SHORT PARTICULARS OF CASES
APPEALS

SEPTEMBER 2020

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MINISTER FOR HOME AFFAIRS & ORS v DMA18 AS LITIGATION GUARDIAN FOR DLZ18 & ANOR (M27/2020)

MINISTER FOR HOME AFFAIRS & ANOR v MARIE THERESA ARTHUR AS LITIGATION REPRESENTATIVE FOR BXD18 (M28/2020)

MINISTER FOR HOME AFFAIRS & ANOR v FRX17 AS LITIGATION REPRESENTATIVE FOR FRM17 (M29/2020)

MINISTER FOR HOME AFFAIRS & ANOR v DJA18 AS LITIGATION REPRESENTATIVE FOR DIZ18 (M30/2020)

Court appealed from: Full Court of the Federal Court of Australia
[2019] FCAFC 148

Date of judgment: 28 August 2019

Special leave granted: 20 March 2020

The four respondents in these matters, FRM17, DLZ18, BXD18 and DIZ18 commenced proceedings in the Federal Court of Australia as representatives of over fifty proceedings pending in the Federal Court where the effect of s 494AB of the *Migration Act 1958* (Cth) ("the Act") has been raised. Broadly, section 494AB of the Act prohibits certain legal proceedings against the Commonwealth being instituted or continued in any court by transitory persons (as defined by s 5(1) of the Act). A determination was made under s 20(1A) of the *Federal Court of Australia Act 1976* (Cth) that the Court's original jurisdiction in respect of the hearing and determination of the questions set out by the parties be exercised by a Full Court.

The two questions for determination were:

1. when the proceeding was commencing in the Federal Court of Australia, was the effect of s 494AB of the Act that it could not be instituted? And

2. is the effect of s 494AB of the Act that the proceeding cannot be continued in the Federal Court?

The parties relied on a statement of agreed facts common to all proceedings, namely the arrangements between Australia and Nauru for the transfer of unauthorised maritime arrivals and for the provision of services to them. With the exception of DIZ18, all respondents were transitory persons who arrived in Nauru from Christmas Island. DIZ18 was born on Nauru to parents held in immigration detention there.

In August 2019 Justices Kenny, Robertson and Griffiths held that the answers to the questions above be "no" in relation to respondents FRM17 and DLZ18; "no" and "yes" in relation to respondent BXD18; and "yes" in relation to respondent DIZ18.

The grounds of appeal in this Court related to various issues arising from the construction of s 494AB of the Act.

DEGUISA & ANOR v LYNN & ORS (A4/2020)

Court appealed from: Full Court of the Supreme Court of South Australia [2019] SASCFC 107

Date of judgment: 5 September 2019

Special leave granted: 20 March 2020

An area of land of approximately 68 acres in Fulham, South Australia, was owned by Mr Oliver Ayton (the third respondent's maternal grandfather). After his death, the land was transferred to Mr Keith Ayton and Mrs Betty Fielder (the third respondent's mother). In the mid-1960s, the land was subdivided into approximately 54 allotments, with each allotment (with the exception of two allotments) being subject to restrictive covenants. The covenants prohibited the owners of the allotments from building blocks of flats, home units or other multiple dwellings on the affected land.

The appellants are the registered proprietors of land situated at 538 Henley Beach Road Fulham (Lot 3) in South Australia. The first two respondents are the executors of the estate of the late Mrs Betty Fielder. The third respondent is the owner of two properties, namely Lots 5 and 35.

In December 2015 the appellants applied to the relevant council for development approval of Lot 3. Approval was granted for the sub-division of the property into two equal parts. In November 2017 the appellants applied for development approval to build two attached residences on the property, one on each sub-divided lot. The Council granted planning consent later that month. The respondents contended that the building of the two dwelling houses on the sub-divided land infringed the covenant and in July 2016 they lodged a caveat over the property to protect their interests in enforcing the covenant.

The respondents commenced an action in the District Court of South Australia seeking to extend the caveat over the property. Judge Tilmouth held that the appellants had deemed and actual knowledge of the encumbrance and that the respondents as caveators were statutorily entitled to enforce the caveat. Judge Tilmouth ordered that the building of the houses on the land was in breach of the encumbrance and that the appellants were prohibited from taking steps to build on the land.

The appellants then appealed to the Full Court of the Supreme Court of South Australia. The majority of the Full Court dismissed the appeal. Peek J (with Hughes J agreeing) held that if a potential purchaser is on notice from the Certificate of Title that there may be a restriction on title, they must make reasonable searches of the Register to determine the nature and extent of those restrictions. Peek J held that the appellants were bound by the covenant. Kourakis CJ would have allowed the appeal, holding that the documents evidencing the covenant and the registered instrument did not identify the land covered by it. As a result, Kourakis CJ held that the appellants were not bound by the covenant.

The grounds of appeal in this Court are that the majority of the Full Court of the Supreme Court of South Australia:

a. erred in finding that restrictive covenants ran with the land and bound all subsequent owners, including the appellants;

b. erred in holding that the third respondent had standing to enforce the restrictive covenants by virtue of his ownership of “Lot 35”; and

c. erred in holding that the restrictive covenants properly construed only permitted one dwelling house to be constructed on the proposed subdivided land.

THE QUEEN v ABDIRAHMAN-KHALIF (A5/2020)

Court appealed from: Court of Criminal Appeal of the Supreme Court of South Australia
[2019] SASFC 133

Date of judgment: 31 October 2019

Special leave granted: 20 March 2020

In December 2017 the respondent was charged with being a member of a terrorist organisation (namely Islamic State) between July 2016 and May 2017 contrary to section 102.3(1) of the *Criminal Code* (Cth). Following trial in the Supreme Court of South Australia, a jury unanimously convicted the respondent of the offence and as a result the respondent was sentenced to three years imprisonment with a non-parole period of two years and three months.

The respondent appealed to the Court of Criminal Appeal of the Supreme Court of South Australia on three grounds:

1. that the trial judge erred in law in his directions as to what was required to establish that the respondent was intentionally a member of a terrorist organisation;

2. the fair trial of the respondent miscarried as a result of the unbalanced summing up by the trial judge; and

3. the verdict was unreasonable having regard to the evidence.

The majority of the Court of Criminal Appeal dismissed the appeal on grounds 1 and 2 but allowed the appeal on ground 3. Kourakis CJ (Parker J agreeing) held that there was no evidence against which to evaluate any connection between the proved conduct of the respondent with formal or informal membership of Islamic State. As a result the Court held that the conviction be set aside and an order of acquittal entered. Kelly J in dissent dismissed the appeal in its entirety, holding that the whole of the evidence pointed overwhelmingly to the respondent's guilt of the charge and it was open to the jury to convict the respondent.

The grounds of appeal in this Court are that in concluding that the evidence adduced at trial was incapable of proving the respondent was a member of a terrorist organisation, the majority of the Court of Criminal appeal erred in:

1. holding that, to prove that an accused person has taken steps to become a member of a terrorist organisation, the prosecution must adduce evidence as to how the terrorist organisation admits members; and

2. misconstruing the concept of an "organisation" for the purposes of Division 102 of the *Criminal Code* (Cth).

AUS17 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION AND ANOR (S71/2020)

Court appealed from: Federal Court of Australia
[2019] FCA 1686

Date of judgment: 16 October 2019

Special leave granted: 24 April 2020

The Appellant is a Sri Lankan citizen of Tamil ethnicity who arrived in Australia in 2012. On 10 September 2015 he applied for a protection visa, an application that was later withdrawn. On 10 February 2016 the Applicant applied for a class of protection visa known as a Safe Haven Enterprise Visa ("SHEV"). The Appellant claimed to fear persecution on a number of grounds, including: imputed political affiliation, his Tamil ethnicity, the fact that he left Sri Lanka illegally and his membership of the particular social group comprising failed asylum seekers.

On 9 September 2016 a delegate refused the Appellant a SHEV. On 14 September 2016 that decision was referred to the Immigration Assessment Authority ("the Authority") for a review. On 9 January 2017 however, the Authority decided to affirm the delegate's decision.

Prior to the Authority making its decision, the Appellant's then representative gave it a letter which enclosed various documents. Those documents included a letter dated 12 October 2016 ("Letter of Support") from a Mr Appathuray Vinayagamoorthy, someone who had been a Sri Lankan member of parliament. Relevantly, the Authority did not consider this information to be the type of "new information" to which it would otherwise be obliged to have regard.

Upon judicial review to the Federal Circuit Court, the Appellant submitted that the Authority had fallen into jurisdictional error by failing to consider the Letter of Support. On 8 December 2017 Judge Driver agreed and quashed the Authority's decision.

On 16 October 2019 Justice Logan upheld the First Respondent's appeal. His Honour held that the Letter of Support simply recounted the claims already provided by the Appellant. His Honour was not therefore satisfied that any exceptional circumstances existed to justify considering that document to be "new information".

The grounds of appeal include:

- The Federal Court erred in law in holding (at [26]) that the Authority finding that the Letter of Support could have been "obtained and furnished to the Minister before the delegate made the decision under review" provided a "sufficient basis" for the Authority not considering the letter pursuant to s 473DD of the *Migration Act 1958* (Cth). The Court should have held that:

  a) On the proper construction of s 473DD, it is not necessary for an applicant to satisfy the Authority of the matters in paragraph (b)(i) for there to be "exceptional circumstances" to justify considering new information under para (a);

b) Accordingly, a finding that new information was or could have been "provided to the Minister before the Minister made the decision under s 65" cannot be a sufficient basis for concluding that there are not "exceptional circumstances" to justify considering the new information;

c) The new information in this case was capable of answering the description of "credible personal information which was not previously known and, had it been known, may have affected consideration of the referred applicant's claims" within the meaning of para (b)(ii), and the Authority did not find otherwise;

d) In the premises, the Authority misunderstood or took an unduly narrow view of the breadth of the expression "exceptional circumstances" in para (a); and

e) The primary judge was correct to hold (at [50]) that the Authority erred in applying s 473DD and constructively failed to exercise jurisdiction.

ROY v O'NEILL (D2/2020)

Court appealed from: Court of Appeal of the Supreme Court of the Northern Territory
[2019] NTCA 8

Date of judgment: 4 September 2019

Special leave granted: 20 March 2020

The appellant was the subject of a Domestic Violence Order (DVO) which restrained her from being in the company of her partner when she was consuming or under the influence of alcohol or other intoxicating drug or substance.

In April 2018 the Northern Territory Police Force conducted Operation Haven which was designed to address issues concerning domestic violence and alcohol-related crime. As part of the operation three police officers attended a unit in Katherine where the appellant and her partner lived. One of the police officers gave evidence in a Local Court hearing that the reason for their visit was that he had observed antisocial behaviour coming from the property for several weeks prior to the operation. He had frequently observed the appellant in an intoxicated state and neighbours had reported seeing the appellant in a continuous alcohol-affected state. The police were also aware that the respondent's partner had a medical condition. The police officer described his attendance at the unit as 'proactive policing' which involved attendance at identified residences to check compliance with DVOs.

Upon arriving at the unit the police officers used a footpath running from the street to the front door where they knocked on the front door. The police could see both the appellant and her partner in the unit, with the appellant clearly affected by alcohol. The police called the appellant to the front door for the purpose of the DVO check. A breath test was conducted on the appellant which was positive for alcohol. She was then taken to the Katherine Watch House for further breath analysis.

The matter came before the Local Court in Katherine in November 2018 when there was a challenge to the admissibility of the evidence of the arresting police officers. The Local Court determined that the officers did not have power under either the *Police Administration Act 1978* (NT) or the *Domestic and Family Violence Act 2007* (NT) to attend the residence and check that the appellant was complying with the terms of the DVO.

The prosecution appealed the decision of the Local Court and the matter was heard in the Supreme Court in March 2019. In dismissing the appeal, Mildren AJ held that unless there is a clear and express statutory power to do so, neither the police nor anyone else has an implied invitation to enter private property for the mere purpose of investigating whether a breach of the law has occurred in circumstances where there is no basis for suspecting that an offence has been, or is in the process of being, committed.

The prosecution then appealed to the Court of Appeal of the Supreme Court of the Northern Territory. Southwood and Kelly JJ, together with Riley AJ, allowed the appeal, holding that the police officers did not seek to go beyond the threshold of the premises or enter the premises. Their actions did not involve interference with the occupier's possessions or injury to the person or property of either occupier. It

was open to the appellant and her partner to revoke or negate the implied invitation or licence by telling the police to leave. Neither did so.

The grounds of appeal in this Court are as follows:

1. The Court of Appeal erred in holding that the police officers were not trespassers on the curtilage of the appellant's premises; and

2. The Court of Appeal erred in holding that an implied licence entitled the police officers to enter upon the curtilage of the appellant's premises for the purpose of investigating the appellant for a criminal offence because they did so with the additional purpose of communicating with another occupant of the same dwelling.

CLAYTON v BANT (B21/2020)

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

Date of judgment: 7 November 2019

Special leave granted: 17 April 2020

The Appellant ("the Wife"), a citizen of Australia, and the Respondent ("the Husband"), a citizen of the United Arab Emirates ("the UAE"), married in 2007 by executing a contract of marriage before a judge of the Sharia Court of Dubai in the UAE. The couple lived between Dubai and Australia until they separated in 2013, whereupon the Wife continued living in Australia (with the couple's child). Property owned by one or both of the parties is located in the UAE, Australia and other countries. The total value of property owned by the Husband, which includes interests in various commercial ventures, far exceeds the value of property owned by the Wife.

In July 2013, proceedings by which the Wife sought parenting orders under the *Family Law Act 1975* (Cth) ("the FLA") were amended so as also to seek orders in respect of property. In July 2014 the Husband commenced divorce proceedings in Dubai ("the Dubai proceedings"). The Wife was notified of the Dubai proceedings in October 2014, after she had filed a divorce application of her own under the FLA. In December 2014 the Wife commenced proceedings for final orders for property settlement and spousal maintenance (including capitalised child maintenance) under the FLA ("the Australian proceedings").

A relevant legal provision in the UAE is Article 62.1 of Federal Law No 28/2001 ("UAE Article 62.1"), which provides as follows:

> *A woman … is free to dispose of her property and the husband may not, without her consent, dispose thereof; each one of them has independent financial assets. If one of the two participates with the other in the development of a property, building a dwelling place or the like, he may claim from the latter his share therein upon divorce or death.*

In the Dubai proceedings, the Husband sought a divorce with an extinguishment of all associated matrimonial rights of the Wife, including her entitlements to alimony and a "deferred dowry" (a fixed sum payable under the marriage contract upon either divorce or death). The Wife declined to appear in the Dubai proceedings, and in February 2015 the Personal Status Court of Dubai ("the Dubai court") issued a ruling ("the Dubai decree") granting the divorce sought by the Husband. The Dubai decree stated however that the Dubai court found it untimely to deal with the Husband's application in respect of alimony and the deferred dowry. The Wife did not then appeal within a non-extendable appeal period, with the result that her rights to seek orders in respect of property under the law of Dubai came to an end.

The Husband subsequently applied for a permanent stay of the Australian proceedings, on the basis that the Wife's cause of action had been finalised by the Dubai decree. On 18 September 2018 Justice Hogan dismissed the Husband's application. Her Honour considered that the causes of action dealt with by the Dubai proceedings were the divorce and associated financial consequences according to the law administered in Dubai, the latter being limited to alimony and the deferred dowry. Justice Hogan held that the issues dealt with in the Dubai proceedings did not include the right of one party to claim property from the other,

because such a right did not exist under the law of Dubai save for the limited right prescribed in UAE Article 62.1. The broader rights to seek property settlement and adjustment orders under s 79 of the FLA therefore remained available to the Wife. The Wife could also pursue spousal maintenance, since the Dubai court had not determined the issue of her entitlement to alimony.

The Full Court of the Family Court (Strickland, Ainslie-Wallace and Ryan JJ) unanimously allowed an appeal by the Husband and permanently stayed the Australian proceedings. Their Honours found that Justice Hogan had erred by seeking in effect a direct analogue between UAE Article 62.1 and s 79 of the FLA. The former provision, though limited in scope, did provide a right to an adjustment of property, a right which the Wife had not pursued. The Full Court found that the issue of alimony had effectively been determined, consequent upon the Wife having failed to exercise her right to address it in the Dubai proceedings. Their Honours held that, since analogous causes of action had been determined by the Dubai court, the Wife could not be permitted to pursue claims for spousal maintenance and an adjustment of property under the FLA.

The grounds of appeal include:

- The Full Court erred in finding:

    a) that the claims for property settlement and spousal maintenance which the Wife seeks to agitate in the Family Court of Australia had merged in the Dubai decree; and/or

    b) that the Dubai decree had finally determined such claims as between the parties.

- In circumstances where the Wife could not have brought forward, as part of the contest in the Dubai proceedings:

    a) the determination of ownership of property and contributions to property outside Dubai, it being common ground that the Dubai court had no jurisdiction over property outside Dubai;

    b) an adjustment of the property of the parties except to the extent provided for by Article 62.1 of Federal Law No 28/2001 of the UAE;

    the Full Court erred in holding that the Wife was prevented by *res judicata*, cause of action estoppel, the “Henderson extension” or otherwise from prosecuting her case under s 79 of the FLA.

GBF v THE QUEEN (B18/2020)

Court appealed from: Court of Appeal of the Supreme Court of Queensland [2019] QCA 4

Date of judgment: 1 February 2019

Special leave granted: 15 April 2020

On 2 August 2016 the Appellant was convicted of three counts of rape and two counts of indecent treatment of a child under 16. Each count was a domestic violence offence. All of the counts were alleged to have occurred between December 2012 and August 2013, with the Complainant being the Appellant's half-sister. At the time of the offences the Appellant was aged between 33 and 34, while the Complainant was aged between 13 and 14. At his trial, the Appellant neither gave, nor called, evidence. On 4 August 2016 Judge Wall sentenced him to a total of nine years imprisonment.

Upon appeal the Appellant submitted, inter alia, that Judge Wall had misdirected the jury during the summing-up. That misdirection was said to concern the effect of a comment from Judge Wall to the jury that the *absence of evidence from the Appellant* might make it easier to convict. This was notwithstanding the fact that proper directions *were* given to the jury concerning the absence of evidence from the Appellant earlier on.

On 1 February 2019 the Court of Appeal (Morrison & Philippides JJA; Boddice J) unanimously dismissed the Appellant's appeal against conviction, but allowed an appeal against sentence in part. Their Honours noted that, while Judge Wall's words were unwise, neither the Prosecutor nor the Defence Counsel had sought any redirection or correction. The Court of Appeal noted that Judge Wall had previously made specific directions to the effect that the Appellant was presumed to be innocent and that no adverse inference was to be drawn from his failure to give evidence. They further found that Judge Wall had properly directed the jury that the prosecution bore the onus of proof, including that the Appellant was not operating under a mistake of fact. Furthermore, any comment that his Honour may have made in respect of the evidence was an observation that may be accepted or rejected by the jury.

Their Honours found that there was no real possibility that the jury may have misunderstood Judge Wall's direction. The Appellant was not therefore deprived of a real chance of acquittal as a consequence of Judge Wall's inappropriate comment. No miscarriage of justice had arisen.

The sole ground of appeal is:

- The Court of Appeal erred in finding that Judge Wall's statement to the jury that the absence of sworn evidence from the Appellant "might make it easier" to accept the Complainant's evidence, while wrong because it impacted both the right to silence and presumption of innocence, did not occasion a miscarriage of justice because no redirection was sought and because of other contradictory directions.