SHORT PARTICULARS OF CASES
APPEALS

AUGUST 2006

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ATTORNEY-GENERAL FOR VICTORIA v ANDREWS & ORS (M83/2005)

Cause removed from: Full Federal Court

Date of judgment: 17 February 2005

Date cause removed: 6 July 2005

This matter concerns the validity of determinations made by the Minister for Employment and Workplace Relations (the first respondent) pursuant to s 100 of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) ("the Act"), which provides:

> *If the Minister is satisfied that it would be desirable for this Act to apply to employees of a corporation that:*
>
> *(a) is, but is about to cease to be, a Commonwealth authority; or*
>
> *(b) was previously a Commonwealth authority; or*
>
> *(c) is carrying on business in competition with a Commonwealth authority or with another corporation that was previously a Commonwealth authority;*
>
> *the Minister may, by notice in writing, declare the corporation to be eligible to be granted a licence under this Part.*

On 7 July 2004 the Minister declared that the third respondent ("Optus") was eligible to be granted a licence under Part VIII of the Act, which effectively allowed it to become a self-insurer under the Act and meant that it was not subject to the laws of a State or Territory relating to workers' compensation. A similar declaration was made in relation to the Toll group of companies on 30 August 2004. The Victorian Workcover Authority ("the VWA") issued proceedings in the Federal Court, seeking declarations that the licences granted to Optus and Toll were invalid, void and of no force and effect because the Minister failed to afford the VWA a fair hearing before making the determinations; and seeking declarations, certiorari and other relief on the basis that ss 104(1), 108(1) and 108A(7)(a) of the Act were beyond the legislative power of the Commonwealth. By consent Optus was joined as a respondent. The Attorney-General for Victoria intervened in support of VWA.

The trial judge (Selway J) found that the VWA did not have a right to be heard by the Minister before the declarations were made, because the breadth of the discretion conferred by s 100 meant that the VWA could not have had a legitimate expectation that the Minister would not make a determination that would prejudicially affect its interests. With respect to the Constitutional issue, the VWA argued relied on the proviso to the insurance power in s 51(xiv) of the Constitution. Selway J held that the proviso did not apply to invalidate a general law that incidentally affects a State insurer. He found there was no basis for treating the words "State insurance" in s 51(xiv) as extending to State laws requiring persons to insure with a State insurer or to State laws conferring an economic monopoly on a State insurer. Properly analysed, the relevant provisions of the Act did not have any effect on "State insurance" so understood. Thus those provisions were not invalid for any lack of legislative power in the Commonwealth Parliament.

The Attorney-General for Victoria appealed to the Full Federal Court. The grounds of appeal include:

- The learned judge erred in failing to hold that ss 104(1), 108(1) and 108A(7)(a) of the SRC Act "touch and concern" State insurance in a way that is not merely "insubstantial, tenuous and distant" and are consequently not laws "with respect to" "insurance other than State insurance";

- The learned judge erred in holding that the words "State insurance" in s 51(xiv) of the Commonwealth Constitution do not extend to State laws requiring persons to insure with a State insurer or to State laws conferring an economic monopoly on a State insurer;

- The learned judge erred in holding that the mandatory requirement contained in the *Accident Compensation Act* 1985 (Vic) and the *Accident Compensation (Workcover Insurance) Act* 1993 (Vic), that employers in Victoria be insured in relation to workers compensation liability (unless they are authorised under those Acts to be "self-insured"), was not "State insurance".

On 6 July 2005, Gleeson CJ ordered, by consent, that the cause pending in the Full Court namely the Appeal, be removed to the High Court.

SZAYW v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS (S57/2006)

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

Date of judgment: 12 August 2005

Date of grant of special leave: 10 February 2006

The appellant is a Palestinian who lived in Lebanon. He claimed to fear persecution in Lebanon at the hands of Hezbollah or Islamic Jihad. On the appellant's account, three other applicants for protection visas had shared his experiences in Lebanon. A delegate of the Minister refused to grant any of them a protection visa.

Each sought review of the decision by the Refugee Review Tribunal ("RRT"). The appellant and the other three persons were represented, before the RRT, by the Refugee Advice and Casework Service (Australia) Inc ("RACS"). On 23 December 1998, RACS wrote to the Registrar of the RRT on behalf of the appellant and requested:

> *We confirm that we act for* [the appellant] *in his application for review of the decision refusing to grant a Protection Visa.*
>
> *Please find attached an application for review signed by him.*
>
> *We note that the four young men* [the three others and the appellant] *were together for the events which form their claim. We ask therefore that consideration be given to the same member being allocated to the four persons.*

Responding to this request of RACS, the RRT determined that one member would hear the reviews of the appellant and the three others on the one day. The appellant gave his evidence in the presence of two of the three other persons and inconsistencies with their evidence were discussed with all of them present.

The RRT found that the hardship and discrimination the appellant would suffer as a Palestinian in Lebanon would not amount to persecution and that his claims relating to a link with Hezbollah lacked credibility. It also concluded any censure or disciplinary action the appellant might suffer from the Palestinian Liberation Organisation or the Palestinian Karate Association, the two organisations he "dragged ...into a dishonest visa scheme", would not be for a Convention reason.

Before the Federal Magistrate, the appellant successfully contended he was not given a private hearing as required by s 429 of the *Migration Act* 1958 (Cth) ("the Act"). He also contended, unsuccessfully, that he was denied procedural fairness. In the appeal to the Full Federal Court the Minister challenged the Federal Magistrate's conclusion about whether the hearing was "in private".

The majority of the Full Federal Court (Moore and Weinberg JJ, Kiefel J dissenting) found that the Federal Magistrate erred in construing s 429 so narrowly as to require exclusion of the other persons from the hearing in the

circumstances of the case. The majority found that the expression "in private" in s 429 meant no more than that the hearing not be "in public".

A notice of contention has been filed by the respondent.

The ground of appeal is:

- The majority of the Full Court of the Federal Court erred in finding that the Refugee Review Tribunal did not breach section 429 of the Migration Act 1958 by conducting the hearing other than in private.