SHORT PARTICULARS OF CASES
APPEALS

COMMENCING WEDNESDAY, 4 MARCH 2015

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INDEPENDENT COMMISSION AGAINST CORRUPTION v CUNNEEN & ORS (S302/2014)

Court appealed from: New South Wales Court of Appeal
[2014] NSWCA 421

Date of judgment: 5 December 2014

Date referred to Full Court: 12 December 2014

The Respondents to this application for special leave to appeal are Ms Margaret Cunneen SC (a senior prosecutor in New South Wales), her son Mr Stephen Wyllie and Ms Sophia Tilley. In October 2014 the Respondents were each served with a summons to give evidence at a public inquiry ("the Inquiry") to be conducted by the Independent Commission Against Corruption ("ICAC"). The Inquiry was to be held for an investigation into an allegation that at the scene of a car accident Ms Tilley, on the advice of Ms Cunneen and Mr Wyllie, pretended to have chest pains to avoid police testing of her blood alcohol level and that each of the three had acted with an intention to pervert the course of justice ("the Allegation").

The Respondents commenced Supreme Court proceedings, seeking orders restraining ICAC from holding the Inquiry and investigating the Allegation. They contended that the Allegation could not constitute "corrupt conduct" within the meaning of the *Independent Commission Against Corruption Act* 1988 (NSW) ("the Act") and that the Inquiry was therefore beyond the scope of ICAC's principal functions as set out in s 13 of the Act.

Section 8(2) of the Act relevantly provides that "corrupt conduct" includes conduct by any person (whether or not a public official) that could adversely affect, either directly or indirectly, the exercise of official functions by a public official (or a body of such officials) and which could involve any of certain matters listed in the sub-section. Those matters included perverting the course of justice, or attempting to do so.

On 10 November 2014 Hoeben CJ at CL dismissed the Respondents' claim. His Honour found that, assuming the facts supporting the Allegation were true, the alleged conduct of the Respondents could amount to perverting, or attempting to pervert, the course of justice. Justice Hoeben held that the conduct satisfied both tests for "corrupt conduct" contained in s 8(2). The Respondents appealed.

The Court of Appeal allowed the appeal (Basten & Ward JJA; Bathurst CJ dissenting). Their Honours unanimously held that the conduct alleged in the Allegation could amount to attempting to pervert the course of justice.

Basten and Ward JJA each held that the alleged conduct did not fall within the scope of ICAC's functions. This was after construing s 8(2) in light of the focus of the Act, which was on corruption in the public sector rather than on any unlawful conduct that may affect public administration. Their Honours held that the first test (or limb) of s 8(2) was not satisfied, as a police officer being dissuaded by the alleged conduct from giving a blood alcohol test would not be acting dishonestly in the performance of his or her duties. It could therefore not be said that the exercise of official functions by a public official could be adversely affected.

Bathurst CJ however held that the alleged conduct of the Respondents could have the relevant adverse effect, due to potential impacts on court proceedings (a court being a body of judicial officers, each of whom is a public official). First, the conduct could divert a police officer from investigating a suspected crime and thereby deflect the police from invoking the jurisdiction of a court. Secondly, it could frustrate the course of potential court proceedings or impair a court's capacity to do justice.

On 12 December 2014 Chief Justice French referred this application to the Full Court for hearing in the March 2015 sittings as if on appeal.

The proposed ground of appeal is:

- The majority of the Court of Appeal erred in holding that the allegation then being investigated with respect to the Respondents could amount to perverting the course of justice, but could not amount to conduct that "adversely affects, or could adversely affect … the exercise of official functions by any public official" within the meaning of s 8(2) of the Act, such as to be capable of being investigated by ICAC under s 13(1).

UELESE v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR (S277/2014)

Court appealed from: Full Court of the Federal Court of Australia
[2013] FCAFC 86

Date of judgment: 8 August 2013

Special leave granted: 17 October 2014

Mr Peter Uelese is a New Zealand citizen who has lived in Australia since 1998. On 3 September 2012 the visa permitting Mr Uelese's indefinite residence in Australia was cancelled by a delegate of the First Respondent ("the Minister"). This was on character grounds, on the basis of a substantial criminal record, under s 501 of the *Migration Act* 1958 (Cth) ("the Act").

With legal representation, Mr Uelese obtained a review of the Minister's cancellation decision by the Administrative Appeals Tribunal ("the Tribunal"). In carrying out that review, the Tribunal considered a Ministerial direction dated 28 July 2012 ("Direction 55"), which applied to visa cancellation decisions under s 501. The Act obliged the Tribunal to consider Direction 55, which required decision-makers to have regard to certain "primary considerations". Such considerations included the best interests of any children of the visa-holder.

Although Mr Uelese is the father of five children, the documents before the Tribunal (and provided to the Minister) only addressed the interests of Mr Uelese's three children by his partner, Ms Peta Fatai. The fact that he had two other children emerged only during the cross-examination of Ms Fatai.

On 14 November 2012 the Tribunal affirmed the decision to cancel Mr Uelese's visa. This was after disregarding the evidence that he had more than three children. The Tribunal found that it was compelled to disregard that evidence by s 500(6H) of the Act, which provides that "*the Tribunal must not have regard to any information presented orally in support of the person's case unless the information was set out in a written statement given to the Minister at least 2 business days before the Tribunal holds a hearing …*".

An appeal to the Federal Court was then dismissed by Justice Buchanan, who held that the Tribunal was obliged by s 500(6H) to disregard any material that arose from the oral evidence concerning two of Mr Uelese's children. His Honour found that that would have been so even if the Tribunal hearing had been adjourned to a later date. Mr Uelese again appealed.

The Full Court of the Federal Court (Jagot, Griffiths & Davies JJ) unanimously dismissed Mr Uelese's appeal. Their Honours found that the Tribunal had not denied Mr Uelese procedural fairness by failing to consider the best interests of two of his children, as the extent of procedural fairness was limited by s 500(6H) of the Act. The Full Court held that it was not open to the Tribunal to adjourn the hearing to enable Mr Uelese to provide further documents to the Minister on the basis that such provision would comply with the timeframe prescribed by s 500(6H). Their Honours also held that the Tribunal was not itself obliged to collect further information on Mr Uelese's other two children, as their existence and interests were not critical facts in Mr Uelese's case as it had been presented.

On 26 November 2014 a “Section 78B” notice was filed in this matter. As at the time of writing, no Attorney-General had intervened in this matter.

The grounds of appeal are:

- The Full Court erred in failing to find jurisdictional error in the decision of the Tribunal, namely, that the Tribunal erred in law in holding that s 500(6H) of the Act prohibited it from having regard to information concerning two of the Appellant’s children either tendered by the First Respondent, or adduced in cross-examination of a witness by the First Respondent, unless the Appellant had set out that information in a written statement to the First Respondent at least two days before the hearing.

- The Full Court erred in failing to find jurisdictional error in the decision of the Tribunal, namely, that the Tribunal erred in law in holding that the date upon which the Tribunal “holds a hearing” for the purposes of ss 500(6H) and 500(6I) of the Act is the first day of any such hearing, and does not include the date upon which an adjourned hearing is resumed.