

SHORT PARTICULARS OF CASES
APPEALS

DECEMBER 2023

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AB (A PSEUDONYM) & ANOR v INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSION (M63/2023)

Court appealed from: Supreme Court of Victoria Court of Appeal
[2022] VSCA 283

Date of judgment: 15 December 2022

Special leave granted: 11 August 2023

During an investigation conducted by the Independent Broad-based Anti-corruption Commission (“IBAC”), the First Appellant (“AB”) gave evidence in a private examination, pursuant to a summons served upon him by IBAC. Following the investigation, IBAC prepared a draft special report (“Draft Report”) which contained comments and opinions that were adverse to AB and the Second Appellant (“CD”). IBAC proposed to transmit the special report, once finalised, to each House of the Victorian Parliament, pursuant to section 162(1) of the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) (“IBAC Act”). IBAC provided a redacted version of the Draft Report to AB and CD for their response, purportedly in compliance with s 162(3) of the IBAC Act. Section 162(3) relevantly provides that if IBAC intends to include in a special report “a comment or opinion which is adverse to any person”, then it “must first provide the person a reasonable opportunity to respond to the adverse material and fairly set out each element of the response in its report”.

In proceedings before the Supreme Court of Victoria, AB and CD contended that IBAC had infringed the common law principles of natural justice in the manner in which it prepared the Draft Report and the natural justice requirements of s 162(3) of the IBAC Act in the manner in which it sought responses to the adverse material in the Draft Report. The Appellants considered the common law natural justice requirements had been infringed in the preparation of the Draft Report, as IBAC did not notify them of the purpose of the investigation or allow them to do various things during the investigation, such as attending the examination of other witnesses or applying to cross-examine witnesses. The Appellants considered the natural justice requirements of s 162(3) of the IBAC Act to have been infringed as IBAC refused to provide various requested documents to the Appellants, such as transcripts of examinations of other persons referred to in the Draft Report, and refused to allow the Appellants to seek assistance from other employees of CD.

Ginnane J concluded that IBAC had not infringed either the common law principles of natural justice or the natural justice requirements of s 162(3) of the IBAC Act. Ginnane J accepted that IBAC was required to provide natural justice during its investigation, but that the content of the natural justice it must provide was dependent on the statutory context. Following analysis of various provisions of the IBAC Act, Ginnane J concluded that the Appellants had no right to be notified of the investigation, to receive transcripts of other witnesses’ evidence or documents on which IBAC relied, to cross-examine other witnesses or to call witnesses. Ginnane J also held that the words ‘adverse material’ in s 162(3) means the material upon which IBAC’s adverse comments or opinions contained in the Draft Report were based, and His Honour was satisfied that the provision of the right to make a written response to the adverse material on which the adverse comments and opinions are based is to provide a reasonable opportunity to respond to the adverse materials, as required by s 162(3) and by common law. Ginnane J was satisfied

that the Draft Report contained the substance of the adverse material upon which the adverse comments or opinions about the Appellants contained in it were based.

AB and CD sought leave to appeal the entirety of Ginnane J's decision, and IBAC filed a notice of contention asserting Ginnane J had erred in his interpretation of 'adverse material' in s 162(3) of the IBAC Act. The Court of Appeal agreed with Ginnane J's ultimate decision and refused the Appellant's application for leave to appeal. In their reasons Emerton P, Beach and Kyrou JJA stated that they agreed with Ginnane J's articulation of the applicable law and the application of the law to the facts of the case, aside from an error in his construction of the phrase 'adverse material' in s 162(3), which was the subject of IBAC's notice of contention.

The Court of Appeal unanimously upheld IBAC's notice of contention that Ginnane J had erred in finding that the 'adverse material' referred to in s 162(3) of the IBAC Act, and to which IBAC must provide an affected person a reasonable opportunity to respond, means the material upon which IBAC's comments or opinions in a draft report, adverse to the affected person, are based. Following a statutory interpretation analysis, the Court of Appeal determined that Ginnane J should have found that:

- (a) The 'adverse material' referred to in s 162(3) consists of the comments or opinions contained in a draft report that are adverse to the affected person;
- (b) It is those comments or opinions to which s 162(3) requires that the affected person be given a reasonable opportunity to respond.

The sole ground of appeal is:

- The Court of Appeal erred in concluding that 'adverse material' in s 162(3) of the IBAC Act refers only to the comments or opinions contained in a draft report that are adverse to a person, and not the evidentiary material on which such comments or opinions are based.

**CHIEF EXECUTIVE OFFICER, ABORIGINAL AREAS
PROTECTION AUTHORITY v DIRECTOR OF NATIONAL PARKS
(ABN 13 051 694 963) (D3/2023)**

Court appealed from: Full Court of the Supreme Court of the
Northern Territory
[2022] NTSCFC 1

Date of judgment: 30 September 2022

Special leave granted: 19 May 2023

Gunlom Falls located in Kakadu National Park is a “sacred site” under the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) (“Sacred Sites Act”). The land is Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (“ALRA”) and held in fee simple by the Gunlom Aboriginal Land Trust on behalf of the Jawoyn people. The First Respondent (“the DNP”) engaged a contractor to construct a walking track at Gunlom Falls which involved excavating and clearing trees, rocks, soil and vegetation and inserting concrete steps. The DNP caused the works to be undertaken without obtaining a certificate under the Sacred Sites Act from the Appellant or the Minister. The Appellant charged the DNP with an offence against section 34(1) of the Sacred Sites Act. The DNP entered a plea of not guilty in the Local Court of the Northern Territory on the basis that, amongst other things, s 34(1) did not impose criminal liability on it as a matter of construction or, in the alternative, it was beyond the legislative power of the Territory to do so.

On 8 October 2021, the Local Court of the Northern Territory stated a special case to the Supreme Court of the Northern Territory, and on 16 November 2021, the Supreme Court referred the special case to the Full Court of the Supreme Court of the Northern Territory for determination.

The question of law upon which the opinion of the Full Court was sought was:

- Do the offence and penalty prescribed by s 34(1) of the Sacred Sites Act not apply to the DNP:
 - As a matter of statutory construction; or
 - Alternatively, because they are beyond the legislative power of the Legislative Assembly, conferred by s 6 of the *Northern Territory (Self-Government) Act 1978* (Cth) and s 73(1)(a) of the ALRA?

In response to the question of law, the Full Court answered that the offence and penalty prescribed by s 34(1) of the Sacred Sites Act does not apply to the DNP as a matter of statutory construction.

In coming to this conclusion, the Full Court relied on the presumption, applied by the High Court in *Cain v Doyle* (1946) 72 CLR 409, that a statute will not impose criminal liability on the executive, including government instrumentalities with the same legal status, without the clear indication of a legislative intention and purpose to do so. The Full Court was required to determine whether the DNP is an entity to which the presumption was capable of application, whether the DNP is intended to

have the same legal status as executive government in relation to the operation of the presumption, and whether the Sacred Sites Act discloses a legislative intention to impose criminal liability on the Commonwealth executive government.

The Full Court stated that the statutory provisions and indicia led to the necessary conclusion that the intention of the statutory scheme is for the Commonwealth to administer, manage and control Commonwealth reserves through the DNP, rather than for the DNP to perform its functions independently of the Commonwealth. The Full Court therefore concluded that the legislative intention is for the DNP to enjoy the privileges and immunities of the federal executive government, including the presumption against the imposition of criminal liability, except to the extent that they are withdrawn or modified under the statutory scheme. Following an examination of the statutory scheme, the Full Court concluded that a very deliberative legislative choice was made to limit the imposition of criminal liability to the Territory Crown, and therefore, as a matter of statutory construction the Sacred Sites Act does not impose a criminal liability on the DNP.

The grounds of appeal include:

- The Full Court erred in holding that the presumption associated with *Cain v Doyle* (1946) 72 CLR 409 remains good law and requires that the reference to “body corporate” in s 34(1) of the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) be construed so as not to include the body corporate that is the First Respondent.
- Rather than deciding the question by reference to the intention of the Northern Territory legislature as disclosed by the Sacred Sites Act as a whole, the Full Court made nine errors, relating primarily to the *Cain v Doyle* presumption, and legislative intention.

A notice of a constitutional matter was filed by the Appellant.

The Northern Land Council, the Gunlom Aboriginal Land Trust, Joseph Markham and Billy Markham seek leave to intervene in the proceeding.

**MINISTER FOR IMMIGRATION, CITIZENSHIP AND
MULTICULTURAL AFFAIRS v McQUEEN (P2/2023)**

Court appealed from: Full Court of the Federal Court of Australia
[2022] FCAFC 199

Date of judgment: 13 December 2022

Date referred to Full Court: 11 August 2023

The Respondent is a citizen of the United States of America who was sentenced to a term of imprisonment in September 2019, upon being convicted of selling and offering to sell or supply methylamphetamine, possession of methylamphetamine, possession of unlawful property, and offering to sell or supply cannabis. The Respondent's visa was mandatorily cancelled on 13 November 2019, as a result of the sentence, pursuant to section 501(3A) of the *Migration Act 1958* (Cth) ("the Migration Act").

Following notification of his visa cancellation, the Respondent made representations to the Minister with a view to satisfying him that the mandatory cancellation should be revoked, per the process afforded by s 501CA of the Migration Act. Section 501CA of the Migration Act provides that the Minister may revoke a visa cancellation decision if the person makes representations, and the Minister is satisfied: (i) that the person passes the character test (as defined by s 501); or (ii) that there is another reason why the visa cancellation decision should be revoked. It was common ground that the Respondent did not pass the character test, accordingly he sought to persuade the Minister there was "another reason" why his visa cancellation should be revoked.

The Minister was provided with a submission from an assistant secretary of his department ("the Submission"), which had four attachments: a decision page; a summary of the representations made by the Respondent and their supporting material (cross-referenced to the documents actually submitted by the Respondent); a draft statement of reasons; and copies of all the documents submitted by the Respondent. It was open to the Minister to consider the matter personally or refer the matter to a departmental delegate for a decision. The Minister elected to consider the matter personally and on 14 April 2021, decided not to revoke the visa cancellation. The Minister signed the decision page and the draft statement of reasons attached to the Submission to record the decision.

The Respondent commenced proceedings in the Federal Court of Australia, seeking a review of the Minister's decision not to revoke the cancellation of his visa on the basis of alleged jurisdictional error. Colvin J concluded that, on the facts, the Minister acted upon the summary of the representations in the Submission, rather than personally reading and considering the representations attached to the Submission. From the authorities, Colvin J concluded that where the Minister personally (and not by delegate) forms the required state of satisfaction for the purposes of s 501CA(4), the statutory scheme requires the Minister himself 'to consider and understand the representations received'. Colvin J confirmed that this requires the Minister to personally perform the whole of the deliberative task. The Minister may obtain limited assistance from departmental officers, including for example by adopting draft reasons prepared by a departmental officer

(provided they reflect the Minister's own reasons), but there can be no delegation of the deliberative task itself.

As the Minister acted upon the summary of the representations, Colvin J found that the Minister failed to undertake his deliberative task and was assisted by departmental officers in a manner that was not lawful. Colvin J held that in all the circumstances the Minister failed to give the necessary proper, genuine, and realistic consideration to the merits of the representations. The Minister could only do so by personally considering and understanding the representations made and that required him to read the attachments to the Submission. Colvin J set aside the Minister's decision not to revoke the cancellation of the Respondent's visa and ordered the matter be remitted to the Minister for determination according to law.

The Minister appealed Colvin J's decision to the Full Court of the Federal Court of Australia. Whilst Mortimer, Banks-Smith and O'Sullivan JJ did not agree with some of the factual findings of Colvin J and attributed different weighting to inferences that could be drawn from certain factual findings, the conclusion reached was ultimately the same as that of Colvin J. Their Honours confirmed that where the Minister elects to exercise the power personally, the satisfaction about whether a person's representations provide "another reason" to revoke the visa cancellation must be the Minister's *personal* satisfaction about those representations, formed by having directly considered the representations, not another person's summary of them. Mortimer, Banks-Smith and O'Sullivan JJ concluded that Colvin J was correct to find that on the evidence it was more likely than not that the Minister had relied on the summary in the Submission and had not considered the Respondent's representations for himself. Accordingly, the appeal was dismissed in its entirety.

On 11 August 2023, Gordon and Gleeson JJ referred the Minister's application for special leave to appeal to the Full Court of the High Court of Australia for consideration as if on appeal. The sole ground of appeal is:

- The Full Court of the Federal Court of Australia erred in concluding that s 501CA(4) of the Migration Act does not permit the Minister to rely on a departmental synthesis or summary of a person's representations but requires the Minister to read the actual documents submitted by the person.