SHORT PARTICULARS OF CASES
APPEALS

MAY 2007

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AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v BAXTER HEALTHCARE PTY LIMITED & ORS (S56/2007)

Court appealed from: Full Court of the Federal Court of Australia

Dates of judgment: 24 August 2006

Date of grant of special leave: 9 February 2007

This case concerns the anti-competitive effects of "exclusionary bundling". This is the practice of supplying customers with a bundle of products cheaper than they would otherwise be supplied individually. This is done on the condition that the customer will not, except to a limited extent, acquire similar products from a competitor.

The Australian Competition and Consumer Commission ("ACCC") alleged that Baxter Healthcare Pty Limited ("Baxter") contravened sections 46 and 47 of the *Trade Practices Act 1974* (Cth) ("TPA") in various ways. This was in the sale and supply of sterile fluids and peritoneal dialysis products to the health authorities of New South Wales, Queensland, South Australia, Western Australia and the Australian Capital Territory. It sought declaratory and injunctive relief, monetary penalties under section 76 of the TPA and findings of fact for the purposes of section 83 of the TPA. The relevant events covered the periods from 1998 to 2001.

On 16 May 2005 Justice Allsop held that the provisions of the TPA did not apply to the questioned conduct. This was due to the principles of Crown immunity or derivative Crown immunity. If not for this, his Honour held that Baxter would have contravened section 46 of the TPA by entering into an agreement with South Australia known as the "Offer 1A contravention". He found however that Baxter had not otherwise contravened section 46 of the TPA in respect of its dealings with NSW, Queensland, South Australia, Western Australia or the ACT generally ("the section 46 conclusions generally"). Again working on the assumption that he was wrong on the Crown immunity issue, his Honour held that Baxter would have contravened section 47 of the TPA by its conduct known as the "section 47 Contraventions". It had not however contravened section 47 in respect of what the ACCC called the wider competitive process in the market.

The ACCC appealed against the decision on both the Crown immunity issue and the section 46 conclusions generally (other than the conclusion of the Offer 1A contravention). It also appealed against the decision concerning the section 47 contraventions. This was to the extent that they were not based on exclusive dealing having the purpose or effect of substantially impeding or hindering "the wider competitive process in the market". Baxter also filed a notice of contention, alleging that Justice Allsop erred in both fact and law with respect to the section 46 conclusions generally, along with the section 47 contraventions.

On 24 August 2006 the Full Federal Court (Mansfield, Dowsett and Gyles JJ) unanimously dismissed the ACCC's appeal. Their Honours held that Justice Allsop's conclusion on the threshold Crown immunity issue was correct. The correctness of his other findings was therefore moot. In reaching this conclusion, the Full Court expressed its doubts about the leading case in this field, *Bradken Consolidated Ltd v Broken Hill Co Ltd* (1979) CLR 107

(*"Bradken"*). It nevertheless held that *Bradken* was binding authority. Their Honours noted however that the effect of that Crown immunity was to have a substantial area of commerce in which restrictive practices could be carried on by all those dealing with a government. This was potentially to the disadvantage of the public purchasing authority, other suppliers and to the consumers.

The grounds of appeal include:

- The Full Court erred in holding that, by reason of the operation of the principles of Government or Crown immunity, the TPA (in particular sections 46 and 47 of the TPA) did not apply to nor operate upon the conduct of Baxter alleged to contravene sections 46 and 47 of the TPA, including:

  a) conduct in and in connection with negotiations which took place prior to the entry into the impugned contracts;

  b) conduct constituted by the entry into the impugned contracts; and

  c) conduct constituted by performing and otherwise giving effect to the impugned contracts;

  with the consequence that no relief could be granted to the ACCC.

SANTOS LIMITED v CHAFFEY & ANOR (D8/2006);
ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY OF AUSTRALIA v CHAFFEY & ANOR (D9/2006)

Court appealed from: Full Court of the Supreme Court of the Northern Territory

Date of grant of special leave: 9 February 2007

The first respondent in each matter, Cameron Owen Chaffey, sustained an injury on or about 10 September 2003 in the course of his employment with Santos Limited, for which Santos accepted liability to pay compensation pursuant to the *Work Health Act* 1987 (NT) (the Act). On 26 January 2005 the Act was amended by the *Work Health Amendment Act* 2004 (the amending Act). The amending Act in section 49 excluded from the definition of "normal weekly earnings" superannuation contributions made by employers. This amendment was said to have been a response to the decision of the Full Court of the Supreme Court in *Hastings-Deering (Australia) Ltd v Smith* [2004] NTCA 13, which concluded that superannuation contributions were encompassed by section 49 of the Act prior to the passage of the amending Act. The decision in *Hastings-Deering* was itself the subject of an unsuccessful application for special leave to appeal. The calculation of the compensation paid to the first respondent by Santos from the date of the injury and beyond the date of commencement of the amending Act did not include employer superannuation contributions.

The matter came before the Full Court of the Supreme Court (Angel J in dissent; Mildren and Southwood JJ) by way of a case stated which was referred to the Full Court by Mildren J. Mildren J identified two questions for determination:

- Whether for the period up to the date of commencement of the amending Act, the amendment constituted an acquisition of the worker's property inconsistent with section 50 of the *Northern Territory (Self-Government) Act* 1978 (Cth) and as such was invalid to the extent of such inconsistency, and;

- Whether for the period after the date of commencement of the amending Act, the amendment constituted an acquisition of the worker's property inconsistent with section 50 of *Northern Territory (Self-Government) Act* and as such was invalid to the extent of such inconsistency.

Section 50 of the *Northern Territory (Self-Government) Act* provides that the legislative power of the Northern Territory parliament does not extend to the making of laws with respect to the acquisition of property otherwise than on just terms.

Mildren and Southwood JJ (Angel J dissenting) held that the amending Act did effect an acquisition of property otherwise than on just terms, finding that the worker's rights under the Act were conferred in exchange for full common law rights to damages for personal injury and as such were not susceptible of modification or extinguishment by legislation, other than on just terms. Angel J held that the exclusion of superannuation from the computation of compensation was not an acquisition of property. His Honour held that the right to compensation pursuant to the Act was a right subject to alteration and any

diminution of the value of that right was merely a characteristic of the right and not a loss of it.

The grounds of appeal include:

- Whether the amending Act effects an acquisition of property within the meaning of section 50 of the Northern Territory (Self-Government) Act.

TOFILAU v THE QUEEN (M144/2006)

Court appealed from: Court of Appeal, Supreme Court of Victoria

Date of judgment: 21 April 2006

Date special leave granted: 10 November 2006

The appellant was convicted on 16 October 2003 of murdering Belinda Romeo, a woman with whom he had had a sexual relationship. Ms Romeo's body was found by her mother in the bedroom of her flat on 29 June 1999. An autopsy revealed that she had died several days earlier, the cause of death being ligature strangulation. The appellant was interviewed by police on 14 July 1999. He told them he had last seen Ms Romeo at a hotel in the early hours of Sunday 20 June 1999.

In November 2001 the police set up "Operation Pink" which involved a series of 16 "scenarios" in which undercover operatives, posing as members of an organised criminal gang, approached the appellant and induced him to believe that they wanted him to join the gang. The process included emphasis being placed on a supposed code of truth, honesty and loyalty between all gang members, and the necessity for full disclosure of any past crimes which the police might still be investigating. He was also told that declaring any criminal activity would enable the boss of the gang to use corrupt contacts within the police force to "fix" any police investigations. On 17 March 2002 the appellant made admissions regarding the murder of Ms Romeo to one of the police operatives ("P"). On the same day, he was taken to Crown Casino to meet "the boss", to whom he made a detailed statement regarding the circumstances of the murder.

On the following day, the appellant was arrested and interviewed. He denied murdering Ms Romeo, and when the tape of his conversation with "the boss" was played to him, he said that he had pretended that he had committed a murder so that he could join the gang and he had fabricated what he told them. At his trial, the appellant's counsel submitted that admissions he made to "the boss" and other police operatives, and the record of interview of 18 March 2002, should be excluded. The trial judge (Osborn J) rejected that submission.

The appellant appealed against his conviction to the Court of Appeal (Callaway, Buchanan and Vincent JJA), on the grounds that the trial judge erred in failing to exclude the admissions as involuntary or as contrary to the general discretion. The appellant relied on the common law principle that a confessional statement is not admissible if it has been preceded by an inducement held out by a person in authority. The Court found that the trial judge was correct in finding that the operatives to whom the admissions were made were not "persons in authority" because such persons must possess, by reason of some lawfully held or conferred status or relationship with the maker of the statement, the capacity to influence the course of the prosecution, or the manner in which he is treated in respect of it. In this case, the appellant believed he was dealing with a criminal gang acting outside and contrary to the interests of any legitimate authority.

The appellant also contented that his statements were inadmissible as they were involuntary in a basal sense, that is, that they had been secured by

trickery and other conduct that effectively denied him the ability to exercise a choice to speak or remain silent. The Court of Appeal found the trial judge's conclusion that despite the fact that the appellant was fundamentally misled as to the context in which his confessional statements were made, he was not compelled to make them or threatened in such a way that it could be concluded that his will was overborne, was open on the material before him.

The grounds of appeal are:

- the Court below erred in failing to determine that the learned trial judge had erred in:
  (a) not ruling as inadmissible the evidence of that which the Crown asserted were confessional statements made by the appellant to -
    (i) covert police operative "Pat Austinn" on 17 March 2002;
    (ii) covert police operative "Mark Butcher" on 17 March 2002-
  on the basis of involuntariness; and as a consequence,
  (b) not ruling as inadmissible
    (i) the evidence of the [second] record of interview conducted with the appellant on 18 March 2002;
    (ii) the evidence concerning the conduct of the covert police operatives with respect to carrying out the various "scenarios", including the evidence of the Crown witness Detective Senior Sergeant Mark Robert Caulfield; and
    (ii) the evidence of the covert police operatives carrying out the various (16) "scenarios" with the appellant and the conversations with the appellant whilst carrying out these scenarios.

HILL v THE QUEEN (M146/2006)

Court appealed from: Court of Appeal, Supreme Court of Victoria

Date of judgment: 21 April 2006

Date special leave granted: 10 November 2006

The appellant was convicted on 6 August 2004 of murdering his step-brother, Craig Reynolds. At the time of his death, the victim was sharing a house with the appellant. They were both heroin users. The appellant claimed that he arrived home at 9.00 pm on 17 February 2002 to find Reynolds lying on his back on the lounge room floor, covered in blood. Reynolds died in hospital 5 days later from multiple skull fractures and traumatic brain damage. The appellant's brother told police that the appellant had confessed to him that he killed Reynolds by repeatedly striking him with a house brick.

In June 2002 the police set up "Operation Exode" which involved a series of 19 "scenarios" in which undercover operatives, posing as members of an organised criminal gang, approached the appellant and induced him to believe that they wanted him to join the gang. The process included emphasis being placed on a supposed code of truth, honesty and loyalty between all gang members, and the necessity for full disclosure of any past crimes which the police might still be investigating. He was also told that declaring any criminal activity would enable the boss of the gang to use corrupt contacts within the police force to "fix" any police investigations. Ultimately, on 6 August 2002, a meeting took place between the appellant and "the boss" of the gang, who obtained admissions from him regarding the death of Reynolds.

Three days later the appellant was arrested and interviewed. He said he and Reynolds had an argument and he lost his temper. He couldn't remember anything that had occurred, but when he "snapped out of it" he saw Reynolds on the floor with blood all over his head, and a house brick lying next to him. At his trial, the appellant's counsel submitted that admissions he made to "the boss" and other undercover police, which contradicted his assertion that he couldn't remember hitting Reynolds with the brick, should be excluded. The trial judge (Bongiorno J) rejected that submission.

The appellant appealed against his conviction to the Court of Appeal (Callaway, Buchanan and Vincent JJA), on the grounds that the trial judge erred in failing to exclude the admissions as involuntary, as unreliable, or as contrary to the general discretion. The Court found that the operatives to whom the admissions were made were not "persons in authority" for the purposes of the exclusionary rule. The appellant contented that his statements were inadmissible as they were involuntary in a basal sense, that is, that his will was overborne by a combination of promises and tactics of bullying, haranguing and cajoling. The Court of Appeal found the trial judge's conclusion that at all times the conversations between the appellant and the police operatives were voluntary and made by him in a free exercise of his will to speak or not speak, was well supported by the evidence.

The grounds of appeal are:

- the Court below erred in failing to determine that the learned trial judge had erred in failing to find that both covert police operative "Pat Austinn" and covert police operative "Mark Butcher" were persons in authority;

- the Court below erred in failing to determine that the learned trial judge had erred in:
  (a) not ruling as inadmissible on the basis of involuntariness the evidence of that which the Crown asserted were confessional statements made by the appellant to -
    (i) covert police operative "Pat Austinn" on 6 August 2002;
    (ii) covert police operative "Mark Butcher" on 6 August 2002.

  (b) not ruling as inadmissible
    (i) the evidence of that portion of the record of interview conducted with the appellant on 9 August 2002 concerning what the Crown asserted were confessional statements; and
    (ii) the evidence of the covert police operatives carrying out the various (19) "scenarios" with the appellant between 18 June 2002 and 6 August 2002 and the conversations with the appellant whilst carrying out these scenarios.

CLARKE v THE QUEEN (M147/2006)

Court appealed from: Court of Appeal, Supreme Court of Victoria

Date of judgment: 21 April 2006

Date special leave granted: 10 November 2006

The appellant was convicted on 15 June 2004 of murdering a six-year old child, Bonnie Clarke. Bonnie was strangled and stabbed in her bed at her home in Northcote, on 21 December 1982. The appellant, who had been a boarder at the home until September 1982, was spoken to by the police in the months following the murder, but was never formally interviewed.

In February 2001 the Homicide Squad re-commenced its enquiries into the death of Bonnie Clarke. It set up an undercover operation whereby members of the Covert Investigation Unit of the Victoria Police impersonated a criminal gang, one member of which (known as "Terry") established a friendship with the appellant. Terry offered him the possibility of becoming a member of the gang, if he were approved by the boss ("Mark"). The appellant was told repeatedly that the gang relied upon a relationship of trust, loyalty and honesty between its members and Mark had to know the full truth about anything in the past which might bring police attention to the gang. On 3 June 2002 a member of the Homicide Squad ("Iddles") visited the appellant's home and left a message that he wished to speak to him. When the appellant rang Iddles two days later he was told that he would be required to provide a DNA sample and undergo a polygraph test. At his next meeting with Terry, the appellant was told that Mark could "fix" the lie detector and change the DNA sample, but only if he was "110% truthful" in "a job interview" that had been arranged with Mark later in the week.

On 6 June 2002 the appellant was taken by Terry to a city hotel to meet Mark. He was shown a document which purported to be a "progress report re investigation" signed by Iddles. It contained a conclusion that the appellant was the only suspect for the murder of Bonnie Clarke. Mark then said, "What do you want to do about it? Because I'm telling ya this is not going to go away... I can't have you hanging around with us." The appellant then told Mark that he had killed Bonnie Clarke, and described the circumstances in which she had died. Soon after the discussion with Mark, the appellant was taken by Terry to the offices of the Homicide Squad where he was arrested and a record of interview, in which he made relatively detailed admissions regarding the murder, was conducted. At his trial, his counsel's submission that the admissions he made to Mark, and the admissions in the record of interview, should be excluded, was rejected by the trial judge.

The appellant appealed against his conviction to the Court of Appeal (Callaway, Buchanan and Vincent JJA), on the grounds that the trial judge erred in failing to exclude the admissions as involuntary, as unreliable, or as contrary to the general discretion. The Court found that the trial judge's conclusion that the appellant did not make the admissions in circumstances in which his will was overborne, was open on the evidence. With respect to the appellant's contention that the admissions were made in circumstances that rendered them inherently unreliable, the court found that there was much material to support the appellant's admissions and his Honour was correct in rejecting the

submission that the evidence should be excluded on that basis. The appellant's argument that he must have suffered severe forensic disadvantage as the evidence of the circumstances in which his statements were made involved the implication that he had serious criminal propensities, was rejected on the basis that the trial judge's approach involved a careful balance of the relevant considerations such as an assessment of the probative value of the evidence; some editing of the material to confine it to what was really required for the proper presentation of the prosecution case; and the provision of clear instructions to the jury as to the use to which the evidence could properly be put.

The grounds of appeal are:

- The Court of Appeal of the Supreme Court of Victoria erred in law in finding that the admissions made by the appellant to covert operative "M" on 6 June 2002 were voluntary.

MARKS v THE QUEEN (M145/2006)

Court appealed from: Court of Appeal, Supreme Court of Victoria

Date of judgment: 21 April 2006

Date special leave granted: 10 November 2006

The appellant was convicted on 15 October 2004 of murdering his great aunt, Margaret O'Toole. The victim's body was found in the lounge room of her home by her brother on 17 April 2002. She had suffered trauma to the left side of her face, and had been dead for some time. Circumstantial evidence suggested that she had died on or about 7 April 2002, and an autopsy revealed she had suffered multiple skull fractures, probably caused by 15 to 20 blows with a hard blunt instrument such as a hammer. The appellant came under suspicion because he was one of the few people who visited the victim regularly, and he had recently borrowed money from her. He was interviewed by police on 6 May 2002. He admitted that he had a gambling problem and was heavily in debt, but he denied murdering Ms O'Toole.

In September 2002 the police set up "Operation Satchel" which involved a series of 16 "scenarios" in which undercover operatives, posing as members of an organised criminal gang, approached the appellant and induced him to believe that they wanted him to join the gang. The process included emphasis being placed on a code of truth, honesty and loyalty between all gang members, and the necessity for full disclosure of any past crimes which the police might still be investigating. He was also told that background checks had to be made before he could be accepted into the gang. Ultimately, on 27 November 2002, a meeting took place between the appellant and the "boss" of the gang. The boss said that his inquiries had revealed that the appellant was a suspect in a murder, and he needed to know what had happened so that the situation could be handled. The appellant then made detailed admissions regarding the death of Ms O'Toole.

The appellant was then driven to St Kilda Road Police Complex where he was arrested and interviewed. He maintained that he had nothing to add to what he had said in the interview on 6 May 2002, in which he had denied committing the murder. At his trial, the appellant's counsel submitted that admissions he made to "the boss" should be excluded. The trial judge (Coldrey J) rejected that submission.

The appellant appealed against his conviction to the Court of Appeal (Callaway, Buchanan and Vincent JJA), on the grounds that the trial judge erred in failing to exclude the admissions as involuntary or unreliable. It was also argued that the trial judge erred in finding that the probative value of the statements made by the appellant outweighed any prejudicial effect. The Court found that the operatives to whom the admissions were made were not "persons in authority" for the purposes of the exclusionary rule. The appellant contented that his statements were inadmissible as they were involuntary in a basal sense, that is, that his will was overborne by a combination of promises and tactics of bullying, haranguing and cajoling. The Court of Appeal found the trial judge's conclusion that there was no evidence that the will of the appellant was overborne, was open to him in the circumstances.

The grounds of appeal are:

- the Court below erred in failing to determine that the learned trial judge had erred in failing to find that both covert police operative "Rick Baxter" and covert police operative "Gary Butcher" were persons in authority;

- the Court below erred in failing to determine that the learned trial judge had erred in:
  (a) not ruling as inadmissible on the basis of involuntariness the evidence of that which the Crown asserted were confessional statements made by the appellant to -
    (i) covert police operative "Rick Baxter" on 27 November 2002;
    (ii) covert police operative "Gary Butcher" on 27 November 2002.

  (b) not ruling as inadmissible
    (i) the evidence concerning the conduct of the covert police operatives with respect to the carrying out of the various "scenarios", including the evidence of the Crown witness Detective Sergeant Stephen Cody; and
    (ii) the evidence of the covert police operatives carrying out the various (16) "scenarios" with the appellant and the conversations with the appellant whilst carrying out these scenarios.

SZFDV v MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS & ANOR (S61/2007)

Court appealed from: Federal Court of Australia

Date of judgment: 13 September 2005

Date of grant of special leave: 9 February 2007

The appellant is an Indian citizen who arrived in Australia on 16 May 2004. On 3 June 2004 he applied for a protection visa on the basis of his (and his family's) association with the Communist Party in Tamil Nadu. The appellant claimed that his brother was killed by political rivals at a Communist Party meeting in 1998. He also said that the police had laid 'false charges' against him. The appellant further claimed that he had been physically attacked by his opponents on several occasions. He also said that he and his family had moved to Chennai to avoid further harrasment.

On 11 June 2004 the first respondent's delegate refused the appellant's application, as did the Refugee Review Tribunal ("RRT") on 10 November 2004. While the RRT accepted the appellant's claims as genuine, it found that he could relocate to another state to avoid further harassment. In particular the RRT held that the appellant could relocate to neighbouring Kerela, a state where the Communist Party is one of the two main political parties. Kerela is also a state whereby the DMK, the main opposition to the Communist Party in Tamil Nadu, has little power or influence. In reaching this conclusion the RRT applied the reasonableness of relocation test of *Randhawa v Minister for Immigration , Local Government and Ethnic Affairs* ("*Randhawa*"). This was after having regard to factors such as the appellant's education, health, social capability and ethnicity.

On 16 June 2005 Federal Magistrate Scarlett rejected the appellant's application for judicial review. His Honour found that none of the grounds in the appellant's application had any substance.

On appeal to the Federal Court, the appellant submitted that there was a constructive failure of jurisdiction by the RRT. This allegedly arose due to the application of the internal relocation question. On 13 September 2005 Justice Madgwick rejected that submission. While his Honour expressed personal doubs about the continued appropriateness of *Randhawa,* he held that it was binding authority upon him. On that basis Justice Madgwick concluded that the RRT had proceeded in a legally unexceptionable way. The appellant's appeal was therefore dismissed.

The grounds of appeal include:

- The Federal Court of Australia erred in failing to find jurisdictional error in the decision of the Refugee Review Tribunal in its consideration of the issue of the appellant's possible relocation within India.

- Further or alternatively, the Federal Court of Australia erred in failing to find jurisdictional error in the decision of the Refugee Review Tribunal to the extent that it:

- asked whether the appellant might reasonably be expected to relocate within India in order to avoid persecutory harm;

- treated the reasonable availability of protection against persecutory harm within India as determinative or conclusive of the appellant's refugee status

- failed to make findings about, and to consider, whether requiring the appellant to relocate would involve the abnegation of the attribute for which the appellant was selected for persecution; and

- failed to make findings about, and to consider, whether the appellant would be subjected to persecution following his relocation within India by reason of there being false murder charges outstanding against him in Tamil Nadhu.

SZATV v MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS & ANOR (S62/2007)

Court appealed from: Federal Court of Australia

Date of judgment: 31 October 2005

Date of grant of special leave: 9 February 2007

The appellant is a Ukrainian citizen who arrived in Australia on 12 June 2001. Initially he trained as a civil engineer, but from May 1991 he began working as a freelance journalist. This was only part-time to begin with, but from 1995 onwards he sought full-time work in this field. On 24 July 2001 the appellant applied for a protection visa on the basis of an anti-government political opinion imputed to him by the authorities. The appellant claimed that he had been harassed and beaten by the authorities as a result of his articles about the Kuchma Government. He also said that his wife had received threats at her workplace. The appellant further claimed that he had difficulty obtaining work because of his high profile. He said that editors were nervous about hiring him.

On 26 April 2002 the first respondent's delegate refused the appellant's application, as did the Refugee Review Tribunal ("RRT") on 30 April 2003. Despite some reservations, the RRT found the appellant to be a generally credible witness. It also concluded that he had been subjected to a systematic campaign of harassment amounting to persecution for a Convention reason. Nevertheless, the RRT went onto find that internal relocation was still a realisitic option. It found that the appellant was well educated and that he could move from his home region of Chervovsky. While the RRT conceded that the appellant may not be able to work as a journalist in the Ukraine, it found that he may be able to work in other areas, such as in the construction industry. The RRT also concluded that since the appellant did not have a national anti-government political profile, he would not be of interest to the authorities outside Chervovsky.

On 30 April 2003 Federal Magistrate Nicholls rejected the appellant's application for judicial review. On appeal to the Federal Court, the appellant submitted that both the RRT and the Magistrate had erred with respect to the relocation issue. He alleged that they had not considered that his inability to work as a journalist was persecution in itself.

On 31 October 2005 Justice Tamberlin concluded that there had been no error in the approach of either the RRT or the Magistrate on the relocation issue. His Honour held that an inability to work in one's chosen field, without more, was not persecution. His Honour also rejected the appellant's submission that he was denied an opportunity to comment on the material relied upon by the RRT in relation to the question of relocation.

The grounds of appeal include:

- The Federal Court of Australia erred in failing to find jurisdictional error in the decision of the Refugee Review Tribunal in its consideration of the issue of the appellant's possible relocation within the Ukraine.

- Further or alternatively, the Federal Court of Australia erred in failing to find jurisdictional error in the decision of the Refugee Review

Tribunal holding that the internal relocation principle applied even though relocation by the appellant within the Ukraine would not in itself avoid persecutory harm.

MEAD v MEAD (S123/2007)

Court appealed from: Full Court of the Family Court of Australia

Dates of judgment: 6 June 2006 & 25 August 2006

Date of grant of special leave: 2 March 2007

Ms Lucy Mead ("the wife") appealed against orders made by Justice Cohen sentencing her to four months imprisonment for contempt of Court. This arose out of proceedings brought against her by Mr Colin Mead ("the husband") pursuant to section 112AP of the *Family Law Act* 1975 (Cth).

The orders that the wife was convicted of breaching ("the injunctive orders") were made by a Judicial Registrar on 30 August 1999, extended by Justice Rose on 7 September 1999 and varied by Justice Cohen on 2 November 2001. In essence, the parties were restrained from dealing with any real property in which they had an interest. There was no evidence however that the wife was in Court on either 30 August 1999 or 7 September 1999. It is also common ground that she was never served with a sealed copy of those orders.

On 20 December 2001 the wife signed a mortgage of her interest in a property known as the Quoin Island Resort, while on 14 February 2003 she also transferred her interest in a property at 68 First Avenue, Katoomba. Both properties were the subject of the injunctive orders. There is no question that the injunctive orders remained in force at all relevant times. At the contempt trial before Justice Cohen, the wife did not adduce any evidence. She submitted however that the husband had failed to prove all of the elements of his application beyond reasonable doubt. On 30 May 2005 his Honour concluded that the evidence established beyond reasonable doubt that the wife had breached the injunctive orders. He also held that the wife knew of both their contents and their meaning. Justice Cohen further held that the wife's actions were a flagrant challenge to the authority of the Court.

On 6 June 2006 and 25 August 2006 the Full Court of the Family Court (Holden & Coleman JJ, May J dissenting) upheld the wife's appeal. Their Honours found that there was no admissible evidence before Justice Cohen to establish that the wife knew of both the contents and the meaning of the injunctive orders. It also could not be presumed a lay person of reasonable intelligence would understand such orders. The majority further held that Justice Cohen was wrong to draw an adverse inference from the wife's failure to give evidence. This relieved the husband of the requirement of proving an essential element of his case. It also imposed an unjustifiable evidentiary onus upon the wife.

Justice May however held that Justice Cohen's finding that the wife was aware of the orders was a conclusion clearly open to him. His Honour found that it was a rational inference in view of the wife's choice not to give evidence.

The grounds of appeal include:

- The Full Family Court erred in holding that, because any communications between the wife and her solicitor would have been the subject of client legal privilege which she could have invoked as the basis for objecting to evidence being led of such communications, it was not open to the learned trial judge to infer that the wife had acquired knowledge of the contents and meaning of the injunctive orders by way of such communications.

ROADS AND TRAFFIC AUTHORITY OF NSW v DEDERER & ANOR (S122/2007)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 5 October 2006

Date of grant of special leave: 2 March 2007

On 31 December 1998, Philip Dederer, the first respondent, dived off the Forster/Tuncurry bridge and was rendered a paraplegic. He was fourteen years old at the time.

The general area is a busy tourist destination attracting families and children. For many years young people, particularly in the summer months, frequently jumped and (less often) dived off the bridge into the estuary below. Philip had spent holidays in the area since he was a very small boy. He had frequently observed children and adults jump and dive off the bridge.

The bridge had two flat central horizontal railings beneath a flat top railing. Philip was able to use the two central railings to step onto the flat top railing. At first, he planned to jump off the bridge but at the last moment, on impulse, he decided to dive and used the flat top railing as a platform. He dived off the bridge at a point that was about nine metres from the surface of the water. He dived into approximately two metres of water, struck his head on a sandbar, and was rendered paraplegic.

There were pictograph signs on or at the approaches to the bridge prohibiting diving and signs in words prohibiting climbing on the bridge. Prior to diving, Philip saw and understood these signs but ignored them.

There was evidence that the appellant, Roads and Traffic Authority ("the RTA") had been aware of people frequently jumping off the bridge and in 1990 had conferred with police to attempt to prevent this. However, attempts to enforce the prohibition against jumping proved futile. The response of the RTA and the second respondent, Great Lakes Shire Council ("the Council") was to replace existing pictorial signs with the "No Diving" pictographs in 1995, but these had virtually no effect. The Council, but not the RTA, admitted that it knew that the practice of people jumping off the bridge was continuing.

Philip brought a claim against the RTA and the Council for damages for personal injury. In relation to the RTA, he argued that it failed to conduct an adequate risk assessment in relation to the bridge, failed to provide appropriate warning signs as opposed to prohibition signs, failed to modify the railing which could have prevented him from diving from the bridge, and failed to provide a net outside the railing to prevent diving.

The trial judge, Dunford J, upheld Philip's claim and decided that both the RTA and the Council were negligent. He further held that Philip had been guilty of contributory negligence and apportioned his share of responsibility for his own injury at 25 per cent. As between the RTA and the Council, his Honour found that the RTA was 80 per cent responsible for the first respondent's damages and the Council was 20 per cent responsible. The parties had agreed on the quantum of damages.

The RTA and the Council appealed against the findings of negligence and apportionment made by the trial judge.

The Court of Appeal (Handley, Ipp and Tobias JJA) by majority, dismissed the substantive appeal of the RTA and made an adjustment to the apportionment of damages. Handley JA, dissenting, found that the primary judge's finding that the appellant was aware of the continuing practice of diving from the bridge was contrary to the evidence. Furthermore, the absence of any recorded injury in the 39 years before Philip's accident demonstrated that the common practice of jumping off the bridge was not unsafe.

The first respondent cross-appeals, subject to the grant of special leave, from:

- those parts of the judgment of the New South Wales Court of Appeal given on 5 October 2006 which allowed the appellant's appeal to that Court and held that the first respondent was guilty of being contributorily negligent to the extent of 50% in lieu of 25% contributory negligence found by the trial judge; and

- the decision of that Court of 29 November 2006 refusing an order that the appellant pay the costs that the first respondent was ordered to pay to Great Lakes Shire Council.

The grounds of appeal include:

- The majority of the New South Wales Court of Appeal erred in holding that the appellant breached its duty of care by failing to respond to an alleged knowledge of habitual diving head first from the Foster/Tuncurry bridge when there was no evidence of any such knowledge.

- The majority of the New South Wales Court of Appeal erred when applying *Wyong Shire Council v Shirt* (1980) 146 CLR 40 in holding that the placement of "No Diving" pictogram signs and "Fishing from and Climbing on bridge prohibited" word signs on the bridge were an inadequate response to the risk in the following respects (including):

    - failing to apply a test of reasonable foresight at a time before the first respondent's accident;

    - failing to give sufficient weight to the trial judge's findings that the first respondent saw the signs, understood the signs, deliberately disregarded the signs, knew the depth of water was variable, knew that jumping from heights could cause injury and part of the thrill of diving was the risk.

SZFDE & ORS v MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS & ANOR (S118/2007)

Court appealed from: Full Court of the Federal Court of Australia

Date of judgment: 3 October 2006

Date of grant of special leave to appeal: 2 March 2007

In February 2002 a Lebanese family comprising a husband, wife and two children ("the family") arrived in Australia. On 23 March 2002 they applied for protection visas based on the Applicant wife's claim that she feared persecution because of her political opinions. She also claimed to be a member of a particular social group comprised of Islamic women who were perceived as having transgressed the customs of Islamic society. On 29 August 2002 a Departmental delegate refused their applications and they then applied to the Refugee Review Tribunal ("RRT") for a review of that decision.

Unfortunately for the family they were introduced to Mr Hussain, a man who said that he was a solicitor experienced in migration matters. They then engaged him to represent them in the RRT. As it turns out, Mr Hussain had been struck off as a solicitor in December 2001 and was deregistered as a migration agent in March 2002. He gave the family advice which was not only bad, but fraudulent. Mr Hussain told them not accept an invitation to appear before the RRT at an oral hearing because their application would be refused. He also said he was going to write to the Minister for Immigration & Multicultural Affairs ("the Minister") and that he was worried that the family may say something inconsistent to the RRT. Despite having their doubts about this, the family took Mr Hussain's advice. On 11 October 2003 the RRT refused their application for review, noting that the wife had not appeared before it and that there were relevant matters it had wanted to explore with her.

On 20 December 2005 Magistrate Scarlett upheld the family's application for judicial review. His Honour found that the family had been dissuaded from appearing before the RRT by the fraud of the agent. He then quashed its decision and remitted the matter for reconsideration. The Minister then appealed.

On 3 October 2006 a majority of the Full Federal Court (Allsop & Graham JJ, French J dissenting) upheld the Minister's appeal. While Justice Allsop acknowledged the impact of Mr Hussain's fraud on the family, his Honour found that it did not follow that the RRT's decision was itself induced or affected by fraud. His Honour also held that there was no basis to conclude that there had been any denial of procedural fairness. Justice Allsop further held that the agent's dishonesty had not denied the RRT the authority to decide the application for review under the *Migration Act* 1958 ("the Act"). His Honour held that the family's real complaint was not about the RRT's processes, but with Mr Hussain's conduct.

Justice Graham found that the Magistrate had erred in finding that Mr Hussain's actions had "deprived the invitation to the hearing from its quality of being a meaningful invitation under section 425". His Honour held that an invitation to a hearing under section 425 of the Act needed only to comply with the requirements of sections 425(1), 425A and 426 of the Act. The RRT did not

therefore commit jurisdictional error by proceeding to decide the application for review.

Justice French agreed that there had been no denial of procedural fairness, but he did find that the lead-up to the RRT's decision was compromised by Mr Hussain's fraud. The apparent consent by the Applicant wife to have her application decided without a hearing had been obtained by that fraud. It followed therefore that the RRT's decision was itself affected by it.

On 5 April 2007 the Minister filed a notice of contention, the grounds of which include:

- The Full Federal Court failed to find and should have found that:

    a) Magistrate Scarlett did not find that Mr Hussain acted fradulently in advising the family either that it would be best for them not to attend before the RRT or that the RRT was "not accepting any visa applications at all at the moment"; or

    b) in the alternative, if Magistrate Scarlett did so find, his Honour erred in making such a finding when there was no evidence that Mr Hussain did not hold opinions to that effect.

The grounds of appeal include:

- The Full Federal Court ought to have held (and erred in that it failed to hold) that the decision of the RRT to dismiss the family's application for review was liable to be quashed upon the issue of a writ of certiorari because:

    a) as found by French J, the decision was induced or affected, and therefore vitiated by fraud of Mr Hussain (a person whose practicing certificate as a solicitor, and whose registration as a migration agent, had been cancelled unbeknown to the family, but who, having falsely represented himself to the family to be a solicitor entitled to act for them as such, was shown in the records of the RRT as an "Authorised Recipient" of the family for the purpose of section 441G of the Act).

    b) further and alternatively, the RRT failed to comply with section 425(1) of the Act in that:

        (i) by the fraudulent intervention of Mr Hussain, letters of invitation addressed by the RRT to the family (pursuant to sections 425(1), 425A, 441A(4) and 441G of the Act) were not effectively communicated to them, but were negated, discounted or qualified by Mr Hussain's insistent, fraudulent misrepresentations to the effect that they should not appear before the RRT because the RRT was not granting any applications for review and any appearance by them before the RRT could, accordingly, only harm representations he proposed as their solicitor to make to the Minister; and

        (ii) for the purpose of section 425(2)(b) of the Act, the "consent" of the family to the RRT deciding the application for review without them appearing before it was vitiated by Mr Hussain's

fraud.

c) further and alternatively, the decision was affected by a denial of procedural fairness in that:

(i) the principles of procedural fairness are predicated upon an absence of fraud affecting the decision making process; and

(ii) the fraud of Mr Hussain deprived the RRT's decision making process of that foundation.