

HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

PAUL NICHOLAS

PLAINTIFF

AND

THE COMMONWEALTH OF AUSTRALIA & ANOR

DEFENDANTS

Nicholas v The Commonwealth [2011] HCA 29

10 August 2011

S183/2010

ORDER

1. *Order that the question stated in the special case be answered as follows:*

Question: Is item 5 of Schedule 1 to the Military Justice (Interim Measures) Act (No 2) 2009 (Cth) a valid law of the Commonwealth Parliament?

Answer: Yes.

2. *The plaintiff pay the defendants' costs.*

Representation

B Levet with A B Petrie for the plaintiff (instructed by Kinghan & Associates)

S J Gageler SC, Solicitor-General of the Commonwealth with S J Free for the first defendant (instructed by Australian Government Solicitor)

Submitting appearance for the second defendant

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Nicholas v The Commonwealth

Constitutional law (Cth) – Judicial power of Commonwealth – Constitution, Ch III – Validity of laws – Plaintiff defence force member – Plaintiff convicted of disciplinary offences and sentenced to punishment by Australian Military Court ("AMC") established under *Defence Force Discipline Act* 1982 (Cth) ("Discipline Act") – Plaintiff subjected to punishment – High Court subsequently held invalid provisions of Discipline Act establishing AMC – *Military Justice (Interim Measures) Act (No 2)* 2009 (Cth) ("Interim Measures Act"), Sched 1, item 5 applied where AMC had imposed punishment to declare rights and liabilities of all persons to be same as if punishment properly imposed by general court-martial, subject to review under Sched 1, Pt 7 – Whether provisions of Interim Measures Act had prohibited features of bill of pains and penalties – Whether provisions invalid as contrary to Ch III.

Words and phrases – "bill of pains and penalties", "usurpation of judicial power".

Constitution, s 51(vi), Ch III.

Defence Force Discipline Act 1982 (Cth), ss 27, Pt VIIIA.

Military Justice (Interim Measures) Act (No 2) 2009 (Cth), Sched 1, items 3, 4, 5, Pt 7.

1 FRENCH CJ, GUMMOW, HAYNE, CRENNAN, KIEFEL AND BELL JJ.
From 1 January 2004 until 25 August 2008, the plaintiff was a commissioned officer in the Australian Army, holding the rank of Captain. Between 18 and 25 August 2008 he was tried by the Australian Military Court ("the AMC") on 11 charges under the *Defence Force Discipline Act* 1982 (Cth) ("the Discipline Act"). On 25 August 2008, he was convicted of four of those offences, two of obtaining a financial advantage contrary to s 135.2(1) of the *Criminal Code* (Cth) (as applied by s 61(3) of the Discipline Act), one of engaging in conduct tending and intended to pervert the course of justice and one of attempting to pervert the course of justice. He was sentenced to be reduced in rank to Lieutenant with seniority in that rank dating from 1 January 2006, to dismissal from the defence force effective on 19 September 2008 and to a severe reprimand. Orders were made that he pay certain amounts as reparation to the Commonwealth.

2 On 26 August 2009, after the orders made by the AMC had taken effect, this Court declared¹ that the provisions of Div 3 of Pt VII of the Discipline Act, which established the AMC, were invalid. In response to this decision, the Parliament enacted the *Military Justice (Interim Measures) Act (No 2)* 2009 (Cth) ("the Interim Measures No 2 Act"), the provisions of Pt 2 of Sched 1 to which Act apply with respect to certain punishments imposed by the AMC (including those imposed on the plaintiff).

3 By an action brought in the original jurisdiction of this Court the plaintiff alleged that those provisions of the Interim Measures No 2 Act which "purport to give effect to punishments ... and orders made by the [AMC] are invalid". He sought a declaration that the relevant provisions of the Interim Measures No 2 Act are invalid, together with declarations that the convictions recorded by the AMC against him are invalid, that the punishments imposed on him are invalid and that his dismissal from the defence force was invalid and of no effect.

4 His central allegation was that the Interim Measures No 2 Act is a bill of pains and penalties and thus invalid as being contrary to Ch III of the Constitution.

5 The second defendant, the Chief of the Defence Force, filed a submitting appearance. The plaintiff and the Commonwealth joined in stating a special case in which the following question was stated for the opinion of the Full Court:

1 *Lane v Morrison* (2009) 239 CLR 230; [2009] HCA 29.

French CJ
Gummow J
Hayne J
Crennan J
Kiefel J
Bell J

2.

"Is item 5 of Schedule 1 to the [Interim Measures No 2 Act] a valid law of the Commonwealth Parliament?"

The special case was heard at the same time as the special case stated in *Haskins v The Commonwealth*².

6

The impugned provisions and the arguments advanced in support of the submission that the impugned provisions constituted a bill of pains and penalties are sufficiently recorded in the reasons given in *Haskins*. For the reasons given in *Haskins*, the question stated in the special case in this matter should be answered "Yes". The impugned provisions of the Interim Measures No 2 Act do not have the prohibited features of a bill of pains and penalties. The impugned provisions are not invalid as contrary to Ch III. The plaintiff must pay the costs of the special case.

3.

7 HEYDON J. The plaintiff, Paul Nicholas, seeks certain declarations against the first defendant, the Commonwealth of Australia, and the second defendant, the Chief of the Defence Force. The declarations include declarations that convictions recorded by the Australian Military Court against him, punishments imposed by the Australian Military Court on him, and his dismissal from the Australian Defence Force were invalid. He was convicted on two charges relating to the obtaining of financial advantage, and two charges relating to perverting the course of justice. Taken as a whole, the sentences were a reduction in rank, orders to pay reparation, a severe reprimand, and dismissal from the Defence Force.

8 The circumstances relating to the plaintiff's claim are largely the same as those relating to the plaintiff in *Haskins v The Commonwealth*³, save that the plaintiff in that case lost his liberty for a time, and the plaintiff in this case has been dismissed. The Australian Military Court's convictions, punishments and orders would have been invalid but for the *Military Justice (Interim Measures) Act (No 2) 2009* (Cth).

9 However, for the reasons given in relation to the plaintiff in *Haskins v The Commonwealth*⁴, item 5 of Sched 1 to that Act is invalid. The question in the Special Case should be so answered. Some additional arguments were advanced for that outcome, but they need not be considered. The declarations which the plaintiff seeks should be made. The first defendant must pay the plaintiff's costs.

3 [2011] HCA 28.

4 [2011] HCA 28 at [95]-[113].