



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 07 Apr 2021 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number: S129/2020
File Title: Zhang v. The Commissioner of Police & Ors
Registry: Sydney
Document filed: Form 27F - Outline of oral argument
Filing party: Plaintiff
Date filed: 07 Apr 2021

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

BETWEEN

JOHN SHI SHENG ZHANG

Plaintiff

and

THE COMMISSIONER OF POLICE & ORS

Defendants

PLAINTIFF'S OUTLINE OF ORAL ARGUMENT

Part I: Certification

1 This outline of oral submissions is in a form suitable for publication on the internet.

Part II: Outline of Propositions

Question 1(a): Misstatement of the substance of sec 92.3(2) of the *Criminal Code*

2 The substantial misstatement of the offence in the third condition of each of the Warrants as importing an element of influence upon a process, or the exercise of a right or duty, instead of influence upon a person, did not comply with sec 3E(5) of the *Crimes Act 1914* (Cth): *Smethurst* [42] – [45], PS [7], [11]. The statement of the offence was insufficient
10 to guide as to the object of the search or its limits, because it did not convey the nature of the offence correctly, which, in the circumstances of this case, required clarity as to the elements of the offence: PS [11], plaintiff's reply submissions (PRS) [2] – [3].

Question 1(b), ground 1: failure to identify the target with precision (sec 92.3(2))

3 The statement of the offence in the third condition of each of the Warrants did not identify the alleged target with precision: PS [16]. It was not clear that Mr Moselmane was the alleged target, because it was not clear that any target was named. The consequence was that the limits and object of the search were unknown: PS [18].

Question 1(b), ground 2: failure to identify the foreign principal with precision (sec 92.3(1) and (2))

20 4 It was necessary to identify the foreign principal to assess the object and limits of the search, so that the plaintiff and those executing the warrants could identify the entity on whose behalf or with whom it was suspected the plaintiff and others collaborated in engaging in the relevant conduct: PS [19], [21] – [22].

5 The identity of the foreign principal was unclear. The repeated references to China do not mean that the foreign principal is one and the same, given the many aspects of a foreign country which may constitute foreign principals: PS [21].

Questions 1(c), (d), (3) and (4): constitutional argument

6 The Provisions effectively burden the implied freedom: PS [33]. That burden is not slight: PRS [9] – [10].

7 The purpose of the Provisions is the prevention of any potential undisclosed or non-transparent foreign influence over Australian political or governmental processes, or over Australian democratic or political rights or duties, regardless of the character of that influence: PS [36].

8 That purpose is illegitimate because it prevents communication within the Australian political system of advancing policy positions favourable to foreign actors: PS [45]. A person's conduct may fall foul of the Provisions if any part of it is covert.

9 The purpose advanced by the Commonwealth and NSW of "protecting Australia's sovereignty by reducing the risk of foreign interference in Australia's political or governmental processes" is illegitimate because it proceeds from the premise that foreign interference is inherently harmful, whereas the Provisions are aimed at foreign interference which is covert in part, or undisclosed, regardless of whether it could cause any harm: PRS [12].

10 If the Provisions have a legitimate purpose, they are not proportionate to that purpose: PS [49].

11 There is no rational connection between the Provisions and a legitimate purpose, by reason of the breadth of effect of the Provisions: PS [50] – [52].

12 The Provisions are not necessary for the achievement of any legitimate purpose by reason of the obvious and complete alternative available: PS [53], PRS [14] – [16].

13 The Provisions are inadequate in their balance between the importance of the purpose served by the restrictive measure and the extent of the restriction on the freedom: PS [55]. The effect on the freedom is direct, and is not balanced by the benefits sought to be achieved.

Question 2: section 3LA Orders

14 It is common ground between the plaintiff and the Commonwealth that if the First Warrant is invalid in its entirety, the Section 3LA Orders are also invalid: PS [24] – [27], DS [16].

Question 5: relief

15 Writs of certiorari should issue quashing the Warrants, and the Section 3LA Orders, in consequence of their invalidity: PS [58].

16 A declaration as to the invalidity of the Provisions should be made, either as part of the plaintiff's case as to the invalidity of the Warrants or independently, on the basis that the

plaintiff has a real interest in the determination of the question of whether the Provisions are invalid: PS [59], PRS [19].

10 17 An injunction reversing the effects of the invalid Warrants should also be granted: PS [60]. As recognised by the plurality in *Smethurst v Commissioner of the Australian Federal Police* (2020) 94 ALJR 502 at 528 [99] - [100], the public interest in the disclosure of criminality is the same public interest as that recognised by the legislature in enacting statutes which authorise search warrants and which informs the view of the courts and the legislature as to the admissibility of unlawfully obtained evidence. That same public interest inheres in the accusatorial process for the investigation, prosecution and trial of a criminal offence and requires the timely imposition of constraints on the future use of unlawfully obtained material, in order to avoid compounding of its use leading to undesirable outcomes, as occurred in *Strickland v Commonwealth DPP* (2018) 266 CLR 325.

18 As recognised in *Project Blue Sky Inc & ors v Australian Broadcasting Authority* (1998) 194 CLR 355 at 393 [100], even if a contravention of a statutory provision is not invalid, it is unlawful and injunctive relief may be available to restrain the contravener from taking any further action based on its unlawful action.

7th April 2021

20



Bret Walker



Victoria Brigden

