**SHORT PARTICULARS OF CASES**
**APPEALS**

**SEPTEMBER 2015**



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# NORTH AUSTRALIAN ABORIGINAL JUSTICE AGENCY LIMITED & ANOR v NORTHERN TERRITORY OF AUSTRALIA (M45/2015)

Date Special Case referred to Full Court: 3 June 2015

This special case challenges the validity of Division 4AA of Part VII of the *Police Administration Act* 2014 (NT) ('the PA Act') which commenced operation on 17 December 2014. The new powers apply where a member of the police force arrests a person without a warrant and does so believing on reasonable grounds that the person has committed, was committing, or was about to commit an "infringement notice offence". Some 35 different offences fall within this class. The majority are minor offences for which no term of imprisonment could be imposed as a penalty for the offence, if the person were found guilty by a court. Many are of a "public order" character. The new powers purport to authorise police to take a person into custody and hold the person for a period of up to four hours or, if the person is intoxicated, for a period longer than four hours, until the member believes on reasonable grounds that the person is no longer intoxicated.

The first plaintiff provides legal services to Aboriginal and Torres Strait Islander people in the Northern Territory. It alleges that a disproportionately high number of people detained under s 133AB of the PA Act since it came into effect are indigenous. The second plaintiff was arrested and taken into custody purportedly pursuant to s 133AB(2)(b) of the PA Act on 19 March 2015 and was held in custody for almost 12 hours.

The plaintiffs filed a writ of summons challenging the validity of the legislation and Nettle J, on 3 June 2015, referred the Special Case agreed by the parties to the Full Court. The issues arising are: (a) does the separation of powers enshrined in Chapter III of the Commonwealth Constitution limit the legislative power of the Parliament under s 122 of the Constitution? If so, does it limit the legislative power of the Legislative Assembly of the Northern Territory ('the NT') because the stream cannot rise higher than its source? And if so, do the impugned provisions contravene the separation between judicial and executive powers; and (b) do the impugned provisions (by effectively removing from judicial oversight the involuntary detention of a citizen) undermine the institutional integrity of the courts of the NT contrary to the principle in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 5?

The Plaintiffs submit that the new powers conferred on NT Police are unprecedented in Australia and in the common law world. In comparing these NT powers to existing powers in other jurisdictions, two features are striking: first, Div 4AA purports to authorise a period in custody of up to four hours without any requirement even that the time be used for the purpose of investigating an offence; and secondly, Div 4AA fails to provide for judicial oversight of the process. The Plaintiffs contends that because detention under Div 4AA lacks any non-punitive purpose, and because it cannot be regarded as being reasonably capable of being considered necessary for any such purpose, the detention which that Division authorises can only be an incident or result of a judicial order or warrant. Division 4AA purports to allow this detention at the instance of the Executive without judicial order or warrant. It is therefore invalid for conferring judicial power on the Executive rather than on a court as required by s 71 of the Constitution.

The Defendant submits that the doctrine of the separation of powers in Chapter III of the Constitution does not apply to the Northern Territory. It further contends that detention of a person as prescribed by s 133AB of the PA Act is within one of the qualifications accepted in *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 to the more general proposition that the power to require a citizen to be involuntarily detained in custody is judicial.

The Attorneys-General of the Commonwealth, New South Wales, South Australia, Western Australia, Queensland and the Australian Capital Territory have given notice that they will intervene. An application for leave to intervene has been filed by the Australian Human Rights Commission.

The questions reserved by the Special Case signed by the parties include:

- Is Division 4AA of Part VII of the *Police Administration Act* 2014 (NT) (or any part thereof) invalid on the ground that:
  (a) it purports to confer on the executive of the Northern Territory a power to detain which is penal or punitive in character:
    a. which, if it had been passed by the Commonwealth Parliament, would be beyond the powers of that Parliament under s 122 of the Constitution, which powers are limited by the separation of powers enshrined in the Constitution; and
    b. which is therefore beyond the powers of the Legislative Assembly of the Northern Territory under the *Northern Territory (Self-Government) Act* 1978 (Cth), which powers are subject to the same limits; and/or
  (b) it purports to confer on the executive (rather than the courts) of the Northern Territory a power of detention which is penal or punitive in character, thereby undermining or interfering with the institutional integrity of the courts of the Northern Territory in a manner contrary to the Constitution?

# FIREBIRD GLOBAL MASTER FUND II LTD v REPUBLIC OF NAURU & ANOR (S29/2015)

Court appealed from: Supreme Court of New South Wales
(Court of Appeal)
[2014] NSWCA 360

Date of judgment: 23 October 2014

Special leave granted: 13 February 2015

In October 2011 in the Tokyo District Court, the Appellant ("Firebird") obtained a judgment in its favour against the First Respondent ("Nauru") for more than 1.3 billion yen ("the Judgment"). Firebird then registered the Judgment with the Supreme Court of New South Wales ("the Registration") under the *Foreign Judgments Act* 1991 (Cth) ("FJA"). This was by following the procedure set out in Part 53 of the *Uniform Civil Procedure Rules* 2005 (NSW) ("UCPR"). In accordance with that procedure, Firebird served on Nauru the resulting notice of registration of the Judgment ("the Notice") and did not serve the summons it had filed to seek the Registration ("the Summons").

Nauru does all of its banking through various accounts it maintains with the Westpac Bank in Australia, against which Firebird sought execution for the sum awarded by the Judgment.

Nauru did not apply to set aside the Registration within the 14-day time limit that applied under the procedure prescribed by the FJA and UCPR. Later however Nauru applied for the Registration to be set aside under s 38 of the *Foreign States Immunities Act* 1985 (Cth) ("FSI Act"), invoking the general immunity from the jurisdiction of Australian courts provided by s 9 of that Act.

On 3 October 2014 Young AJA set aside the Registration. This was on the basis that it had been obtained without service of the Summons on Nauru, contrary to s 27(1) of the FSI Act. His Honour held that the FSI Act was a specialised Act which operated as an exception to the procedure under the FJA and UCPR for the registration of foreign judgments (and the setting aside of such registrations). Justice Young held that the exception under s 11 of the FSI Act to the general immunity from suit provided by s 9 did not apply to Nauru, as the Judgment was not a "commercial transaction" within the meaning of s 11.

On 23 October 2014 the Court of Appeal (Bathurst CJ, Beazley P & Basten JA) unanimously dismissed Firebird's appeal. Their Honours held that the requirement under the FSI Act for service of originating process did not conflict with the FJA, as the latter did not require such service. Nauru was therefore entitled to seek relief under the FSI Act regardless of the time limit under the FJA. The Court of Appeal held that the "commercial transaction" exception to immunity in s 11 of the FSI Act did not apply to the Registration, as the word "concerns" in that section did not extend to the subject matter of the Judgment. Bathurst CJ, with whom Beazley P agreed, found that the general immunity from execution provided by s 30 of the FSI Act applied to the funds in Nauru's accounts with the Westpac Bank. This was because their uses or purposes, in the circumstances of Nauru as a small island nation, were such that the funds were not "commercial property" so as to attract the exception in s 32 of the FSI Act.

The grounds of appeal include:

- The Court erred in holding that, where a foreign court has given judgment against a foreign state and Part 2 of the FJA applies to that foreign judgment:

    a) the FSI Act, s 9, renders a foreign state immune to an application to the Court for an order for the registration of the foreign judgment under the FJA, s 6 ("Application"), as involving the exercise against the foreign state of "jurisdiction of [the Court] in a proceeding", and, as so construed, has not impliedly been repealed by the FJA, ss 6 and 7; and

    b) the FSI Act implicitly requires that an order for the registration of the foreign judgment under the FJI, s 6, cannot be made unless the summons commencing the Application has first been served on the foreign state, and, as so construed, has not impliedly been repealed by the FJI.

On 27 April 2015 the Attorney-General of the Commonwealth of Australia filed a summons, seeking leave to intervene in this matter.

On 1 June 2015 the First Respondent filed a summons, seeking leave to file a notice of contention out of time. The grounds of that proposed notice of contention include:

- The Court of Appeal erred in holding that s 27 of the FSI Act relates only to a judgment in default of appearance after service has been effected. The Court of Appeal should have held that s 27 of the FSI Act expressly prohibits the entering of a judgment against a foreign State in circumstances where the initiating process has not been served in accordance with Part III of the FSI act (CA [39]-[45).

## THE QUEEN v BECKETT (S94/2015)

Court appealed from: Supreme Court of New South Wales
(Court of Criminal Appeal)
[2014] NSWCCA 305

Date of judgment: 12 December 2014

Special leave granted: 15 May 2015

Ms Barbara Beckett was committed for trial in the District Court on the charge of perverting the course of justice pursuant to s 319 of the *Crimes Act* 1900 (NSW) ("the Crimes Act"), or in the alternative, with making a false statement under oath pursuant to s 330 of the Crimes Act. Ms Beckett's impugned conduct occurred during the course of a compelled interview with investigators from the Office of State Revenue ("OSR"), pursuant to s 72 of the *Taxation Administration Act* 1996 (NSW) ("the Administration Act"). During that interview, Ms Beckett provided copies of two cheques on which the issue dates had been altered, and she knowingly made a false statement to the investigators.

Ms Beckett applied for a permanent stay of her prosecution as an abuse of process. Sweeney DCJ dismissed that application and Ms Beckett then sought leave to appeal pursuant to s 5F of the *Criminal Appeal Act* 1912 (NSW) ("the Appeal Act").

Upon appeal the issues for determination included:

(1) Whether the proceedings were commenced and maintained mala fides;

(2) Whether the representations made by Ms Beckett were made in "the course of justice" within the meaning of s 319 of the Crimes Act;

(3) Whether s 72 of the Administration Act abrogated the right to silence and the privilege against self-incrimination;

(4) Whether the information obtained in the compelled interview could be used, including by way of evidence in criminal proceedings in proof of an offence under the Crimes Act.

On 12 December 2014 the Court of Criminal Appeal (Beazley P, R A Hulme J and Bellew J) allowed Ms Beckett's appeal and ordered that count 1 on the indictment be permanently stayed. With respect to mala fides, their Honours held that there is no requirement, under s 71 or otherwise, that evidence given or information obtained pursuant to a compulsory examination under s 72 be used only for the purposes of a prosecution under a taxation law. They further held that there was no abuse of process in the manner in which the interview was conducted. Ms Beckett was not deceived or tricked into believing that she was not in any way liable to be exposed to other aspects of the criminal law by the OSR investigators.

The Court of Criminal Appeal specifically found however that the "course of justice" for the purposes of s 319 of the Crimes Act does not commence until the jurisdiction of a court or competent judicial tribunal was invoked. As the conduct engaged in by Ms Beckett, if proved, occurred prior to this occurring, it was

incapable of constituting an offence under s 319 of the Crimes Act. Count 1 of the indictment needed therefore to be permanently stayed.

With respect to the abrogation of the right to silence and the privilege against self-incrimination, their Honours found that the privilege against self-incrimination was impliedly abrogated by s 72 of the Administration Act.

The grounds of appeal include:

- An act committed before the commencement of judicial proceedings may constitute an offence of pervert the course of justice under s 319 of the Crimes Act where the act is done with the intent to frustrate or deflect the course of judicial proceedings which the accused contemplates may possibly be instituted.

## COMMISSIONER OF TAXATION v AUSTRALIAN BUILDING SYSTEMS PTY LTD (IN LIQUIDATION) (B19/2015)

## COMMISSIONER OF TAXATION v GINETTE DAWN MULLER AND JOANNE EMILY DUNN AS LIQUIDATORS OF AUSTRALIAN BUILDING SYSTEMS PTY LTD (IN LIQUIDATION) (B20/2015)

Court appealed from: Full Court of the Federal Court of Australia [2014] FCAFC 133

Date of judgment: 8 October 2014

Special leave granted: 17 April 2015

On 2 March 2011 administrators were appointed to Australian Building Systems Pty Ltd ("ABS") under Part 5.3A of the *Corporations Act* 2001 (Cth) ("the Corporations Act"). On 6 April 2011 the creditors of ABS resolved, under s 439C of the Corporations Act, that ABS be wound up and Ms Muller and Ms Dunne be appointed liquidators ("the liquidators"). The assets of ABS then included a property at Crestmead in Queensland. On 21 July 2011 the liquidators caused ABS to enter into a contract for the sale of the Crestmead property. ABS made a capital gain on the sale of $1,120,000 which entered into the calculation of ABS' assessable income of that year.

The Appellant ("the Commissioner") argued that s 254(1)(d) of the *Income Tax Assessment Act* 1936 (Cth) ("the 1936 Act") required the liquidators to retain sufficient funds from the proceeds of the sale of the Crestmead property to pay the tax that would have become due in respect of the net capital gain arising from the disposal of the property. The liquidators argued that the requirement to withhold funds would only arise upon the issue of a valid assessment by the Commissioner.

At first instance, Logan J held that s 254 of the 1936 Act had no application to the liquidators. They were not, in the absence of any assessment, subject to any retention and payment obligation.

The Full Court of the Federal Court of Australia (Edmonds, Collier and Davies JJ) upheld the decision of Logan J that s 254(1)(d) of the 1936 Act only imposed an obligation of retention once a relevant assessment had been issued. Davies J agreed that the appeals should be dismissed, but dissented in part, opining that it was not a complete answer to the Commissioner's case that it was apparently common ground that any assessment would issue to the company.

In both matters, the grounds of appeal include:

- The Full Court (with Davies J dissenting in part) erred in the application of section 254(1) of the 1936 Act to the case of a trustee within the meaning of s 6 of the 1936 Act who is not the trustee of a trust estate (such as a liquidator or receiver) and who derives income profits or gains ("IPG") in a representative capacity by concluding that s 254(1) only operates in relation to IPG on which the trustee (eg. liquidator or receiver) was assessable under Part III, Division 6 of the 1936 Act (which cannot arise unless there is a trust estate).

In both matters a Notice of Contention was filed, the grounds of which include:

- The Full Court of the Federal Court of Australia should have dismissed the appeal on the basis that the primary judge's reasoning was correct and justified the orders made by the primary judge.

## THE QUEEN v PHAM (M101/2014)

Court appealed from: Supreme Court of Victoria (Court of Appeal) [2014] VSCA 204

Date of judgment: 5 September 2014

Date special leave granted: 15 May 2015

On a flight from Vietnam on 15 March 2013 the respondent became unwell and required medical attention. Two small packages of white powder were discovered in a toilet which he had been using. When subsequently questioned, he admitted that he had ingested heroin during the flight and that the packages of powder were his. On analysis, the powder was found to be a mixture of heroin and caffeine. The total pure weight of heroin detected was 577.1 grams. A marketable quantity of heroin is an amount between 2 grams and 1.5 kilograms. Thus, the amount comprised a little over one-third of the range of quantities covered by the offence of importing a marketable quantity of heroin. The maximum sentence applicable to the offence is 25 years' imprisonment.

On 23 October 2013 the applicant pleaded guilty in the County Court of Victoria to one charge of having imported a marketable quantity of heroin contrary to s 307.2(1) of the *Criminal Code* 1995 (Cth). He was sentenced by Judge Tinney to 8 years and 6 months' imprisonment with a non-parole period of 6 years. The respondent appealed to the Court of Appeal (Maxwell P, Osborn and Kyrou JJA) on the grounds that the sentence imposed, and the non-parole period fixed, were manifestly excessive.

Maxwell P undertook a statistical analysis of the results of 32 appeal court cases which had the following common features: a marketable quantity of drugs, a guilty plea, first conviction of the accused, and the fact that the accused was a courier. His Honour calculated the actual quantity of drugs imported as a percentage of the commercial quantity for each of the different drugs imported. His analysis was adopted by Osborn JA and Kyrou JA.

The Court concluded that when the respondent pleaded guilty, he was reasonably entitled to assume that he would be sentenced in accordance with current sentencing practices in Victorian courts. The comparative analysis showed that the sentence was outside the range reasonably open to the sentencing judge in the circumstances of the case, having regard to applicable sentencing practices for a case of this kind. The appeal was allowed and the respondent was re-sentenced to six years' imprisonment with a non-parole period of four years. The appellant appealed to this Court.

The grounds of appeal include:

- The Court of Appeal erred in law by determining that the respondent should be sentenced in accordance with current sentencing practices in Victorian courts, to the exclusion of sentencing practices in other jurisdictions.

- The Court of Appeal adopted an impermissible statistical analysis of comparable cases to determine the objective seriousness of the offence.

The respondent has filed a notice of contention, the grounds of which include:

- Maxwell P erred in fact in failing to find that the impugned sentence was heavy compared to sentencing practices in jurisdictions other than Victoria.

# MINISTER FOR IMMIGRATION AND BORDER PROTECTION v WZARH & ANOR (S85/2015)

Court appealed from: Full Court of the Federal Court of Australia [2014] FCAFC 137

Date of judgment: 20 October 2014

Special leave granted: 17 April 2015

WZARH is a Sri Lankan citizen of Tamil ethnicity who entered Australia by boat in November 2010. Having arrived without a visa, he was an "unauthorised maritime arrival" and as such was prevented by s 46A of the *Migration Act* 1958 (Cth) ("the Act") from making a valid application for a visa. After a Refugee Status Assessment found that he did not qualify for refugee status, WZARH sought an Independent Merits Review ("IMR").

During the IMR process, in January 2012 WZARH was interviewed by a reviewer ("the First Reviewer"). The First Reviewer told WZARH that she would consider the information he had given, along with any further documents he wished to provide, before making a recommendation as to his refugee status to the Appellant ("the Minister"). WZARH later provided further documents that he wished to be taken into account. After the First Reviewer became unavailable, the IMR file was referred to another reviewer ("the Second Reviewer"), who completed the IMR with the aid of a recording and a transcript of the interview conducted by the First Reviewer. On 25 July 2012 the Second Reviewer found that WZARH did not meet any of the criteria for a protection visa set out in s 36(2) of the Act.

WZARH applied for judicial review of the IMR process, contending that he had been denied procedural fairness. This was primarily on the basis that he had not been interviewed by the Second Reviewer.

On 14 October 2013 Judge Raphael dismissed WZARH's application. His Honour held that an adequate hearing had been given. Judge Raphael found that the Second Reviewer's views as to WZARH's credibility were based on inconsistencies in the evidence that had for the most part been raised with WZARH by the First Reviewer.

The Full Court of the Federal Court (Flick, Nicholas & Gleeson JJ) unanimously allowed WZARH's subsequent appeal, finding that he had been denied procedural fairness. Flick and Gleeson JJ held that WZARH had a legitimate expectation either that the First Reviewer would ultimately make the IMR recommendation or that any such recommendation made by a different reviewer would occur only after that reviewer had conducted an oral hearing. That expectation was founded upon the fact that an oral hearing had been conducted, along with the First Reviewer's statements as to her role in conducting the IMR and making a recommendation. Their Honours held that WZARH had suffered a practical injustice by a change in the process that had occurred without his knowledge. Justice Nicholas found, for similar reasons, a denial of procedural fairness by the Second Reviewer's failure to inform WZARH that there had been a change of reviewer. His Honour also found that the Second Reviewer's findings related to matters upon which WZARH's demeanour might have had some bearing.

The grounds of appeal include:

- The Full Court erred in holding that WZARH was denied procedural fairness because the Second Respondent did not:

  (a) invite him to attend a face-to-face hearing; and/or

  (b) inform him that the First Reviewer who conducted the hearing on 16 January 2012 had become unavailable after the interview to complete the review; and/or

  (c) ask him how he wished for the review to proceed, given the change of reviewer.