SHORT PARTICULARS OF CASES

MARCH 2018

No.	Name of Matter	Page No
	TUESDAY, 13 MARCH	
1.	Minister for Immigration and Border Protection v SZVFW & Ors	**1**
	WEDNESDAY, 14 MARCH	
2.	In the matter of questions referred to the Court of Disputed Returns pursuant to section 376 of the *Commonwealth Electoral Act* 1918 (Cth) concerning Senator Katy Gallagher	**3**
	THURSDAY, 15 AND FRIDAY, 16 MARCH	
3.	Pipikos v Trayans	**6**
	TUESDAY, 20 MARCH	
4.	Trkulja v Google Inc	**8**
	WEDNESDAY, 21 MARCH	
5.	Shrestha v Minister for Immigration and Border Protection & Anor	**10**
6.	Ghimire v Minister for Immigration and Border Protection & Anor	**10**
7.	Acharya v Minister for Immigration and Border Protection & Anor	**10**
8.	Hossain v Minister for Immigration and Border Protection & Anor	**12**
	THURSDAY, 22 MARCH	
9.	Collins v The Queen	**14**

****

MINISTER FOR IMMIGRATION AND BORDER PROTECTION v SZVFW & ORS (S244/2017)

Court appealed from: Full Court of the Federal Court of Australia [2017] FCAFC 33

Date of judgment: 2 March 2017

Special leave granted: 14 September 2017

The Protection Visa applicants ("the Visa Applicants") are a Chinese family comprising a husband, wife and their son. The primary claims were made by the husband and related to the alleged compulsory acquisition of his farming land in China. Such was the level of harassment that they suffered, that the Visa Applicants claimed that they decided to flee China.

The husband advised the Appellant's Department ("the Department") that all correspondence concerning their application was to be sent to him at their address in Roselands, NSW. He also expressly stated that the Department was not to contact him by any other means. The husband and wife subsequently failed to attend a Departmental interview, having been notified of that interview by mail to their nominated address. On 16 April 2016 the Delegate refused their application.

The Visa Applicants then made an application to the Refugee Review Tribunal ("the Tribunal") for a review of the Delegate's decision. Similarly, they specified that all correspondence concerning their application was to be sent to the husband at the same Roselands postal address. This was despite their also having provided the Tribunal with both an email address and a phone number. The Visa Applicants subsequently failed to attend the Tribunal hearing, despite their having been notified of it, by mail, to their nominated address.

On 12 September 2014 the Tribunal refused the Visa Applicants' application and a successful application for judicial review to the Federal Circuit Court duly followed. On 19 August 2016 Judge Barnes found that the Tribunal had acted unreasonably in making a final decision without having taken any further action to enable the Visa Applicants to appear before it.

On 2 March 2017 the Full Federal Court (Griffiths, Kerr & Farrell JJ) dismissed the Appellants' subsequent appeal. Their Honours found that Judge Barnes was correct in concluding that her task (in determining whether the Tribunal had acted unreasonably) was an evaluative, not a discretionary one. Her Honour was also correct in concluding that the Tribunal could not have been satisfied that the Visa Applicants were, in a practical sense, aware of the hearing date. The Full Court further found that the husband's direction (on the original Protection Visa application) that he did not want the Department communicating with him by fax, email or any other means was effectively irrelevant. This was because that statement was directed to communications from the *Department*. It said nothing about the receipt of communications from the Tribunal during any subsequent review process.

The grounds of appeal are:

- The Full Court erred in approaching the appeal on the basis that the Minister had to establish an error in the nature of that required by *House v King* (1936) 55 CLR 499.

- The Full Court ought to have concluded that the decision of the Tribunal was not legally unreasonable, and that the primary judge's conclusion to the contrary was in error.

IN THE MATTER OF QUESTIONS REFERRED TO THE COURT OF DISPUTED RETURNS PURSUANT TO SECTION 376 OF THE *COMMONWEALTH ELECTORAL ACT* 1918 (CTH) CONCERNING SENATOR KATY GALLAGHER (C32/2017)

Date referred to Full Court: 14 February 2018

Section 44 of the Constitution provides that any person who has any of certain attributes shall be incapable of being chosen or of sitting as a Senator or a Member of the House of Representatives. Among those attributes is (in s 44(i)) being a subject or a citizen of a foreign power.

Senator Katy Gallagher was sworn in as a Senator for the Australian Capital Territory on 26 March 2015, filling a vacancy left by the resignation of Senator Kate Lundy. In May 2015, the Australian Labor Party, ACT Branch, pre-selected Senator Gallagher as a candidate for the position of ACT Senator in an upcoming election. The Prime Minister called a double dissolution election to be held on 2 July 2016.

On 31 May 2016 Senator Gallagher was nominated in a group of ACT candidates endorsed by the ALP for the Senate for the general election to be held on 2 July 2016. Senator Gallagher was then returned as a Senator for the ACT after the election.

Senator Gallagher was born in Australia in 1970 and has been an Australian citizen from birth. Her father was born in England in 1939 of an Irish-born father and an English-born mother. Her mother was born in Ecuador in 1943 of UK-born parents. Senator Gallagher's parents married in England on 17 December 1966.

Unbeknown to Senator Gallagher, at the time of her birth she had acquired the status of a Citizen of the United Kingdom and Colonies by descent. On commencement of the *British Nationality Act 1981* (UK), citizens with Senator Gallagher's status were re-classified as British citizens.

On 20 April 2016, having become aware that there was a possibility of her having British citizenship, Senator Gallagher applied to renounce any British citizenship she may have held by submitting the prescribed form (together with some accompanying documents and an authority to debit her credit card for the requisite renunciation fee) to the UK Home Office. On 6 May 2016, the fee was debited by the Home office from her credit facility. On 20 July 2016, Senator Gallagher received a letter dated 1 July 2016 from the Home Office. It acknowledged receipt of the Declaration of Renunciation of British citizenship and said "Before we can proceed further please send us all of the following original documents …by 1/08/16". The documents specified included 'evidence that you are a British citizen' or "alternatively if you are a British citizen by descent…please provide the relevant certificates of birth…and marriage to establish a claim…". Ms Gallagher wrote back to the Home Office on 20 July 2016 supplying the original versions of her own and her father's Birth Certificates and her parents' Marriage Certificate.

Senator Gallagher's renunciation was registered by the Home Office on 16 August 2016. The issue is whether, her UK citizenship not having been renounced until then, Senator Gallagher was under the disability of s 44(i) of the Constitution by remaining a British citizen at the time of her nomination and her subsequent election.

The following questions were transmitted to the High Court by the Senate on 7 December 2017 pursuant to s 377 of the *Commonwealth Electoral Act* 1918 (Cth):

(a) whether, by reason of s 44(i) of the Constitution, there is a vacancy in the representation of the Australian Capital Territory in the Senate for the place for which Katy Gallagher was returned;

(b) if the answer to Question (a) is "yes", by what means and in what manner that vacancy should be filled;

(c) what directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference; and

(d) what, if any, orders should be made as to the costs of these proceedings.

On 14 February 2018 the Chief Justice directed that the questions referred by the Senate be set down for a hearing by the Full Court of the High Court on 14 March 2018.

A Notice of a Constitutional Matter has been filed by Senator Gallagher.

It is common ground in the proceedings that notwithstanding that Senator Gallagher's paternal grandfather was born in Ireland and her mother was born in Ecuador, there are no issues of Senator Gallagher's having a disability under s 44(i) of the Constitution in regard to those matters.

Each of the parties has sought the advice of an expert on British citizenship. The essential difference between the experts is as to whether the Home Office was obliged (and could have been compelled by mandatory order) to register the Declaration of Renunciation based on the documents sent by Senator Gallagher on 20 April 2016 without asking for further documents, or whether the Home Office was entitled to seek further evidence from Senator Gallagher and was therefore not obliged to, and could not have been compelled to, register her renunciation before that evidence was provided. .

The Commonwealth Attorney-General submits that given that it is conceded that Senator Gallagher was a British citizen when she nominated and was elected, the issue is whether the exception to the ordinary operation of s 44 (i) identified by the High Court in *Re Canavan* applies*,* such that she was capable of being chosen notwithstanding that she was a British citizen during the process of choice. It is argued that *Re Canavan* is authority for the proposition that it is necessary to read s 44(i) as subject to an 'implicit qualification' that where the operation of foreign law makes it impossible, or not reasonably possible, to renounce their foreign citizenship, a candidate can avoid the strict (disqualification) effect of s 44(i). It is not the reasonableness of the steps which a candidate takes which can relieve them from the disqualification provision of s 44(i) but rather the reasonableness of the foreign law setting out those steps. It follows that "except in cases where the

renunciation is impossible or not really achievable, then it is always achievable. If achievable it should be achieved."

Alternatively, even if it is necessary to determine whether Senator Gallagher took all reasonable steps prior to nomination, she failed to do so as she did not allow reasonable time (she did not apply until over one year after she was pre-selected as a candidate) nor did she ask for expedition of her application, nor did she supply sufficient documents to the Home Office to oblige it to register the renunciation without further enquiry.

Alternatively, even if it is necessary to determine whether Senator Gallagher took all reasonable steps prior to nomination, she failed to do so as she did not allow reasonable time (she did not apply until over one year after she was pre-selected as a candidate) nor did she ask for expedition of her application, nor as Mr Fransman has advised, did she supply sufficient documents to the Home Office to oblige it to register the renunciation without further enquiry.

Senator Gallagher submits that it is common ground between the experts that the material provided by Senator Gallagher on 20 April 2016 was "sufficient" there and then to satisfy the requirements imposed by the law of Britain for cessation of her citizenship and that her renunciation was "in the correct form". The dispute between the experts is whether it merely became "open" to the Home Office to allow an indefinite period in which the Home Office could exercise a "wide discretion" to consider the quality of information provided and requisition further information if desired, or whether Senator Gallagher had an entitlement there and then to have her citizenship terminated, enforceable by a mandatory order.

Senator Gallagher submits that by no later than 6 May 2016 (when the fee was debited), she "had taken *every* step, as a matter of British law, to terminate her citizenship" by the nomination date. The *Re Canavan* parties are distinguishable because they had taken "no step" to terminate their citizenship by the nomination date. Those parties invoked "reasonable steps" to seek to excuse taking *any* steps. The test in *Re Canavan* was not expressed as a reasonable steps test but rather as follows: "where it can be demonstrated that the person has taken all steps that are reasonably required… and are within his or her power." Further that: "the Attorney-General's interpretation of the test wrongly diverts its focus *away* from what is required by foreign law and what is within the power of a citizen; towards what is *not required* by foreign law and what *rests within* the power of a foreign official. It is argued that the unsatisfactory logic of the Attorney-General's case is that potential candidates cannot know if they can take up their prima facie legal qualification to nominate until all the discretionary processes which are not "within their power" are exhausted. This allows for discriminatory outcomes and would be an example of "where the foreign law is contrary to the constitutional imperative that an Australian citizen not be irremediably prevented by foreign law from participation in representative government" (*Re Canavan*").

PIPIKOS v TRAYANS (A30/2017)

Court appealed from: Full Court of the Supreme Court of South Australia [2016] SASCFC 138

Date of judgment: 16 December 2016

Date special leave granted: 18 August 2017

The appellant is the former brother in law of the respondent. The appellant and his wife, and the respondent and her husband agreed to purchase a property in Penfield Road, Virginia together. The appellant paid the deposit as well as the balance of the purchase price and the transaction costs ('the settlement costs'). The appellant claims that because the respondent and her husband could not afford to contribute to the settlement costs they agreed that the respondent would sell them a half interest in another property owned by the respondent ('the Clark Road property'). The value of that half interest in the respondent's property was slightly higher than the amount owed by virtue of the agreement so the appellant would pay the respondent $8000. The appellant brought proceedings in the District Court of South Australia, seeking orders that he be registered as a joint proprietor of "one undivided moiety" of the Clark Road property, or a declaration that the respondent held one half of her interest in that property on trust for him.

The trial Judge (Judge McIntyre) found in favour of the respondent. Her Honour found that the appellant had not established that there was an oral agreement between the appellant and the respondent to sell an interest in the Clark Road property. Further, even if there was such an agreement, the appellant had not identified its subject matter or the parties to the agreement; it was vague and ambiguous and it failed to meet the requirements of s 26 of the *Law of Property Act* 1936 (SA) ('the Act'). The Judge also found that, if there was an oral agreement, it was not enforceable because there was no part performance.

The appellant appealed to the Full Supreme Court (Kourakis CJ, Kelly and Hinton JJ), on the grounds that the trial judge erred in finding that the agreement was not fully concluded. He submitted that the respondent had knowledge of the agreement, and on the basis of that knowledge executed the transfer by which the property was purchased. The appellant argued that a handwritten note of the respondent, made some considerable time after the transaction, was evidence of the respondent's knowledge and acceptance of the agreement and also fulfilled the statutory requirements that a contract for the sale of land be in writing.

The Full Court found that there was an agreement between the appellant and the respondent. It was improbable that the appellant would have agreed to purchase the Penfield Road property with the respondent and her husband without securing the agreement to receive a half interest in the Clark Road property. The Court noted that the respondent conceded in cross-examination that she accepted the transfer of the Penfield Road property with the knowledge that her husband had agreed to finance that transfer by giving the appellant a half share in the Clark Road property. By acting with that knowledge the respondent bound herself to the agreement.

However, the agreement was not in writing as required by the Act. The handwritten note did not refer to any written documents nor to the essential terms of the transaction. There was no complete record of agreement. There was no part performance. The purchase of the new property did not refer to any agreement and was complete in and of itself. The agreement was therefore not enforceable.

The grounds of the appeal include:

- The Full Court erred in holding that the actions of the appellant in performance of the agreement did not amount to part performance of the same sufficient to entitle him to declarations and orders compelling the respondent to perform the agreement, notwithstanding that there may be an insufficient written memorandum of the same as required by s 26 of the *Law of Property Act* 1936 (SA).

The respondent has filed a cross-appeal on the grounds that the Full Court erred in finding that there was an enforceable agreement to which the respondent was a party by her conduct, and that the trial judge was in error in refusing to grant the appellant leave to amend his pleadings. In the premises, the respondent claims that the Full court erred in reducing her costs on the appeal by 15%.

TRKULJA v GOOGLE INC (M88/2017)

Court appealed from: Court of Appeal of the Supreme Court of Victoria [2016] VSCA 333

Date of judgment: 20 December 2016

Date special leave granted: 16 June 2017

The respondent ('Google') sought to set aside a defamation proceeding brought against it in the Supreme Court of Victoria by the appellant, on the basis that the proceeding had no real prospect of success. In support of its application, Google submitted, inter alia, that as a matter of law it could not be held to have published the alleged defamatory matter; and that it would not be open to the trier of fact to conclude that the matter relied upon was defamatory of the appellant. McDonald J rejected these submissions, and ordered that the summons be dismissed.

Google's appeal to the Court of Appeal (Ashley, Ferguson and McLeish JJA) was successful. The Court held that a search engine, when it publishes search results in response to a user's enquiry, should be accounted a secondary publisher of those results. The fact that the defamatory matter complained of is the product of an automated response does not necessarily gainsay an intention to publish that material. When that consideration is supplemented by the facts that the Google search engine holds itself out as providing a means of navigating the web, that its role is not passive and that in providing a search result it does more than merely facilitating contact between A and B, the Court concluded that intention to publish that which is in fact published is an available conclusion.

Further, the Court found that an innocent dissemination defence will almost always, if not always, be maintainable in a case such as this, in a period before notification of an alleged defamation. Despite reservations as to whether, and how, notification of a past defamatory publication by way of search results could lead to innocent dissemination becoming something else, the Court considered it was arguable that notification could have some part to play upon the question of innocent dissemination.

The Court concluded that the secondary publisher/innocent dissemination defence analysis appeared to be both the preferable outcome in point of principle, and to be a rational way of dealing with the problem of results produced by a search engine.

With respect to the second issue raised in the appeal, the question to be determined was whether Google had established that the plaintiff had no real prospect of success in attempting to show that the matter complained of was capable of conveying any of the pleaded imputations. The Court held that the question must be determined by reference to the understanding of an ordinary reasonable user of a search engine such as the Google search engine, and concluded that, so approached, the appellant would have no prospect at all of establishing that the images he complained of conveyed any of the defamatory imputations relied upon.

The appellant relied on a printout of results produced by the images section of the Google search engine in response to a search term entered by him. For the most part, the printouts were compilations of 'thumbnails' photographs. In each instance of a compilation of thumbnails, the compilation included a thumbnail of the plaintiff. In each instance, also, thumbnails of members, actual or reputed, of the Melbourne underworld appeared. But the Court noted that the trier of fact would immediately notice that the compilations variously included thumbnails of others, who were not Melbourne underworld figures; and other images altogether, including thumbnails of a former Chief Commissioner of Victoria Police, two well-known crime reporters, a barrister dressed in wig and gown, a solicitor, a murder victim, actors who appeared in film and television productions concerned with the Melbourne underworld, the late Marlon Brando, report headings of defamation proceedings brought by the plaintiff at an earlier time against Yahoo! and Google, the St Kilda pier, and a Melbourne tram. When the pages were viewed in their entirety, Google's submission that the matter complained of was not capable of making out the defamatory imputations complained of, because the ordinary reasonable user of the internet would not understand the content of the search results in such a way, was emphasised.

The grounds of the appeal include:

- The Court of Appeal erred in law by holding that the Plaintiff had no real prospect of success (and hence setting aside service) in proving that Google Inc was a publisher in the circumstances of the case as pleaded.

SHRESTHA v MINISTER FOR IMMIGRATION & BORDER PROTECTION & ORS (M141/2017)
GHIMIRE v MINISTER FOR IMMIGRATION & BORDER PROTECTION & ORS (M142/2017)
ACHARYA v MINISTER FOR IMMIGRATION & BORDER PROTECTION & ORS (M143/2017)

Court appealed from: Full Court of the Federal Court of Australia [2017] FACAFC 69

Date of judgment: 27 April 2017

Date special leave granted: 14 September 2017

The three appellants are citizens of Nepal. They each entered Australia holding a Student (Class TU) Higher Education Sector (subclass 573) visa. They were each enrolled in two courses: a diploma and a bachelor degree. The diploma course was to be undertaken before and for the purposes of the degree course. Their enrolment meant they met the definition of 'eligible higher degree student' ('EHDS definition') in cl 573.111 of 10 Schedule 2 to the *Migration Regulations* 2004 (Cth). By reason of meeting this definition, the appellants were assessed against the 'less stringent' criterion in cl 573.223(1A) of the Regulations. The appellants were not successful students. After the end of the first semester of their studies, each of them had ceased to be enrolled in their diploma courses. They nonetheless remained enrolled (and maintained confirmation of enrolment in) their respective bachelor degree courses for some time afterward.

A delegate of the first respondent ('the Minister') cancelled each appellant's visa on the ground that the circumstances which permitted the grant of the visa no longer existed because each of the appellants was no longer an eligible higher degree student. Each of the cancellation decisions was affirmed by the Migration Review Tribunal. The appellants each made applications for judicial review of the Tribunal's decisions to the Federal Circuit Court. Each application for judicial review was dismissed.

The appellants' respective appeals to the Full Federal Court (Bromberg, Bromwich & Charlesworth JJA) were dismissed.

Charlesworth J found that in the part of its reasons concerning the existence of the cancellation power, the Tribunal wrongly pre-occupied itself with the question of whether the appellants currently fulfilled the EHDS definition and cl 573.223(1A). That question was clearly relevant to the exercise of the discretionary power to cancel, but not relevant to its existence. The Tribunal asked itself the wrong question because, in the circumstances, the power to cancel the visa would be enlivened irrespective of whether the appellants continued to satisfy alternate parts of the EHDS definition or otherwise satisfied alternate visa criteria. It was sufficient that the circumstance of their enrolment in the diploma course had ceased to exist. The Tribunal assumed the test for identifying a cancellation ground to be more onerous than that for which s 116(1)(a) of the *Migration Act* 1958 (Cth) provides.

However, her Honour concluded that relief should be refused as a matter of discretion, as she was not satisfied that the outcome of the Tribunal's review function could or might have been any different had the error identified in the appeal not been made. In short, the Tribunal arrived at the same conclusion on the application of an incorrect test as it was bound to arrive at on the application of the correct test.

Bromberg J agreed with Charlesworth J that the Tribunal asked the wrong question in applying s 116(1)(a) of the Act. However, on the facts at hand and with the requisite degree of clarity, his Honour was satisfied that no different outcome could have eventuated had the right question been posed and answered by the Tribunal in each case.

Bromwich J found that there was no jurisdictional error in the Tribunal's decisions.

The ground of each appeal is:

- The Full Court of the Federal Court erred in exercising its discretion not to issue writs of certiorari.

The first respondent has filed a Notice of Contention, submitting that the decisions of the Tribunal in each case were not affected by jurisdictional error.

HOSSAIN v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR (S177/2017)

Court appealed from: Full Court of the Federal Court of Australia [2017] FCAFC 82

Date of judgment: 25 May 2017

Mr Sorwar Hossain is a citizen of Bangladesh who arrived in Australia on a student visa in 2003. Since the expiry of that visa in November 2005 Mr Hossain has remained in Australia without a valid visa. In May 2015 he applied for a partner visa. The application was refused by a delegate of the first respondent ("the Minister"), on the basis that Mr Hossain did not satisfy cl 820.211 of Sch 2 to the *Migration Regulations* 1994 (Cth) ("the Regulations") because the delegate was not satisfied that Mr Hossain met the requirements of criterion 3001.

Clause 820.211(2)(d)(ii) required criteria 3001, 3003 and 3004 of Sch 3 to the Regulations to be satisfied unless the Minister was satisfied that there were compelling reasons for those criteria not to be applied.

Mr Hossain applied to the Administrative Appeals Tribunal ("the Tribunal"), which reviewed the delegate's decision and affirmed it. The Tribunal found no "compelling reasons" and concluded that Mr Hossain had not satisfied criterion 3001 because he had not lodged his partner visa application within 28 days after the expiry of his student visa. The Tribunal also found that Mr Hossain did not satisfy cl 820.223 of Sch 2 to the Regulations. That was on the basis that he had not met Public Interest Criterion ("PIC") 4004, because Mr Hossain had outstanding debts to the Commonwealth which he had not arranged to pay.

Mr Hossain then applied to the Federal Circuit Court. In those proceedings, the Minister conceded that the Tribunal had erred by considering "compelling reasons" as at the time Mr Hossain applied for a partner visa, rather than at the time of the Tribunal's decision ("the Temporal Error"). On 11 July 2016 Judge Street quashed the Tribunal's decision and ordered the Tribunal to reconsider Mr Hossain's application to it. His Honour held that the Temporal Error was a jurisdictional error. In relation to Mr Hossain's non-compliance with PIC 4004, Judge Street granted relief on a discretionary basis, in view of the fact that Mr Hossain had since paid his debts to the Commonwealth (although that had occurred three months after the Tribunal's initial decision). His Honour considered that the Tribunal, upon a reconsideration of Mr Hossain's application to it, might find compelling reasons not to apply criteria 3001, 3003 and 3004 of Sch 3 to the Regulations.

An appeal by the Minister was allowed by the Full Court of the Federal Court (Flick and Farrell JJ; Mortimer J dissenting). Flick and Farrell JJ held that although the Temporal Error was a jurisdictional error, the Tribunal's decision ought not to have been quashed. This was because s 65(1)(b) of the *Migration Act* 1958 (Cth) precluded the making of any decision other than the refusal of Mr Hossain's visa application. Their Honours held that although the Tribunal had exceeded its jurisdiction in making the Temporal Error, it had not exceeded its jurisdiction in making the separate finding that Mr Hossain had failed to satisfy PIC 4004. Since Mr Hossain had failed to satisfy that criterion at both relevant times (the time of the delegate's decision and the time of the Tribunal's decision), s 65(1)(b) mandated the refusal of his visa application.

Mortimer J however would have dismissed the Minister's appeal. PIC 4004 had discretionary elements, in that it was a "time of decision" criterion and it prescribed "appropriate arrangements" for the payment of debts to the Commonwealth. Her Honour considered that the Tribunal had some discretionary scope as to both the timing of its decision after a hearing and the appropriateness of arrangements in satisfaction of PIC 4004. Mortimer J held that the "compelling reasons" element of cl 820.211(2)(d)(ii) of Sch 2 to the Regulations was not independent of PIC 4004, as the existence of any such compelling reasons at the conclusion of a review hearing might persuade the Tribunal to give an applicant a longer period of time in which to meet PIC 4004. Her Honour then held that Judge Street had not erred by considering Mr Hossain's payment of debts owed to the Commonwealth in determining that there was utility in ordering the Tribunal to redetermine Mr Hossain's application to it.

The ground of appeal is:

- The Federal Court erred in finding that, although the decision of the Tribunal dated 25 February 2016 was infected by jurisdictional error and contained a conclusion in excess of the jurisdiction or authority vested in it, the Tribunal nevertheless retained jurisdiction or authority to make its decision.

COLLINS v THE QUEEN (B68/2017)

Court appealed from: Queensland Court of Appeal
[2017] QCA 113

Date of judgment: 2 June 2017

Special leave granted: 17 November 2017

The Appellant was convicted of a number of sexual offences against a 19 year old woman, the most serious of which was rape. Some hours following the incident during which the offences were said to have been committed, the Complainant telephoned her mother (Ms M). In a brief conversation, she protested about what had taken place and was advised by Ms M to go to the police.

Ms M was called as a witness at the Appellant's committal hearing and later at his trial. On each occasion she was asked to give her account of this conversation and, in particular, to recall the words spoken by her daughter. The account which she gave at the trial however was different to that which she gave on the same topic at the committal hearing.

The sole ground of appeal is that a "miscarriage of justice occurred by reason of the way in which the learned trial judge directed the jury as to the use that could be made" of the account which Ms M gave at the committal hearing.

On 2 June 2017 the Court of Appeal (Gotterson & Morrison JJA, Burns J) unanimously dismissed the Appellant's appeal. This is despite their Honours finding that that a misdirection by the trial judge concerning Ms M's evidence had in fact occurred.

The Court of Appeal found that his Honour had erred when he instructed the jury that "what the mother said to the committal court seven years ago is not evidence of the fact that the Complainant *said* those things to her". Although it was correct to direct the jury, as his Honour immediately did thereafter, that such evidence is "not evidence of the truth of the contents of the statement", Ms M's prior account had also become part of her oral testimony at trial. It was therefore available for use by the jury when considering what the Complainant said by way of preliminary complaint to her mother. Thus, the use to which the evidence could be put extended beyond merely using it to assess Ms M's credit. If accepted, it was also available to determine the consistency or otherwise of the preliminary complaint and, therefore, the Complainant's credit.

Despite this misdirection, their Honours applied the proviso and dismissed the appeal, finding that no substantial miscarriage of justice had occurred. They noted that the Crown case was strong. They found that the Complainant's account of what took place was comprehensively tested in cross-examination and she was unmoved regarding any of its essential details. Physical evidence, although not going to the proof or otherwise of the issue of consent, nevertheless supported parts of her account. Furthermore, preliminary complaints were not only made to Ms M but also to a Ms Johnson and a Mr Haberfield. The guilt of the Appellant on each of the offences for which he was convicted had therefore been proved beyond reasonable doubt.

The grounds of appeal are:

- The Court of Appeal made an error in applying the proviso when:

  a) The Crown:

     i. did not request its application;
     ii made no argument in support of its application;
     iii. disavowed its application; and
     iv. that position was objectively explicable and there is no suggestion of fraud or incompetence.

  b) the defence had made a submission that the proviso should not apply; and

  c) the Court did not give any indication it was inclined to a contrary position and did not invite submissions against its application.

On 6 December 2017 the Respondent filed a notice of contention, the grounds of which include:

- The Court of Appeal erred in concluding that the adoption by Ms M of her own earlier testimony amounted in the particular circumstances to an acceptance of the truth of the earlier account.