

TAYLOR v ATTORNEY-GENERAL OF THE COMMONWEALTH (M36/2018)

Date Special Case referred to Full Court: 8 March 2019

On 16 March 2018, in accordance with Part 2.2 of the *Criminal Procedure Act 2009* (Vic), the plaintiff lodged a charge-sheet and summons with a Registrar of the Magistrates Court of Victoria alleging that Ms Aung San Suu Kyi had committed a crime against humanity contrary to ss 268.11 and 268.115 of the *Criminal Code Act 1995* (Cth) (the Code). Ms Suu Kyi is the Foreign Minister of the Republic of the Union of Myanmar. Under s 268.121 of the Code, proceedings for an offence against s 268.11 must not be commenced or continued without the consent of the defendant. The plaintiff sought that consent on 16 March 2018. On or about 19 March 2018, the defendant refused to give his consent, in accordance with the ministerial submission provided to him, which said that "*incumbent heads of state, heads of government and foreign ministers all enjoy full immunity from foreign criminal proceedings under customary international law*".

The plaintiff filed an application in the original jurisdiction of this Court, seeking writs of prohibition, mandamus and certiorari against the defendant, alleging that in making the decision to refuse consent he misunderstood the law, and committed jurisdictional error. The defendant contends that the decision to refuse consent to a prosecution is not susceptible of review, having regard both to the long-settled constitutional position concerning the involvement of the judiciary in reviewing decisions relating to criminal prosecutions and to the clear terms of the provisions under which the impugned decision was made. He further contends that, in any event, the claim that he fell into jurisdictional error rests upon incorrect contentions about the content of international law, and on a flawed understanding of the extent to which s 268.121(1) permitted him to consider international law.

The plaintiff contends that Ms Suu Kyi does not have the claimed immunity because: (a) the only relevant immunity under Australian law is that conferred under the *Diplomatic Privileges and Immunities Act 1967* (Cth), the *Consular Privileges and Immunities Act 1972* (Cth) and the *Foreign States Immunities Act 1985* (Cth) which do not apply to her; (b) the claimed immunity is inconsistent with the legislated immunities and does not form part of the common law of Australia; or, (c) alternatively, if the claimed immunity formed part of customary international law, it did not form part of the law of Australia and it did not apply to an offence against s 268.11 of the Code.

The plaintiff also contends that the defendant failed to afford him procedural fairness in refusing consent on the basis of Ms Suu Kyi's claimed immunity without giving him notice of, or any opportunity to respond to, that issue.

On 8 March 2019 Nettle J referred the Special Case for consideration by the Full Court.

Notices of Constitutional Matter have been served. No State or Territory Attorney-General has filed a Notice of Intervention.

The questions in the Special Case include:

- Is the defendant's decision to refuse to consent under s 268.121 of the Criminal Code to the prosecution of Ms Suu Kyi insusceptible of judicial review?
- If no, did the defendant make a jurisdictional error in refusing consent on the ground that Australia was obliged under customary international law to afford an incumbent foreign minister absolute immunity from Australia's domestic criminal jurisdiction for one or more of the following reasons:
 - (a) Under customary international law as at the date of the defendant's decision, the asserted immunity did not apply in a domestic criminal prosecution in respect of crimes defined in the Rome Statute?
 - (b) By reason of:
 - (i) the declaration made by Australia upon ratifying the Rome Statute;
 - (ii) Australia's treaty obligations under the Rome Statute and/or
 - (iii) the enactment of the *International Criminal Court Act 2002* (Cth) and the *International Criminal Court (Consequential Amendments) Act 2002* (Cth),
the obligations assumed by Australia under international law were such that the Defendant was not entitled to refuse, on the basis of the asserted immunity, to consent to the domestic prosecution of Ms Suu Kyi in respect of crimes defined in the Rome Statute?
 - (c) By reason of:
 - (i) the declaration made by Australia upon ratifying the Rome Statute;
 - (ii) Australia's treaty obligations under the Rome Statute;
 - (iii) the enactment of the *International Criminal Court Act 2002* (Cth) and the *International Criminal Court (Consequential Amendments) Act 2002* (Cth);
and/or
 - (iv) the *Diplomatic Privileges and Immunities Act 1967* (Cth), the *Consular Privileges and Immunities Act 1972* (Cth) and the *Foreign States Immunities Act 1985* (Cth),
the Defendant was not entitled under Australian domestic law to refuse, on the basis of the asserted immunity, to consent to the domestic prosecution of Ms Suu Kyi in respect of crimes defined in the Rome Statute?