SHORT PARTICULARS OF CASES

MELBOURNE
SEPTEMBER 2017

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WILKIE & ORS v. THE COMMONWEALTH OF AUSTRALIA & ORS
(M105/2017)

Date application referred to Full Court: 17 August 2017

On 9 August 2017, the Commonwealth Treasurer directed the third defendant (the Australian Statistician) to collect statistical information about the proportion of participating electors who are in favour of, and who are against, the law being changed to allow same-sex couples to marry ("the postal survey"). On the same day the Minister for Finance (the second defendant) had issued an "Advance to the Finance Minister Determination" ("the Determination") under s 10 of the *Appropriation Act (No1) 2017-2018* (Cth) ("the Act") to increase the departmental item for the Australian Bureau of Statistics ("the ABS") by $122 million to pay for the postal survey.

The plaintiffs contend that the Determination is invalid as it was not made in accordance with law and, insofar as the second defendant purported to be satisfied that there was an urgent need for expenditure in the current year that was not provided for, or was insufficiently provided for, either because of an erroneous omission or understatement, or because the expenditure was unforeseen, the exercise of power was not reasonable or involved an error of law. The plaintiffs also contend that subsections (1), (2) and (4) of s 10 of the Act are invalid as they are not a permissible exercise of Commonwealth legislative power to enact Appropriation Acts, and they effect an impermissible delegation of the legislative power of the Commonwealth to the second defendant.

Further grounds for the application are that the Treasurer's direction of 9 August is invalid because the opinions that are being sought are not "statistical information" within the meaning of the *Australian Bureau of Statistics Act* 1975 (Cth) or the *Census and Statistics Act* 1905 (Cth); and that the Electoral Commissioner (the fifth defendant) is not authorised by the *Commonwealth Electoral Act* 1918 (Cth), and in particular s 7A, to conduct or participate in the conduct of the postal survey.

On 17 August 2017 Kiefel CJ referred the application for consideration by the Full Court, together with the matter of *Australian Marriage Equality Ltd & Anor v Minister for Finance & Anor* (M106/2017). Notices of Constitutional Matter have been served. No Notice of Intervention has been filed to date. The fourth and fifth defendants have filed submitting appearances.

The grounds of the application include:

- The Advance to the Finance Minister Determination (No 1 of 2017-2018) is invalid as the Determination was not made in accordance with law;

- The Census and Statistics (Statistical Information) Direction 2017 is invalid because the opinions which are being sought are not "statistical information" within the meaning of the *Australian Bureau of Statistics Act* 1975 (Cth) or the *Census and Statistics Act* 1905 (Cth) and are not "statistics" within the meaning of "census and statistics" in s 51(xi) of the Constitution.

AUSTRALIAN MARRIAGE EQUALITY LTD & ANOR v. MINISTER FOR FINANCE MATHIAS CORMANN & ANOR (M106/2017)

Date Special Case referred to Full Court: 21 August 2017

On 9 August 2017, the Commonwealth Treasurer directed the second defendant (the Australian Statistician) to collect statistical information about the proportion of participating electors who are in favour of, and who are against, the law being changed to allow same-sex couples to marry ("the postal survey"). On the same day the first defendant ('the Minister") had issued an "Advance to the Finance Minister Determination" ("the Determination") under s 10 of the *Appropriation Act (No1) 2017-2018* (Cth) ("the Act") to increase the departmental item for the Australian Bureau of Statistics ("the ABS") by $122 million to pay for the postal survey.

The plaintiffs are seeking declarations under s 75(v) of the *Commonwealth Constitution* that the drawing of money from the Consolidated Revenue Fund of the Commonwealth to pay for the conduct of the postal plebiscite by the ABS is not authorised by the departmental item for the ABS in the Act. They are also seeking an order restraining the Minister or his delegates from making available to the ABS or the second defendant any funds to pay for the postal plebiscite. They contend that expenditure on the postal plebiscite is not within the ordinary annual services of the Government, as required by s 10(1)(b) of the Act. Alternatively, they contend that the expenditure was not "unforeseen" within the meaning of that section.

The defendants contend that the question of the characterisation of the Act, and the appropriations for which it provides, as appropriations for the ordinary annual services of Government, is one for determination by the Houses of Parliament and is not justiciable by a court. Alternatively, they say that, on the proper construction of s 10 of the Act, expenditure which is provided for by a determination made pursuant to s 10 must be taken to be expenditure which is for the ordinary annual services of the Government. They deny that the expenditure was not unforeseen. The defendants also contend that the plaintiffs do not have standing to seek the relief claimed.

On 21 August 2017 Kiefel CJ referred the Special Case for consideration by the Full Court, together with the matter of *Wilkie & Ors v The Commonwealth & Ors* (M105/2017). Notices of Constitutional Matter have been served. The Attorney-General for the Commonwealth has filed a Notice of Intervention.

The questions in the Special Case include:

- Is the Determination invalid by reason that the criterion in s 10(1)(b) of the 2017-2018 Act was not met such that the Finance Minister's power to issue the Determination was not enlivened?

BRF038 v. REPUBLIC OF NAURU (M28/2017)

Court appealed from: Supreme Court of Nauru
[2017] NRSC 14

Date of judgment: 22 February 2017

This appeal is from a judgment of the Supreme Court of Nauru under the *Refugees Convention Act* 2012 (Nr) ('the RCA').

The Appellant is an asylum seeker from Somalia who arrived in Christmas Island and was transferred to Nauru in September 2013, where he remains.

On 26 February 2014 the Appellant made an application to Nauru for refugee status determination under the RCA, relying on grounds based on his fear of persecution as a member of the Gabooye tribe. He also sought protection based on his actual or imputed political opinion an as opponent of Al-Shabaab, and feared abduction upon his return to Somalia. He further feared persecution on the basis that his return after a prolonged period of absence from Somalia put him at greater risk of harm at the hands of Al-Shabaab.

On 21 September 2014 the Secretary of the Nauru Department of Justice and Border Control determined that the Appellant was not a refugee and was not entitled to complementary protection.

The Appellant made an application for merits review of that decision to the Refugee Status Review Tribunal ("the Tribunal"). The Tribunal affirmed the Secretary's determination on 15 March 2015. The Appellant then appealed to the Supreme Court of Nauru on points of law comprising a failure by the Tribunal to comply with s 37 of the RCA and thus afford him procedural fairness and the misapplication of the law as to persecution.

At the time of the Tribunal's decision, s 37 of the RCA required the Tribunal to give to the Appellant "clear particulars of information that the Tribunal considers would be the reason, or part of the reason, for affirming the determination that is under review" and to give the Appellant the opportunity to comment on that information. The Supreme Court found that the Tribunal had "made a factual finding in relation to the composition of the police forces in Somaliland" and accepted that the information on which that finding was made had not been put to the Appellant. The Supreme Court further found that the information was "not critical to the decision" and that therefore there was "no breach of procedural fairness...on behalf of the Tribunal."

The Tribunal had accepted that the Appellant suffered significant discrimination on the basis of his Gabooye ethnicity, but found that the discrimination did not amount to persecution under the *Refugees Convention Act* and therefore under the RCA. The Supreme Court upheld the Tribunal's approach in this regard.

The Supreme Court dismissed the appeal and affirmed the Tribunal's decision.

On 8 March 2017, the Appellant appealed to the High Court of Australia pursuant to s 5 of the *Nauru (High Court Appeals) Act* 1976 (Cth). This Act implements the Agreement between the Governments of Australia and Nauru relating to appeals to the High Court of Australia from the Supreme Court of Nauru signed on 6

September 1976. It provides that in civil cases in which the Supreme Court of Nauru was exercising its original (rather than appellate) jurisdiction such as this one, an appeal lies to the High Court as of right against any final judgment.

The grounds of the appeal are:

- That the Supreme Court erred in its application of the principles of procedural fairness required by ss 22 and 37 of the RCA, in finding that the Tribunal was not required to put to the Appellant material relating to the tribal composition of the Somali police force before making an adverse finding relating to that information; and

- That the Supreme Court erred in applying the incorrect test for persecution under international law for the purposes of an assessment under s 6 of the RCA.

REGIONAL EXPRESS HOLDINGS LIMITED v. AUSTRALIAN FEDERATION OF AIR PILOTS (M71/2017)

Court appealed from: Full Court, Federal Court of Australia
[2016] FCAFC 147

Date of judgment: 26 October 2016

Date special leave granted: 12 May 2017

The appellant is a company which provides commercial aviation services. On 5 September 2014, it sent a letter to people who had applied and been shortlisted for its cadet employment program. The respondent, a registered organisation of employees under the *Fair Work (Registered Organisations) Act* 2009 (Cth), alleged that the letter contravened various civil remedy provisions of the *Fair Work Act* 2009 (Cth) ("the FW Act").

On 15 April 2015, the respondent applied to the Federal Circuit Court of Australia for (inter alia) the imposition of pecuniary penalty orders for these alleged contraventions, pursuant to item 11 of section 539(2) of the FW Act. The appellant applied to the Court for orders that the respondent's application be summarily dismissed on the basis that the respondent lacked standing to bring the proceeding because it could not demonstrate that it was "*entitled to represent the industrial interests of*" the affected persons under s 540(6)(b)(ii) of the FW Act. Judge Reithmuller found that the respondent was entitled to represent the industrial interests of the unidentified affected people, because they were capable of becoming members of the respondent under its membership eligibility rules.

The appellant's appeal to the Full Federal Court (North, Jessup & White JJ) was unsuccessful.

The Court considered the use of the phrase "*entitled to represent the industrial interests of*", and its variants, in past industrial legislation, concluding that throughout the period in question the legislature had treated it as a given that it was an organisation's eligibility rules which gave it the entitlement to represent the industrial interests of employees, and intending employees, whether or not they were actual members. The question was, therefore, did the FW Act alter that situation?

The Court noted that, in the *Workplace Relations Act* 1996 (Cth) after the Work Choices amendments, the qualifier "*under its eligibility rules*" was included in references to an organisation's entitlement to represent the industrial interests of employees, whereas the FW Act contains no such qualifier. The appellant submitted that the removal of the qualifier amounted, in effect, to a signal of legislative intent that eligibility alone should no longer be regarded as sufficient to generate an entitlement to represent the industrial interests of the person concerned. The Court found that the better way of looking at it, however, would be to regard the qualifier as a limitation upon the circumstances which might, factually, give rise to the entitlement in a particular case: the entitlement could not arise otherwise than under the eligibility rules. Once the qualifier was removed, as it was with the enactment of the FW Act, there was no limitation upon the range of circumstances which might give rise to the entitlement. But the premise that eligibility would always amount to one such circumstance, sufficient of itself to give rise to the entitlement, was not undermined by the removal of the qualifier.

Although the construction of s 540(6) of the FW Act which attracted itself to the primary Judge involved a substantive change in the law, the Full Court found that consideration could not prevail in the face of the reality that in the FW Act the legislature introduced a standing provision which departed substantially from its predecessor. While the content of the phrase "*entitled to represent the industrial interests of*", was undoubtedly problematic, the Court could not ignore this departure. The pattern of s 539 of the FW Act was to consolidate what was previously a miscellany of standing provisions, and to employ the phrase in a setting with which it had not been associated in any previous corresponding provision. Most pointedly, for an organisation to have standing in circumstances where it was not itself affected, it was no longer an express requirement that the individual who *was* affected be a member of it.

Therefore, in the case of an organisation, coverage of a person under its eligibility rules would be sufficient of itself to bring the organisation under the provisions of the FW Act which operate by reference to the formula, "entitled to represent the industrial interests of", *a propos* the person.

The ground of appeal is:

- The Court below erred in its construction of s 540(6)(b)(ii) of the *Fair Work Act* 2009 (Cth), by concluding that an "industrial association" that was an organisation registered under the *Fair Work (Registered Organisations) Act* 2009 (Cth) was "entitled to represent the industrial interests" of affected persons who were merely eligible to be members of the organisation pursuant to its eligibility rules, despite not being actual members of that organisation.

MEG027 & ANOR v. REPUBLIC OF NAURU (M21/2017)

Court appealed from: Supreme Court of Nauru
[2017] NR SC 5

Date of judgment: 7 February 2017

This appeal raises issues of Nauru's international obligations under the Convention to Eliminate All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child and consideration of the *Refugees Convention Act* 2012 (Nr).

The Appellants are a mother and son of Iranian citizenship who have unsuccessfully applied to the Republic of Nauru for refugee status determination. They left Iran by plane on 21 June 2013 and were intercepted by Australian authorities on 24 July 2013 on a boat from Indonesia and transferred to detention on Christmas Island. Then on 24 August 2013 they were transferred from Christmas Island to detention in Nauru where they remain.

On 16 December 2013 the Appellants made an application to Nauru for refugee status determination under the *Refugees Convention Act* 2012 (Nr), relying on grounds including their family's political profile; the risks to the mother of being a divorced woman with no male protection; the risks to the mother, her son and her ability to find employment from her ex-boss who had sexually assaulted her; the risk of harm to her son from being taken back into the custody of his her former husband, a serious drug user; and the risk of being returned to Iran as failed asylum seekers.

The Secretary of the Nauru Department of Justice and Border determined that the First Appellant (mother) was not a refugee and was not entitled to complementary protection, and that the Second Appellant (son) could not be accorded derivative status. The Appellants made an application for review of that decision to the Nauru Refugee Status Review Tribunal. The Tribunal affirmed the earlier determination on 26 September 2014. It did not accept that the First Appellant had a well-founded fear of persecution in Iran on the claimed grounds.

The Appellants then appealed to the Supreme Court of Nauru on two narrow grounds of appeal on points of law, each of which related to the manner in which the Tribunal dealt with the First Appellant's claim that her ex-husband would take custody of the Second Appellant if they returned to Iran.

The grounds of the appeal are that the Tribunal:

- Erred in failing to implement Nauru's international obligations under the Convention to Eliminate All Forms of Discrimination Against Women under the (CEDAW) in considering the claims of the First Appellant;

- Erred in failing to consider claims by the Second Appellant that his return to Iran would contravene Nauru's obligations under the Convention on the Rights of the Child; and

- Erred in failing to deal with submissions and country information relating to the Appellants' claim that they might face harm as failed asylum seekers if returned to Iran.

The written submissions filed by the parties raise a preliminary issue of whether the Appellants may raise grounds of appeal that were not raised in the Supreme Court of Nauru.

HFM045 v. REPUBLIC OF NAURU (M27/2017)

Court appealed from: Supreme Court of Nauru
[2017] NRSC 12

Date of judgment: 22 February 2017

This appeal is from a judgment of the Supreme Court of Nauru under the *Refugees Convention Act* 2012 (Nr) ('the RCA').

The Appellant is a Hindu, a member of the Chhetri tribe and a national of Nepal who has unsuccessfully applied to the Republic of Nauru for refugee status determination. Having left Nepal in May 2013 he travelled by boat from Indonesia to Christmas Island in September 2013. On 2 November 2013 he was transferred to detention in Nauru pursuant to the regional processing arrangement between Australia and Nauru, where he remains.

On 29 January 2014 the Appellant made an application to Nauru for refugee status determination under the *RCA,* relying on grounds based on his alleged fear of harm if he were returned to Nepal: he claimed that the Maoists would target him because of his political activities and the Mongols would target him because of his membership of the Chhetri tribe. He also claimed the Nepalese authorities would not afford him any protection.

On 12 September 2014 the Secretary of the Nauru Department of Justice and Border Control determined that the Appellant was not a refugee and was not entitled to complementary protection. In so doing he found that the Appellant's evidence in several respects was unreliable. The Appellant made an application for merits review of that decision to the Refugee Status Review Tribunal ("the Tribunal"). The Tribunal affirmed the Secretary's determination on 16 January 2015. The Appellant then appealed to the Supreme Court of Nauru on points of law comprising a failure by the Tribunal to comply with s 37 of the RCA and thus afford him procedural fairness and the misapplication of the law as to complementary protection.

The Supreme Court of Nauru dismissed the appeal and affirmed the Tribunal's decision.

The grounds of the appeal include:

- That the Supreme Court erred in holding that the Tribunal did not deny the Appellant procedural fairness or natural justice in circumstances where:
  (a) the primary judge failed to consider the requirements of s 37 of the RCA, and
  (b) [*in various respects*], the Tribunal "sought independent information";

- That the Supreme Court erred in holding that the Tribunal did not apply the wrong test or misinterpret the law in determining the Appellant's complementary protection claim [*in various circumstances*].