# SHORT PARTICULARS OF CASES

## APPEALS COMMENCING WEDNESDAY, 8 OCTOBER 2014

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Wednesday, 8 October 2014

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| 1. | Hunter and New England Local Health District v McKenna<br>Hunter and New England Local Health District v Simon & Anor | 1 |

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**HUNTER AND NEW ENGLAND LOCAL HEALTH DISTRICT v MCKENNA (S142/2014)**
**HUNTER AND NEW ENGLAND LOCAL HEALTH DISTRICT v SIMON & ANOR (S143/2014)**

Court appealed from: New South Wales Court of Appeal
[2013] NSWCA 476

Date of judgment: 23 December 2013

Special leave granted: 20 June 2014

On 20 July 2004 Mr Stephen Rose arranged for his friend, Mr William Pettigrove, to be admitted to the Manning Base Hospital in Taree ("the Hospital") due to concerns he had over Mr Pettigrove's mental health. Pursuant to the *Mental Health Act* 1990 (NSW), Mr Pettigrove was compulsorily detained overnight. He was however released into Mr Rose's care the next day following a subsequent psychiatric assessment by the Hospital's psychiatrist, Dr Coombes. Mr Pettigrove was released to enable both men to travel by car to Victoria which is where Mr Pettigrove's mother lived. After stopping en route near Dubbo, Mr Pettigrove strangled Mr Rose to death. Mr Pettigrove later told police that he had acted on a revenge impulse, apparently believing that Mr Rose had killed him in a past life. Mr Pettigrove himself subsequently committed suicide.

Mr Rose's mother and sisters ("the Family") then sued the Hunter and New England Local Health District ("the Health District"), being the legally responsible entity, in negligence. They claimed that the Hospital owed Mr Rose (and them) a common law duty of care and that it had breached that duty by discharging Mr Pettigrove into Mr Rose's custody. The Family also claimed that they suffered from psychiatric injury resulting from nervous shock following Mr Rose's death.

On 2 March 2012 Judge Elkaim found for the Health District, holding that the Family had not established negligence. His Honour further found that they had not satisfied him that Mr Rose's death (and consequently their injuries) were causally related to that alleged negligence.

On 23 December 2013 the Court of Appeal (Beazley P & Macfarlan JA; Garling J dissenting) allowed the Family's appeal. The majority held that the Hospital owed Mr Rose a common law duty to take reasonable care to prevent Mr Pettigrove causing him physical harm. This was because the Hospital not only had direct dealings with Mr Rose, but it also controlled the source of the risk to him (being Mr Pettigrove). They found that there was a foreseeable (and not insignificant) risk of serious harm being occasioned to Mr Rose upon Mr Pettigrove's discharge. The majority found that a reasonable person in the Hospital's position would have responded to that risk by continuing Mr Pettigrove's detention. Negligence had therefore been established.

The majority further held that the Health District was not entitled to the protection of s 5O of the *Civil Liability Act* 2002 (NSW) ("the Liability Act"), as there was no relevant practice to which Dr Coombes had conformed when discharging Mr Pettigrove. Their Honours also found that the Health Service was not entitled to the protection of s 43 or s 43A of the Liability Act. This was because the Family's claims were not for breach of a statutory duty or based on the Hospital's exercise of, or failure to exercise, a special statutory power conferred by s 35(3) of the *Mental Health Act* 1990.

The majority additionally held that the Family had established that Mr Rose's injuries (and therefore their own) were causally related to Dr Coombes' negligence. For the purposes of s 5D of the Liability Act, the Hospital's breach was a necessary condition of the harm and it was therefore appropriate that liability extend to that harm.

The grounds of appeal (in both matters) include:

- The New South Wales Court of Appeal erred in concluding that the Health District owed a duty of care to Mr Rose and the Family.

- The New South Wales Court of Appeal, having found that the Health District owed a duty of care to Mr Rose, erred in finding that the relevant 'risk of harm' for the purposes of section 5B of the Liability Act was the risk of any physical harm to Mr Rose, including physical harm that Mr Rose might suffer as a result of Mr Pettigrove attempting to harm himself.

**MINISTER FOR IMMIGRATION AND BORDER PROTECTION v SZSCA & ANOR (S109/2014)**

Court appealed from: Full Court of the Federal Court of Australia [2013] FCAFC 155

Date of judgment: 10 December 2013

Special leave granted: 16 May 2014

The First Respondent is an Afghani citizen of Hazara ethnicity who claimed to fear persecution due to his membership of a particular social group, namely "truck drivers who transported goods for foreign agencies". He also claimed to fear persecution based upon political opinions imputed to him by the Taliban. A delegate of the Appellant refused the First Respondent a protection visa, as did the Refugee Review Tribunal ("RRT"). While the RRT accepted the plausibility of the threats made against the First Respondent, it concluded that he could avoid persecution if he returned to Kabul and changed his occupation.

On 7 June 2013 Judge Nicholls upheld the First Respondent's application for judicial review of the RRT's decision.

On 10 December 2013 the Full Federal Court (Robertson & Griffiths JJ; Flick J dissenting) dismissed the Appellant's subsequent appeal. The majority concluded that the RRT had committed a jurisdictional error by reasoning that the First Respondent could avoid persecution in Afghanistan by making certain choices as to his profession and his domicile. In doing so, their Honours held that the RRT had limited itself to what the First Respondent *could* reasonably do upon his return to Afghanistan rather than what he *would* do. It had also not properly examined the reasons why the First Respondent would not earn his living as before.

Justice Flick however would have allowed the appeal. His Honour found that there was no absolute right for a protection visa claimant to engage in behaviour unrelated to the specific categories of protection afforded by the Refugees Convention. This was especially in circumstances whereby such behaviour may result in the imputation of a particular political opinion, thereby leading to threats of persecution. Justice Flick noted that it was this type of conduct which the RRT reasoned could be avoided, with the attendant threats of persecution likewise being avoided. His Honour held that neither the Refugees Convention, nor the relevant case law, precluded the course of reasoning pursued by the RRT in this matter. Judge Nicholls therefore had erred in deciding otherwise.

The grounds of appeal include:

- Contrary to the findings of the Full Court, *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 did not have the consequence that the decision of the RRT in the present matter was vitiated by jurisdictional error.

**ARGOS PTY LTD ACN 008 524 418 & ORS v. SIMON CORBELL, MINISTER FOR THE ENVIRONMENT AND SUSTAINABLE DEVELOPMENT & ORS (C3/2014)**

Court appealed from: Court of Appeal of the Supreme Court of the Australian Capital Territory [2013] ACTCA 51

Date of judgment: 29 November 2013

Special leave granted: 21 May 2014

This appeal purports to raise a question as to whether there is a general rule that economic interests are insufficient to ground standing under the "person aggrieved" test in s 5(1) of the *Administrative Decisions (Judicial Review) Act* 1989 (ACT) ("the ADJR Act").

The first appellant, Argos Pty Ltd, holds a lease of Crown land at the Kaleen Local Centre. An IGA Supermarket is located in the centre but it is not operated by Argos, rather it is operated by the second appellant, Cavo Pty Ltd as a sub-lessee. The third appellant, Koumvari Pty Ltd, is a trustee for the Vizadis Family Trust. The Trust holds a sub-lease of the Crown Lease for the site of the IGA Supermarket at the Evatt Local Centre and conducts the IGA Supermarket at that address.

The first respondent, ("the Minister") granted approval to a development application made by the second respondent on behalf of the third respondent. That application sought approval for a supermarket and speciality shops on land known as the Giralang Local Centre, being the land at Blocks 4 and 5, Section 74, Giralang, ACT.

The appellants challenged the Minister's decision on the following grounds:
(1) The Minister did not have jurisdiction to approve the development application as it was inconsistent with the relevant code, contrary to s 119(1)(a) of the *Planning and Development Act* 2007 (ACT) ("the Planning Act");
(2) the decision was not authorised under the enactment under which it was purportedly made, namely the Planning Act;
(3) the decision was an improper exercise of the power given under the Planning Act to approve development proposals because the Minister failed to take into account relevant considerations, or in the alternative the making of the decision was an exercise of power that was so unreasonable that no reasonable person could have so exercised the power;
(4) the Minister breached the rules of natural justice; and
(5) the decision involved an error of law.

Burns J found that the appellants did not have standing to claim the relief sought. Further, although it was not necessary for his Honour to make findings with respect to the substantive grounds of the application, he did so and dismissed each ground.

The appellants appealed this decision. The Court of Appeal (Penfold and Cowdroy JJ and Nield AJ) found that except for each applicant's alleged interest in the maintenance of the hierarchy of commercial centres in the ACT they had not identified any special interest over and above their respective economic interests and held that the decision of the primary judge was correct in deciding

that the appellants lacked standing to apply for judicial review. Accordingly, the appeal was dismissed.

The ground of appeal is:

- The Court of Appeal erred in holding that the first, second and third appellants were not, within the meaning of the then terms of s 5(1) of the ADJR Act, persons "aggrieved by" the decision made by the first respondent on 17 August 2011 pursuant to s 162 of the Planning Act approving a development application made by the second respondent.

**CPCF v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR (S169/2014)**

Date writ of summons filed: 7 July 2014

Date special case referred to Full Court: 21 August 2014

The plaintiff is a Tamil Sri Lankan who claims to have refugee status. He and several family members of his were among 157 people ("the detainees") aboard a vessel ("the Indian vessel") that was intercepted by a border protection vessel ("the Australian vessel") on 29 June 2014. That interception occurred in the Indian Ocean near Christmas Island, in the "contiguous zone" to Australia's territorial sea. After the Indian vessel later became unseaworthy, the detainees were transferred to the Australian vessel and were then detained aboard it.

Section 72 of the *Maritime Powers Act* 2013 (Cth) ("Maritime Powers Act") makes provision for the detention and movement of persons on a vessel detained by maritime officers (which include members of the Australian Defence Force and Customs officers). Section 72(4) provides as follows:

> *A maritime officer may detain the person and take the person, or cause the person to be taken:*
> *(a) to a place in the migration zone; or*
> *(b) to a place outside the migration zone, including a place outside Australia.*

On 1 July 2014 the National Security Committee of Cabinet decided that the detainees should all be taken to India. This was in accordance with a government policy of intercepting and removing from Australian waters any person without a visa who attempts to enter Australia by boat. The detainees remained aboard the Australian vessel while it travelled through international waters and later waited near India while diplomatic negotiations took place.

The first respondent ("the Minister") then decided to take the detainees into Australia's migration zone instead of to India. The detainees remained aboard the Australian vessel until 27 July 2014, when they were taken to the Cocos (Keeling) Islands. They were then detained under s 189(3) of the *Migration Act* 1958 (Cth).

By that time the plaintiff had commenced proceedings in this Court against both the Minister and the Commonwealth of Australia (together, "the defendants"). The plaintiff challenges the lawfulness of his detention outside of Australia and Australia's contiguous zone. He seeks damages for wrongful imprisonment.

A Notice of a Constitutional Matter was filed by the plaintiff on 24 July 2014. At the time of writing, no Attorney-General had informed the Court of an intention to intervene in these proceedings. Applications for leave to appear as *amicus curiae* have been made by both the United Nations High Commissioner for Refugees and the Australian Human Rights Commission (the latter seeking such leave in the alternative to leave to intervene in the proceedings).

The parties filed a special case, the following questions in which were stated by Justice Hayne for the opinion of the Full Court:

(1) Did s 72(4) of the Maritime Powers Act authorise a maritime officer to detain the plaintiff for the purpose of taking him, or causing him to be taken, to a place outside Australia, being India:

(a) whether or not the plaintiff would be entitled by the law applicable in India to the benefit of the non-refoulement obligations;
(b) in implementation of a decision by the Australian Government that the plaintiff (and others on the Indian vessel) should be taken to India without independent consideration by the maritime officer of whether that should be so; and
(c) whether or not, prior to the commencement of the taking of the plaintiff to India, an agreement or arrangement existed between Australia and India concerning the reception of the plaintiff in India?

(2) Did s 72(4) of the Maritime Powers Act authorise a maritime officer to:
(a) take the steps set out in paragraph 20 in implementing the decision to take the plaintiff to India;
(b) detain the plaintiff for the purposes of taking the plaintiff to India?

(3) Did the non-statutory executive power of the Commonwealth authorise an officer of the Commonwealth to:
(a) take the steps set out in paragraph 20 for the purpose of preventing the plaintiff from entering Australia;
(b) detain the plaintiff for the purposes of taking the plaintiff to India?

(4) Was the power under s 72(4) of the Maritime Powers Act to take the plaintiff to a place outside Australia, being India, subject to an obligation to give the plaintiff an opportunity to be heard about the exercise of that power and, if so, was that obligation breached?

(5) Was any non-statutory executive power of the Commonwealth to take the plaintiff to a place outside Australia, being India, for the purpose of preventing the plaintiff from entering Australia, subject to an obligation to give the plaintiff an opportunity to be heard about the exercise of that power and, if so, was that obligation breached?

(6) Was the detention of the plaintiff unlawful at any, and if so what period, from 1 July 2014 to 27 July 2014 and if so are they entitled to claim damages in respect of that detention?

(7) Who should pay the costs of this special case?

(8) What if any order should be made to dispose of the proceeding or for the conduct of the balance (if any) of the proceeding?

**HENDERSON v STATE OF QUEENSLAND (22/2014)**

Court appealed from: Court of Appeal of the Supreme Court of Queensland [2013] QCA 82

Date of judgment: 16 April 2013

Special leave granted: 16 May 2014

In April 2002, police searched a motel room at which the appellant was staying. There they found illegal drugs in the possession of acquaintances of the appellant's who were the focus of the search. The police also searched a car that the appellant had hired. In the boot they found a small quantity of cannabis, along with $598,325 cash ("the money"). The appellant, who had a lengthy criminal record, claimed to have obtained the money by selling a collection of antique jewellery which he and three of his siblings had inherited from their late father. The police however seized the money and banked it, suspecting it to be tainted property.

The police later obtained a restraining order against the money under the *Criminal Proceeds Confiscation Act* 2002 (Qld) ("the Act"), upon satisfying the Supreme Court that they had reasonably suspected that the money was property of a person who had engaged in an activity that constituted a serious criminal offence.

The respondent ("the State") later applied, under s 56 of the Act, for an order of forfeiture of the money to it. In response, the appellant applied for an exclusion order under s 65 of the Act, to exclude the whole of the money from any forfeiture order that would be made. The success of the appellant's application depended upon a finding under s 68(2)(b) of the Act that the money had probably not been illegally acquired.

The appellant gave evidence that his father, about four to five years before his death in 2001, gave the appellant a boxful of jewellery and told him to use it to look after his siblings. The appellant and three of his siblings all gave evidence that their father had told them that he had a collection of jewellery that had been given to an ancestor of his as a reward for services provided to Russian nobles. Such a gift would have been made in the late 1800s or early 1900s. The appellant's evidence was that after his father's death he obtained a valuation of the jewellery, which estimated it to be worth between $600,000 and $700,000 wholesale or $1 million retail. The appellant then sold the jewellery for $620,000 cash to a man who was later untraceable, as his details had been written only on a $50 note which had since been exchanged (either by the appellant or by the police when the money was banked). The valuer named by the appellant was unfit to give evidence, but sketches of the jewellery made by him were examined by a valuer called by the State, who gave evidence that the jewellery in those sketches would have been made after 1950.

On 22 November 2011, Justice P Lyons ordered that the money be forfeited to the State and dismissed the appellant's application for an exclusion order. His Honour found that the appellant had received the jewellery from his father and that the money was the product of the sale of that jewellery, as "[t]he evidence does not identify any other potential source of the funds." Justice Lyons then held however that the appellant had failed to prove that the jewellery had not been

illegally acquired, as he was unable to establish how his father had come to possess it.

On 16 April 2013 the Queensland Court of Appeal (Holmes & White JJA, Daubney J) unanimously dismissed the appellant's appeal. Their Honours held that the appellant could not succeed by raising an absence of evidence as to how his father had acquired the jewellery, as the Act cast the onus on the appellant to prove that relevant property had not been illegally acquired. He therefore had to prove both that the jewellery was from an era when it had allegedly come into the family and that his father had not unlawfully acquired it. The Court found it open to Justice Lyons to find that that onus had not been discharged.

The grounds of appeal include:

- The Court of Appeal erred in ruling that for the appellant to succeed in his application he had to persuade the Court that his deceased father prior to gifting him the jewellery had come by the jewellery lawfully.

- The Court of Appeal erred in failing to find that possession of the jewellery by the appellant's deceased father was prima facie evidence of ownership by the appellant's father.