SHORT PARTICULARS OF CASES
APPEALS

AUGUST 2020

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CXXXVIII v COMMONWEALTH OF AUSTRALIA & ORS (A30/2019)

Court appealed from: Full Court of the Federal Court of Australia
[2019] FCAFC 54

Date of judgment: 3 April 2019

Special leave granted: 18 October 2019

This appeal concerns the validity of summonses and notices to produce served on the appellant, CXXXVIII, by officers of the Australian Crime Commission ("ACC") under the *Australian Crime Commission Act 2002* (Cth) ("ACC Act").

On 26 June 2018 CXXXVIII was met by members of the ACC at Adelaide Airport where he was served with a summons (the First Summons) pursuant to a determination of the ACC Board to investigate high risk criminal targets. The First Summons required CXXXVIII to attend the ACC for examination. He was also served with a notice to produce which required him to surrender his mobile telephone.

On 27 June 2018 CXXXVIII made an application to the Federal Circuit Court for judicial review in relation to the First Summons and notice to produce. On 28 June 2018 a further summons (the Second Summons) and related notice to produce were then served requiring CXXXVIII to attend the ACC for examination and produce various electronic devices on 3 July 2018.

In the Federal Circuit Court the ACC conceded that the First Summons and related notice were invalid as the determination they relied upon did not comply with the ACC Act. CXXXVIII argued that the Second Summons and related notice to produce also failed to comply with the ACC Act and amounted to an abuse of process. In dismissing the application, Judge Brown concluded that the relevant determination attached to the Second Summons was valid and no circumstances of abuse of process arose.

On appeal, the majority of the Full Court of the Federal Court (Bromwich and Charlesworth JJ) upheld the validity of the Second Summons and related notice to produce. Logan J in dissent concluded that the notice to produce failed to comply with the production requirements set out in the ACC Act and was invalid.

The grounds of appeal are that the Full Court of the Federal Court erred:

- in finding that the Second Summons and related notice to produce were validly issued pursuant to determinations made by the Board of the ACC.

- by concluding that the determinations were validly made within the scope of power in s 7C of the ACC Act.

A person known as CXXXVIX has applied for leave to intervene in the appeal on the ground that she has proceedings pending in the Federal Circuit Court of Australia in which she seeks to challenge, on the same basis as the appellant in this case, the validity of a summons for her to appear before an examiner of the Australian Crime Commission.

APPLICANT S270/2019 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION (S47/2020)

Court appealed from: Full Court of the Federal Court of Australia
[2019] FCAFC 126

Date of judgment: 7 August 2019

Special leave granted: 20 March 2020

The appellant is a citizen of Vietnam who arrived in Australia, aged 15, as the holder of a *Funded Special Humanitarian* (subclass K4B12) visa on 7 June 1990. Since then he has departed only once, and that was to visit his parents in Vietnam in 1994. On 15 November 1994 the appellant was granted a Class BB Subclass 155 *Five Year Resident Return* visa ("visa"). The appellant therefore became a lawful non-citizen under the *Migration Act 1958* (Cth) ("the Act).

On 26 April 2016 a delegate of the Minister for Immigration and Border Protection ("the Minister") cancelled the appellant's visa on character grounds. This was done pursuant to s 501(3A) of the Act (the "cancellation decision"). Section 501(3A) provides that, if the Minister is satisfied that a person does not pass the character test *and* the person is serving a sentence of imprisonment on a full-time basis, the Minister *must* cancel the visa. The Minister is then obliged to invite that person to make representations about the revocation of the original decision.

On 12 May 2016 the appellant made representations to the *National Character Consideration Centre* of the Department of Immigration and Border Protection "about revocation of the cancellation decision". On 17 January 2017 the Assistant Minister decided not to revoke that decision.

On 19 March 2018 Justice Bromwich dismissed the appellant's subsequent application for judicial review, while on 7 August 2019 the Full Federal Court (Charlesworth & O'Callaghan JJ; Greenwood J dissenting) dismissed the appellant's further appeal. The majority held that when assessing the appellant's risk of recidivism, the Assistant Minister had considered the lack of respect the appellant had shown for Australian laws. This was as evidenced by the fact that the "cancellation" offence occurred *after* the appellant had received a warning that any future offending might result in the cancellation of his visa. The majority went on to hold that those considerations provided an evident and intelligible basis for the Assistant Minister's conclusion that reoffending could not be ruled out. It was therefore open to the Assistant Minister to find that there was a possibility of reoffending, notwithstanding the appellant's claim that he had recovered from his addiction to drugs in 2004.

The ground of appeal is:

- The Full Court of the Federal Court erred in not finding that the respondent had proceeded on an incorrect understanding of the law, failed to exercise jurisdiction, or otherwise failed to discharge the statutory obligation imposed by section 501CA(4), by erroneously considering that any non-refoulement obligations owed to the appellant could necessarily be considered in the context of a protection visa application and consequently by failing to engage with the question of whether the appellant was owed non-refoulement obligations.

ABT17 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR (M65/2019)

Court appealed from: Federal Court of Australia
[2019] FCA 613

Date of judgment: 16 April 2019

Special leave granted: 18 October 2019

The appellant (ABT17) is a citizen of Sri Lanka of Tamil ethnicity and Hindu faith who arrived in Australia by boat without a visa in 2012. In October 2015 he lodged an application for a temporary protection visa which was considered by a delegate of the Minister for Immigration and Border Protection. The delegate found ABT17's evidence to be plausible and generally consistent with country information but found that country conditions had since changed to such an extent that ABT17's chances of facing persecution on return to Sri Lanka were remote. The temporary protection visa application was refused in September 2016.

ABT17 applied for review of the delegate's decision by the Immigration Assessment Authority ("IAA"). The IAA, after review of the transcript of the delegate's interview with ABT17, doubted his credibility and affirmed the delegate's decision in December 2016.

In the Federal Circuit Court ABT17 argued that the IAA's decision was affected by jurisdictional error on various grounds and was unreasonable. Judge Smith rejected those arguments and dismissed the application in March 2018.

On appeal to the Federal Court, ABT17 argued that the IAA should have exercised its discretion under s 473DC of the *Migration Act 1958* (Cth) ("the Act") and invited ABT17 to attend a further interview in order to conduct its own assessment of ABT17's credibility rather than relying on a transcript of interview between ABT17 and the delegate for that purpose. In dismissing the appeal Justice Bromberg held that the IAA's refusal to obtain further evidence was reasonable. His Honour further held that any error regarding credibility was not material in any event as both the delegate and the IAA refused the visa application on the basis that country conditions in Sri Lanka had improved.

The grounds of appeal are that the Federal Court erred:

- in failing to find the decision of the IAA was affected by jurisdictional error by failing to exercise its discretion under s 473DC of the Act to invite ABT17 to provide new information by interview.

- in finding that ABT17 must establish 'that the IAA failed to consider exercising the s 473DC discretion' before unreasonableness in the failure to exercise that discretion could be found.

- in finding that the failure of the IAA to exercise its discretion under s 473DC could not be a jurisdictional error because the failure was not material to the decision.

HSIAO v FAZARRI (M137/2019)

Court appealed from: Full Court of the Family Court of Australia

Date of judgment: 5 March 2019

Special leave granted: 10 October 2019

The parties commenced an intimate relationship in August 2012. In March 2013 the respondent separated from his first wife. The parties lived in separate residences throughout their relationship. The respondent had assets of approximately $20 million (subsequently reduced to $9 million after his property settlement with his first wife). The appellant was unemployed with few assets. The respondent financially supported the appellant throughout the relationship.

In April 2014 the respondent purchased a residential property in Melbourne ("the property") for $2.2 million using his own funds and bank loans. The respondent claimed the appellant 'insisted" that she have an interest, so he provided her with a 10% interest as tenant in common at settlement.

In December 2014 the respondent was hospitalised for a suspected heart attack. He alleged that during his hospital stay the appellant pressured him to sign over an additional 40% interest in the property to her, which he did through a signed Transfer document. That Transfer was registered and legal title reflected that each party owned a 50% interest in the property as joint tenants.

In March 2015 the parties signed a Deed of Gift ("the Deed") which stated that the parties were joint tenants of the property and made provision for payment by the respondent in the event of certain circumstances. Clause 7 provided that "this Deed will have no application in the event that: (a) The Parties do not own the property as joint tenants as at the date of [the appellant's] death or (b) [the respondent] predeceases [the appellant]…".

In August 2016 the parties married. In September 2016, the parties separated.

In November 2016 the respondent commenced proceedings for property settlement. Cronin J of the Family Court of Australia found that the parties lived together for intermittent periods but they did not commence a de facto relationship. His Honour did not make detailed findings about what comprised the pool of net assets for consideration in the settlement and its value, noting it was difficult to make income and earning capacity findings in relation to the appellant, as she had not filed any evidence. Instead, Cronin J focused on matters of contribution. The initial 10% interest was treated as a gift. An analysis based on the relevant borrowings and consideration of factors under the *Family Law Act 1974* (Cth) resulted in the appellant being awarded $100,000. His Honour rejected her claim to an additional 40% interest in the property as he accepted that the appellant had 'pressured' the respondent to make that gift. The appellant was also ordered to transfer her interest in the property to the respondent.

Cronin J's analysis of the Deed was that because the effect of his orders severed the joint tenancy, the terms of the Deed no longer applied.

The appellant appealed to the Full Court of the Family Court. She sought leave to file fresh evidence which she argued would show that she had not pressured the respondent to sign over the additional 40% interest in the property and that the parties had lived in a de facto relationship. On 5 March 2019, the Full Court (Strickland, Kent and Watts JJ) dismissed the appellant's application to file further evidence and the appeal. In holding that the appellant had not established a proper basis for filing any further evidence, the Full Court noted that the deliberate failure to call evidence at trial ordinarily weighs heavily against the exercise of discretion. The appellant conceded that almost all the documents and evidence that she sought to file by way of further evidence were available to her at the time of the trial.

The Full Court did not accept the appellant's argument that the primary judge had failed to take the legal ownership of the property into account as required by *Stanford v Stanford* (2012) 247 CLR 108. The Full Court accepted the primary judge's characterisation of the Deed and that it had ceased operation, holding that the Deed was a distraction in the disposition of the appeal. It endorsed the approach of the primary judge in assessing "the contributions to the acquisition, conservation and improvement of" the property. The Full Court noted that "the effect of the primary judge's property settlement orders left the appellant with assets of $430,000 and the respondent in excess of $12 million."

The grounds of appeal include that the Full Court:

- erred in holding that the circumstances in which the appellant obtained the additional 40% interest in the property and the Deed "were distractions in the disposition of the appeal".

- erred in holding that the finding of the respondent's overwhelming contribution to the property did not fail to take into account the appellant's 50% interest in it prior to marriage.

- erred in holding that the fresh evidence ought not to have been accepted.

CALIDAD PTY LTD & ORS v SEIKO EPSON CORPORATION & ANOR (S329/2019)

Court appealed from: Full Court of the Federal Court of Australia
[2019] FCAFC 115

Date of judgment: 5 July 2019

Special leave granted: 15 November 2019

The First Respondent is a Japanese company that manufactures, sells and permits the sale of Epson computer printers and cartridges. Its exclusive distributor in Australia is the Second Respondent, Epson Australia Pty Ltd, which holds Australian patent numbers 2009233643 and 2013219239 ("the Patents"). The Patents describe a means of ink-level detection, a memory function and a certain layout of electrical connection terminals on printer cartridges. The particular layout of terminals is designed to reduce the risk of shorting caused by stray ink deposits.

The Third Respondent, Calidad Distributors Pty Ltd ("CDP"), purchases used Epson printer cartridges that have been modified and refilled overseas ("refilled cartridges"). CDP then imports such cartridges into Australia and sells them under its own brand. The modifications made to refilled cartridges generally include drilling (and later sealing) a small hole, filling a chamber with ink and either replacing a memory chip or rewriting data in the original memory chip.

In 2015, the Respondents (collectively, "Seiko") commenced Federal Court proceedings against CDP and three companies related to it (collectively, "Calidad"), alleging infringement of the Patents. Calidad contended that, although the refilled cartridges imported and sold in Australia fell within the relevant claims of the Patents, any purchaser and subsequent owner of original Epson cartridges was entitled to do as he or she wished with those cartridges, free from any control by Seiko. For the proceedings, the parties agreed upon nine categories of refilled cartridges, based on different modifications made and certain periods of time.

On 16 February 2018 Justice Burley declared that Calidad had infringed claim 1 of each of the Patents by the importation and sale of certain categories of refilled cartridges. His Honour held that Seiko, by giving no notice of any restriction on the use of Epson cartridges when selling them, had impliedly given a licence for purchasers and any subsequent owners to do as they wished with those cartridges, which included selling them or throwing them away ("the Implied Licence"). If particular modifications made to cartridges, however, amounted to a material change to the embodiment of the invention claimed in the Patents, a termination of the Implied Licence would be effected. Justice Burley found such a material change in five of the nine categories, with the consequence that the Patents had been infringed correspondingly.

The Full Court of the Federal Court (Greenwood, Jagot and Yates JJ) unanimously dismissed an appeal by Calidad and allowed a cross-appeal by Seiko. Their Honours found that in all nine categories the modifications amounted to a remanufacture, such that the refilled cartridges were different articles from the Epson cartridges sold by Seiko. Such a new embodiment of the invention claimed in the Patents did not fall within the scope of the Implied Licence. The Full Court therefore declared that Calidad additionally had infringed claim 1 of each of the Patents in respect of those four categories which Justice Burley had found to be non-infringing.

The grounds of appeal include:

- The Full Court erred in finding that the Appellants had infringed claim 1 of each of the Patents by importing, offering for sale and selling in Australia a range of printer cartridges.

- The Full Court erred in overturning the finding of the primary judge that the Appellants' conduct in respect of certain categories of those printer cartridges (being Categories 1, 2, 3 and A) did not infringe claim 1 of either Patent.

NORTHERN LAND COUNCIL & ANOR v QUALL & ORS (D21/2019)

Court appealed from: Full Court of the Federal Court of Australia [2019] FCAFC 77 and [2019] FCAFC 101

Date of judgment: 19 June 2019

Special leave granted: 15 November 2019

The Northern Land Council ("NLC") is a representative Aboriginal/Torres Strait Islander body under Part 11 of the *Native Title Act 1993* (Cth) ("the Act"). It is also a Land Council established under s 21 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

In 2016 the NLC and the Northern Territory made an indigenous land use agreement under the Act in relation to land and waters at the Cox Peninsula near Darwin known as the Kenbi Indigenous Land Use Agreement ("Kenbi ILUA"). In March 2017, the Chief Executive Officer of the NLC signed a certificate for the making of an application for registration of the Kenbi ILUA under the Act. The certification stated (supported by reasons) that the NLC was of the view that the requirements under the Act about identification of the native title holders and their authorization of the agreement have been met.

The respondents contended that the certification was invalid because of an 'absence of delegated authority'. They argued that: (1) the certification function under the Act was not delegable or (2) alternatively, the delegation instrument did not in fact delegate that function.

The trial judge (Reeves J) rejected the first argument and accepted the second because the delegation instrument issued in 2000 pre-dated the commencement of the relevant certification provisions under the Act. The trial judge held that the NLC had not certified the application for registration of the Kenbi ILUA for the purpose of the Act or in the performance of its function as a representative body under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

An appeal was made to the Full Court of the Federal Court and was accompanied by an interlocutory application to file evidence of a further instrument of delegation issued in 2001. The respondents cross-appealed that the certification function under the Act was not delegable, which the Full Court allowed.

The Full Court (Griffiths, Mortimer and White JJ) considered the outcome on cross-appeal to be decisive on the issues raised by the appeal, but added that if there was power to delegate and the 2001 instrument was admitted as fresh evidence, it was doubtful it would be effective as the instrument was in the name of the NLC rather than the Chief Executive Officer as delegate. The Full Court held that the NLC did not have power to delegate its certification function under the Act and dismissed the appeal and interlocutory application.

The ground of appeal in this Court is that the Full Court erred in not holding that the 2017 certificated signed by the Chief Executive Officer of the NLC is a certification of the application for registration of the Kenbi ILUA within the meaning of the Act.

The Northern Territory intervenes in this proceeding in support of the appellants. The Attorney-General of the Commonwealth seeks leave to intervene in support of the appellants to make submissions as to the interpretation of the Act in the context of the performance of functions by a body corporate representative body.