

SHORT PARTICULARS OF CASES

FEBRUARY 2022

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CITTA HOBART PTY LTD & ANOR v CAWTHORN (H7/2021)

Court appealed from: Full Court of the Supreme Court of Tasmania
[2020] TASFC 15

Date of judgment: 23 December 2020

Special leave granted: 13 August 2021

The first appellant is undertaking a building development on land owned by the second appellant. There will be three entrances, one of which will provide access only by stairs. The respondent complained under the *Anti-Discrimination Act 1998* (Tas) ('the State Act') that the stairs-only entrance constitutes disability discrimination. The complaint was referred to the Tasmanian Anti-Discrimination Tribunal ('the Tribunal'). The appellants contended that they had complied with the Disability Standards ('the Standards') made under the *Disability Discrimination Act 1992* (Cth) ('the Commonwealth Act'). They argued that the provisions of the State Act under which the complaint was made were directly or indirectly inconsistent with the Commonwealth Act and therefore invalid under s 109 of the *Constitution*.

The Tribunal decided that, as the defence raised a Constitutional matter and as it could not exercise federal jurisdiction because it is not a court of a State, it did not have jurisdiction. The Tribunal dismissed the complaint. The respondent appealed to the Full Court of the Supreme Court of Tasmania.

The Full Court allowed the appeal. Blow CJ held that there was no direct or indirect inconsistency between the State and Commonwealth Acts. As a result, the Tribunal was not called on to exercise federal jurisdiction and therefore had a duty to hear and determine the complaint. Wood J agreed with the Chief Justice. Estcourt J, providing separate reasons, found that s 109 of the *Constitution* did not apply because the Standards are not a federal law and consequently the Tribunal erred in finding that it had no jurisdiction.

The appellants applied to the High Court for special leave to appeal which was granted on 13 August 2021. The appellants filed a notice of appeal and notice of a constitutional matter on 27 August 2021. The respondent has filed a notice of contention and a further notice of contention. The Attorneys-General for New South Wales, Tasmania, South Australia, Queensland, Western Australia, Victoria and the Commonwealth have intervened. The Australian Human Rights Commission has been granted leave to appeal as *amicus curiae*.

The grounds of appeal are that:

- The Full Court erred in concluding that, because (in the Full Court's opinion) the claim of inconsistency within the meaning of s 109 of the *Constitution* made in the defence to the complaint in the Anti-Discrimination Tribunal (the Tribunal) would not succeed, the Tribunal was not called upon to exercise federal jurisdiction and therefore had a duty to hear and determine the complaint rather than dismissing it.
- The Full Court erred in deciding that the *Anti-Discrimination Act 1998* (Tas) was not inconsistent, within the meaning of s 109 of the *Constitution*, with the federal law comprised of the *Disability Discrimination Act 1992* (Cth) and the Disability (Access to Premises — Buildings) Standards 2010 made under that Act.

The grounds of contention are that:

1. The Full Court erred in law by failing to decide that:
 - (a) the Anti-Discrimination Tribunal ought not to have dismissed the complaint without forming an opinion about whether the appellants' defence in reliance on s109 of the *Constitution* ('the constitutional defence') was reasonably arguable and not misconceived;
 - (b) as the only opinion that the Tribunal could properly have formed in relation to the constitutional defence was that it was not reasonably arguable and/or was misconceived, the Tribunal erred in law in dismissing the complaint.
2. Alternatively, the Full Court erred in law by failing to decide that:
 - (a) in the event that an opinion that the constitutional defence was reasonably arguable, and/or was not misconceived, was open to the Tribunal to form, the Tribunal ought to have adjourned the hearing of the complaint on the basis that the appellants should seek a writ of prohibition or other appropriate relief to prevent the Tribunal from proceeding to hear the complaint from a Court having jurisdiction to grant the relief, rather than dismissing it as it did;
 - (b) a Court having jurisdiction to hear the writ of prohibition or other appropriate relief would conclude, as the Full Court did, that the constitutional defence would fail.
3.
 - (a) The Full Court erroneously found that s 24(a) of the *Anti-Discrimination Act 1998* (Tas) (the AD Act), and s 11 of the *Building Act 2016* (Tas) (the BA), did not have the consequence that compliance with the Disability (Access to Premises – Buildings) Standards 2010 (the Standards) would afford the appellants with a complete defence to the complaint.
 - (b) Accordingly, the Full Court was in error in failing to find that, by reason of s 24(a) of the AD Act and s 11 of the BA, the constitutional defence would fail because there was no basis for concluding that there could be any inconsistency between the AD Act and the DD Act and/or the Standards.

Alternatively to paragraphs 1, 2 and 3 above:

- (a) the Full Court erred in law by failing to find that there could be any inconsistency for the purposes of s 109 of the *Constitution* between the AD Act and the DD Act and/or the Standards (which relevantly only applied to "buildings"), insofar as the complaint concerned the discriminatory provision of access to facilities, goods and services not "within buildings";
- (b) accordingly, the Full Court erred in law in failing to find that the complaint ought not to have been dismissed by the Tribunal insofar as it related to access to facilities, goods and services not "within buildings" under the Standards.

The ground of contention in the further notice of contention is:

- The respondent contends that the decision of the Full Court below should be affirmed on the further ground that the Full Court ought to have found that the Tribunal should not have dismissed the complaint because it had, and was exercising, executive power in relation to the complaint without exercising

federal judicial power, which executive power included the power to find that the complaint was substantiated and make the orders sought under s 89 of the *Anti-Discrimination Act 1998* (Tas) on the basis that those orders were not enforceable as orders of the Supreme Court under s 90 of the Act.

**FARM TRANSPARENCY INTERNATIONAL LTD & ANOR v
STATE OF NEW SOUTH WALES (S83/2021)**

Date writ of summons filed: 10 June 2021

Date amended special case referred to Full Court: 7 October 2021

The first plaintiff (“Farm Transparency”) is a not-for-profit charity that seeks to relieve and prevent animal suffering by raising public awareness of cruelty to animals and by advocating for changes to relevant practices and laws. Its activities include the publication of photographs and audio-visual recordings of various practices and events on farms and in abattoirs. The second plaintiff, Mr Christopher Delforce, is an activist for animal welfare and is a director of Farm Transparency.

In pursuing his and Farm Transparency’s animal welfare activities, Mr Delforce has installed devices and has made recordings and taken photographs in purported contravention of s 8 of the *Surveillance Devices Act 2007* (NSW) (“the SD Act”), which prohibits the use of an optical surveillance device where entry to a property without consent is involved. Mr Delforce and Farm Transparency also have purportedly contravened s 11 of the SD Act (a publication prohibition) and s 12 of the SD Act (a possession prohibition).

In their proceedings in this Court, the plaintiffs challenge the validity of ss 11 and 12 of the SD Act. This is on the basis that the provisions burden the implied freedom of political communication in a manner not compatible with the system of government established by the *Constitution*.

On 7 October 2021 Justice Keane granted the parties leave to state the following questions of law, in the form of an amended special case, for the opinion of the Full Court:

1. Does s 11 of the SD Act impermissibly burden the implied freedom of political communication?
2. If “yes” to question 1, is s 11 of the SD Act severable in respect of its operation upon political communication pursuant to s 31(2) of the *Interpretation Act 1987* (NSW)?
3. Does s 12 of the SD Act impermissibly burden the implied freedom of political communication?
4. If “yes” to question 3, is s 12 of the SD Act severable in respect of its operation upon political communication pursuant to s 31(2) of the *Interpretation Act 1987* (NSW)?
5. Who should pay costs?

The plaintiffs have filed a notice of a constitutional matter. The Attorneys-General of the Commonwealth, Queensland, Western Australia and South Australia are intervening in the proceeding.

RUDDICK v COMMONWEALTH OF AUSTRALIA (S151/2021)

Date writ of summons filed: 24 September 2021

Date special case referred to Full Court: 3 December 2021

Mr John Ruddick is a member of The Liberal Democratic Party (“the LDP”), a political party registered under the *Commonwealth Electoral Act 1918* (Cth) (“the Electoral Act”) on the Australia Electoral Commission (“AEC”) register of political parties. On 28 August 2021, Mr Ruddick was endorsed by the LDP as its lead Senate candidate for New South Wales.

On 3 September 2021 the *Electoral Legislation Amendment (Party Registration Integrity) Act 2021* (Cth) (“the Amending Act”) came into force. By items 7, 9, 11 and 14 of Sch 1 to the Amending Act (“the impugned provisions”), the Electoral Act was amended so as to, amongst other things, enable a first-registered party to object to a second-registered party’s continuation on the AEC’s register when the parties’ names share a common word. The AEC may uphold the objection, requiring the second party to change its name or be deregistered.

By an amended writ of summons, Mr Ruddick seeks a declaration that the impugned provisions are invalid in whole or in part because they impermissibly interfere with the implied freedom of political communication and are contrary to ss 7 and 24 of the *Constitution*, which require that members of Parliament be directly chosen by the people.

On 9 November 2021 the Federal Director of the Liberal Party lodged an objection with the AEC pursuant to s 134A of the Electoral Act to the continued entry of the LDP on the AEC register. On 23 November 2021, the AEC notified the LDP that it had upheld the objection and the LDP would be deregistered under s 137 of the Electoral Act if it did not make an application to change its name and abbreviation within one month or if it made such an application but it was refused. If the LDP is deregistered before the issue of writs for the next federal election, which is to be held by 21 May 2022, then the current name of the LDP will not be printed adjacent to Mr Ruddick’s name on an electoral ballot. If the LDP changes its name, Mr Ruddick may not have his name associated with a new party name on an electoral ballot.

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

1. Are any of items 7, 9, 11 and 14 of Sch 1 to the *Electoral Legislation Amendment (Party Registration Integrity) Act 2021* (Cth) invalid, in whole or in part, on the ground that they infringe the implied freedom of political communication?
2. Are any of items 7, 9, 11 and 14 of Sch 1 to the *Electoral Legislation Amendment (Party Registration Integrity) Act 2021* (Cth) invalid, in whole or in part, on the ground that they preclude the direct choice by the people of Senators and Members of the House of Representatives, contrary to ss 7 and 24 of the *Constitution*?
3. In light of the answers to questions 1 and 2, what relief, if any, should issue?

4. Who should pay the costs of and incidental to this special case?

The plaintiff has filed a notice of a constitutional matter. The Attorneys-General of Western Australia and New South Wales are intervening in the proceeding.

DELIL ALEXANDER (BY HIS LITIGATION GUARDIAN BERIVAN ALEXANDER) v MINISTER FOR HOME AFFAIRS & ANOR (S103/2021)

Date application for a constitutional or other writ filed: 23 July 2021

Date amended special case referred to Full Court: 26 October 2021

In April 2013 Mr Delil Alexander, an Australian citizen since his birth in Sydney in 1986, departed Australia for Turkey. Mr Alexander indicated on his outgoing passenger card that he would return to Australia after a three-month holiday. He had told his family that he would return after arranging a marriage.

While overseas, Mr Alexander entered Syria, where he married in May 2013. The Minister for Foreign Affairs cancelled Mr Alexander's passport in September 2013, on the basis that the Australian Security and Intelligence Organisation ("ASIO") suspected on reasonable grounds that Mr Alexander would likely engage in conduct that might prejudice the security of Australia or another country.

In November 2017 Mr Alexander was arrested by Kurdish militia in the Syrian province of Deir El-Zour. He claims that he was then tortured by Kurdish militia and by the Syrian authorities. In January 2019 he was convicted of offences against the Syrian Penal Code and was sentenced to imprisonment for 15 years (a sentence which was later reduced to 5 years' imprisonment).

On 16 June 2021 the Director of the Australian Security and Intelligence Organisation ("ASIO") furnished the Minister for Home Affairs ("the Minister") with a qualified security assessment ("QSA") in relation to Mr Alexander. ASIO assessed that Mr Alexander had joined the Islamic State of Iraq and the Levant by August 2013 and that he had likely engaged in foreign incursion and recruitment by entering or remaining in Syria's Al-Raqqa Province on or after 5 December 2014. On 2 July 2021 the Minister, relying partly on the QSA, made a determination ("the Determination") under s 36B(1) of the *Australian Citizenship Act 2007* (Cth) that Mr Alexander ceased to be an Australian citizen.

The Determination was on the stated bases that the Minister was satisfied that: Mr Alexander had engaged in foreign incursion and had, by his conduct, repudiated his allegiance to Australia; it would be contrary to the public interest for Mr Alexander to remain an Australian citizen; and Mr Alexander would not be without nationality or citizenship of another country.

Mr Alexander had automatically acquired citizenship of Turkey when he was born, by virtue of the nationality of his parents. At the time of his birth, however, his name was "Delil Günenç" and it is in that name that his Turkish citizenship is registered in the records of the Republic of Turkey. (Mr Alexander adopted his current surname in 1995.)

Mr Alexander commenced proceedings in this Court, seeking a writ of certiorari quashing the Determination and seeking a declaration that he is an Australian citizen. He claims that, despite having received a pardon from the Syrian government (after he had served less than half of his reduced sentence), he remains incarcerated in Syria because he is not a lawful resident of that country

and Syrian authorities will not repatriate him to Turkey due to his Turkish citizenship being under a different name.

Mr Alexander filed a Notice of a Constitutional Matter, in response to which no Attorney-General has elected to intervene in the proceeding.

The parties filed an amended special case stating the following questions of law, which Justice Steward referred for consideration by the Full Court:

1. Is s 36B of the *Australian Citizenship Act 2007* (Cth) invalid in its operation in respect of the plaintiff because:
 - a. it is not supported by a head of Commonwealth legislative power;
 - b. it is inconsistent with an implied limitation on Commonwealth legislative power preventing the involuntary deprivation of Australian citizenship;
 - c. it effects a permanent legislative disenfranchisement which is not justified by a substantial reason;
 - d. it effects a permanent disqualification from being chosen or from sitting as a senator or a member of the House of Representatives, otherwise than in the circumstances contemplated by ss 34 and 44 of the Constitution;
 - e. it reposes in the Minister the exclusively judicial function of punishing criminal guilt?
2. What, if any, relief should be granted to the plaintiff?
3. Who should pay the costs of the special case?