

SHORT PARTICULARS OF CASES
APPEALS

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SDCV v DIRECTOR-GENERAL OF SECURITY & ANOR (S27/2022)

Court appealed from: Full Court of the Federal Court of Australia
[2022] FCAFC 51

Date of judgment: 9 April 2021

Special leave granted: 21 February 2022

SDCV is a citizen of Lebanon whose permanent residence visa was cancelled in August 2018 by the Minister for Home Affairs (“the Minister”) under s 501(3) of the *Migration Act 1958* (Cth). The cancellation was based on a recommendation contained in an adverse security assessment (“ASA”) made by the Director-General of Security on behalf of the Australian Security Intelligence Organisation (“ASIO”). ASIO had assessed that SDCV was directly or indirectly a risk to security, in view of his having communicated with family members in Syria and in Australia who were of security concern (some of whom had been convicted of serious offences) via a specially purchased mobile telephone which he then disposed of.

SDCV was provided with an unclassified statement of grounds for the ASA. Certain content was omitted from that statement, however, as the Minister had certified under s 28(2)(b) of the *Australian Security Intelligence Organisation Act 1979* (Cth) (“the ASIO Act”) that disclosure to SDCV would be prejudicial to the interests of national security.

Upon a review of the ASA by the Administrative Appeals Tribunal (“the Tribunal”), the Minister gave certificates under ss 39A(8) and 39B(2)(a) of the *Administrative Appeals Tribunal Act 1975* (Cth) (“the AAT Act”), which enabled the Tribunal to receive evidence and submissions from the Director-General in the absence of SDCV and to restrict certain information to Tribunal members, on the ground that disclosure would prejudice Australia’s security. The Tribunal found that the ASA was justified, based upon evidence which the Tribunal had received in closed session and which was not available to SDCV.

SDCV appealed to the Federal Court under s 44 of the AAT Act. In the appeal, the Federal Court received and examined all documents that were before the Tribunal. Section 46(2) of the AAT Act however required the Federal Court to restrict information the subject of certificates under s 39B(2) to the judges dealing with the matter. SDCV challenged the validity of s 46(2) on the basis that the provision contravened Chapter III of the *Constitution* by impermissibly interfering with the exercise of Commonwealth judicial power because it caused the Federal Court to deny him procedural fairness.

The Full Court of the Federal Court (Rares, Bromwich and Abraham JJ) unanimously dismissed SDCV’s appeal. Their Honours found that the broader statutory regime, enacted in view of national security considerations, had modified the requirements of procedural fairness and that no practical injustice had been caused. The Court considered that the source of the non-disclosure to SDCV was the certificates issued by the Minister, the validity of which SDCV had not challenged, and that SDCV’s position in his appeal had been improved by the provision of all material pursuant to s 46(2) of the AAT Act, despite his being unable to make submissions specifically addressing material which had been considered by the Tribunal and by the Court.

The sole ground of appeal is:

- The Full Court erred by concluding that s 46(2) of the AAT Act is a valid law of the Commonwealth to the extent that it:
 - a) precludes the Federal Court from providing a party a fair opportunity to respond to evidence on which an opposing party relies; or alternatively
 - b) requires or authorises the Court to act in a manner which is inconsistent with the essential character of a court or with the nature of judicial power.

A notice of a constitutional matter was filed by the plaintiff. The Attorneys-General of New South Wales, Queensland, Western Australia and South Australia are intervening in the appeal.

ARISTOCRAT TECHNOLOGIES AUSTRALIA PTY LTD v COMMISSIONER OF PATENTS (S40/2022)

Court appealed from: Full Court of the Federal Court of Australia
[2021] FCAFC 202

Date of judgment: 19 November 2021

Special leave granted: 10 March 2022

Innovation Patent No. 2016101967 (“the Patent”) was held by the Appellant (“Aristocrat”) until it was revoked in July 2018 by the Respondent (“the Commissioner”) following an examination under s 101A of the *Patents Act 1990* (Cth) (“the Act”). Claim 1 of the Patent describes hardware, software and firmware components of an electronic gaming machine (“EGM”), including the display and operation of a “feature game” (a second set of reels displaying configurable and non-configurable symbols) that is triggered by a defined event in the base game. The Commissioner’s delegate found that the invention claimed in the Patent was in substance only a rule in a business scheme for generating either revenue for the EGM’s operator or prize money for a winning player; it was not a “manner of manufacture” (“MM”) as is required in s 18 of the Act.

An appeal by Aristocrat to the Federal Court under s 101F(4) of the Act was allowed by Justice Burley in July 2020. His Honour found that Claim 1 could not be a mere business scheme, as it described a device that was a combination of hardware and software providing an EGM that functioned in a particular way. The invention described in Claim 1 was an MM, involving both an abstract idea and a means of carrying it out.

The Full Court of the Federal Court (Middleton, Perram and Nicholas JJ) unanimously allowed an appeal by the Commissioner. Justices Middleton and Perram held that Justice Burley had erred by focusing on whether the claimed invention was a business scheme, thereby overlooking an important question of computer implementation. The majority favoured the posing of the following two questions in cases such as Aristocrat’s:

- (a) Is the invention claimed a computer-implemented invention?
- (b) If so, can the invention claimed broadly be described as an advance in computer technology?

Justices Middleton and Perram answered the first question in the affirmative, finding that the substance of the invention disclosed by Claim 1 was the feature game implemented on the EGM, a computer, by means of a game controller. Their Honours then found that Claim 1 was silent on the topic of computer technology and that it pertained only to the *use* of a computer, leaving a programmer to devise code to implement the feature game.

Justice Nicholas, while joining the majority in allowing the Commissioner’s appeal, would have remitted for consideration by Justice Burley the question of whether Claim 1 was an MM on the basis that it involved technical and functional improvements to EGMs through the use of configurable symbols.

The grounds of appeal include:

- The Full Court majority erred in holding that “*the general principles patentability*” do not apply to “*a computer-implemented invention*”.
- The Full Court majority erred in applying a new, “*Proposed Alternative Approach*”, to determine whether “*a computer-implemented invention*” is an MM within s 18(1A)(a) of the *Patents Act 1990* (Cth), which did not apply the general principles of patentability and conflated MM and novelty.

A notice of contention filed by the respondent raises the following ground:

- The Full Court ought to have held (if and to the extent that their Honours did not so hold) that the invention claimed in Claim 1, considered as a matter of substance (not form):
 - (a) was an abstract idea, being a scheme or set of rules for playing a game, which was implemented using conventional computer technology for its well-known and well-understood functions;
 - (b) further or alternatively, did not make any technical contribution to or provide any technical solution to a problem in the field of gaming technology, or constitute any advance in the field of gaming technology, and was thereby not an MM.

The Fédération Internationale des Conseils en Propriété Intellectuelle and the Institute of Patent and Trade Mark Attorneys of Australia have applied for leave to make submissions as *amicus curiae* in this appeal. The Court will receive the written submissions filed on behalf of the Fédération Internationale des Conseils en Propriété Intellectuelle and both written submissions and oral submissions on behalf of the Institute of Patent and Trade Mark Attorneys of Australia.

DANSIE v THE QUEEN (A4/2022)

Court appealed from: Supreme Court of South Australia Court of Criminal Appeal
[2020] SASCF 103

Date of judgment: 2 November 2020

Special leave granted: 18 February 2022

The Appellant was charged with the murder of his wife on 16 April 2017. The Respondent alleged that the Appellant had taken his wife, who was in a wheelchair following a stroke 22 years earlier, to the South Parklands of Adelaide. The Respondent alleged that she drowned after the Appellant pushed her into a pond. The Appellant's defence case was that, while he was attempting to move his wife's wheelchair away from the pond where she had been positioned to watch ducks, the wheelchair's movement was obstructed and accidentally tipped into the pond. His attempts to save her were unsuccessful and she drowned.

On 20 December 2019, after a trial without jury, the trial Judge found the Appellant guilty of murder. The Appellant appealed to the Court of Criminal Appeal on the basis that the verdict could not be supported having regard to the evidence and that the trial Judge had no, or insufficient, regard to aspects of the evidence which tended to cast doubt on the prosecution case.

On 2 November 2020, the majority of the Court of Criminal Appeal (Parker and Livesey JJ) dismissed the appeal. Nicholson J, in dissent, would have upheld the appeal on the basis that the conviction was unreasonable or could not be supported by the evidence.

The Appellant applied for special leave to appeal to the High Court which was granted on 18 February 2022.

The grounds of appeal in the High Court are that:

- The Court of Criminal Appeal (by majority) erred in finding that the verdict of murder was not unreasonable or unsupported by the evidence within the meaning of s158(1)(a) of the *Criminal Procedure Act 1921 (SA)* (CPA) in that:
 - The Court of Criminal Appeal failed to conduct an independent assessment of the whole of the evidence to determine whether it was open to the trial judge to find the Appellant's guilt had been proved beyond reasonable doubt.
 - The Court of Criminal Appeal failed to hold that it was not open to the trial judge to exclude a hypothesis consistent with innocence, namely accidental drowning.

STEPHENS v THE QUEEN (S53/2022)

Court appealed from: Court of Criminal Appeal of the Supreme Court of New South Wales
[2021] NSWCCA 152

Date of judgment: 9 July 2021

Special leave granted: 8 April 2022

On 8 June 1984 amendments to the *Crimes Act 1900* (NSW) (“the Crimes Act”) came into effect repealing the offence in s 81 of indecent assault on a male person which carried a maximum penalty of 5 years imprisonment, and creating the offence, in s 78K, of homosexual intercourse with a male person between the ages of 10 years and 18 years, carrying penalty of up to 10 years imprisonment.

On 29 November 2018, the Appellant was arraigned in the District Court of New South Wales on an indictment containing 18 counts, with dates ranging between 1982 and 1987. The counts alleged offences against s 81 of the Crimes Act, together with alternative counts against s 78K, with dates commensurate with the dates the respective provisions were in force.

On 1 December 2018, s 80AF of the Crimes Act (“s 80AF”) came into force. That provision provided, relevantly, that in trials for sexual offending against children in which there was uncertainty about the time when an offence was committed and because of a change in the law the alleged conduct would have constituted more than one offence, a person could be prosecuted under any of the offences (except the one carrying the higher maximum penalty), regardless of when conduct actually occurred. Any requirement to establish that the offence charged was in force was satisfied if the prosecution was able to establish that the offence was in force at some time during the relevant period.

On 5 February 2019, and subsequently on 19 February 2019, Judge Woodburne granted the prosecution leave to amend the indictment to enable the prosecution to rely on s 80AF. On 19 February 2019, the Appellant was re-arraigned before a jury on an amended indictment of 14 counts. On 4 March 2019, the Appellant was found guilty on seven counts, including counts 6, 7 and 13, which were offences against s 81 of the Crimes Act committed between dates extending beyond the repeal of that section.

On appeal against his convictions on counts 6, 7 and 13, the Appellant contended that the primary judge had erred in granting the prosecution leave to amend the indictment and challenged the application of s 80AF.

The Court of Criminal Appeal (Simpson AJA and Davies J; Button J dissenting) dismissed the appeal against conviction on counts 6, 7 and 13. The majority held that while criminal proceedings against the Appellant had commenced prior to s 80AF coming into force (having commenced no later than 29 November 2018), the provision applied retrospectively to the proceedings. Acting Justice Simpson (with whom Justice Davies agreed) considered that s 80AF was procedural in nature, not substantive, as it did not affect any existing rights or obligations as the conduct alleged in the indictment would constitute a criminal offence at any time during the period encompassed by the charge. It could therefore be given

retrospective operation. Their Honours further considered that, as s 80AF did not have the effect of making past acts criminal, did not create a criminal offence or alter a pre-existing criminal offence, it applied to proceedings already commenced.

Justice Button would have allowed the appeal, quashed the convictions on counts 6, 7 and 13, and ordered a new trial. His Honour considered that s 80AF constitutes a mechanism whereby inculpation is expanded, in the practical sense of the ability of the prosecution to obtain a verdict of guilty in certain circumstances in which a verdict of guilty would not previously have been available. Absent an express transitional provision stating that it was applicable to proceedings already commenced or any implication in the extrinsic material, it could not apply to the proceedings.

The grounds of appeal, in summary, are:

- The Court of Criminal Appeal erred in determining that s 80AF applied to the Appellant's trial, with the consequence that the convictions sustained by the Appellant on counts 6, 7 and 13 on the 14-count indictment dated 5 February 2019 (as amended on 19 February 2019) must be set aside.
- The Court of Criminal Appeal erred in failing to determine that the Appellant's convictions on counts 6, 7 and 13, should be set aside on the basis that a substantial miscarriage of justice had occurred in circumstances where:
 - the trial judge granted leave to the prosecutor to amend the indictment so as to permit the Crown to rely upon s 80AF; and
 - the conduct relied upon by the Crown as constituting the offences the subject of counts 6, 7 and 13 was alleged to have occurred within a range of dates which extended beyond the repeal of s 81 of the Crimes Act effective as of 8 June 1984, and the Crown was unable to prove reasonable doubt that the said conduct occurred prior to 8 June 1984.