

Hicks v Ruddock (2007) 156 FCR 574

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*Note: this case concerned an application for summary judgement. The standard of proof here was "was there a reasonable chance of success", not the balance of probabilities. The matter never proceeded to an actual trial, as Hicks was released not long after this decision was handed down.

Facts

- David Hicks was an Australian citizen by birth who travelled overseas to assist, in some capacity, with groups associated with the Taliban, sometime around 1999.
- In about 2001, he was picked up in Afghanistan by the US, and eventually transported to Guantanamo Bay. He was held there, without charge, for 5 years. This attracted a lot of criticism for the alleged grave breaches of human rights.
- His legal counsel in Australia filed a writ of habeas corpus in an attempt to get Mr Hicks some access to justice.
- The Australian Government applied to have his claim struck out, stating - amongst other arguments - that it was non-justiciable.

Issue

- In this summary, we will focus on the question of whether the matter was justiciable.

Held

- The Judge held that this matter concerned two interrelated principles: the Act of State doctrine and non-justiciability.
- The Act of State doctrine states that the courts of one country cannot pass judgement on the actions of another country, done within their territory.
- The non-justiciability doctrine is wider, providing that there are certain matters that the courts cannot decide on, as they concern sensitive foreign affairs matters that the court is not equipped to deal with.
- The Judge noted that the House of Lords in the UK had developed an exception for this, being that there was an exception where it concerned a grave departure from the standards of human rights.
- The Judge noted that some cases had acknowledged that Australian courts have justiciability over questions about executive power, or foreign affairs power, under the constitution.
- The Judge also noted that the US Circuit Court had made decisions that implied just because a matter "touched on" issues of foreign affairs, did not mean it was always non-justiciable.
- On this basis, Tamberlin J held that there was at least some prospect that the case would succeed, and struck out Ruddock's application.

Significance

- The significance of this decision is that the non-justiciability may be narrower than previously thought, and that some matters concerning foreign affairs and foreign governments may be justiciable after all.

Quotes

- "It is arguable that the necessity for 'judicial or manageable standards' by which to decide the issues in a given case are satisfied when those issues involve *consideration of the Constitutional reach of, and limitations on, executive power*" [37]

Read more

- The full text of this case can be found at <https://jade.io/j/?a=outline&id=5190>
- An interesting analysis of this case and all of the issues can be found at <http://www.austlii.edu.au/au/journals/AUIntLawJl/2007/20.pdf>
- Another interesting paper on this case can be found at <http://www.austlii.edu.au/au/journals/SydLawRw/2007/21.html>

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