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**KHALIL v MINISTER FOR IMMIGRATION, CITIZENSHIP,
MIGRANT SERVICES AND MULTICULTURAL AFFAIRS & ANOR
(M112/2024)**

Court appealed from: Full Court of the Federal Court of Australia
[2024] FCAFC 119

Date of judgment: 11 September 2024

Special leave granted: 5 December 2024

The appellant is an Egyptian national who came to Australia on a student visa in 2007. In 2013, he applied for a Partner (Temporary) (Class UK) visa, however this application was refused in 2014 by a delegate of the first respondent (“the Minister”) on the basis that he was not in a genuine and continuing relationship. The appellant applied to the Administrative Appeals Tribunal (the second respondent, “AAT”) for review and in the interim, in 2016, was convicted of a criminal offence, for which he was sentenced to 16 months’ imprisonment. A few months later the AAT found the appellant was in a genuine and continuing relationship and remitted the matter to a delegate of the Minister for determination of the remaining considerations. In November 2017, the appellant’s visa application was again refused by the delegate, this time on character grounds (“the 2017 refusal decision”).

Section 501(1) of the *Migration Act 1958* (Cth) (“the *Migration Act*”) provides that the Minister may refuse to grant a visa to a person if they do not pass the ‘character test’. To guide the decision-making process under s 501(1), the Minister can give a ‘direction’ under s 499(1). In the exercise of this power under s 499(1), the Minister has made a series of written directions (with each new direction given a number) which revoke and replace their predecessor. The issue in this appeal is which direction the AAT is required to comply with when, after an application for judicial review is made, but before it is decided, a direction is revoked and another made in its place.

The appellant sought judicial review of the 2017 refusal decision, and in 2018, in its first decision on character grounds, the AAT refused the application applying Direction 65 (“the 2018 AAT decision”). After lengthy litigation which resulted in the matter being appealed twice to the Full Court of the Federal Court (“the Full Court”), the matter was remitted back to the AAT on two occasions for determination in accordance with law (in its second decision in November 2020, the AAT had affirmed the delegate’s decision applying Direction 79). In October 2022, the AAT made a third decision, again affirming the delegate’s decision (“the 2022 AAT decision”). In the 2022 AAT decision, the Tribunal member applied Direction 90.

In June 2023, an application by the appellant for judicial review of the 2022 AAT decision was dismissed by the Federal Court. Justice Moshinsky considered the question of whether the AAT had erred by failing to comply with Direction 65 and instead applying Direction 90. His Honour held that the AAT did not err, applying *Jagroop v Minister for Immigration and Border Protection* (2016) 241 FCR 461; [2016] FCAFC 48 (“*Jagroop*”). In *Jagroop*, the Full Court held that the applicant in that case did not have an accrued right to have his application for review determined pursuant to the Direction in place at the time he lodged his application for review.

A further appeal by the appellant was dismissed by the Full Court (McDonald J; Katzmann and Dowling JJ agreeing), who found that *Jagroop* was not distinguishable or plainly wrong and held there was no reason to depart from this authority.

In this appeal, the appellant submits that he had an accrued right to have the review decided in accordance with Direction 65 (applicable at the time the AAT made its initial character decision), and not the less advantageous Direction 79 or Direction 90. The appellant says that the later Directions changed what matters he was entitled to have considered, and what the AAT was obliged to consider, and he only lost this entitlement because the Tribunal exceeded its jurisdiction in making the 2018 AAT decision. The appellant relies on the common law protection of rights that are unintentionally affected by legislative change, as well as s 7(2)(c) and (e) of the *Acts Interpretation Act 1901* (Cth) ("the *Acts Interpretation Act*"). These subsections protect accrued rights and preserve obligations incurred from laws and instruments that would otherwise 'affect' them (unless intentionally).

The Minister contends that the wording of s 499(2A) of the *Migration Act* requires the AAT to comply with the applicable Direction as at the time of its decision, not the time the application was made. They further submit that the appellant did not acquire a right to compliance with Direction 65 or a favourable decision, saying at best the appellant had a hope or expectation of one, but this was conditional on the AAT exercising its discretion favourably, and this does not engage s 7 of the *Acts Interpretation Act*. Alternatively, the Minister submits that Directions 79 and 90, which each expressly state that the previous Direction is revoked with effect from the date that the new Direction applies, show an unambiguous intention to affect any such right.

The sole ground of appeal is:

- The Full Court of the Federal Court of Australia erred in failing to find that the primary judge erred in failing to find that the Administrative Appeals Tribunal erred jurisdictionally in failing to comply with Direction 65 given under s 499(1) of the *Migration Act*.

COMMISSIONER OF TAXATION v PEPSICO, INC.**(M98/2024; M100/2024; M101/2024)****COMMISSIONER OF TAXATION v STOKELY-VAN CAMP, INC.****(M99/2024; M102/2024; M103/2024)**

Court appealed from: Full Court of the Federal Court of Australia
[2024] FCAFC 86

Date of judgment: 26 June 2024

Special leave granted: 7 November 2024

PepsiCo Beverage Singapore Pty Ltd (“PBS”) is an Australian company which, like each of the Respondents (two American companies), is a member of the PepsiCo group. Pursuant to exclusive bottling agreements (“EBAs”) made in 2009 between the Respondents and Schweppes Australia Pty Ltd (“SAPL”), SAPL was licensed to use trade marks and other intellectual property owned by PepsiCo Inc and was required to sell and distribute beverages branded Pepsi, Mountain Dew, and Gatorade. The EBAs also governed the exclusive selling to SAPL by the Respondents or a related entity of all necessary beverage concentrate, and specified the unit pricing of such concentrate (but did not provide for any payment by SAPL for the use of PepsiCo Inc’s intellectual property).

In the income years ending 30 June 2018 and 30 June 2019, SAPL manufactured and sold beverages in accordance with the EBAs, purchasing concentrate from PBS, which the Respondents had arranged to be the related entity selling the concentrate. SAPL was not required to, and did not make, payments to the Respondents. PBS transferred 99.95% of the money it received from SAPL to a Singaporean company in the PepsiCo group.

The Appellant assessed the Respondents as non-residents liable for royalty withholding tax (“RWT”) under section 128B(2B) of the *Income Tax Assessment Act 1936* (Cth) (“ITAA 1936”), on the basis that the Respondents had derived income from the payments made by SAPL and that those payments had included royalties for the use of the Respondents’ intellectual property. The Appellant also assessed the Respondents, in the alternative, as liable to pay diverted profits tax (“DPT”) on the basis that they had entered into a “scheme” to reduce tax, within the meaning of Part IVA of the ITAA 1936, and that they had thereby obtained a “DPT tax benefit” within the meaning of s 177J(1)(a) of the ITAA 1936.

The Respondents commenced proceedings under s 39B of the *Judiciary Act 1903* (Cth), seeking declarations that RWT was not payable, and pursuant to Part IVC of the *Taxation Administration Act 1953* (Cth) (“the TAA”), challenging the assessments for DPT. On 22 December 2023, Moshinsky J declared that the Respondents were liable to pay RWT, and set aside the notices of assessment for DPT that had been issued by the Appellant. His Honour found that part of the payments by SAPL under the EBAs were made as consideration for the right to use intellectual property licensed by the Respondents, and therefore included a “royalty” within the meaning of that term as defined in s 6(1) of the ITAA 1936. Moshinsky J also held that the royalty component of the payments was income derived by the Respondents. His Honour nevertheless proceeded to consider potential DPT, finding that the Respondents had undertaken a scheme to obtain a tax benefit (no liability to pay Australian RWT) and to reduce foreign tax (US tax on their income), and that the relevant provisions of Part IVA of the ITAA 1936 therefore

would have applied, absent the finding as to royalties and the conclusion as to liability for RWT.

The Respondents appealed in relation to RWT. The Appellant also appealed, contending that, were the Respondents to succeed in their appeals they ought nevertheless to be held liable to pay DPT.

The Full Court of the Federal Court (Perram, Colvin and Jackman JJ) unanimously allowed the Respondents' appeals and, by a majority (Colvin J dissenting) dismissed the Appellant's appeals.

In relation to RWT, Perram and Jackman JJ found that the payments by SAPL were for concentrate alone, and did not include a component paid as consideration for the use of intellectual property so as to constitute a "royalty" as defined in s 6(1) of the ITAA 1936. Their Honours also found that none of the moneys received by PBS from SAPL constituted income derived by the Respondents, as the EBAs did not give rise to any antecedent obligation on SAPL to pay the Respondents that could support a finding that the payments to PBS "came home" to the Respondents as payments made at their direction. The Respondents therefore were not liable for RWT under s 128B(2B) of the ITAA 1936. Colvin J held that the EBAs were properly construed as agreements to bottle, sell and distribute products of valuable brands such that SAPL's payments did include amounts paid as consideration for the use of intellectual property, although his Honour agreed with the majority that income was not derived by the Respondents and that the terms of s 128B(2B) therefore were not met.

In respect of DPT, all members of the Full Court considered it could be found that, objectively, the Respondents had entered into a scheme for a principal purpose of obtaining a tax benefit (no ostensible receipt of royalties and therefore no liability for RWT), satisfying that criterion as prescribed in s 177J(1)(b)(i) of the ITAA 1936. Perram and Jackman JJ held that the Appellant's appeals must fail, however, as no decision could be made on any tax effect because there were no postulates which were reasonable alternatives to the scheme (s 177CB(3)), such being a necessary element in the consideration of any tax benefit (s 177C) obtained in connection with a scheme (s 177J(1)(a)). This was after assessing the Appellant's alternative postulates, which were that the EBAs might reasonably be expected to provide that the payments by SAPL were for all the property provided (not only the concentrate), or that the payments included a royalty for the right to use intellectual property. Perram and Jackman JJ considered that neither the Appellant's postulates nor the evidence (which included no analysis of the EBAs' economics, such as the concentrate's manufacturing costs) could support inferences that the concentrate price included a distinct value of, and a royalty for, the licence to use intellectual property rights. Such lack of evidence also enabled the Respondents to discharge their burden, under s 14ZZO(b)(i) of the TAA, of showing that there were no reasonable alternative postulates. Colvin J, however, would have allowed the Appellant's appeals. His Honour found that there was a tax benefit, because if the EBAs had not been entered into, a postulated bottling agreement might reasonably be expected to have provided for a royalty to be paid by SAPL to the Respondents for the use of their trade marks.

The grounds of appeal are:

- The Full Court ought to have found that payments made by SAPL, under an exclusive bottling agreement entitling SAPL to bottle and sell branded PepsiCo Group beverages in Australia, included a “royalty” paid “as consideration for” the use of or right to use intellectual property licensed by the Respondents to SAPL, within the meaning of s 6(1) of the ITAA 1936.
- The Full Court ought to have found that the royalty component of the exclusive bottling agreement payments was income “derived” by and was “paid to” the Respondents under s 128B(2B) of the ITAA 1936, and withholding tax was payable under s 128B(5A).
- In the alternative to the above grounds, if no royalty withholding tax was payable by the Respondents, the Full Court of the Federal Court of Australia ought to have found that the Respondents were liable to [pay] diverted profits tax for the purposes of ss 177J and 177P of the ITAA 1936.

By notice of contention, the Respondents raise a ground that, even if the Respondents obtained “a DPT tax benefit” in connection with the scheme within the meaning of s 177J(1)(a) of the ITAA 1936, the condition in s 177J(1)(b) (regarding “principal purpose”) was not satisfied in relation to the scheme in the relevant year of income.

THE KING v BATAK (S148/2024)

Court appealed from: Court of Criminal Appeal of the Supreme Court of
New South Wales
[2024] NSWCCA 66

Date of judgment: 10 May 2024

Special leave granted: 7 November 2024

In April 2019, two men broke into an apartment in order to steal drugs and money. Two people resided in the apartment: Sargon Odisho and John Odisho. Sargon Odisho was a drug dealer. Each intruder was armed with a handgun. Sargon Odisho also had a handgun. A confrontation occurred and shots were fired by one of the intruders and by Sargon Odisho. John Odisho was shot in the head by a bullet fired by the intruder, and he died later that day. Sargon Odisho was struck by two bullets, and one of the intruders, Cengiz Coskun, was also struck. The identity of the other intruder remains unknown.

The respondent, Cem Batak, was not present at the robbery. Earlier that night, the respondent supplied Mr Coskun with a loaded Glock pistol and a high visibility shirt for use in the home invasion. Following a trial by jury, the respondent was convicted of two offences: the foundational offence of attempting to rob Sargon Odisho of drugs and money whilst armed with a dangerous weapon (contrary to section 97(2) of the *Crimes Act 1900* (NSW) (“the Act”)), and the constructive murder of John Odisho (contrary to s 18(1)(a) of the Act). Mr Coskun was separately tried and convicted of the same two offences. The respondent appealed his conviction to the Court of Criminal Appeal of the Supreme Court of New South Wales (“NSWCCA”) on four grounds. Relevantly, the respondent’s first ground of appeal was that it was an error of law to permit constructive murder to be left to the jury on the basis of accessorial liability.

Constructive murder is taken to have been committed where an act or omission of the accused caused the death charged, and was done in an attempt to commit, or during or immediately after the commission, by either the accused, or some accomplice with him or her, a foundational crime of the identified degree of seriousness (a crime punishable by imprisonment for life or for 25 years). At trial, the pathway to the respondent being liable for murder that the prosecution pursued was on the basis of the respondent being an accessory before the fact, whereby the respondent intentionally encouraged and assisted the commission of the foundational s 97(2) offence by provision of a gun and/or a high visibility shirt, knowing that they were to be used for such an offence, and where the Crown further contended that the respondent contemplated the possibility that the gun could be discharged in the commission of the robbery, resulting in grievous bodily harm or death.

The respondent argued in the NSWCCA that the law does not recognise or provide for a person to be liable to a charge of constructive murder, pursuant to s 18(1)(a), on the basis of being an accessory before the fact to a relevant foundational offence. The respondent contended that, for liability for constructive murder to arise under s 18(1)(a), the act causing death must be done by either the accused or an accomplice who was present and part of a joint criminal enterprise to commit the foundational offence. If that construction is correct, the respondent – who neither discharged the fatal shot nor was present at the scene of the shooting as an

accomplice – cannot be liable for constructive murder. The respondent argued that to establish an accessory before the fact offence, the Crown must prove that the accessory assisted the principal in some way to commit the particular serious indictable offence, in this case, murder.

The NSWCCA observed that a charge of constructive murder under s 18(1)(a) of the Act involves proof not only of the foundational offence, but of a distinct element of there being an act or omission causing death. To make out liability against a person based on being an accessory before the fact, consistently with the principles articulated in *Giorgianni v The Queen* (1985) 156 CLR 473 (“*Giorgianni*”), it would be necessary for the prosecution to show that the accessory knew all the essential facts which made what was done a crime, and then intentionally aided, abetted, counselled or procured the acts of the principal. One of the elements of constructive murder is that an act or omission occurs causing death. *Giorgianni* would thus require knowledge in the accessory before the fact of an intent to do so such an act; yet if there was such a plan, it would fall within the first category of murder under s 18(1). The very point of constructive murder is that there is no need to establish intent or recklessness as to causing death or grievous bodily harm. To require foresight of the act causing death is inconsistent with the notion of constructive murder. Accordingly, the NSWCCA concluded that liability as an accessory before the fact cannot work together coherently with liability for constructive murder. It is a case where the application of sections dealing with aiding and abetting are excluded by the nature of the substantive offence or the general tenor or policy of the provisions by which it is created. Consequently, the NSWCCA upheld appeal Ground 1 with respect to the constructive murder charge, quashed the respondent’s constructive murder conviction, and ordered a retrial in relation to that charge.

The sole ground of appeal is:

- The Court of Criminal Appeal of New South Wales erred in concluding that it was an error of law to permit constructive murder to be left to the jury on the basis of accessorial liability.

The respondent seeks leave to file a notice of contention out of time. The ground of the respondent’s proposed notice of contention is:

- The Court of Criminal Appeal erred in failing to uphold Ground 2 of the appeal before it, on the basis that the trial miscarried on account of the failure of the trial judge to properly direct the jury on Count One in accordance with *Giorgianni* as to:
 - (a) the requisite state of knowledge of an accessory before the fact to constructive murder as to the act causing death; and
 - (b) the requirement that the putative accessory give intentional assistance or encouragement to the principal with this knowledge.

LAMING v ELECTORAL COMMISSIONER OF THE AUSTRALIAN ELECTORAL COMMISSION (B75/2024)

Court appealed from: Full Court of the Federal Court of Australia
[2024] FCAFC 109

Date of judgment: 23 August 2024

Special leave granted: 5 December 2024

Between 6 December 2018 and 18 May 2019, the appellant was a member of the House of Representatives and the administrator of a public Facebook page titled “*Redland Hospital: Let’s fight for fair funding*”. He was also a candidate in the federal election held on 18 May 2019. On three occasions, namely 24 December 2018, 7 February 2019, and 5 May 2019, he posted content to the Facebook page. The respondent (“the AEC”) alleged that each of the posts constituted ‘electoral matter’ within the meaning of section 4AA(1) of the *Commonwealth Electoral Act 1918* (Cth) (“the Act”), so that they were required to contain the particulars specified by s 321D(5) of the Act. The AEC alleged that the appellant had contravened that section by (1) communicating an electoral matter; (2) to a person; (3) as a disclosure entity; and (4) without disclosing his name and relevant town or city. The AEC commenced proceedings seeking declarations in respect of breaches of s 321D and the imposition of pecuniary penalties.

The appellant conceded that, if the posts were electoral matter, they did not include the required particulars so that he had contravened s 321D in respect of each post. The primary judge held that the 24 December post was “an electoral matter”. The appellant ultimately admitted that the remaining two posts were each “electoral matter”. It was common ground that the three posts had been viewed by (respectively) six, eight and fourteen people (i.e. a total of twenty-eight people across the three posts). The AEC contended that s 321D was contravened on each occasion any of the posts was viewed by a person. The primary Judge held that the appellant contravened s 321D on three occasions; that is each time he made a post. His Honour imposed pecuniary penalties for those three contraventions.

The AEC’s appeal to the Full Court was allowed, with the Court (Logan, Perry and Meagher JJ) holding that s 321D was contravened on each occasion a post was viewed by a person, so that although the appellant had only authored and published three Facebook posts, he had contravened s 321D on twenty-eight occasions. The Court considered the statutory purpose and history of Part XXA of the Act (where s 321D is found) and concluded that there were a number of textual and contextual matters that required a result different to that of the primary judge. Their Honours accordingly determined to re-exercise the discretion as to penalty, and doubled the fine imposed on the appellant compared to that which had been imposed by the primary Judge.

The sole ground of appeal is:

- The Full Court erred in finding that s 321D(5) of the *Commonwealth Electoral Act 1918* (Cth) was contravened on each occasion that a person viewed a post published by the Appellant on the Facebook page ‘Redland Hospital: Let’s fight for fair funding’, rather than finding a contravention occurred when the Appellant caused a post to be published.