

## SHORT PARTICULARS OF CASES

APRIL 2021

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**ZHANG v THE COMMISSIONER OF POLICE & ORS (S129/2020)**

Date application for a constitutional or other writ filed: 3 August 2020

Date special case referred to Full Court: 12 November 2020

The Plaintiff, Mr John Zhang, is an Australian citizen who migrated to Australia from the People's Republic of China ("the PRC") in 1989. From October 2018 to 21 September 2020 Mr Zhang was employed part-time at the New South Wales ("NSW") Parliament in the office of the Honourable Shaoquett Moselmane, MLC, a member of the NSW Opposition until his suspension from the Australian Labor Party on 27 June 2020.

On 25 June 2020 the Second Defendant, a magistrate of the Local Court of NSW, issued two search warrants pursuant or purportedly pursuant to s 3E of the *Crimes Act 1914* (Cth) ("the Act") authorising members of the Australian Federal Police ("the AFP") to enter and search Mr Zhang's residential premises ("the First Search Warrant") and warehouse premises from which Mr Zhang and his wife operated a business ("the Second Search Warrant"). The Second Defendant also issued an order to Mr Zhang pursuant to s 3LA of the Act requiring Mr Zhang to provide the passcodes and other access assistance to three mobile phones at his residential premises ("the First s 3LA Order").

On 26, 27 and 28 June 2020 officers of the AFP executed the First and Second Search Warrants and searched Mr Zhang's residential premises and the warehouse premises. Evidential material including mobile phones, computers and approximately \$60,000 in cash contained in bundles of bank notes and in envelopes were identified and certain electronic devices were removed for examination. In early July 2020, AFP officers conducted an examination of devices which had been removed including two Huawei mobile phones and three computers and requested that Mr Zhang voluntarily provide passcodes for the WeChat application (an instant messaging service owned, controlled and operated by a company incorporated in the PRC) on the Huawei phones.

On 23 July 2020 the Third Defendant, a registrar of the Local Court of NSW, issued a search warrant pursuant or purportedly pursuant to s 3E of the Act authorising members of the AFP to enter and search premises known as the 'Jubilee Room' in NSW Parliament House ("the Third Search Warrant"). The Third Search Warrant was executed on 24 and 25 July 2020, during which AFP officers obtained copies of certain electronic data.

On 29 July 2020 the Fourth Defendant, a magistrate of the Local Court of NSW, made an order pursuant to s 3LA of the Act requiring Mr Zhang to provide any information or assistance that was reasonable and necessary to allow, amongst other things, AFP officers to access data held in or accessible from the Huawei phones ("the Second s 3LA Order"). Mr Zhang subsequently provided passcodes for the Huawei phones but advised the AFP that he was unable recall his WeChat password and unable to find his WhatsApp password.

Each of the First, Second and Third Search Warrants were expressed to relate to offences contrary to ss 92.3(1) and 92.3(2) of the Schedule to the *Criminal Code Act 1995* (Cth) ("the Criminal Code"), being indictable offences of reckless foreign interference. The alleged conduct included engagement by Mr Zhang and others while acting on behalf of Chinese State and Party apparatus in a private social

media chat group and in other fora with Mr Moselmane, to advance the interests and policy goals of a foreign principal, being the PRC.

In his proceeding in this Court, Mr Zhang seeks relief which includes the quashing of the First, Second and Third Search Warrants and the First and Second s 3LA Orders. Mr Zhang also seeks that the material seized by the AFP be destroyed or delivered up to him.

The parties filed a Special Case, the questions in which Justice Nettle referred for consideration by the Full Court. The Special Case states the following questions for the opinion of the Court:

- 1) Are the First Search Warrant, the Second Search Warrant, and the Third Search Warrant invalid, in whole or in part, on the ground that:
  - a) they misstate the substance of s 92.3(2) of the Criminal Code?
  - b) they fail to state the offences to which they relate with sufficient precision?
  - c) s 92.3(1) of the Criminal Code is invalid on the ground that it impermissibly burdens the implied freedom of political communication?
  - d) s 92.3(2) of the Criminal Code is invalid on the ground that it impermissibly burdens the implied freedom of political communication?
- 2) In light of the answer to Question 1, is the First s 3LA Order and/or the Second s 3LA Order invalid?
- 3) Is s 92.3(1) of the Criminal Code invalid on the ground that it impermissibly burdens the implied freedom of political communication?
- 4) Is s 92.3(2) of the Criminal Code invalid on the ground that it impermissibly burdens the implied freedom of political communication?
- 5) If the answer to any or all of the questions (1)-(4) is 'yes', what relief, if any, should issue?
- 6) Who should pay the costs of the proceeding?

A Notice of a Constitutional Matter was filed by the Plaintiff. The Attorneys-General of the Commonwealth, New South Wales and South Australia are intervening in the proceeding.

**SUNLAND GROUP LIMITED & ANOR v GOLD COAST CITY COUNCIL**  
**(B64/2020)**

Court appealed from: Court of Appeal of the Supreme Court of Queensland  
[2020] QCA 89

Date of judgment: 1 May 2020

Special leave granted: 13 October 2020

The essential question in this appeal is which of two regimes for a developer's financial contributions to a local government for the funding of infrastructure is applicable to a certain development of real property.

In 2007, the Planning and Environment Court granted a preliminary development approval ("the Preliminary Approval") over a parcel of undeveloped land within the local government area of the Respondent ("the Council"), under the *Integrated Planning Act 1997* (Qld) ("the IPA"). The Preliminary Approval was granted subject to certain conditions. Relevantly, the conditions included requirements that the developer make contributions to the Council for the cost of certain infrastructure (two of the conditions allowing existing credits to offset the contributions payable). The contributions were expressed to be in accordance with certain planning scheme policies ("the Policies"), which had been made by the Council under the IPA.

The Second Appellant is part of a group of companies controlled by the First Appellant (the Appellants together, "Sunland"). In May 2015, the Second Appellant purchased the land the subject of the Preliminary Approval. By that time, the Policies had ceased to have effect and the IPA had been repealed and replaced with the *Sustainable Planning Act 2009* (Qld) ("the SPA"). Although the SPA changed the way in which infrastructure contributions were levied, the Preliminary Approval remained in effect pursuant to transitional provisions in the SPA. Amendments made to the SPA in 2011 required a local government to give an infrastructure charges notice ("ICN") upon the giving of a development approval (where the local government had resolved that an "adopted infrastructure charge" applied to a development). In 2015 and 2016 ICNs were issued to Sunland by the Council upon the latter's approval of development applications lodged by Sunland.

In July 2017 the SPA was repealed and replaced with the *Planning Act 2016* (Qld) ("the Planning Act"), s 286 of which had the effect of preserving the Preliminary Approval.

In 2017 the Sunland Parties commenced proceedings in the Planning and Environment Court of Queensland, seeking declarations that the Council could collect infrastructure contributions, and would apply infrastructure credits, only in accordance with the conditions set out in the Preliminary Approval. The Council however contended that the Policies underlying the conditions in the Preliminary Approval were no longer applicable and that Sunland was required to make payments in accordance with the ICNs. Judge Everson held that the repeal of the Policies was inconsequential and that s 880(3)(b) and (d) of the SPA expressly preserved the infrastructure conditions pertaining to instruments such as the Preliminary Approval. His Honour therefore found in favour of Sunland and declared that the Council had no power to issue ICNs (by that time, under s 119 of the Planning Act).

The Court of Appeal (Sofronoff P, Philippides and McMurdo JJA) unanimously allowed an appeal by the Council and set aside the declarations made by Judge Everson. Their Honours held that s 880(2)(b) of the SPA prevented the Council from imposing a condition under a planning scheme policy, and further held that s 880(3) of the SPA did not apply, as the conditions of the Preliminary Approval dealing with infrastructure contributions did not of themselves give rise to an obligation to pay such contributions. Rather, a developer's obligation to pay arose only through conditions imposed when a development application was approved by the Council. The Court of Appeal held that the continuing effect of the Preliminary Approval, under s 286(2) of the Planning Act, must be considered in that light. The Council was required to issue ICNs and it had no power to require the payment of infrastructure contributions calculated under the Policies.

The grounds of appeal are:

- The Court of Appeal erred by:
  - a) construing conditions of a development approval as merely statements as to the scope of future possible conditions to be imposed and not as imposing operable conditions or terms binding on the developer; and
  - b) resolving an ambiguity in the conditions of a development approval against the developer, rather than, *contra proferentem*, against the Council.

The Council has filed a notice of contention, which raises the following grounds:

- The Court of Appeal failed to decide the Council's submission that if, on their proper construction, the conditions of the Preliminary Approval did impose an obligation to pay infrastructure contributions:
  - a) amendments to the SPA effected by the *Sustainable Planning (Housing Affordability and Infrastructure Charges Reform) Amendment Act 2011* (Qld) and the Planning Act obliged the Council to give Sunland an ICN in respect of any development permit given for development approved (but not authorised) by the Preliminary Approval;
  - b) once given, an ICN was the source of Sunland's obligation to pay infrastructure charges in respect of development authorised by a development permit;
  - c) the Council's obligation to give an ICN upon giving a development permit, and Sunland's obligation to pay any infrastructure charges imposed by an ICN, prevailed over conditions imposed on a preliminary approval under earlier legislation.

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**COMMONWEALTH OF AUSTRALIA v AJL20 (C16/2020; C17/2020)**

Date Cause Removed: 17 December 2020

The respondent is a citizen of Syria who arrived in Australia in May 2005 on a child visa. In October 2014 the Minister cancelled that visa under s 501(2) of the *Migration Act 1958* (Cth) ('the Act'). The respondent then became an unlawful non-citizen and was detained under s 189(1) of the Act.

In November 2019 the respondent commenced proceedings in the Federal Court claiming damages for false imprisonment since July 2019. As the respondent also sought released from immigration detention, another proceeding was commenced in the Federal Circuit Court in May 2020 making the same allegations but seeking an order in the nature of *habeas corpus*. That proceeding was then transferred to the Federal Court under s 39 of the *Federal Circuit Court of Australia Act 1999* (Cth).

In September 2020 Justice Bromberg ordered that the respondent be released and published reasons for making that order. Justice Bromberg also made a declaration that the respondent's detention during the period July – November 2019 and after November 2019 was unlawful. In October 2020 the Commonwealth filed notices of appeal in the Full Court of the Federal Court in each proceeding.

On 14 December 2020 the Attorney-General of the Commonwealth applied to this Court to remove the proceedings from Full Court of the Federal Court of Australia. On 17 December 2020 Justice Bell made that order. Accordingly, those appeals will now be considered by the High Court of Australia.

The appeals to the Full Court of the Federal Court concern the lawfulness of the detention of an unlawful non-citizen under s 189 of the Act where there has not been compliance with the statutory duty under s 198 of the Act to remove that person 'as soon as reasonably practicable'.

The constitutional issue is whether, to the extent ss 189 and 196 of the Act authorise and required the detention of an unlawful non-citizen until, relevantly, he or she is in fact removed under s 198 despite non-compliance with the duty under that section, those sections can do so consistently with the requirements of Chapter III of the Constitution.

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**DEPUTY COMMISSIONER OF TAXATION v SHI (S211/2020)**

Court appealed from: Full Court of the Federal Court of Australia  
[2020] FCAFC 100

Date of judgment: 4 June 2020

Special leave granted: 11 November 2020

On 27 November 2018 freezing orders were made against Mr Zu Neng Shi by the Federal Court in proceedings commenced by the Appellant to recover Mr Shi's unpaid tax liabilities. Ancillary disclosure orders were also made requiring Mr Shi to disclose details of his worldwide assets. In response, Mr Shi filed two affidavits. The first was filed and served on the Appellant, disclosing assets with an estimated aggregate value of \$360,100.00. A copy of the second affidavit, disclosing further assets, was delivered to the Court in a sealed envelope under a claim that its contents should not be disclosed by reason of the privilege against self-incrimination ("the Privileged Affidavit"). On 24 April 2019 judgment was entered by consent for the Appellant against Mr Shi in the amount of \$42,297,437.65.

In the week prior to judgment being entered, Mr Shi sought, by an interlocutory application, orders under s 128A of the *Evidence Act 1995* (Cth) ("the Act") that the Privileged Affidavit be returned to him or, in the alternative, that if the Court ordered disclosure of the Privileged Affidavit then Mr Shi be given a certificate under s 128A(7)-(8) of the Act prohibiting any evidence, document or thing obtained as a result of the disclosure from being used against Mr Shi in any proceeding in an Australian court ("the Application").

The application was determined by Justice Steward on 21 June 2019. His Honour read the Privileged Affidavit and was satisfied that its contents disclosed reasonable grounds for the claims of privilege against self-incrimination and may tend to prove that Mr Shi had committed an Australian offence but not an offence in China. His Honour was not satisfied that the interests of justice required the Privileged Affidavit to be disclosed to the Appellant and ordered its return. Justice Steward considered it in the public interest that the Appellant have access to the most complete information concerning the worldwide assets of Mr Shi and be able to use any resulting information for the purposes of recovery including against Mr Shi in any subsequent proceedings. His Honour considered that the limitations on use of information disclosed subject to a certificate granted under s 128A of the Act weighed against the interest of justice requiring disclosure. In arriving at that conclusion, his Honour considered it relevant that the Appellant could obtain the privileged information more freely from Mr Shi by exercising its powers under s 353-10 of Schedule 1 to the *Taxation Administration Act 1953* (Cth) ("the TAA"), to which the privilege against self-incrimination cannot be invoked as a reason for non-compliance.

An appeal by the Appellant was dismissed by the Full Court of the Federal Court (Lee and Stewart JJ; Davies J dissenting). Justices Lee and Stewart agreed with the primary judge that the interests of justice did not require disclosure of the Privileged Affidavit. However, their Honours followed a different course of reasoning in arriving at that conclusion. Amongst other factors, their Honours considered it relevant that regard be had to the curial context in which the interests of justice were considered, being post-judgment and to, in effect, assist methods of execution. In that respect, the majority considered it relevant to examine other

available ways that execution could be assisted. In particular, their Honours considered it relevant that the Appellant could have availed itself of the mechanism under s 108 of the *Civil Procedure Act 2005* (NSW) to require Mr Shi to attend court for oral examination or produce any document or thing in his possession that related to a material question as to his means of satisfying the judgment. Their Honours also considered that the risk of the derivative use of information in the Privileged Affidavit, were it to be disclosed with a certificate pursuant to s 128A of the Act, in relation to the accusatorial process of criminal justice militated against disclosure.

Justice Davies however would have allowed the appeal. Her Honour found that the primary judge, in holding that it was not in the interests of justice to require disclosure of the Privileged Affidavit because the Appellant had available a statutory power which abrogated the privilege against self-incrimination, had acted on a wrong principle and that the exercise of weighing the interests of justice consequently was affected by material error.

The grounds of appeal are:

- In determining whether it was in the interests of justice to grant a certificate pursuant to s 128A of the Act in respect of the Privileged Affidavit:
  - a) the Full Court erred in taking into account the mechanism under s 108 of the *Civil Procedure Act 2005* (NSW) to examine Mr Shi as a judgment debtor; and
  - b) the Full Court erred in taking into account the risk of derivative use of the Privileged Affidavit in the event that a certificate was granted pursuant to s 128A of the Act.

Mr Shi has filed a notice of contention, which raises the following ground:

- Having correctly found for the purposes of s 128A of the Act that the onus is on the party seeking disclosure to satisfy the court of the matters in s 128A(6), and in upholding Mr Shi's ground of contention 1(a), the Full Court should have found, but erroneously failed to find, that it was not open for the primary judge to have been satisfied of the negative proposition set out in s 128A(6)(b), namely that "*the information [in the Privileged Affidavit] does not tend to prove that [Mr Shi] has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country*".

**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND  
MULTICULTURAL AFFAIRS v MOORCROFT (B66/2020)**

Court appealed from: Federal Court of Australia  
[2020] FCA 382

Date of judgment: 23 March 2020

Special leave granted: 16 October 2020

Ms Deanna Moorcroft is a citizen of New Zealand. From 17 November 2013 to 24 December 2017 she resided lawfully in Australia as the holder of a Special Category (subclass 444) visa under the *Migration Act 1958* (Cth) (“the Act”) (a “444 visa”). On 24 December 2017, Ms Moorcroft left Australia for New Zealand to visit family. At that time, she was on parole having been convicted of criminal offences and sentenced to a term of imprisonment.

On 2 January 2018 Ms Moorcroft returned to Australia and, upon presentation of her New Zealand passport, was automatically granted a 444 visa. On 3 January 2018, a delegate of the Appellant cancelled Ms Moorcroft’s visa. The following day Ms Moorcroft was removed from Australia to New Zealand. Ms Moorcroft commenced proceedings in the Federal Circuit Court for judicial review of the decision to cancel her visa. On 28 June 2018 Judge Vasta made orders by consent quashing the delegate’s decision.

On 29 January 2019 Ms Moorcroft again arrived in Australia, whereupon a delegate of the Appellant (“the Delegate”) refused her application (made earlier that day) for a 444 visa. The basis for the Delegate’s refusal was that Ms Moorcroft was a “behaviour concern non-citizen” as defined in s 5(1) of the Act (“the Definition”) because she had been removed or deported from Australia or another country pursuant to subparagraph (d) of the Definition.

Ms Moorcroft commenced proceedings in the Federal Circuit Court for judicial review of the Delegate’s decision. The application was dismissed by Judge Vasta on 8 March 2019. His Honour found that as a matter of statutory construction whether a person “has been removed or deported from Australia, or removed or deported from another country” in sub-paragraph (d) of the Definition was a factual issue. As Ms Moorcroft had been physically removed from Australia on 3 January 2018, his Honour found that the Delegate’s decision was not affected by jurisdictional error.

An appeal by Ms Moorcroft to the Federal Court was allowed by Justice Collier. Her Honour set aside the decision of the Federal Circuit Court, quashed the Delegate’s decision and ordered that the Appellant determine Ms Moorcroft’s application for a 444 visa according to law. Justice Collier accepted the Appellant’s submission that it would be wrong to imply the words “lawfully” or “validly” before the words “removed or deported” into subparagraph (d) of the Definition. However, her Honour found that when construed in light of other provisions of the Act the word “removed” was confined in meaning to the person being an “unlawful non-citizen”. While Ms Moorcroft had been physically removed from Australia on 4 January 2018, she had not been an “unlawful non-citizen” at that time and consequently had not been “removed” from Australia under the Act.

The grounds of appeal are:

- The Federal Court erred in construing the expression “removed or deported from Australia” in paragraph (d) of the Definition meaning (in effect) *validly* or *lawfully* removed or deported from Australia under Part 2 Div 8 of the Act.
- Properly construed, the expression “removed or deported”, where it twice appears in paragraph (d) (from “Australia”, and from “another country”), means removed or deported *in fact*, where “removal” or “deportation” is an act performed by or on behalf of a government in taking an individual out of the country.
- On this basis, the Court should have held that the delegate made no error in not being satisfied that Ms Moorcroft satisfied the requirements of s 32(2)(a).