# FEDERAL COURT OF AUSTRALIA

## Plaintiff S99/2016 v Minister for Immigration and Border Protection [2016] FCA 483

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| File number: | VID 305 of 2016 |
| Judge: | **BROMBERG J** |
| Date of judgment: | 6 May 2016 |
| Catchwords: | **NEGLIGENCE** – applicant, a refugee, raped on Nauru during or shortly after seizure and fell pregnant – on her request, respondents agreed to procure for applicant a termination of pregnancy – applicant taken to Papua New Guinea for proposed abortion – applicant alleged legal risk attendant upon abortion in PNG arising out of its criminal law dealing with abortion — applicant alleged medical risk attendant upon abortion in PNG, arising out of unavailability of medical equipment, experience, and expertise alleged to be required in order to adequately guard against risk<br><br>**NEGLIGENCE** – duty of care – whether respondents owed duty of care to applicant to exercise reasonable care in procuring for her a safe and lawful abortion – if so, whether procurement of abortion in PNG discharged duty – if not, whether breach of duty apprehended – discussion of *Stavar* multi-factorial approach to determination of existence of novel duty of care – consideration of authorities relating to duties of care in connection with exercise or non-exercise of statutory powers – consideration of statutory setting – consideration of relationship of applicant and respondents – consideration of circumstances of applicant's removal to Nauru, her detention on Nauru, and her continued presence on Nauru having been accepted as a refugee – consideration of respondents' involvement in the foregoing, including its provision of settlement and health services – discussion of circumstances of applicant's travel to PNG and respondents' involvement in same – application of multi-factorial approach in determination whether duty of care existed – consideration, in particular, of consistency of putative duty with statutory scheme, of policy, of vulnerability, of control, and of assumption of responsibility – duty of care found to exist, to exercise reasonable care in procuring for the applicant a safe and lawful abortion<br>**NEGLIGENCE** – apprehended breach – whether apprehended breach established – consideration of applicable standard of care – rejection of submission that standard of care determined by reference to medical |

399 As to the first consideration, no case has been made that there is no feasible option other than Australia, for alleviating the risks faced by the applicant. As the extract at [390] shows, Mr Nockels accepted that it could be expected that Singapore or New Zealand would provide medical services equivalent to those in Australia. He saw no legal or safety problem in those two locations and if, for a policy reason, Australia was not an option, Mr Nockels accepted, subject to getting the advice of IHMS, that he could have "solved this problem by arranging an abortion in New Zealand or Singapore". I note further, that in the Third RMM, IHMS suggested that the applicant could be referred for care to a "third country" which when read in context, meant a country other than Papua New Guinea or Australia.

400 Again, the import of the evidence of Mr Nockels was not directed at demonstrating a difficulty in finding an alternative to Papua New Guinea. His evidence was directed to the absence of relevant risk in that location. That was essentially the basis for Mr Nockels's contention that the applicant's circumstances were not "exceptional" so as to allow for Australian-based care as an option.

401 It is not necessary for me to enter that debate as I am not persuaded that feasible options outside of Australia are unavailable. However, a brief recount of the reasoning advanced by Mr Nockels demonstrates the implausibility of his position that the applicant's circumstances are not exceptional.

402 Mr Nockels's position was that the applicant's circumstances were not exceptional to a degree sufficient so that she might be brought to Australia, because Dr Sapuri had advised that he could perform the abortion in Papua New Guinea. Mr Nockels came to or continued to hold that view despite:

- having accepted that he had no expertise and was reliant on IHMS to advise him on the appropriate needs for the conduct of a surgical abortion;
- IHMS having advised him that a surgical abortion should take place in Australia;
- his knowledge that PIH did not have neurological services of the kind IHMS had advised were required;
- having read the neurological, psychiatric and anaesthetic evidence called by the applicant in this proceeding as well as the evidence of the risks occasioned by [redacted] and having no reason to doubt that evidence;
- having not discussed that evidence with Dr Sapuri (who, in any event, would not have had the relevant expertise to contradict most if not all of the applicant's experts); and

- having accepted that the baseline care appropriate was the Australian standard of care but not knowing whether Dr Sapuri's advice was based on the application of PNG standards or Australian standards.

403 Furthermore, as to whether the legality of the abortion procured in Papua New Guinea provided a basis for saying that the circumstances were exceptional, Mr Nockels said he had assumed that Dr Sapuri would have an understanding of the "legal framework". In that context, and without seeking legal advice, he relied and continues to rely on Dr Sapuri's understanding, despite recognising that there is a serious issue raised about the legality of an abortion for the applicant in Papua New Guinea.

404 There are, in my view, no material considerations established on the evidence which weigh against or reasonably excuse the need for the Minister to have alleviated the risks to the applicant which I have found exist. I make that finding as to the medical risks, as to the legal risks and as to the combination of those risks. I do so with particular regard to the findings I have made as to the magnitude of the risks involved which, in each case, lead me to the conclusion that the risks are grave. I consider that a reasonable person in the Minister's position would have alleviated and should alleviate those risks.

405 I find that by procuring (in the sense of obtaining or making available) an abortion for the applicant in Papua New Guinea, the Minister failed to exercise reasonable care in the discharge of the responsibility that he assumed to procure for the applicant a safe and lawful abortion. Accordingly, there was no discharge of the duty effected. Having not already procured for the applicant a safe and lawful abortion in the circumstances detailed by the evidence which I have accepted, and having indicated no intention to do so, I further find that the applicant has established a reasonable apprehension that the Minister will not do so. I also find that damage is likely to be caused to the applicant should the Minister not procure for her a safe and lawful abortion. In each case, by "safe and lawful abortion" I mean an abortion that that addresses the risks identified by the applicant's medical experts and that is free of the risk of the applicant being charged or convicted of unlawful conduct.

406 In arriving at those conclusions, I have considered the Minister's contention that there is no breach or no apprehended breach, as the standard of care must be assessed by reference to the medical services reasonably available in Papua New Guinea. In part, the Minister based that submission on the proper law being Papua New Guinean law and that the standard of care must therefore be assessed by reference to the medical services reasonably available in that country. I reject that submission for two reasons. *First*, I have found that the proper law is Australia. *Second*, I have earlier held that in the absence of evidence as to the tort law of Papua New Guinea, I must presume that the law is the same as the law of Australia. That