HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA S25/2021

BRISBANE REGISTRY

BETWEEN: **CATHERINE VICTORIA ADDY**

Appellant

and

COMMISSIONER OF TAXATION

Respondent

RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: STATEMENT OF ISSUES

2. This appeal concerns whether the rate of tax applied to certain income derived by individuals while they hold working holiday visas[1] infringes **article 25**(1) of the *Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital made at Canberra*[2] (**Double Tax Agreement**). That article states:

> *Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected.*

3. The appeal raises these particular issues:

a) does article 25 only prohibit differential tax treatment that is *solely* attributable to nationality?

b) if so, was the tax imposed on Ms Addy *solely* by reason of her British nationality?

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1 More specifically, Working Holiday visas and Work and Holiday visas.

2 The text of the convention is set out in Australian Treaty Series 2003 No 22 [2003] ATS 22. The Double Tax Agreement entered into force on 17 December 2003, following notification pursuant to article 29. The convention also includes the "exchange of notes relating to the convention (see the definition of "United Kingdom convention" in s 3AAA of the *International Tax Agreements Act 1953* (Cth), but the notes are not relevant for present purposes.

4. Here, the rate of tax did not apply because of Ms Addy's nationality. Rather, it applied because she held a particular type of visa. The critical discrimen was not nationality. The reasoning of the Full Federal Court should be upheld.

PART III: SECTION 78B NOTICES

5. No notice is required to be given under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: STATEMENT OF FACTS (AS [6] - [22])

6. The Respondent (**Commissioner**) does not agree with the factual background identified at paragraphs [6] to [22] of Ms Addy's submissions (**AS**), as it contains contentious descriptions and oversimplifications. The factual background is sufficiently set out at FFC [31]-[41]. The Commissioner wishes to emphasise certain matters.

7. Ms Addy is a British citizen. She arrived in Australia on 20 August 2015 on a subclass 417 (Working Holiday) visa. In simple terms, that kind of visa could only be granted to a person who was aged between 18 and 31 and who satisfied the Minister, among other things, that the visa applicant intended to enter and remain in Australia as a genuine visitor whose principal purpose was to spend a holiday in Australia.

8. The visa authorised Ms Addy to travel to, enter and remain in Australia for 12 months, and could (if certain work pre-requisites had been met) be "renewed" only once. She remained in Australia until 2 January 2016 (that is, less than 5 months), at which time she went to South-East Asia on a holiday. She returned to Australia on 8 March 2016 (that is, around 2 months later). Ms Addy, having met the relevant work pre-requisites, on 8 July 2016, applied for a second working holiday visa which was granted with on 9 July 2016. The second working holiday visa took effect on 20 August 2016 following the expiry of her first working holiday visa. This second visa authorised her to remain in Australia and (subject to its conditions) to work here until 20 August 2017.

9. On 2 December 2016, the *Income Tax Rates Amendment (Working Holiday Maker Reform) Act 2016* (Cth) was enacted. It applies to **working holiday taxable income**, which is defined to be income derived from sources in Australia[3] on or after 1 January 2017[4] while

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[3] See s 3A of the *Income Tax Rates Act 1986* (Cth), excluding certain amounts not presently relevant.

[4] See Part 2 of Schedule 1 of the *Income Tax Rates Amendment (Working Holiday Maker Reform) Act 2016* (Cth).

the individual is a **working holiday maker** (defined to be individuals that hold one of two specified subclasses of visa or a related bridging visa[5]). It is not in dispute that Ms Addy was a working holiday maker and that she derived working holiday taxable income after 1 January 2017.[6]

10. That Act amended the *Income Tax Rates Act 1986* (Cth) (the **Rates Act**) by imposing a flat tax of 15% on working holiday taxable income up to $37,000. It did so by inserting a new Part III into Schedule 7 of the Rates Act (the **Working Holiday Maker Income Tax Rates**).[7]

11. One purpose of introducing the Working Holiday Maker Income Tax Rates was to secure a tax rate that ensured Australia was attractive for working holiday makers.[8] Before the introduction of the tax, where a working holiday maker was not an Australian resident for tax purposes, that person would be taxed at the rates for non-residents contained in Part II of Schedule 7 of the Rates Act. In short, this meant that non-resident working holiday makers were taxed at 32.5% on income up to $87,000.[9] The amendments brought about by the Working Holiday Maker Income Tax Rates sought "to increase Australia's attractiveness as a destination of choice for working holiday makers, whilst ensuring that they pay tax at a fair rate on their earnings in Australia."[10] Those amendments were considered necessary because Parliament believed that the majority of working holiday makers were likely to be non-residents for tax purposes.[11] Thus, the amendments meant they would be liable to pay less tax.[12]

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5 See s 3A of the *Income Tax Rates Act 1986* (Cth). See FFC [9], [258].

6 FFC [9], [260].

7 FFC [197].

8 Explanatory Memorandum to the *Treasury Laws Amendment (Working Holiday Maker Reform) Bill 2016* (Cth) at [3.22].

9 See Part II of Schedule 7 of the Rates Act. See also the definition of "second resident personal tax rate" in s 3 of that statute, which says that it "means the rate mentioned in item 2 of the table in clause 1 of Part I of Schedule 7". The rate mentioned there is 32.5%.

10 Explanatory Memorandum to the *Income Tax Rates Amendment (Working Holiday Maker Reform) Bill 2016* (Cth) at [1.2]. See also the Second Reading speech for the Bill, referred to at FFC [197]. The Court may consider this material pursuant to s 15AB(2)(e) and (f) of the *Acts Interpretation Act 1901* (Cth): see *Minister for Immigration and Citizenship v SZJGV* (2009) 238 CLR 642 at [9] (in relation to the use of Second Reading Speeches).

11 Explanatory Memorandum to the *Treasury Laws Amendment (Working Holiday Maker Reform) Bill 2016* (Cth) at [3.21]; see also Steward J FFC [350]; and FFC [261].

12 So much was reflected in the Explanatory Memorandum - it estimated a decrease in revenue, over the forward estimates period, of $420 million: Explanatory Memorandum to the *Income Tax Rates Amendment (Working Holiday Maker Reform) Bill 2016* (Cth) at page 1.

12. Ms Addy, however, was found to be an Australian resident — albeit only on the basis of s 6(a)(ii) of the definition of "resident" in the *Income Tax Assessment Act 1936.*[13] Tax on her working holiday taxable income was assessed in accordance with the Working Holiday Maker Income Tax Rates.[14] This meant that she paid tax at 15% on her income of $26,576. By contrast, an Australian resident earning that income, who was not a working holiday maker, would have had a tax-free threshold of $18,200,[15] and thereafter paid tax at 19%.[16]

13. The central issue in this appeal is whether the tax imposed on Ms Addy, in those circumstances, infringed article 25.

PART V: STATEMENT OF ARGUMENT

10 *Overview (AS [23]-[39])*

14. Australia and the United Kingdom (**UK**) are parties to the Double Tax Agreement. It has the force of law in Australia.[17] Article 25 and the other provisions of the Double Tax Agreement have effect notwithstanding anything inconsistent contained in the *Income Tax Assessment Act 1936* (Cth) or the *Income Tax Assessment Act 1997* (Cth), or an Act imposing Australian tax.[18] If article 25 is infringed, the effect is that the tax payable by Ms Addy is limited to that which would have been paid had the rates in Part I of Schedule 7 of the Rates Act applied.

15. In simple terms, and as has been observed, article 25 provides that nationals of one State shall not be subjected in the other State to more burdensome taxation than the taxation to
20 which nationals of that other State in the same circumstances may be subjected.

16. Under the Double Tax Agreement, an Australian national is, relevantly, "an Australian citizen or an individual not possessing citizenship who has been granted permanent residency status."[19] A British national is, relevantly, "in relation to the United Kingdom, any British

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13 See FFC [30], [42]-[59], [258], and [269]-[288].

14 Clause 4 of Part I of Schedule 7 of the Rates Act meant that Ms Addy was not taxed as an Australian resident on her working holiday taxable income.

15 See the definition of "tax free threshold" in s 3 of the Rates Act. The tax free threshold would be reduced if the Australian resident was not resident for the whole year, see ss 16-20 of that Act.

16 Part I of Schedule 7 of the Rates Act.

17 See s 5(1) of the *International Tax Agreements Act 1953* (Cth).

18 See s 4(2) of the *International Tax Agreements Act 1953* (Cth).

19 Article 3(1) of the Double Tax Agreement.

citizen, or any British subject not possessing the citizenship of any other Commonwealth country or territory, provided that individual has the right of abode in the United Kingdom ….”[20] It is common ground that Ms Addy was a British national.[21]

17. To determine if article 25 is engaged, one seeks to identify a notional Australian national who is “in the same circumstances, in particular with respect to residence” and compare the tax treatment such a notional person would receive with the tax treatment of the applicant (a national of the UK).[22]

18. The focus of the dispute concerns the phrase “in the same circumstances, in particular with respect to residence.” The proper interpretation of those words is central to the dispute.
10 So much is common ground: AS [31].

19. The Commissioner contends that there are two reasons why article 25 was not infringed. Those reasons are related. The first is that article 25 is concerned with a foreign national being subject to a more burdensome tax that, upon its proper characterisation, is being imposed on the foreign national *solely* by reason of their nationality. In this case, the rates were applied to Ms Addy because of the type of visa she held — in particular, she entered and remained in Australia on a working holiday visa. She earned “working holiday taxable income” whilst in Australia and, thereby, became liable to pay tax at the Working Holiday Maker Income Tax Rates. Properly characterised, the higher amount of tax here was not imposed on Ms Addy because of her nationality.

20 20. Secondly, and related to the first point, the words “in the same circumstances” in article 25 mean identical in all matters relevant to the imposition of taxation except nationality. Here, it was not possible for an Australian national to earn working holiday income while holding a working holiday visa. This means that an Australian national could not be “in the same circumstances” as Ms Addy. The consequence is that article 25 was not engaged and, thereby, was not infringed.

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20 Article 3(1) of the Double Tax Agreement.

21 FFC [9], [326].

22 FFC [329]. See also FFC [210].

21. The proper approach to the interpretation of a tax treaty is settled.[23] Consistently with article 31 of the *Vienna Convention on the Law of Treaties 1969*, a holistic approach is to be taken. The written text is the starting point and has primacy in the interpretation process. However, the context, object and purpose of the treaty must also be considered.[24] Article 32 goes on to say that extrinsic sources may be used: (1) to confirm the meaning resulting from the application of article 31; or (2) to determine the meaning when interpretation according to article 31 leaves the meaning "ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable."[25]

22. Article 25(1) was modelled on article 24(1) of the Model Taxation Convention on Income and Capital, which was adopted by the Organisation for Economic Cooperation and Development (**OECD**). The OECD has also published Commentary on that Convention (**OECD Commentary**).

23. In interpreting the Double Tax Agreement, the OECD Commentary can be used to assist in interpreting article 25.[26] That said, it is inappropriate to focus upon the OECD Commentary to the exclusion of the words of the Double Tax Agreement.[27]

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23 *Thiel v Commissioner of Taxation* (1990) 171 CLR 338 at 349, 356; *Commissioner of Taxation v Lamesa Holdings BV* (1997) 77 FCR 597 at 604; *McDermott Industries (Aust) Pty Ltd v Commissioner of Taxation* (2005) 142 FCR 134 at [37]; *Federal Commissioner of Taxation v SNF (Australia) Pty Ltd* (2011) 193 FCR 149 at [113], [119]-[120]; *Resource Capital Fund III LP v Commissioner of Taxation* (2013) 95 ATR 504 at [46]-[53]; *Task Technology Pty Ltd v Commissioner of Taxation* [2014] FCA 38 at [10]; *Task Technology Pty Ltd v Commissioner of Taxation* [2014] FCAFC 113 at [12]; *Tech Mahindra Limited v Commissioner of Taxation* [2015] FCA 1082 at [51]-[61]; *Bywater Investments Limited v Commissioner of Taxation* (2016) 260 CLR 169 at [165]-[167]. See also, more generally, in relation to the use of the Vienna Convention to interpret treaties: *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 251-252; *Maloney v The Queen* (2013) 252 CLR 168 at [14], [235]; *Commonwealth Minister for Justice for Adams* (2013) 253 CLR 43 at [32]; *Macoun v Commissioner of Taxation* (2015) 257 CLR 519 at [69]-[71]. The principles contained in the Vienna Convention apply even though the Vienna Convention has not been enacted as part of the law of Australia: *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH* (2006) 231 CLR 1 at [34].

24 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 231, 240, 253-255.

25 See *Povey v Qantas Airways Ltd* (2005) 223 CLR 189 at [24]; *Macoun v Commissioner of Taxation* (2015) 257 CLR 519 at [72].

26 *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338 at 344, 349-350, 356-357; *Commissioner of Taxation v Lamesa Holdings BV* (1997) 77 FCR 597 at 604; *McDermott Industries (Aust) Pty Ltd v Commissioner of Taxation* (2005) 142 FCR 134 at [42]; *Federal Commissioner of Taxation v SNF (Australia) Pty Ltd* (2011) 193 FCR 149 at [107], [114]; *Task Technology Pty Ltd v Commissioner of Taxation* [2014] FCA 38 at [10]; *Task Technology Pty Ltd v Commissioner of Taxation* [2014] FCAFC 113 at [35]; *Commissioner of Taxation v Seven Network Ltd* [2016] FCAFC 70 at [85]; *Bywater Investments Limited v Commissioner of Taxation* (2016) 260 CLR 169 at [167]; *Pike v Commissioner of Taxation* [2020] FCAFC 158 at [25]. See generally *Maloney v the Queen* (2013) 252 CLR 168 at [175] on the use of extrinsic materials generally.

27 *Russell v Commissioner of Taxation* [2011] FCAFC 10 at [26]-[31].

Article 25 is concerned with discrimination solely on the grounds of nationality (AS [40]-[45])

24. The taxation laws in Australia, like many countries, impose different taxes, or rates of taxes, on persons based on differences between those persons. This can be done for many reasons, including to encourage or discourage taxpayers in a wide range of ways. Taxation laws commonly discriminate based on residency by imposing different rates of taxes on residents and non-residents. This is entirely permissible (and expressly envisaged by article 25). On its ordinary meaning, article 25 prevents the imposition of a "more burdensome" tax upon a foreign national who is "in the same circumstances" as a notional Australian national. Article 25 prohibits discrimination on one ground and one ground only, that of nationality. In this way, article 25 operates to prevent the imposition of a more burdensome tax upon a foreign national where, upon its proper characterisation, the more burdensome tax is imposed *solely* on the grounds of nationality. That it has this operation is the natural consequence of the language of article 25, which conceives of all other relevant circumstances (being circumstances that have taxation consequences) being the "same". The constraint agreed to by Contracting States in article 25 is not a broad one.

25. The Explanatory Memorandum to the *International Tax Agreements Bill 2003* (Cth) states, relevantly (emphasis added):[28]

> *A potential breach of paragraph 1 of this article only arises if two persons who are residents of the same country are treated differently* ***solely*** *by reason of one being a national of Australia and the other being a national of the United Kingdom.*

26. Similarly, the OECD Commentary confirms the ordinary meaning of article 25. At paragraph [4], it states (emphasis added):

> *... the underlying question is whether two persons who are residents of the same State are being treated differently* ***solely by reason of having a different nationality****.*[29]

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28 At [1.252].

29 This is contained in the version published on 28 January 2003 (**2003 OECD Commentary**). This was the version of the OECD Commentary that was current on 21 August 2003, when the Double Tax Agreement was signed.

27. Therefore, both the OECD Commentary and the Explanatory Memorandum confirm that article 25 is concerned with discrimination that is solely based on nationality.

28. All members of the Full Court reached the conclusion that the article is infringed only where nationality is the sole basis for the discrimination: FFC [5], [230], [324], [347], [349]. This was also the view of the trial judge.[30] Indeed, Davies J, who dissented in the result, observed that article 25 "is plainly restricted to disparity in tax treatment based solely on nationality:" FFC [5].

29. The conclusion reached by all four judges below is supported by the authorities on analogous treaty provisions. In the New Zealand Court of Appeal decision in *Commissioner of Inland Revenue v United Dominions Trust* [1973] 2 NZLR 555 (***United Dominions Trust***), all three appeal judges concluded that an analogous article[31] prevented discrimination *solely* on the basis of nationality. Richmond J stated at 566 (emphasis added):

> *In this context there can be no doubt that the **sole** purpose of article XIX(I) is to prevent discrimination against "nationals" as such. Clearly it is for this very reason that the phrase "in the same circumstances" has been used in article XIX(I). If those words are to achieve their intended effect they should be construed in the sense of **"in substantially identical circumstances" - that is, identical as regards all matters (except nationality) which are relevant from a taxation point of view to the notional comparison which article XIX(1) requires to be made.** If the article is not so construed, then the result can easily be to make it apply in terms to a situation which is not really a case of discrimination on the grounds of nationality, but is in truth a case of discrimination based on some other ground such, in particular, as non-residence.*

The judgments delivered by President McCarthy (at 560-561) and Justice White (at 572-573) were to the same effect.

30. If the discrimination is based on something other than nationality or where nationality is but an integer amongst other circumstances, article 25 is not infringed.

31. Ms Addy does not accept this: AS [40]-[45]. She submits that the Full Court put an "unwarranted gloss"[32] on the text of article 25 and fell into error by "moving away from the express criteria posed by the text of article 25 and applying a rule of limitation that does not appear in the text."[33] She goes as far as contending that this was a "plain case of a Court

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30 *Addy v Commissioner of Taxation* [2019] FCA 1768 at [102].

31 The equivalent article appears at [1973] 2 NZLR 555 at 564-565.

32 AS [45].

33 AS [40].

substituting extrinsic materials for the text of the provision in question" and that this was "an erroneous approach to statutory construction": AS [41].

32. Ms Addy's contentions should not be accepted. There is no basis for construing article 25 divorced from its context and purpose, nor for ignoring the OECD Commentary as well as the Explanatory Memorandum to the *International Tax Agreements Bill 2003* (Cth). Ms Addy's invitation to do so is contrary to established principles concerning the interpretation of international treaties[34] (see paragraph [21] above and FFC [204]-[207]). That is a matter developed further below (see paragraphs [35] to [37]).

33. Further, Ms Addy's reliance on principles concerning the interpretation of domestic statutes in construing article 25 is misplaced.[35] Assuming it is appropriate to have regard to those principles,[36] it is impossible to reconcile Ms Addy's approach with the modern approach to statutory interpretation. This insists that context, including the mischief to which the provision is directed, be considered in the first instance.[37] Moreover, it accepts the possibility that "if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance";[38] and it recognises that, where a literal meaning does not conform to the evident purpose of a provision, it is "entirely appropriate for the courts to depart from the literal meaning".[39]

34. The Commissioner's position is that the phrase "in the same circumstances" means that nationality is to be the sole "circumstance" that is different as between the taxpayer and the notional taxpayer who is an Australian national. In this way, it is proper to describe

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34 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 251-256; *Lamesa Holdings BV* (1997) 77 FCR 597 at 604-605; *McDermott Industries (Aust) Pty Ltd v Federal Commissioner of Taxation* (2005) 142 FCR 134 at [38].

35 AS [41] and footnote 5 of Ms Addy's submissions.

36 As to which, see *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 231 (Brennan CJ) and 240 (Dawson J); *Bywater Investments Limited v Commissioner of Taxation* (2016) 260 CLR 169 at [140]-[150].

37 *CIC Insurance Ltd v Bankstown Football Club Inc* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ); *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14] (Kiefel CJ, Nettle and Gordon JJ).

38 *CIC Insurance Ltd v Bankstown Football Club Inc* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

39 *R v A2* (2019) 93 ALJR 1106 at [37] (Kiefel CJ and Keane J), [148] (Nettle and Gordon JJ generally agreeing); see also Edelman J at [163].

nationality as the sole basis for discrimination. This is confirmed by the context, object and purpose of article 25.

35. Ms Addy also submits, in seeking to avoid the use of the OECD Commentary as an interpretative tool, that article 32 of the Vienna Convention means that reference can only be made to the OECD Commentary where the meaning of article 25 is ambiguous or obscure or when its ordinary meaning leads to a result that is manifestly absurd or unreasonable: AS [43].

36. This submission is contrary to the terms of the Vienna Convention itself. Reference to the context, object and purpose of a treaty, as well as the text, is a mandatory requirement under article 31(1).[40] Previous authorities have accepted that the OECD Commentary forms relevant "context" under article 31 of the Vienna Convention.[41] In any case, under article 32 of the Vienna Convention, the OECD Commentary can be used "to confirm the meaning resulting from the application of article 31."[42] There is, therefore, no need to find ambiguity before reference can be made to that Commentary, which (as explained in paragraph [25] above) confirms the ordinary meaning of article 25 of the Double Tax Agreement.

37. If the court regards that Ms Addy's construction of article 25 is open, the Commissioner contends that there is ambiguity such that it is permissible to refer to the OECD Commentary

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40 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 240 (Dawson J), 253-255 (McHugh J). McHugh J's reasons have been approved by all members of the Full Federal Court on two occasions: see *Lamesa Holdings BV* (1997) 77 FCR 597 at 604-605; *McDermott Industries (Aust) Pty Ltd v Federal Commissioner of Taxation* (2005) 142 FCR 134 at [38].

41 *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338 at 349 (Dawson J). See also *Federal Commissioner of Taxation v SNF (Australia) Pty Ltd* (2011) 193 FCR 149 at [114].

42 *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338 at 350 (Dawson J), 356-357 (McHugh J); *Federal Commissioner of Taxation v SNF (Australia) Pty Ltd* (2011) 193 FCR 149 at [114]; *Bywater Investments Limited v Commissioner of Taxation* (2016) 260 CLR 169 at [167] (Gordon J). Article 32(a) of the Vienna Convention permits use of supplementary means of interpretation in a wide range of circumstances: given the range of meanings that the word "confirm" can convey, supplementary means of interpretation may not necessarily reinforce the meaning reached by the application of article 31: see R Gardiner, *Treaty Interpretation* (2nd ed), 2015 at [3.4], [4.2.2].

to resolve the ambiguity.[43] Ms Addy has not cited any authority in which the Court concluded that it was impermissible to refer to the OECD Commentary.

38. In any event, Ms Addy is still confronted by the difficulty posed by the Explanatory Memorandum to the statute. It confirms that article 25 is concerned with discrimination *solely* on the grounds of nationality.[44] It is appropriate to refer to the Explanatory Memorandum in the process of interpretation.[45]

39. Before leaving this point, it is appropriate to address the examples at AS [43(a)] and [44]. AS [43(a)] refers to the outcome in *Commonwealth Minister for Justice for Adamas* (2013) 253 CLR 43 (***Adamas***). That case, however, is distinguishable. It is not a case where there was a controversy as to whether extrinsic material could be relied upon. It was a case in which one party claimed that a word formula imposed different tests as between different States in which extradition was requested. The High Court saw no support for such a view in the language, context, or purpose of the treaty. It bears no meaningful resemblance to this case.

40. At AS [44], Ms Addy refers to a tax that imposes harsher treatment on the basis of nationality as well as ethnicity and religion. She says that such a tax would be discriminatory and contends that "it would be surprising if article 25 did not prevent harsher tax treatment that applies to a UK national who has the additional characteristics of belonging to a particular ethnic and religious group:" AS [44]. This submission raises a straw man. The Full Court did not hold that a tax imposed by reference to nationality **and** any other characteristic would avoid infringing article 25. On the contrary, their Honours made it clear that the application of article 25 depended on characterising the different tax treatment as being based solely on nationality. Their findings about the tax here cannot be extrapolated to hypothetical taxes targeting ethnicity or religion.

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43 *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338 at 349-350 (Dawson J), 356-357 (McHugh J, with whom Mason CJ, Brennan and Gaudron JJ agreed (at 344)). See also *Commissioner of Taxation v Lamesa Holdings BV* (1997) 77 FCR 597 at 604; *McDermott Industries (Aust) Pty Ltd v Commissioner of Taxation* (2005) 142 FCR 134 at [42]; *Federal Commissioner of Taxation v SNF (Australia) Pty Ltd* (2011) 193 FCR 149 at [107], [114]; *Task Technology Pty Ltd v Commissioner of Taxation* [2014] FCA 38 at [10]; *Task Technology Pty Ltd v Commissioner of Taxation* [2014] FCAFC 113 at [35]; *Commissioner of Taxation v Seven Network Ltd* [2016] FCAFC 70 at [85]; *Bywater Investments Limited v Commissioner of Taxation* (2016) 260 CLR 169 at [167]; *Pike v Commissioner of Taxation* [2020] FCAFC 158 at [25]. On the use of such material generally, see also *Maloney v The Queen* (2013) 252 CLR 168 at [175].

44 See the Explanatory Memorandum to the *International Tax Agreements Bill 2003* (Cth) at [1.252].

45 *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 99-100 (Toohey, Gaudron and Gummow JJ); s.15AB(2)(e) of the *Acts Interpretation Act 1901* (Cth).

The tax was not imposed on Ms Addy solely by reason of her nationality (AS [46]-[54])

41. Once it is accepted that article 25 prohibits disparity in taxation treatment that is solely based on nationality, the question for this Court is whether the rates imposed on certain income derived by Ms Addy while she held a working holiday visa were imposed solely on the basis of nationality.

42. The answer is "no," for the reasons explained by the Full Court. The Full Court found that, upon a proper characterisation of the tax in this case, it was the type of visa Ms Addy held, and not her nationality, that dictated the tax imposed on her income: FFC [223]-[225] (Derrington J), [346] (Steward J).

43. Two points can be made to demonstrate why nationality is not the cause of the discrimination:

- a UK national can enter Australia on a different visa that does not attract the Working Holiday Maker Income Tax Rates;
- a UK national can enter Australia on a working holiday visa and that same national can obtain a different visa while in Australia and then no longer attract those rates without changing nationality.

Neither would be possible if the rates were attracted solely on the basis of nationality or if the particular visa were a proxy for nationality. Both are therefore fatal to Ms Addy's case.

44. Derrington J made this point forcefully.[46] It is convenient to reproduce that reasoning, as it is central to the Commissioner's case (emphasis in original):

> *[223] Pt III Sch 7 does not impose tax at differential rates on persons merely because they hold a "visa." It imposes tax on the income of a person because they hold a particular type of visa. Although, it is true that British nationals require the authority of a visa to enter Australia and remain here, they are not required to obtain a "working holiday visa." They may apply for and obtain one of the wide range of available visas which would permit them entry into Australia and for a period of time during which they might earn income and, at least temporarily, attain the status of a resident. Such visas may include: …*
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> *[224] A British national on any of those visas will not be subject to the operation of the Backpacker Tax in Pt III Sch 7. If, for a relevant tax year, they have acquired residency in Australia, their income will be taxed according to Pt I Sch 1 as an Australian resident. That, of itself, must indicate that the rates in Pt III Sch*

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[46] FFC [223]-[225].

> *7 are not imposed on the basis of nationality. If, on the other hand, they do not acquire residency in Australia then tax is assessed in accordance with Pt II Sch 7.*
>
> *[225] It follows that, in this case, the relevant circumstance which prevents any comparison being made for the purposes of Art 25 of the Double Tax Agreement is the holding of a "working holiday visa." Although Ms Addy is a British national and holds such a visa, she does not hold it* **because** *she is a British national. The holding of that visa was a matter of choice and not a necessary concomitant of her being a British national. There is, therefore, no necessary casual nexus between her nationality and her liability to pay the rates of tax imposed by Pt III Sch 7 (the Backpacker Tax). …"*

45. Steward J's conclusion was to similar effect: FFC [343]-[347]. Indeed, his Honour endorsed Derrington J's reasoning at FFC [223] above and added that "a foreign national can always stay in Australia using a different visa: in such a case that person would not be taxed on their Australian source income pursuant to Pt III of Schedule 7. Those observations highlight that it is the holding of a working holiday maker visa, and not nationality, which is decisive in determining the rates of tax payable": FFC [346]. His Honour also noted that a "working holiday maker is not defined in s 3A [of the Rates Act] by reference to a taxpayer's nationality of any particular country," adding that "the provision does not refer at all to a person's nationality:" FFC [343]. This led Steward J to conclude that the tax was not based solely on Ms Addy's nationality, such that article 25 was not infringed. Thus, central to the conclusions reached by both Derrington J and Steward J was that, upon its proper characterisation, the tax did not discriminate against Ms Addy solely by reason of her British nationality.

46. Nor is there disguised discrimination. Properly understood, what attracts the rates is the holding of a working holiday visa. Properly understood, what attracts the rates is the granting and holding of a particular type of permission to enter Australia. All the facts and circumstances on which that permission is granted are what attracts the rates. UK nationality is one of those circumstances that must exist to get that permission, but the rates are not attracted because of UK nationality but because of the basis of the permission granted.

47. At AS [46]-[54], Ms Addy focuses on four matters that she says led the Full Court to conclude that article 25 was not infringed.[47] These paragraphs mischaracterise the Full Court's reasoning and contain other flaws. The first of those matters is that the Full Court relied on the fact that not all foreign nationals are liable to pay the tax. However, the Full

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[47] Ms Addy returns to this matter at AS [62].

Court did not imply that a tax would only attract article 25 if it was imposed on all foreign nationals. Regarding AS [52(i)], the question is not whether Ms Addy would get a different result if she was an Australian national. This is an oversimplification and will not reveal the cause of the discrimination. Nor did they suggest that a tax would fall necessarily outside of article 25 whenever some of the circumstances on which it operated were the result of voluntary action (the second and third of the four matters relied on by Ms Addy). The Full Court did not lay down such broad propositions; its statements were directed to the narrower question whether the disparity in taxation treatment in this case was based solely on nationality. The majority made the point that the Working Holiday Maker tax rates did not apply *because* Ms Addy was a British national, but because she had chosen a particular type of visa: FFC [223]-[225]; [346]. That reasoning does not disclose the errors alleged.

48. The fourth matter that Ms Addy says moved the Full Court to its conclusion was that she would not have been liable to pay the tax if she earned no income. This matter does not assist Ms Addy at all; it is irrelevant — it was not mentioned in Derrington J or Steward J's reasons and was of no moment in the Full Court's conclusion.

49. For those reasons, the tax was not imposed on Ms Addy solely by reason of her British nationality. It did not infringe article 25.

Ms Addy was not "in the same circumstances" as a notional Australian national: (AS [55]-[62])

50. The Commissioner's submissions thus far have contended that article 25 prevents discrimination solely on the basis of nationality and that, in this case, the tax imposed on Ms Addy did not infringe article 25 because, properly characterised, it was not imposed on her solely by reason of her nationality. There is, however, another related reason why article 25 was not infringed. Article 25 requires a comparison in tax treatment between Ms Addy and an Australian national "in the same circumstances" as Ms Addy. However, an Australian national could never be "in the same circumstances" as Ms Addy.

51. Pursuant to the *Migration Act 1958* (Cth), it is not possible for an Australian national to hold a working holiday visa: FFC [219]. First, the Minister has no power to grant a visa to a citizen.[48] Secondly, while the holder of a permanent visa (and thus an "Australian national"

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[48] Section 29 of the *Migration Act 1958* (Cth).

under the Double Tax Agreement) could apply for *and* be granted a working holiday visa, if one were granted, it would result in the person's permanent visa ceasing to be in effect.[49] Hence, the grant of a working holiday visa would result in an Australian national (by reason of permanent residency) ceasing to be such. Thus, the holder of a working holiday visa cannot be an Australian national. This has the consequence that the comparison required by article 25 is not possible.

52. In circumstances where the tax discrimen is not nationality (and not a proxy for it), the inability to undertake the comparison means that article 25 is not engaged. This is consistent with authority.

53. The New Zealand Court of Appeal addressed this issue in the *United Dominions Trust* case.[50] In that case, the Court held that the expression "in the same circumstances" in an analogous double tax treaty[51] meant identical in all matters, except nationality, which were relevant from a taxation point of view.[52] The word "same" carried with it "the connotation of uniformity, of exactness in comparison."[53] But if no comparison was possible, including because the circumstances were in truth not the same or could not be the same, or if factors other than nationality were relevant to the "more burdensome" treatment, then the equivalent of article 25 was not engaged.[54]

54. At AS [59], Ms Addy says that two persons can be in the same circumstances, "even where they are, in one or two respects, different." This submission highlights a flaw in Ms Addy's case. Ms Addy has elsewhere contended that there is no textual support for construing article 25 as if it were concerned with discrimination solely on the basis of nationality: AS [41]. She has also suggested that the expression "in the same circumstances" is so clear that it is not permissible to have regard to the preparatory material such as the OECD Commentary: AS [43(i)]. But once she accepts that, despite its terms, article 25 does *not* require all circumstances of the taxpayer and the notional Australian national to be the

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49 Section 82(2) of the *Migration Act 1958* (Cth).

50 [1973] 2 NZLR 555.

51 Article XIX(1) of the Double Taxation Relief Agreement between the Governments of New Zealand and the United Kingdom. It stated: "The nationals of one of the territories shall not be subjected in the other territory to any taxation or any requirement connected therewith which is more burdensome than the taxation and connected requirements to which the nationals of the latter territory in the same circumstances are or may be subjected."

52 [1973] 2 NZLR 555 at 566 (Richmond J). See also at 561 (McCarthy P).

53 [1973] 2 NZLR 555 at 561 (McCarthy P).

54 [1973] 2 NZLR 555 at 562 (McCarthy P), 566 (Richmond J), 572-573 (White J).

same, those submissions become untenable. The context, object and purpose of article 25 will inevitably determine which circumstances must be shared by the taxpayer and the notional Australian comparator. As identified earlier in these submissions, the context, object and purpose of article 25 suggest that it is concerned with discrimination based on nationality only; and the preparatory materials (including the OECD Commentary) confirm that. Ms Addy's submission at AS [59] therefore demonstrates that her earlier criticisms of the Full Court are without substance.

55. Further, at AS [61], Ms Addy says that the Commissioner's construction of article 25 is "absurd" because "the only foreign nationals in Australia who would be able to claim consistent tax treatment under article 25 are illegal immigrants, because every foreign national who is lawfully present in Australia has a visa." No such absurdity arises, because article 25 is not so confined. It extends to every form of discrimination where the discrimination is solely on the grounds of nationality. One such example is provided in the judgment below; namely, a tax that discriminates based on whether or not a person holds, or is entitled to hold, a passport issued by a State.[55] Another example is an additional 5% tax imposed on persons of British nationality. A tax imposed on such persons solely by reason of their nationality would infringe article 25. They would not need to be an illegal immigrant in Australia to obtain the benefit of the article.

56. In summary, for those reasons, article 25 was not engaged because Ms Addy could never be "in the same circumstances" as the notional Australian national - by reason that such a person could never hold a working holiday visa. Because that criterion is neither nationality nor a proxy for it,[56] it cannot be disregarded under article 25 and so the more burdensome tax treatment cannot be established in the manner required in order to engage the article.

Other matters

57. At AS [63]-[72], Ms Addy raises a point that "is not essential" to her argument, but which she says has relevance: AS [63]. It is unclear what point is sought to be made in those paragraphs.

58. It further appears that Ms Addy contends that because she was found to be an Australian resident, then it follows that she was "in the same circumstances" as a notional Australian

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55 FFC [230].

56 As to why this is not the case see the passage extracted from Derrington J's reasons above.

national. This theme runs throughout Ms Addy's submissions: see AS [45], [56], [58]. Ms Addy suggests, in other words, that her Australian residency, in and of itself, was sufficient to place her "in the same circumstances" as a notional Australian national; she says that "article 25 singles out tax residency as a type of circumstance in which article 25 will prevent foreign nationals from being taxed more harshly than their Australian equivalents": AS [30].

59. That contention should not be accepted. In the circumstances of this case, the characteristic of "residency" is something that must be the same to permit the inquiry to be made as to whether there has been a more burdensome imposition of tax on the basis of nationality. In other words, those words clarify that residency is removed as a prohibitive cause of the discrimination. It assumes no higher significance. So much is apparent from the use of the expression "in particular with respect to residence" in article 25, and from the OECD Commentary.[57] The OECD Commentary states at [3]:[58]

> *The expression 'in particular with respect to residence' makes clear that the residence of the taxpayer is one of the factors that are relevant in determining whether taxpayers are placed in similar circumstances. The expression 'in the same circumstances' would be sufficient by itself to establish that a taxpayer who is a resident of a Contracting State and one who is not a resident of that State are not in the same circumstances.*

60. The fact that Ms Addy was found to be an Australian resident therefore does not, by itself, mean that she was "in the same circumstances" as a notional Australian national.[59]

61. The point can be made differently. In the particular circumstances of this case (and the differences between the rates in Parts I and III of Schedule 7 of the Rates Act), Ms Addy's Australian tax resident status was practically necessary before article 25 could conceivably be

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57 Such a conclusion is fortified by the extrinsic material. See the document headed "Working Party No 1 on Double Taxation of the Committee on Fiscal Affairs - Scope of the Article on Non-Discrimination (note by the Delegate for France)" dated 22 March 1991 in which the French Delegate submitted a question on the operation of article 25 to a working party; see also the Note by the "Working Party No 1 on Double Taxation of the Committee on Fiscal Affairs" headed "Scope of the Non-Discrimination Article: Questionnaire and Summary of Country Replies" dated 10 February 1992, as well as the ensuing Note issued by the "Working Party No 1 on Double Taxation of the Committee on Fiscal Affairs" headed "Summary Record of the Fifty-Sixth Meeting of Working Party No 1" dated 9 November 1993 at page 6. It is appropriate to have regard to those materials in construing article 25 as this falls within the meaning of "the preparatory work of the treaty and the circumstances of its conclusion" where those words are used in article 32 of the Vienna Convention: see also *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 230-231 (Brennan CJ), at 277 (Gummow J) and at 294 (Kirby J).

58 See also the Explanatory Memorandum to the *International Tax Agreements Amendment Bill 2003* (Cth) at [1.252], referred to at FFC [217].

59 It follows that article 25 does not prohibit discrimination on the grounds of residency. All members of the Full Court reached this conclusion: FFC [5], [16] (Davies J); [218] (Derrington J); [324], [349] (Steward J). So did the trial judge: see *Addy v Commissioner of Taxation* [2019] FCA 1768 at [102].

engaged (because if she were a non-resident, the Working Holiday Maker Income Tax Rates would benefit her). However, being an Australian tax resident was not a sufficient condition for any finding that article 25 has been infringed. Ms Addy needs to establish that she faces a more burdensome tax outcome than an Australian national in the same circumstances; not merely a more burdensome tax outcome than other Australian tax residents. Ms Addy is wrong to suggest that because she was an Australian resident for tax purposes, that suffices to demonstrate an infringement of article 25.

62. The only other point advanced by Ms Addy is that it was inappropriate to take her visa status into account in determining whether she was "in the same circumstances" as the notional Australian national.

63. Ms Addy's criticism is without foundation: AS [64]-[65]. As identified earlier, the notional Australian national must be identical in all matters, except nationality, which are relevant from a taxation point of view: *United Dominions Trust* (cf: AS [70]).[60] Steward J made this point when his Honour stated that he agreed with the Commissioner's submission that "the circumstances that must be the 'same' are only those which go to, or affect, the tax liability of the foreign national": FFC [348].

64. The references to Klaus Vogel and the Explanatory Memorandum at AS [69]-[70] do not assist Ms Addy. Contrary to her claims, the Full Court did not rely on Vogel to formulate the rule that she criticizes. Further, Ms Addy does not address those parts of the Explanatory Memorandum that make it plain that article 25 is directed to prohibiting discrimination in taxation solely on the basis of nationality.

65. Accordingly, the appeal should be dismissed.

Costs

66. Ms Addy has received test case funding for this appeal. If the Commissioner is successful in this appeal, the appropriate order is that there be no order as to costs.

PART VI: STATEMENT OF ARGUMENT REGARDING NOTICE OF CONTENTION OR CROSS-APPEAL

67. There is no Notice of Contention or Cross-Appeal.

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60 [1973] 2 NZLR 555 at 566 (Richmond J). See also at 561 (McCarthy P).

PART VII: TIME ESTIMATE

68. The Commissioner estimates that 2 hours will be required for his oral argument.

Dated: 13 May 2021

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ANNEXURE A

List of statutory provisions referred to in submissions

Legislation and Regulations

1. *Acts Interpretation Act 1901* (Cth) (Compilation No. 31), s 15AB.
2. *Income Tax Rates Act 1986* (Cth) (Compilation No. 49), s 3A, Sch 7, Pts I, II and III.
3. *Income Tax Rates Amendment (Working Holiday Maker Reform) Act 2016* (Cth) (Compilation No. 92).
4. *International Tax Agreements Act 1953* (Cth) (Compilation No. 35), ss 4, 5.
5. *Migration Act 1958* (Cth) (Compilation No. 134), ss 29, 82.
6. *Migration Regulations 1994* (Cth) (Compilation No. 184), sch 2, cl 417.211.

Treaties

7. Convention between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains, (21 August 2003) Arts 3 and 25.
8. Double Taxation Relief Agreement between the Government of New Zealand and the United Kingdom, (28 August 2008), Art XIX.
9. Extradition Treaty between Australia and the Republic of Indonesia, (September 2007), Art 9.
10. Vienna Convention on the Law of Treaties (23 May 1969) Arts 31 and 32.