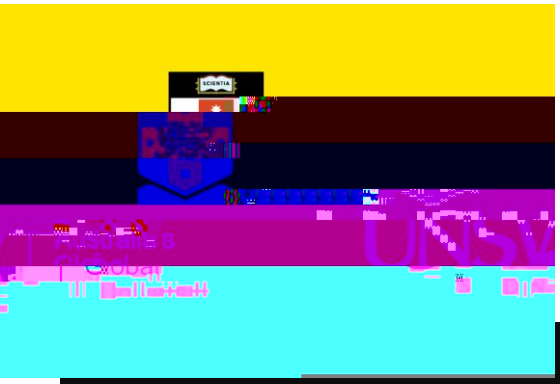

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PLAINTIFF S99/2016 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION [2016] FCA 483

Last updated: July 2016

This case note provides an overview of the key facts and findings of the Federal Court of Australia in *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483 (*Plaintiff S99)*. The case was originally filed in the High Court before it was referred to Bromberg J in the Federal Court for an urgent hearing and determination.

Facts

The applicant

The applicant in this case was a young African woman who arrived in Australia by boat on 17 October 2013. The applicant had a history of trauma.

Prior to fleeing her country of origin, when she was about 16 years old, the applicant witnessed the murder of her sister. She began to have seizures and continued to experience regular seizures at the time of the hearing. Also at the age of 16, the appl father arranged her marriage to a 45 year old man with other wives. In this marriage she said she was
(*Plaintiff S99* at [74]). After falling pregnant the applicant ran away to her mother, who from her first husband. She remarried, however her first husband tried to force her to return to him. He accused her of adultery and threatened to inform the government. The applicant fled, fearing that she would be stoned to death. She travelled to Indonesia and then to Australia by boat to seek asylum. Her son remains in the care of her mother ([70]-[75]).

Events on Nauru

On 19 October 2013 the applicant was transferred to the Republic of Nauru (Nauru) by Australian authorities agreement with Nauru, against her will. On Nauru the applicant was detained at the Regional Processing Centre (RPC) until she was found to be a refugee. In November 2014 the applicant was granted a Temporary Settlement Visa and moved into a residence in the Nauruan community. Pursuant to its agreement with

including settlement services, visas

On 31 January 2016 the applicant submitted that she went outside her room to make a phone call, had a seizure and fell unconscious. It was not in dispute between the parties that result .

The applicant received medical support on Nauru for her pregnancy and psychological and/or neurological conditions from International Health and Medical Services (IHMS), a private company contracted by the Australian Government to provide health services to asylum seekers and refugees on Nauru, as well as to people in detention centres in Australia and on Manus Island. The applicant submitted that she told an IHMS doctor on Nauru that she wished to have an abortion ([101]). The fact that the applicant required an abortion was not in contest between the parties. However this procedure was not expected to be straightforward, due to
mental health and physical complications.

Taking of the applicant to Papua New Guinea (PNG)

The applicant was taken to PNG on 6 April 2016. While the exact circumstances of her transfer were unclear, Bromberg J held that the evidence supported a finding that the offered and the applicant agreed to be taken to another country so that her pregnancy could . However she was not offered a choice of destinations and
consent to be taken to another country, she did not give her approval to having an abortion in the medical and legal setting in relation to which she now complains ([111]). IHMS recommended the applicant be transferred to Australia for the procedure, however the Minister instead arranged for the applicant to be taken to PNG for the procedure ([130]-[157]).

The proceedings

At the time of the hearing the applicant was in Port Moresby, but had not yet undergone the termination procedure for which she had been taken there. Lawyers for the applicant commenced this proceeding in the High Court, and it was subsequently referred to Bromberg J in the Federal Court for an urgent hearing and determination.

The applicant's case

The applicant argued that it would be neither safe nor legal for her to undergo the termination procedure in PNG ([10]-[11]).

Relying on expert medical evidence, the applicant submitted that she would be exposed to grave risks due to the absence of medical resources in PNG, including:

- neurological expertise of a neurologist and EEG diagnostic equipment;
- mental health expertise of a psychologist and other professionals with experience in trans-cultural issues;
- gynaecological expertise of a gynaecologist experienced in dealing with the

¶ expertise of an anaesthetist experienced with newer, safer anaesthetic drugs and anaesthetic techniques and familiar with anaesthesia in an MRI facility.

The applicant also submitted that abortion in PNG was illegal, and that she would be exposed to criminal liability if she were to go ahead with the procedure.

Relying upon the legal relationship between herself and the Minister, the applicant claimed that the Minister had a duty of care to procure for her a safe and legal abortion. The applicant did not argue that the abortion had to be procured and conducted in Australia, but did submit that doing so would fulfil the to her. The applicant apprehended that the Minister would fail to discharge this duty, and sought declarations and orders to preclude the Minister from doing so.

The Minister denied that he had a duty of care to the applicant. The Minister also argued that if there was a duty of care, the procuring of an abortion for the applicant in PNG was both safe and lawful and would therefore discharge any obligation owed. Further, the Minister submitted that if there was a duty of care and an apprehended breach of that duty of care, the Court was powerless to grant the applicant injunctive relief. For that and other reasons, the Minister contended that the proceeding should be dismissed ([12]).

Judgment

Identifying the applicable law

in tort by negligently procuring the service in a country with a tort law favourable to defendants or providing a defence ([181]).

Did the Minister owe the applicant a duty of care?

The applicant argued that the Minister owed her a duty to procure for her a safe and lawful abortion. Her submissions turned on establishing a novel duty of care based on two main factors:

1. of the statutory power exercised by the Respondents in respect of the applicant; and
2.


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safely infer that the probability of their occurrence neither trivial nor insignificant the risks are material ([386]).

no breach or apprehended breach because the standard of care he owed to the applicant should be assessed by reference to the medical services available in the country where the

t would result in the wrongful act (the careless act of procuring) escaping an assessment as to its reasonableness ([408]).

imminence of harm, the insufficiency of damages as a remedy for this harm, and the concession that the nature of any hardship that may be imposed on the Minister by the grant of an injunction is not a significant factor against an injunction being granted in this case ([490]-[495]).

Further reading

¶ Summary: Plaintiff S99/2016 v Minister for Immigration and Border Protection [2016] FCA 483

¶ abortion *Castan Centre for Human Rights Law,* 11 May 2016

¶ Refugee status determination in Nauru
Centre for International Refugee Law, May 2016

¶ Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues

¶ Case note: *Plaintiff M68/2015 v. Minister for Immigration and Border Protection & Ors* ational Refugee Law, July 2016

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