HIGH COURT OF AUSTRALIA

FRENCH CJ

Matter No S119/2015

HAMDI ALQUDSI PLAINTIFF

AND

THE COMMMONWEALTH OF AUSTRALIA DEFENDANT

Matter No S132/2015

HAMDI ALQUDSI APPLICANT

AND

THE QUEEN RESPONDENT

Alqudsi v The Commonwealth
Alqudsi v The Queen
[2015] HCA 49
20 July 2015
S119/2015 & S132/2015

ORDER

Matter No S119/2015

1. *The proceeding be remitted to the Supreme Court of New South Wales.*

2. *The proceeding continue in that Court as if the steps already taken in the proceeding in this Court have been taken in that Court.*

3. *The Registrar of this Court forward to the proper officer of that Court photocopies of all documents filed in this Court.*

4. *The costs of the Commonwealth's amended summons, this summons, be the costs in the cause remitted.*

5. *The costs of the proceeding to the date of remission, including the costs of this order, are to be according to the scale applicable to proceedings in this Court and thereafter according to the scale applicable to that Court and in the discretion of that Court.*

6. *The costs of the plaintiff's summons of 15 July 2015 will be costs in the cause.*

Matter No S132/2015

1. *The application for removal is dismissed.*

2. *There will be no order as to costs.*

Representation

S B Lloyd SC with D P Hume for the plaintiff/applicant (instructed by Zali Burrows Lawyers)

C L Lenehan for the defendant/respondent (instructed by Australian Government Solicitor and the Commonwealth Director of Public Prosecutions)

CATCHWORDS

Alqudsi v The Commonwealth
Alqudsi v The Queen

Remitter summons – Plaintiff sought declaratory relief that s 7(1)(e) of *Crimes (Foreign Incursions and Recruitment) Act* 1978 (Cth) is invalid in context of pending criminal proceedings – Whether proceedings should be remitted.

Application for removal – Whether sufficient cause shown to remove pending criminal proceedings – Relevance of principle against fragmentation of pending criminal proceedings.

Words and phrases – "fragmentation of pending criminal proceedings", "sufficient cause".

Judiciary Act 1903 (Cth), ss 40(1)-(2), 44(1).

1 FRENCH CJ. The plaintiff, Hamdi Alqudsi, has been charged on an indictment dated 7 May 2015 with seven counts of offences against s 7(1)(e) of the *Crimes (Foreign Incursions and Recruitment) Act* 1978 (Cth) ("the Act"). Each of the counts alleges that between 25 June and 14 October 2013 in Sydney he performed services for another person with the intention of supporting or promoting the commission of an offence against s 6 of the Act, being the entry by that person into a foreign State, namely Syria, with intent to engage in a hostile activity in Syria, in particular engaging in armed hostilities in Syria. Each of the seven counts related to services performed for a different person. The Act was in force at the time of the alleged offences but was repealed with effect from 1 December 2014 by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act* 2014 (Cth). Section 7(1)(e) of the Act made it an offence to:

> "give money or goods to, or perform services for, any other person or any body or association of persons with the intention of supporting or promoting the commission of an offence against section 6".

Section 6 provided, inter alia:

> "(1) A person shall not:
>
> (a) enter a foreign State with intent to engage in a hostile activity in that foreign State; or
>
> (b) engage in a hostile activity in a foreign State."

The term "engage in a hostile activity in a foreign State" covers a number of categories of conduct and includes doing an act with the intention of achieving the overthrow, by force or violence, of the government of the foreign State or engaging in armed hostilities in the foreign State[1]. The term also extends to causing by force or violence the public in the foreign State to be in fear of suffering death or personal injury[2].

2 The plaintiff was originally arrested and charged with the offences on 3 December 2013. Between that time and November 2014 the charges were pending in the Local Court. In the course of an appearance for a mention in the Local Court on 14 October 2014, the plaintiff's lawyer indicated to the Crown the prospect of a High Court challenge to the Act.

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1 Act, s 6(3)(a), (aa).

2 Act, s 6(3)(b).

3 On 24 November 2014, the Local Court committed the plaintiff for trial in the District Court in Sydney and directed he appear in that Court on 28 November 2014.

4 The Commonwealth Director of Public Prosecutions applied to the Chief Justice of New South Wales, under s 128 of the *Criminal Procedure Act* 1986 (NSW), for an order that the trial of the plaintiff proceed in the Supreme Court of New South Wales and not the District Court. The solicitor for the plaintiff advised on 21 January 2015 that there was no objection to the Crown application. In the letter so advising, the plaintiff's solicitor further indicated that a constitutional challenge relating to the validity of the Act was "under active contemplation" and foreshadowed that an application would be made to the High Court "that may need to be dealt with prior to any trial processes being undertaken".

5 On 27 January 2015, the Chief Justice of New South Wales made an order under s 128 of the *Criminal Procedure Act* so that the prosecution could proceed in the Supreme Court. The Chief Justice in his letter advising of that order noted the potential constitutional challenge to the legislation.

6 The matter came before Johnson J as Criminal List Judge in the Arraignments List on 1 April 2015. There was discussion, among other things, about the possibility of a High Court challenge and the proceedings were adjourned until 8 May 2015.

7 The plaintiff appeared in the Arraignments List on 8 May 2015, was arraigned on the seven counts and pleaded not guilty to each of them. The Director of Public Prosecutions sought a trial date. Counsel for the plaintiff indicated that consideration was still being given to an application to the High Court. Justice Johnson decided that the appropriate course would be to fix a trial date given that much time had passed and there was no application which had been brought in the High Court. Counsel for the plaintiff told his Honour that they would be content with him setting a trial date.

8 Following discussion about the number of witnesses and the likely length of the hearing, the trial was fixed for six weeks commencing on 21 September 2015. His Honour directed that any notice of motion and affidavit with respect to pre-trial issues be filed and served by the plaintiff by 18 June 2015.

9 The Crown filed and served a notice of prosecution case and other materials on 27 May 2015, pursuant to s 142 of the *Criminal Procedure Act* and the Practice Note in relation to criminal proceedings.

10 On 18 June 2015, the plaintiff commenced the present proceedings in this Court seeking a declaration that s 7(1)(e) of the Act is invalid. On the same day the plaintiff's solicitor filed a motion in the Supreme Court seeking an order that

the trial of the charges against the plaintiff be vacated and that the trial be stayed pending the outcome of the proceedings commenced in the High Court. Justice Johnson, in dealing with the motion, noted that no explanation had been offered for the delay in instituting the proceedings in the High Court, which had been foreshadowed as long ago as 14 October 2014. His Honour said what must have been entirely clear and obvious to the accused and his legal representatives was that the Supreme Court would proceed to list the matter for trial and make associated orders. The making of repeated but unparticularised statements that a High Court challenge was under consideration would not itself cause the Supreme Court to take a different approach.

11 In the event, his Honour did not dismiss the motion but indicated that the plaintiff would have to present further evidence as to what had and had not happened in the past and of steps taken to urgently prosecute the matter filed in the High Court. He made clear to the plaintiff that it should not be assumed that the Supreme Court would automatically vacate the trial date. Whatever course the Court took would have to be based upon evidence accompanied by submissions. He adjourned the motion to 9 July 2015 and directed the plaintiff to file any further affidavit in support of it by 6 July 2015.

12 By a summons filed on 3 July 2015 in the declaratory proceedings instituted in this Court by the plaintiff, the Commonwealth sought a direction that the matter be remitted to the Supreme Court of New South Wales. That application was made under s 44(1) of the *Judiciary Act* 1903 (Cth).

13 In separate proceedings, S132 of 2015, commenced in this Court by application on 7 July 2015, the plaintiff sought an order pursuant to s 40 of the *Judiciary Act*, removing the whole of the cause now pending in the Supreme Court of New South Wales, that is to say the pending prosecution, into this Court.

14 On 9 July 2015, Johnson J observed that the further evidence filed by the plaintiff pursuant to his direction said nothing about why it had taken until 18 June to commence the declaratory proceedings in this Court. There was, and is, no evidence on the record about the delay. His Honour then further adjourned the motion to 17 July and on that day Adamson J, who will be the trial judge, adjourned it further until 20 July 2015.

15 On 15 July 2015, I heard a summons by the plaintiff seeking to have the remitter application adjourned and heard concurrently with the removal application. I made orders directing that both the remitter summons and the removal application be heard today.

16 Section 40(1) of the *Judiciary Act* relevantly provides:

> "Any cause or part of a cause arising under the Constitution or involving its interpretation that is at any time pending in ... a court of a State ... may, at any stage of the proceedings before final judgment, be removed into the High Court under an order of the High Court, which may, upon application of a party for sufficient cause shown, be made on such terms as the Court thinks fit ..."

It is difficult to see how at present there is a formal question arising under the Constitution or involving its interpretation in the Supreme Court in the pending prosecution against the plaintiff. The making of statements from the Bar Table in the Supreme Court about unarticulated challenges to federal legislation under which the prosecution is brought does not lead to the characterisation of the matter as one attracting the application of s 40(1). The position would have been different if a motion to quash the indictment on the basis of the invalidity of s 7(1)(e) had been filed in the Supreme Court. Such a motion is foreshadowed if the proceedings are removed into this Court. However, s 40(2) relevantly provides that:

> "Where:
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> ...
>
> (b) there is at any time pending in a court of a State a cause involving the exercise of federal jurisdiction by that court;
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> the High Court may, upon application of a party ... at any stage of the proceedings before final judgment, order that the cause or a part of the cause be removed into the High Court on such terms as the Court thinks fit."

The High Court is not to make such an order unless it is by consent of all parties or[3]:

> "the Court is satisfied that it is appropriate to make the order having regard to all the circumstances, including the interests of the parties and the public interest."

That requirement may be seen as setting a test which is somewhat different from the sufficient cause requirement in the case in which a constitutional question arises, but if the present application were unable to be dealt with under s 40(1), in my opinion, the power under s 40(2) would cover the case.

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3 *Judiciary Act* 1903 (Cth), s 40(4)(b).

17 Despite the real question about whether in a formal sense the proceedings in the Supreme Court at this stage arise under the Constitution or involve its interpretation within the meaning of s 40(1), I am prepared to assume an affirmative answer to that question for present purposes and to proceed on the basis that the requisite test is whether there is sufficient cause to make the removal order. The practical considerations relevant to that criterion overlap with those relevant to the question whether the cause pending in this Court should be remitted to the Supreme Court.

18 Remitter is provided for by s 44 of the *Judiciary Act* and, relevantly, in subs (1):

> "Any matter ... that is at any time pending in the High Court ... may, upon the application of a party or of the High Court's own motion, be remitted by the High Court to any federal court, court of a State or court of a Territory that has jurisdiction with respect to the subject-matter and the parties, and, subject to any directions of the High Court, further proceedings in the matter or in that part of the matter, as the case may be, shall be as directed by the court to which it is remitted."

19 The plaintiff's constitutional points are set out under the heading "Basis of claimed invalidity" in the writ issued in S119 of 2015. Paragraphs 4 to 6 state:

> "4. The impugned legislation falls outside the ambit of the heads of power set forth in section 51 of the Constitution. Without limiting the generality of the foregoing, the Plaintiff says the impugned legislation does not properly fall under section 51(vi) or (xxix) of the Constitution and is invalid.
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> 5. Section 7(1)(e) of the Act falls outside the ambit of the defence power, because the purpose of the legislation is not the defence of Australia.
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> 6. The various potential subject-matters of section 7(1)(e) of the Act provide no basis for the characterization of that provision as relating to the external affairs of Australia. In so far as that provision may operate in circumstances which have a tenuous or remote connection with external affairs, they cannot properly be characterized as relating to the external affairs of Australia."

20 The plaintiff submits that his challenge to the validity of s 7(1)(e) raises important and novel questions of constitutional law which can only be resolved in this Court. That, of course, may be true of any challenge to validity, whether based on established criteria or a novel argument about the scope of Commonwealth legislative power. It is a proposition which would encompass

any argument that this Court should not follow its own previous decisions. The characterisation of a point as novel covers the frivolous as well as the substantial.

21 In considering the nature of the constitutional challenge which the plaintiff foreshadows, as elaborated in the written and oral submissions on his behalf, I will accept for present purposes that he has an arguable case. The existence of an arguable case, however, is not sufficient cause for removal of proceedings into this Court. The Commonwealth makes the obvious point that to grant the removal application would be to disturb or interrupt the course of criminal proceedings in the Supreme Court. It would undoubtedly delay the commencement of those proceedings by some months.

22 There is ample authority for the proposition that this Court should be reluctant to disturb the progress of pending criminal proceedings. As Kirby J said in *Pan Laboratories Pty Ltd v The Commonwealth*[4]:

> "This Court has said on many occasions, including recently, that great restraint must be exercised by the High Court and by other courts of appeal and review before issuing orders or taking steps which may disturb or fragment the course of a criminal trial." (footnote omitted)

His Honour also applied that principle, as the Commonwealth points out, in determining to remit proceedings in this Court to the District Court under s 44 of the *Judiciary Act*[5]. Further, it is open to the plaintiff, as has been foreshadowed, to file a motion to quash the indictment in the Supreme Court. That Court could also make directions for dealing with the declaratory proceedings if they are remitted to it from this Court. Whether it would be convenient to deal with them together with the quashing motion or to deal with the pre-trial motion first and make other directions in relation to the declaratory proceedings would be a matter for the Supreme Court.

23 There are many contingencies that might shape the progress of the debate about constitutional validity in the Supreme Court. They may include an application for leave to appeal to the Court of Criminal Appeal from a decision on a quashing motion and/or an appeal in relation to declaratory proceedings, each of which might arguably lead to an application for special leave to appeal to this Court, even before the trial itself proceeds. There are other contingencies under which the constitutional point might never be reached or might become irrelevant, for example, because of an acquittal after trial. In my opinion, insufficient cause has been shown to overcome the principle against

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4 (1999) 73 ALJR 464 at 466 [11].

5 (1999) 73 ALJR 464 at 468 [14]-[15].

fragmentation of pending criminal proceedings by the interlocutory interventions of this Court.

24 I therefore order in S132 of 2015 that:

1. The application for removal is dismissed.

2. There will be no order as to costs.

In S119 of 2015, the orders will be:

1. The proceeding be remitted to the Supreme Court of New South Wales.

2. The proceeding continue in that Court as if the steps already taken in the proceeding in this Court have been taken in that Court.

3. The Registrar of this Court forward to the proper officer of that Court photocopies of all documents filed in this Court.

4. The costs of the Commonwealth's amended summons, this summons, be the costs in the cause remitted.

5. The costs of the proceeding to the date of remission, including the costs of this order, are to be according to the scale applicable to proceedings in this Court and thereafter according to the scale applicable to that Court and in the discretion of that Court.

6. The costs of the plaintiff's summons of 15 July 2015 will be costs in the cause.