Departing from the General Rule: place no impediments in the way of challenging one's detention

Federal Court considers costs following case on Constitutional definition of Aboriginality

Summary

The recent case of *Helmbright v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 3)*[1](*Helmbright (No 3))* considered the allocation of costs between the three parties involved in the earlier *Helmbright v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)*[2] (*Helmbright (No 2)*).

Ultimately (and despite submissions from the respondent Minister for Immigration, Citizenship, Migrant Services and Multi-cultural Affairs (the Minister) seeking costs from both the applicant and the intervening party), the Court held that each party should bear its own costs.[3]

The judgement noted:

- that while Mr Helmbright's application had failed, it had failed narrowly and no party was "so plainly vindicated that it was obvious they should be compensated for costs";[4] and

- the compensatory (and not punitive) purpose of awards for costs needed to be borne in mind when exercising the Federal Court's discretion on costs, and in assessing submissions.[5]

Background

The earlier *Helmbright (No 2)* case related to an application by Kenrick Hanare Helmbright (Mr Helmbright), a New Zealand citizen of Australian Aboriginal descent. He sought a declaration that he was not an alien for the purposes of section 51(xix) of the Constitution[6] after learning the Minister was considering cancelling his visa.

The Minister (as respondent) argued Mr Helmbright was not an Aboriginal person for the purposes of section 51(xix).

melythina tiakana warrana (Heart of Country) Aboriginal Corporation (mtwAC) was an intervening party, representing the descendants of Aboriginal people living in north-eastern Tasmania at the time of the first European settlement.

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[1] [2021] FCA 955.
[2] [2021] FCA 647.
[3] *Helmbright v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 3)* [2021] FCA 955, 1.
[4] Ibid [15] and [20].
[5] Ibid [17].
[6] Section 51 (xix) provides - "*The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: … (xix) naturalization and aliens; …"*

What happened in *Helmbright (No 2)*?

Helmbright (No 2) considered questions arising from the High Court decision in *Love v Commonwealth; Thoms v Commonwealth*[7] (*Love/Thoms*) and the majority finding that Aboriginal Australians (as understood according to the tripartite test in *Mabo (No 2)*) cannot be declared aliens pursuant to section 51(xix) of the Constitution.

Helmbright (No 2) held that:

- a single Federal Court judge was not free to adopt a different test to that applied in *Mabo (No 2)*[8] (and specifically the test applied in the *Tasmanian Dam Case*[9]);

- the decision in *Love/Thoms* did not mean that, unless a non-citizen who identifies as Aboriginal can prove membership of a native title holding group, they cannot be immune from being declared an alien;[10] and

- Mr Helmbright was not an Aboriginal Australian by reference to the *Mabo (No 2)* test because he had not proven the second aspect of the mutual recognition limb requiring recognition to have been given by 'elders or others enjoying traditional authority'.[11]

This meant Mr Helmbright could not prove he was not an alien for the purposes of section 51(xix), and his application was dismissed.

Notwithstanding the above, the Court noted that, if the Minister had sought declaratory relief confirming Mr Helmbright was an alien, it would not have been appropriate because:

- Mr Helmbright may still be able to prove the second aspect of the mutual recognition limb; and

- Alternative tests might also apply to his case.[12]

What happened in *Helmbright (No 3)?*

After orders were made in *Helmbright (No 2)*, the parties were invited to reach agreement on costs. Agreement could not be reached, and submissions were filed as follows:

- Mr Helmbright sought orders that each party bear its own costs;[13]

- The Minister sought orders that:

    - Mr Helmbright pay the Minister's costs; and

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[7] [2020] HCA 3; 375 ALR 597.
[8] *Helmbright v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2*) [2021] FCA 647 (15 June 2021) [5].
[9] *Commonwealth v Tasmania* [1983] HCA 21; 158 CLR 1.
[10] *Helmbright v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)* [2021] FCA 647 (15 June 2021) [7] and [210].
[11] Ibid [8].
[12] Ibid [346].
[13] *Helmbright v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 3)* [2021] FCA 955 [4].

    - mtwAC pay the Minister's costs of the interlocutory application; [14] and

- mtwAC made no submissions regarding the other parties, but submitted:

    - there should be no order that mtwAC pay any other party's costs; and

    - the Minister should pay mtwAC's costs in respect of its successful intervention application.[15]

What did the court decide?

The Court held that each party should bear its own costs.[16] The reasons noted:

- that, while Mr Helmbright's application failed, it failed narrowly and no party was" so plainly vindicated that it was obvious they should be compensated for costs";[17] and

- the compensatory (not punitive) purpose of awards for costs needed to be borne in mind when approaching the discretion in section 43 of the *Federal Court of Australia Act 1976* (Cth) (on costs) and assessing submissions.[18]

The Court accepted Mr Helmbright's submission that the proceeding was of public importance, as it was the first contested trial on whether the Federal Court was bound to apply the test in *Mabo (No 2)* when applying *Love/Thoms*.[19]

With reference to the compensatory nature of costs orders, the Court was persuaded by observations in *Cabal v United Mexican States (No 6)*[20] which said at [22]:

> *Although an order for costs is made to compensate a successful party for the expenses incurred in responding to an application or proceeding, that principle of compensation should yield in favour of the principle that a person detained by authority of the State should not be deterred by a potential costs order from seeking his or her liberty.* ***There is a public interest in ensuring that persons detained against their will should not have any impediment put in their way which will inhibit them in seeking their liberty. In my view that public interest outweighs the general rule that a successful party is to be compensated for its costs by the unsuccessful party. In particular is this so where the costs are incurred by the State under whose authority the person is detained.***
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> (Emphasis added)

Relevantly, Mr Helmbright's liberty and ability to stay in Australia would have been at risk if his visa had been cancelled. To avoid that, he had to prove in Court that his family had always considered themselves Aboriginal Australians and Māori People (which he did).[21]

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[14] Ibid [5].
[15] Ibid [6].
[16] Ibid 1.
[17] Ibid [15] and [20].
[18] Ibid [17].
[19] Ibid [19]-[20].
[20] [2000] FCA 651; 174 ALR 747 at [22].
[21] *Helmbright v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 3)* [2021] FCA 955 [23].

Noting *Cabal (No 6)*, the Court said, even if the public importance of the proceeding was ignored (which it should not have been), there was a public interest in ensuring people like Mr Helmbright were not stopped from seeking to prove they are not aliens and, therefore, not subjected to detention and removal. This was considered especially important in the context of the treatment of First Nations Peoples in Australia.[22]

The Court did not consider any of the following factors relevant to the allocation of costs:

- The fact Mr Helmbright was cross-examined;
- The fact the Minister's costs came from public funds; or
- The fact Mr Helmbright's legal representation was provided on a conditional basis with recoverable fees limited to any amount of costs paid by the respondent pursuant to an order of the Court.[23]

Costs of mtwAC's intervention

No costs of the substantive proceeding were sought against mtwAC. The only issue was whether the reserved costs of the intervention application should result in a costs order against mtwAC in favour of the Minister.

The Court did not consider such an order appropriate but gave serious consideration to the opposing mtwAC submissions, having noted:

- mtwAC had an interest in the proceeding, as a body which decides whether to recognise individuals as members of the group of First Nations People it represents; and
- the Court had been assisted by mtwAC's submissions.[24]

The Court further noted:

- there may well be an ongoing role for such organisations in proceedings relating to whether a person is an alien, or an Aboriginal Australian; and
- it is in the interests of the administration of justice for there be no chilling effect on such parties, due to imposition of costs burdens, when their participation is measured, effective and efficient.[25]

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5 September 2021

[22] Ibid.
[23] Ibid [24]-[26].
[24] Ibid [29]-[30].
[25] Ibid [34].