SHORT PARTICULARS OF CASES
APPEALS

SEPTEMBER SITTINGS 2010

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MINISTER FOR IMMIGRATION AND CITIZENSHIP V. SZJSS AND ORS (S147/2010)

Court appealed from:	Federal Court of Australia [2009] FCA 1577
Date of judgment:	24 November 2009
Date of grant of special leave:	28 May 2010

The visa applicants (the respondents to the appeal) are a husband and wife from Nepal. They entered Australia in late February 2006 and they applied for protection visas shortly thereafter. Only the husband made claims of persecution. He claimed to be a politically active school teacher who feared persecution from Maoist insurgents in Nepal. He said that that persecution involved him being pressured into making financial "donations" to the Maoists. It also involved him being press-ganged (sometimes for days at a time) into Maoist training camps under threats of violence. In July 2006 the Minister's delegate refused the visa applicants' applications, finding that they could live safely in Kathmandu.

Three adverse decisions of the Refugee Review Tribunal ("RRT") followed the delegate's decision. The first two RRT decisions, dated October 2006 and December 2007 respectively, were set aside by the Federal Magistrates' Court. The matter currently before this Court arises from the third RRT decision dated October 2008.

Prior to the first RRT hearing, the husband produced three letters ("the letters") which were highly corroborative of his claims. Two were from the headmaster of his former school dated 20 March 2006 and 18 May 2006 respectively. The third was from the principal of his daughters' boarding school, also dated 20 March 2006. The second RRT caused an inquiry to be made through the Australian Embassy in Nepal about the genuineness of the letter from the husband's school dated 20 March 2006, along with that from the daughters' boarding school also dated 20 March 2006. (It does not appear that the letter of 18 May 2006 was sent to the Embassy for verification.) The Embassy reported back that both documents were genuine.

The third RRT accepted that the husband had been forced to participate in local Maoist training camps. It also accepted that he was forced to make financial "donations" to the Maoists. In many other respects however the third RRT found that the husband had exaggerated his claims. It also gave no weight to the content of the letters. The third RRT concluded that if the visa applicants returned to Nepal now (and lived in Kathmandu) they would not face a real chance of persecution.

On 11 September 2009 Federal Magistrate Lloyd-Jones dismissed the visa applicants' application for judicial review arising from the third RRT's decision. His Honour rejected the allegation of bias which arose from its use of the phrase "baseless tactic" in response to an apparent shift in the husband's evidence. In relation to the letters, his Honour was satisfied that it was logical for the third RRT to give them no weight at all. This was because their content conflicted with some of the other evidence.

On 24 November 2009 Justice Rares upheld the visa applicants' appeal. His Honour noted that the third RRT's rejection of the letters (on the basis that they had been solicited and they were, presumably, not therefore genuine) amounted to a failure to give proper, genuine or realistic consideration to the visa applicants' claims. He also found that the Magistrate had erred in relation to the bias issue. Justice Rares held that a fair-minded lay-observer (or properly informed lay person) would find the third RRT's use of the phrase "baseless tactic" disturbing in the context of its reasoning. This, coupled with its treatment of the letters, gave rise to an apprehension of bias.

The grounds of appeal include:

- Contrary to the findings of Rares J, the Refugee Review Tribunal's treatment of the letters to which it referred was "rational" and "reasonable" and gave "proper, genuine and realistic consideration" to the merits of the case before it. Alternatively there was no jurisdictional error shown by his Honour's findings.

- Contrary to the findings of Rares J, there was no jurisdictional error shown by the Tribunal's use of the language "baseless tactic".

HILI v THE QUEEN (S142/2010) JONES v THE QUEEN (S143/2010)

Court appealed from: New South Wales Court of Criminal Appeal [2010] NSWCCA 108

Date of judgment: 14 May 2010

Date of referral to the Full Court: 30 July 2010

On 17 August 2009 Mr Hili was arraigned in the District Court at Sydney before Morgan DCJ and pleaded guilty to an offence contrary to s 134.2(1) of the *Criminal Code Act* 1995 (Cth) ("the Criminal Code") by a deception dishonestly obtaining a financial advantage from the Commissioner of Taxation between about 16 January 2002 and about 4 November 2003. On 30 September 2008 Mr Jones pleaded guilty before a Magistrate in the Downing Centre Local Court to three charges as follows: (1) Between about 11 April 2001 and about 20 April 2001 defrauding the Commonwealth contrary to s 29D of the *Crimes Act* 1914 (Cth) ("the Crimes Act"); (2) Between about 7 February 2002 and about 31 October 2003 by a deception dishonestly obtaining a financial advantage from the Commissioner of Taxation contrary to s 134.2(1) of the Criminal Code; (3) Between about 13 January 2003 and about 21 January 2004 dealing with money to the value of $100,000 or more intending that the money would become an instrument of crime contrary to s 400.4(1) of the Criminal Code.

On 13 November 2009 the applicants were sentenced by Morgan DCJ to a term of imprisonment of 18 months, commencing 13 November 2009, with a recognisance release order at the expiration of 7 months, which order would commence on 12 June 2010.

The Crown appealed the sentences and alleged that they were manifestly inadequate. Each of the offences to which the applicants pleaded carried a significant penalty. The maximum penalty for a contravention of s 134.2(1) of the Criminal Code committed by Mr Hili was imprisonment of 10 years and/or a fine of $66,000. In relation to Mr Jones, the contravention of s 29D of the Crimes Act carried a maximum penalty of 10 years imprisonment and/or a fine of $110,000. The contravention of s 134.2(1) of the Criminal Code carried a maximum penalty of imprisonment for 10 years and/or a fine of $66,000 and the offence against s 400.4(1) of the Criminal Code carried a maximum penalty of 20 years imprisonment and/or a fine of $132,000.

The Court of Criminal Appeal (McClellan CJ, Howie and Rothman JJ) allowed the Crown appeals. Rothman J gave the judgment of the Court. His Honour found that the sentencing Judge's exercise of discretion had miscarried and required correction and that a more severe sentence for each of Mr Hili and Mr Jones was required. The sentence imposed on Mr Hili was set aside and in lieu of the sentence imposed for the contravention of s 134.2(1) of the Criminal Code, he was sentenced to a term of imprisonment of 3 years to commence on 13 November 2009 to be released after 18 months, upon entering into a recognisance release order. The sentences imposed on Mr Jones for the contravention of s 29D of the Crimes Act and s 134.2(1) of the Criminal Code were set aside. In lieu of the sentence imposed for the contravention of s 29D, Mr Jones was sentenced to a fixed term of imprisonment of 12 months to commence on 13 November 2009. For the contravention of s 134.2(1) Mr Jones was sentenced to a term of imprisonment of 2 years and 6 months to commence on 13 May 2010. Mr Jones is to be released after 18 months imprisonment, namely on 13 May 2011, upon entering into a recognisance release order.

The questions of law said to justify the grant of special leave include (both matters):

- Whether, absent special circumstances, there is or should be a norm or starting point, expressed as a percentage, for the period of imprisonment of the federal offender for the federal sentence:

  - specified in a recognisance release order made in respect of the federal offence ("pre-release period); or

  - during which the person is not to be released on parole (the non-parole period),

  (the "**Norm**") and if there is or should be a Norm, whether the Norm is or should be the same for all federal offences or differ depending upon the federal offence, relevantly discriminating between federal offences relating to the importation of drugs and federal offences relating to taxation matters or taxation matters, fraud and dishonesty generally.

SELECTED SEEDS PTY LTD v. QBEMM PTY LIMITED & ORS (B16/2010)

Court appealed from: Court of Appeal, Supreme Court of Queensland [2009] QCA 286

Date of judgment: 22 September 2009

Date special leave granted: 12 March 2010

The appellant is a seed merchant. It bought Jarra seed (a seed for livestock fodder) which it then sold to S & K Gargan, which planted the seed and harvested a seed crop from it. S & K Gargan sold that seed to Landmark which also planted the seed and harvested seed which it sold to a Mr and Mrs Shrimp, who planted it for fodder. In fact, the original Jarra seed was contaminated by summer seed, a much lower quality livestock fodder, and the grass crop for the Shrimps comprised only summer seed, which required them to take steps to remove and eradicate it. Mr and Mrs Shrimp brought proceedings against Landmark, to which S & K Gargan and the appellant were joined. The appellant and others settled the proceedings. The appellant then sought indemnity from the respondents which was refused. In the proceedings brought by the appellant to enforce the insurance policy, the respondents relied upon the "efficacy clause" which excluded liability caused or arising from "a failure of any product to germinate or grow or meet the level of growth or germination warranted or represented by the Insured" or from "the failure of any product to correctly fill its intended use or function and/or meet the level of performance, quality, fitness or durability warranted or represented by the Insured". The trial judge (McMurdo J) found for the appellant, concluding that liability for damages arose not from what the product failed to do (that is, grow Jarra grass) but the damage it caused to the claimant's property.

The Court of Appeal (Holmes and Fraser JJA and White J) allowed the respondents' appeal, Fraser JA delivering the principal judgment with which Holmes JA and White J agreed. The Court held that the appellant's only alleged liability to S & K Gargan and others, including the Shrimps, arose only because the seed it supplied did not correctly fulfil its represented or warranted quality as Jarra seed or correctly fulfil its intended function of producing Jarra grass and seed. On a literal interpretation of the efficacy clause, the liability for which the appellant sought indemnity was plainly excluded, even though such an interpretation reduced the extent of cover for product liability.

The grounds of appeal include:

- Whether the Court of Appeal erred in adopting a literal construction of an efficacy exclusion clause, in a broad form products liability policy, which effectively deprived the policy of all practical operation as products liability cover.

- Given that the case proceeded on the basis of agreed facts including that the seed was contaminated, whether it was permissible for the Court of Appeal to make findings contrary to or at odds with that agreed fact.

MINISTER FOR IMMIGRATION & CITIZENSHIP v SZGUR & ANOR
(S179/2010)

Court appealed from:	Federal Court of Australia [2010] FCA 171
Date of judgment:	4 March 2010
Date of grant of special leave:	30 July 2010

The First Respondent is a Nepalese citizen who arrived in Australia in December 2004. In January 2005 he applied for a protection visa, claiming to fear persecution in Nepal due to his association with the Maoist insurgency in that country. That application was unsuccessful and three adverse decisions of the Refugee Review Tribunal ("RRT") followed. (The first two were set aside by the Federal Magistrates' Court.) The matter currently before this Court concerns the third RRT's decision. In its decision to refuse him a protection visa, the third RRT made a number of adverse credibility findings against the First Respondent.

On 7 August 2009 Magistrate Nicholls dismissed the First Respondent's application for judicial review of the third RRT's decision.

The First Respondent's appeal before Justice Rares concerned two principal questions. The first was whether the third RRT had an adequate basis for taking into account the First Respondent's claimed depression and bipolar mood disorder. (It rejected these conditions as capable of explaining both his evidentiary inconsistencies and his apparent forgetfulness.) Also in issue was whether the third RRT ought to have considered the First Respondent's request to exercise its power under s 427(1)(d) of the *Migration Act 1958* ("the Act") to request a psychiatric examination. That request was made by the First Respondent's migration agent in response to a letter sent by the third RRT pursuant to s 424A of the Act.

On 4 March 2010 Justice Rares held that it was open to the third RRT to find that the First Respondent's claimed mental illnesses did not affect his memory. This was because there was no evidence before it to show that those conditions had substantially impaired his memory. His Honour however held that the third RRT's failure to properly consider the request for a psychiatric examination amounted to a constructive failure to exercise jurisdiction. He noted that there was no indication in the RRT's written reasons (or in the material before the Federal Court) that identified the making of that request. It followed therefore there was also no evidence that such a request, having been made, had been considered and then validly rejected.

The grounds of appeal are:

- His Honour erred in finding that the second respondent failed to consider the first respondent's request that it exercise its power under s 427(1)(d) of the Act.

- His Honour erred in finding that, by reason of its failure to consider whether to exercise its power under s 427(1)(d) of the Act, the second respondent constructively failed to exercise its jurisdiction.

- His Honour erred in finding that, by reason of its failure to consider the first respondent's request that it exercise its power under s 427(1)(d) of the Act, the second respondent failed to have regard to a relevant consideration.

THE QUEEN V NGUYEN (M23/2010)

Court appealed from: Court of Appeal of the Supreme Court of Victoria [2010] VSCA 23

Date of judgment: 23 February 2010

Date referred: 30 July 2010

After a trial by jury in the Supreme Court of Victoria, the respondent was convicted of the murder of Hieu Trung Luu (Hieu) and the attempted murder of Chau Minh Nguyen (Chau). The events that gave rise to the conviction occurred on 7 November 2004. The respondent, with two co-accused, Bill Ho ('Ho') and Dang Khoa Nguyen ('Khoa'), went to a flat in Carlton, allegedly to collect a drug debt. While they were there Ho pulled out a hand gun, shot Chau and then killed Hieu.

The Crown case against the respondent was put on three alternative bases:

(a) either before the men went to the flat, or while they were in the flat, Ho, Khoa and the respondent agreed or reached an understanding that the collection of the drug debt would, if necessary, involve killing or infliction of very serious injury. Neither Khoa nor the respondent withdrew from that agreement before the offences occurred ('acting in concert case');

(b) either before the men went to the flat or while they were there, Khoa and the respondent agreed, or had an understanding with Ho, that violence could be used to collect the debt and foresaw the possibility that a person might be killed or really seriously injured. They continued to participate in Ho's criminal conduct on that basis ('extended common purpose case'); or

(c) although neither (a) or (b) applied, while Khoa and the respondent were present at the flat they intentionally encouraged or assisted Ho to kill or seriously injure both victims. Alternatively they encouraged or assisted him to kill Hieu after Chau was shot ('aiding or abetting case').

The Court of Appeal (Neave and Bongiorno JA and Lasry AJA) upheld the respondent's appeal against conviction. The Court found that a jury, acting reasonably, must have had a reasonable doubt as to the respondent's guilt. There was no evidence that he knew of the existence of the drug debt or knew that Ho was carrying a gun before they went to the flat. Nor was there sufficient evidence to permit a reasonable jury to find beyond reasonable doubt that the respondent went to the flat armed with a Samurai sword, in pursuance of an understanding or agreement to use violence in order to collect the drug debt. There was also insufficient evidence to establish that, after the men arrived at the flat, the respondent reached an agreement or understanding with Ho to kill or inflict serious injury if necessary to recover the debt, or to use violence to recover the debt, and that the respondent foresaw the possibility that death or serious injury could occur. The time between the first and second shot was too short to permit an inference to be drawn that during that period, the respondent and Ho made an agreement or reached an understanding that if necessary a person would be killed or that violence would be used to collect the debt after the first shot was fired. The Court of Appeal quashed the conviction.

On 30 July this Court (Hayne, Crennan & Bell JJ) directed that the Crown's application for special leave to appeal be referred to an expanded bench to be argued as on an appeal.

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

- The Court of Appeal misapplied the test in *M v The Queen* (1994) 181 CLR 487 by considering the significance of circumstantial evidence consistent with the respondent's innocence in isolation from other evidence.

- The Court of Appeal erred in that it did not examine the evidence in the trial with a view to determining what facts the jury could infer beyond reasonable doubt that the respondent:
  a) acted in concert with the co-accused; or
  b) aided and abetted the co accused in the murder of Hieu Trung Luu, the attempted murder of Chau Minh Nguyen or both charges.

The respondent will be seeking to rely on a proposed Notice of Contention in the event special leave were to be granted. The ground of the proposed Notice of Contention is that the trial judge had erred in failing to properly direct the jury as to criminal complicity, and in particular as to the alternative verdict of manslaughter.

MARCOLONGO v CHEN & ANOR (S114/2010)

Court appealed from:	New South Wales Court of Appeal [2009] NSWCA 326
Dates of judgment:	13 October 2009 & 12 November 2009
Date of grant of special leave:	23 April 2010

This matter was heard alongside the related matter of Lym International Pty Ltd ("Lym") in both the Supreme Court and the Court of Appeal. (Special leave to appeal was not sought in relation to the Lym matter). The combined litigation involved two separate, but related claims. The Lym matter involved a claim by Lym to set aside the sale of a $15 million property in Golf Avenue, Mona Vale ("the Golf Avenue property") to Mr Chen for purported breaches of fiduciary duties. The Marcolongo matter however concerned a claim by Mrs Marcolongo to declare the conveyance of the Golf Avenue property to Mr Chen invalid (as being affected by fraud) pursuant to s 37A of the *Conveyancing Act 1919* (NSW) ("the Conveyancing Act"). On 2 March 2009 Justice Hamilton found against Mr Chen in both matters and set aside the sale of the Golf Ave property. Mr Chen duly appealed.

In the Lym appeal, the central issue was whether Justice Hamilton had erred in finding that Mr Chen was liable for breach of fiduciary duties in transferring the Golf Avenue property to himself. Mr Chen submitted that once the limited nature of his duties was appreciated, most of the alleged breaches were unsustainable. In the Marcolongo appeal however, the central issue was whether Justice Hamilton had erred in holding that Lym, through its director Ms Yang, had sold the Golf Avenue property with an intention to defraud its creditors. If so, then s 37 of the Conveyancing Act provided grounds upon which that sale could be set aside.

In the Lym appeal, Young JA (with whom Allsop P and Giles JA agreed) held that there had been a clear breach of fiduciary duties on Mr Chen's part. Their Honours nevertheless still allowed the appeal over the form of Justice Hamilton's original orders.

In relation to the Marcolongo appeal, all Justices allowed the appeal. President Allsop and Justice Giles held that Justice Hamilton had failed to address the question of fraudulent mental state as required by s 37A. They further found that the evidence was inadequate to establish this when Ms Yang signed the contract of sale to Mr Chen. Justice Young however held that Mrs Marcolongo lacked the standing to bring a claim. He further held that even if she had that standing, there was no evidence that Ms Yang had acted with an intent to defraud Mrs Marcolongo when she (Ms Yang) signed the contract of sale to Mr Chen.

On 12 November 2009 the Court of Appeal amended its orders in both matters. While the appeal was still allowed in the Marcolongo matter, the costs orders were varied.

The grounds of appeal include:

- The Court of Appeal erred in holding by majority (Allsop P and Giles JA agreeing) that the alienation of property with intent to defraud creditors, within the meaning of s 37A of the Conveyancing Act, requires an actual dishonest intent.
- The Court of Appeal should have found that s 37A of the Conveyancing Act requires the alienation of property being made with a real or actual intent to defeat, delay or hinder creditors.