

SHORT PARTICULARS OF CASES
APPEALS

NOVEMBER 2022

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ATTORNEY-GENERAL (CTH) v HUYNH & ORS (S78/2022)

Court appealed from: Court of Appeal of the Supreme Court of
New South Wales
[2021] NSWCA 297

Date of judgment: 8 December 2021

Special leave granted: 12 May 2022

In 2015, the First Respondent (“Mr Huynh”) was convicted of conspiring to import a commercial quantity of a border-controlled precursor, in breach of the *Criminal Code 1995* (Cth), and was sentenced to 12 years imprisonment with a non-parole period of 8 years. He unsuccessfully appealed against his conviction in 2017; his application for special leave to appeal to the High Court was dismissed in 2019.

In March 2020, having exhausted all available avenues of appeal, Mr Huynh applied to the Supreme Court under s 78 of the *Crimes (Appeal and Review) Act 2001* (NSW) (“the Act”) for an inquiry into his conviction. Mr Huynh was self-represented. Garling J dismissed his application in October 2020. Mr Huynh then sought an order in the supervisory jurisdiction of the Court of Appeal quashing that decision on the ground that the judge had erred in law. At that point, questions were raised about the significance of the fact that Mr Huynh had been convicted of Commonwealth rather than State offences. The issues considered by the Court were whether the post-appeal inquiry procedures under Part 7 of the Act: (1) conferred judicial or administrative functions on a judge of the Supreme Court; (2) are available, as laws of the State, to review convictions for federal offences; and (3) if they do not apply of their own force, whether they are picked up and applied as federal law. The Court of Appeal (Bathurst CJ, Basten, Gleeson, Leeming & Payne JJA) dismissed the application. As to (1), the Court held that the power conferred was administrative. As to (2), a majority held that the relevant provisions did not apply of their own force. As to (3), the Court held that s 68(1) of the *Judiciary Act 1903* (Cth) (“Judiciary Act”) did not pick up the relevant provisions.

In this Court, the Appellant contends that the following questions should all be answered ‘yes’:

- (a) Is the function conferred by Div 3 of Part 7 of the Appeal and Review Act an administrative function that is conferred on Supreme Court judges as *persona designata*? (“Question 1”);
- (b) If the answer to Question 1 is ‘yes’, then does Div 3 of Part 7 apply of its own force to federal offenders who are convicted and sentenced in New South Wales courts? (“Question 2”);
- (c) Does s 68(1) of the Judiciary Act pick up and apply Div 3 of Part 7 as federal law? (“Question 3”).

Mr Huynh agrees with the Appellant's submissions. The Third Respondent (Supreme Court of NSW) filed a submitting appearance, as has the Second Respondent (Attorney-General for NSW). The Court has granted Graeme Hill SC and James Stellios leave to appear as amici curiae to act as contradictor. The amici curiae agree that Question 1 should be answered in the affirmative, but that Question 2 and 3 should be answered in the negative.

A Notice of Constitutional matter was filed by the Appellant, and the Attorney-General for the State of Victoria has intervened.

The ground of appeal is:

- The New South Wales Court of Appeal erred in holding that the relevant provisions of Part 7 of the *Crimes (Appeal and Review) Act 2001* (NSW) were not available with respect to a conviction or sentence for an offence against a law of the Commonwealth heard and determined in a New South Wales court.

**KINGDOM OF SPAIN v INFRASTRUCTURE SERVICES
LUXEMBOURG S.À.R.L. & ANOR (S43/2022)**

Court appealed from: Full Court of the Federal Court of Australia
[2021] FCAFC 3;
[2021] FCAFC 112

Dates of judgments: 1 February 2021;
25 June 2021

Special leave granted: 18 March 2022

In 2011, the Respondents (a company incorporated in Luxembourg and a company incorporated in the Netherlands) invested €139.5 million in solar power plants located in Spain. In the following year, the Appellant embarked on a reduction of its subsidisation of renewable energy production, which the Respondents alleged was in breach of *The Energy Charter Treaty* (“the ECT”). The Respondents were successful in an arbitration of its dispute with the Appellant under the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (“the ICSID Convention”), obtaining an arbitral award of more than €101 million (“the Award”).

Both the Appellant and the Commonwealth of Australia are parties to the ICSID Convention, a treaty which has the force of law in Australia by virtue of s 32 of the *International Arbitration Act 1974* (Cth) (“the IA Act”). Article 54(1) of the ICSID Convention provides that each contracting state will recognise arbitral awards as binding and will enforce any imposed pecuniary obligations in its territory as if a final judgment of a court of that state. Article 54(2) prescribes requirements for the seeking of recognition or enforcement of an award, while Article 55(3) provides that execution of an award will be governed by the laws concerning the execution of judgments in the state where execution is sought. Article 55 then provides that nothing in Article 54 derogates from contracting states’ laws relating to immunity from execution.

In 2019, the Respondents commenced proceedings in the Federal Court of Australia (“the Proceedings”), seeking leave under s 35(4) of the IA Act to enforce the Award as if it were a judgment of the Federal Court. The Respondents also sought an order that the Appellant pay the Respondents the amount awarded. In response, the Appellant claimed immunity from the jurisdiction of Australian courts under s 9 of the *Foreign States Immunities Act 1985* (Cth) (“the Immunities Act”).

In February 2020, Stewart J granted the relief sought by the Respondents, holding that the Appellant could not rely on immunity under s 9 of the Immunities Act because the Appellant came within the “submission to jurisdiction” exception provided in s 10. That was because the ICSID Convention was clearly an “agreement” within the meaning of the Immunities Act, and by being a party (along with Australia) to the ICSID Convention, the Appellant had thereby submitted to the jurisdiction of Australian courts in a manner provided in s 10.

An appeal by the Appellant was unanimously allowed by the Full Court of the Federal Court (Allsop CJ, Perram and Moshinsky JJ), although the outcome which the Appellant had sought was not achieved. Their Honours considered that Article 54 of the ICSID Convention contemplated separate applications for recognition and enforcement, although “enforced” in s 35(4) of the IA Act must be construed so as to include “recognised” in order for the Federal Court to exercise jurisdiction for the necessary phase of recognition. The Full Court held that despite the extent of the relief sought by the Respondents, the Proceedings were to be characterised as proceedings for recognition only; they were not also proceedings for enforcement. Their Honours held that the Appellant had effectively submitted to Australian jurisdiction for recognition proceedings, and Article 55, which referred only to execution, did not apply.

The Full Court nevertheless proceeded to set aside the orders made by Stewart J and replace them with orders in a different form. By the fresh orders, the Federal Court both recognised the Award as binding on the Appellant and, pursuant to s 35(4) of the IA Act, entered judgment in favour of the Respondents against the Appellant for the amount provided in the Award. The Full Court further ordered that those orders did not derogate from the effect of any law relating to immunity of the Appellant from execution.

The grounds of appeal include:

- The Full Court erred in finding that, by the Appellant being a contracting party to the ECT and the ICSID Convention, the Appellant:
 - a) had thereupon (and without more) submitted to the jurisdiction of the Federal Court of Australia for the purpose of these proceedings; and
 - b) further thereupon, the Appellant had waived its rights of foreign State jurisdictional immunity afforded by s 9 of the Immunities Act for the purpose of these proceedings.

The Respondents have filed a notice of contention, the grounds in which include:

- Alternatively to the reasons given by the Full Court, the Full Court should have found that, on a proper reconciliation of the authentic texts of the ICSID Convention in accordance with the customary international law rules of treaty interpretation (embodied in Arts 31 and 32 of the *Vienna Convention on the Law of Treaties*), the Appellant by Art 54 of the ICSID Convention (given force of law by s 32 of the IA Act) had waived its immunity to proceedings for the recognition and enforcement of the award but not its execution and the orders made by the Federal Court were orders in the nature of recognition and enforcement of the award and were not orders for its execution, in each case within the meaning of the ICSID Convention (*contra* Perram J at [87] and adopting the finding at paragraph [144] of the first instance judgment).

The European Commission had applied for leave to be heard as *amicus curiae*, to make submissions in support of the Appellant. The Court has considered the application, but is of the view that it would not be assisted by the proposed submissions.

STANLEY v DIRECTOR OF PUBLIC PROSECUTIONS (NSW) & ANOR (S126/2022)

Court appealed from: Court of Appeal of the Supreme Court of
New South Wales
[2021] NSWCA 337

Date of judgment: 21 December 2021

Special leave granted: 19 August 2022

In October 2020, Ms Emma-Jane Stanley pleaded guilty in the Local Court of New South Wales to various offences against the *Firearms Act 1996* (NSW) in relation to her involvement in the unauthorised storage and supply of firearms and ammunition. The weapons initially had been secreted at Ms Stanley's home by her cousin, without Ms Stanley's knowledge. Ms Stanley subsequently acquiesced in the weapons remaining at her home, and she received a small payment from her cousin (and another co-offender) after the weapons had been sold. The magistrate sentenced Ms Stanley to imprisonment for three years with a non-parole period of two years.

In an appeal by Ms Stanley to the District Court against the severity of her sentence, the evidence included that Ms Stanley was a single mother of young children who were in her care, that she had had long periods of employment, and that she had previous convictions but had never served a term of full-time imprisonment. For one previous conviction, Ms Stanley had served her sentence in the community pursuant to an intensive correction order ("ICO") made under s 7 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("the CSP Act"), and Ms Stanley sought an ICO in respect of her latest sentence. A sentencing assessment report described Ms Stanley as having a medium risk of re-offending, and the report set out a potential supervision plan for Ms Stanley in the event that she would serve her sentence in the community.

One of the statutory provisions relevant to the making of an ICO is s 66 of the CSP Act. Section 66(1) provides that community safety must be the paramount consideration when considering whether to make an ICO, while s 66(2) provides that when considering community safety, the court is to assess whether an ICO or full-time detention would more likely address the offender's risk of reoffending ("the s 66(2) Assessment"). Section 66(3) then provides that the sentencing court must also consider s 3A and common law principles, and may consider any other relevant matters.

Judge N Williams dismissed Ms Stanley's application, addressing many factors in lengthy reasons for judgment. Her Honour did not however refer to the s 66(2) Assessment in deciding that an ICO should not be made.

Ms Stanley applied for judicial review (an appeal from the District Court's decision being statute barred), contending that Judge Williams had failed to undertake the s 66(2) Assessment and that such failure amounted to jurisdictional error.

The Court of Appeal (Bell P, Basten, Leeming and Beech-Jones JJA; McCallum JA dissenting) dismissed Ms Stanley's application. McCallum JA and Beech-Jones JA found that Judge Williams had failed to undertake the s 66(2) Assessment, while the other Justices assumed such a failure for the purpose of considering the question of jurisdictional error. Various Justices in the majority found it unlikely that Parliament had intended that compliance with s 66(2) be a requirement for the exercise of jurisdiction, and held that the failure (either actual or assumed) to undertake the s 66(2) Assessment was an error made *within* the District Court's jurisdiction. The entire majority of the Court of Appeal held that the s 66(2) Assessment was not a condition of a sentencing court's exercise of discretion to make an ICO, and Judge Williams' failure to undertake that assessment therefore did not amount to jurisdictional error.

McCallum JA however would have allowed Ms Stanley's application. Her Honour held that jurisdictional error had occurred because there had been a fundamental misconception of a function conferred by statute, being the requirement to determine the manner in which a sentence of imprisonment was to be served after assessing which method of serving the sentence would best address the offender's risk of reoffending.

The ground of appeal is:

- The Court of Appeal erred in failing to hold that the District Court's decision was affected by jurisdictional error and should be quashed.

The first respondent has filed a notice of contention, raising the following ground:

- The sentencing judge undertook the assessment required by s 66(2) of the CSP Act.

UNIONS NSW & ORS v STATE OF NEW SOUTH WALES
(S98/2022)

Date writ of summons filed: 29 June 2022

Date special case referred to Full Court: 28 September 2022

The *Electoral Funding Act 2018* (NSW) (“the EF Act”) makes provision for the disclosure, capping and prohibition of certain donations and expenditure in relation to electoral campaigns for state and local government elections in New South Wales.

Each of the four plaintiffs is an employee organisation that has incurred electoral expenditure in the past as a third-party campaigner registered under the EF Act, and may incur such expenditure again in the future. When common interests arise, the plaintiffs seek to coordinate their messages and undertake joint political campaigns. (The first plaintiff is the “State peak council for employees” prescribed by section 215 of the *Industrial Relations Act 1996* (NSW)).

Section 29(11) of the EF Act prescribes a cap of \$20,000 on the electoral expenditure of any third-party campaigner in respect of a by-election for the Legislative Assembly.

Section 35 of the EF Act is in the following terms:

- (1) *It is unlawful for a third-party campaigner to act in concert with another person or other persons to incur electoral expenditure in relation to an election campaign during the capped expenditure period for the election that exceeds the applicable cap for the third-party campaigner for the election.*
- (2) *In this section, a person acts in concert with another person if the person acts under an agreement (whether formal or informal) with the other person to campaign with the object, or principal object, of:*
 - (a) *having a particular party, elected member or candidate elected, or*
 - (b) *opposing the election of a particular party, elected member or candidate.*

On 29 June 2022, the plaintiffs commenced proceedings in this Court, seeking declarations that sections 29(11) and 35 of the EF Act are invalid.

An amended special case filed by the parties was referred to the Full Court by Justice Keane. The amended special case states the following questions for the opinion of the Full Court:

1. Is section 29(11) of the *Electoral Funding Act 2018* (NSW) invalid because it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution?

2. Is section 35 of the *Electoral Funding Act 2018* (NSW) invalid (in whole or in part and, if in part, to what extent), because it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution?
3. Who should pay the costs of the special case?

The plaintiffs have filed a notice of a constitutional matter. The Attorney-General of the Commonwealth of Australia is intervening.