FEDERAL COURT OF AUSTRALIA

Bethell v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 727

File number:	QUD 192 of 2021
Judgment of:	**JACKSON J**
Date of judgment:	29 June 2021
Catchwords:	**MIGRATION** - detention of unlawful citizen under s 189 of the *Migration Act 1958* (Cth) - applications for writ of *habeas corpus* and interlocutory injunction - similar applications made before other judges - finding that application is an abuse of process - no indication that requirements of s 189 not satisfied - no serious question to be tried - application for injunction dismissed
Legislation:	*Migration Act 1958* (Cth) ss 133C, 116, 189, 196
Cases cited:	*AJL20 v Commonwealth of Australia* [2020] FCA 1305 *Bethell v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 661 *Bethell v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCCA 1429 *Censori v Adult Parole Board of Victoria* [2015] VSCA 254; (2015) 254 A Crim R 455 *Commonwealth of Australia v AJL20* [2021] HCA 21 *Connelly v Director of Public Prosecutions* [1964] AC 1254 *Eshugbayi Eleko v The Government of Nigeria (Officer Administering)* [1928] AC 459 *Frigger v Trenfield* [2019] FCA 1746 *Mansour v Jamil* [2002] NSWCA 48 *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* [2003] FCAFC 70; (2003) 126 FCR 54 *Nudd v The Queen* [2006] HCA 9; (2006) 225 ALR 161 *Okwume v Commonwealth of Australia* [2016] FCA 1252 *Re Edwards* (1988) 92 FLR 96 *Rogers v The Queen* (1994) 181 CLR 251 *Ruddock v Taylor* [2005] HCA 48; (2005) 222 CLR 612 *Tomlinson v Ramsey Food Processing Pty Limited* [2015] HCA 28; (2015) 256 CLR 507

	Vasiljkovic v Honourable Brendan O'Connor [2010] FCA 1246; (2010) 276 ALR 326 *Vasiljkovic v The Honourable Brendan O'Connor (No 2)* [2011] FCAFC 125 *Williams v Spautz* (1992) 174 CLR 509
Division:	General Division
Registry:	Queensland
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	58
Date of hearing:	28 June 2021
Counsel for the Applicant:	The applicant appeared in person
Counsel for the Respondent:	Ms S Spottiswood
Solicitor for the Respondent:	Australian Government Solicitor

ORDERS

QUD 192 of 2021

BETWEEN:	**KARL ANTONY BETHELL** Applicant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS** Respondent

ORDER MADE BY:	**JACKSON J**
DATE OF ORDER:	**29 JUNE 2021**

THE COURT ORDERS THAT:

1. Paragraph 2 of the originating application is dismissed.

2. Costs in the cause.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

JACKSON J:

1 Mr Bethell is in immigration detention. He is a citizen of the United Kingdom (**UK**). He has lodged an urgent application for a writ of *habeas corpus* for his release from detention, together with application for an injunction against deportation until the lawfulness of his detention is ascertained. For the following reasons, the latter interlocutory injunction application will be dismissed.

Background

2 The background to the matter is contained in an affidavit of Tigiilagi Etuati sworn 25 June 2021 which was filed on behalf of the respondent (**Minister**). That background also appears, in part, in a decision of Rangiah J of this court, *Bethell v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 661 (***Bethell No 1***). That decision was in a different proceeding, QUD 95 of 2021.

3 The following basic facts emerge from *Bethell No 1*. Mr Bethell was in Australia on a Temporary Worker Visa. That visa was cancelled on 10 November 2016 under s 116(1)(e)(ii) of the *Migration Act 1958* (Cth) on the basis that his presence in Australia was or might be a risk to the health or safety of another person. At that time, Mr Bethell was in prison in Queensland. He was taken into immigration detention on 15 November 2019 after being removed from the custody of the Queensland authorities.

4 On 15 January 2021, Mr Bethell was granted a bridging visa and then released from immigration detention. But the Minister cancelled that visa on 23 February 2021 under s 133C(3) of the *Migration Act*. Mr Bethell was returned to immigration detention on 26 February 2021.

5 On 29 March 2021, Mr Bethell filed the originating application in QUD 95 of 2021, seeking a writ of *habeas corpus*. Rangiah J heard that application on 16 June 2021 and delivered his judgment in *Bethell No 1* on 17 June 2021. His Honour dismissed the application with costs.

6 On 18 June 2021, Mr Bethell lodged the application for *habeas corpus* which commenced the present proceeding. It seems that the court registry did not accept that application for filing immediately.

7 Also on 18 June 2021, Mr Bethell filed an appeal against *Bethell No 1*, along with an injunction to prevent his removal before the determination of the appeal. White J heard the injunction application on 21 June 2021 and dismissed it on that day.

8 On 21 June 2021, Mr Bethell filed in the Federal Circuit Court of Australia an application for judicial review of the cancellation of his bridging visa on 23 February 2021. That too was accompanied by an application for an interlocutory injunction restraining his removal from Australia. On 22 June 2021, the Federal Circuit Court (Judge Lucev) dismissed the interlocutory injunction application: *Bethell v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCCA 1429 (***Bethell FCC***). The court found that the judicial review application raised no serious question to be tried.

9 At a time which is unclear, Australian Border Force notified Mr Bethell that he was to be removed from Australia to the UK on a flight departing at 11.00 pm Brisbane time on 22 June 2021. On the morning of 22 June 2021 the registry accepted the application in this proceeding for filing, and it came before me for an urgent hearing later that day.

10 At that hearing, uncertainty emerged as to whether Mr Bethell was in fact going to be removed that night, because he had not taken a COVID-19 test. Apparently, the relevant migration authorities in the UK require a negative test before they will receive him in that country. There was no opposition from the Minister to a short adjournment accompanied by an injunction to preserve the position until the application could be heard substantively, and that interim injunction was extended further at a hearing on 23 June 2021 to give the Minister the opportunity to file written submissions (Mr Bethell had already done so) and to permit all concerned to take account of the significance, if any, of the High Court's decision in *Commonwealth of Australia v AJL20* [2021] HCA 21 (***AJL20 HC***), which was handed down on the morning of 23 June.

11 Mr Etuati's affidavit of 25 June 2021 deposes to the present intention of the Department of Home Affairs to remove Mr Bethell on a charter flight which is scheduled to arrive in the UK on the morning of 21 July 2021.

12 These reasons have been prepared on an urgent basis after substantively hearing the injunction application on 28 June 2021.

The parties' cases on the present application

13 Mr Bethell relied on two affidavits dated 18 June 2021 and (apparently) 23 June 2021. They are both signed but not witnessed. They also contain much material in the nature of submissions. But the Minister did not object to my having regard to the affidavits and I have done so. Mr Bethell also provided three sets of written submissions to my Chambers. One of those is a copy of his submissions before White J and I have not had close regard to them, as they relate to a different proceeding and to the extent that they are relevant the points made in them seem to be replicated in the other two written submissions, to which I have had regard.

14 Mr Bethell is unrepresented on the application and, with respect, does not express himself in writing in a straightforward way. His affidavits and written submissions are difficult to understand. Doing my best to try to extract from them the grounds of his application for *habeas corpus*, it seems that they are as follows.

15 *First*, Mr Bethell claims that the decision of the Minister on 23 February 2021 to cancel his bridging visa was invalid. This, he says, means that he is not an unlawful non-citizen and therefore should not be detained. He claims that Rangiah J should have considered that issue in *Bethell No 1*, but did not. There are various bases on which Mr Bethell seeks to impugn the Minister's decision. One relates to the interests of Mr Bethell's son, who is a minor. While the Minister took those interests into account, Mr Bethell says that he failed to take into account a 'family report' which was due in February 2021 and which, he says, the Department somehow 'prevented'. Mr Bethell also claims that the Minister relied on a domestic violence order against him which was, in fact, not a domestic violence order at all but a temporary protection order. He also says that the Minister put weight on Australia's international obligations concerning protection and non-refoulement when, given that he was going to return to the UK, that should have been a neutral consideration. Finally, he complains of what he says was the failure of the Department to give him the documents required to be given along with the notice of cancellation and an alleged failure to acknowledge that he had applied for revocation of the cancellation.

16 *Second*, Mr Bethell complains about what he says is the length of time the court took to determine his first *habeas corpus* application in QUD 95 of 2021. As I have said, the application which resulted in *Bethell No 1* was filed on 29 March 2021 and heard on 16 June 2021, with judgment delivered on 17 June 2021. That alleged delay seems to be connected in Mr Bethell's mind to the lawfulness of his present detention because, he says, the delay allowed

'the Commonwealth to get its house in order for a period of months' and so gave it 'time to make the unlawful lawful'.

17 *Third*, Mr Bethell submitted that the Department's endeavours during QUD 95 of 2021 to arrange for his removal from Australia were unlawful, because the *habeas corpus* application should have put a pause on 'any attempt to remove the applicant from the Jurisdiction of the court, to which he applied'. It is not clear how this is said to be relevant to the *habeas corpus* application; Mr Bethell's complaints on this point seemed to be directed at the lawfulness of the alleged attempts to remove him, rather than the lawfulness of his detention.

18 *Fourth*, Mr Bethell made a number of submissions to the effect that his treatment in previous matters in this court and in the Federal Circuit Court had not been fair. Again, it was not clear how this is said to bear on the lawfulness of his current detention, although one way in which it could conceivably be relevant to this application is mentioned below.

19 *Fifth*, Mr Bethell made a number of allegations about, in effect, misleading conduct in which he says the Department of Home Affairs and those representing it in court have engaged. Once again, it was not clear how these were said to impact on the lawfulness of his present detention. Mr Bethell submits that Rangiah J erred when he found at [42] that Mr Bethell had refused voluntary removal so that his removal had to be arranged on the basis that it was involuntary.

20 Mr Bethell made a number of other submissions orally and in writing which were difficult to comprehend and, in some cases, extravagant and unsupported by evidence. I have not dealt specifically with every single one. He agreed with me that the summary I have given picked up the main points he wished to put.

21 The Minister resists these claims on two bases. The first is that the decision in *AJL20 HC* confirms that Mr Bethell's detention is lawful. The second is that, in view of *Bethell No 1*, the present application for *habeas corpus* is precluded by the doctrines of *res judicata*, *Anshun* estoppel or abuse of process.

Principles of interlocutory injunctions

22 In *Frigger v Trenfield* [2019] FCA 1746 at [6], I summarised the principles applicable to interlocutory injunctions, relevantly, as follows:

> (1) If interlocutory relief is to be sought, it should be sought promptly and any delay in applying for injunctive relief should be adequately explained: *Baker & McAuliffe Holdings Pty Ltd t/as JSB Lighting v Carey* [2018] FCA 1972 at [62].

(2) Where an applicant seeks interlocutory relief, it is necessary to demonstrate that:

(a) there is a serious question to be tried as to the applicant's entitlement to relief;

(b) the applicant is likely to suffer injury for which damages will not be an adequate remedy; and

(c) the balance of convenience favours the granting of an interlocutory injunction.

Australian Broadcasting Corporation v O'Neill [2006] HCA 46; (2006) 227 CLR 57 at [19] (Gleeson CJ and Crennan J).

(3) The applicant must show a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial: *ABC v O'Neill* at [65] (Gummow and Hayne JJ); *Twinside Pty Ltd v Venetian Nominees Pty Ltd* [2008] WASC 110 at [9] (Beech J).

(4) The likelihood of success required is dependent upon the nature of the right being asserted and the practical consequences that are likely to flow if the injunction is granted: *ABC v O'Neill* at [71]; *Twinside* at [9]; *Apotex Pty Ltd v Cipla Limited* [2017] FCA 1627 at [40] (Beach J).

(5) The resolution of the question of where the balance of convenience and justice lies requires the court to exercise a discretion: *Samsung Electronics Co Limited v Apple Inc* [2011] FCAFC 156; (2011) 217 FCR 238 at [65] (Dowsett, Foster and Yates JJ). The court will weigh up the injustice which might be suffered by the respondent if the injunction is granted and the applicant later fails at trial, against the injustice which might be suffered by the applicant if the injunction is not granted and the applicant later succeeds at trial: *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 at 623; *Twinside* at [11].

…

(7) The question of whether there is a serious question or a prima facie case should not be considered in isolation from the balance of convenience. The apparent strength of the parties' substantive cases will often be an important consideration to be weighed in the balance: *Samsung Electronics* at [67]. As the apparent strength of the applicant's case diminishes, the balance of convenience moves against the making of an order: *Glenwood Management Group Pty Ltd v Mayo* [1991] 2 VR 49 at 54-55; *Twinside* at [11].

…

Serious question to be tried

Abuse of process

23 The immediate and obvious problem facing Mr Bethell in his application for a writ of *habeas corpus* is that he made an application for identical relief to Rangiah J and sought to lodge the present application the very day after Rangiah J dismissed the first application. Hence the Minister's submissions about *res judicata*, *Anshun* estoppel and abuse of process.

24 Nevertheless, Mr Bethell relies on *Re Edwards* (1988) 92 FLR 96 as authority for the proposition that in cases of *habeas corpus*, an applicant has the right to go from one court to another and that no court is bound by the view taken by any other court. That was a case of an application for bail in criminal proceedings. The relevant passage from the judgment of McPherson J (at 98) is:

> On behalf of the respondent, Mr Scott of counsel submitted that, the earlier application for bail having been refused, it was not now competent for the applicant to apply again to another judge of this Court. The submission is certainly contrary to the law as it used to be. Bail was originally granted upon application for habeas corpus: see *R v Malone* [1903] St R Qd 140 at 141. In England the old rule was that an applicant for habeas corpus was entitled to go from one Court to another, and that no Court was bound by the view taken by any other: ibid. In England that is now no longer possible: see *Re Kray* [1965] Ch 736 at 742. In Queensland, however, the right to go from judge to judge was recognised by the Full Court as recently as 1973: see *R v Kerr; Ex parte Groves* [1973] Qd R 314 at 316. In *R v Malone* (supra) the Full Court held that there was 'an independent right' in the party of a person detained in custody 'to apply for bail, and if refused by one judge, to apply to another'.

25 The 'old rule' to which McPherson J refers was affirmed by the Privy Council in ***Eshugbayi Eleko*** *v The Government of Nigeria (Officer Administering)* [1928] AC 459. In that case, the judge at first instance had decided that, having heard and dismissed a motion for *habeas corpus* previously, he had no jurisdiction to entertain a new application (at 465). The conclusion of the Privy Council was that each judge of the High Court of Justice 'still has jurisdiction to entertain an application for a writ of *habeas corpus* in term time or in vacation and that he is bound to hear and determine such an application on its merits notwithstanding that some other judge has already refused a similar application' (at 468). The Privy Council did not, however, consider the potential application of doctrines which frequently stand in the way of repeating an application made previously, namely *res judicata*, *Anshun* estoppel and abuse of process.

26 In any event, there is authority in this court, which I am required to follow, to the effect that those doctrines can apply to applications for *habeas corpus*. That authority is the decision of *Vasiljkovic v Honourable Brendan O'Connor* [2010] FCA 1246; (2010) 276 ALR 326 (***Vasiljkovic 1st Instance***) together with the Full Court decision in which it was upheld, *Vasiljkovic v The Honourable Brendan O'Connor (No 2)* [2011] FCAFC 125 (***Vasiljkovic FC***). The applicant in that case was arrested with a view to extraditing him to Croatia. The ensuing procedural history was extremely involved; I will only describe the aspects of it that are relevant to the present issue. Mr Vasiljkovic applied to this court for review of a decision of a magistrate that he was eligible for surrender to the Republic of Croatia. That application was

dismissed, an appeal by Mr Vasiljkovic to the Full Court was successful, but the High Court overturned that, and Mr Vasiljkovic was returned to prison. He then filed the application which came before Edmonds J. It sought, relevantly, a declaration that Mr Vasiljkovic's detention was unlawful, and an order in the nature of a writ of *habeas corpus*. The Minister sought summary judgment on various grounds, including that the application for *habeas corpus* was precluded by the outcome of the earlier review decision in the High Court, because both the High Court's decision and the application before Edmonds J turned on the lawfulness of Mr Vasiljkovic's detention.

27 Edmonds J granted summary judgment on several grounds. One was that the substance of both the review proceeding and the *habeas corpus* proceeding was the same: a challenge to the legality of the instrument that authorises Mr Vasiljkovic's detention (at [58]). Thus, *res judicata* precluded the new proceeding (at [60]). Also, Mr Vasiljkovic sought to raise new issues that were closely connected with the review proceeding and were not, but should have been, litigated in the review proceeding, so *Anshun* estoppel prevented him from raising them (at [73]). Also, to the extent that Mr Vasiljkovic was seeking to reargue the very matter decided adversely against him in the previous proceeding (at [76]), or that he was wanting to argue a different case (at [77]), he was seeking an outcome that would conflict with the previous decision in the review proceeding, and this was an abuse of process (at [83]).

28 In *Vasiljkovic FC* the Full Court unanimously dismissed the applicant's appeal, and in emphatic terms. At [16], after describing the grounds just mentioned, Jessup J (with whom Keane CJ and Dowsett J agreed) said:

> The primary Judge upheld the respondents' motion on all the grounds referred to above. Save for the matters briefly raised on behalf of the appellant to which I shall refer presently, it was not submitted on his behalf that his Honour had been in error in relevant respects. In my opinion, and with respect to the grounds referred to in the previous paragraph, this was a very clear case for the exercise of the power with which the court is invested under both s 31A of the *Federal Court Act* and O 20 r 5 of the Rules of Court. Nothing put on behalf of the appellant, and nothing which the material before us otherwise discloses, gives rise to a scintilla of doubt as to the correctness of his Honour's disposition of the respondents' motion.

29 That dictum was not the *ratio decidendi* of the Full Court's decision, given that those grounds appear not to have been argued before it. It is also true that neither the Full Court nor Edmonds J had their attention drawn to the *Eshugbati Eleko* line of authority. But the emphatic way in which the Full Court agreed with Edmonds J's conclusions on those points means, in

my view, that I must accept those conclusions. *Res judicata*, *Anshun* estoppel and abuse of process may be raised in answer to an application for *habeas corpus*.

30 Mr Bethell sought to distinguish *Vasiljkovic* on various grounds. One is that it was an appeal. It was not clear what he meant or whether he was referring to *Vasiljkovic 1st Instance* or *Vasiljkovic FC*. The first of these was a summary judgment application, not an appeal, and Edmonds J's approach at first instance was emphatically approved by the Full Court, so the fact that that was an appeal is not a relevant point of distinction.

31 Mr Bethell somehow sought to rely on a submission that the 'nature of habeas; is proof in the negative, not in the positive'. He appears to have been referring to the principle enunciated in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* [2003] FCAFC 70; (2003) 126 FCR 54 at [176] that while it is for the applicant to adduce evidence that puts in issue the legality of detention, once that occurs the burden shifts to the respondent to show on the balance of probabilities that the detention is lawful. But there is no reason why it follows from this principle that going from judge to judge with multiple *habeas corpus* applications is unconstrained by *res judicata*, *Anshun* estoppel or abuse of process. The onus is one thing; whether the issues in question were determined in a previous proceeding, or should have been raised in it but were not, is another.

32 Mr Bethell argued that *habeas corpus*, like bail, allowed 'an applicant to explore with another Judge the elements in the case that the presiding judge; did not properly turn his mind' [sic]. This was, once again, based on the assertion that it was for the respondent to prove the legality of detention, not the applicant to prove its illegality. But even if that proposition (oversimplified as it is) is correct, it does not follow that repeated *habeas corpus* applications are permissible where no relevant circumstances have changed.

33 Mr Bethell also pointed to arguments which found favour with Edmonds J which arose from the nature of Vasiljkovic as an extradition proceeding. But that does not mean that his Honour did not also deal with the arguments about *habeas corpus*. The Full Court cited, without disapproval, Edmonds J's characterisation of the principal relief in the proceeding as an order in the nature of *habeas corpus*: *Vasiljkovic FC* at [13]. Mr Bethell was unable to articulate how the fact that the detention in Vasiljkovic concerned extradition, rather than immigration detention, affected the overarching principle that the doctrines of *res judicata*, *Anshun* estoppel and abuse of process applied to *habeas corpus* applications.

34 Finally, Mr Bethell sought to rely on differences between the statutory provisions bearing on *habeas corpus* in New South Wales and Queensland, submitting that in New South Wales there was a provision, s 71 of the *Supreme Court Act 1970* (NSW), which effectively prevented an applicant for habeas corpus from 'going from judge to judge'. But Vasiljkovic was a federal matter concerning the Commonwealth extradition legislation, and Edmonds J made no mention of the New South Wales legislation.

35 All that said, the fact that the judges in the *Vasiljkovic* decisions were not taken to the *Eshugbayi Eleko* line of authority means that I would prefer to rest my decision in this case on the ground of abuse of process. The availability of that doctrine in a case like the present is confirmed by ***Censori*** *v Adult Parole Board of Victoria* [2015] VSCA 254; (2015) 254 A Crim R 455. That case concerned a provision of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) rules which modified the 'old rule'. However the Court of Appeal recognised at [60] that even setting that statutory provision to one side, considerations of abuse of process may still come into play, 'albeit that allowances are to be made for the fact that the proceeding involves the liberty of the subject'. With respect, that view is consistent with first principles. The power of the courts to suppress any abuses of its process is inherent in the court's powers to act effectively within its jurisdiction: see *Connelly v Director of Public Prosecutions* [1964] AC 1254 at 1301 quoted with approval in *Williams v Spautz* (1992) 174 CLR 509 at 518. As the court noted in *Censori*, derogation from the court's inherent powers to protect its own processes would require statutory words of the utmost clarity (at [60]). At [62] the Court of Appeal approved *Vasiljkovic 1st Instance*.

36 In short, I consider that any proposition that *habeas corpus* is in some special category which prevents the court from restraining abuses of its process to be incorrect.

37 In *Tomlinson v Ramsey Food Processing Pty Limited* [2015] HCA 28; (2015) 256 CLR 507 at [24]-[26] the High Court explained the principles applicable under the doctrine of abuse of process in situations of this kind (footnotes omitted).

> To explain contemporary adherence to the comparatively narrow principle in *Ramsay v Pigram*, it is appropriate also to explain the relationship between the doctrine of estoppel and the doctrine of abuse of process as it has since come to be recognised and applied in Australia. The doctrine of abuse of process is informed in part by similar considerations of finality and fairness. Applied to the assertion of rights or obligations, or to the raising of issues in successive proceedings, it overlaps with the doctrine of estoppel. Thus, the assertion of a right or obligation, or the raising of an issue of fact or law, in a subsequent proceeding can be simultaneously: (1) the subject of an estoppel which has resulted from a final judgment in an earlier proceeding; and (2) conduct which constitutes an abuse of process in the subsequent proceeding.

> Abuse of process, which may be invoked in areas in which estoppels also apply, is inherently broader and more flexible than estoppel. Although insusceptible of a formulation which comprises closed categories, abuse of process is capable of application in any circumstances in which the use of a court's procedures would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute. It can for that reason be available to relieve against injustice to a party or impairment to the system of administration of justice which might otherwise be occasioned in circumstances where a party to a subsequent proceeding is not bound by an estoppel.
>
> Accordingly, it has been recognised that making a claim or raising an issue which was made or raised and determined in an earlier proceeding, or which ought reasonably to have been made or raised for determination in that earlier proceeding, can constitute an abuse of process even where the earlier proceeding might not have given rise to an estoppel. Similarly, it has been recognised that making such a claim or raising such an issue can constitute an abuse of process where the party seeking to make the claim or to raise the issue in the later proceeding was neither a party to that earlier proceeding, nor the privy of a party to that earlier proceeding, and therefore could not be precluded by an estoppel.

38 Applying these principles, it appears to me that this proceeding is an abuse of process. In my view, that is clear enough to negative any serious question to be tried, even allowing for the fact that the proceeding concerns the liberty of an individual. Mr Bethell lost an application for *habeas corpus* on 17 June 2021 and tried to commence a new one on 18 June 2021. It is hardly to be supposed that any new facts have emerged in the day (or less) between the two applications, and Mr Bethell did not suggest that any did. To the extent that any of the matters on which he now seeks to rely were already raised in QUD 95 of 2021, to try to relitigate them now - almost immediately after they were decided against him, with no change in position or new facts coming to light - is an abuse.

39 The use of a court's procedures in that way is unjustifiably oppressive to the Minister. The oppression is compounded by the fact that this is the third interlocutory injunction application seeking to restrain the Minister from removing Mr Bethell from Australia that this court and the Federal Circuit Court have heard within the space of a week.

40 If this proceeding continues to its conclusion there is also a risk that there will be inconsistent decisions, which may erode public confidence in the administration of justice by generating conflicting decisions on the same issue: see *Rogers v The Queen* (1994) 181 CLR 251 at 256-257 (Mason CJ), 280 (Deane and Gaudron JJ). Mr Bethell submitted that they would not be inconsistent because he was seeking to pursue different grounds to those he pursued before Rangiah J. But ultimately, on the present hypothesis, this court will have made two

decisions about the same issue - the lawfulness of Mr Bethell's detention - when no relevant circumstances could possibly have changed.

41 To the extent that the matters on which Mr Bethell now seeks to rely were not raised, it is an abuse to seek to do so now. Since no circumstances have changed, Mr Bethell is raising issues which ought reasonably to have been made or raised for determination in QUD 95 of 2021. Worse, they *were* raised, after a fashion. Mr Bethell was represented by Anthony Morris QC, acting pro bono, in that proceeding. In his written submissions dated 5 May 2021 at paras 2 and 3, Mr Morris said:

> 2. At the same time, it must be understood that, having accepted the responsibility of representing Mr Bethell, the undersigned also has a responsibility to the Court. That responsibility:
>
> (a) precludes advancing any argument or contention which the undersigned, exercising his independent judgment, regards as having no real prospect of success; and
>
> (b) requires that the evidence and material before the Court be limited to that which is relevant to arguments and contentions which the undersigned, exercising his independent judgment, regards as having some prospect of success.
>
> 3. It necessarily follows that this outline, and the oral submissions on behalf of Mr Bethell, will not necessarily traverse every argument or contention which Mr Bethell, if unrepresented, would wish to advance on his own behalf. Should the Court wish to hear submissions in respect of such arguments or contentions, the undersigned will do his best to assist the Court by presenting them with appropriate frankness and candour. Alternatively, the Court may choose to accept that the arguments and contentions advanced by the undersigned represent the only arguments and contentions which can properly be advanced on Mr Bethell's behalf, consistently with the obligations of the undersigned pursuant to subsection 37N(2) of the *Federal Court of Australia Act 1976*, as well as his ordinary professional and ethical duties.

42 At the hearing before Rangiah J on 16 June 2021, Mr Morris said:

> … your Honour will have read the disclaimer at the beginning of my submissions that I'm in an awkward position choosing to make only those submissions that I regard as having a foundation. My client wishes to make the point that he is - should not be regarded as an unlawful non-citizen because the decision to revoke his visa was itself unlawful in that the Minister - that the wrong Minister made it and, in any event, was made on the basis of erroneous information. I highlight that that is a submission that my client wishes to make, and I say nothing further about it.

Plainly Mr Morris was indicating that, consistently with his obligations to the court not to advance matters which have no proper foundation, he was not advancing the principal argument Mr Bethell now seeks to advance.

43 This does not support Mr Bethell's current position. Whether Mr Morris was correct to discount the argument or not (and for reasons expressed below, I respectfully consider that he was correct), Mr Bethell must be held to the choice that his counsel made. It is a cardinal principle of adversarial litigation that, subject to carefully controlled qualifications, parties are bound by the conduct of their counsel: *Nudd v The Queen* [2006] HCA 9; (2006) 225 ALR 161 at [9] (Gleeson CJ). If the argument was reasonably capable of being advanced before Rangiah J, then it should have been, and it was not.

44 Mr Bethell sought to meet this point by saying that he put his hand up at the end of the hearing and caught Rangiah J's eye, so that his Honour must have known that he wanted to make further submissions of his own. But that is not to the point. It is fundamental to the proper and efficient conduct of the business of the courts that if a party is represented by counsel in a proceeding (whether pro bono or not), the court may proceed on the basis that all the arguments that the client wishes to put that can properly be put are put by counsel. There is not necessarily any unfairness in the court preferring the submissions of a party's counsel over any submissions that that party may wish to make contrary to counsel: see e.g. *Mansour v Jamil* [2002] NSWCA 48 at [54] (Sheller JA, Stein and Hodgson JJA agreeing). Unless Mr Bethell took the extraordinary step of terminating Mr Morris's retainer before submissions had closed (which he did not), he had no right to put further arguments of his own.

45 As a result, for Mr Bethell (through counsel) to decline to put an argument in a proceeding, and then try to raise it (self-represented) when seeking identical relief within a matter of days of the first proceeding ending, is a clear abuse of process. For that reason alone, there is no serious question to be tried here.

46 Mr Bethell sought to argue that Mr Morris's retainer, or at least his ability to put arguments, were somehow limited by the fact that he did not have sufficient time to prepare all the arguments he might otherwise have made. That is an assertion unsupported by evidence. Mr Morris filed written submissions dated 5 May 2021 and the hearing at which he appeared was not for another six weeks, on 16 June 2021. There is no reason to think he could not prepare sufficiently. As his submissions quoted above indicate, the true reason he did not put the other arguments is because he did not consider that they had sufficient merit. For the reasons about to follow, indeed they did not.

Merits of the application for habeas corpus

47 If I am wrong that the proceeding is an abuse of process, so that the court must consider the merits of Mr Bethell's case as if *Bethell No 1* (and the proceedings before White J and Judge Lucev) never happened, then it nevertheless appears to me that the principal basis of Mr Bethell's current claim is not reasonably open to be put.

48 Mr Bethell's principal submission is that he is not an unlawful non-citizen because the decision cancelling his visa was not lawfully made and should be treated as a nullity. But in ***Ruddock v Taylor*** [2005] HCA 48; (2005) 222 CLR 612, the High Court held that the lawfulness of the detention of a person who is claimed to be an unlawful non-citizen depends, not just on whether he or she is one in fact, but also, and independently, on the reasonableness of the view of the detaining officers as to that. At [24]-[28] Gleeson CJ, Gummow, Hayne and Heydon JJ held that it is enough under s 189 of the *Migration Act* if the detaining officers hold a reasonable suspicion that the person is an unlawful non-citizen. Section 189(1) provides that 'If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person'. At [28] their Honours said (footnote removed):

> That is, it follows from the considerations just mentioned that s 189 may apply in cases where the person detained proves, on later examination, not to have been an unlawful non-citizen. So long always as the officer had the requisite state of mind, knowledge or reasonable suspicion that the person was an unlawful non-citizen, the detention of the person concerned is required by s 189. And if the Minister brought about a state of affairs where an officer knew or reasonably suspected that a person was an unlawful non-citizen by steps which were beyond the lawful exercise of power by the Minister, it does not automatically follow that the resulting detention is unlawful. Rather, separate consideration must be given to the application of s 189 - separate, that is, from consideration of the lawfulness of the Minister's exercise of power. If it were suggested that the Minister had exercised power where the Minister knew or ought to have known that what was done was beyond power an action may lie for the tort of misfeasance in public office. But that has never been the respondent's case in this matter.

49 The decision of the High Court in *AJL20 HC* handed down last week does not deal specifically with this issue, but it is consistent with the way it was addressed in *Ruddock v Taylor*: see *AJL20 HC* at [72]. Mr Bethell sought to persuade me that *AJL20 HC* was irrelevant because it does not deal with a case where the decision of the Minister to cancel the visa is flawed and wrong. But for reasons I have given, even if it turns out that the decision is flawed and wrong, the question remains as to whether the relevant officer of the Department knows or reasonably suspects that Mr Bethell is an unlawful non-citizen.

50 The Minister relied on an affidavit of the relevant officer in this case, Natalie Jackson, affirmed on 25 June 2021 to the effect that, having reviewed Mr Bethell's records, having seen that his most recent bridging visa was cancelled and having regard to the fact that he holds no other valid visa, she has 'formed reasonable suspicion [sic] that the applicant is an unlawful non-citizen' (para 9). While I put no weight on Ms Jackson's conclusionary statement of opinion that her suspicion is reasonable, there is no basis for doubt that she does (at least) suspect that Mr Bethell is an unlawful non-citizen.

51 A suspicion that a person is an unlawful non-citizen must also be objectively justifiable on the basis of relevant material, including that material which is discoverable by efforts of search and enquiry that are reasonable in the circumstances: *Okwume v Commonwealth of Australia* [2016] FCA 1252 at [119](3) (Charlesworth J). In circumstances where in *Bethell FCC* the Federal Circuit Court has ruled that Mr Bethell's application for judicial review of the cancellation decision does not raise a serious question to be tried, it can hardly be said that the suspicion is not reasonable.

52 For some reason, Mr Bethell fixed in particular on *Bethell FCC* at [10], in which Judge Lucev dealt with a particular aspect of the Minister's decision to cancel the bridging visa as follows:

> Mr Bethell also asserts that the Minister erred in putting weight on a clearly neutral ground, being Australia's international obligations, because there were no international obligations. That, with respect, misapprehends what the Minister put weight upon at paragraph 42 of the Minister's decision. The Minister put weight upon the fact that Mr Bethell had not expressed any concerns or issues to the Department that would give rise to any international obligations to which Australia is a signatory. The Minister had indicated that he was not aware of any international obligations which might be breached as a result of cancelling Mr Bethell's visa, but then went on to indicate that Mr Bethell had not expressed any concerns or issues with the Department that would give rise to any international obligations to which Australia is a signatory, and, therefore, Mr Bethell has, with respect, misapprehended what it is that the Minister has placed weight upon in that regard.

53 Mr Bethell claimed that this passage was legally unreasonable, but when asked why, he could only assert that it made no sense. To the contrary, and with respect, it does make sense. It is unsurprising that the Minister should find that a person who is to be returned to the UK is unlikely to engage Australia's international protection and non-refoulement obligations. This is no basis to doubt the objective reasonableness of Ms Jackson's belief that Mr Bethell is an unlawful non-citizen.

54 It follows that there is no serious question to be tried as to whether Mr Bethell's current detention is lawful.

55 Mr Bethell sought to dispute the arguments made by the Minister in *Bethell No1* that the facts distinguished it from the single judge decision of this court in *AJL20 v The Commonwealth* [2020] FCA 1305, from which *AJL20 HC* was an appeal. But that argument is now academic in light of the High Court's overturning of that decision.

Mr Bethell's other arguments

56 Turning, in light of the above views, to Mr Bethell's other arguments summarised at the outset:

(1) *The length of time the court took to determine his first habeas corpus application in QUD 95 of 2021*. This argument is redundant in view of the outcome of *AJL20 HC*. The effect of that decision is that, regardless of whether the Minister took steps to remove Mr Bethell as soon as practicable, his detention was lawful as long as the relevant officer held the necessary knowledge or reasonable suspicion. So regardless of whether the court's alleged delay gave the Department time to 'get its house in order', the detention was (and is) lawful. In any event, this is an argument that could have been raised at the hearing in *Bethell No 1* (held a day before judgment was delivered), and was not. It is an abuse of process to raise it now. Mr Bethell also claimed that he was self-represented now because of the court's delay. There is no foundation in the evidence for that submission.

(2) *The Department's endeavours during QUD 95 of 2021 to arrange for Mr Bethell's removal from Australia*. While it was not clear, it seemed that Mr Bethell alleged that the Department's conduct during QUD 95 of 2021 amounted to a breach of the *Habeas Corpus Act 1679*, 31 Cha 2, c 2, or some common law rule surrounding *habeas corpus*, or a contempt of court. But even if it was all of those things, that could not affect the lawfulness of his detention. That is because, as the majority of the High Court was at pains to say in *AJL20 HC*, s 189 of the *Migration Act requires* an unlawful non-citizen (or a person reasonably suspected to be one) to be detained until one of the events specified in s 196(1) occurs: see *AJL20 HC* at [49]. One of those events is removal from Australia: s 196(1)(a). Even if one of the ancient English statutes or common law doctrines on which Mr Bethell relies is still current, even if it was breached, and even if that somehow could otherwise affect the lawfulness of Mr Bethell's current detention, it cannot override that modern statutory requirement.

(3) *Mr Bethell's treatment in previous matters in this court and in the Federal Circuit Court*. Mr Bethell's submissions here were based on allegations about the demeanour

and objectives of the judges who heard his previous proceedings which were unsupported by evidence, as well as complaints about how Judge Lucev in the Federal Circuit Court dealt with the evidence, and claims about legal unreasonableness. Those allegations could only bear on the current question in this respect: if the court were to conclude that an applicant did not receive procedural fairness in a previous proceeding, that could be relevant to the evaluation of whether a subsequent proceeding about the same subject matter is an abuse of process. But here, there was no evidentiary support for Mr Bethell's claims that he was denied procedural fairness. In any event, *Bethell No 1* alone provides ample foundation for the conclusion that this proceeding is an abuse of process. The only allegation Mr Bethell made as to denial of procedural fairness in that proceeding was an untenable and largely incomprehensible suggestion that in failing to refer to an assurance from the Commonwealth not to remove him pending determination of the validity of his revocation application, Rangiah J showed actual bias.

(4) *Allegedly misleading conduct by the Department and its lawyers*. Once again, it was entirely unclear how these claims were said to impact on the lawfulness of Mr Bethell's present detention. No basis was articulated as to how these claims, if made out, could override the categorical requirements of s 189 of the *Migration Act*. Mr Bethell submitted that one instance of allegedly misleading conduct led Rangiah J into error when he found in *Bethell No 1* at [42] that Mr Bethell had refused voluntary removal so that his removal had to be arranged on the basis that it was involuntary. But this proceeding is not a basis to review the factual findings made in *Bethell No 1*. It is an abuse of process to seek to reopen those findings in the present circumstances, rather than by way of appeal.

Balance of convenience

57 Given my firm view that there is no serious question to be tried, there is no need to consider the question of balance of convenience.

Conclusion

58 The application for an injunction restraining the Minister from removing Mr Bethell from Australia until the lawfulness of his detention is determined will be refused. It is appropriate for costs to be in the cause.

I certify that the preceding fifty-eight (58) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jackson.

Associate: 

Dated: 29 June 2021