SHORT PARTICULARS OF CASES

DECEMBER 2020

****

THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA v TRAVELEX LIMITED (S116/2020)

Court appealed from: Full Court of the Federal Court of Australia
[2020] FCAFC 10

Date of judgment: 14 February 2020

Special leave granted: 25 June 2020

On 16 December 2009 the Respondent ("Travelex") lodged a Business Activity Statement ("BAS") and GST return for the November 2009 tax period ("the November 2009 BAS"), reporting a net amount of $37,751 payable by Travelex to the Appellant ("the Commissioner") under the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ("the GST Act"). The Commissioner then recorded a debit of $37,751 in an account which is a Running Balance Account ("RBA") for Travelex for the purposes of Part IIB of the *Taxation Administration Act 1953* (Cth) ("the TAA") and Travelex paid $37,751 to the Commissioner.

In 2012 however Travelex revisited the November 2009 BAS, seeking to increase its input tax credits (for GST it had paid on certain purchases) in light of this Court's judgment in *Travelex Ltd v Commissioner of Taxation* [2010] HCA 33. Travelex requested the Commissioner to amend the November 2009 BAS such that the company could report a net amount of negative $111,269 for the monthly tax period. On 28 June 2012 the Commissioner recorded a credit entry of $149,020 in Travelex's RBA with an "effective date" of 16 December 2009. In the following days the Commissioner paid $149,020 to Travelex, after informing the company that the net amount in the November 2009 BAS had been changed from $37,715 debit to $111,269 credit. The Commissioner subsequently made a small additional payment to Travelex under the *Taxation (Interest on Overpayments and Early Payments) Act 1983* (Cth) ("the Overpayments Act"), for delayed refund interest calculated (on $149,020) for the period 29 June 2012 to 6 July 2012. This was based on a view taken by the Commissioner that Travelex was entitled to interest only from the date by which the company had provided sufficient details for the calculation of the refund to which it was entitled.

In December 2016 Travelex commenced proceedings in the Federal Court, seeking a declaration that the interest to which it was entitled should have been calculated from around the date on which it had originally lodged the November 2009 BAS. On 12 July 2018 Wigney J made the declaration sought and ordered the Commissioner to pay Travelex $17,265.15 in interest. This was after his Honour had held that an entity was not permitted under the relevant legislation (the TAA and/or the GST Act) to give the Commissioner an amended BAS. Wigney J held however that Travelex was entitled to the interest it had sought because the Commissioner had accepted he was liable to pay Travelex a refund, which he chose to process administratively by means of a purported amendment to the November 2009 BAS.

An appeal by the Commissioner was dismissed by the Full Court of the Federal Court (Kenny and Steward JJ; Derrington J dissenting). Their Honours unanimously held that the Commissioner had no power to amend a BAS, the methods for adjusting an entity's liability being either an assessment by the Commissioner under s 105-5 of Schedule 1 to the TAA or a claim by the entity for unclaimed input tax credits in a BAS for a later tax period under s 29-10(4) of the GST Act.

Steward J, with whom Kenny J agreed, held that the Commissioner's allocation of a credit of $149,020 to Travelex's RBA sufficiently established an "RBA surplus" on which interest accrued under s 12AA of the Overpayments Act (even if the credit had been a mistake). Interest commenced to run on that credit, under s 12AF of the Overpayments Act, 14 days after the date which the Commissioner had recorded in Travelex's RBA as the "effective date", 16 December 2009.

Derrington J however would have allowed the appeal. His Honour held that an "RBA surplus" on which interest could accrue could arise only by the allocation to an RBA of credits to which an entity was substantively and legitimately entitled under a taxation law. The Commissioner's mere act of allocation did not give rise to such an entitlement, as it was not one of the means prescribed in the TAA and/or the GST Act for the adjustment of a liability or entitlement reflected in a BAS.

The grounds of appeal include:

- The majority of the Full Court erred in concluding that the act of the Commissioner on 28 June 2012 in allocating a credit of $149,020 to the RBA of Travelex and recording it as having an "effective date" of 16 December 2009 created an "RBA surplus" within the meaning of Part IIB of the TAA and an entitlement to interest on that "RBA surplus" from that date under the Overpayments Act, notwithstanding the unanimous conclusion of the Full Court that Travelex never became entitled to a refund or credit under the GST Act or other taxation law.

Travelex has filed a Notice of Contention, raising the following ground:

- The Full Court erred in failing to find that the Commissioner had, on or around 28 June 2012, made an assessment that there was a negative net amount for the November 2009 tax period of $111,269 (being $149,020 less $37,751) as at 16 December 2009.

A Notice of a Constitutional Matter was filed, in response to which no Attorneys-General have intervened in the appeal.

MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS v AAM17 & ANOR (P23/2020)

Court appealed from: Federal Court of Australia
[2019] FCA 1951

Date of judgment: 25 November 2019

Special leave granted: 29 May 2020

The first respondent, AAM17, is a citizen of Pakistan of Mohajir ethnicity who claimed to fear harm based on his ethnicity, speaking the Urdu language, his Sunni religion and the generalised violence and security situation in his home region. AAM17 applied for a protection visa on those grounds. In May 2015, the application was refused by a delegate of the then Minister for Immigration.

AAM17 applied to the Administrative Appeals Tribunal for review of that decision. After hearing AAM17's evidence during a hearing, the Tribunal was not satisfied that AAM17 is a person to whom Australia has protection obligations under the Refugees Convention and affirmed the delegate's decision to refuse him a protection visa.

On appeal to the Federal Circuit Court of Australia in 2017 for judicial review of the Tribunal's decision, AAM17 claimed that the Tribunal did not properly take into account evidence he gave at hearing and that the Tribunal's findings were unreasonable and were affected by jurisdictional error. Judge Street found that there was no basis in relation to the conduct, process or outcome to find that the review by the Tribunal was legally unreasonable. Further, Judge Street held that the application failed to make out any jurisdictional error in relation to the Tribunal's decision. The application was dismissed.

AAM17 appealed the decision of the Federal Circuit Court of Australia to the Federal Court on the basis that the process in the Federal Circuit Court was procedurally unfair. Justice Mortimer, in allowing the appeal, noted that the reasons for the exercise of judicial power must be reasonably and practically available to the litigants who are affected by that exercise of power, especially those adversely affected. Justice Mortimer further held that the denial of procedural fairness by the Federal Circuit Court is clear, and serious.

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

- Concluding that the obligation of the Federal Circuit Court to provide procedural fairness extended to the manner and circumstances of providing reasons;

- Concluding that it was a denial of procedural fairness for orders to be pronounced at a final hearing of a judicial review application and without provision of any written version of the reasons to the litigant as soon as practicable after the orders were pronounced; and

- Setting aside the decision of the Federal Circuit Court (and remitting the matter back to the Federal Circuit Court) notwithstanding that:
    - any denial of procedural fairness could have been, and was, remedied by the hearing in the Federal Court; and

- the Federal Court found that there was no relevant error in the decision of the Federal Circuit Court or the Administrative Appeals Tribunal.

MINISTER FOR IMMIGRATION AND BORDER PROTECTION v EFX17 (B43/2020)

Court appealed from: Full Court of the Federal Court of Australia [2019] FCAFC 230

Date of judgment: 16 December 2019

Special leave granted: 3 July 2020

The Respondent is an Afghani citizen who previously held a Protection Visa. He is illiterate in his native Hazaragi. It is not in dispute that the Respondent also has only very limited English literary or speaking skills.

On 19 December 2016 the Respondent was convicted of offences contrary to s 317 of the *Criminal Code 1899* (Qld) and was sentenced to 7 years imprisonment. On 3 January 2017 the Appellant's delegate cancelled the Respondent's Protection Visa pursuant to s 501(3A) of the *Migration Act 1958* (Cth) ("the Act"). This was on the basis that he did not pass the "character test". On that date the delegate emailed notification ("the Notice") of that decision to the Brisbane Correction Centre, which is where the Respondent was being held. The delegate also requested that the Respondent be given both the decision record and the associated accompanying documents. This was done on 4 January 2017, but there is no evidence that an interpreter was used to explain to the Respondent the implications of that cancellation, or what his rights were in relation to seeking a revocation of that decision.

The Respondent's application for judicial review of the delegate's decision to the Federal Circuit Court failed. Judge Egan rejected the submission that the delivery of the Notice to the Respondent did not comply with s 501CA(3) of the Act because the Minister did not have regard to the Respondent's circumstances, principally being his illiteracy.

On 16 December 2019 a majority of the Full Federal Court upheld the Respondent's subsequent appeal. Greenwood J, with whom Rares J generally agreed, held that the minimum standard required of the Minister was to give a person written *notice* of the decision, together with the *particulars* of the reason for cancelling the visa. The mere *service* of the notice on a former visa holder, who otherwise had no capacity to comprehend what was served upon him or her, did not discharge the statutory duty of giving "notice". In the Respondent's case, his illiteracy in English meant that he was effectively prevented from making meaningful representations seeking the revocation of the cancellation of his visa after receiving that Notice.

In this Court the Appellant submits that the majority erred in holding that the Notice was invalid because the Minister did not have regard to the capacity of the Respondent to properly understand what was served upon him under s 501CA(3)(a) & (b). The Appellant further submits that there was no obligation on the Minister to have regard to such capacity matters under s 501CA(3)(a) of the Act, or to invite the Respondent to make representations about revocation of the visa cancellation under s 501CA(3)(b). The Appellant further submits that the valid performance of those duties did not turn on the question of whether the Respondent understood what was served upon him.

The grounds of appeal include:

- The Full Court erred in holding that the Minister did not perform his duties under ss 501CA(3)(a) & (b) of the Act in relation to the decision of the Minister to cancel the Respondent's visa under s 501(3A) of the Act because, in performing those duties, he did not have to regard to the Respondent's literacy, capacity to understand English, mental capacity and health, and facilities available to him while in custody. The Full Court ought to have held that the Minister was not required to take those matters into account.

On 24 July 2020 the Respondent filed a Notice of Contention, the ground of which is:

- The decision below should be affirmed on the ground that the Minister failed to invite the Respondent to make representations about revocation of the original decision as required by s 501CA(3)(b) of the Act, because the purported invitation did not specify the period ascertained in accordance with the regulations for making representations to the Minister.

MILLER v THE QUEEN (A19/2020)

Court appealed from: Court of Criminal Appeal of the Supreme Court of South Australia
[2019] SASCFC 91

Date of judgment: 29 July 2019

Special leave granted: 14 August 2020

Following trial by jury the appellant was found guilty of murdering his next-door neighbour during a late-night altercation while both men were intoxicated. The two men had a history of confrontation and on the night of the incident both the appellant and the deceased had been yelling and insulting one another. The deceased struck the appellant with a metal pole several times; the appellant was armed with a knife and fatally stabbed the deceased.

At trial the prosecution's case was that the appellant provoked the fight and the stabbing was a deliberate act done under cover of self-defence. The appellant gave evidence that the stabbing was accidental, and he did not intend to harm the deceased.

On appeal against conviction to the Court of Criminal Appeal, broadly, the appellant raised the following issues for determination: (1) was provocation raised on the evidence? (2) did the trial judge err in failing to leave provocation to the jury? And (3) were the trial judge's directions on self-defence erroneous in inviting the jury to consider whether the appellant had been a 'willing combatant'?

In dismissing the appeal, Stanley J (Parker and Doyle JJ agreeing) held that on the version of facts most favourable to the appellant, provocation was not raised on the evidence. The trial judge did not err in failing to leave provocation to the jury, and the trial judge's directions to the jury on self-defence were not erroneous.

The grounds of appeal are that the Court of Criminal Appeal erred in dismissing the appellant's appeal against conviction for murder in that:

- The Court wrongly held that provocation did not arise on the evidence based on a misapplication of the principles set out in *Masciantonio v The Queen* (1995) 183 CLR 58 and *Lindsay v The Queen* (2015) 255 CLR 272 as to when provocation must be left, by conflating the separate questions whether there was evidence raising provocation and whether the applicant should have been acquitted of murder on account of provocation; and

- The Court erred in failing to find that there was evidence before the jury which might reasonably have led the jury to return a verdict of manslaughter on the ground of provocation.

MINISTER FOR HOME AFFAIRS v BENBRIKA (M112/2020)

Date Cause Removed: 30 October 2020

On 15 September 2008, the respondent was convicted of having intentionally been a member of a terrorist organisation and intentionally directing the activities of a terrorist organisation contrary to 102.3(1) and 102.2(1) of the *Criminal Code* (Cth) ("the Code"). He was sentenced to a total effective sentence of 15 years' imprisonment. with a non-parole period of 12 years. Parole was never granted. The respondent's sentence was due to expire on 5 November 2020.

On 4 September 2020, the applicant commenced proceedings in the Supreme Court of Victoria for a continuing detention order ("CDO") in respect of the respondent under s 105A.7(1) of the Code. The respondent sought to challenge the validity of Division 105A of the Code and had also served a Notice of Constitutional Matter. The Attorney-General of the Commonwealth intervened in the Supreme Court proceeding.

The Supreme Court may make a CDO under s 105A.7(1) of the Code if it is satisfied: (a) to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a offence Australia if released into the community; and (b) that there is no less restrictive measure that would be effective in preventing that risk. The Supreme Court of Victoria is a "court of a State" capable of being invested with federal jurisdiction under s 77(iii) of the *Commonwealth Constitution*. However, the Commonwealth Parliament cannot confer power on the Supreme Court that is not the judicial power of the Commonwealth.

The respondent contends that the power to make a CDO is removed from the traditional conception of the judicial power of Commonwealth in three respects. First, a CDO involves determination not of existing rights and obligations having regard to past events, but the determination of new rights and obligations. Second, detention by court order, generally and traditionally, depends upon, and is imposed for, an anterior finding of criminal guilt. Thus, while preventative interferences with or conditions on liberty may not be powers that are intrinsically non-judicial, the power to continue to imprison a person after the person's sentence has expired is in a different category. Third, by reason of s 105A.10(4), a CDO lacks the conclusiveness that attends exercise of the judicial power of the Commonwealth.

On 8 October 2020, Tinney J reserved the following question for consideration of Court of Appeal of the Supreme Court of Victoria:

> Is all or any part of Division 105A of the *Criminal Code* (Cth) and, if so, which part, invalid because the power to make a continuing detention order under s 105A.7 of the Code is not within the judicial power of the Commonwealth and has been conferred, inter alia, on the Supreme Court of Victoria contrary to Chapter III of the Commonwealth Constitution?

Ahead of the matter being heard by the Court of Appeal, Tinney J, on 27 October 2020, made an interim detention order (not opposed by the respondent) pursuant to s 105A.9 of the Code for a period of 28 days from 5 November 2020.

On 20 October 2020 the Attorney-General of the Commonwealth applied to this Court to remove the proceeding from the Court of Appeal. On 30 October 2020 Nettle J made that order. Accordingly, this Court will consider the question reserved by Tinney J.

The Attorney-General of the Commonwealth is intervening in the proceeding.