Recent developments

Anne Thomas

Appointment to the Federal Court of Australia

The Attorney-General, the Hon Michaelia Cash MP, has announced the appointment of Ms Helen Rofe QC as a judge of the Federal Court of Australia.

Ms Rofe has been appointed to the Victorian registry and will replace Justice Simon Steward following his appointment of the High Court of Australia. She will commence her appointment on 12 July 2021.

Ms Rofe graduated from the University of Melbourne with a Bachelor of Science in 1988, a Bachelor of Laws (Hons) in 1992 and a Master of Laws in 1995. Following her admission to the Supreme Court of Victoria in 1993, Ms Rofe commenced her legal career as a solicitor at Blake Sly & Weigall (now Deacons). She was called to the Bar in 2001, where she specialised in science and technology related matters. Ms Rofe is currently Junior Vice President of the Victorian Bar Council and was the President of the Intellectual Property Society of Australia and New Zealand from 2007 to 2009.

We congratulate Ms Rofe on her appointment.

<https://www.attorneygeneral.gov.au/media/media-releases/appointment-federal-court-australia-11-june-2021>

Leading a national approach to justice for victims and survivors of sexual assault, harassment and coercive control

The Attorney-General, the Hon Michaelia Cash MP, has announced a Government-led new multijurisdictional initiative aimed at ensuring victims and survivors of sexual violence and coercive control have similar protections and legal avenues throughout Australia.

The majority of criminal laws relating to sexual violence and sexual harassment are the responsibility of states and territories, which makes justice and community education challenging issues due to the variations in law from state to state. The Commonwealth is seeking, through the initiative, to address how these laws can be harmonised while working towards a consistent response to domestic, family and sexual violence across Australia. The initiative will also focus on achieving greater clarity and uniformity with respect to application of relevant offences.

‘We are working towards a better system, one which will reassure sexual assault and sexual harassment victims that the justice system will provide consistent outcomes’, the Attorney-General said.

The initiative will look at issues such as:

- sentencing
- evidence law
- coercive control
- consent
- protections for vulnerable witnesses
- minimum sentencing standards
- specialist sexual offence courts.

<https://www.attorneygeneral.gov.au/media/media-releases/leading-national-approach-justice-17-may-2021>

Appointment to the Federal Circuit Court of Australia

The Attorney-General, the Hon Michaelia Cash MP, has announced the appointment of Ms Sandra Taglieri SC and Mr Marcus Turnbull SC as judges of the Federal Circuit Court of Australia.

Ms Taglieri will commence in the Hobart registry on 18 May 2021, replacing Judge Barbara Baker. Ms Taglieri was admitted to the Supreme Court of Tasmania and the High Court in 1989, where she commenced her career as a barrister and solicitor at the firm Butler McIntyre & Butler and then from 1995 as a partner at Phillips Taglieri. In 2009, Ms Taglieri joined Derwent & Tamar Chambers and was appointed as Senior Counsel in 2018.

Mr Turnbull will commence in the Launceston registry replacing Judge Terrance McGuire following his appointment to the Family Court of Australia. Mr Turnbull was admitted to the Supreme Court of Tasmania and the High Court in 1991. Since 2000, he practised as a partner at Ogilvie Jennings and was appointed as Senior Counsel in 2020.

We take the opportunity to congratulate Ms Taglieri and Mr Turnbull on their appointments.

<https://www.attorneygeneral.gov.au/media/media-releases/appointments-federal-circuit-court-australia-13-may-2021>

Reappointments to the Administrative Appeals Tribunal

The Government has announced 13 reappointments to the Administrative Appeals Tribunal. The Tribunal is an important mechanism in ensuring the provision of independent merits review. The Government is committed to ensuring the Tribunal has the resources it needs to provide high-quality merits review with minimum delay.

The reappointments are as follows.

One part-time Deputy President:

- The Hon Dennis Cowdroy AO QC.

Seven full-time members:

- Mr Theodore Tavoularis
- Dr Louise Bygrave
- Mr Kent Chapman
- Mr Jeffrey Thomson
- Ms Justine Clarke
- Ms Jennifer Cripps Watts
- Mr Justin Meyer.

Five part-time members:

- Professor David Ben-Tovim
- Ms Angela Cranston
- Mr Michael Manetta
- Ms Jane Marquard
- Mr James Silva.

We congratulate all the appointees.

<https://www.attorneygeneral.gov.au/media/media-releases/reappointments-administrative-appeals-tribunal-13-may-2021>

Extension for Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability

The Morrison Government has extended the final reporting date for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with a Disability to 29 September 2023.

This extension provides an additional 17 months to account for the disruption caused by COVID-19 and recognises the broad and complex issues under the Royal Commission's terms of reference.

The Minister for Families and Social Services, the Hon Anne Ruston, said '[t]his extension will enable the Government to receive and implement recommendations as expeditiously as possible. This will make meaningful change to the lives of people with disability, while also enabling the Royal Commission to fulfil its terms of reference'.

A seventh Commissioner has also been appointed to assist the Commission's workload.

<https://www.attorneygeneral.gov.au/media/media-releases/extension-royal-commission-violence-abuse-neglect-and-exploitation-people-disability-13-may-2021>

Establishment of a Royal Commission into Defence and Veteran Suicide

The Morrison Government has recommended to the Governor-General the establishment of a Royal Commission into Defence and Veteran Suicide in recognition of the need to prevent the tragic loss of any Australian Defence Force member or veteran to suicide.

Prime Minister Scott Morrison said the Royal Commission will be set up after listening to community calls for a national inquiry focusing on the systemic issues faced by Australian Defence Force members and veterans that too often result in their loss of life to suicide.

The Minister for Veterans' Affairs, the Hon Darren Chester MP, said the Royal Commission was another step in efforts to build confidence, trust and hope for current and future veterans and their families that they will be supported.

'This will provide an opportunity for us all to reset, further increase our understanding of this issue, and unite the Parliament, the ex-service community, and the families who have been affected by suicide', Minister Chester said.

The Attorney-General's Department will provide administrative support to the Royal Commission.

It is the Government's intention that the Royal Commission and the National Commissioner for Defence and Veteran Suicide Prevention operate together in a complementary way to achieve long-term change. Although the terms of reference for the Royal Commission have yet to be finalised, the Royal Commission will look at past deaths by suicide (including suspected suicides and lived experience of suicide risks) from a systemic point of view. The National Commissioner will, on the other hand, have a forward-looking role, including overseeing the implementation of the Royal Commission's recommendations. The National Commissioner for Defence and Veteran Suicide Prevention Bill currently before the Parliament will be amended to enable the Commissioner to operate in this complementary manner.

It is anticipated that three Commissioners will be required to lead the inquiry given the complex issues for consideration and the importance of ensuring members of the Australian Defence Force, veterans and their families have an opportunity to be heard. Consultation is underway to appoint these candidates.

A public consultation process on the draft terms of reference closed on 21 May 2021, with an announcement to be made once the terms of reference are finalised. The Prime Minister has also communicated with First Ministers inviting their contributions to the draft terms of reference with the view of a joint Commonwealth−State Royal Commission.

<https://www.attorneygeneral.gov.au/media/media-releases/establishment-royal-commission-defence-veteran-suicide-19-april-2021>

Appointment to the Family Court of Australia

The Attorney-General, the Hon Michaelia Cash MP, has announced the appointment of Judge Paul Anthony Howard to the Family Court of Australia from his current position as a judge of the Federal Circuit Court of Australia.

Judge Howard has been appointed to the Brisbane registry and will commence on the 6 April 2021.

Judge Howard graduated with a Bachelor of Laws from the Queensland Institute of Technology in 1986, when he was admitted as a solicitor to the Supreme Court of Queensland. Judge Howard commence his legal career in 1987 as a solicitor at Pattisson & Barry Solicitors and then at Vercorp Pty Ltd in 1988. He then practised as a barrister from 1990 to 2007 before being appointed as a judge in the Brisbane Registry of the Federal Circuit Court of Australia in 2007, where he predominately heard family law matters. In 2018, Judge Howard completed the Fulbright Scholarship as a visiting foreign judicial fellow at the Federal Judicial Centre in Washington DC.

Judge Howard has extensive experience working through complex family law trials. He has lectured extensively on his research, domestically and internationally, and has published extensively on Australia's family law system.

We congratulate Judge Howard on his appointment.

<https://www.attorneygeneral.gov.au/media/media-releases/appointment-family-court-australia-1-april-2021>

Appointment to the Federal Circuit Court of Australia

The Attorney-General, the Hon Michaelia Cash MP, has announced the appointment of Senior Registrar Colin Campbell, Ms Jennifer Howe and Mr Jonathan Davis QC as judges of the Federal Circuit Court of Australia.

Senior Registrar Campbell will commence in the Sydney Registry on 6 April 2021. He was admitted as a legal practitioner of the Supreme Court of NSW in 1986 and commenced his career as a solicitor at Vaughan Hains and Main in 1987. In 2005 he was appointed as a Registrar of the Family Court of Australia and the Federal Circuit Court of Australia and was appointed Senior Registrar in 2020.

Ms Howe will commence in the Melbourne Registry on 6 April 2021. She was admitted as a barrister and solicitor in the Supreme Court of Victoria in 2005 and commenced her career in 2005 as a solicitor at Phillips Fox (now DLA Piper). Ms Howe specialises in family law.

Mr Davis QC will commence in the Melbourne Registry on 6 April 2021. He was admitted as a barrister and solicitor in the Supreme Court of Victoria in 1991. He commenced his career as a solicitor in 1991 specialising in commercial practice.

We take the opportunity to congratulate Senior Registry Campbell, Ms Howe and Mr Davis QC on their appointments.

https://www.attorneygeneral.gov.au/media/media-releases/appointment-federal-circuit-court-australia-1-april-2021

Reappointments of Sex Discrimination Commissioner and Age Discrimination Commissioner

Ms Kate Jenkins and the Hon Dr Kay Patterson AO have been reappointed as Commissioners of the Australian Human Rights Commission.

Ms Jenkins was reappointed as the Sex Discrimination Commissioner and Dr Patterson as the Age Discrimination Commissioner. The appointments are for a further two years to enable the Commissioners to continue their important work at the Commission.

Ms Jenkins led the Commission's project on cultural reform within the Australian Defence Force and the National Inquiry into Sexual Harassment in Australian Workplaces culminating in the Respect@Work report. Ms Jenkins will continue to support the Government's implementations of the report's recommendations as Chair of the Government-established Respect@Work Council. She is also leading an independent inquiry into Commonwealth parliamentary workplaces that was announced by the Government on 5 March 2021.

Dr Patterson is currently implementing the recommendations from the Commission's *Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability* report and the Australian Law Reform Commission report *Elder Abuse – A National Legal Response* and the priorities outlined in the National Plan to Respond to the Abuse of Older Australians.

We congratulate Ms Jenkins and Dr Patterson on their reappointments.

<https://www.attorneygeneral.gov.au/media/media-releases/reappointment-sex-age-discrimination-commissioners-1-april-2021>

Commonwealth Ombudsman report on the AFP's use and administration of telecommunications data powers

On 28 April 2021, the Commonwealth Ombudsman, Mr Michael Manthorpe PSM, released a report on his investigation of the Australian Federal Police's (AFP) use and administration of telecommunications data and powers.

The investigation commenced in response to a disclosure made by the AFP to the Ombudsman that it had identified compliance issues affecting ACT Policing's handling of requests for location-based services (LBS) telecommunications data, dating back to 2007.

The investigation concluded that many of the authorisations made by ACT Policing for LBS between 2015 and 2019 were not properly authorised or reported to the Ombudsman or the relevant Commonwealth Minister, which had led to a culture of non-compliance with the *Telecommunications (Interception and Access) Act 1979* such that 'LBS could have been accessed unlawfully', according to Mr Manthorpe.

'This could have a number of potential consequences, for example, the privacy of individuals may have been breached and we are unable to rule out the possibility that unauthorised LBS may have been used for prosecutorial purposes', said Mr Manthorpe.

The investigation also found that the AFP and ACT Policing had failed on a number of occasions to identify and address the issue.

'Law enforcement agencies rely on a wide range of covert and intrusive tools to do their work, but to maintain public trust these tools need to be properly deployed, in accordance with the legislation which governs their use', Mr Manthorpe said.

The report makes eight recommendations to assist the AFP in addressing these non-compliance issues and implementing processes to prevent recurrence. The AFP has accepted all eight recommendations.

The report can be found on the Commonwealth Ombudsman website at <https://www.ombudsman.gov.au/__data/assets/pdf_file/0021/112476/Report-into-the-AFPs-use-and-administration-of-telecommunications-data-powers.pdf>.

<https://www.ombudsman.gov.au/media-releases/media-release-documents/commonwealth-ombudsman/2021/28-april-2021-commonwealth-ombudsman-report-into-the-afps-use-and-administration-of-telecommunications-data-powers>

Consent law reform

In light of recommendations made in the New South Wales (NSW) Law Reform Commission Report 148, *Consent in Relation to Sexual Offences*, handed down in November 2020 (which can be found at <https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report%20148.pdf>), the NSW Government is seeking to both strengthen and simplify sexual consent laws in an effort to protect victim−survivors and educate the community.

NSW Attorney General, Mr Mark Speakman, said, '[n]o law can ever erase the trauma of sexual assault, but we can send a message that survivors' calls for reform have been heard'.

The key law reforms include legislating that:

(a) a person does not consent to sexual activity unless they said or did something to communicate consent; and

(b) an accused person's belief in consent will not be reasonable in the circumstances unless they said or did something to ascertain consent.

'This means we have an affirmative model of consent, which will address issues that have arisen in sexual offence trials about whether an accused's belief that consent existed was actually reasonable', Mr Speakman said.

The reforms will also introduce five new jury directions available for judges to give at trial to address common misconceptions about consent.

'These directions will support complainants by ensuring their evidence will be assessed fairly and impartially, and that juries will be able to better understand the experiences of sexual assault survivors', explained Mr Speakman.

The NSW Government has also committed to fund a research project designed to improve understanding of victim experiences with the criminal justice process and a targeted education program for judges, legal practitioners and police.

<https://www.dcj.nsw.gov.au/news-and-media/media-releases/consent-law-reform>

Have your say on NSW privacy laws

On 7 May 2021, the NSW Attorney General, Mr Mark Speakman, and NSW Minister for Digital and Minister for Customer Service, Mr Victor Dominello, released for public consultation a draft of the Privacy and Personal Information Protection Amendment Bill 2021. If enacted, the scheme provided for in the Bill will make NSW the first Australian state or territory to introduce a mandatory data breach notification scheme, increasing accountability and transparency in the handling of personal information held by NSW public sector agencies.

Essentially the scheme will ensure NSW public sector agencies are required to notify the Privacy Commissioner and affected individuals when a date breach involving personal information is likely to result in serious harm.

The NSW Privacy Commissioner will play a role in the implementation and administration of the scheme.

'The NSW Government is committed to enhancing services through digital innovation, but it is vital the use of technology and data embodies the highest privacy, trust and security standards', Mr Dominello said.

'The Information and Privacy Commission NSW and agencies such as Cyber Security NSW support the introduction of mandatory reporting to clarify agency obligations and give the NSW public greater certainty about how data breaches involving personal information will be handled.'

Public submissions closed on Friday, 18 June 2021.

<https://www.dcj.nsw.gov.au/news-and-media/media-releases/have-your-say-on-nsw-privacy-laws>

Recent decisions

The effect of interpretation errors on a decision-maker's decision

DVO16 v Minister for Immigration and Border Protection; BNB1717 v Minister for Immigration and Border Protection [2021] HCA 12

DVO16 v Minister for Immigration and Border Protection; BNB1717 v Minister for Immigration and Border Protection concerned two matters involving the effect of interpretation errors on two separate visa decisions reviewed by the Immigration Assessment Authority (the Authority). The two matters were heard together before Kiefel CJ and Gageler, Gordon, Edelman and Steward JJ, both on appeal from the Federal Court of Australia. While the bench unanimously dismissed the appeals, Edelman J wrote a separate judgement. The decision was handed down on 14 April 2021.

DVO16 and BNB17 were two individuals who had applied for protection visas. DVO16 was a Shia Muslim from Khuzestan in Iran and identified as an Ahwazi Arab. DVO16's visa application was based on a fear of persecution resulting from the failure of the Iranian state to protect him from harm inflicted by another Iranian tribal group, resulting from a specific incident and from a fear of persecution resulting from the failure of the Iranian state to protect him more generally from harm inflicted by another tribal group by reason of his ethnicity as an Ahwazi Arab. BNB17 was a Hindu Tamil from Sri Lanka who based his application on a fear of persecution by reason of imputed links to the Liberation Tigers Tamil Eelam (LTTE).

Each appellant participated in a protection interview with the delegate, who later refused their respective applications for a protection visa. In each case the Minister referred the decision of the delegate to the Authority for review under Pt 7AA of the *Migration Act 1958* (Cth), the fast-track review process in relation to certain protection visa decisions. The Secretary of the Department of Immigration and Border Protection gave the respective audio copies of the protection interviews to the Authority as part of the review material. In each case, the Authority affirmed the decision of the delegate.

However, in each respective protection interview there had been interpretation errors made by the interpreters. The subsequent decisions of the Authority were made in consideration of the audio recording of the protection interviews as part of the review material which included those interpretation errors. This, the appellants submitted, gave rise to jurisdictional error in the Authority's respective decisions.

In DVO16's case, the result of the interpretation error was that the delegate, and later the Authority, misapprehended that the appellant did not understand what was meant by 'ethnicity' when in fact the appellant did not understand what was meant by 'persecution'. In BNB17's case, there were three identified interpretation errors. The first was the statement of the appellant that he feared harm from 'army, CID, police', which was translated as that he feared harm from 'other people'. The second was that the appellant's answer as to what he meant by his claim to 'have been beaten' and the substance of his response that it was 'to find out whether he was a member of LTTE or supported LTTE' had not been translated. The third error was in relation to a reference by the appellant to 'sexual assault', which had been translated as 'sexual harassment'.

Each appellant sought judicial review of the Authority's decision in the Federal Circuit Court of Australia (*DVO16 v Minister for Immigration and Border Protection* [2018] FCCA 3058*;* and *BNB17 v Minister for Immigration and Border Protection* [2019] FCCA 1314). Each appeal was dismissed. Appeals from decisions of the Federal Circuit Court were dismissed respectively in the Full Court of the Federal Court of Australia (*DVO16 v Minister for Immigration and Border Protection* (2019) 271 FCR 342) and a single Justice of the Federal Court of Australia, exercising the power of the Full Court (*BNB17 v Minister for Immigration and Border Protection* [2020] FCA 304). In the Federal Court and before the High Court, the grounds of appeal in each case were concerned with whether the interpretation errors during the protection interviews with the delegate resulted in the decision of the Authority being affected by jurisdictional error — specifically, whether the translation errors were so significant as to require the Authority to exercise its powers under s 473DC of the Act to get new information or take any other step to cure the error such that the Authority's failure to do this means the decisions were affected by error; and, secondly, whether the interpretation errors meant that the review material provided to the Authority was incomplete such that the Authority failed to complete its statutory review task.

In other words, as summarised by the Court, in what circumstances could mistranslation result in the invalidity of an administrative decision? This, the Court determined, would turn on consideration of whether the mistranslation might result in non-compliance with a condition expressed or implied in the legislation authorising the decision-making process and the limits on the decision-making authority.

The plurality decision found that there were only two possibilities where interpretation errors could lead to an error of law by the Authority when making a decision under a Pt 7AA review process, neither of which were present in either case. The first possibility arises from the implied condition of reasonableness on the Authority's duty to regard the review material and from the Authority's powers to get new information and consider, if satisfied, that it is credible information not previously known that would have otherwise affected the Minister's decision and there are 'exceptional circumstances' to justify its consideration (see the *Migration Act 1958* (Cth) s 473DD).

The plurality noted that interpretation errors in a recording of a protection interview revealed or suggested by the review material provided by the Secretary could enliven the Authority's powers to get and consider new information. Where it fails to exercise those powers to interview the referred applicant and then to consider the referred applicant's testimony as

correctly translated, this could lead to error. However, whether the decision of the Authority is in breach of the reasonableness requirement turns on whether the decision-making course 'adopted by the Authority in the circumstances known to it was open to a reasonable member of the Authority cognisant of the statutory obligation of the Authority ordinarily to conduct its reviews without accepting or requesting new information or interviewing the referred applicant, cognisant of its powers to get new information in an interview with the referred applicant and to consider that information, and mindful of the statutory exhortation on the Authority to pursue the objective of providing a mechanism of limited review that is both "efficient" and "quick"', as required under s 473FA the Act (at [21]).

The second possibility arises through non-compliance with the duty of the Authority to 'review' the referred decision — that is, to consider the review material provided by the Secretary with the ability to request new information and consider it subject to limited circumstances. The Authority's duty in reviewing the referred decision requires an assessment of the claims raised by the applicant against the criteria for the grant of a protection visa in order to determine whether or not to be satisfied that those criteria have been met. Mistranslation has the potential to result in the Authority failing to understand and therefore consider the substance of the claim against the criteria.

The plurality found that in neither case were the interpretation errors such that they impacted the reasonableness of the Authority's ability to make a decision or that they provided a basis for a conclusion that the Authority failed to understand and therefore consider the substance of the claims made by the appellants in their respective interviews. Specifically, for BNB17, the substance of the questions that were misinterpreted was repeated several times during the course of the interview, where they were subsequently interpreted correctly, while in DVO16's case the delegate asked the appellant a number of open-ended questions which gave him plenty of opportunity to give evidence about his fear of persecution, which he failed to do. As a result, the Authority had all the relevant information in the review material for both matters, despite the interpretation errors, to make a reasonable and considered decision.

Justice Edelman likewise held that in neither case had the Authority committed an error of law. Justice Edelman identified three situations where interpretation errors could lead to a decision of the Authority being affected by jurisdictional error, with the first and third situations mirroring largely those identified by the plurality. The first is where significant interpretation errors are apparent to the Authority which, as a matter of legal reasonableness, would require the exercise of an available power by the Authority to remedy the error — such as, for example, obtaining new information under s 437DC of the Act. The second is where the mistranslation is so significant in critical respects that the Secretary is unable to perform the duty, which is a precondition for a valid review by the Authority, of giving the Authority a statement that contains reference to the evidence on which the findings of the delegate were based. The third is that the misinterpretation is so extreme that it deprives the assessment by the Authority of its character as a 'review' under s 473CC of the Act.

Justice Edelman also identified a fourth situation, which he considered not applicable under a Pt 7AA review — that is, the possibility that misinterpretation might result in a breach of the natural justice hearing rule. However, s 473DA(1), which requires the rules for the conduct of a review under Pt 7AA to be 'taken to be an exhaustive statement of the requirements of the

natural justice hearing rule', effectively means that the requirements for the rule have been excluded under a Pt 7AA review.

In both cases Edelman J found no issues regarding the reasonableness of the Authority's decision not to exercise its power under s 473DC of the Act to obtain new information in light of the interpretation errors. The imperfect translations 'did not rise to a level of significance of interpretation error' (at [73]), requiring the exercise of the Authority's powers to remedy the errors. Justice Edelman noted that the power under s 473DC is shaped by the statutory context which includes the expressed assumption that the Authority generally 'does not hold hearings' and is required to conduct its review efficiently and quickly. Moreover, the Authority's review is not 'de novo' in the traditional sense, as the Authority is provided with the delegate's decision and is required to take the delegate's reasoning into account; and, even if new information is obtained, it can only be considered in limited circumstances (s 473DD of the Act).

The second possibility of error also did not arise in these cases, as the requirement, under s 473CB of the Act, that the Secretary give the Authority the review material was in fact met. The submission made by the appellants was that s 473CB(1)(b) of the Act required the Secretary to give the Authority 'material provided by the referred applicant to the person making the decision', which included any information provided by the applicant during an interview, including oral interview remarks. This was rejected by Edelman J. He agreed with the interpretation of 'material' in this context by Anderson J in the Federal Court — that is, 'material' refers to physical or electronic documents, objects and information', such that the oral evidence provided by the applicant at the interview was not 'material' provided by the appellant to the delegate and thus was not required to be provided to the Authority by the Secretary (see *BNB17 v Minister for Immigration and Border Protection* [2020] FCA 304 [95]).

As to the third possibility of error, Edelman J held that in neither case were the translation errors of such a fundamental nature as to deprive the exercise of power by the Authority of the character of a 'review' of the decision. In both cases, the interpretation errors did not preclude the appellants from putting forward their cases and the Authority understanding the 'gist' of it.

The presence of procedural fairness where access to certain material is denied

SDCV v Director-General of Security [2021] FCAFC 51

SDCV v Director-General of Security concerned an appeal from the Administrative Appeals Tribunal (AAT) which was heard before Rares, Bromwich and Abraham JJ (*SDCV and Director-General of Security* [2019] AATA 6112). Their joint decision was handed down on 9 April 2021, dismissing the appeal. Justice Rares, while agreeing with the decision and reasoning of Bromwich and Abrahams JJ, provided separate observations on the constitutional issue.

The applicant is a citizen of Lebanon. In 2012 he was granted a Class BS Subclass 801 Partner (Residence) visa, permitting him permanent residence in Australia. Sometime after, his application for citizenship was approved. However, it subsequently came to the attention

of the Australian Security Intelligence Organisation (ASIO) that some of the applicant's relatives were connected to the Islamic State of Iraq and the Levant (ISIL). The applicant was consequently a subject of an ASIO investigation which concerned his contact with his relatives in Syria and Lebanon.

On 14 August 2018, the applicant was assessed to be 'directly or indirectly, a risk to security' as defined in s 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act). This assessment was reflected in the Director-General of Security's certificate, which also recommended that the applicant's visa be cancelled. The certificate and the assessment comprised the adverse security assessment (ASA) decision of the Director-General of Security, made on behalf of ASIO. The Minister for Home Affairs, in light of the ASA decision, subsequently cancelled the applicant's visa on the basis that 'he reasonably suspected that the applicant did not pass the character test and was satisfied that cancellation of his visa was in the national interest'. The effect of this was that the visa cancellation could not be revoked as long as the ASA remained in place.

On 27 August 2018, the applicant sought a review of the ASA decision by the AAT under s 54 of the ASIO Act. The review was conducted in the Security Division of the AAT in accordance with ss 39A and 39B of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act). The Minister signed four certificates under s 39B of the AAT Act. The certificates effectively precluded the applicant and his lawyers from access to some of the evidence and submissions before the AAT and from being present when that evidence was given and those submissions were made.

On 2 December 2019, the AAT affirmed the ASA. The AAT handed down two sets of reasons — one 'open', which was seen by the applicant and his lawyers; and one 'closed', which has not been seen by them. The applicant appealed the AAT's review of the ASA decision to the Federal Court under s 44 of the AAT Act on five questions of law. However, prior to hearing the appeal, the Court heard a constitutional challenge concerning the validity of s 46(2) of the AAT Act. The Commonwealth Attorney-General intervened and the respondent adopted the Attorney-General's submissions. Prior to hearing the substantive appeal, the Court advised that the constitutional challenge had been unsuccessful for the following reasons.

Section 46(2) of the AAT Act effectively operates to prevent the disclosure of certified matter to the applicant or his legal representatives. As there was no challenge made to the validity of the Minister's certificates under s 39B of the AAT Act in this case, the premise for the appeal was that the information to which s 46(2) applied is material that was properly certified.

The basis for the applicant's constitutional challenge was, first, that a court exercising judicial power of the Commonwealth cannot be required (or authorised) to act in a manner that is procedurally unfair, brought about in this case by s 46(2) of the AAT Act, which excluded the applicant from accessing all the evidence that was before the AAT; secondly, that s 46(2) was the cause of this procedural unfairness unless read down; and, thirdly, that s 46(2) could be read down to remain within constitutional limits. In other words, where a procedure has the capacity to result in the court making an order that finally determines a right or legally protected interest of a person, it must afford that person a fair opportunity to respond to evidence on which that order might be made, as a minimum. Essentially, if the Court views

material and considers it relevant to the matter before it then the applicant is entitled to see the material.

The plurality accepted the uncontroversial position that procedural fairness is an essential feature of a Ch III court and noted that the underlying question in this case was 'whether, taken as a whole, the Court's procedures avoid practical injustice' (at [85]). This question was considered in light of the particular legislative regime in which s 46(2) appears in the AAT Act and governs the nature of the merits review function of the AAT.

Justices Bromwich and Abraham noted that, despite the risk of exposure of sensitive material, in the AAT Act Parliament has imposed a duty on the Director-General of Security to present to the Tribunal all relevant information available to the Director-General, whether favourable or unfavourable, under s 39A(3) of the AAT Act. This ensures that the AAT can conduct a meaningful merits review. However, to mitigate the risks of this material being disclosed, Parliament has enacted a specific regime. Consequently, unlike ordinary Tribunal proceedings, these proceedings must be in private (s 39A(5) of the AAT Act) and the persons who can be present are specified (s 39A(6) of the AAT Act). These include the applicant and his/her representative, except where the Minister has certified that the evidence or submission to be made are of such a kind that the nature of the disclosure of the evidence or submission would be contrary to the public interest because it would prejudice the security or defence of Australia, and that evidence is being addressed (s 39A(9) of the AAT Act). The disclosure of that material can be governed by a certificate issued by the Minister under s39B of the AAT Act. Section 44 of the AAT Act provides for an appeal on a question of law arising from the merits review process. Subsequently, s 46(2) ensures that all the material before the AAT is also before the Court for the judicial review proceedings.

The plurality went on to contrast this with the situation if s 46(2) of the AAT Act was absent — that is, the material before the AAT would simply not be before the Court on appeal, as there would inevitably be a public interest immunity claim and, where those claims are successful, that material would be excluded from evidence. The only challenge would be way of judicial review of the ASA, which would occur without access to the material upon which the decision was based. Moreover, where the material relates to national security, it is reasonable to assume that any claim of public interest immunity would have significant prospects of success. Consequently, without the Court having the material as provided by s 46(2) of the AAT Act, the applicant would likely be in a worse position. The plurality found no practical injustice on the applicant having appealed by way of s 44 of the AAT Act from the decision of the AAT, such that s 46(2) was invalid.

In making its decision the plurality also heavily distinguished the authorities relied upon by the applicant to the issues in this case (see *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 78 CLR 38; HT v R (2019) 374 ALR 216; *Gypsy Jokers Motor Cycle Club Inc v Commissioner of Police* (2008) 234 CLR 532*;* and *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1). Namely, there was no party in this case requiring an order of the Court that would affect or alter the rights or interests of a person on the basis of evidence which is not revealed to the applicant as a result of public interest and national security issues, finding seven reasons the arguments advanced by the applicant based on those authorities were incorrect or not applicable to the case.

Justice Rares likewise agreed with the conclusion reached by Bromwich and Abraham JJ and emphasised the fact that, absent s 46(2) of the AAT Act, all evidence and other material subject to the s 39B certificate and the closed reasons of the AAT would be (or at least highly likely to be) inadmissible into evidence because those relate to matters of state within the meaning of s 130 of the *Evidence Act 1995* (Cth) — namely, adducing such evidence would 'prejudice the security, defence or international relations of Australia', which mirrors the ground under s 39B of the AAT Act. As a result, an applicant challenging an ASA would only have the open evidence, material and open reasons available in which to argue a question of law.

Justice Rares held that s 46(2) of the AAT Act is an important provision in ensuring that evidence which would otherwise be inadmissible under s 130 of the Evidence Act, but which is likely to have been of significant weight to the Tribunal's decision and the interests of justice, can be considered by the Court as evidence as part of a review under s 44 of the AAT Act. Section 46(2) is a parliamentary modification of the common law principles of procedural fairness and open justice. Both of these are capable of adapting to preclude one party knowing or having access to crucial evidence in the case against that party provided it is necessary in the interests of justice to do so. Justice Rares emphasised the fact that 'necessity can warrant departure from the rules of procedural fairness' (at [29]), which is an objective criterion that has no element of discretionary judgement. Moreover, in this case, s 46(2) is analogous to the exceptions to the ordinary application of the principles of procedural fairness and open justice, albeit that it does not give the Court the power to control whether the procedure that it mandates should apply.

In summary, s 46(2) is a statutory mechanism that allows the Court to consider the confidential and secret material on which the Tribunal based its decision while also protecting that confidentiality and secrecy in the public interest because the grounds of the s 39B certificate reflect matters of state immunity that would otherwise make this evidence inadmissible except as provided by s 46(2) of the AAT Act.

Aside from the constitutional challenge, the applicant raised five questions of law which were considered by Bromwich and Abraham JJ in their decision. All five grounds were found to have failed.

Ground 1 raise by the applicant was that the Tribunal misconstrued and or misapplied the concept of 'directly or indirectly a risk to security' because the Tribunal did not identify some specific future overt act by the applicant. The plurality held that the capacity to be a risk did not have to be confined to what the applicant might immediately or directly cause by his own actions. It could also encompass someone who may in some way indirectly materially increase the difficulty of protecting Australia. While regard is to be had to the broad definition of 'security' under s 4 of the ASIO Act, neither the Tribunal nor the ASA is confined to only aspects of that definition.

Under grounds 2a and 4, it was submitted that the Tribunal failed to give reasons and make findings in relation to the ASA, as the open reasons provided to the applicant stated that the Tribunal was unable to form a view as to whether the ASA was justified based on the open evidence. The plurality found that there is nothing that requires the Tribunal's findings to be

recorded in open reasons and there were no issues with the Tribunal preparing two sets of reasons, one open and one closed. Additionally, the s 39B certificates did not preclude the Tribunal from 'casting a broader restrictive umbrella' over the material that could be discussed in the closed reasons. The plurality accepted the Attorney-General's submissions that there was no obligation on the Tribunal to identify in its open reasons whether or not it concluded that the ASA was justified. In light of the closed reasons, the Court found no defect in the Tribunals' conclusion — it complied with the Tribunal's requirements under s 43(2B) of the AAT Act to include in its reasons findings on material questions of fact and reference to the evidence or material on which those findings were based.

Ground 2b submitted by the applicant was that the Tribunal failed to make findings on unchallenged evidence which was the witness evidence from a Catholic priest and the applicant's wife. The error in this line of argument that was pointed out was that the applicant did not have access to all the evidence and the Minister's non-publication certificates prevented closed evidence being put to the witnesses such that the evidence was in and of itself rather limited. The fact that the Tribunal did reference the evidence in its open reasons was considered evidence that it was material the Tribunal had taken into account and had given some limited weight to. This was considered sufficient enough in the circumstances such that on the totality of the open and closed reasons the Court found no error by the Tribunal in going no further with the evidence.

The applicant's third ground was that there had been a denial of procedural fairness by the Tribunal because of a translation of an Arabic message used for the purposes of cross-examination of the applicant which may not have been accurate and which the applicant was not given access to. As with ground 5, which asserted the decision of the Tribunal was illogical or irrational, the plurality could find no basis for either ground in light of the open and closed evidence before the Tribunal and the conclusions it reached.

Validity of a ministerial determination preventing international travel

LibertyWorks Inc v Commonwealth of Australia [2021] FCAFC 90

LibertyWorks Inc v Commonwealth of Australia was a joint decision of Katzman, Wigney and Thawley JJ handed down on 1 June 2021.

On 18 March 2020 the Governor-General declared the existence of a human biosecurity emergency — the COVID-19 pandemic. In light of the declaration, on 25 March 2020 the Health Minister, under s 477 of the *Biosecurity Act 2015* (Cth), made the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination* (the Determination). The Determination, under s 5, prevents any Australian citizen, permanent resident or operator of an outgoing aircraft or vessel from leaving Australian territory unless an exemption applies to the person or is granted to the operator. An exemption can only be granted by the Australian Border Force (ABF) Commissioner or ABF employee and only in 'exceptional circumstances' where a 'compelling reason for needing to leave the Australian territory' has been demonstrated.

In October 2020, Christopher De Bruyne, an employee of LibertyWorks Inc, applied through an online portal administered by the Department of Home Affairs for an exemption under

s 7(1) of the Determination in order to travel from Sydney to London to 'assess potential conference venues' for an upcoming conference hosted by LibertyWorks. Mr De Bruyne's application was refused on the ground that Mr De Bruyne's travel was 'not exempt from the travel restrictions'. The Declaration that was in force at the time of Mr De Bruyne's application was registered on 11 September 2020 and remained in force until 17 December 2020.

By an originating application, LibertyWorks Inc challenged the validity of the Determination and sought a declaration that the Determination was 'invalid by reasons of inconsistency with, or of lacking authority in, the [Act]'. Specifically, LibertyWorks challenged the validity of the restriction on overseas travel imposed by the Determination such that the Determination was ultra vires because this restriction is a measure 'of a kind' set out in s 96 of the Act that may not be included in the Determination.

During a human biosecurity emergency, s 477 of the Act gives the Health Minister the power to determine any requirement that he or she is satisfied is necessary in order to prevent or control the entry of the listed human disease the subject of a declaration into Australia or its emergence, establishment or spread in Australia; to prevent or control the spread of the disease made to another country; or to give effect to any recommendation in relation to the disease made to the Health Minister by the World Health Organisation under Pt III of the International Health Regulations. Section 477(6) prevents the Minister from making a determination which requires an individual to be subject to a biosecurity measure of a kind set out in Subdiv B of Div 3 of Pt 3 of Ch 2. Section 96 appears in that subdivision. It provides that, for a specified period of no more than 28 days, an individual may be required by a human biosecurity control order not to leave Australian territory on an outgoing passenger aircraft or vessel. LibertyWorks submitted that, since s 5 of the Determination had the same purpose and effect as the measure permitted in s 96, the Determination was beyond the Minister's power. The Health Minister, it argued, could not subject a group of individuals by a determination to a measure of a kind which the Chief Medical Officer could only subject an individual by a biosecurity order.

The Court turned to the construction of s 477 read in light of its context consistent with the principles of statutory interpretation under *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355. Chapter 2 of the Act in which s 96 sits provides for the making of human biosecurity control orders on individuals. On the other hand, Ch 8, which includes s 477, is intended to be used in circumstances where there is an emergency of such a scale and significance as to require management at a national level, according to the Explanatory Memorandum to the Act and as outlined in s 473 of the Act.

Specifically, the Court found that the power under s 477 was very broad such that the Health Minister is entitled to impose any requirement he or she is 'satisfied is necessary' to prevent or control the entry of COVID-19 into Australian territory or the spread of the disease in Australia or elsewhere. This would include the ability to restrict or prevent the movement of person in or between places, including across international borders. To construe this power as anything less than that would be contrary to Parliament's intention in enacting the emergency power.

This, according to the Court, was reinforced by the simplified outline in s 473, which states that Pt 2 of Ch 8 contains *additional powers* to those available in Ch 2. Moreover, restricting the scope of a determination under s 477, as suggested by LibertyWorks, would lead to a situation where the only way to prevent or reduce the risk of contagion from Australians who travel overseas during a pandemic would be through making a human biosecurity control order on every single individual who wishes to do so and then only for more than 28 days. In addition, any officer imposing the order would be required to ensure that each individual had been informed of the order and provided an opportunity to consent to it. The affected individuals would also have a right to seek merits review of the order in the Administrative Appeals Tribunal, with potential avenues for judicial review. The time and expense of such a mechanism would far outweigh the utility of the order and have a detrimental effect on the ability of the Government to control a human biosecurity emergency.

The Court found that the mere fact that a determination made under s 477 may affect an individual does not prevent the Health Minister from making the determination and, while Art 12 of the *International Covenant on Civil and Political Rights* ratified by Australia in 1980 requires acquiescence to the right to freedom of movement, it also expressly allows for restrictions provided by law which are necessary, among other things, to protect public health.

The Court upheld the validity of the Determination and dismissed the originating application.