

SHORT PARTICULARS OF CASES

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FAIRBAIRN v RADECKI (S179/2021)

Court appealed from: Full Court of the Family Court of Australia
[2020] FamCAFC 307

Date of judgment: 11 December 2020

Special leave granted: 15 October 2021

In or about late 2005, the Respondent (“Mr Radecki”) moved into the rural home of the Appellant (“Ms Fairbairn”), initially paying board before the parties commenced a de facto relationship. In 2010 and 2015 the parties executed cohabitation agreements, quarantining their respective property. Ms Fairbairn updated her will in 2016 such that Mr Radecki, who had not previously been a beneficiary, was entitled to continue to reside at Ms Fairbairn’s farm for up to six months after her death, her two adult children however remaining the primary beneficiaries.

Ms Fairbairn experienced cognitive decline and in 2017 she was diagnosed with a progressive form of dementia. In January 2018 she entered an aged care facility. The NSW Trustee and Guardian (“the Trustee”) was then appointed as legal guardian and financial manager of Ms Fairbairn, following disagreements (and several tribunal proceedings) between her children and Mr Radecki as to the management of her property and the funding of her care. Mr Radecki continued to reside at the farm, which he opposed being sold to fund a refundable accommodation deposit (“RAD”) for Ms Fairbairn’s aged care. By June 2019 however Mr Radecki had started contributing to Ms Fairbairn’s aged care costs.

The Trustee commenced proceedings against Mr Radecki on Ms Fairbairn’s behalf in the Federal Circuit Court, seeking a property settlement under s 90M of the *Family Law Act 1975* (Cth) (“the Act”) so as to sell the farm and from the sale proceeds pay a RAD (which would greatly reduce the amount of ongoing regular payments required by Ms Fairbairn’s aged care provider). Judge Betts firstly determined a key preliminary issue, declaring under s 90RD of the Act that the parties’ de facto relationship had broken down by no later than 25 May 2018. His Honour did so after finding that Mr Radecki’s actions in 2017 and 2018 were consistent only with the relationship having ceased. Those actions included having Ms Fairbairn revoke and execute enduring powers of attorney while she laboured under an incapacity, instructing solicitors to prepare an updated will for Ms Fairbairn, causing a depletion of Ms Fairbairn’s estate by opposing the farm’s sale by the Trustee, and seeking that the Trustee use Ms Fairbairn’s superannuation to pay her aged care costs before he would contribute to such costs.

An appeal by Mr Radecki was unanimously allowed by the Full Court of the Family Court (Ainslie-Wallace, Ryan and Aldridge JJ). Their Honours held that Judge Betts had erred by taking an approach not supported by legal authority, namely, by imputing to Mr Radecki an objective intention to separate from Ms Fairbairn. The Full Court found that the evidence could not support findings that the de facto relationship had broken down or that Mr Radecki had formed and acted on an intention to separate from Ms Fairbairn. Their Honours considered that poor behaviour of the kind exhibited by Mr Radecki was all too often a hallmark of a relationship, and that Mr Radecki’s views in respect of selling the farm and the potential use of superannuation as a source of funds were not incompatible with a continuing de facto relationship. The Full Court held that Judge Betts had erred by viewing the parties’ separation of their assets as determinative and by failing to take

into account the facts that Mr Radecki had frequently visited Ms Fairbairn and had paid care costs from his own resources.

The sole ground of appeal is:

- The Full Court of the Family Court erred in law in finding that there was no basis for concluding that as between the Appellant and the Respondent the de facto relationship had ended and/or broken down.

The Appellant and the Respondent have each filed a notice of constitutional matter, in response to which no Attorney-General has intervened in the proceeding.

THOMS v COMMONWEALTH OF AUSTRALIA (B56/2021)

Court from which cause removed: Federal Court of Australia

Date cause removed: 11 October 2021

The Applicant, Mr Brendan Thoms, is a citizen of New Zealand whose visa was cancelled by the Minister for Home Affairs under s 501(3A) of the *Migration Act 1958* (Cth) (“the Act”) in view of Mr Thoms having been sentenced to 18 months’ imprisonment for assault occasioning bodily harm. On 28 September 2018, upon his release on court-ordered parole, Mr Thoms was placed in immigration detention by Border Force officers. This was purportedly under s 189 of the Act, based on a reasonable suspicion that Mr Thoms was an unlawful non-citizen.

Mr Thoms is an Aboriginal Australian (a member of the Gunggari people) who has lived in Australia for the great majority of his life. On 5 December 2018 he commenced proceedings in this Court against the Respondent, seeking (among other things) that he be released from detention and that he be awarded damages for wrongful imprisonment. Essentially this was on the basis that he had a continuing right to remain in Australia regardless of his citizenship or visa status and that he was not subject to the detention powers under the Act.

On 11 February 2020 this Court, in answering a question of law referred by way of a special case, determined that Mr Thoms, as an Aboriginal Australian, was not an “alien” within the meaning of s 51(xix) of the *Constitution* (*Love v Commonwealth of Australia; Thoms v Commonwealth of Australia* [2020] HCA 3). Mr Thoms was then immediately released from detention.

The proceeding was subsequently remitted by consent to the Federal Court. In the course of the pursuit by Mr Thoms of his claim for damages, which was based on his having been wrongfully imprisoned for 502 days, a separate question was formulated for determination. Upon an application by the Attorney-General of the Commonwealth, Justice Keane ordered the removal into this Court of that part of the cause pending in the Federal Court. The part removed is the question “Was the detention of Brendan Craig Thoms between 28 September 2018 and 11 February 2020 unlawful?”

The Applicant has filed a notice of a constitutional matter in relation to the removed cause, in response to which no Attorney-General has intervened.

NATHANSON v MINISTER FOR HOME AFFAIRS & ANOR
(M73/2021)

Court appealed from: Full Court of the Federal Court of Australia
[2020] FCAFC 172

Date of judgment: 9 October 2020

Special leave granted: 15 October 2021

The appellant is a citizen of New Zealand who lived in Australia. In August 2018, a delegate of the first respondent cancelled his visa under s 501(3A) of the *Migration Act 1958* (Cth) (“the Act”) because the delegate was not satisfied that he passed the “character test”. Mr Nathanson made representations to the first respondent about the revocation of the cancellation but a delegate refused to revoke the cancellation. On 15 January 2019, the appellant applied to the second respondent for a review of that decision. The second respondent affirmed the decision not to revoke the cancellation.

The appellant applied to the Federal Court for judicial review of the second respondent’s decision. The appellant argued that he had not been accorded procedural fairness by the second respondent. In particular, the second respondent had not given him fair notice of an issue that turned out to be material to the decision. He argued that he was not given a fair opportunity to address that issue in either his evidence or submissions. The primary judge accepted that the appellant had not been accorded procedural fairness. However, he found that this did not amount to jurisdictional error because it was not a material breach. This was because the appellant had not demonstrated that “compliance” with the requirements of procedural fairness would have resulted in a different decision.

The appellant appealed to the Full Court of the Federal Court. The majority, Steward and Jackson JJ, found that, although the appellant had been denied procedural fairness, it did not amount to jurisdictional error. The majority found that the appellant had not established that compliance with the obligations of procedural fairness could realistically have resulted in a different decision. Wigney J, in dissent, found that the second respondent’s failure to give the appellant a fair hearing denied him the realistic possibility of a successful outcome and would have allowed the appeal.

The appellant sought special leave to appeal which was granted on 15 October 2021.

The ground of appeal is that:

- The Federal Court erred in not allowing the appeal, in that it should have held that the failure by the Administrative Appeals Tribunal to afford procedural fairness to the appellant amounted to jurisdictional error.

GARLETT v THE STATE OF WESTERN AUSTRALIA & ANOR **(P56/2021)**

Cause removed from: Supreme Court of Western Australia Court of Appeal

Cause removed on: 21 December 2021

Primary judgment: Supreme Court of Western Australia
[2021] WASC 387

On 24 June 2019, the appellant pleaded guilty and was convicted, among other counts, of one count of aggravated robbery. The offence was committed on 19 November 2017 and involved the theft of a pendant necklace and \$20 in cash, in the company of others with threats of violence while pretending to be armed. The appellant has been incarcerated since his arrest on 20 November 2017.

The appellant was sentenced to a total effective sentence of 3 years 6 months' imprisonment, backdated to 20 November 2017, and he was ordered to be eligible for parole. He was not released on parole and during his incarceration was sentenced to a further five months' imprisonment for criminal damage. He was due to be released on 19 October 2021.

On 29 July 2021, the State applied for a restriction order under s 48 of the *High Risk Serious Offenders Act 2020* (WA) ("the Act") and orders for the preparation of reports following a preliminary hearing under ss 46(2)(a), (b) and (d). A restriction order under the Act may be either a 'continuing detention order' (s 26) or a 'supervision order' (s 27). At the preliminary hearing on 13 October 2021 the appellant contended that parts of the Act were invalid.

On 18 October 2021, the primary judge, Corboy J, held that the challenged parts of the Act were not invalid. On 12 November 2021, Corboy J made a declaration that none of the provisions of the Act contravene the Constitution or are inconsistent with s 9(1A) of the *Racial Discrimination Act 1975* (Cth) in so far as they apply to a serious offender under custodial sentence who has been convicted of the offences of robbery or assault with the intention to rob, as referred to in items 34 and 35 of Schedule 1 Division 1 of the Act.

On 23 November 2021, the appellant appealed to the Court of Appeal. On 10 December 2021, the appellant applied under s 40 of the *Judiciary Act 1903* (Cth) to remove the cause in the Court of Appeal to the High Court. On 21 December 2021, Gordon J ordered that the cause be removed to the High Court.

On 31 January 2022, Mr Derek Ryan, who is currently subject to a supervision order under the Act, sought leave to appear as *amicus curiae*. His written submissions were received by the Court, but the Court will not require oral submissions on his behalf. The Attorneys-General of the Commonwealth, New South Wales, South Australia, Queensland, Tasmania and Victoria have intervened.

The ground of appeal to be considered by the Court is that:

- His Honour Justice Corboy erred in declaring that none of the provisions of the *High Risk Serious Offenders Act 2020* (WA):
 - (a) contravene any requirement of Ch III of the Commonwealth Constitution; or
 - (b) are inconsistent with s 9(1A) of the *Racial Discrimination Act 1975* (Cth), in so far as they apply to a serious offender under custodial sentence who has been convicted of the offences of robbery or assault with the intention to rob, as referred to in items 34 and 35 of Schedule 1 Division 1 of the Act.

BELL v THE QUEEN (A30/2021)

Court appealed from: Supreme Court of South Australia Full Court
[2020] SASCF 116

Date of judgment: 3 December 2020

Special leave granted: 13 August 2021

In November 2014, the South Australian Independent Commissioner Against Corruption (“the Commissioner”) decided to investigate the appellant. During the investigation, three witnesses were compulsorily examined and search warrants were executed. In May 2017, the Commissioner forwarded the matter to the Director of Public Prosecutions (“the Director”) to determine whether a prosecution should be instituted.

In August 2017, the Director filed an Information in the Magistrates Court. The appellant was later committed for trial in the District Court. ICAC investigators served and filed documents and other evidentiary material including the witness statements of the witnesses who had been compulsorily examined.

In June 2020, the appellant filed an application seeking a permanent stay. The primary judge observed that ICAC investigators had taken on the role that would usually be performed by SA Police in an indictable matter. She found that the Commissioner had acted unlawfully in referring the matter directly to the Director, exercising various powers and performing a prosecutorial role. She found that ICAC investigators had stepped beyond the statutory functions of ICAC into the arena of criminal proceedings. However, the primary judge refused the stay on the basis that the appellant could still receive a fair trial and the administration of justice would not otherwise be brought into disrepute.

The appellant filed a notice of appeal against the refusal of the stay. The Director filed a notice of contention on the appeal and made an application for the referral of questions of law. The Full Court, in answering the questions of law, found that the referral and conduct of the prosecution were lawful and not inconsistent with the *Independent Commissioner Against Corruption Act 2012 (SA)* (“the ICAC Act”).

The appellant sought special leave to appeal which was granted on 13 August 2021.

The grounds of appeal are that:

- The Full Court erred in finding that the *Independent Commissioner Against Corruption Act 2012 (SA)* authorised the Independent Commissioner Against Corruption to refer a matter for prosecution directly to the Director of Public Prosecutions and to provide to the Director evidentiary material obtained in the course of an investigation including by the exercise of compulsive powers.
- The Full Court erred in finding that, following referral of the matter for prosecution and the institution of criminal proceedings, the Commissioner was authorised under the ICAC Act or otherwise to provide assistance to the Director in connection with the prosecution of the applicant including by the exercise of compulsive powers.

HOANG v THE QUEEN (S146 – S149/2021)

Court appealed from: Court of Criminal Appeal of the Supreme Court of New South Wales
[2018] NSWCCA 166

Date of judgment: 3 August 2018

Special leave granted: 10 September 2021

In 2015 Mr Quy Huy Hoang stood trial before a jury, charged with 12 counts of sexual offending against five children whom he had tutored in mathematics. One juror was discharged on account of ill health prior to the jury's deliberations and giving of any verdicts.

On the night of 5 November 2015, after the remaining 11 jurors had agreed on verdicts in respect of eight counts, one of those jurors ("Juror A") accessed information online in relation to a detail that had arisen in the trial: the need for persons in certain professions, including teaching, to hold a "Working with Children Certificate". Juror A was a retired teacher who was curious as to why she had not had such a certificate, learning online that the relevant legislative requirement had come into force only after she had retired. Prior to the commencement of court the next day, the jury foreperson disclosed Juror A's inquiry in a note to the trial judge, Judge Traill.

On 6 November 2015 Judge Traill proceeded to take ten verdicts, comprising two agreed that day and those which had been agreed the previous day. Juror A was then examined and discharged from the jury, Judge Traill finding that Juror A had engaged in "misconduct" as defined in s 53A(2)(a) of the *Jury Act 1977* (NSW) ("the Act"). This was on the basis that Juror A had contravened s 68C(1) of the Act by conducting an inquiry for the purpose of obtaining information about a matter relevant to the trial. Verdicts of guilty were subsequently returned by the jury on the two outstanding counts, Mr Hoang being found guilty on a total of 10 counts.

An appeal by Mr Hoang against his conviction was dismissed by the Court of Criminal Appeal (Hoeben CJ at CL and N Adams J; Campbell J dissenting). The majority held that s 68C(1) of the Act was not contravened, as Juror A had conducted her inquiry for personal purposes rather than for use in the trial, with the result that there was no contravention of s 68C(1) and no misconduct of the type defined in s 53A(2)(a). Their Honours then considered the alternative form of misconduct, defined in s 53A(2)(b), and found that no risk of a substantial miscarriage of justice had arisen. Juror A therefore had been discharged in error. The majority then held that the two verdicts given after Juror A's discharge should stand, as the removal of Juror A did not constitute a fundamental defect in the trial process, and s 22 of the Act provided that a jury impacted by discharge should remain if its number was not lower than 10.

Campbell J would have allowed the appeal, quashed those convictions which flowed from verdicts taken on 6 November 2015, and ordered a new trial. His Honour held that, although the inquiry made by Juror A might have been undertaken for her own purposes, that did not exclude a purpose being the obtaining of information about a matter relevant to the trial, within the meaning of s 68C(1) of the Act, and Juror A had correctly been discharged for misconduct. The matter was relevant to the trial, since evidence as to "Working with Children" checks had been

led by the prosecution, had been countered by other evidence led by the defence and had been referred to by defence counsel in his closing address to the jury. Campbell J held that Judge Traill had erred by taking verdicts from the jury prior to dealing with the question of misconduct, and the eight convictions which flowed from verdicts given with Juror A's involvement could not stand.

The grounds of appeal are:

- The Court of Criminal Appeal erred in holding that:
 - (a) in order for “misconduct” to be established pursuant to s 53A(1)(c) and s 53A(2) of the Act, the juror’s stated intention or purpose for “making an inquiry” (as defined in s 68C of the Act) is relevant; and/or
 - (b) to satisfy s 53A(2)(a) the inquiry must have been made by the juror with the sole or specific intention or purpose of obtaining information relevant to the trial; and/or
 - (c) the trial judge was in error in determining that there was juror misconduct warranting mandatory discharge pursuant to s 53A(1)(c) of the Act.
- The Court of Criminal Appeal erred in holding that mandatory discharge was not required prior to the trial judge taking the verdicts in the trial in circumstances where the trial judge was satisfied that misconduct under s 53A(2) had occurred.