# Trials without juries

Lucy Robb Vujcic reports on *Alqudsi v The Queen* [2016] HCA 24.

In *Alqudsi v The Queen* [2016] HCA 24, a majority of the High Court held that s 80 of the Constitution prevents state courts exercising federal jurisdiction from trying indictable offences in the absence of a jury. In the course of doing so, the court reaffirmed the principles expressed in *Brown v The Queen* [1968] HCA 11; (1968) 160 CLR 171.

## The procedural background

The hearing arose out of a motion by Mr Alqudsi for an order that his trial proceed by judge alone under s 132 of the *Criminal Procedure Act 1986* (NSW) ('the CPA').

Mr Alqudsi was charged with seven offences against s 7(1)(e) of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) (the CFIR Act=). Each count charged him with performing services in New South Wales for another person with the intention of supporting or promoting the commission of an offence against s 6 of the Act. Section 6 of the CFIR Act prohibits engagement in hostile activity in a foreign state and entry into a foreign state with intent to engage in such activity. The penalty for commission of an offence under s 7 is imprisonment for 10 years. Section 9A of the Act provides that prosecutions shall be on indictment.

The trial was listed to commence on 1 February 2016 before a judge and jury in the Supreme Court of NSW. The Supreme Court is conferred with jurisdiction to try a person on indictment for a Commonwealth offence by s 68(2)(c) of the *Judiciary Act 1903* (Cth) ('the Judiciary Act'). The jurisdiction of the court is expressly made subject to s 80 of the Constitution.

On 25 November 2015, the applicant filed a notice of motion in the Supreme Court seeking a trial by judge alone order under s 132 of the CPA. Section 132 relevantly provides:

(1) An accused person or the prosecutor in criminal proceedings in the Supreme Court or District Court may apply to the court for an order that the accused person be tried by a judge alone (a 'trial by judge order').

(2) The court must make a trial by judge order if both the accused person and the prosecutor agree to the accused person being tried by a judge alone.

(3) If the accused person does not agree to being tried by a judge alone, the court must not make a trial by judge order.

(4) If the prosecutor does not agree to the accused person being tried by a judge alone, the court may make a trial by judge order if it considers it is in the interests of justice to do so.

Under s 68(1)(c) of the *Judiciary Act*, state laws regarding the procedure for trial and conviction on indictment can be applied to persons accused of federal offences.

The High Court ordered the removal of the notice of motion to the court. The question was whether s 68(1)(c) could have any operation in relation to s 132 of the CPA given s 80 of the Constitution. Section 80 provides:

> The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

By a majority of six to one, French CJ dissenting, the High Court answered that it could not. In essence, s 132 creates a mechanism that allows a judge, on the application - one or both parties, to opt out of trial by jury in prosecutions for indictable offences. This is contrary to the mandatory terms of s 80. Therefore, s 132 can have no application in the context of an indictable federal offence.

## The arguments

The applicant accepted that s 80 was mandatory on its face. Nevertheless, he submitted that s 80 permitted trials of indictable federal offences by judges alone in 'exceptional circumstances.' The statutory conditions governing the exercise of a judge's power to make orders under s 132 were said to be exemplars of 'exceptional circumstances.' Accordingly, s 132 could be picked up and applied by s 68(1) of the Judiciary Act because there was no inconsistency between the requirements of s 80 and the CPA.

The attorneys-general of the Commonwealth, Tasmania, Queensland and Victoria intervened, largely in support of the arguments raised by the applicant (hereafter, 'the interveners'). The attorney-general for South Australia also intervened on a more limited basis in relation to the proper construction of s 80.

The attorney-general for the Commonwealth made three further submissions. First, that as a matter of construction, there was no 'trial by jury' unless and until all the conditions specified by the parliament that might lead to a judge alone trial (including s 132 of the CPA) had been exhausted. Second, that s 132 was an 'elective mechanism' that mirrored, 'functionally and substantively', similar mechanisms that existed prior to the enactment of s 80. Third, that s 132 fully respected the individual and community values that underpinned s 80.

The applicant and interveners submitted more generally that s 80 should be construed purposively. Viewed through that lens, it accommodated elective mechanisms for judge-alone trials in federal indictable offences. Any other construction ignored the historical circumstances within which s 80 was enacted, as well as developments in the use of jury trials since federation.

To succeed, the applicant and the interveners had to address the court's earlier decision in *Brown v The Queen*[1]. That case concerned a South Australian statute that enabled an accused person to elect to be tried by judge alone. The High Court held that the statute was inconsistent with s 80 when applied in the context of a federal indictable offence.

## The Brown decision

In *Brown*, the Commonwealth intervened and, in an argument adopted by Brown, submitted that s 80 confers a personal right or guarantee, capable of being waived by those who stood to benefit from it. Brennan, Deane and Dawson JJ separately held that s 80 was not a personal right or privilege. It was an integral part of the structure of government and the distribution of judicial power under Chapter III of the Constitution. Moreover, it was mandatory.

The applicant and the interveners submitted that *Brown* ought to be distinguished because it was limited to instances of 'unilateral waiver' of the right to jury trial.

The majority in *Alqudsi* rejected the submission. They held that the decision in *Brown* was based on the structure of the Constitution, rather than the specific characteristics of the South Australian Act. As such, there was no reason to distinguish the two cases.

The applicant's only recourse was to have *Brown* overturned. For a variety of reasons, the majority refused to do so. The salient points of the different judgments are set out below.

## Section 80 in historical perspective

The applicant submitted that *Brown* adopted an overly literalist interpretation of the text. The proper approach was to construe s 80 in its historical context. According to the Commonwealth, this meant acknowledging the prevalence of elective-mechanisms for non-jury criminal trials at the time of federation, as well as the continued evolution in jury trials since.

The joint judgment of Kiefel, Bell and Keane JJ addressed these arguments. Their Honours found that by Federation, there was a well-understood distinction between trial on indictment and summary proceedings. They also acknowledged that, by federation, the Australian colonies had enacted legislation permitting summary disposal of indictable offences. The problem with the applicant's and interveners' argument, however, was that it 'equat[ed] trial on indictment before a judge and jury with the summary trial of an indictable offence before two justices or a magistrate.'[2]

Their Honours held that the two processes are fundamentally distinct. In the former, an offence is to be tried on indictment; in the latter, the offence (although serious enough to merit indictment) is, by promulgation of parliament, disposed of summarily. This was the basis of the High Court's decision in *R v Archdall and Roskruge; Ex parte Carrigan and Brown* (*Archdall*) (1928) 4 CLR 128; [1928] HCA 18.

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The applicant and the Commonwealth treated the *Archdall* decision in different ways. The applicant argued that the ruling in *Archdall* was a basis for criticising the current construction of s 80 because it allowed parliament to 'eviscerate' s 80 and circumvent its protections by enacting laws declaring that serious offences would not be tried on indictment. The Commonwealth submitted that *Archdall* was evidence that s 80 could flexibly accommodate laws that evoked the same values of 'parliamentary designation, the accused's participation and community involvement' that enlivens s 132 of the CPA.[3] According to the Commonwealth, s 132 was merely the 'functional and substantive' successor to the provisions sanctioned in *Archdall*.[4]

Their Honours considered both arguments to be fundamentally misconceived. The drafting history of s 80 makes it clear that the draftsmen went through a careful and deliberate process of determining which type of offences would fall within the remit of the Constitution. Any argument that suggested s 80 could

accommodate different styles of federal trials overlooked this drafting history.

Furthermore, it is no argument to say that s 80 cannot be construed to allow parliament to choose which offences shall be tried on indictment and which shall not. This is the clear import of the provision. Parliament shall choose and once it does, the section applies without equivocation.

The submission that s 80 could adapt or evolve to accommodate other methods of trial for indictable federal offences ignored the simple, mandatory language of the text. As the joint judgment of Kiefel, Bell and Keane JJ acknowledged: 'It suffices to observe that whether one characterises trial on indictment by judge alone as a qualification relating to the operation of an evolving institution of trial by jury or not, trial by judge alone is not trial by jury.'[5]

## The democratic purpose of s 80

Gageler J articulated a further reason for dismissing the motion. While his Honour was prepared to accept the merits of adopting a purposive approach to the text, his Honour held that the argument failed because the applicants ascribed to s 80 the wrong purpose. In his Honour's view, the purpose of s 80 went beyond protection of personal liberty, or the broader public interest in the administration of justice. Section 80 was designed to protect democracy, by ensuring that the power to make decisions concerning the personal liberty of people accused of serious crimes was not removed from the populace. The submissions of the applicant and the interveners overlooked this factor. Once the democratic purpose of s 80 was understood, it was clear that s 80 could not be interpreted in a way that departed from its basic tenets.

## Section 80 and the federal system

Nettle and Gordon JJ dismissed the motion on the further basis that it was 'directly contrary to principles which underpin our federal system of government and which have stood since at least *R v Kirby; Ex parte Boilermakers' Society of Australia* [1956] HCA 10; (1956) 94 CLR 254'. Their Honours held that 'Chapter III is an exhaustive statement of the manner in which the judicial power of the Commonwealth can be exercised.'[6] Simply put, this meant that federal jurisdiction cannot be exercised in a manner inconsistent with the requirements of Chapter III, including s 80. No Commonwealth or state legislature can enact laws that would require federal judicial power to be exercised inconsistently. Thus, s 132 of the CPA, which is valid in the context of state criminal jurisdiction, can have no operation in relation to federal criminal jurisdiction.

## The dissent

French CJ was the sole voice of dissent.

His Honour considered that the decision in *Brown* should be reopened on the ground that 'the principle which underpinned the ruling was too broad, imposing an unwarranted rigidity upon the construction of s 80.'[7] His Honour accepted that s 80 had both an institutional dimension and a rights protective dimension.[8] Adopting the language of Gaudron J in *Cheng v The Queen* [2000] HCA 53; (2000) 203 CLR 248 at 278, his Honour held that, like any other constitutional guarantee, 'it should be construed liberally, and not pedantically confined.'[9] There was no basis for excluding elective mechanisms for judge alone trials on the basis of the drafting history, as the Constitution's framers had probably not turned their mind to the question. Moreover, if a rigid construction were adopted, it would lead to potential incongruity. His Honour was doubtful of any construction that would vest such absolute power in the legislature that it could enact a law that gave an accused the power to choose to have a summary trial but, at the same time, prohibit a law enabling an accused being tried on indictment from waiving the right to a jury.

The ultimate point was that the Constitution's final and paramount purpose is to do justice.[10] Section 132 does no injustice. On the contrary, an overly-rigid approach to s 80 was likely to be productive of injustice. On this basis, his Honour concluded, the law ought to be reconsidered.

## Endnotes

1. [1968] HCA 11; (1968) 160 CLR 171.
2. At [99].
3. At [106].
4. At [106].
5. At [98].
6. At [168].
7. At [76].
8. At [70].
9. At [58].
10. At [1].