SHORT PARTICULARS OF CASES

DECEMBER 2019

STATE OF WESTERN AUSTRALIA v MANADO & ORS (P34/2019)
STATE OF WESTERN AUSTRALIA v AUGUSTINE & ORS (P35/2019)
COMMONWEALTH OF AUSTRALIA v AUGUSTINE & ORS (P36/2019)
COMMONWEALTH OF AUSTRALIA v MANADO & ORS (P37/2019)

Court appealed from: Full Court of the Federal Court of Australia [2018] FCAFC 238

Date of judgment: 20 December 2018

Special leave granted: 21 June 2019

Section 212(2) of the *Native Title Act 1993* (Cth) ("the NTA") provides that a law of the Commonwealth, a State or a Territory may confirm "any existing public access to and enjoyment of: (a) waterways; or (b) beds and banks or foreshores of waterways; or (c) coastal waters; or (d) beaches." Acting pursuant to this provision, the Parliament of Western Australia enacted s 14 of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) ("the TVA"), which came into effect on 4 July 1995. It relevantly provided that "existing public access to and enjoyment of" (a) waterways; (b) beds and banks or foreshores of waterways; (c) coastal waters; or (d) beaches is "confirmed".

On 2 May 2018, in the Federal Court of Australia, North J made two determinations of native title which recognised that the members of the Jabirr Jabirr/Ngumbarl native title claim group and Bindunbur native title claim group (the Claimants) possessed native title rights and interests in areas of land north of Broome in the Dampier Peninsula in Western Australia. Each determination recognised that the native title holders possessed exclusive native title rights and interests in relation to some parts of the determination areas, and non-exclusive native title rights and interests in relation to the balance. Each determination also recognised as "other interests" within the determination area for the purposes of s 225(c) of the NTA, public access to and enjoyment of particular waterways, beds and banks or foreshores of waterways, coastal waters and beaches ('public access clauses')**.** North J held that it was appropriate to include the public access clauses in the determinations on the basis that "existing" public access to and enjoyment of the areas described therein had been established, because the public had the ability to access and enjoy those areas in that there was no prohibition on them doing so.

The Claimants appealed against the form of each Determination. They contended that s 225 of the NTA required that, in order for the public access confirmed by s 14 of the TVA to be referred to in a determination, the State needed to satisfy the Court that the public were possessed of an existing *right* of access to and enjoyment of the waterways, etc, in the area. Alternatively, they contended that the Court needed to be satisfied that, at the time the NTA commenced operation, the public in fact physically enjoyed access to identified areas. The State contended that s 14 of the TVA, in accordance with s 212(2) of the NTA, confirmed a legal privilege to access the coastal areas, and that it was unnecessary to define that privilege by reference to actual use.

On appeal, the Full Court of the Federal Court (Barker, Perry and Charlesworth JJ) held that there were two ways in which s 212(2) applied in circumstances such as the present case: (1) first, a public access interest may arise where it is shown to be the subject of an existing common law or statutory

right or interest (as defined by s 253 of the NTA) at the time that s 212(2) of the NTA was enacted; (2) second, the public access interest may be shown to be a relevant interest where a person asserting an "existing public access to and enjoyment of" land or waters of the type mentioned in s 212(2) establishes that public access and enjoyment, as a matter of fact, existed at the time of the enactment of s 212(2).

The Full Court found that in the present case, neither of these ways by which s 212(2) might apply was relied upon by the primary judge in making the impugned determinations. No demonstrated common law or statutory right of such access was identified. Nor did the State or any other respondent lead any evidence or otherwise attempt to prove at trial that public access to or the enjoyment of the places listed in the determinations actually and physically existed at material times. They therefore concluded that the primary judge erred in construing s 212 as enabling an ability of or liberty in the public to access unallocated Crown land that answers the description of land and waters mentioned in subs (2), as an "interest" for the purposes of s 253 of the NTA and thus amongst the other interests in each determination. It followed that those parts of the two determinations that purport to determine other interests on the basis of s 14 of the TVA should be removed from the determinations.

The grounds of the appeals by the State of Western Australia include:

- The Full Federal Court erred in law in determining that the existing public access to and enjoyment of waterways, beds and banks or foreshores of waterways, coastal waters or beaches, as at 1 January 1994, which was confirmed by s 14 of the TVA in accordance with s 212(2) of the NTA, was not a right or privilege in connection with land or waters within the definition of "interest" in s 253 of the NTA.

The grounds of the appeals by the Commonwealth include:

- The Full Court erred in construing s 212(2) of the NTA as requiring the existence of a "right" or the fact of physical access to and enjoyment of a prescribed area before it will be said there was "existing public access to and enjoyment of" a prescribed area.

LOVE v COMMONWEALTH OF AUSTRALIA (B43/2018)
THOMS v COMMONWEALTH OF AUSTRALIA (B64/2018)

Dates writs of summons filed: 10 September 2018
5 December 2018

Date special cases referred to Full Court: 5 March 2019

Mr Daniel Love and Mr Brendan Thoms identify as Aboriginal and are accepted as such by their respective tribes. Both men were born overseas and neither has Australian citizenship. Each held an Australian visa until it was cancelled in 2018.

Mr Love was born Papua New Guinea ("PNG") in 1979 and is a citizen of that country. His mother was a citizen of PNG and his father is a citizen of Australia. Mr Love's father was born in the Territory of Papua (as it then was), to a Papuan mother and an Aboriginal Australian father. From the age of five Mr Love held an Australian permanent residency visa and has resided continuously in Australia since the age of six. In 2018 he was sentenced to 12 months' imprisonment for assault occasioning bodily harm, with court-ordered parole due to commence on 10 August 2018. On 6 August 2018 a delegate of the Minister for Home Affairs cancelled Mr Love's visa under s 501(3A) of the *Migration Act 1958* (Cth) ("the Migration Act"). This was on the bases that: (1) Mr Love was serving a sentence of full-time imprisonment, and (2) Mr Love had been sentenced to a term of imprisonment for 12 months or more. On the day on which his parole commenced, Mr Love was released from prison into the custody of Border Force officers, who handcuffed him and took him directly to an immigration detention facility. This was done pursuant to s 189 of the Migration Act, on suspicion that Mr Love was an unlawful non-citizen. Mr Love was released from immigration detention on 27 September 2018 when a delegate of the Minister for Home Affairs revoked the cancellation of Mr Love's visa.

Mr Thoms was born in New Zealand in 1988 to an Aboriginal Australian mother and a New Zealand citizen father. He is a citizen of New Zealand but has lived in Australia since 1994. In 2018 Mr Thoms was sentenced to 18 months' imprisonment for assault occasioning bodily harm. On 27 September 2018 the Minister for Home Affairs cancelled Mr Thoms' visa under s 501(3A) of the Migration Act (on the same bases on which Mr Love's visa was cancelled). The next day, Mr Thoms commenced court-ordered parole. Like Mr Love, Mr Thoms was immediately handcuffed and placed in immigration detention by Border Force officers.

Each of the Plaintiffs seeks the payment of damages for false imprisonment, on the basis that his being held in immigration detention was (and is) unlawful. Mr Thoms also seeks to be released from immigration detention. The Plaintiffs argue that s 189 of the Migration Act cannot apply to them, since they have a special connection to Australia such that neither of them is an "alien" within the meaning of s 51(xix) of the *Constitution* ("the aliens power"). Each contends that he has a continuing right to remain in Australia regardless of whether he has Australian citizenship or a current visa.

In each proceeding the parties filed a Special Case, which Justice Edelman referred for consideration by the Full Court. Each Special Case raises the following two questions:

1. Is the Plaintiff an “alien” within the meaning of s 51(xix) of the *Constitution*?

2. Who should pay the costs of this Special Case?

The Plaintiffs jointly submit that their Aboriginality (by descent, self-identification and community acceptance), bolstered by their longstanding residence in Australia and their owing no allegiance to a foreign power (on account of their having emigrated from PNG and New Zealand as children), takes them beyond the reach of the aliens power.

The Defendant submits that any person who does not have the status of a citizen of Australia under the *Australian Citizenship Act 2007* (Cth) is necessarily an alien. The Defendant further submits that Mr Love and Mr Thoms owe allegiance to PNG and New Zealand respectively on account of their respective citizenship of those countries.

Notices of a Constitutional Matter have been filed in both proceedings. The Attorney-General for the State of Victoria has intervened in each proceeding.

Subsequent to the Full Court reserving its decision on 8 May 2019, the parties were invited by the Court to make submissions on the following proposition:

In general terms the question is whether members of an Aboriginal society have such a strong claim to the protection of the Crown that they may be said to owe permanent allegiance to the Crown. More particularly the question arises in this way:

- *Section 51(xix) of the Constitution does not allow the Parliament to treat as an alien a person who cannot answer the description of an alien according to the "ordinary understanding" of that word;*
- *The ordinary understanding of an alien is informed by the common law of Australia;*
- *According to the common law an alien is a person who does not have the permanent protection of and owe permanent allegiance to the Crown in right of Australia;*
- *The common law's recognition of customary native title logically entails the recognition of an Aboriginal society's laws and customs and in particular that society's authority to determine its own membership;*
- *The common law must be taken to have comprehended a unique obligation of protection owed by the Crown to an Aboriginal society, requiring it to protect each member of that society;*
- *Corresponding to the Crown's obligation of protection is the permanent allegiance which each member of an Aboriginal society owes to the Crown.*
- *It follows that a person whom an Aboriginal society has determined to be one of its members cannot answer the description of an alien according to the ordinary understanding of that word.*

Both matters have been relisted for further hearing before the Full Court on 5 December 2019.

STRBAK v THE QUEEN (B55/2019)

Court appealed from: Queensland Court of Appeal
[2019] QCA 42

Date of judgment: 12 March 2019

Special leave granted: 11 September 2019

Ms Heidi Strbak was charged with the manslaughter of her 4 year old son, Tyrell. While she pleaded guilty to that offence, the particular basis for her criminal responsibility was disputed. The medical evidence showed that Tyrell died as a result of abdominal injuries caused by blunt force trauma. The prosecution alleged that Ms Strbak applied that force, or alternatively, that she failed to seek medical treatment for him. Ms Strbak admitted her guilt only upon that second basis. A trial to determine the facts then followed.

In 2017 a co-accused, Mr Matthew Scown (Ms Strbak's then partner, but not the father of Tyrell), pleaded guilty to manslaughter. He was then sentenced upon the basis that he had caused Tyrell's death by failing to obtain medical assistance for him.

The prosecution's case that Ms Strbak had inflicted the fatal blows was entirely circumstantial. There was however evidence that she had previously acted abusively and aggressively towards Tyrell. Although the medical evidence differed, the dominant view was that the fatal injuries were the result of two distinct episodes. The first occurred 24 to 48 hours prior to death, with the second occurring much closer to the time of death. After a six day hearing, the sentencing judge found that Ms Strbak had caused Tyrell's fatal injuries. She was then sentenced to nine years' imprisonment.

On 12 March 2019 the Queensland Court of Appeal (Fraser & McMurdo JJA; Crow J) unanimously refused Ms Strbak leave to appeal against her sentence. Justices McMurdo and Fraser held that the sentencing judge had not erred in finding that Ms Strbak had caused Tyrell's injuries, a conclusion that was supported by the prosecution's strong circumstantial case and by Mr Scown's testimony. This made it much more probable than not that Ms Strbak was responsible for those injuries, rather than Mr Scown (who was the only other realistic candidate).

While agreeing with Justices McMurdo and Fraser, Justice Crow also dismissed Ms Strbak's complaint that the sentencing judge had erred in placing determinative weight on Mr Scown's evidence without taking into account the strong incentive he had to absolve himself. His Honour additionally rejected the submission that the sentencing judge had undermined the privilege against self-incrimination by more readily accepting the prosecution evidence. This was in circumstances whereby Ms Strbak had exercised her right to silence. While senior counsel for Ms Strbak conceded that *R v Miller* [2004] 1 Qd R 548 ("*R v Miller*") compelled the sentencing judge to take this view, it was submitted that *R v Miller* was incorrect and that it ought to be reconsidered. Justice Crow however concurred with Justice McMurdo that *R v Miller* was simply not engaged.

In this matter, the ground of appeal is:

- In refusing to reconsider *R v Miller* there was a constructive failure by the Queensland Court of Appeal to exercise its jurisdiction.