HIGH COURT OF AUSTRALIA

KIRBY J

IN THE MATTER OF AN APPLICATION BY WILLIAM DUDLEY KAVANAGH FOR LEAVE TO ISSUE A PROCEEDING

Re Kavanagh's Application [2003] HCA 76
10 December 2003
H3/2003

ORDER

Application for leave to issue a proceeding dismissed.

CATCHWORDS

Re Kavanagh's application

High Court – Practice and procedure – Leave to issue proceedings – Applicant previously unsuccessful in application for special leave to appeal from State Supreme Court judgment – Applicant propounds for filing in the High Court motion claiming declarations invoking the International Covenant on Civil and Political Rights – Claims right to fair hearing violated in High Court and in State Supreme Court – Relevance of the International Covenant on Civil and Political Rights to Australian domestic law – Relevance in circumstances where the governing law is statutory and admits of no doubt or ambiguity – Whether propositions reasonably arguable.

International law – Relevance to Australian domestic law – International law of human rights – International Covenant on Civil and Political Rights – Status of unincorporated treaty – Influence of Covenant on development of common law and in the resolution of ambiguous legislation – Duty of Australian courts to obey and give effect to clear domestic law applicable to the case – Inadmissibility of process in the High Court seeking declaration and orders based on alleged effect of Covenant.

Constitution, covering cl 5, ss 75(i) and (iv), 76(i).
Judiciary Act 1903 (Cth), ss 35(1) and (2).
High Court Rules, O 58, r 4(3).

1 KIRBY J. On 19 August 2003, Hayne J, acting pursuant to O 58 r 4(3) of the High Court Rules, directed the Registrar of this Court not to issue a notice of motion presented by Mr William Kavanagh ("the applicant") without the leave of a Justice first being obtained.

2 In accordance with the direction of Hayne J, on 19 September 2003 the applicant presented an *ex parte* application for leave to issue process, supported by an affidavit sworn by him. His documents were accepted for filing. In accordance with the direction of Hayne J, they have been referred to me, as duty judge, to consider whether leave should now be given to the applicant to issue the propounded proceeding.

The proposed notice of motion

3 The substantive part of the notice of motion seeks the following declaration and orders from this Court:

> "1(a) A Declaration that the High Court of Australia has, pursuant to s75(i) and s76(i) of the *Constitution* and to the second limb of s30(a) of the *Judiciary Act 1903*, jurisdiction to hear an appeal from a decision of a State or Federal Court on grounds which are founded on an individual's right to a fair hearing of his or her suit at law, pursuant to Article 14.1 of the *International Covenant on Civil and Political Rights*;- AND FOR,
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> 1(b) An order granting the applicant leave to appeal on those grounds the judgment of the Full Court of the Supreme Court of Tasmania, [2000] TASSC 45, given on 17 May 2000.
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> OR, IN THE ALTERNATIVE, for:-
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> 2(a) A Declaration that, in the determination of his suit at law against the *State of Tasmania* in the Supreme Court of Tasmania the applicant's civil right to a fair hearing of that suit, pursuant to Article 14.1 of the *International Covenant on Civil and Political Rights*, has been violated. The relevant court references and dates of judgment are; 79/1999 given on 9 August 1999 and [2000] TASSC 45 given on 17 May 2000; AND FOR,
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> 2(b) Such consequential order or orders as the Court deems it necessary to make."

Background to the propounded proceedings

4 From the applicant's affidavit in support of his application, and an earlier affidavit which is annexed to it, sworn to accompany a propounded notice of

motion presented in June 2003 but subsequently withdrawn, the following background facts emerge.

5 Although now stated to be a resident of Queensland, at the time of the relevant proceedings, the applicant resided in Hobart, Tasmania[1]. Before 1988, the applicant was employed as an architect in the Housing Department of the Government of Tasmania. In February 1988, he entered into an employment or service contract with the relevant Minister pursuant to s 38 of the *Tasmanian State Service Act* 1984 (Tas). In 1990, a dispute arose between the applicant and the Department in which he worked. It is unnecessary for present purposes to describe that dispute. Eventually, the applicant brought proceedings in the Supreme Court of Tasmania against the State of Tasmania. He alleged that he was entitled to damages for breach of contract in respect of his employment by the State. The action was tried by Wright J, sitting in the Supreme Court without a jury. In the result, on 9 August 1999, his Honour ordered that judgment be entered in favour of the State. On 15 November 1999 he ordered that the applicant pay the costs of the proceedings.

6 The applicant appealed to the Full Court of the Supreme Court of Tasmania. His appeal was heard in March 2000 by a court comprising Cox CJ, Underwood and Evans JJ. On 17 May 2000, in a unanimous decision, written for the court by Underwood J, the appeal was dismissed[2]. The applicant was ordered to pay the State's costs of the appeal.

7 In the reasons of Underwood J, it is stated that "[t]he [applicant] is both a legal practitioner and an architect but has never practised as a lawyer"[3]. He conducted his own case at first instance and on appeal. Unfortunately, as he has acknowledged in the affidavit filed in these proceedings, his "handling of the matter has been marked by a lack of appropriate knowledge and experience". It is this lack of knowledge and experience that also lies behind the proceeding that the applicant now seeks to commence in this Court.

8 Being discontented with the decision of the Full Court of the Supreme Court of Tasmania, the applicant, in the normal way, applied to this Court for special leave to appeal against the judgment dismissing his appeal to the Full Court. According to the applicant's affidavit, his application for special leave was heard by this Court in Hobart on 5 April 2001. It was unsuccessful. Subsequently, the applicant filed a notice of motion seeking to have the Court

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1 cf Constitution, s 75(iv).

2 *Kavanagh v State of Tasmania* [2000] TASSC 45.

3 *Kavanagh v State of Tasmania* [2000] TASSC 45 at [2].

reconsider his application for special leave to appeal. According to his affidavit, that motion was heard by the Court in Canberra on 3 May 2002. It was likewise unsuccessful.

9 In his affidavit, the applicant states:

> "Following that hearing I commenced work on a Communication to be submitted to the Human Rights Committee of the United Nations in Geneva. The grounds for this complaint being alleged violations of my Article 14.1 right to a fair hearing in the determination of my rights in a suit at law by reason of judicial errors at both first instance and on appeal … It was in the preparation of the *Communication* that the consequences of the absence of an unqualified entitlement to seek a domestic remedy at the highest judicial level came to prominence. This is by reason that failure to exhaust domestic remedies is ground for rejection of a complaint by the Human Rights Committee and it is also because, as already argued, the absence of such a domestic remedy is inconsistent with the Commonwealth's acceptance of it's [sic] treaty obligations pursuant to Article 2.3."

The ICCPR and domestic remedies

10 It is clear from the proceeding presented by the applicant, and from the terms of his affidavit, that he seeks to rely on Art 14.1 of the International Covenant on Civil and Political Rights ("ICCPR")[4] to support the proceeding. Australia is a party to the ICCPR. It has also subscribed to the First Optional Protocol to the ICCPR. That Protocol permits persons in the position of the applicant to communicate to the Human Rights Committee of the United Nations where they contend that, in particular respects, Australia is in breach of its obligations under the ICCPR. This, it appears, the applicant has done, or intends to do, in consequence of his complaints about the outcome of the foregoing proceedings.

11 Although at various times, it has been suggested that the ICCPR should be made part of Australia's domestic law, by the enactment of legislation giving it direct local effect, no such law has, to this time, been enacted. This does not mean that the ICCPR is irrelevant to Australia's legal system. Views differ concerning the precise ways in which the provisions of the ICCPR may be invoked in support of, and the extent to which they are relevant to, legal rights

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4 Done at New York on 19 December 1966, 1980 *Australia Treaty Series* 23, entered into force for Australia on 13 November 1980 in accordance with Art 49.

and duties in Australia[5]. However, in *Mabo v Queensland [No 2]*[6], writing in this Court with the concurrence of Mason CJ and McHugh J, Brennan J said:

> "The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights."

In the same reasons, Brennan J said[7]:

> "The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports."

12 A reflection of the differing views concerning the way in which the requirements of the ICCPR may be used in expressing the law applicable in this country can be seen in the decision of the New South Wales Court of Appeal in *Young v Registrar, Court of Appeal [No 3]*[8]. That case bears a distant similarity to the present one. As I said in that case, it is permissible, in my view, in accordance with the reasons of Brennan J in *Mabo [No 2]*, to utilise the articles of the ICCPR in the development of the common law of Australia where that law is in doubt or otherwise undeveloped. Similarly, for my own part, I would be prepared to accept that the articles of the ICCPR may be used to assist in the resolution of an ambiguity that arises in the meaning of Australian legislation[9], including federal legislation[10]. The ICCPR may be relevant in still further ways not presently material[11].

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5 See eg *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 384-385 [97]-[99], 417-419 [166]-[167]; *AMS v AIF* (1999) 199 CLR 160 at 180 [50], 217-218 [166]-[169].

6 (1992) 175 CLR 1 at 42.

7 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42 (footnote omitted).

8 (1993) 32 NSWLR 262.

9 cf *Attorney-General (WA) v Marquet* (2003) 202 ALR 233 at 274-277 [172]-[181].

10 cf *Austin v Commonwealth* (2003) 77 ALJR 491 at 543-544 [257]; 195 ALR 321 at 392.

11 Mason, "The Role of the Judiciary in Developing Human Rights in Australian Law", in Kinley (ed), *Human Rights in Australian Law: Principles, Practice and*

(Footnote continues on next page)

13 However, where there is applicable Australian legislation which is clear, and without relevant ambiguity, and where such legislation governs the case to the exclusion of the common law, there is no room for the articles of the ICCPR to "bring to bear" on Australian law the influence mentioned in *Mabo [No 2]* or as otherwise favoured by me. In such cases, because Australian parliaments have not, so far, given domestic effect to the ICCPR as part of the municipal law of Australia, the duty of Australian courts is clear. It is the duty stated in the Australian Constitution itself[12]. It is to obey and give effect to the law of Australia, including the law stated by the Parliament.

14 In the present case, the applicable law is expressed clearly in federal legislation. It appears in the *Judiciary Act* 1903 (Cth), relevantly s 35(2). By that sub-section it is provided:

> "An appeal shall not be brought from a judgment, whether final or interlocutory, referred to in subsection (1) unless the High Court gives special leave to appeal."

In s 35(1), reference is made in par (a) to "judgments of the Supreme Court of a State". The judgment in the applicant's case is such a "judgment". This, therefore, is the law that confines appeals to this Court from judgments, such as those made by the Supreme Court of Tasmania in the applicant's case. Relevantly, such appeals lie only where this Court grants special leave to appeal.

15 The constitutional validity of the prototype for the provision obliging special leave to appeal from judgments of Australian superior courts was considered by this Court in *Smith Kline & French Laboratories (Aust) Ltd v The Commonwealth*[13]. Notwithstanding a frontal attack on the constitutional validity of that provision, when measured against the requirements of s 73 of the Constitution, this Court, in a unanimous decision, upheld the validity of the imposition of the requirement for special leave to appeal as a precondition to securing access to the appellate jurisdiction of the Court.

Potential, (1998) 26 at 43-44; Walker, "The Intersection of International Law and Australian Constitutional Law", in Jones and McMillan (eds), *Public Law Intersections: Papers presented at the Public Law Weekend – 2000 & 2001*, (2003) 97.

12 Constitution, covering cl 5.

13 (1991) 173 CLR 194.

16 The decision in the *Smith Kline* case, and the companion decision in *Carson v John Fairfax & Sons Ltd*[14], confirmed the change of practice of this Court, relevantly following the introduction of the universal special leave requirement in s 35 of the *Judiciary Act*. The law and practice there stated have been followed by this Court ever since.

17 It is by no means unusual – indeed it is quite common, if not universal – for final and constitutional courts of appeal in the common law world, and elsewhere, to have restrictions on the facility of appeal. Such restrictions are expressed in differing ways. It is difficult to imagine how this Court could have coped with the burden of its appellate jurisdiction, without the provision of some such statutory prescription. The applicant initially conformed to it. When his first application failed, he sought to bring a second application. His present process must be understood against this background. Effectively, the applicant seeks to bypass the provisions enacted by the Federal Parliament in Australia to govern the engagement of the appellate jurisdiction of this Court.

18 The applicant is effectively attempting to outflank the unanimous decision of the Court upholding the validity of the legislation imposing requirements of special leave in all appeals, including the one he seeks to bring. In effect, he asserts a right to appeal without obtaining special leave from the Court. He asserts that he can do so by simple "leave" and that jurisdiction exists for this purpose. He seeks declarations and orders accordingly. His assertion is incompatible with the law enacted in clear terms by the Federal Parliament and upheld by this Court. In fact, the applicant seeks to gain an advantage that other litigants do not have. The only foundation for this attempt is a reliance on Art 14.1 of the ICCPR by which Australia accepts the obligation at law to ensure that "[a]ll persons shall be equal before courts and tribunals". However, the applicant seeks to be more equal than others. His attempt cannot succeed. It is not reasonably arguable.

19 Article 14.1 of the ICCPR also states (relevantly):

> "In the determination of … his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

20 I do not accept that it is reasonably arguable that the applicant has been deprived of that right. Nothing in Art 14.1 of the ICCPR appears incompatible with a legal provision, in the case of a second level appeal to a final national appellate court, that imposes a requirement first to obtain special leave to appeal from the final court. Yet even if it were otherwise, because the ICCPR is not part

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14 (1991) 173 CLR 194.

of Australia's domestic law, it could not override the clear requirements of s 35 of the *Judiciary Act*. In the event of any inconsistency, this Court, like every Australian court, is obliged to obey, and give effect to, the duly enacted and valid law of an Australian parliament. It can make no declarations or orders to the contrary.

21 In so far as the proposed declaration 2(a) claims that the proceedings in the Supreme Court of Tasmania did not accord the applicant a fair hearing and thus violated Art 14.1 of the ICCPR, the same remarks apply. The ICCPR is not part of the law of Tasmania. The Tasmanian Supreme Court acted according to its own governing law. By statute and the common law that court was required to afford the applicant a fair hearing. Any complaint in this Court about that hearing or its alleged lack of fairness is obliged by federal law to be made in an application for special leave to appeal, and, if special leave is granted, in an appeal. The declaration sought is unavailable, futile and embarrassing.

22 It is perhaps understandable that a lay person might consider that international law has legal force superior to domestic law. The habit of thinking in a federal system of government, such as Australia, might encourage such reasoning. Thus, by analogy with the superiority of valid federal law over State law, it might be thought that international law, in a similar fashion, always overrides domestic federal law. This is not the case.

23 Ultimately, municipal courts derive their lawful authority and legitimacy from a national Constitution, not from international law. The duty of such courts in Australia is ultimately to that Constitution. They must obey the laws made under, and in accordance with, the Constitution. Commonly, they will endeavour to avoid inconsistencies between domestic (national) and international law[15]. The influence of international law, and its impact on domestic law, is growing, including in Australia. However, international law, such as the ICCPR, does not, as such, oust or override municipal law. The applicant's mistaken belief that it is otherwise is fatal to his endeavour to invoke the ICCPR in this Court to circumvent the binding and valid obligations of Australian federal legislation, applicable to his case.

Conclusion and orders

24 On this basis, the proceeding propounded by the applicant is misconceived and futile. I leave aside formal objections to the terms and relevance of the two declarations that are sought by him in pars 1(a) and 2(a) of the draft notice of motion and to the orders as drafted. Turning to the substance, the making of those declarations would be inconsistent with the provisions of the *Judiciary Act*

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15 cf *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 [30].

that require the grant of special leave to appeal from the judgment of the Supreme Court of Tasmania which the applicant wishes to challenge. No declaration or order, such as is proposed in pars 1(b) or 2(b), could be made in the circumstances in the face of the clear language of the *Judiciary Act* governing the requirement for special leave to appeal to this Court in such a case. The contrary proposition is not reasonably arguable. It is not one which could be improved by leave to replead.

25 It follows that the proceeding presented by the applicant for filing is unsustainable on its face. Leave to file the proceeding must therefore be refused.

26 The application is dismissed.