IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No. S 275 of 2016

BETWEEN:

COMMISSIONER OF TAXATION

Appellant

HIGH COURT OF AUSTRALIA
FILED
07 FEB 2017
THE REGISTRY SYDNEY

KAMAL JAYASINGHE

Respondent

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APPELLANT'S REPLY

Filed for the Appellant on 6 February 2017

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Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Reply submissions

Issues on appeal

2. The issue in the appeal is one of statutory construction. In resolving that issue, a question necessarily arises as to the kinds of concerns that may validly inform the construction of s 6 of the *International Organisations (Privileges and Immunities) Act 1963* (Cth) (**IOPI Act**) and reg 10 of the *United Nations (Privileges and Immunities) Regulations 1986* (Cth) (**UN Regulations**). That, however, does not have the consequence that the question is one of fact: cf RS[3]. Nor, in identifying the question for the Court at AS[3], has the Commissioner fallen for a false dichotomy: cf RS[3], fn 1. The question accurately and conveniently exposes the error in the construction for which the respondent contended (and continues to contend) and which was adopted by the majority in the Full Federal Court.

3. The respondent submits that the question for this Court is whether the words in s 6 of the IOPI Act bear their so-called "*ordinary meaning in Australian law*" rather than a "*meaning which turns on the acts and decisions of a body outside of Australia*": RS[2(a)]. Such an approach to the key issue before this Court erroneously assumes the existence of a "*single*", "*inherent*", "*ordinary*" meaning of the language in s 6(1)(d) that can and should be divined from a consideration of the text of that provision alone; and that the putative "*Australian law meaning*" of such language can and should be arrived at without advertence to the international law context in which the IOPI Act appears: RS[10], fn 9, [11], [12], [20], [28]. That construction of the IOPI Act cannot be reconciled with modern authority on statutory interpretation.[1]

4. In resolving the issue of construction raised by the grounds of appeal, the Commissioner

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[1] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey, Gummow JJ; *Thiess v Collector of Customs* (2014) 250 CLR 664 at 671-672 [22]-[23] per French CJ, Hayne, Kiefel, Gageler and Keane JJ; *Independent Commissioner Against Corruption v Cunneen* (2015) 256 CLR 1 at 28 [57] per French CJ, Hayne, Kiefel and Nettle JJ.

does not seek for this Court to make any finding of fact,[2] but rather to correct the approach to construction adopted by the majority of the Full Federal Court and Administrative Appeals Tribunal (**Tribunal**) on the facts found by the Tribunal.

Construction of the IOPI Act

5. The respondent's approach to construction is affected by the following errors.

6. *First*, and fundamentally, as noted above, the respondent's submissions are wholly predicated on the proposition that the language of "office" in s 6(1)(d) of the IOPI Act has a "*well-established*", "*single*", "*constant*", "*inherent*" and "*ordinary*" meaning as a matter of Australian law that is imported into the particular statutory context here in issue, and from which no departure is warranted (RS[10], [12], [15], [17], [20], [21], [28], [38]). The respondent characterises any resort to purpose and context of the IOPI Act as involving the "*displace[ment]*" of this ordinary meaning, or as involving the "*weighing*" of contextual considerations as against the statutory text, which ought be given primacy (RS[15], [16], [38], [49]). That approach should not be adopted. The authorities cited by the respondent demonstrate that there is no singular or authoritative meaning of the term "office"[3]. While the word "office" *might* bear certain meanings in certain statutory landscapes, its meaning must be determined in each case having regard to the relevant statutory context.[4] That context is not to be resorted to in order to "*displace*" some fixed ordinary meaning of the word "office", but must be considered in the first instance in order to discern the meaning of the text at the outset, particularly in circumstances where the language is capable of conveying a variety of meanings.[5]

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[2] No misstatement of fact appears at AS[7]: cf RS[7]. It cannot be gainsaid that the terms and conditions incorporated in the ICA provided that the legal status of the respondent was as an independent contractor: Appeal Book (**AB**), pp 24.10, 36.10, 66.20, 68.20, 118.20.

[3] The meanings accorded to the term "office" in *Sykes v Cleary* (1992) 176 CLR 77 at 97 (***Sykes***) and in *Grealy v Commissioner of Taxation* (1989) 24 FCR 405 at 411 (***Grealy***) differ and can be each contrasted to the approach taken by Rowlatt J in *Great Western Railway Co v Bater* [1920] KB 266 (at 274). Moreover, there was no finding by the Tribunal (AAT[49]) that the respondent's position here was "permanent" and the assertion at RS[13] is not conceded.

[4] *Sykes* at 96-97 (contrary to RS[22], the statement by Mason CJ, Toohey, McHugh JJ that the meaning of "office" turns largely on the context in which it is found is not to be confined to where that term appears in a constitutional setting); *Grealy* at 411.

[5] The distinction drawn by the respondent between connotation and denotation is entirely irrelevant and cannot displace that principle.

7. As the passage in *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39] extracted at RS[16] makes clear, "*[t]he statutory text must be considered in its context. That context includes legislative history and extrinsic materials*". The analysis of s 6 of the IOPI Act advanced by the respondent does not address these contextual considerations. While the respondent seemingly acknowledges (RS[47]) that the conferral – by the various paragraphs of s 6(1) of the IOPI Act, the Schedules to that Act, and the clauses of the UN Regulations – of different sets of privileges and immunities on different classes of UN personnel may be relevant to the construction task, no attempt is made by the respondent to construe the phrase "*person who holds an office in an international organisation*" in s 6(1)(d) of the IOPI Act having regard to these distinctions drawn by the statutory scheme.

8. *Secondly*, the construction of "office" contended for by the Commissioner does not relegate that word to being no more than a "*label given by the parties to their relationship*": cf RS[11], [45]. Nor does it "*delegate*" the question of officeholding to an official of the organisation in question, here the UN: cf RS[23]. Rather, such a construction gives the phrase "*holds an office in an international organisation*" a substantive meaning drawn from the particular mechanisms in place within the relevant organisation for appointing officials. That meaning is supported by the structure of the provisions in s 6(1) of the IOPI Act, which – in conferring different sets of privileges and immunities on specific classes of personnel – necessitates the identification of indicia to delineate between such personnel. To recognise that the concept of UN officeholding under the IOPI Act and UN Regulations turns upon the proper designation by the UN of a person as an office holder in that organisation does not "*delegate*" a judicial task to the UN. Rather, in any given case, it will be a matter for the Court, upon being asked to adjudicate a claim to a privilege or immunity under Part I of the Fourth Schedule to the IOPI Act, to:

   a. identify, by reference to established principles of statutory construction, the criteria that are to be applied to a determination of whether a person holds an office in the relevant organisation; and

   b. ascertain whether such criteria apply on the basis of the evidence adduced, following the ordinary forensic process.

9. Here, that task is to be performed in the manner identified by Allsop CJ at FFC[26]-[30], namely, by determining whether the respondent was appointed by the UN Secretary-General as a "member of staff" of the UN in accordance with Article 101 of the UN Charter and the regulations to which it refers. That is because the UN resolved in 1946 that, subject to irrelevant exceptions, all "members of the staff of the United Nations" were granted the privileges and immunities of an "official" under the *Convention on the Privileges and Immunities of the United Nations* [1949] ATS 3 (**UN Convention**). It is clear that the respondent was not a UN staff member, and therefore was not a UN official. He did not receive a letter of appointment referred to in Regulation 4.1 of the UN Staff Regulations; and he was not given the rights and obligations conferred upon staff members as international civil servants under Staff Regulation 1.1. Instead, he received a contract expressly stating that he was not a staff member (AB, pp 24.10, 36.10).

10. *Thirdly*, the close structural correlation between the UN Convention and the IOPI Act ought not, as the respondent appears to submit (RS[37], [48]), simply be ignored when construing the IOPI Act in its proper context. To construe the IOPI Act having regard to its international law context is not to fall into the error identified in *NBGM v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52 (***NBGM***): see AS[37(c)], cf RS[37]. The proposition that the principle of construction on which the Commissioner particularly relies, namely, that "*Australian courts will endeavour to adopt a construction of the Act and the Regulations, if that construction is available, which conforms to the Convention*"[6], is one which is only available for the purpose of determining whether Australia has "fallen short" of its international obligations should also be rejected: cf RS [18]. The principle has never been and is not apt to be expressed in that highly qualified way, nor was it employed for that limited purpose in *QAAH* or *NBGM* in any event. Indeed, the third sentence of RS[18], read with footnote 18 of RS, would seem to leave no room for the operation of that principle at all. As outlined at AS[28]-[29] and [38], adopting a construction of the word "office" in s 6(1)(d) of the IOPI Act and reg 10 of the UN Regulations which accords with the designation of a person as a UN official under the UN Convention does not give any false precedence to that Convention nor involve the

[6] See, eg, *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at 15 [34] (***QAAH***) and *Minister for Immigration and Border Protection v WZAPN* (2015) 254 CLR 610 at 630 [53].

domestic statute being read down by reference to it (cf RS[50]), but ensures, as part of an approach which is "available" or "open" on the text of the IOPI Act, that the different protections conferred on different categories of UN personnel under both international law and domestic law are, to the extent possible, aligned. The respondent makes no attempt to address the potential lack of conformity between international law and domestic law which arises on his construction of the notion of "officeholding" pursuant to s 6(1)(d).

11. *Fourthly,* the fact that the IOPI Act is one of general application is a matter which advances, rather than detracts from, the construction preferred by Allsop CJ and contended for by the Commissioner: cf RS[19], [26]. At FFC[32] Allsop CJ said:

> *The meaning of the words of the 1963 Act and the Regulations thereunder, in particular when read in their context, require one to ask oneself whether, in the organisation itself, he held an office or was an official of that organisation or an officer of that organisation.*

12. Such an approach provides a coherent framework for the determination of whether a person holds an office in a variety of different international organisations – not just the UN – and remains equally apposite whether one is considering the question of officeholding in the UN or in any other organisation the subject of regulations made under the IOPI Act.

The Ruling

13. The "natural meaning" of the Ruling propounded by the respondent (RS[41]) is that a person will only be engaged "*as*" an expert if they are "*engaged only to perform the function of reporting to or advising the organisation in the capacity of an expert and consultant*". That approach impermissibly reads words into the text of the Ruling, which should be interpreted as set out at AS[51]-[53].

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J O Hmelnitsky SC **T L Phillips**

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