SHORT PARTICULARS OF CASES

OCTOBER 2015

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PLAINTIFF M68/2015 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ORS (M68/2015)

Date Special Case referred to Full Court: 20 August 2015

On 10 September 2012, the first respondent ('the Minister') designated Nauru as a regional processing country under s 198AB(1) of the *Migration Act* 1958 (Cth) (*Migration Act*). On 29 July 2013, the Minister issued a direction under s 198AD of the *Migration Act* requiring officers to take unauthorised maritime arrivals to Papua New Guinea or Nauru.

The plaintiff is a citizen of Bangladesh who on 19 October 2013 was on board a vessel that was intercepted at sea by officers of the Commonwealth. She was taken to Christmas Island, and then, on 22 January 2014, to detention in Nauru. She has applied to be recognised as a refugee under the *Convention Relating to the Status of Refugees*. On 23 January 2014 the Principal Immigration Officer of Nauru granted to the plaintiff a regional processing centre visa, which specified that she must reside at the Nauru Regional Processing Centre ('the RPC'). Pursuant to s 18C of the *Asylum Seekers (Regional Processing Centre) Act* 2012 (Nr) and rule 3.1.3 of the Rules of the RPC Centre it was unlawful for the plaintiff to leave, or attempt to leave her accommodation facility within the RPC without the permission of an authorised officer.

On 2 August 2014 the plaintiff was brought to Australia for medical treatment. The plaintiff filed an application for an order to show cause seeking, inter alia, a writ of prohibition to prevent the Minister from taking steps to return her to the Republic of Nauru. Nettle J, on 20 August 2015, referred the Special Case agreed by the parties to the Full Court. The issue raised by this case is whether the Commonwealth can take persons, who are present in Australia and have the full protections of the Australian Constitution, to a foreign country so as to subject them to extra-judicial, extraterritorial detention which is funded, caused and effectively controlled by the Commonwealth, but which lacks those constitutional protections.

The plaintiff submits: (a) officers of the Commonwealth engaged in conduct (which includes entering into and exercising rights under a contract in relation to the provision of services at regional processing countries dated 24 March 2014 between the third defendant (Transfield) and the Commonwealth), which authorised, procured, caused and resulted in her detention at the RPC and would (if she were returned to Nauru) engage in further conduct of that nature with the same result; (b) she has standing to challenge that conduct; (c) that conduct was required to be, but was not authorised, by a valid statutory provision enacted by the Commonwealth Parliament or by s 61 of the Constitution; (d) by reason of those matters (alternatively, by reason of those matters and the unlawfulness of the plaintiff's detention under the Constitution of Nauru), s 198AD(2) of the *Migration Act* does not authorise or require that the plaintiff be taken to Nauru; and (e) the Transfield contract is not authorised by s 198AHA of the *Migration Act* or any other law and is invalid.

The Commonwealth submits: (a) the plaintiff lacks standing to challenge whether the Commonwealth was authorised, in the past, to engage in the acts or conduct which she impugns; (b) the impugned conduct was and would be authorised by s 198AHA of the *Migration Act*, which is supported by the aliens power, the external affairs power and the power with respect to relations with Pacific islands;

(c) alternatively, the impugned conduct was and would be supported by s 328 of the *Financial Framework (Supplementary Powers) Act* 1997 (Cth), read with regulations made under that Act, or non-statutory executive power; (d) in any event, s 198AD of the *Migration Act* requires that the plaintiff be taken to Nauru as soon as reasonably practicable; (e) none of these matters turn on whether the laws of Nauru, pursuant to which the plaintiff was and would be allegedly detained in Nauru, are invalid because they infringe the *Constitution of Nauru.* Even if they did, the validity of those laws should not be questioned. In any event, the laws do not infringe the *Constitution of Nauru.*

The Attorneys-General of the Western Australia and Queensland have given notice that they will intervene.

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

- Assuming that:
  (A) the restrictions imposed on the plaintiff … were lawful under the law of Nauru; and
  (B) the specification in the RPC visa … that the plaintiff must reside at the Nauru RPC, s 18C of the *Asylum Seekers (Regional Processing Centre) Act* 2012 (Nr) and rule 3.1.3 of the Centre Rules were lawful and calid under the law of Nauru,

was the Commonwealth or the Minister authorised, in the past, to engage in [the] acts or conduct by:

(a) s 61 of the *Constitution*?
(b) s 198AHA of the *Migration Act* (assuming it is valid)?
(c) s 32B of the *Financial Framework (Supplementary Powers) Act* 1997 (Cth), read with reg 16 and items 417.021, 417.027, 417.029 and 417.042 of sched 1AA to the *Financial Framework (Supplementary Powers) Regulations* 1997 (Cth)?

MACOUN v COMMISSIONER OF TAXATION (S100/2015)

Court appealed from: Full Court of the Federal Court of Australia
[2014] FCAFC 162

Date of judgment: 4 December 2014

Special leave granted: 15 May 2015

From 1992 to 2007 Mr Andrew Macoun was employed by the International Bank for Reconstruction and Development ("IBRD"), one of the organisations comprising the World Bank. During his employment with the IBRD, Mr Macoun made mandatory contributions from his salary to the World Bank's Staff Retirement Plan ("SRP"), a defined benefits scheme. After taking early retirement from the IBRD at the age of 60, Mr Macoun received monthly pension payments under the SRP. He believed that those payments were exempt from income tax, as apparently provided by the *Convention on the Privileges and Immunities of the Specialized Agencies* ("the Convention").

The *International Organisation (Privileges and Immunities) Act* 1963 (Cth) ("the Act") implements the Convention in Australia. Section 6(1)(d)(i) of the Act provides that regulations may confer, upon a person holding an office with an international organisation, any of the privileges or immunities listed in Part 1 of the Fourth Schedule. Item 2 there listed ("Item 2") is an exemption from taxation of salaries and emoluments received from international organisations. The *Specialized Agencies (Privileges and Immunities) Regulations* 1986 (Cth) ("the Regulations") expressly apply to the IBRD. Regulation 8(1) of the Regulations provides that a person who holds an office in the IBRD has the privileges and immunities listed in Part 1 of the Fourth Schedule to the Act.

For the income years ended 30 June 2009 and 30 June 2010, the Respondent ("the Commissioner") assessed Mr Macoun for income tax by including in his assessable income the total amounts he had received as SRP payments in those years ("the Payments"). Objections lodged by Mr Macoun were both disallowed ("the Commissioner's decision"). Mr Macoun sought review of those disallowances in the Administrative Appeals Tribunal ("the Tribunal").

On 20 March 2014 the Tribunal set aside the Commissioner's decision. The Tribunal found that the Payments were exempt from tax on the basis that they were "emoluments" under Item 2, the entitlement to which arose during the course of Mr Macoun's employment with the IBRD and continued after his retirement from it.

On 4 December 2014 the Full Court of the Federal Court (Edmonds, Perram & Nicholas JJ) unanimously allowed the Commissioner's subsequent appeal and affirmed the Commissioner's decision. Their Honours held that the Tribunal had erred by construing the Act by reference to the Regulations, rather than vice versa. The Full Federal Court found a clear dichotomy in s 6(1)(d) of the Act between a person holding office and a person who had ceased to hold office (the latter being entitled only to immunity from suit for acts done as an officer). As Mr Macoun did not hold office in the IBRD at the time he received the Payments, he was not entitled to the privilege described in Item 2. Justice Perram however noted that, in this respect, the Act differed from the position under public

international law where “emoluments” exempted from tax due to the Convention included pensions such as that paid to Mr Macoun under the SRP.

The grounds of appeal include:

- The Full Federal Court erred in holding that pension payments received by Mr Macoun from a Specialised Agency (in his case, the IBRD), despite being “emoluments” to which Mr Macoun became entitled while holding office in the IBRD, were not exempt from taxation because Mr Macoun no longer held office in the IBRD in the income years in which the payments were received so that the privilege conferred by Item 2 of Part 1 of the Fourth Schedule to the Act was not available to him.

On 15 June 2015 the Commissioner filed a summons, seeking leave to file a proposed notice of contention out of time. The grounds of that proposed notice of contention include:

- The Full Federal Court ought to have decided that the Tribunal erred in law in finding that the periodical pension payments received by Mr Macoun, being payments in the nature of retirement benefits, were “emoluments received from the organisation” within the meaning of Item 2 of Part 1 of the Fourth Schedule to the Act.

COMMONWEALTH OF AUSTRALIA v DIRECTOR, FAIR WORK BUILDING INSPECTORATE & ORS (B36/2015)

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION & ANOR v DIRECTOR, FAIR WORK BUILDING INSPECTORATE & ANOR (B45/2015)

Court appealed from: Full Court of the Federal Court of Australia
[2015] FCAFC 59

Date of judgment: 1 May 2015

Special leave granted: 18 June 2015 and 6 August 2015

In civil proceedings before the Federal Court (where that Court's original jurisdiction was exercised by a Full Court), the Director, Fair Work Building Industry Inspectorate ("the Director") alleged that the Construction, Forestry, Mining and Energy Union, along with the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia ("the Unions") contravened the *Building and Construction Industry Improvement Act* 2005 (Cth) ("the BCII Act"). The Director then sought pecuniary penalties and associated declaratory relief against the Unions. The Commonwealth of Australia ("the Commonwealth") intervened in those proceedings and was heard in relation to an issue arising from the decision of this Court in *Barbaro v The Queen* [2014] HCA 2 ("Barbaro"). The Director and the Unions both supported the Commonwealth's submissions. Counsel however was briefed (by the Commonwealth) to appear before the Full Federal Court as a contradictor.

The primary issue before the Full Federal Court was a practice which has become commonplace in proceedings for the imposition of *civil* pecuniary penalties. In such cases, submissions are frequently made by the parties, often jointly, nominating the actual figure to be adopted, or the range within which it should fall. In *Barbaro* however the majority of this Court (French CJ, Hayne, Kiefel and Bell JJ) held, that in *criminal* sentencing proceedings, the prosecution should not nominate the specific sentencing result, or the range within which it should fall.

Before the Full Federal Court in this case, the parties agreed upon the penalties which they considered to be appropriate. On 1 May 2015 however their Honours (Dowsett, Greenwood and Wigney JJ) unanimously concluded that the reasoning in *Barbaro* should also apply to this, a civil case. They held therefore that they should have no regard to the parties' agreed figures (concerning penalties), other than to the extent that that agreement demonstrates a degree of remorse and/or cooperation on the part of each of the Unions.

In matter number B36/2015 (the Commonwealth's appeal) the Chief Justice has granted Mr Cameron Moore SC and Ms Danielle Tucker leave to appear as amicus curiae at the hearing of the appeal.

In matter number B36/2015 (the Commonwealth's appeal) the grounds of appeal include:

- The Full Federal Court erred in ruling that the decision in *Barbaro* applies to civil pecuniary penalty proceedings under the BCII Act, so as to

constrain the making and consideration of submissions as to appropriate penalty amounts, including on an agreed basis.

In matter number B45/2015 (the Unions' appeal) the grounds of appeal are:

- The Full Federal Court erred in:

  a) Holding that evidence and submissions by the parties to the proceedings as to the agreed penalty, and as to the appropriate penalty, were inadmissible and the Court should have no regard to them, save to the extent that the agreement demonstrated a degree of remorse and/or cooperation by each of the Unions.
  b) Declining to grant the orders jointly sought by the parties to the proceedings.

ALLEN v CHADWICK (A14/2015)

Court appealed from: Full Court, Supreme Court of South Australia [2014] SASCFC 100

Date of judgment: 16 September 2014

Date special leave granted: 19 June 2015

At around 2.00 am on 12 March 2007, the respondent (Chadwick) suffered serious spinal injuries resulting in paraplegia, in a car accident which occurred near Port Victoria on Yorke Peninsula. She was a rear-seat passenger in a vehicle driven by the appellant (Allen). Her seatbelt was not fastened and she was thrown from the vehicle. It was not disputed that at the time of the accident, Allen had a blood alcohol reading of 0.229. The trial judge (Judge Tilmouth) declined to make a reduction of 50% in accordance with s 47 of the *Civil Liability Act* 1936 (SA) ('the CLA'), holding that no person in Chadwick's situation could reasonably be expected to have had any practical choice other than to get into the vehicle with an intoxicated driver and that the exception in s 47(2)(b) was thus enlivened. His Honour did, however, reduce Chadwick's damages by 25% because of her failure to wear a seatbelt, in accordance with s 49 of the CLA.

Allen appealed to the Full Supreme Court (Kourakis CJ (dissenting in part), Gray and Nicholson JJ) against the judge's failure to reduce Chadwick's damages pursuant to s 47. Chadwick cross-appealed, with respect to the reduction of damages pursuant to s 49. Both parties challenged aspects of the judge's assessment of damages.

With respect to s 47, the majority (Gray and Nicholson JJ) noted that the onus fell on Chadwick to show that she could not reasonably be expected to have avoided the risk of the driver's intoxication. The exception in s 47(2)(b) called for the Court to assess whether a reasonable person in Chadwick's circumstances would have avoided the risk in question. This assessment had to be made without the benefit of hindsight. Their Honours found that the following considerations were relevant in this case: Chadwick was faced with an unexpected and confusing situation; she was aged 21 years and pregnant; and Allen, her *de facto* partner, was some seven years older. The Court noted that she was in an unlit rural area at 2.00 am and that when she got in the car, she asked to drive, but Allen responded aggressively, directing her to "get in the fucking car". He had created a situation in which Chadwick had to make a choice. On the one hand, she could stay out of the car and attempt to locate and walk to the hotel where they were staying, or she could get into the car and run the risk associated with Allen's intoxication. In assessing whether Chadwick could not reasonably be expected to have avoided the risk, she was not to be judged against the standard of a perfectly rational decision maker, equipped with the relevant statistical evidence and capable of accurately assessing and weighing the probability of encountering harm attendant on two particular courses of action. It was to be expected that any young woman in an unfamiliar, rural area would perceive a significant risk to her personal safety in walking alone along an unlit road at 2.00 am. The majority held that Chadwick satisfied the onus and the statutory exception was established.

Kourakis CJ noted that s 47 of the CLA is expressed in terms which the law has long understood to impose an objective, normative standard. Applying that standard, he concluded that the reasonable person would not have impulsively

jumped into a vehicle driven by someone whom she knew to have drunk excessively during the day and to have acted recklessly in taking control of the car. The reasonable person would have refused to get into the car and would have walked towards the hotel.

With respect to s 49, the Full Court noted that the *Road Traffic Act* 1961 (SA) (the RTA) required compliance with Rule 265 of the *Australian Road Rules* (SA). A person does not offend against that Rule if the failure to wear a seatbelt is caused by the act of a stranger. Chadwick contended that Allen engaged in an aggressive and uncontrolled manner of driving, that she made repeated attempts to fasten her seatbelt and, further, that she attempted to move to a seat with a functioning seatbelt, with the accident intervening before she could do so. Thus Allen's manner of driving was the cause of the failure of the seatbelt to extend, both as a consequence of establishing a countervailing gravitational force and by causing Chadwick to panic. The Court noted that to conclude that, in those circumstances, a passenger should be sufficiently calm and collected to wait for an opportunity to fasten the seatbelt, was wholly unrealistic. This was not a case where Chadwick simply refused, through laziness, inadvertence, carelessness or simple obduracy, to wear the seatbelt, which were the paradigm cases embraced by s 49 of the CLA. The Court was satisfied that Chadwick had made out the act of a stranger exception to s 49 on the balance of probabilities.

The grounds of appeal include:

- The majority of the Full Court erred in considering that the statutory exception to the 50 per cent reduction in damages was analogous to or accommodated the common law doctrines of 'alternative danger' and 'agony of the moment' and erred in considering there was any relevant alternative danger or emergency justifying agony of the moment.