affairs (â€œthe First Respondentâ€•), and the Attorney General (intervening) applied to have the summonses set aside because they were oppressive and had no legitimate forensic purpose. The Magistrates Court dismissed the application, holding that the evidence sought by Mr. Behrooz would be relevant to his defence.

On appeal, the Supreme Court of South Australia set aside the summonses, holding that establishing harsh conditions at Woomera would not support a defence known to law.

This appeal was brought to the High Court of Australia by Mr. Behrooz on the grounds that the Supreme Court erred in setting aside the summonses.

Decision and Reasoning

The Court dismissed the appeal, holding that the Supreme Court correctly concluded that the defense asserted by the Appellant is not available in law. They held that the existence of harsh conditions would not have rendered the detention punitive in nature, and that the Appellantâ€™s detention would be valid â€œimmigration detentionâ€• regardless of conditions because a detention may be authorizedÂ by statute even if the conditions of that detention are contrary to law. They held that it was open to the Appellant to pursue alternative legal remedies because a detaining authority owes a duty of care to detainees.

The Court noted that the Appellant did not put forward the acceptable defense of necessity: he did not assert that he escaped Woomera to avoid a threat to his life or safety.

Kirby J dissented and would have allowed this appeal. He found that the assertion that the Appellant was in â€œimmigration detentionâ€• should not have been conclusive. It should have been for the Court to decide what kind of detention could be authorized by the Act in accordance with constitutional powers. Kirby J found that

prolonged detention in intolerable conditions is unconstitutional in Australia, therefore the Act could not have authorized this type of detention.

The dissent found that inhuman and intolerable conditions could have rendered the Appellantâ€™s detention punitive, rather than administrative.Â This determination should have been based on â€œthe legal and constitutional character of the detentionâ€• rather than on the asserted description. The Act could not have authorized punitive detention because punitive detention requires a final decision by the judiciary. Further, in cases of ambiguity, legislation must be interpreted in accordance with international law. Australia is bound by provisions of the International Covenant on Civil and Political Rights which state that â€œ[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishmentâ€•.

The dissent found absurd the conclusion that the Appellant should have exhausted all alternative remedies before attempting escape. He found that it is unlikely that unlawful non-citizens being held in immigration detention would be able to pursue expensive civil rights claims, especially because they risk removal from Australia before their claims could be heard.

Decision Excerpts

â€œThe information the subject of the witness summonses might have assisted the appellant to demonstrate that he had a legitimate cause for complaint about his conditions of detention, and that he had a case for legal redress. But it could not have assisted an argument that he was not in immigration detention, or that s 197A did not validly prohibit his escape. The definition of "immigration detention" in s 5 of the Act includes being held in a detention centre established under the Act. The appellant was being held in a detention centre so established. By definition, he was in immigration detention. The nature of this detention was established by the statutory provisions pursuant to which, and for the purpose of which, his detention was required. The statutory definition applied to this case. That from which he escaped was immigration detention. The conditions at the detention centre could not alter the case. For that reason, the information was irrelevant to the charge of a contravention of s 197A. The purpose for which the summonses were issued was not a legitimate forensic purpose.â€• Para. 22

â€œ[T]he Act evinces a distinction between the creation and continuance of the state or condition of being in "immigration detention" and the civil and criminal liabilities which officers may encounter in relation thereto. What otherwise might be civil or criminal liability arising by acts done by officers in the exercise of authority to detain persons is qualified by a number of express provisions.â€• Para. 48

â€œIf, by evidence, the appellant could demonstrate that the conditions in which he was held at Woomera immediately before he left that place passed beyond the language of the Act ("immigration detention") and the purposes for which the Parliament had provided in the Act for detention (holding, processing, admitting or expelling "unlawful" alien entrants) he would have a reasonable argument that his custody not only fell outside the "immigration detention" for which the Parliament had provided. It would also fall outside any such administrative detention for which the Parliament could provide, without the prior authorisation of a judicial order.â€• Para 120 (dissent)

â€œIt is one thing to establish, and enforce, a form of administrative custody for the detention of aliens unlawfully entering Australia and for the limited purposes envisaged by the Act. Arguably, it is quite a different thing, outside the Act and beyond constitutional power, to subject such an alien as a detainee to inhuman and intolerable conditions. If such conditions could be proved by evidence, it would be reasonably arguable, as a matter of statutory construction, that "escape" from them was not escape from "immigration detention", as enacted and as constitutionally permitted. Arguably, it would be no more an "escape" from "immigration detention" than it would be for the detainee to "escape" from equivalent inhuman and intolerable conditions into which the detainee had been illegally confined in a wholly private detention facility falling outside the Act. Or in an offshore cage selected in the vain hope of avoiding accountability to the standards of Australian law.â€• Para. 125 (dissent)

â€œThe respondents themselves accepted that the Act did not authorize inhuman and intolerable conditions in immigration detention. That concession properly recognises the need to read the Act in a way that avoids an operation of federal law that would conflict with international law. However, once that concession is made, a party with a serious claim of a breach of international law must be in a position, on that basis and without delay, to contest the lawfulness of any detention alleged to contravene such standards. As the appellant accepted, and HREOC submitted, the remedies for unlawful conditions of detention would not necessarily extend to release into the community. Instead, the appropriate remedy might be no more than removal from being subjected to the conditions of detention that were inhuman and intolerable. Or it might extend to

providing, in a case such as the present, an answer to a criminal offence expressed in terms that assume that the "detention" is lawful.â€• Para. 131 (dissent)

â€œâ€¦the place at which the person is detained would remain one of the places identified by the Act where to be held by or on behalf of an officer would mean being in â€œimmigration detentionâ€•. And any want of valid legislative authority to commit those acts or make those omissions, which together are said to render the conditions of detention harsh or punitive, denies the lawfulness of those acts and omissions. It does not deny the lawfulness of detention at the place identified in the Act.â€• Para. 174