SHORT PARTICULARS OF CASES
APPEALS

BRISBANE CIRCUIT - JUNE 2006

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MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS v. QAAH OF 2004 & ANOR (B2/2006)

Court appealed from: Full Court of the Federal Court of Australia

Date of judgment: 27 July 2005

Date of grant of special leave: 16 December 2005

The respondent, a citizen of Afghanistan, arrived in Australia on 27 September 1999 and on 28 March 2000 was granted by a delegate of the applicant a Class XA temporary protection visa. The respondent then applied, on 17 April 2000, for a permanent protection visa. Changes were made to the *Migration Regulations* 1994 (Cth) prior to the determination of the respondent's permanent protection visa application which had the effect of deeming an application for a Class XC temporary protection visa to have been made by holders of an XA visa granted before 19 September 2001 who had an unresolved permanent protection visa application. Accordingly, on 27 March 2003, a delegate of the appellant granted to the respondent a Class XC temporary protection visa. On 21 November 2003, a delegate of the appellant refused the respondent's application for a permanent protection visa.

That decision was affirmed by the Refugee Review Tribunal on 3 May 2004. In that decision, the Tribunal concluded that the cessation clause (Article 1C(5)) of the *Convention Relating to the Status of Refugees* applied to the respondent and that there had been a change of circumstances in his country of nationality so that he ceased to be a refugee by reference to the circumstances originally claimed in his protection visa application. However, the Tribunal proceeded to consider, pursuant to Article 1A(2) of the *Refugees Convention*, new claims raised by the respondent in his application for a permanent protection visa, and concluded that those claims were insufficient to establish that he now had well-founded fear of persecution for a Convention reason if he were to return to Afghanistan. The respondent then lodged an application to the Federal Court of Australia for review of the decision of the Tribunal.

On 11 November 2004, the Federal Court (Dowsett J) dismissed the application with costs. Dowsett J found that the Tribunal had erred in its approach to the determination of the respondent's application for a permanent protection visa. His Honour concluded, in reliance upon the decision in *Chan v MIEA* (1989) 169 CLR 379, that the question for determination by the Tribunal was whether, at the time of its decision, the protection visa applicant had a well-founded fear of persecution for a Convention reason. His Honour concluded that in the circumstances it was not necessary to decide whether the cessation clause in Article 1C(5) had been engaged as a result of changed circumstances in the Afghanistan. The respondent appealed to the Full Court of the Federal Court.

On 27 July 2005 a majority of the Full Court (Wilcox and Madgwick JJ) allowed the appeal. In separate reasons, their Honours concluded that where a person has already been recognised as a refugee (here, by the grant of the temporary protection visa Class XA in March 2000), the inquiry for the decision-maker in relation to the application for a permanent protection visa must first be a consideration of whether the cessation clause in Article 1C(5) of the *Refugees Convention* has been activated by reason of a change in the circumstances which led to the grant of the first protection visa. The majority held that it is not

until this issue has been resolved to the detriment of an applicant for refugee status that there can be any consideration under Article 1A(2) of the *Refugees Convention* of new claims to the refugee status. Their Honours concluded that because the cessation clause works to the disadvantage of the refugee, it therefore requires a strict and restrictive approach before the refugee is stripped of the benefits of recognition of refugee status, which include an assured future in the host country.

Wilcox J observed that there is a considerable practical importance in the distinction between how a decision-maker approaches the grant of refugee status under Article 1A(2) and how that decision-maker approaches the prospective subsequent withdrawal of refugee status under the cessation clause. When considering the initial grant of refugee status, the evidentiary burden, loosely termed, rests on the applicant. Where cessation is being considered, that burden rests on the State. The majority, having concluded that the Tribunal approached its determination correctly, nevertheless found that the Tribunal had erred in its consideration of whether there had been substantial, durable and profound changes in circumstances in Afghanistan and held that this amounted to a jurisdictional error.

Lander J would have allowed the appeal, and relied upon the reasoning of Emmett J in *NBGM v MIMIA* [2004] FCA 1373 (an appeal against which was dismissed on 12 May 2006 by the Full Court, Black CJ, Marshall, Mansfield, Stone and Allsop JJ, reported at [2006] FCAFC 60). Lander J concluded that the scheme of the *Migration Act* and the *Migration Regulations*, particularly section 36(2) of the Act and subclass 866.221 of Schedule 2 to the Regulations, means that each time there is an application for a temporary protection visa (except the Class XC visa which is granted by operation of the Regulations) or a permanent protection visa, the applicant for that visa must establish afresh that he or she has a well-founded fear of persecution for a Convention reason, and thus is a person to whom Australia owes protection obligations. His Honour concluded that each such application is a fresh application and that the cessation clause in the *Refugees Convention* has no operation after the grant of a temporary protection visa and before the determination of a permanent protection visa application. His Honour agreed with Emmett J in *NBGM v MIMIA* that the only question for the decision-maker is whether at the time of determination of the fresh protection visa application the visa applicant was a refugee.

The questions of law said to justify a grant of special leave to appeal include:

- The interpretation and application of the cessation clause in the *Refugees Convention*;

- Whether the cessation clause poses the same question in substance as Article 1A(2) of the *Refugees Convention*, namely, does the person now have a well-founded fear of being persecuted for a Convention reason; and

- Whether there is an evidential burden imposed upon a State before it can invoke the cessation clause in respect of a person who at some point had been recognised as a refugee.

PELDAN & ANOR v. ANDERSON & ANOR (B110/2005)

Court appealed from: Federal Court of Australia

Date of judgment: 25 August 2005

Date of grant of special leave: 16 December 2005

On 11 September 2003, Mr and Mrs Pinna executed a transfer in relation to a property of which they were joint tenants for the purpose of severing the joint tenancy. Upon registration of the instrument of transfer, Mr and Mrs Pinna held title as tenants in common in equal shares. On 12 January 2004, Mrs Pinna died. On 21 April 2004, Mr Pinna was declared bankrupt. He had been insolvent at the time of execution of the transfer. Mrs Pinna's interest in the property passed to her children under her will.

On 22 February 2005, Jarrett FM of the Federal Magistrates Court held that the transfer of the bankrupt's interest in the property was void against the trustees of the bankrupt estate, pursuant to section 121(1) of the *Bankruptcy Act* 1966 (Cth). The respondents, who are the executors of Mrs Pinna's estate, appealed to the Federal Court of Australia (Kiefel J sitting as a Full Court). The Court held that the instrument of transfer effected a severance of the joint tenancy and a transfer of an interest in the property from each joint tenant to him or herself. The Court held that this did not amount to a transfer "to another person" as required by section 121(1)(a) of the *Bankruptcy Act* 1966 (Cth). The Court observed that the purpose of section 121 is to prevent fraudulent dispositions of property and to protect creditors from such dealings, but not to enlarge creditors' interests because of some unforeseen event such as, here, the particular sequence of the severance of the joint tenancy, followed by Mrs Pinna's death, then by Mr Pinna's bankruptcy.

The grounds of appeal include:

- Whether a severance of a joint tenancy constitutes a transfer of property for the purposes of section 121 of the *Bankruptcy Act;*

- Whether the severance of the joint tenancy was void as against the appellant, by reason of section 121 of the *Bankruptcy Act;* and

- Whether the purpose of section 121 of the *Bankruptcy Act* is to protect creditors by preventing fraudulent dispositions of property.

TULLY v. THE QUEEN (B47/2005)

Court appealed from: Court of Appeal of the Supreme Court of Queensland

Date of judgment: 13 May 2005

Date of grant of special leave: 10 March 2006

The appellant formed a relationship with the complainant's mother in early 1999. The applicant was subsequently convicted on four counts of indecently dealing with a child under 16 years of age (that is, the complainant), and on three counts of permitting himself to be indecently dealt with by a child under 16 years of age. The complainant was aged between nine and 10 when the offences occurred between January 1999 and June 2000.

The complainant told her mother about the applicant's conduct in April 2002. Her evidence-in-chief consisted of two tape-recorded interviews with New South Wales police officers in April and May 2002. The applicant was convicted on seven counts, but the jury was unable to agree on a verdict on another count of permitting himself to be indecently dealt with and on two counts of rape. At the trial, there was also evidence from the complainant of a number of acts of sexual assault and rape which were not charged. The applicant was sentenced to three years' imprisonment on each of the seven counts, to be served concurrently.

The Court of Appeal (Williams, Keane JJA & Helman J) dismissed the applicant's appeal against conviction. There were a number of grounds of appeal raised in the Court of Appeal, but the only ground raised in the application to this Court for special leave to appeal was the alleged inadequacy of, or failure to give, directions to the jury in relation to the uncorroborated evidence of the complainant, the evidence of the uncharged acts, and the applicant's failure to give evidence. The grant of special leave to appeal was confined to the first two aspects of that ground.

The grounds of appeal include:

- Whether the learned trial Judge adequately instructed the jury to scrutinise the evidence of the complainant given the delay in making her complaint, her age at the time, and the inconsistencies between her first complaint to the police and her evidence at trial;

- Whether the directions of the learned trial Judge to the jury in relation to the evidence of uncharged acts was adequate.