SHORT PARTICULARS OF CASES
APPEALS

COMMENCING MONDAY, 30 MARCH 2009

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PAPE v THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA & ANOR (S35/2009)

Writ of Summons: Issued 26 February 2009

Special Case: Filed 17 March 2009

This Special Case involves the legality of the Federal Government's proposed $900 tax bonus to taxpayers. The *Tax Bonus for Working Australians Act* (No 2) 2009 (Cth) ("the Act") was assented to on 18 February 2009. Section 5 of the Act sets out the entitlement of a person to the payment of a tax bonus for the 2007-08 income year. The plaintiff is purportedly entitled to receive a tax bonus of $250. He contends that the payment of the tax bonus is characterised as a gift and is not authorised on the grounds that the Act is not a law with respect to taxation as provided by s 51(ii) or any other paragraph of s 51 of the *Constitution* and as such is invalid. He also claims that the payment of the tax bonus is not authorised on the grounds that the Act fails to comply with ss 81 and 83 of the *Constitution* because the Act contains no provision which lawfully appropriates money for the purposes of the Commonwealth.

The defendants claim that the Act is valid law. The heads of power under the *Constitution* which are relied on to support the Act are: the appropriations power and the incidental power; the nationhood power; the external affairs power; the interstate and overseas trade and commerce power; and the taxation power.

Notice of a Constitutional Matter has been given as required by s 78B of the *Judiciary Act.*

The Special Case states the following questions for consideration by the Full Court:

- Does the Plaintiff have standing to seek the relief claimed in his Writ of Summons and Statement of Claim?

- Is the *Tax Bonus for Working Australians Act* (No 2) 2009 (Cth) valid because it is supported by one or more express or implied heads of legislative power under the *Constitution*?

- Is payment of the tax bonus to which the plaintiff is entitled under the *Tax Bonus for Working Australians Act* (No 2) 2009 (Cth) supported by a valid appropriation under ss 81 and 83 of the *Constitution*?

- Who should pay the costs of the special case?

THE QUEEN v EDWARDS & ANOR (H4/2008)

Court appealed from: Supreme Court of Tasmania (Single Justice) [2008] TASSC 17

Date of order: 16 May 2008

Date special leave granted: 5 December 2008

The respondents, Qantas pilots, were charged with reckless operation of an aircraft contrary to ss 20A(1), 20A(2) and 29 of the *Civil Aviation Act* 1988 (Cth), arising out of a take-off from the Launceston Airport on 23 October 2001. The first respondent was the captain of the aircraft and the second respondent was his co-pilot. The particulars of the charge were that each respondent was responsible for the taxiing and take-off of a Boeing 737 aircraft carrying passengers at night whilst the airport taxiway and runway edge lights were not illuminated (owing to the time of night at which the landing and take-off took place, it was up to the pilots to activate the lighting system, the airport being unattended at the time). Each respondent sought a stay of proceedings on the basis that the primary technological evidence was not available and that a "gap" in the lighting equipment could not be shown to have occurred because of evidence not retrieved and now unobtainable.

Slicer J noted that on any trial, the jury would have to be satisfied that the taxiing and runway lights were not operating when the aircraft taxied and/or at take-off. His Honour noted the existence of a number of witnesses who could give evidence that they observed that, at the point of take-off, the lights were not operating. The absence of primary data would not, of itself, constitute a sufficient basis for the grant of a stay of proceedings.

His Honour proceeded to consider the history of the proceedings and the delays involved in the investigation and prosecution. CASA conducted an investigation and a decision was made to refer the matter to the DPP in April 2002. Complaints were not sworn until 30 March 2004. Pleas were entered on 14 September 2004. Committal proceedings took place between 2 and 4 November 2005 and the respondents were committed for trial. The indictment was signed on 28 September 2006. The trial was listed for sittings commencing 21 November 2006. Further delays occurred, arising from deficiencies in the transcript. The matter finally came on for hearing before Slicer J on 26 November 2007. His Honour noted that not much of the delay was caused by the conduct of the respondents. His Honour then considered the adequacy of the investigative process following the alleged event. Two matters were of significance in the early phase of the investigation – the failure to notify the pilots or the operator immediately and the failure to retrieve electronic records from the aircraft and ground-based equipment.

Having considered these factual issues, his Honour noted that the Court's inherent power to stay proceedings should be exercised in only the most extreme circumstances and where no other remedy could be found to rectify the prejudice. The question was whether, on the material before the Court, continuation of the trial "could constitute an unacceptable injustice or unfairness". In this case, the difficulty was ensuring a fair trial for two persons who might be found to be responsible for the conduct or omission of the other. Severance, rulings on evidence and directions would provide no vehicle for redress. The nature of the crime with its doctrine of strict liability and the statutory provisions governing "mistake of fact" would make any trial more complex. The time elapsed from the

event until trial was seven years, increasing the understandable but greater need for witnesses to rely on their first statements, and the effects of the passage of time on memory which, absent primary evidence, may reduce the case to “word-on-word”. The overall delay combined with the loss of significant primary evidence persuaded his Honour to grant the stay.

The grounds of appeal include:

- The learned trial judge erred in holding that the test to be applied in deciding whether to order a permanent stay of the trials of the first respondent and the second respondent was whether the loss of primary data or evidence and delay could constitute an unacceptable injustice or unfairness.

- The learned trial judge erred in holding that the loss of primary data or evidence could not be rectified by directions to be given to the jury in the trials of the first and second respondent.

MINISTER FOR IMMIGRATION & CITIZENSHIP v SZLFX & ANOR (S503/2008)

Court appealed from: Full Court of the Federal Court of Australia [2008] FCAFC 125

Date of judgment: 27 June 2008

Date of grant of special leave: 14 November 2008

The First Respondent ("SZLFX") is a Chinese citizen who first arrived in Australia in 2002 and who applied for a protection visa in 2007. He claimed to fear persecution in China as a Falun Gong practitioner, having become one after his arrival in Australia. On 11 April 2007 the Minister's delegate refused that application, as did the Refugee Review Tribunal ("RRT") on 31 August 2007. The RRT found that SZLFX was not a credible witness. It was not satisfied that he had ever practiced Falun Gong, let alone that he was a committed practitioner.

SZLFX's principal complaint upon judicial review was that the RRT had breached section 424A of the *Migration Act* 1958 ("the Act"). This was due to its failure to notify him of a conversation it had with a “Michael” from “Falun Dafa (Sydney & suburbs)”, the contents of which were capable of undermining his claims. On 11 April 2008 Magistrate Raphael upheld SZLFX's application, finding that the RRT fell into jurisdictional error by failing to put SZLFX on notice of this information.

On 27 June 2008 the Full Federal Court (Branson, Bennett & Flick JJ) noted that the Minister accepted that if *SZKTI v Minister for Immigration & Citizenship* was correctly decided, its case would fail. Their Honours then indicated their agreement with the Full Court in *SZKCQ v Minister for Immigration & Citizenship* that *SZKTI v Minister for Immigration & Citizenship* was not plainly wrong and that it should therefore be followed. Accordingly, the Minister's appeal was dismissed.

The grounds of appeal include:

- The Full Court of the Federal Court of Australia erred in the present case in applying the earlier decision of that Court in *SZKTI v Minister for Immigration & Citizenship* [2008] FCAFC 83 because that case had erred:

  a) in construing section 424(2) of the Act so as to limit the generality of section 424(1);

  b) in interpreting section 424 to mean that the RRT may not lawfully obtain information by telephone without following sections 424(2), 424(3) and 424B of the Act.

On 3 February 2009 SZLFX filed an amended notice of contention, the grounds of which include:

- The RRT failed to comply with the requirements of section 424A(2) of the Act, read with section 441A of the Act.

MINISTER FOR IMMIGRATION & CITIZENSHIP v SZKTI & ANOR (S515/2008)

Court appealed from: Full Court of the Federal Court of Australia [2008] FCAFC 83

Date of judgment: 28 May 2008

Date of grant of special leave: 14 November 2008

The First Respondent ("SZKTI") is a Chinese citizen who arrived in Australia on 23 April 2006. A month later he applied for a protection visa, claiming to fear persecution in China due to his involvement with the Shouters Church ("the Shouters"). On 19 August 2006 the Minister's delegate refused that application and an appeal to the Refugee Review Tribunal ("RRT") duly followed. Pursuant to section 424A of the *Migration Act* 1958 (Cth) ("the Act"), the RRT wrote to SZKTI following the hearing and drew his attention to inconsistencies in his evidence. It also asked him to provide details of his involvement with the Shouters in Australia, including information about those with whom he had come into contact. The RRT then contacted one of those named (a Mr Cheah) and asked him a number of questions over the phone. The RRT then sent SZKTI a further section 424A notice and drew his attention to the fact that Mr Cheah knew of him only superficially. It also flagged the possibility of making a finding under section 91R(3) of the Act.

On 30 April 2008 the RRT refused the Applicant a protection visa. It found that SZKTI's knowledge of the Shouters appeared studied and it did not accept that he was involved with any Christian church in China. While the RRT did accept that SZKTI had been involved with the Shouters in Australia, it referred to the fact that Mr Cheah was only able to make "superficial" comments about SZKTI. The RRT therefore disregarded his activities in Australia pursuant to section 91R(3) of the Act.

On 22 October 2007 Magistrate Turner held that the RRT had not erred in its treatment of Mr Cheah's evidence. There was no breach of section 424A of the Act, nor was there a failure to consider the country information. As there was no jurisdictional error, SZKTI's application for judicial review was dismissed.

On 28 May 2008 SZKTI's appeal to the Full Federal Court (Tamberlin, Goldberg & Rares JJ) was successful. Their Honours noted that the RRT did not invite Mr Cheah to provide information under section 424(2) of the Act, but simply called his mobile phone. The Court found that that amounted to an invitation to give additional information to the RRT without complying with the code of procedure under sections 424(2) and (3) of the Act. The RRT had therefore committed jurisdictional error.

The grounds of appeal include:

- The Full Court of the Federal Court of Australia erred:

  a) in construing section 424(2) of the Act so as to limit the generality of section 424(1);

  b) in interpreting section 424 to mean that the RRT may not lawfully obtain information by telephone and without following sections 424(2), 424(3) and 424B of the Act, either at all or when, as here, the RRT thereafter gave the applicant for a protection visa notice of the information in question and an invitation to respond.

CARROLL v THE QUEEN (S30/2009)

Court appealed from: New South Wales Court of Appeal
[2008] NSWCCA 218

Date of judgment: 19 September 2008

Date of grant of special leave: 13 February 2009

This matter concerns the Crown's successful appeal over the sentence imposed upon Mr Josh Carroll for manslaughter. Mr Carroll had pleaded guilty in the Local Court to the unlawful killing of Mr Luigi Criniti following an altercation in a hotel in May 2007. On 24 April 2008 Judge Flannery sentenced Mr Carroll to three years imprisonment, with a non-parole period of eighteen months. The custodial part of that sentence was to be served by way of periodic detention. The Crown then appeal against the leniency of that sentence.

On 19 September 2008 the Court of Criminal Appeal (McClellan CJ at CL & Hislop J, Simpson J dissenting) allowed the Crown's appeal. The majority held that both the length of the sentence, combined with its amelioration by it being served by periodic detention contributed to it being considered manifestly inadequate. They further found that it is a rare case where the appropriate punishment for manslaughter does not involve a term of full time custody. This was not such a case. The majority then re-sentenced Mr Carroll to full time custody for 18 months, to be released on parole on 1 November 2009.

Justice Simpson however did not believe the sentencing judge had fallen into error and would have dismissed the Crown's appeal.

The grounds of appeal include:

- The majority erred by constraining the exercise of judicial discretion, through stating a "type" of case and applying it to the appellant rather than considering the Crown appeal by reference to all relevant circumstances of the offence and the offender the subject of the appeal.
- The majority erred in not demonstrating error and in failing to dismiss the appeal.
- The majority erred [in] failing to re-sentence the appellant according to law.