HIGH COURT OF AUSTRALIA

FRENCH CJ

BRIAN GEORGE LANE PLAINTIFF

AND

COLONEL PETER JOHN MORRISON
& ANOR DEFENDANTS

Lane v Morrison
[2009] HCA 5
16 January 2009
C3/2008

ORDER

1. *The name of the first defendant be amended to "Colonel Peter John Morrison, a Military Judge of the Australian Military Court".*

2. *The Plaintiff have leave to file a Further Amended Application for an Order to Show Cause in the form notified to the registry on 9 January 2009.*

3. *The Further Amended Application for an Order to Show Cause, insofar as it seeks relief on Grounds 4, 5 and 7, be dismissed.*

4. *The Further Amended Application for an Order to Show Cause, insofar as it seeks relief on Grounds 1, 2, 3 and 6, be referred for further hearing by a Full Court.*

5. *The plaintiff file and serve a revised s 78B notice by not later than 4pm on 23 January 2009, and file an affidavit of service by not later than 4pm on 2 February 2009.*

6. *The second defendant prepare and file an Application to Show Cause book, in accordance with the index as settled by the Registry, by not later than 4pm on 10 March 2009 (being within 10 working days of the plaintiff filing the affidavit of service of the s 78B notice).*

7. The standard timetable for filing submissions set out in High Court Practice Direction No 1 of 2000 be varied as follows:

7.1 The plaintiff shall file and serve its written submissions on or before 6 February 2009.

7.2 The second defendant shall file and serve its written submissions at least 15 clear working days before the hearing of the Further Amended Application by the Full Court.

7.3 Any intervener shall file and serve its written submissions at least 10 clear working days before the hearing of the Further Amended Application by the Full Court.

7.4 The plaintiff may file and serve written submissions in reply at least five working days before the hearing of the Further Amended Application by the Full Court.

7.5 The second defendant may file and serve written submissions in reply to any interveners at least five working days before the hearing of the Further Amended Application by the Full Court.

8. Costs of this hearing be costs in the cause.

9. The plaintiff's summons dated 16 July 2008 be otherwise dismissed.

10. Liberty to apply in writing on three clear working days notice.

Representation

A W Street SC with M J Duncan and K S Cochrane for the plaintiff (instructed by Provest Law)

Submitting appearance for the first defendant

S J Gageler SC, Solicitor-General of the Commonwealth, with N M Wood for the second defendant (instructed by Australian Government Solicitor)

CATCHWORDS

Lane v Morrison

Constitutional law – High Court – original jurisdiction – defence power – military justice system – application for show cause order – whether arguable – notice to Attorneys-General – *Judiciary Act* 1903 (Cth), s 78B – requirement of notice – not to include proposed argument

1 FRENCH CJ. The plaintiff seeks an order against a Military Judge of the Australian Military Court (AMC) to show cause why prohibition should not issue to restrain him from trying charges against the plaintiff under the *Defence Force Discipline Act* 1982 (Cth) ("the Act"). Declarations of the invalidity of various provisions of the Act are also sought.

2 The plaintiff was charged on 8 August 2007, under ss 61(3) and 25 of the Act, with offences of committing an indecent act and assaulting a superior officer. The offences are said to have arisen out of an incident at Roma in the State of Queensland in August 2005. At the time he was a member of the Australian Defence Force. Although initially referred by the Director of Military Prosecutions to the former Registrar of Military Justice with a request that a court-martial be convened, the charges were ultimately referred by the Registrar of the AMC to be heard by that Court. That referral was done under transitional provisions following amendments to the Act which established the AMC and the office of Registrar of that Court[1].

3 The charges were listed for hearing before the AMC on 25 March 2008. The plaintiff objected to its jurisdiction The charges will now not be listed for trial until the proceedings before this Court have been resolved.

4 The application to show cause was listed for directions on 9 December 2008. It was adjourned to 13 January to allow the plaintiff to refine his grounds for the relief claimed. When the matter came on for further directions on 13 January, a proposed further amended application was handed up in Court. A proposed amended notice under s 78B of the *Judiciary Act* 1903 (Cth) had also been lodged with the Court. The notice ran to some 37 pages setting out arguments in support of the various grounds for relief. As to that, it suffices to say that, where s 78B of the *Judiciary Act* applies to a pending cause, it requires "notice of the cause, specifying the nature of the matter" to be given to the Attorneys-General of the Commonwealth and the States[2]. The section does not require the inclusion of detailed submissions in a notice issued under it.

5 The Commonwealth is named as second defendant in the application. The Solicitor-General of the Commonwealth informed the Court that the Commonwealth would consent to the referral of the application to the Full Court

---

1 *Defence Legislation Amendment Act* 2006 (Cth) No 159 of 2006, Sched 1, pt 3, item 257 sub-items (1) and (2).

2 The scope of such notices was discussed by the Court of Appeal of New South Wales in *State Bank of New South Wales v Commonwealth Saving Bank of Australia* (1986) 4 NSWLR 549.

on ground 1. It would not oppose referral on grounds 2, 3 and 6. It opposes referral to the extent that the application relies on grounds 4, 5 and 7 and it does so on the basis that they are untenable.

6 Section 61(3) of the Act provides, inter alia, that a person who is a defence member or a defence civilian is guilty of an offence if:

> "(a) the person engages in conduct outside the Jervis Bay Territory (whether or not in a public place); and
>
> (b) engaging in that conduct would be a Territory offence, if it took place in the Jervis Bay Territory (whether or not in a public place)."

The maximum punishment for such an offence is the maximum punishment for the relevant Territory offence. If the punishment for the Territory offence is fixed then the maximum under s 61 will be that fixed punishment[3].

7 The term "Territory offence" is defined to include an offence against a law of the Commonwealth in force in the Jervis Bay Territory other than the Act or regulations made under it[4]. The criminal law in force in the Jervis Bay Territory included, at the relevant time, the *Crimes Act* 1900 (ACT).

8 The Australian Military Court is created by s 114 of the Act. It is designated as a Court of record[5]. It consists of the Chief Military Judge and such other military judges as from time to time hold office in accordance with the Act[6]. The Court has jurisdiction under the Act "to try any charge against any person"[7]. This is subject to certain classes of offences set out in s 63, which require the consent of the Director of Public Prosecutions before they can be tried in the AMC. The AMC may sit at any place inside or outside Australia[8]. There is provision for trial by a military jury[9].

---

3 Section 61(4).

4 Section 3.

5 Section 114(1A).

6 Section 114(2).

7 Section 115.

8 Section 117.

9 Sections 132A, 132AA, 132AB.

9 The plaintiff in effect challenges the establishment of the AMC under the Act, and the provisions of the Act which confer jurisdiction to try offences under s 61 which would be offences against the criminal law generally applicable in the Jervis Bay Territory.

10 The first ground for the relief claimed challenges the validity of the provisions of the Act establishing the AMC on the basis that its independence from command structures within the Australian Defence Force is inconsistent with s 68 of the Constitution. That section vests command of the Naval and Military Forces of the Commonwealth in the Governor-General. Having regard to comments made by Callinan J in *White v Director of Military Prosecutions*[10] the Commonwealth supports the referral of the further amended application to the Full Court for further hearing insofar as the claim for relief is based on ground 1.

11 In ground 2, the plaintiff asserts that the AMC is not a service tribunal but a federal court impermissibly created "outside Ch III" and "contrary to section 71 of the Constitution". The Commonwealth does not oppose referral of the amended application to the extent that it relies on ground 2. That is on the basis that the issue raised by ground 2 is whether a body such as the AMC can be created with the indicia of a federal court. The Commonwealth stated in its submissions that it understands from the plaintiff that the term "service tribunal" is used to mean "an ad hoc Military Tribunal, not a permanent Court".

12 Ground 3 involves the contention that the Act purports to confer on the AMC a general criminal jurisdiction which is not subordinate and supplementary to the general criminal law and can only validly be conferred on a Ch III court. Ground 6 raises the contention that the Act is beyond the power conferred by s 51(vi) of the Constitution to the extent that it confers a general criminal jurisdiction on the AMC. The Commonwealth does not oppose the referral of the amended application insofar as it seeks relief on grounds 3 and 6.

13 By ground 4 the plaintiff contends that the AMC's general criminal jurisdiction is invalidly conferred in that:

> "… general criminal jurisdiction for valid laws of the Commonwealth can only be vested in a court created under s 71 exercising the judicial power of the Commonwealth under Chapter III conferred with such jurisdiction pursuant to ss 75, 76 and 77 and within the protection of s 80 constituted by judges appointed under s 72 of the Constitution".

---

10 (2007) 231 CLR 570 at 649 [241]-[242]; [2007] HCA 29.

14 In submissions in the proposed s 78B notice dealing with this ground, the plaintiff says that the trial and determination of the alleged offences against s 61 of the Act "is within s 80 of the Constitution and accordingly constitutes an exercise of the judicial power of the Commonwealth". Further reference is made to "the correct principles of interpretation of s 80 in Chapter III …". The plaintiff submits that *R v Bernasconi*[11] is wrong to the extent that it supports a reading down of s 80 to exclude trial in the Territories. Similarly it is submitted that *Kingswell v The Queen*[12] is wrong to the extent that it provides that s 80 is not a guarantee of trial by jury for all serious offences against the law of the Commonwealth. The plaintiff also seeks to distinguish or have overruled *R v Archdall and Roskruge; Ex parte Carrigan*[13]; *R v Federal Court of Bankruptcy; Ex parte Lowenstein*[14]; *Sachter v Attorney-General (Cth)*[15]; *Zarb v Kennedy*[16]; *Li Chia Hsing v Rankin*[17]; *Cheng v The Queen*[18] and *Re Colina; Ex parte Torney*[19].

15 Ground 5 is expressed as follows:

> "That the Australian Military Court is impermissibly defined and vested by *Defence Force Discipline Act* 1982 ss 10, 61, 114 and 115 and Part VIII Division 3 with a criminal jurisdiction because trial of the alleged offence under s 61 to be prosecuted by the Director of Military Prosecutions is a general criminal jurisdiction 'matter' of a kind specified in ss 75 (i), 76 (i) and (ii) of the Constitution interferes with an essential feature of State government and offends the integrated judicial system in Australia under the Constitution through Chapter III and ss 51, 52, 73, 80, 106, 107, 109, 111, 118, 119, 120, 121 and 122 of the Constitution."

---

11 (1915) 19 CLR 629; [1915] HCA 13.

12 (1985) 159 CLR 264; [1985] HCA 72.

13 (1928)41 CLR 128; [1928] HCA 18.

14 (1938) 59 CLR 556; [1938] HCA 10.

15 (1954) 94 CLR 86; [1954] HCA 43.

16 (1968) 121 CLR 283; [1968] HCA 80.

17 (1978) 141 CLR 182; [1978] HCA 56.

18 (2000) 203 CLR 248; [2000] HCA 53.

19 (1999) 200 CLR 386; [1999] HCA 57.

There seems to have been an error of logic in the construction of this ground which, as presently framed, does not make much sense. It seems to suggest that the jurisdiction of the AMC is invalidly conferred because the trial of the particular offence with which the plaintiff is charged under s 61 will interfere with an essential feature of State government and offend the integrated judicial system in Australia.

16 In his explanation of the ground in the proposed s 78B notice the plaintiff says, inter alia:

> "67 The general criminal jurisdiction of a State is an essential feature for continued existence of the States as recognised by the Constitution and effectively the DFDA impermissibly discriminates between application of the general criminal law of the States and the Jervis Bay Territory general criminal law. Section 109 of the Constitution does not permit the co-existence of what are in essence State laws that must be inconsistent with the DFDA offences under s 61. It matters not whether the jurisdiction involves of the judicial power of the Commonwealth as there still an incompatible interference by Commonwealth law with an essential function of State governments, and in this case specifically, the State of Queensland." [sic]

17 The submissions in relation to ground 5, like those in relation to other grounds, are expressed in sweeping language but do not disclose clear lines of argument. The ground appears to roll up two propositions. The first is that the Act "interferes with an essential feature of State government". The second is that it "offends the integrated judicial system in Australia under the Constitution …". In submissions in support of the ground in the proposed s 78B notice, the plaintiff seeks to distinguish or have overruled some sixteen decisions of this Court. The ground appears also to rely, inter alia, upon various provisions of the Constitution including ss 118 and 122 in a way that eludes ready comprehension.

18 By ground 7, it is asserted that the alleged offence against s 61 of the Act is beyond the jurisdiction of the AMC. This is because Ch III and ss 106 and 109 of the Constitution preclude trial by service tribunals of an offence that would be a civil offence under the general law unless the alleged offence has a service connection and was said to have been committed on active service outside the jurisdiction of ordinary courts or in circumstances or places where the jurisdiction of ordinary courts cannot be exercised.

19 The Solicitor-General of the Commonwealth submitted that, as appears from amendments to grounds 4 and 5 in the proposed further amended application, and, as is made clear by the proposed s 78B notice, the plaintiff is seeking to reagitate grounds dismissed as unarguable by Gleeson CJ in *White v*

Director of Military Prosecutions [2006] HCATrans 566 at 770-885. The Commonwealth contended that:

> "10.1. By ground 4 the Plaintiff seeks a trial on indictment and by a jury pursuant to s 80 of the Constitution. The plaintiff in the recent matter of *White v DMP* (2007) 231 CLR 570 sought to raise the same issue. Gleeson CJ dismissed the application for an order to show cause in that matter insofar as it raised that issue on the ground that there was 'no arguable basis for a grant of final relief'.
>
> 10.2. By ground 5 the Plaintiff appears to argue in part that s 61 of the DFDA does not give full faith and credit to the criminal jurisdiction of the State of Queensland and is thus invalid. Again, in this case, the issue was raised by the plaintiff in *White* and again the application in that matter was dismissed by Gleeson CJ on the basis that there was no 'arguable basis for a grant of final relief'."

20 The Solicitor General also pointed out that the proposed s 78B notice indicates that the plaintiff seeks to argue, under ground 5, that Parliament cannot confer a "separate judicial power to determine criminal guilt outside Chapter III of the Constitution and beyond the appellate power of s 73 of the Constitution". Particular reliance is placed on the operation of s 61 of the Act. The plaintiff's argument, it was said, is very similar to if not the same in substance as the arguments rejected by the Full Court in *White*[20]. Insofar as the amended application seeks by ground 5 to agitate the arguments again, the Solicitor-General submitted that it should be dismissed. The other arguments in relation to ground 5 appear to be the same as those raised by grounds 3 and/or 6.

21 As to ground 7, the Solicitor-General contended that in order to succeed the plaintiff would need leave to argue that each High Court case decided post World War II that has considered the constitutional validity of a military justice system outside Ch III of the Constitution was wrongly decided because in each case there was no service connection of the type said by the plaintiff to be necessary. Reference was made in this context to *White*; *Re Aird; Ex parte*

---

20 See *White v Director of Military Prosecutions* (2007) 231 CLR 570 at [14] and [24]-[25] per Gleeson CJ, [57]-[59] and [75] per Gummow, Hayne and Crennan JJ, [233]-[238] per Callinan J, [246] per Heydon J.

Alpert[21]; *Re Tyler; Ex parte Foley*[22]; *Re Nolan; Ex parte Young;*[23] and *Re Tracey; Ex parte Ryan*[24].

22 In his submission in reply, the plaintiff argued that the observations made by Gleeson CJ in *White* were "clearly distinguishable" as White's application for referral was based on different legislation. It did not involve the AMC, a military jury or the vesting of criminal jurisdiction. How that distinction was material to the aspects of the grounds under challenge by the Commonwealth did not emerge with any clarity.

23 In relation to ground 4, the plaintiff said the ground was "based on s 80 of the Constitution and the true characterisation of the offence as being within Ch III". He contended that the ground was not run in *White* and the basis upon which the majority in *Re Tracey* and *Nolan* distinguished s 80 was the allegedly different nature of service offences from offences created by the ordinary law. This "parallel coexistence", it was said, could not be sustained by close analysis of the structure and text of the Constitution, and in particular the 10 sections of Ch III (including s 80).

24 Ground 5 is said to have been based on controversies raised under s 61 of the Act, being matters within ss 75(i), 76(i) and (ii) of the Constitution " … as well as a Melbourne Corporation argument and the related argument of offending an integrated judicial system".

25 As to ground 7, the plaintiff said there was no concession that the proceedings were within the Defence power and that the test applied to determine whether disciplinary proceedings are within legislative power is wrong because it fails to give effect to other Constitutional principles of limitation.

26 In my opinion the submissions made on behalf of the Commonwealth in respect of grounds 4, 5 and 7 should be accepted. In light of the existing authority of this Court, the contentions raised by those grounds to the extent that they do not overlap with grounds 2, 3 and 6 are unsustainable and should go no further. I am prepared therefore to make directions giving leave to the plaintiff to file its proposed Further Amended Application for an Order to Show Cause. I will order that the application so filed be dismissed insofar as it seeks relief on grounds 4, 5 and 7 and that it otherwise be referred for further hearing by a Full

---

21 (2004) 220 CLR 308; [2004] HCA 44.

22 (1994) 181 CLR 18; [1994] HCA 25.

23 (1991) 172 CLR 460; [1991] HCA 29.

24 (1989) 166 CLR 518; [1989] HCA 12.

Court on grounds 1, 2, 3 and 6. I note that the parties have agreed a Statement of Facts which all accept as sufficient for the purposes of the hearing. The matter should be able to be heard in the April sittings of the Court.

27 The orders I will make are as follows:

1. The name of the first defendant be amended to "Colonel Peter John Morrison, a Military Judge of the Australian Military Court".

2. The Plaintiff have leave to file a Further Amended Application for an Order to Show Cause in the form notified to the registry on 9 January 2009.

3. The Further Amended Application for an Order to Show Cause, insofar as it seeks relief on Grounds 4, 5 and 7, be dismissed.

4. The Further Amended Application for an Order to Show Cause, insofar as it seeks relief on Grounds 1, 2, 3 and 6, be referred for further hearing by a Full Court.

5. The plaintiff file and serve a revised s 78B notice by not later than 4pm on 23 January 2009, and file an affidavit of service by not later than 4pm on 2 February 2009.

6. The second defendant prepare and file an Application to Show Cause book, in accordance with the index as settled by the Registry, by not later than 4pm on 10 March 2009 (being within 10 working days of the plaintiff filing the affidavit of service of the s 78B notice).

7. The standard timetable for filing submissions set out in High Court Practice Direction No 1 of 2000 be varied as follows:

   7.1 The plaintiff shall file and serve its written submissions on or before 6 February 2009.

   7.2 The second defendant shall file and serve its written submissions at least 15 clear working days before the hearing of the Further Amended Application by the Full Court.

   7.3 Any intervener shall file and serve its written submissions at least 10 clear working days before the hearing of the Further Amended Application by the Full Court.

7.4 The plaintiff may file and serve written submissions in reply at least five working days before the hearing of the Further Amended Application by the Full Court.

7.5 The second defendant may file and serve written submissions in reply to any interveners at least five working days before the hearing of the Further Amended Application by the Full Court.

8. Costs of this hearing be costs in the cause.

9. The plaintiff's summons dated 16 July 2008 be otherwise dismissed.

10. Liberty to apply in writing on three clear working days notice.