Re Woolley, ex parte Applicants M276

(2004) 225 CLR 1; (2004) 80 ALD 1; (2004) 210 ALR 369; (2004) 79 ALJR 43; (2004) 32 Fam LR 180; [2004] HCA 49

Country: Australia
Region: Oceania
Year: 2004
Court: High Court
Health Topics: Child and adolescent health, Infectious diseases, Mental health, Prisons
Human Rights: Freedom from discrimination, Freedom from torture and cruel, inhuman or degrading treatment, Freedom of expression, Freedom of religion, Right to liberty and security of person

Facts

The Applicants were four Afghani children who arrived in Australia with their parents as “unlawful non-citizens” (a person who is in the migration zone who is not an Australian citizen and who does not hold a valid visa) according to the Migration Act 1958 (the Act). The family was placed in immigration detention pursuant to the Act. The father then applied for protection visas for the family. The decision making process about these visas was ongoing and the family remained in immigration detention for approximately three and a half years.

The Applicants challenged their detention on two grounds. Firstly, that the relevant detention provisions of the Act did not apply to them as children; and secondly, that even if they did apply, they were invalid under the Constitution because mandatory detention was a form of punishment by the Executive and therefore contrary to Chapter III of the Constitution and the doctrine of the separation of powers (“a structural feature of the Constitution”). The Applicants sought orders of habeas corpus against Baxter Immigration Detention Centre, and prohibition and injunction against the Minister for Immigration.

Sections 189 and 196 of the Act relevantly provided for the mandatory detention of unlawful non-citizens until their removal from Australia or their being granted a visa. Section 198 provided for the removal of an unlawful non-citizen who requests such removal.

Decision and Reasoning

The Court held that ss 189 and 196 of the Act, providing for the detention of “unlawful non-citizens,” applied to children. In its language, the legislation made no distinction between those under and those over 18 and therefore unequivocally applied to all unlawful non-citizens, including children. The Court held that this was not the result of an oversight or mistake but rather a plain reflection of the will of the Parliament. This clear and valid enactment overrode any possible intervention on the basis of the Court’s parens patriae jurisdiction and did not provide scope for interpreting the Act in accordance with Australia’s international treaty obligations. Additionally, other parts of the legislation clearly applied to children and “demonstrate[d] that the legislature contemplated…the detention of children” (para. 129). Further, the Court held that if the Act did not apply to children there would be a gap in the legislation and parents would be subject to mandatory detention whilst their children would be “in a kind of legal limbo” (para. 8). The Court also recognized the difficulty in defining “children” because those under the age of 18 constituted a heterogeneous group ranging from entirely dependent infants to independent 17-year-olds.

The Court also held that the mandatory detention provisions were authorized under the constitutional grant of legislative power in s 51(xix) of the Constitution, i.e. that they were laws “with respect to aliens”. While “most heads of federal legislative power do not seem expansive enough to justify a law that authorises or requires detention divorced from a breach of law” (para. 63), the detention of aliens was a recognized exception to this. The Court upheld the previous case of Chu Kheng Lim v. Minister for Immigration (1992) 176 CLR 1 and said that the legislative power in s 51(xix) of the Constitution extended to conferring on the Executive the authority to detain aliens. This authority was construed as an incident of the power to exclude, admit or deport aliens as part of territorial sovereignty and for the purpose of receiving, investigating and determining applications for entry into Australia.

The detention was further held not to be “punitive” in its application to the Applicants as children, and could not

be held unconstitutional on that basis. The Applicants argued that their detention was punitive in its effect because of its prolonged duration, their special status as children, and their incapacity to request removal pursuant to s 198. But the Court held unanimously that the detention was not punitive. “Detention of aliens, certainly for the purpose of determining rights of entry into, or arranging deportation from, Australia” is recognized as detention “otherwise than of a punitive kind” (para. 262). The fact that the detainees were children did not “make a relevant legal difference” (para. 263). The majority held that the object or purpose of the law authorizing detention was the determinative factor in deciding if such detention was punitive, not the effect of the detention on an individual.

The purpose of the detention in the present case was to prevent unlawful citizens, children included, from entering into the Australian community while a decision was made as to whether or not to grant a visa or otherwise remove them. The Court held that prolonged detention “will not itself demonstrate that the purpose of detention has passed from exclusion by segregation to punishment” (para. 227). The Court held that while they did not wish to diminish the detrimental effect detention may have had on the Applicants, the Applicants’ circumstances were not sufficiently harsh nor was their detention sufficiently prolonged to warrant the intervention of the Court because their detention had been transformed into punishment. Further, the Applicants’ incapacity (as children) to request removal did not render their detention punitive because their parents were vested with the discretion to make a decision about their removal.

The provisions were therefore held to be constitutionally valid and were not contrary to Chapter III of the Constitution or the doctrine of the separation of powers. The Court stated that they could not strike out the law on the basis of the “wisdom, humanity and justice of … [the] policy” (para. 198).

Decision Excerpts

“Nowhere was it suggested, in the reasoning of Brennan, Deane and Dawson JJ, or Mason CJ, or any member of the Court, that the power of detention conferred by the legislation in that case would take on a different character if, in its application to some particular detainees, or some class of detainees, it was capable of causing particular hardship. One of the most obvious features of the system of mandatory detention considered in Chu Kheng Lim, as of the system with which this case is concerned, is that it does not address the particular circumstances of individual detainees. That is the difference between mandatory and discretionary detention. If the possibility of the severity of the operation of mandatory detention in a particular case or class of case altered the character of the power of detention from an incident of executive power to extra-judicial and unconstitutional punishment, then the system of mandatory detention would have been found unconstitutional. Furthermore, it is impossible to identify the criterion by which severity of application would be measured. There is no reason why it would be limited to children, or to some children. Children might constitute a class whose members would include specially vulnerable people, but so would the elderly, the infirm, and perhaps others.” Para. 29.

“However, the issue in this Court is not whether the detention of the present applicants is arbitrary according to international jurisprudence, whether it constitutes a breach of various Conventions to which Australia is a party or whether it is contrary to the practice of other States. It is whether Parliament has the purpose of punishing children who are detainees so that, for the purpose of the Constitution, the Parliament has exercised or authorised the Executive to exercise the judicial power of the Commonwealth. On that very different issue, the international jurisprudence and the practice of other States do not assist. That is because the purpose of ss 189 and 196 is a protective purpose – to prevent unlawful non-citizens, including children, from entering the Australian community until one of the conditions in s 196(1) is satisfied. If that is the purpose of the provisions, as I think it is, the Parliament has not exercised, nor authorised the Executive to exercise, the judicial power of the Commonwealth. Whether or not Australia may be in breach of its international obligations cannot affect that constitutional question.” Para. 115.

“In the light of this history and on the face of the public record of the Parliament, the suggestion that there has been some oversight, mistake or a failure to consider the immigration detention of children in Australia is fanciful. Detention is the deliberate policy of the Australian Parliament, repeatedly affirmed. In default of a constitutional basis for invalidating it, it is the duty of this Court to give effect to the Act, whatever views might be urged about the wisdom, humanity and justice of that policy.” Para. 198.