HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S25/2021
File Title:	Addy v. Commissioner of Taxation
Registry:	Brisbane
Document filed:	Form 27E - Reply
Filing party:	Appellant
Date filed:	27 May 2021

Important Information

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: **Catherine Victoria Addy**
Appellant

Commissioner of Taxation
Respondent

10 **APPELLANT'S REPLY**

Part I: These submissions are in a form suitable for publication on the internet.

Part II:

Is there a rule of limitation which means Article 25 can only apply to harsher tax treatment imposed on the sole basis of nationality?

1. The Respondent contends for a rule of limitation drawn from Paragraph [1.252] of the Explanatory Memorandum, whereby Article 25 only prohibits harsher tax treatment when the treatment is imposed on the sole basis of nationality.

2. The Respondent's submission seeks to support the proposed rule by referring to the principles of construction. For the most part these principles are agreed. It is correct that
20 construction should seek to give effect to the purpose of a provision, just as it is correct to have regard to context. However Article 31(1) of the Vienna Convention says *'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'* This indicates that while context, object and purpose may be used to construe a provision, the outcome must also be consistent with the ordinary meaning of its text. The Respondent's proposed rule is not consistent with this ordinary meaning. The text of Article 25 describes the taxes and circumstances to which Article 25 applies (*'other or more burdensome'* and '*same circumstances, in particular with respect to residence'*). There is no ordinary reading of those words that permits them to be read as *'imposed on the*
30 *sole basis of nationality'*, even if full recourse is had to the context, object and purpose of Article 25.

3. The incongruity between the proposed rule and the text means, as a practical matter, the rule would cause Article 25 to operate in a way bearing little or no relationship to the express criteria in Article 25. For example, the Respondent contends that Catherine Addy and an Australian comparator were not *'in the same circumstances'* in terms of Article 25 because Addy held a Working Holiday Visa. Yet the Respondent also says (at RS[55]) the position would be different and Addy could rely on Article 25 if Australia had imposed a tax requiring Addy to pay 5% more of her income than the Australian, or if Addy was liable for a tax on foreign passports. In all three of these cases Addy's personal circumstances would be the same. The Respondent's proposed rule means the same set of facts about Catherine Addy's circumstances could both answer and not answer the criteria posed by Article 25, depending on whether the relevant tax was of a type described in Paragraph [1.252] of the Explanatory Memorandum.

4. Paragraph [1.252] does not even articulate a rule of limitation. It offers the observation that Article 25 is only breached if harsher treatment is imposed by reason of nationality. An observation in the extrinsic materials about the effect of a provision can be erroneous, and is not the same thing as a rule.[1]

5. The suggested limitation on Article 25 is also unwise. When a provision has a remedial purpose and is cast in general terms, the better construction is usually one that gives the provision all the flexibility its words allow, in recognition that the provision may need to operate in a wide range of different cases and not all of these cases can be anticipated. To place an *a priori* limitation on Article 25 is to do the opposite. The Appellant has pointed out the suggested limitation would make Article 25 incapable of giving relief against an overtly discriminatory tax which is framed so as to apply through more than one criterion, such as a tax that uses the criteria of nationality *and* ethnicity. This in turn means Article 25 could not offer relief against some of the most distasteful legislation associated with the White Australia policy.[2] It is quite possible this did not occur to the person who prepared the Explanatory Memorandum on which the Respondent now relies. One of the reasons it is dangerous to gloss the text of a provision is that not all the implications of doing so will necessarily be apparent.

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[1] *Hunter Resources Ltd v Melville* (1988) 164 CLR 234 at 241 per Mason CJ and Gaudron J.
[2] Legislation referenced in Footnotes 7 and 8 of Appellant submission in chief.

6. A final reason to reject the Respondent's proposed rule is that the text of Article 25, and in particular the phrase *'in the same circumstances, in particular with respect to residence'* provides a satisfactory controlling principle. In any individual case the application of Article 25 can be resolved by determining whether a foreign national and an Australian comparator are sufficiently in the same circumstances that relief should lie. When a court comes to apply Article 25 it will be appropriate to draw on extrinsic materials (in order to determine, for example, what circumstances need to be shared by the claimant and Australian comparator). But the purpose of referring to extrinsic materials, one suggests, should be to construe the textual requirement for same circumstances. It should not be to replace that textual requirement with a rule that has no foundation in the text.

Was Addy in the same circumstances as an Australian, given that an Australian cannot hold a Working Holiday Visa?

7. RS[20] and [50] – [56] argues that Addy was not relevantly in the same circumstances as an Australian because Addy held a visa, and an Australian cannot hold a visa. The Appellant's position on this was set out at AS[57] – [62].

8. The suggestion that a requirement for same circumstances should be construed so strictly that the very characteristics which attract harsher treatment must be shared by the comparator is an argument that has been put on previous occasions. Many Australian anti-discrimination statutes utilise criteria which compare the discriminatory treatment of an individual with the treatment of a comparator in the same circumstances. The cases that address those statutes have considered the argument on which the Respondent now relies.

9. In *Collier v Austin Health* (2011) 36 VR 1 the court said, if there is a requirement for the characteristic that attracts discriminatory treatment to be imputed to a comparator in the same circumstances, the effect would be to *'decimate'* the operation of the legislation. The court in *Collier* said the same thing about the argument that, if there is no comparator, an anti-discrimination clause cannot apply. Similar conclusions were reached by courts in other cases involving a same circumstances criterion.[3] These

[3] *Commonwealth v HREOC, Dopking, Thomas* (1993) 46 FCR 191 per Black CJ at 196, Lockhart J at 205 – 206 and Wilcox J at 211- 212, *Commonwealth v Humphries and Ors* (1998) 86 FCR 324 at 332 – 333, *HREOC v Mt Isa Mines* (1993) 46 FCR 301 per Lockhart J at 327.

decisions tell against the argument put by the Respondent. They also tell against the main case on which the Respondent relies, *IRC v United Dominions Trust* [1973] 2 NZLR 555, and the Respondent's interpretation of what Vogel says about the circumstances that must be the same.

Was harsher treatment imposed solely by reason of Addy's nationality, so that Addy should still obtain relief if the Respondent's proposed rule applies?

10. The Appellant says that, even accepting the proposed limitation on Article 25, the appeal should be allowed.

11. The Appellant's submission in chief made the point at [48] - [49] that, if an Australian lived in the United Kingdom and then travelled from the UK to Australia, as Addy did, acquired Australian tax residence and started earning income from the same job as Addy, the Australian would not be liable to pay the Backpacker Tax. The thing causing the harsher tax treatment is that Addy's nationality required her to obtain a visa to perform the same basic actions.

12. The Respondent's rejoinder to this, at RS [43] - [46], duplicates the reasoning of the Full Court majority. The argument goes that nationality is not the reason for the harsher treatment because Addy and other UK nationals can enter Australia on visas other than a Working Holiday Visa and, further, their choice to travel to Australia is voluntary and not all UK nationals are liable for the Backpacker Tax.

13. This argument is not convincing. The courts have long experience with questions of causation. The cause of an event, or an outcome, is typically what occurred in historical fact. The cause of harsher tax treatment is not the theoretical courses of action that were open to somebody like Addy, which would have resulted in a different outcome. If a motorist collides with a truck the cause of the motorist's injury has something to do with the car and the truck; not the possibility the motorist could have caught a train. Nor is the identification of the cause of the motorist's injury assisted by the observation that the decision to go for a car trip is voluntary, and that not all motorists are involved in car crashes.

14. Consider the situation in which a hotel requires foreign nationals to pay a fee for admission, but does not require Australians to pay a fee. The Respondent's argument, at least implicitly, seems to be that the reason for this harsher treatment is not nationality

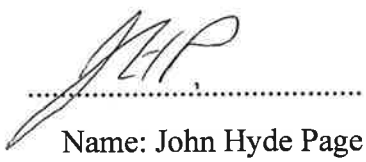
because foreign nationals who enter the hotel have made the choice to do so. This Court is thereby invited to ignore the comparison of Addy to an Australian who took the same actions as Addy, which is the comparison mentioned in the Explanatory Memorandum as well as Article 25 itself. This Court is also asked to focus on the fact that Addy could have applied for a different visa, in the same way that a foreigner faced with the hotel entrance fee could have gone to a different venue, or stayed home altogether. This is not the same as comparing the treatment of the foreign national with the treatment of an Australian who took the same action by entering the hotel. Nor are the matters emphasised by the Respondent the explanation for the different treatment as between a foreign national and an Australian who both enter the same hotel.

15. It is notable the Respondent has not, at any stage of these proceedings, identified a type of visa (other than a Working Holiday Visa) which Catherine Addy could have successfully applied for and used to travel to Australia. A list of visa types is set out in Paragraph [223] of the Full Court judgment. It does not appear Addy was eligible for any of them. There is no suggestion, for example, that she was a business owner and able to apply for the Business Owner Visa (Subclass 890). There is no reason to think it was even a theoretical possibility that Addy could have travelled to Australia otherwise than on a Working Holiday Visa.

Costs

16. The Appellant has received test case funding for this appeal but not the special leave application. Accordingly, the Appellant seeks an order that the Respondent pay the costs of and concerning the special leave application. The Appellant otherwise agrees to an order that there be no order as to costs in relation to this appeal.

Dated: 27 May 2021



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