

MINOGUE v STATE OF VICTORIA (M2/2017)

Date Special Case referred to Full Court: 21 December 2017

On 12 July 1988, in the Supreme Court of Victoria, the plaintiff was convicted of one count of murder arising from the explosion of a car bomb in the vicinity of the Russell Street Police Complex on 27 March 1986. The explosion resulted in the death of a policewoman. The plaintiff was sentenced to imprisonment for life with a non-parole period of 28 years. On 30 September 2016, his non-parole period expired and he became eligible for the grant of parole. He made an application to the Adult Parole Board (“the Board”), which made a decision to proceed to parole planning. Before the Board could complete the performance of its functions, the *Corrections Act 1986* (Vic) (“the Act”) was amended to insert s 74AAA, which provides that the Board must not make a parole order in respect of a prisoner convicted and sentenced to a term of imprisonment with a non-parole period for the murder of a person who the prisoner knew was, or was reckless as to whether the person was, a police officer, unless it is satisfied that the prisoner is in imminent danger of dying or is seriously incapacitated.

Following the commencement of this proceeding, s 127A was inserted into the Act with effect from 20 December 2017. Section 127A relevantly provides that, “to avoid doubt”, the amendments made by made by Part 2 of the 2016 Amendment Act (which inserted s 74AAA) also apply to a prisoner regardless of whether, before the commencement of those amendments, the prisoner had become eligible for parole, or the prisoner had taken steps to ask the Board to grant the prisoner parole, or the Board had begun any consideration of whether the prisoner should be granted parole.

The plaintiff contends that ss 74AAA and 127A of the Act should be construed as not applying to the exercise by the Board of its jurisdiction and power to make a parole order in respect of him because: in the case of s 74AAA, his parole eligibility date had arisen, he had applied for parole, and the Board’s jurisdiction had been enlivened and exercised, before the commencement of that section; and, in the case of s 127A, he had instituted these proceedings before the commencement of that section.

The plaintiff further contends that s 74AAA does not apply to his application for parole because it is expressed to turn upon the prisoner’s having been convicted and sentenced for an offence involving a particular state of mind at the time of his or her offending (namely, knowledge or recklessness as to whether the deceased was a police officer as defined) and that state of mind was not an issue arising in his trial and was not a matter established by his conviction.

If the Court were to find that ss 74AAA and 127A apply to the making of a parole order in respect of the plaintiff, he contends that those provisions exceed the legislative power of the Parliament of Victoria on the ground that they are contrary to the rule of law and inconsistent with the Commonwealth Constitution because they purport to affect the criteria for the grant of the plaintiff’s parole, or divest the Board’s jurisdiction or power to order the plaintiff’s release on parole, after it had been enlivened by the expiration of the non-parole period, been engaged by the making of an application for parole, and been exercised by the decision to proceed to parole planning.

On 21 December 2017 Gordon J referred the parties' Special Case for consideration by the Full Court.

Notices of Constitutional Matter have been served. The Attorneys-General of New South Wales, Queensland, Western Australia and South Australia have filed Notices of Intervention.

The questions in the Special Case include:

- (a) Is s 74AAA of the Act capable of applying to the plaintiff in circumstances where:
 - (i) before the commencement of that section:
 - (A) the plaintiff's non-parole period had ended or parole eligibility date had occurred;
 - (B) the Plaintiff had made an application for parole; or
 - (C) the Board had made a decision to proceed with parole planning in respect of the plaintiff; or
 - (ii) before the commencement of s 127A of the Act, the plaintiff had commenced this proceeding?
- (b) Is s 74AAA of the Act capable of applying to the plaintiff in circumstances where it was not an element of the offence of which the plaintiff was convicted that the plaintiff knew, or was reckless as to whether, the deceased was a police officer as defined by s 74AAA(6)?
- (c) If the answer to (a) and (b) is "yes", is s 74AAA and/or s 127A of the Act invalid in their application to the plaintiff in that they do not operate consistently with the Commonwealth Constitution and the constitutional assumptions of the rule of law?