

SHORT PARTICULARS OF CASES
APPEALS

JUNE 2023

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CRIME AND CORRUPTION COMMISSION v CARNE (B66/2022)

Court appealed from: Supreme Court of Queensland Court of Appeal
[2022] QCA 141

Date of judgment: 5 August 2022

Special leave granted: 15 December 2022

In 2018, an anonymous complaint received by the appellant (“the CCC”) alleged that the then Public Trustee of Queensland, Mr Peter Carne, had engaged in corrupt conduct. The CCC investigated the allegations, referring some of them to Queensland’s Attorney-General and providing evidence to Queensland’s Director of Public Prosecutions. It was determined however that no criminal prosecution would be pursued.

In October 2020, the CCC provided a report on its investigation (“the Report”) to the Queensland Parliament’s Parliamentary Crime and Corruption Committee (“the Committee”). The Report outlined the evidence and contained recommendations, but contained no finding that Mr Carne had engaged in corrupt conduct. The CCC nevertheless requested that the Committee direct, under s 69(1)(b) of the *Crime and Corruption Act 2001* (Qld) (“the CC Act”), that the Report be given to the Speaker of the Legislative Assembly. Any report the subject of such a direction is required, by s 69(4), to be tabled by the Speaker in the Legislative Assembly.

Mr Carne promptly commenced Supreme Court proceedings, impugning the preparation of the Report, the applicability of s 69(1) of the CC Act to the Report, and the CCC’s resolution to request the Committee to make a direction under that provision.

On 10 September 2021, Davis J dismissed Mr Carne’s application. This was after his Honour had found that the preparation of the Report was authorised by s 64 of the CC Act, which provided that the CCC “*may report in performing its functions*”. The Report had resulted from an investigation pursuant to powers vested in the CCC by the CC Act, and there was no requirement that the CCC produce a report only when it had found corrupt conduct. The Report also was of a kind which could be the subject of a direction under s 69(1) of the CC Act. Davis J found that the Report had been prepared with an intention of referring it to the Committee, and held that both the preparation of the Report and the CCC’s resolution to request a direction attracted the immunity from impeachment in courts prescribed in s 8 of the *Parliament of Queensland Act 2001* (Qld) (“the PQ Act”). This was because those steps came within the definition of “*proceedings in the Assembly*”, which attract the immunity. The term “*proceedings in the Assembly*” was defined very broadly in s 9(1) to include words spoken and acts done for the purposes of or incidental to transacting business of the Assembly or a committee, and s 9(2) provided that the term included submitting a document to a committee.

An appeal by Mr Carne was allowed by the Court of Appeal (McMurdo and Mullins JJA; Freeburn J dissenting), which declared that the Report was not a report for the purposes of s 69(1) of the CC Act. McMurdo and Mullins JJA held that the CCC’s corruption functions under the CC Act had been exhausted in this case by the completion of its investigation, the outcome of which was that criminal proceedings or disciplinary action would not be taken. The Report was beyond the

reporting power prescribed in s 64 of the CC Act, and could not be supported by any desire of the CCC to make evidence of conduct public on the basis that the conduct might have fallen short of a standard to be expected of a public official. Their Honours held that, as the preparation and delivery of the Report were not acts validly done by the CCC in performing its functions under the CC Act, those acts were not done in transacting the business of the Assembly or a committee, with the result that parliamentary privilege was not conferred on the Report.

Freeburn J however would have dismissed the appeal. His Honour found that the Report was prepared by the CCC in the performance of its functions under the CC Act, which included assessing the appropriateness of procedures, making recommendations, raising standards in public administration, and making reports. The CCC's functions were not limited to a prosecutorial role, nor were they limited temporally by the completion of an investigation with a decision that criminal prosecution would not ensue. Freeburn J also held that Davis J had not erred by finding that the Report was protected by parliamentary privilege under the PQ Act. This was because the Report qualified as "*proceedings in the Assembly*"; both because it had been prepared with an intention that it be submitted, and because it was then submitted to the Committee.

The grounds of appeal are:

- The Court of Appeal erred in impeaching the Assembly's determination of parliamentary privilege attaching to its proceedings and holding that the report submitted by the CCC to the Committee was not protected by parliamentary privilege under s 8 of the PQ Act.
- The Court of Appeal erred in holding that the CCC can only report about a corruption investigation under s 64 of the CC Act if there is a positive finding of "corrupt conduct".

The Commonwealth Attorney-General and the Speaker of the Queensland Legislative Assembly have each been granted leave to intervene in the appeal.

GLJ v THE TRUSTEES OF THE ROMAN CATHOLIC CHURCH FOR THE DIOCESE OF LISMORE (S150/2022)

Court appealed from: Court of Appeal of the Supreme Court of
New South Wales
[2022] NSWCA 78

Date of judgment: 1 June 2022

Special leave granted: 18 November 2022

In 2020 the appellant, GLJ, commenced Supreme Court proceedings against the respondent (“the Trust”), seeking damages for negligence. GLJ’s claim was based on an allegation (first made to the Trust in 2019) that in 1968, when she was 14 years old, she was sexually assaulted by a priest, Father Clarence Anderson. GLJ’s claim was brought on two grounds: 1) the Trust breached a duty of care because clergy members in the Diocese either knew or should have known that Father Anderson had sexually abused other children; and 2) the Trust was vicariously liable for Father Anderson’s conduct.

Father Anderson died in 1996 (25 years after the Catholic Church had approved an application he had made for dispensation from his priestly obligations). Evidence on which GLJ proposed to rely included unsworn statements given by four men, each of whom alleged that they had been sexually assaulted by Father Anderson when they were young boys in the 1960s. It also included contemporary records obtained from the Church that indicated that prior to 1968 it was observed that Father Anderson had a sexual interest in children, that he had been suspended from office following complaints received from boys’ parents, and that he had been witnessed performing (or simulating) a sexual act on a boy.

The Trust applied for a permanent stay of the proceedings, or alternatively that the proceedings be dismissed as an abuse of process, raising the unavailability of Father Anderson and his clerical contemporaries (due to their demise). In September 2021 Campbell J dismissed that application. His Honour held that the Trust had not discharged the onus of demonstrating that the continuation of the proceedings would be unjustifiably oppressive or would bring the administration of justice into disrepute because a fair trial could not be had.

An appeal by the Trust was unanimously allowed by the Court of Appeal (Macfarlan, Brereton and Mitchelmore JJA), which permanently stayed GLJ’s proceedings. Their Honours considered that, in view of the documents available, the mere unavailability of witnesses did not cause the Trust to face manifest unfairness in defending against claims of negligence and vicarious liability such that a permanent stay was warranted on that account. The Court of Appeal held however that Campbell J had erred by finding that the case was not one where everything depended on the acceptance of the plaintiff’s (GLJ’s) account in the absence of a contradictor. On the contrary, the case was exactly of such a kind. The Trust was significantly disadvantaged in its defence by an absence of instructions from a critical witness, Father Anderson, in response to the detail of the allegations made by GLJ and the unsworn statements she had put forward, and by the unavailability of evidence from others on which the Trust could interrogate aspects of GLJ’s account.

The sole ground of appeal is:

- The Court of Appeal erred in permanently staying the proceedings on the basis that a fair trial could no longer be had such that the proceeding was an abuse of process.

By notice of contention, the Trust wishes to raise grounds that include:

- The Court of Appeal erred by not deciding that the Trust would also be denied a fair trial in respect of:
 - a) the negligence claim – upon the basis that the effluxion of time, absence of records, and the death of material witnesses prevent the Trust from defending the negligence claim;
 - b) the vicarious liability claim – upon the basis that the effluxion of time, absence of records, and the death of material witnesses prevent the Trust from defending the vicarious liability claim.

BENBRIKA v MINISTER FOR HOME AFFAIRS & ANOR (M90/2022)

Date cause removed: 13 December 2022

Date special case referred to Full Court: 23 February 2023

The Applicant, Mr Abdul Benbrika, is a citizen of Algeria, where he was born in 1960. He migrated to Australia in 1989 and obtained Australian citizenship in 1998. In 2008, Mr Benbrika was found guilty of being a member of a terrorist organisation and directing activities of such an organisation. (A third offence of which he was convicted was later set aside on appeal.) A sentence of 15 years' imprisonment imposed on Mr Benbrika expired on 5 November 2020.

On 20 November 2020, the Minister for Home Affairs ("the Minister") made a determination that Mr Benbrika ceased to be an Australian citizen ("the Determination"), under s 36D(1) of the *Australian Citizenship Act 2007* (Cth) ("the Citizenship Act"). In doing so, the Minister stated that he was satisfied that the conduct of Mr Benbrika associated with his convictions demonstrated that he had repudiated his allegiance to Australia, and that it would be contrary to the public interest for Mr Benbrika to remain an Australian citizen. Upon the Determination, Mr Benbrika acquired an ex-citizen visa by the operation of s 35(3) of the *Migration Act 1958* (Cth), with which he can remain in Australia.

The Minister has yet to determine an application, made by Mr Benbrika in February 2021, that the Determination be revoked pursuant to s 36H of the Citizenship Act.

In October 2022, Mr Benbrika commenced Federal Court proceedings against the Minister and the Commonwealth, seeking a declaration that s 36D of the Citizenship Act was invalid (and therefore did not authorise the Declaration), and a declaration that he remains an Australian citizen. Mr Benbrika contended that s 36D purported to authorise punishment for criminal guilt, contrary to the implied limitation, arising from Chapter III of the *Constitution*, that the imposition of such punishment was the preserve of the judiciary.

The cause pending in the Federal Court was removed into this Court by order of Justice Steward, upon an application made by the Attorney-General of the Commonwealth.

Justice Steward subsequently referred to the Full Court a special case filed by the parties, which states the following questions of law:

1. Is s 36D of the Citizenship Act invalid in its operation in respect of the Applicant because it reposes in the Minister for Home Affairs the exclusively judicial function of punishing criminal guilt?
2. What, if any, relief should be granted to the Applicant?
3. Who should pay the costs of the special case?

A notice of a constitutional matter has been filed by Mr Benbrika. No Attorney-General is intervening in the proceeding.

JONES v COMMONWEALTH OF AUSTRALIA & ORS (B47/2022)

Date writ of summons filed: 10 October 2022

Date special case referred to Full Court: 3 April 2023

The Plaintiff, Mr Phyllip Jones, acquired British citizenship upon his birth in the United Kingdom in 1950. He migrated to Australia with his family in 1966, and in 1988 he obtained Australian citizenship. In 2003, Mr Jones was convicted of multiple counts of indecent dealing and indecent assault committed between 1980 and 2001. He was sentenced for each offence to imprisonment for two and a half years, all to be served concurrently and with a non-parole period of nine months.

In 2018, Mr Jones's Australian citizenship was revoked by the Minister for Home Affairs, Immigration and Border Protection, under s 34(2) of the *Australian Citizenship Act 2007* (Cth) ("the Citizenship Act"). This was upon a conclusion that there was an unacceptable risk in view of the grave harm that a member of the Australian community would suffer if Mr Jones were to reoffend. The Minister also stated that he had considered the need for general deterrence. As a result of the revocation, Mr Jones automatically acquired an ex-citizen visa under s 35(3) of the *Migration Act 1958* (Cth) ("the Migration Act").

At the time of revocation, Mr Jones had lived in Australia continuously for 52 years (having been absent only for two overseas holidays). Most of his family members are either Australian citizens or permanent residents of Australia. Mr Jones owns no property in the United Kingdom, he has never paid tax there, and he has never voted in a British election or held a British passport.

In December 2021, Mr Jones was notified that the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs had cancelled his ex-citizen visa under s 501(2) of the Migration Act the previous month. Since January 2022, Mr Jones has remained in immigration detention.

In October 2022, Mr Jones commenced proceedings in this Court against the Commonwealth of Australia, the Minister for Home Affairs and the Minister for Immigration, Citizenship and Multicultural Affairs, challenging the constitutional validity of s 34(2)(b)(ii) of the Citizenship Act and seeking a declaration that he is an Australian citizen.

Justice Steward referred to the Full Court a special case filed by the parties that states the following questions of law:

1. Is s 34(2)(b)(ii) of the Citizenship Act invalid in its operation in respect of the Plaintiff because:
 - a) it is not supported by s 51(xix) of the *Constitution*; or
 - b) it reposes in the Minister the exclusively judicial function of punishing criminal guilt?
2. What, if any, relief should be granted to the Plaintiff?
3. Who should pay the costs of the special case?

A notice of a constitutional matter was filed by Mr Jones. No Attorney-General is intervening in the proceeding.