HIGH COURT OF AUSTRALIA

KIRBY J

IN THE MATTER OF AN APPLICATION FOR
DECLARATORY RELIEF AND MANDAMUS
AGAINST THE HONOURABLE MARGARET REID
(IN HER CAPACITY AS PRESIDENT OF
THE SENATE) AND ANOR RESPONDENTS

EX PARTE HELEN BIENSTEIN APPLICANT

Re Reid; Ex parte Bienstein
[2001] HCA 54
Date of Order: 3 September 2001
Date of Publication of Reasons: 21 September 2001
M80/2001

ORDER

Application dismissed.

Representation:

The applicant appeared in person.

No appearance for the first respondent.

G P J Carroll for the second respondent (instructed by Australian Government Solicitor)

CATCHWORDS

Re Reid; Ex parte Bienstein

Constitutional law (Cth) – The Parliament – Removal of federal court judge – Initiation of a procedure for removal – Request to President of the Senate to distribute to senators request for consideration of removal of judge of the Family Court of Australia – Full Court of that Court finds federal court judge ought to have declined to further hear case for ostensible bias – President of Senate declined to distribute documents – Whether President answerable to writ under Constitution s 75(v) – Whether President is an "officer of the Commonwealth" – Whether Mandamus should issue to require consideration by senators of request – Privileges and powers of Houses of the Parliament.

Words and phrases – "Officer of the Commonwealth" – "proved misbehaviour".

Constitution, ss 17, 18, 19, 35, 49, 72(v), 76(ii).
Judiciary Act 1903 (Cth), s 30(a).
Family Law Rules, O 35 r 14.
The Act of Settlement 1700 (12 & 13 Will III c 2).

1 KIRBY J. Before me is an application for an order nisi brought by Mrs Helen Bienstein ("the applicant"). She seeks the issue of a constitutional writ of Mandamus directed to the President of the Senate (Senator the Honourable Margaret Reid) ("the President") and the making of certain declarations. The respondents named in the application are the President ("the first respondent") and the Honourable Paul Guest, a judge of the Family Court of Australia ("the second respondent"). The first respondent has not appeared before the Court. The second respondent has appeared by his legal representative who indicated that he had a "watching brief" only. He took no part in the proceedings.

A claim for a constitutional writ and declarations

2 The declarations sought in the draft order are that:

"a) Justice Paul Guest's unlawful direction to have Helen Bienstein removed from Court and locked in a cell constitutes a criminal offence against her person;

b) The committing of a criminal offence whilst engaged in the duties of judicial office constitutes "misbehaviour" within the meaning of section 72(ii) of the Constitution;

c) A judgment published by a Chapter III Court of Review [sic] with finding that the Judge at first instance committed a criminal offence whilst engaged in the duties of judicial office constitutes sufficient proof of 'misbehaviour' to satisfy section 72(ii) of the Constitution;

d) Section 72(ii) of the Constitution creates a requirement that a court decision with finding of proven misbehaviour [sic] against a Judge must be notified to Parliament for consideration by all serving Parliamentarians;

e) On receipt of documents proving 'misbehaviour' by a Judge, the President of the Senate has a duty to circulate the documents to all senators and to arrange time for debate under section 72(ii) of the Constitution."

3 The proposed writ of Mandamus would purport to require the President:

"a) to circulate to all Senators the 5 June 2001 Full Family Court Judgment in Bienstein appeal No SA87 of 1999, together with transcript of appealed first instance 28 October 1999 hearing that proceeded before the second-named respondent; and

b) to arrange a time for debate under section 72(ii) of the Constitution in regard to the second-named respondent."

The amenability of the respondents to process

4 The second respondent is a judge of a court created by the Parliament. In terms of the Constitution, s 75(v), he is also an "officer of the Commonwealth". He is amenable, in that capacity, to the writ of Mandamus and to adjunct relief[1].

5 The relief in the nature of Mandamus is sought against Senator Reid in her capacity as President of the Senate. This is a constitutional office. It is not part of the Executive Government[2]. In discharging that office it is not clear that the President is an officer of the Commonwealth. She is, in fact, an officer of the Parliament. However, I shall assume for the moment that the President would be amenable to a writ issued by this Court in these proceedings. I make no finding to that effect.

6 In relation to compliance by the Parliament with the process of law-making mandated by the Constitution, it has been held by this Court that it may decide whether, within the four walls of the Parliament, a law has been validly passed: *Cormack v Cope*[3]. In those proceedings the principal plaintiff was, in fact, the then President of the Senate, Senator Sir Magnus Cormack. The then Speaker of the House of Representatives, Mr Cope (a constitutional office holder under s 35 of the Constitution), was the defendant. No question of the validity of a law made by the Parliament arises in these proceedings. The applicant made it clear that, if necessary, she relied upon the Constitution, s 76(i) and the *Judiciary Act* 1903 (Cth), s 30(a) to support her entitlement to have orders directed to the President. Because there are larger problems, I will pass this question by.

The constitutional removal of federal judges

7 The applicant's complaint is not about the process of law-making. Instead, it is about suggested inactivity on the part of the Parliament and the President. The applicant seeks orders and declarations to activate, against the second respondent, the Parliamentary process for the removal of a judge of a federal court provided by s 72 of the Constitution. That section states, relevantly:

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1 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1 at 22; *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 267; *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 215.

2 The Constitution, esp ss 17, 18 and 19.

3 (1974) 131 CLR 432 at 453.

"The Justices of the High Court and of the other courts created by the Parliament:

…

(ii) shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity."

The proceedings in the Family Court of Australia

8 In order to understand the basis of the application, it is necessary to say something about the proceedings in the Family Court of Australia, before the second respondent, in which the applicant was involved. The history of those proceedings is recounted in the reasons of the Full Court of that Court in *Bienstein v Bienstein*[4]. The applicant has placed before me the transcript of the evidence taken before the second respondent referred to in the Full Court's reasons. That transcript appears to confirm the summary which is contained in the reasons of the Full Court upon which I rely.

9 On 28 October 1999 the second respondent, as a judge of the Family Court, commenced a hearing of two applications, one filed by the applicant's husband and a cross-application filed by the applicant. During the course of the proceedings differences broke out between the applicant and the second respondent. At a point in the proceedings, the second respondent directed an officer of the Federal Police to take the applicant into custody and to place her in the cells in the court building. She was then removed from the courtroom. She was kept in custody for about three hours. The applicant complains that she was detained in custody unlawfully, that she was closely guarded by police during that time, that she was given no food and water only when she asked for it. She remains very upset by this event. She seeks legal redress.

10 Before her removal from the courtroom the applicant was told by the second respondent that she was "somewhat hysterical" and that she was "yelling in a fierce voice to me". Ultimately, she was told that the second respondent found her in contempt of court "at the moment". He said that he wished her to be "dealt with" for contempt. However, it was only after the applicant had been returned to the court, about three hours after her removal to the cells, that the second respondent said that he intended "to consider whether you should be charged with contempt in the face of the Court". He stated that she would be dealt with later on that day, presumably for that offence.

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4 Unreported, 5 June 2001.

11 Given an opportunity to apologise to the Court the applicant did so. She later adhered to that apology. However, she applied to the second respondent that he should disqualify himself from hearing the proceedings on the ground of actual or perceived bias. The second respondent declined to do this. He proceeded to hear and determine the matters before him. He made certain orders that were adverse to the applicant.

The appeal to the Full Court of the Family Court

12 The applicant appealed against those orders to a Full Court of the Family Court. She relied on her contention that, after her arrest and incarceration, the second respondent should have disqualified himself from further involvement in the proceedings. Before the appeal was heard, the applicant unsuccessfully applied to this Court for removal of the cause into the High Court pursuant to s 40 of the *Judiciary Act*. That application was dismissed by Hayne J on 1 December 2000[5]. Following his Honour's order, the appeal was duly heard by the Full Court of the Family Court. On 5 June 2001, that Court, constituted by Ellis, Coleman and Rose JJ, in joint reasons, upheld the appeal in part.

13 The Full Court set aside orders as to costs made by the second respondent in favour of Mr Bienstein. It remitted the determination of those costs to be considered by a judge of that Court other than the second respondent. It included in its orders one to the effect that the second respondent was disqualified from hearing any proceedings in which the applicant was a party in her own interest or was purporting to appear in the interests of the daughter of her marriage.

14 The Full Court found that, although, as a matter of law, it had been open to the second respondent to deal with the applicant for contempt in the face of the Court, he had not done so in accordance with law. Specifically, it found, he had not complied with the Family Law Rules, O 35 r 14. Broadly, those Rules follow the basic procedures for dealing with contempt established by the common law[6]. In the case of a federal court, the rules of fair procedure may, in any case, be implied, or inherent, in the Constitution itself[7]. However, it is not necessary to decide that point now. Most significantly, the Full Court found, before dealing with the applicant for contempt and ordering her temporary incarceration, the

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5 On 13 December 2000 the applicant appealed to a Full Court of the High Court, purportedly as of right, in relation to this order (Matter No 140 of 2000). The hearing is listed for 5 October 2001.

6 *Coward v Stapleton* (1953) 90 CLR 573 at 579-580.

7 cf *Ebner v Official Trustee in Bankruptcy* (2000) 75 ALJR 277 at 289-290 [79]-[82], 295-296 [113]-[117]; 176 ALR 644 at 661-662, 669-671.

second respondent had not, as O 35 r 13 of the Family Law Rules requires, told the applicant of the allegation made against her constituting the contempt charged; asked her to state whether she admitted or denied the allegation; heard any evidence in support of the allegation; asked her to state her defences if any; heard any evidence adduced by her in her defence; and only then decided the charge and (if convicting her) dealt with her as the law provides.

15 This Court has said, as others have before it, that the power to punish for contempt committed in the face of the court, being a very great power, should be used sparingly and only in serious cases[8].

16 Mistakes occur in any human system of justice, even serious mistakes. They can be made by the most diligent and accurate of judges. The appellate process, provided by law and envisaged by the Constitution, is the normal way in which mistakes by a judge of the Family Court will be corrected.

17 In this case, the appellate process has been invoked. Save in respect of an application made for her costs in the appeal, the applicant was vindicated by the appeal. However, doubtless because of her loss of liberty and sense of serious injustice, the applicant considers that the Full Court's decision does not go far enough. She wishes, amongst other things, to initiate a process for the Parliamentary removal of the second respondent from his office as a judge of the Family Court. She seeks that initiative on the ground of what she says is his "proved misbehaviour" within the meaning of the Constitution, s 72(ii). She asserts that such misbehaviour is established by the decision of the Full Court of the Family Court.

18 I will not express any view on whether, upon my present understanding of the facts, the behaviour of the second respondent, if proved, would arguably amount to constitutional "misbehaviour". Or whether it has already been "proved", as envisaged by the Constitution. It is unnecessary for me to determine those questions and I refrain from doing so.

The request to the President

19 The applicant placed before me correspondence between her and the President. That correspondence was exhibited to an affidavit affirmed by the applicant and read in these proceedings. In a letter or email to the President of 4 July 2001 the applicant provided the President with the reasons of the Full Court, stating that those reasons proved misbehaviour by the second respondent. She claimed that the reasons of the Full Court showed that she had been imprisoned "without legal authority to do so". She asked the President to ensure

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8 *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at 391 [5].

that the documents, being her request to senators to consider the removal of the second respondent from office and the Full Court's reasons, be distributed to all senators. The applicant stated that she was providing similar documents to the House of Representatives. Another exhibit indicates that she did this.

20 The President responded to the applicant's letter on 9 July 2001. She said:

> "It would not be appropriate for me as President of the Senate to initiate such action. You are, of course, free to approach any other senators about the matter.
>
> My understanding, however, is that section 72 is not seen as a means of dealing with possible judicial errors which can be corrected on appeal."

21 The applicant responded to this communication with a further letter. In this she stated that she had not sought initiation of action against the second respondent by the President, but rather that the documents be provided to all senators for their consideration. The President, in a letter of 17 July 2001, reaffirmed her previous position. She reiterated that the applicant, if she wished to, could approach other senators.

22 It was in these circumstances that the applicant commenced her proceedings in this Court seeking the constitutional writ of Mandamus and the declarations previously set out. In her affidavit the applicant states that she sought that relief to command the President to carry out what she described as the President's constitutional duty so that the Parliament could perform its function under s 72(ii), as envisaged by the Constitution.

The privileges and powers of the Parliament

23 The applicant's process is misconceived. The provisions of s 72(ii) of the Constitution relate to the process of removal of a judge of a federal court following consideration by the Houses of Parliament. That is a process which, almost entirely, belongs to the internal procedures of those Houses. There is little explicitly stated in s 72(ii) that controls the procedures which the Houses must follow in discharging their functions in that regard. All that is expressly provided is:

- The ground of the initiation of the process involved ("proved misbehaviour or incapacity");
- The outcome, if supported by a majority of the Houses of the Parliament concerned (an "address … praying for such removal");
- The requirement of contemporaneity and bicameral concurrence ("both Houses of the Parliament in the same session"); and

- The designation of the recipient of the address and the ultimate actors in the process of removal ("the Governor-General in Council").

24 All other aspects of the procedure belong to the Houses of Parliament themselves[9]. There may, in s 72, be certain constitutional implications as to fair procedures. However, it is unnecessary to explore what these might be. They are uncertain, in part, because invocation of the removal procedure has been so rare. In the first century of the Constitution no federal judge has been removed pursuant to the provisions of s 72(ii).

25 None of the foregoing considerations, stated in s 72(ii), permits or authorises this Court to interfere in the internal procedures of the Senate in relation to the initiation of the consideration of the removal of a federal court judge from office. Any such attempt by this Court to intrude into such procedures would, in a case such as the present, amount to a constitutionally impermissible invasion by the judicial branch of government of the internal affairs of the Parliamentary branch of government, specifically the internal affairs of the Senate[10]. Moreover, the privileges of the Houses of Parliament, including the Senate, are preserved by the Constitution and by federal law[11]. Those privileges, which are based on the ancient law of Parliament, are respected and upheld by the courts. They restrain intervention by the courts in the deliberations of the Houses of Parliament or premature and unnecessary intervention in the process of law making by the Parliament[12].

26 Least of all would it be permissible for this Court to intervene in respect of the initiation of proceedings by a House of Parliament against a federal court judge. The assignment to the elected members of the Federal Parliament of the responsibility for considering and deciding questions concerning the removal from office of a federal judge is a central aspect of an ancient constitutional arrangement inherited by our Constitution from the Constitution of Great

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9 cf *Murphy v Lush* (1986) 60 ALJR 523 at 525; 65 ALR 651 at 655.

10 cf *Egan v Willis* (1998) 195 CLR 424 at 494 [136].

11 The Constitution, s 49; *Parliamentary Privileges Act* 1987 (Cth); *Sankey v Whitlam* (1978) 142 CLR 1 at 35.

12 *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 162-163; *Cormack v Cope* (1974) 131 CLR 432 at 454; *Egan v Willis* (1998) 195 CLR 424 at 444-447 [21]-[29]; *Yougarla v Western Australia* (2001) 75 ALJR 1316 at 1329 [63] and 1331-1333 [76]-[81]; 181 ALR 371 at 388, 391-393; cf *Sue v Hill* (1999) 199 CLR 462 at 508-510 [115]-[119], 558 [251], 567 [276]-[277], 569 [281].

Britain[13]. By that arrangement, in accordance with the Constitution, the judges of this country are ultimately rendered accountable to the representatives of the people in Parliament. They are there ultimately answerable in accordance with the Constitution and the laws and conventions that govern the exercise of that power. It is not for the courts, in a matter such as the initiation of any Parliamentary proceedings against a judge or the circulation of documents to members of the Parliament in connection with that process, to purport to command the presiding officer of a House of Parliament to do anything.

27 In such matters, the presiding officer is subject to the will and law of the Parliament. Within that place, he or she is subject to his or her own conscience. Any person invoking the Constitution can address his or her submission to the President, or to the Speaker, or to the members of either House of the Parliament. This Court does not intrude.

Order

28 The proceedings which the applicant wishes to bring do not, therefore, present a reasonably arguable case. There is no separate basis for relief against the second respondent. The proceedings are misconceived. They are doomed to fail. The application for the order nisi must therefore be dismissed.

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13 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 731 explain that the procedure is traced to *The Act of Settlement* 1700 (12 & 13 Will III c 2); Parkinson, *Tradition and Change in Australian Law* (2001), Pt 3.