SHORT PARTICULARS OF CASES
APPEALS

TO BE HEARD IN CANBERRA
COMMENCING TUESDAY, 3 SEPTEMBER 2013

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MAGAMING v THE QUEEN (S114/2013)

Court appealed from: New South Wales Court of Criminal Appeal
[2013] NSWCCA 23

Date of judgment: 15 February 2013

Special leave granted: 7 June 2013

Mr Bomang Magaming is an Indonesian citizen who was recruited to help maintain and steer a boat carrying asylum seekers towards Australia. On 6 September 2010 that boat was intercepted near Ashmore Reef. Mr Magaming later pleaded guilty to a charge of aggravated people smuggling under s 233C of the *Migration Act* 1958 (Cth) ("the Act"), which carries a maximum sentence of 20 years imprisonment. Section 236B of the Act prescribes a mandatory minimum penalty for that offence (if a first offence) of five years imprisonment with a non-parole period of three years ("the minimum sentence").

On 9 September 2011 Chief Judge Blanch imposed the minimum sentence on Mr Magaming. His Honour found that Mr Magaming was a simple fisherman whose part in the offence was at the very bottom of the scale of seriousness. The Chief Judge commented that normal sentencing principles would not require a sentence as heavy as the minimum sentence.

Mr Magaming appealed against his sentence, challenging the constitutional validity of s 236B of the Act. That challenge compared the sentencing range for an offence under s 233C (smuggling a group of at least five people) with that under s 233A (smuggling a person). Although the elements of each offence are almost identical, s 233A carries a maximum sentence of 10 years imprisonment without any minimum term whereas s 233C carries the minimum sentence and has a maximum of 20 years.

On 15 February 2013 the Court of Criminal Appeal ("CCA") (Bathurst CJ, Allsop P, McClellan CJ at CL, Hall and Bellew JJ) unanimously dismissed Mr Magaming's appeal. Their Honours held that it was open to Parliament to create overlapping offences with different sentences, even if such provisions operated with gross injustice. The CCA found that although a prosecutor could then choose which offence to rely upon, the relevant provisions in the Act did not amount to a vesting of judicial power in the Executive. Their Honours held that such a prosecutorial choice could not be characterised as impairing the independent function of courts in sentencing offenders.

On 20 June 2013 a Notice of Constitutional Matter was filed in this Court by Mr Magaming's lawyers. The Attorneys-General for the Commonwealth, New South Wales, Western Australia, South Australia and Queensland have all advised the Court that they will be intervening in this matter.

In addition, on 26 June 2013 the Australian Human Rights Commission filed a summons seeking leave to appear at the appeal as amicus curiae.

The grounds of appeal are:

- The CCA erred in holding that the legislative power of the Commonwealth extends to the enactment of section 236B of the Act.

- The CCA erred in failing to hold that section 236B(3) of the Act requires the exercise of the judicial power of the Commonwealth in a manner inconsistent with its nature.

- The CCA erred in refusing to set aside the sentence imposed on Mr Magaming by the primary judge on 9 September 2011.

PLAINTIFF M76/2013 v MINISTER FOR IMMIGRATION MULTICULTURAL AFFAIRS AND CITIZENSHIP AND ORS (M76/2013)

Date Special Case referred to Full Court: 2 August 2013

The plaintiff is a Sri Lankan national of Tamil origin. She arrived in Australia by boat in May 2010 and was detained pursuant to s189(3) of the *Migration Act* 1958 (Cth) (the Act), initially on Christmas Island. In July 2010 she applied for protection as a refugee under the Refugee Status Assessment process (the RSA), which was directed to whether the Minister should exercise his discretion under s46A(2) of the Act to allow a person such as the plaintiff to apply for a protection visa.

In March 2011 the Minister made a "residence determination" which allowed the plaintiff (and her two sons) to live in "community detention". In September 2011 an officer of the Department found that the plaintiff was a person to whom Australia owed protection obligations. Pursuant to Ministerial directions already in place, the RSA was not referred to the Minister for consideration under s 46A(2) of the Act, pending the completion of health, identity and security checks. ASIO ultimately furnished to the Department an "Adverse Security Assessment" in April 2012, assessing the plaintiff as likely to engage in acts prejudicial to Australia's security if she were granted a protection visa. Under Ministerial Guidelines which had been issued in March 2012, the plaintiff was not referred to the Minister for consideration of the possible exercise of power under s 46A(2), because a) the plaintiff did not satisfy Public Interest Criterion (PIC) 4002 (as it then stood) and b) she had an adverse security assessment issued by ASIO. In May 2012, the Minister revoked the residence determination and the plaintiff and her two sons were transferred to detention in New South Wales. In July 2012 the plaintiff's spouse was granted a protection visa and became an Australian permanent resident. They married in October 2012 and her third son was born in January 2013. He is an Australian resident. In May 2013 the Minister exercised his power under s 46A(2) of the Act to allow the plaintiff's two eldest children to lodge an application for protection visa. In June 2013 those children were granted protection visas and became Australian permanent residents. At the request of the plaintiff and her husband, all 3 children live as "visitors" with her in order not to be separated from their mother.

In October 2012 the Commonwealth announced terms of reference to an Independent Review of Adverse Security Assessments and the Honourable Margaret Stone was appointed as the Independent Reviewer. The plaintiff was invited to apply for review of the Adverse Security Assessment, which she did in December 2012. Detailed written submissions were made on her behalf. The Independent Reviewer concluded that the Adverse Security Assessment was an appropriate outcome, but recommended that it be reviewed again in 12 months' time. The plaintiff disputes the correctness of the ASIO conclusions and of the Independent Reviewer's opinion.

At present the plaintiff's detention is not for the purpose of considering whether she should be permitted to apply for, or be granted, a visa. The defendants assert that the detention is authorised by s 189(1) and s 196(1) of the Act for the purpose of removing her from Australia as soon as it is reasonably practicable to do so and of segregating her from the

community pending removal. The plaintiff has no present right to enter and remain in any country other than Sri Lanka. Despite efforts by the Department to resettle her (and others like her), at present there is no other country to which she can be sent. The Minister does not propose to remove the plaintiff to Sri Lanka against her will, nor has the plaintiff asked the Minister to remove her to Sri Lanka.

The plaintiff commenced proceedings in this Court by way of an application for an order to show cause. On 2 August 2013 Justice Hayne referred the Special Case signed by the parties for the consideration of the Full Court. Notice of Constitutional Matter has been given. The plaintiff seeks to distinguish this Court's decision in *Al-Kateb v Godwin* (2004) 219 CLR 562 or in the alternative invites the Court to re-open and overturn it.

The questions stated by the Special Case signed by the parties for consideration by the Full Court include:

- Do ss 189, 196 and 198 of the Act authorise the detention of the plaintiff?
- If the answer to question 1 is yes, are these provisions beyond the legislative power of the Commonwealth insofar as they apply to the plaintiff?
- Does the fact that the plaintiff's case was not referred to the Minister for him to consider whether to exercise his power under s46A(2) reveal an error of law?