HIGH COURT OF AUSTRALIA

HAYNE J

IN THE MATTER OF AN APPLICATION FOR WRITS
OF CERTIORARI AND PROHIBITION AGAINST
DIANA BRYANT (IN HER CAPACITY AS
CHIEF FEDERAL MAGISTRATE) AND ANOR RESPONDENTS

EX PARTE PAUL SILVIO GUARINO APPLICANT

Re Bryant; Ex parte Guarino
[2001] HCA 5
Date of Order: 31 January 2001
Date of Publication of Reasons: 14 February 2001
M9/2001

ORDER

Application dismissed.

Representation:

The applicant represented himself.

No appearance for the respondents.

CATCHWORDS

Re Bryant; Ex parte Guarino

Federal Magistrates Court – *Federal Magistrates Act* 1999 (Cth) – Validity.

Constitution, ss 71, 72, 73, 79, 80.
Federal Magistrates Act 1999 (Cth), ss 11, 17, 20, 37(2).
Federal Magistrates (Consequential Amendments) Act 1999 (Cth), Scheds 11, 12.

1 HAYNE J. The applicant, Paul Silvio Guarino, seeks an order nisi for prohibition and certiorari directed to the Chief Federal Magistrate. He seeks prohibition prohibiting the Chief Federal Magistrate (and presumably any other Federal Magistrate) from proceeding further with a matter identified as No ZM 4951 of 2000 in which his wife, Andrea Katherine Guarino, seeks dissolution of their marriage. This proceeding was filed on 28 November 2000 and, as I was told, is fixed for hearing tomorrow, 1 February 2001.

2 Section 78B notices have been sent to the Attorneys-General of the Commonwealth and the States but the probability is that some, at least, of those notices have not yet been received. Given, however, that Mr Guarino seeks an order nisi and that he seeks, in effect, to postpone, if not stop, tomorrow's hearing, I concluded that it was desirable to proceed to hear and determine the application for order nisi without waiting for a reasonable time to elapse between service of the s 78B notices and proceeding further.

3 Apart from seeking prohibition, Mr Guarino also seeks certiorari to quash what is said to have been a decision of the Chief Federal Magistrate made on 28 November 2000 to accept for filing the wife's application for dissolution of marriage.

4 The draft order nisi, which has been filed, gives as the sole ground of the application:

> "The Chief Magistrate and others delegated by her have no jurisdiction to act upon matters of divorce pertaining to section 51 of the Constitution … and that the appointment of a Federal Magistrate is unconstitutional pertaining to Section 71, 72 and 79 of the said Constitution."

5 That ground is amplified a little in the applicant's affidavit in support of his application, it being said that:

first, "appoint[ing] and/or recognis[ing] Federal Judicial power of 'Federal Magistrates' in a Federal Court … is to be seen as offending … section 79 of the 'Constitution'";

secondly, s 20 of the *Federal Magistrates Act* 1999 (Cth) ("the Act") offends s 79 because "it … gives right to the said Federal Magistrates to be recognised as appointed Judges wherein the Order and/or decisions of the said Magistrates are to be by APPEAL before a forum of the Full Court of the Federal Court and/or Family Court as opposed to a REVIEW before a single Judge";

thirdly, the absence of provision for a review by hearing de novo of a Federal Magistrate offends ss 71 and 79 of the Constitution;

fourthly, s 37(2) of the Act offends ss 71 and 79 because it "empowers the said Magistrates with judicial power of an appointed Judge to preside in a review hearing from a lower Court (Arbitrator)";

fifthly, that, contrary to s 80 of the Constitution, the Act denies the parties on trial before the Federal Magistrates Court a trial by jury;

sixthly, that, contrary to s 80, if s 17 of the Act (which relates to contempt of court) applies, there is no provision for trial by jury;

lastly, that, contrary to s 72 of the Constitution, there are no provisions in the Constitution "to determine age, resignation or removal of a Federal Magistrate".

6 The applicant appeared in person but was assisted by a Mr Abbott in the formulation of brief oral argument. It is convenient to deal in turn with each of the matters in the affidavit in support in the order in which they appear in that affidavit.

7 Section 79 of the Constitution provides:

> "The federal jurisdiction of any court may be exercised by such number of judges as the Parliament prescribes."

Section 79 is, therefore, concerned with whether federal jurisdiction is to be exercised by a court constituted by one or by more than one judge.

8 Section 11(1) of the Act provides:

> "For the purposes of the exercise of the jurisdiction of the Federal Magistrates Court, the Federal Magistrates Court is to be constituted by a single Federal Magistrate."

It is not arguable that this provision offends s 79. Indeed, it is a provision of the very kind for which s 79 is intended to provide. True it is, as Mr Guarino pointed out in oral argument, s 79 uses the word "judges" and does not use the word "magistrate". Nevertheless, it is clear when regard is had to s 71 and the power given to the Parliament to create "other federal courts" that the title given to the judicial officer by Parliament in creating such another federal court is not determinative of the constitutional reach of s 79 and the other provisions in Ch III. The constitutional reach of s 79 extends to the Federal Magistrates appointed to serve in the court created by the Parliament by the Act.

9 Section 20 of the Act provides:

> "(1) An appeal must not be brought directly to the High Court from a judgment of the Federal Magistrates Court.

(2) Subsection (1) has effect despite anything in:

(a) section 95 of the *Family Law Act 1975*; and

(b) section 104 of the *Child Support (Assessment) Act 1989*; and

(c) section 109 of the *Child Support (Registration and Collection) Act 1988*.

(3) If, apart from this subsection, subsection (1) is to any extent inconsistent with section 73 of the Constitution, this Act has effect as if the words ', except by special leave of the High Court' were added at the end of subsection (1)."

It is not arguable that this provision offends s 79 or s 73. As may be implicit in the reference in s 20(3) to s 73 of the Constitution, s 20 is a provision intended to constitute prescription by the Parliament of exception or regulation (as is expressly contemplated by s 73 of the Constitution) to the otherwise general conferral of appellate jurisdiction on this Court from all judgments, decrees, orders and sentences of a federal court other than the High Court.

10 Next, as to the second and third of the matters I have identified, provision is made for appeals from the Federal Magistrates Court to lie to the Family Court or to the Federal Court. That provision is made by amendments to the *Family Law Act* 1975 (Cth) and the *Federal Court of Australia Act* 1976 (Cth) set out in Scheds 11 and 12 of the *Federal Magistrates (Consequential Amendments) Act* 1999 (Cth).

11 The appeals for which provision is thus made are not, or at least arguably are not, appeals by rehearing de novo. That is, however, not an arguable ground for their invalidity. In *Allesch v Maunz*[1] there is discussion of the nature of an appeal to the Full Court of the Family Court[2]. Nothing in that discussion suggests that the ground which it is now sought to agitate is arguable.

12 As for the fourth, fifth and sixth of the matters I have mentioned as having been identified in the affidavit in support, it is enough to say that no factual basis has been laid for their agitation by this applicant, even if they were thought to be arguable. There is, as I understand it, no question, in the proceedings to which the applicant is party, of reviewing a decision made as arbitrator and no question, in those proceedings, of punishment for contempt. In any event, as to the latter

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1 (2000) 74 ALJR 1206 at 1210-1211 [20]-[24]; 173 ALR 648 at 653-654.

2 See also *CDJ v VAJ* (1998) 197 CLR 172 at 201-202 [111].

aspect, it would seem that the issues which it is sought to raise were concluded by the recent decision of this Court in *Re Colina; Ex parte Torney*[3].

13 Finally, as for the last of the matters mentioned by the applicant in his affidavit, s 72 of the Constitution does, subject to some qualifications which need not now be noticed, permit the Parliament to fix an age as the maximum age for Justices of a court created by the Parliament. There is no reason to consider it arguable that the constitutional expression "Justice of a court created by the Parliament" does not extend to Federal Magistrates. There is, therefore, no reason to consider that the provisions made in s 9 and Sched 1 of the Act about the term of office and conditions for resignation or removal from office of Federal Magistrates are invalid.

14 In my opinion, no arguable ground for the grant of an order nisi is shown. It follows that the application is dismissed.

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3 (1999) 73 ALJR 1576; 166 ALR 545.