SHORT PARTICULARS OF CASES
APPEALS

ADELAIDE SITTINGS 26 – 28 SEPTEMBER 2011

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SHAHI v MINISTER FOR IMMIGRATION AND CITIZENSHIP (M10/2011)

Date Special Case referred to Full Court: 15 June 2011

The plaintiff was born in Afghanistan. He has never known his precise date of birth. On 18 May 2009, the plaintiff arrived in Australia at Christmas Island as an unaccompanied minor without a valid visa. He was granted a Protection (Class XA)(subclass 866) visa on 16 September 2009. On 4 December 2009 the plaintiffs mother, who was living outside Australia, applied for a Refugee and Humanitarian (Class XB) visa. She sought to satisfy the criteria for the grant of a subclass 202 visa under the "split family" stream, which meant that she was not required to meet the criterion of being subject to substantial discrimination, amounting to gross violation of human rights in her home country, Afghanistan. The plaintiff's brothers and sisters and his niece were included as secondary applicants. The plaintiff was the proposer in respect of his mother's application. He was, at that time, under the age of 18 years. On 7 September 2010, a delegate of the defendant refused the mother's application because he was not satisfied that at the time of decision the mother continued to be a member of the immediate family of the plaintiff. Pursuant to Regulation 1.12AA of the *Migration Regulations* 1994 (Cth) (the Regulations), "a member of the immediate family" includes the parent of a person who is less than 18 years old. The plaintiff was, at the time of the delegate's decision, over the age of 18 years.

On 27 January 2011 the plaintiff filed an application for an order to show cause in this Court. He contends that the delegate erred in his interpretation of clauses 202.211(2) and 202.221 of the Regulations, which relevantly provide:

"202.211(2) The applicant meets the requirements of this subclause if:
(a) the applicant's entry to Australia has been proposed in accordance with approved form 681 by an Australian citizen or an Australian permanent resident (in this subclause called *the proposer);* and
(b) either: ...
(ii) the proposer is, or has been, the holder of a Subclass 866 (Protection) visa, and the applicant was a member of the immediate family of the proposer on the date of application for that visa; or ...
(ba) the application is made within 5 years of the grant of that visa; and
(c) the applicant continues to be a member of the immediate family of the proposer; and
(d) before the grant of that visa, that relationship was declared to Immigration."

202.22 Criteria to be satisfied at time of decision
202.221 The applicant continues to satisfy the criterion specified in clause 202.211.

On 15 June 2011 Crennan J referred the special case agreed upon by the parties to the Full Court. The following question has been stated for the consideration of the Court:

- Did the delegate make a jurisdictional error in finding that the plaintiff's mother did not meet the requirements of clause 202.221 of Schedule 2 to the *Migration Regulations* 1994 (Cth)?

PGA v THE QUEEN (A15/2011)

Court appealed from:	Court of Criminal Appeal of the Supreme Court of South Australia [2010] SASCFC 81
Date of judgment:	23 December 2010
Date special leave granted:	8 June 2011

The appellant was charged with a number of offences, including two counts of rape, contrary to s48 of the *Criminal Law Consolidation Act* 1935 (SA) ("the CLCA"), committed between 22 March 1963 and 14 April 1963. The alleged victim in each case was the appellant's wife, whom he married in September 1962. At the time of the alleged offences they were cohabiting as husband and wife. In 1963 s48 of the CLCA provided: "Any person convicted of rape shall be guilty of felony, and liable to be imprisoned for life, and may be whipped". The elements of the offence against s48 were supplied by the common law.

Judge Herriman of the District Court of South Australia reserved the following question of law for determination by the Court of Criminal Appeal: "Was the offence of rape by one lawful spouse of another, in the circumstances [of this case], an offence known to the law of South Australia as at 1963?

The majority of the Court of Criminal Appeal (Doyle CJ and White J) noted that in 1963 it was generally accepted by judges and writers of textbooks that at common law a husband could not be guilty of raping his wife. That proposition appeared to derive from a statement by Sir Matthew Hale in *The History of the Pleas of the Crown* (1736) in the following terms:

> *But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.*

The appellant submitted that from 1976 onwards Parliament had, by a series of measures, reformed the law relating to rape, but it did not choose to make any of these changes retrospective. In light of this pattern of measured reform it was not appropriate to recast the common law with retrospective effect, going beyond what Parliament saw fit to do. To accept the submissions of the respondent would be to give rise to a new liability retrospectively. It would be to apply to events in 1963 a statement of legal principle first identified for Australia in 1991 in *The Queen v L* (1991) 174 CLR 379.

In rejecting that argument, the majority found that to accede to the appellant's submission would be to leave in place in South Australia (in relation to events before 1976) a principle of the common law reflecting an attitude to marriage and to the status of women which had been rejected in Australian society well before the decision in *The Queen v L*. Although it could not be said that the statements of law appearing in *The Queen v L* represented long established authority, they did reflect the view that the common law had well and truly changed by the time of the decision in that case. The majority considered that they could not ignore those observations and they could not reinstate Sir Matthew Hale's opinion as part of the common law. It was for the High Court, not the Court of Criminal Appeal, to decide that the matters advanced by the appellant were sufficient to decide that the statements in *The Queen v L* should not be applied to events before that decision, or before 1976.

Gray J (dissenting) found that at the time of the alleged offending the common law of rape applied in South Australia. At that time, the common law included a presumption of irrevocable consent on the part of a wife to sexual intercourse with her husband. Had the appellant been charged and tried in the years immediately following the alleged offending, the prosecution would have been unable to prove a lack of consent on the part of his wife because of that presumption. The common law in this respect was abolished in 1976. At his trial on the information presented in 2010, the appellant was entitled to have his conduct judged according to the law in force at the time of the alleged offending in 1963. That law included the presumption of consent.

The appellant has served a Notice of Constitutional Matter and the Attorneys-General of the Commonwealth, South Australia and Queensland have given notice that they will intervene in this appeal.

The respondent has filed a proposed Notice of Contention.

The grounds of appeal include:

- The Full Court erred in its answer to the question whether the applicant is liable to be found guilty of the offences of rape of his wife in 1963, the common law at that time not having developed to provide for rape by one lawful spouse of another in circumstances of this case.

MOLONEY v WORKERS COMPENSATION TRIBUNAL & ANOR (A5/2011)

Court appealed from: Full Court of the Supreme Court of South Australia [2010] SASCFC 17

Date of judgment: 2 August 2010

Date special leave granted: 11 February 2011

The appellant, a legal practitioner whose practice involved acting for claimant workers before the Workers Compensation Tribunal, sought a declaration from the Supreme Court of South Australia that r 31(2) of the Workers Compensation Tribunal Rules 2009 was invalid as being ultra vires of s 88E(1)(f) of the *Workers Rehabilitation and Compensation Act* 1986 (SA) ("the Act"). Section 88E(1)(f) gave the power to the President to make rules of the Tribunal "regulating costs". Section 88G(1) provided "*a representative of a party to proceedings before the Tribunal must not charge nor seek to recover for work involved in, or associated with, that representation an amount exceeding the amount allowable under a scale fixed by regulation*." Rule 31(2) provided:

> *"A representative acting for a worker in respect of proceedings under the Act is not entitled to recover from that worker any costs in respect of those proceedings in addition to those payable by the compensating authority or claim any lien in respect of such costs or deduct such costs from sum awarded as compensation to the worker unless those additional costs have been awarded by a Presidential Member of the Tribunal..."*

The appellant contended that s 88E(1)(f) only authorised the President to make rules regulating party/party costs and not solicitor/client costs and that the word "costs" in the phrase "regulating costs" in s 88E(1)(f) was intended to have the same meaning as the word "costs" referred to in s 88G, namely costs of proceedings, being a reference to party/party costs.

The Full Supreme Court (Doyle CJ, Anderson and Layton JJ) dismissed the application. Doyle CJ, with whom Anderson J agreed, held that a power of the kind conferred by s 88E should be read liberally. His Honour found that there was no inconsistency or direct conflict between a power to make rules relating to and regulating a claim by a representative for the costs of representation against the party represented, and a power to specify a maximum amount recoverable by a representative as a result of such a claim. Rule 31(2) established a procedure by which a representative who wished to claim costs from a worker over and above those payable by the compensating authority could make that claim and have it adjudicated. His Honour concluded that the power conferred by s 88E(1)(f) authorised the making of rules limiting the entitlement of a solicitor to exercise contractual rights to remuneration, and claim remedies in support of those rights such as a lien. That was an aspect of a power to regulate costs.

Layton J found that the meaning of the word "costs" in s 88E(1)(f) and the power conferred on the President to make rules on costs should not be read down by implication as contended for by the appellant to refer only to party/party costs. The term "costs" was broad and the content of other sections of the Act relied on by the appellant did not imply that the expression was limited. There was no inconsistency between s 88E(1)(f) and s 88G. Rule 31(2) did not provide for a scale of costs and was different in content to the regulating power expressed in

s 88G. As the rule covered the topic of costs it was prima facie within the rule making power in s 88E(1)(f).

The grounds of appeal include:

- the Full Court erred in construing the phrase "regulating costs" in s 88E(1)(f) of the Act to include regulating the costs which a worker has agreed to pay his or her representative ("solicitor-client costs") rather than as only regulating costs as between the Relevant Compensating Authority and a worker ("party-party costs").
- in the alternative, if and in so far as the phrase "regulating costs" in s88E(1)(f) of the Act includes a power to regulate solicitor-client costs, the Full Court erred in failing to construe such power as limited to making rules regulating the practice and procedure relating to the exercise of the power conferred by s 95A and, possibly, s 88G(1) of the Act.

AUSTRALIAN EDUCATION UNION v DEPARTMENT OF EDUCATION AND CHILDREN'S SERVICES (A4/2011)

Court appealed from:	Full Court of the Supreme Court of South Australia [2010] SASC 161
Date of judgment:	28 May 2010
Date special leave granted:	11 February 2011

Since the passage of the *Education Act* 1972 (SA) ("the Act"), the Minister of Education of South Australia purported to appoint teachers engaged on a temporary basis under the then s 9(4) of the Act which provided:

> *The Minister may appoint such officers and employees (in addition to the officers of the Department and of the teaching service) as he considers necessary for the proper administration of this Act or for the welfare of the students of any school.*

There was a more specific power for the appointment of permanent and temporary teachers under s 15 of the Act which provided, inter alia:

> *(1) Subject to this Act, the Minister may appoint such teachers to be officers of the teaching service as he thinks fit.*
> *(2) An officer may be so appointed on a permanent or temporary basis...*
> *(4) No officer appointed on a permanent basis shall be dismissed or retired from the teaching service except in accordance with the provision of this Act.*

The practice of appointment under s 9(4) was ultimately discontinued in 2005. All temporary appointments are now made under s 15. As a result of the former practice, a number of teachers had been excluded from the long service leave regime and associated potential entitlements under Pt 3 of the Act. The appellant brought proceedings in the Industrial Relations Court of South Australia on behalf of two temporary relief teachers who, having been purportedly appointed under s 9(4), claimed long service leave entitlements. The parties stated two questions of law on agreed facts, being whether the Minister was entitled to appoint the teachers under s 9(4) and if not, whether the teachers' long service leave entitlements were to be calculated under Pt 3 of the Act.

The Industrial Relations Court (Jennings SJ, McCusker J and Gilchrist J) found that the very wide and general powers conferred on the Minister under Part 2 suggested that it was Parliament's intention to empower the Minister, subject to the constraints imposed by the Act, to do whatever was necessary to make proper provision for education in the State. This called for a "generous construction that allow[ed] for flexibility." The only limitation on the Minister when appointing officers and employees was the considered necessity for the proper administration of the Act or the welfare of the students at any school.

The appellant's appeal to the Full Court of the Supreme Court (Nyland, Gray and Vanstone JJ) was dismissed. Gray J, with whom Nyland J agreed, found that, insofar as the powers in ss 15 and 9(4) both related to the appointment of "teachers", s 9(4) was an auxiliary power to that conferred by s 15. The purpose of s 9(4) was clear: to provide power of additional appointment to address the

diverse and unpredictable employment requirements necessary for the proper administration of the Act and the welfare of students. There was no good reason why teachers should be excluded from that process. Thus, s 9(4) at the time it was in force authorised the Minister to appoint officers to be engaged as teachers independently of s 15 of the Act.

Vanstone J found that the matter was finely balanced and that the appellant's argument that the specific provisions addressing appointment of teachers in Pt 3 should be read as implicitly excluding the use of the Pt 2 powers for that purpose had some attraction. However, her Honour could not find in the language of the section or the structure of the Act any clear indication that the Minister was to be restricted to appointing teachers under s 15.

The grounds of appeal include:

- the Court erred in law in holding that s 9(4) of the Act authorised the Minister of Education to appoint officers to be engaged as teachers independently of s 15 of the Act and ought to have found that the Minister was never empowered to appoint teachers under s 9(4) of the Act.