

HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

THE ATTORNEY-GENERAL FOR
THE COMMONWEALTH

APPELLANT

AND

RONALD TSE CHU-FAI

FIRST RESPONDENT

THE GOVERNOR OF THE METROPOLITAN
RECEPTION AND REMAND CENTRE

SECOND RESPONDENT

Attorney-General for the Commonwealth v Tse Chu-Fai (No 2)
(C13-1997) [1998] HCA 36
20 May 1998

ORDER

The first respondent pay the appellant's costs of the proceedings in this Court.

Cause removed under s 40 of the *Judiciary Act* 1903 (Cth)

Representation:

D M J Bennett QC with M A Wigney and N E Abadee for the appellant (instructed by Australian Government Solicitor)

D F Jackson QC with I A Shearer and D Jordan for the first respondent (instructed by Deacons Graham & James)

No appearance for the second respondent.

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

1 GAUDRON, McHUGH, GUMMOW, HAYNE AND CALLINAN JJ. The first respondent should pay the appellant's costs of the proceedings in this Court.

2 KIRBY J. These proceedings were removed into this Court from the Court of Appeal of the Supreme Court of New South Wales¹. The Court allowed the appeal and set aside the orders of the Supreme Court (Graham AJ)². Ordinarily³, including in extradition cases⁴, this outcome would carry the consequence that the successful appellant (the Attorney-General for the Commonwealth) would recover an order for costs in his favour against the first respondent who was the contradictor in this Court. However, there is no inflexible rule requiring that result. The costs of the appeal were reserved. Written submissions were received from both sides.

3 The first respondent submitted that there were five reasons, amounting to special circumstances, which warranted a departure in this case from the ordinary rule:

1. That the appellant had relied on an argument that a certificate signed by him, and tendered at the trial, was conclusive, or alternatively, highly relevant, on the question whether Hong Kong was an "extradition country"⁵ and that the assertion of conclusiveness raised an issue of general importance which had influenced the removal of the cause into this Court⁶. In its reasons disposing of the appeal the Court did not accede to the argument that the certificate was conclusive⁷. Accordingly, the appellant lost on that issue which was tendered by him for decision;
2. That the questions raised by the proceedings were of general importance, potentially affecting many other cases involving extradition to Hong Kong;

1 Pursuant to the *Judiciary Act* 1903 (Cth), s 40.

2 See *Attorney-General for the Commonwealth v Tse Chu-Fai* (1998) 153 ALR 128; [1998] HCA 25.

3 *Milne v Attorney-General for the State of Tasmania* (1956) 95 CLR 460 at 477; *Oshlack v Richmond River Council* (1998) 72 ALJR 578; 152 ALR 83; [1998] HCA 11 at 35, 67, 134.

4 *Trimbole v The Commonwealth* (1984) 155 CLR 186 at 192; *Riley v The Commonwealth* (1985) 159 CLR 1 at 21.

5 *Extradition Act* 1988 (Cth), s 5.

6 See *Attorney-General for the Commonwealth v Tse Chu-Fai*, Transcript of Proceedings before Gummow J (In Chambers), 22 December 1997 at 5.

7 *Attorney-General for the Commonwealth v Tse Chu-Fai* (1998) 153 ALR 128; [1998] HCA 25 at 51-57.

3.

3. That the proceedings were analogous to criminal proceedings and that, therefore, the compensatory purpose of awarding costs to a successful party was less important⁸ having regard to the fact that the appellant, a federal Minister, had secured the determination by this Court of important questions of public law of significance to his administration of the *Extradition Act 1988* (Cth);
4. That the costs in the Supreme Court and the Court of Appeal will be very substantial and an onerous burden on an individual citizen such as the first respondent; and
5. That the first respondent "may have" resisted the application for the removal of the cause into this Court if the point concerning the suggested conclusiveness of the Executive certificate had been excised from argument and the matter confined to a pure question of statutory construction. Had this been done, the costs in this Court would probably have been avoided because, it is submitted:
 - (a) The first respondent may have resisted the removal application and had the matter heard in the Court of Appeal of New South Wales. If the Court of Appeal had dismissed the appeal, he submitted, this Court may have granted special leave only on the condition that the Attorney-General pay the first respondent's costs; or
 - (b) In the event that the matter had been removed to this Court as no more than a question of statutory construction, it was likely that this Court would have imposed a condition that the Attorney-General pay the first respondent's costs.

4 The costs of and incidental to the proceedings are within the direction of this Court⁹, although it is a discretion to be exercised judicially, having regard to ordinary principles and taking into account relevant considerations. In my opinion, of the considerations relied upon by the first respondent those numbered (1) and (5), at least, are relevant. It cannot be doubted that one reason which affected the procedure that brought the cause to this Court was the reliance of the appellant on his argument that the certificate which he tendered at trial was conclusive as to the matters stated in it¹⁰. That argument raised an important question with significant constitutional implications. It extended the hearings. The finding by this Court that the certificate was admissible on a much more limited, and non-conclusive,

8 *Latoudis v Casey* (1990) 170 CLR 534 at 543-544.

9 *Judiciary Act 1903* (Cth), s 26; High Court Rules, O 71, r 1(1).

10 Amended Notice of Appeal, ground 3.

4.

basis¹¹ represented a significant loss for the appellant on an important point of general application which he argued in this Court and below. It would be unjust to burden the first respondent with the costs of having that point determined.

5 In my opinion the appellant should have only half of his costs in this Court and in the courts below. In so ordering I consider that overall justice is done on the disposition of costs which would not be done if the first respondent had to bear all of the costs.

11 *Attorney-General for the Commonwealth v Tse Chu-Fai* (1998) 153 ALR 128; [1998] HCA 25 at 55-56.

