

## SHORT PARTICULARS OF CASES

DECEMBER 2021

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**PLAINTIFF M1/2021 v MINISTER FOR HOME AFFAIRS (M1/2021)**

Date special case referred to Full Court:

13 April 2021

The plaintiff was born in the Republic of Sudan in 1986 and is a citizen of the Republic of South Sudan. On 30 January 2006, the plaintiff was granted a global special humanitarian visa and on 3 June 2006, he entered Australia.

On 19 September 2017, the plaintiff was convicted of two counts of unlawful assault and sentenced to an aggregate term of 12 months' imprisonment. On 27 October 2017, a delegate of the Minister cancelled the plaintiff's visa under s 501(3A) of the *Migration Act 1958*. On 27 October 2017, an officer of the Department of Immigration and Border Protection sent the plaintiff a letter notifying him of the cancellation decision and inviting him to request revocation. The plaintiff was imprisoned at the time, did not have any legal representation and his ability to read, write and understand English is poor. A fellow inmate helped him request revocation.

On 9 August 2018, a delegate of the Minister refused to revoke the cancellation. The plaintiff did not have any legal representation and was told by the inmate who had previously helped him that he would need to apply for a protection visa to stay in Australia. He did not understand that there was any process available to him to appeal the non-revocation decision. On or about 14 September 2018, the plaintiff applied for a protection visa. On 21 September 2020, a delegate of the Minister refused the plaintiff's application for a protection visa.

In September 2018, the plaintiff completed his custodial sentence and he has been in immigration detention since that time. On 22 October 2020, the plaintiff received legal advice for the first time and was referred to Justice Connect who assisted the plaintiff to obtain counsel's advice and legal representation. On 5 January 2021, an application for a Constitutional or other Writ was filed with the High Court seeking to quash the delegate's non-revocation decision.

The application is proceeding by way of Special Case. The questions of law in the Special Case are:

1. In deciding whether there was another reason to revoke the Cancellation Decision pursuant to s 501CA(4)(b)(ii) of the *Migration Act 1958* (Cth), was the Delegate required to consider the plaintiff's representations made in response to the invitation issued to him pursuant to s 501CA(3)(b) of the Migration Act, which raised a potential breach of Australia's international non-*refoulement* obligations, where the plaintiff remained free to apply for a protection visa under the Migration Act?
2. In making the Non-Revocation Decision:
  - a. did the Delegate fail to exercise the jurisdiction conferred by s 501CA(4) of the Migration Act?
  - b. did the Delegate deny the plaintiff procedural fairness?
  - c. did the Delegate misunderstand the Migration Act and its operation?
3. Is the Non-Revocation Decision affected by jurisdictional error?

4. Should the period of time fixed by s 486A(1) of the Migration Act and rr 25.02.1 and 25.02.2 of the *High Court Rules 2004* (Cth) within which to make the Application be extended to January 2021?
5. What, if any, relief should be granted?
6. Who should pay the costs of, and incidental to, the Special Case?

**KOZAROV v STATE OF VICTORIA (M36/2021)**

Court appealed from: Supreme Court of Victoria (Court of Appeal)  
[2020] VSCA 301

Date of judgment: 24 November 2020

Special leave granted: 21 May 2021

The appellant is a solicitor and former employee of the Victorian Office of Public Prosecutions (the OPP). Between June 2009 and April 2012, she worked in the OPP's Specialist Sexual Offences Unit (the SSOU). During her employment in the SSOU, she suffered a psychiatric injury: chronic PTSD and major depressive disorder.

In October 2016, the appellant commenced proceedings in the Supreme Court of Victoria against the State of Victoria claiming damages for the personal injury sustained during her employment in the SSOU. She claimed negligence, breach of contract and breach of statutory duty. The respondent denied liability and alleged contributory negligence. The primary judge upheld the appellant's claim and rejected the claim of contributory negligence.

The respondent sought leave to appeal. On 24 November 2020, the Court of Appeal granted leave to appeal and allowed the appeal. The Court of Appeal held that, by 29 August 2011, the respondent was on notice of heightened risks regarding the appellant's mental health. However, the Court found that the appellant failed to establish that, if the respondent had exercised reasonable care, it would have avoided or reduced the exacerbation of her PTSD between August 2011 and February 2012. On 22 December 2020, the appellant applied to the High Court for special leave to appeal, which was granted.

On 4 June 2021, the appellant filed a Notice of Appeal. The grounds of appeal are that:

- The Court of Appeal erred in overturning the trial judge's conclusion that if the respondent had discharged its duty of care to the appellant and she was made aware of her psychiatric injury, that would have prompted a reduction of the appellant's exposure to the traumatic work by altering work allocation, arranging time out, arranging temporary and/or permanent rotation to another role, and that the appellant would have co-operated with those steps (cf. VSCA, [102](c), [106]-[108]).
- In overturning that conclusion, the Court of Appeal erred in failing to consider the nature and content of the respondent's duty of care, including that the respondent's duty of care included a duty to maintain and enforce a safe system of work (cf. VSCA, [106]).

On 9 June 2021, the respondent filed a Notice of Contention. The ground of contention is that:

- The Court of Appeal of the Supreme Court of Victoria erred in finding that the respondent had been placed on notice of a risk to the appellant's wellbeing from the end of August 2011, so as to require by way of a reasonable response steps including a supportive welfare inquiry, offer of referral for occupational screening and adjustment of work including rotation out of the SSOU.

**AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER v  
PATTINSON & ANOR (M34/2021)**

Court appealed from: Full Court of the Federal Court of Australia  
[2020] FCAFC 177

Date of judgment: 16 October 2020

Special leave granted: 20 May 2021

The first respondent is a delegate of the second respondent (the Union). In September 2018, he (and therefore the Union) represented to two workers at a building site in Frankston, Victoria, that they could not work at the site unless they became Union members. This representation contravened s 349(1)(a) of the *Fair Work Act* (the Act) which makes it unlawful for a person to knowingly or recklessly make a false or misleading representation about another person's obligation to engage in industrial action, including becoming a member of a union. The respondents both admitted liability. By 2019, the Union had been found by courts to have breached pecuniary penalty provisions 150 times including breaches of s 349(1)(a) of the Act.

The primary judge considered that a penalty was required that would deter the respondents from making similar representations again. As the contraventions involved the same misrepresentation made simultaneously to two workers, the primary judge considered that the total penalties should not exceed the maximum penalty for one contravention. His Honour imposed total penalties of \$63,000 (possible maximum of \$126,000) on the Union and \$6,000 (possible maximum of \$25,200) on the first respondent.

The respondents appealed to the Federal Court of Australia Full Court on the basis that "proportionality" required the primary judge to first assess a penalty range by the objective seriousness of the contravention without regard to the Union's history of wrongdoing, and only then to have regard to that history for the purposes of selecting a penalty within that range. The Full Court rejected the proposition that a range should have been set divorced from the Union's history of contravention. However, the Full Court held that a past history of contravention should only be part of the assessment of the seriousness of the offence and should not be the reason for the maximum penalty to be imposed irrespective of the nature and seriousness of the specific contravention. It found that the primary judge erred by applying the maximum penalty due to the Union's history of contravention, whatever the seriousness of the particular contravention. The appeal was allowed.

The appellant successfully applied to the High Court for special leave to appeal.

The ground of appeal is that:

- the Full Court erred by treating the statutory maximum penalty as a yardstick which requires the highest penalty be reserved for contravening conduct of the most serious and grave kind, with the consequence that the maximum penalty cannot be imposed for contravening conduct that is not of the most serious and grave kind, even if that penalty is necessary in order to deter contravening conduct of the kind that has in fact occurred.

**GEORGE v THE STATE OF WESTERN AUSTRALIA (P45/2020)**

Court appealed from: Supreme Court of Western Australia (Court of Appeal)  
[2020] WASCA 139

Date of judgment: 1 September 2020

Date application referred: 20 May 2021

The applicant was an electrical contactor who performed electrical work at the home of the complainant's family. The prosecution alleged that on 20 April 2017, while the applicant was doing work at the home, he touched the 13-year-old complainant on the bottom and breast. He was charged with two counts of indecently dealing with a child between the ages of 13 years and 16 years.

At trial, the applicant argued that the two acts that formed the basis of the charges did not occur. The prosecution tendered an electronic record of interview with the applicant in which he denied the offences. The applicant did not give any evidence at trial. He was convicted of both counts.

The applicant appealed the convictions. The Court of Appeal considered whether the trial judge failed to direct the jury not to interpret the applicant's silence at trial to his detriment and whether this amounted to a miscarriage of justice. The majority, Quinlan CJ and Mitchell JA, found that the trial judge did not direct the jury that the fact that the appellant did not give evidence could not be used to fill gaps in the State case. However, they held that, in the context of the rest of the directions, the trial judge's omission did not give rise to any miscarriage of justice. The majority refused leave to appeal and dismissed the appeal. Mazza JA, in dissent, found that the trial judge's directions left open the risk that the jury would interpret the applicant's silence at trial to his detriment and would have allowed the appeal.

On 20 May 2021, Gageler, Edelman and Steward JJ referred the application for special leave to a Full Court of the High Court for argument as on an appeal.

The proposed ground of appeal is that:

- The Court of Appeal erred in holding that the trial judge's failure to warn the jury that the applicant's silence in court was not evidence against him, did not constitute an admission by the applicant, could not be used to fill gaps in the evidence tendered by the prosecution, and could not be used as a make-weight in assessing whether the prosecution has proved its case beyond reasonable doubt did not occasion a miscarriage of justice, when it should have found that such a warning was required because there was a perceptible risk that the jury would make use of the applicant's silence at trial to his detriment.