

SHORT PARTICULARS OF CASES
APPEALS

NOVEMBER 2023

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NZYQ v MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS & ANOR (S28/2023)

Date application for a constitutional or other writ filed: 5 April 2023

Date special case referred to Full Court: 2 June 2023

The Plaintiff is a stateless Rohingya Muslim from Myanmar, who was detained in September 2012 upon his arrival in Australia by boat without a valid visa. He was released from immigration detention in September 2014, after being granted a bridging visa.

In January 2015, the Plaintiff pleaded guilty to an offence of sexual intercourse with a person aged between 10 and 14 years, and was sentenced to 5 years' imprisonment, with a non-parole period of 3 years and 4 months. Consequently, his bridging visa was cancelled pursuant to section 116(1)(g) of the *Migration Act 1958* (Cth) ("the Act") and reg 2.43(1)(p)(ii) of the *Migration Regulations 1994* (Cth). Upon his release from prison in May 2018, the Plaintiff was immediately returned to immigration detention, on suspicion that he was an unlawful non-citizen, pursuant to s 189(1) of the Act. The Plaintiff has since remained in immigration detention, under ss 189 and 196 of the Act.

The Plaintiff applied for a protection visa in June 2017. That application was refused in June 2020, a delegate of the first defendant ("the Minister") finding that although Australia owed the Plaintiff protection obligations as a refugee under s 36(2)(a) of the Act, the Plaintiff's conviction of a serious crime provided reasonable grounds for considering that the Plaintiff was a danger to the Australian community for the purposes of s 36(2C) of the Act.

The Administrative Appeals Tribunal ("AAT") affirmed the delegate's decision, and an application to the Federal Court for judicial review of the AAT's decision was dismissed. In February 2023, the Minister decided not to intervene and grant the Plaintiff a visa under s 195A of the Act, nor to make a residence determination in the Plaintiff's favour under s 197AB.

In May 2022, the Plaintiff wrote to the Minister's Department, asking to be removed to another country. As at 30 May 2023, the Department had not identified any viable options for the removal of the Plaintiff from Australia. In view of the finding of protection obligations owed by Australia, and no relevant change in circumstances in Myanmar, the Plaintiff cannot be removed to Myanmar under the Act.

The Plaintiff commenced proceedings in this Court in April 2023, claiming that his detention was not authorised by ss 189(1), 196(1) and 198(1) and/or s 198(6) of the Act, in his alleged circumstances of an unlikelihood of being removed from Australia in the foreseeable future. He contends further (or in the alternative) that those provisions are invalid, to the extent they purportedly authorise his detention, by reason of infringement of Chapter III of the *Constitution*.

The following questions of law stated in a further amended special case filed by the parties have been referred to the Full Court:

1. On their proper construction, did ss 189(1) and 196(1) of the Act authorise the detention of the Plaintiff as at 30 May 2023?

2. If so, are those provisions beyond the legislative power of the Commonwealth insofar as they applied to the Plaintiff as at 30 May 2023?
3. On their proper construction, do ss 189(1) and 196(1) of the Act authorise the current detention of the Plaintiff?
4. If so, are those provisions beyond the legislative power of the Commonwealth insofar as they currently apply to the Plaintiff?
5. What, if any, relief should be granted to the Plaintiff with respect to his detention as at 30 May 2023?
6. Who should pay the costs of the Further Amended Special Case?

A notice of a constitutional matter was filed by the Plaintiff. No Attorney-General is intervening in the proceeding.

The Court has granted leave to the Australian Human Rights Commission, the Human Rights Law Centre and the Kaldor Centre for International Refugee Law to be heard as amici curiae.

HURT v THE KING (C7/2023 & C8/2023)

Court appealed from: Court of Appeal of the Supreme Court of the Australian Capital Territory
[2022] ACTCA 49

Date of judgment: 30 September 2022

Special leave granted: 21 April 2023

In September 2021, Mr Raymond Hurt was sentenced in the Supreme Court of the Australian Capital Territory for three offences under the *Criminal Code* (Cth) (“the Code”) to which he had pleaded guilty: 1) transmission of child abuse material (“the Transmission Offence”); 2) accessing child abuse material (“the Access Offence”); and 3) possession of child abuse material (“the Possession Offence”). The Code prescribed a maximum penalty of 15 years’ imprisonment for each offence.

In sentencing Mr Hurt, Mossop J was required to apply section 16AAB of the *Crimes Act 1914* (Cth) (“the Crimes Act”), which commenced operation on 23 June 2020, as Mr Hurt had previously been convicted of child sexual abuse offences. Section 16AAB(2) prescribed a minimum sentence of 4 years for an offence against s 474.22A(1) of the Code (the source of the Possession Offence) where the offence was a second or subsequent child sexual abuse offence (“the Mandatory Minimum”).

The elements of the Possession Offence prescribed in the Code include having possession or control of child abuse material (s 474.22A(1)(a)), and having used a carriage service to obtain or access the material (s 474.22A(1)(c)). Of hundreds of photographs and videos possessed, transmitted, and accessed by Mr Hurt, twenty-five photographs were obtained or accessed by him after 23 June 2020, while all others involved conduct prior to that date.

Mossop J gave Mr Hurt an aggregate sentence of imprisonment of just under 4 years and 10 months, with a non-parole period of 2 years and 1 month. For the Possession Offence, the sentence was 4 years’ imprisonment, after a discount of 1 year for Mr Hurt’s having pleaded guilty (15 months’ imprisonment being imposed for each of the Transmission Offence and the Access Offence).

In undertaking the sentencing task for the Possession Offence, Mossop J took the Mandatory Minimum as a starting point, to be applied in least serious cases. Such an approach had been endorsed by the Court of Appeal of the Supreme Court of Western Australia in respect of a mandatory minimum sentence provision in the *Migration Act 1958* (Cth) for an offence of people smuggling: *Bahar v R* (2011) 45 WAR 100; [2011] WASCA 249 (“*Bahar*”). His Honour also considered that the Mandatory Minimum applied to the Possession Offence only insofar as it involved the twenty-five photographs which had been obtained or accessed after 23 June 2020. This was in view of item 3 of part 1 of schedule 6 of the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth) (“the application provision”), by which s 16AAB had been introduced into the Crimes Act, which provided that s 16AAB applied where “the relevant conduct was engaged in on or after” the commencement date.

The Court of Appeal (Loukas-Karlsson, Kennett and Rangiah JJ) dismissed an appeal by Mr Hurt and allowed an appeal by the Crown. On Mr Hurt's appeal, Kennett and Rangiah JJ held that the approach taken by Mossop J to the Mandatory Minimum, based on that taken in *Bahar*, was correct. Loukas-Karlsson J dissented on that issue, however. Her Honour considered that the *Bahar* approach was not mandated by the Mandatory Minimum. Rather, a sentencing judge should undertake an instinctive synthesis approach (involving no reference to the Mandatory Minimum as a starting point), before finally checking whether the sentence so determined was not lower than the mandatory minimum imposed by statute.

On the Crown's appeal, the Court of Appeal unanimously held that Mossop J had erred in respect of the application provision. Their Honours held that the Mandatory Minimum should have been applied to the Possession Offence as a whole, rather than its effect be mitigated somewhat by an excision of the obtaining or accessing conduct (the element prescribed in s 474.22A(1)(c) of the Code), which had occurred prior to 23 June 2020. The Court of Appeal held that the sole *conduct* element of the offence was that prescribed in s 474.22A(1)(a) of the Code, namely, having possession or control. Section 474.22A(1)(c) was expressed in the past tense and lay in the background. The only "relevant conduct" on which the application provision operated such that the Mandatory Minimum applied, therefore, was Mr Hurt's having possession or control on or after 23 June 2020. The hundreds of photographs and videos in the possession or control of Mr Hurt after that date therefore were relevant, including those which had come into his possession before that date.

In the result, the Court of Appeal resentenced Mr Hurt to an aggregate prison term of 4 years and 10 months, with a non-parole period of 2 years and 1 month, giving a sentence for the Possession Offence of 4 years and 6 months (after a discount of 18 months). Loukas-Karlsson J however would have given a sentence of just under 3 years and 7 months (after discount) on the Possession Offence (s 16AAC of the Crimes Act permitting discounts below the Mandatory Minimum, for a plea of guilty and/or cooperation with authorities).

The grounds of appeal are:

- The Court of Appeal (by majority) erred in:
 - a) dismissing the appellant's appeal;
 - b) allowing the respondent's appeal;
 - c) resentencing the appellant.

The Court has granted the North Australian Aboriginal Justice Agency leave to be heard as *amicus curiae*, limited to the written submissions that it has filed.

DELZOTTO v THE KING (S44/2023)

Court appealed from: Court of Criminal Appeal of the Supreme Court of
New South Wales
[2022] NSWCCA 117

Date of judgment: 6 June 2022

Special leave granted: 21 April 2023

In June 2021, Mr Enrico Delzotto was sentenced in the District Court of New South Wales, upon being convicted of two offences contrary to provisions of the *Criminal Code* (Cth) (“the Code”) to which he had pleaded guilty: 1) possessing or controlling child abuse material obtained or accessed using a carriage service (“the Possession Offence”); and 2) using a carriage service to access child abuse material (“the Access Offence”). The Code prescribed a maximum penalty of 15 years’ imprisonment for each offence.

The sentencing judge, Judge Grant, gave Mr Delzotto an aggregate sentence of imprisonment of 3 years and 3 months, with a non-parole period of 2 years and 2 months. In doing so, his Honour specified indicative sentences of 2 years and 9 months for the Possession Offence, and 18 months for the Access Offence. The former indicative sentence involved a taking into account, under section 16AAB of the *Crimes Act 1914* (Cth) (“the Crimes Act”), of a previous conviction. That was a conviction of Mr Delzotto in 2001, under Queensland law, of seven counts of a child sexual offence.

Section 16AAB(2) of the Crimes Act prescribed a minimum sentence of 4 years for an offence against s 474.22A(1) of the Code (the source of the Possession Offence) where the offence was a second or subsequent child sexual abuse offence. Section 16AAC permitted the imposition of a sentence less than the minimum prescribed in s 16AAB(2) on account of a plea of guilty and/or the offender’s having cooperated with law enforcement agencies.

In arriving at the indicative sentence for the Possession Offence, which included discounts for Mr Delzotto’s plea and cooperation, Judge Grant eschewed taking an approach whereby the minimum sentence prescribed in s 16AAB was considered a base point, giving a standard sentencing range of between 4 and 15 years’ imprisonment, 4 years being applicable in a least serious case. Rather, his Honour considered all relevant sentencing factors, as if no minimum sentence were prescribed, before finally checking that the proposed indicative sentence did not fall below the minimum permitted by the operation of ss 16AAB and 16AAC (being 2 years’ imprisonment). This was after assessing the objective seriousness of the Possession Offence as being mid-range, and finding that Mr Delzotto’s moral culpability was reduced because a major depressive disorder had contributed to his offending.

The approach eschewed by Judge Grant had been held by the Court of Appeal of the Supreme Court of Western Australia to be the correct approach, in respect of a mandatory minimum sentence provision in the *Migration Act 1958* (Cth) for an offence of people smuggling, in *Bahar v R* (2011) 45 WAR 100; [2011] WASCA 249 (“*Bahar*”).

An appeal by the Crown against Mr Delzotto's sentence was unanimously allowed by the Court of Criminal Appeal ("the CCA") (Beech-Jones CJ at CL, R A Hulme J and Adamson J), which found the aggregate sentence manifestly inadequate, and held that Judge Grant had erred in his application of s 16AAB of the Crimes Act. Their Honours considered there was no relevant distinction between the statutory provisions considered in *Bahar* and those of the Crimes Act applicable in Mr Delzotto's case, and held that the *Bahar* approach should have been taken.

The CCA also rejected an argument made by Mr Delzotto that s 16AAB did not apply to him. That argument was that conduct constituting an element of the Possession Offence, namely, having used a carriage service to obtain or access the material (s 474.22A(1)(c) of the Code), took place before the commencement date of s 16AAB, being 23 June 2020. The relevant amending Act, the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), provided, in item 3 of part 1 of schedule 6 to that Act ("the application provision"), that s 16AAB applied to a conviction for an offence where "the relevant conduct was engaged in on or after" the commencement date. The CCA held that the obtaining or accessing in s 474.22A(1)(c) of the Code was a *circumstance* rather than conduct, and therefore could not be "relevant conduct" within the meaning of the application provision.

The CCA resented Mr Delzotto to an aggregate prison term of 4 years and 6 months, with a non-parole period of 3 years, specifying an indicative sentence of 4 years and 2 months for the Possession Offence (with an unchanged indicative sentence for the Access Offence).

The grounds of appeal are:

- The CCA erred in holding that the approach in *Bahar* applies to s 16AAB of the *Crimes Act 1914* (Cth).
- The CCA erred in holding that s 16AAB of the *Crimes Act 1914* (Cth) applied to Mr Delzotto.

The Court has granted the North Australian Aboriginal Justice Agency leave to be heard as *amicus curiae*, limited to the written submissions that it has filed.

THE KING v ANNA ROWAN – A PSEUDONYM (M47/2023)

Court appealed from: Supreme Court of Victoria Court of Appeal
[2022] VSCA 236

Date of judgment: 28 October 2022

Special leave granted: 16 June 2023

In June 2021, a trial in the County Court of Victoria concluded with a jury finding the Respondent guilty of eleven charges of incest and one of having committed an indecent act on a child under 16. The victims were the Respondent's daughters. The prosecution case was that the Respondent had committed the offences with her partner, the girls' father ("JR").

The Respondent, who has a mild intellectual disability, had sought to rely on a defence of duress, based on evidence given by the complainants about JR's behaviour and a report ("the Report") by a forensic psychologist, whose opinion included that the Respondent's behaviour was consistent with battered woman syndrome. The Report recorded accounts given by the Respondent of controlling behaviour by JR, and physical and sexual abuse experienced at his hands.

A defence of duress was not left to the jury at the Respondent's trial however, because in a pre-trial ruling, Judge Lyon held that there was no factual basis upon which a defence of duress could properly be raised ("the Ruling"). His Honour considered that the evidence sought to be relied on was incapable of establishing that the Respondent had been required by JR to do any of the alleged acts under a threat that serious harm would be inflicted if she failed to comply.

The Court of Appeal (Kyrou, McLeish and Niall JJA) unanimously allowed an appeal by the Respondent, set aside the convictions and the Ruling, and ordered a new trial. Their Honours held that the Respondent should have been allowed to run a defence of duress at her trial, and that her inability to do so had given rise to a substantial miscarriage of justice. Kyrou and Niall JJA considered that it would have been open to the jury to conclude that it was reasonably possible that the Respondent had felt a continuing or ever-present threat of physical and sexual violence if she did not do what JR demanded of her. McLeish JA focused on whether there was sufficient direct evidence, separate from the expert evidence going to the Respondent's psychological condition, from which it could be inferred that the Respondent's will had been overborne so as to cause her to commit the charged offences, and found that there was such sufficient evidence. His Honour considered that evidence given by the Respondent's daughters might lead a jury to conclude a tendency of JR to use threats, intimidation and violence to coerce female family members, and that a jury might reasonably infer that JR's instructing or persuading the Respondent involved an implicit threat of physical harm if she refused to comply.

The sole ground of appeal is:

- The Court of Appeal erred in finding that the trial judge had erred in ruling that the Respondent could not avail herself of the defence of duress.

TESSERACT INTERNATIONAL PTY LTD v PASCALE CONSTRUCTION PTY LTD (A9/2023)

Court appealed from: Supreme Court of South Australia Court of Appeal
[2022] SASCA 107

Date of judgment: 21 October 2022

Special leave granted: 19 May 2023

Tesseract International Pty Ltd (“Tesseract”) was engaged by Pascale Construction Pty Ltd (“Pascale”) to provide engineering consultancy services for the design and construction of a warehouse facility. A dispute between the parties regarding the quality of Tesseract’s work was referred to arbitration, in accordance with contractual dispute resolution provisions.

Pascale alleged that Tesseract’s work was not performed to the standard required under the contract, and that Pascale had suffered loss and damage as a result. Pascale advanced claims of negligence, breach of contract, and misleading or deceptive conduct in contravention of section 18 of the *Australian Consumer Law* (“ACL”) in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (“the CC Act”). Tesseract primarily denied liability. One of its contentions in the alternative was that any damages payable by it should be reduced because there was a third-party wrongdoer, pursuant to proportionate liability provisions in Part 3 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) (“the Law Reform Act”) and Part VIA of the CC Act.

Upon an application by Tesseract, the Supreme Court of South Australia referred the following question of law for determination by the Court of Appeal:

“Does Part 3 of the Law Reform Act and/or Part VIA of the CC Act apply to this commercial arbitration proceeding conducted pursuant to the legislation and the *Commercial Arbitration Act 2011* (SA)?”

The Court of Appeal (Livesey P, Doyle and Bleby JJA) unanimously answered the question “No”. Their Honours held that although the proportionate liability regimes applied to the parties’ dispute under s 28(3) of the *Commercial Arbitration Act 2011* (SA) (“the CA Act”), that section did not require the application of every law within the regimes to arbitration proceedings. The proportionate liability provisions in the Law Reform Act and the CC Act did not apply to the arbitration proceedings by force of their own terms. Although the dispute resolution provisions in the parties’ contract impliedly conferred the arbitrator with power to determine the dispute as if in a court, such conferral was subject to statutory qualifications, and features of the proportionate liability regimes under both the Law Reform Act and the CC Act indicated a legislative intention that the regimes not apply to arbitration proceedings.

The grounds of appeal include:

- The Court erred in finding that the proportionate liability regimes established by Part 3 of the Law Reform Act and Part VIA of the CC Act are not amenable to arbitration.

- The Court erred in finding that s 28 of the CA Act does not require the arbitrator to apply Part 3 of the Law Reform Act or Part VIA of the CC Act in arbitration proceedings in circumstances where the Court found the apportionment legislation to be substantive law.
- The Court erred in finding that the implied power conferred on the arbitrator to determine the parties' dispute as though it were being determined in a court of law with appropriate jurisdiction does not require the arbitrator to apply Part 3 of the Law Reform Act and Part VIA of the CC Act in circumstances where the Court found the apportionment legislation to be substantive law.

The Court has granted the Australian Centre for International Commercial Arbitration (ACICA) leave to be heard as *amicus curiae*, limited to the written submissions that it has filed.

LESIANAWAI v MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS (S12/2023)

Date application for constitutional or other writ filed: 10 February 2023

Date further amended application referred to Full Court: 14 July 2023

Mr Isaac Lesianawai, a citizen of Fiji born in 1983, arrived in Australia in 1988 on a visitor visa. He has remained in Australia ever since. In 1999 he was granted a transitional (permanent) visa.

As a youth, Mr Lesianawai committed offences that included assault, demanding money with menace, and armed robbery (“the juvenile offences”). Between 1996 and 1998, the Children’s Court of New South Wales made control orders and sentenced Mr Lesianawai to imprisonment for some of those offences. In 2010, Mr Lesianawai was convicted by the District Court of New South Wales of various offences, including armed robbery. For those offences he was sentenced to terms of imprisonment ranging between seven and nine years.

In 2013, a delegate of the defendant (“the Minister”) decided to cancel Mr Lesianawai’s visa (“the Decision”) under section 501(2) of the *Migration Act 1958* (Cth) (“the Act”), on the basis that the delegate reasonably suspected that Mr Lesianawai did not pass the character test because he had a substantial criminal record involving a term of imprisonment for 12 months or more.

In a statement of reasons for the Decision, the delegate observed that Mr Lesianawai was a drug user and had a criminal history, with many convictions for offences involving violence or threatened violence and the use of dangerous weapons. The duration and nature of Mr Lesianawai’s ties to Australia were considered, and the delegate noted that apart from a familial connection to Australia through four brothers and his parents, his connection to the Australian community was limited because he had spent a considerable portion of his life in criminal custody, including periods of detention as a juvenile. The delegate found that Mr Lesianawai would face disadvantage in Fiji, but that he would have access to the same level of social, medical, and economic support as other citizens of that country. The best interests of Mr Lesianawai’s daughter (aged six years at the time) were taken into account, the delegate considering that although the extent of contact between Mr Lesianawai and his daughter had been limited, it was in his daughter’s best interests to have her father remain in Australia. The delegate concluded that Mr Lesianawai represented an unacceptable risk of harm to the Australian community, and that the nature of his offending and a risk of reoffending outweighed other considerations.

After pursuing proceedings in the Administrative Appeals Tribunal and the Federal Court without success, Mr Lesianawai commenced proceedings in this Court. By his further amended application, he seeks to quash the Decision and to prevent the Minister from acting upon it. Mr Lesianawai contends that the delegate erred in making the Decision by referring to “*serious convictions ... dating back to 1996 when he was aged 13*”. He so contends on the basis that, in respect of the juvenile offences, the Children’s Court dealt with the matters summarily under s 31 of the *Children (Criminal Proceedings) Act 1987* (NSW) (“the CCP Act”); s 14 of the CCP Act providing that the Children’s Court shall not record a “conviction” in relation to a child aged under 16.

Justice Gleeson granted Mr Lesianawai an extension of time in which to seek a writ of certiorari in respect of the Decision, and referred the matter for consideration by the Full Court.

The grounds of the further amended application are:

- The defendant acted on a misunderstanding of the law.
 - a) The defendant concluded that the plaintiff has serious convictions dating back to 1996 when he was 13.
 - b) The defendant concluded that the plaintiff first appeared in court as a 12-year-old, and was convicted on a number of robbery offences.
 - c) By treating the plaintiff's sentences in 1996 as criminal convictions, the defendant acted on a misunderstanding of the law.
 - d) The defendant's error was material.
- The defendant took into account an irrelevant consideration.
 - a) Where no conviction is recorded following a finding of guilt, a juvenile offender is taken never to have been found guilty of the offence, and as a matter of law there is no conviction for the Minister to take into account.
 - b) By taking into account the plaintiff's offences as a juvenile, the defendant took into account an irrelevant consideration.
 - c) The defendant's error was material.