

HIGH COURT OF AUSTRALIA

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

RE EAST & ORS

RESPONDENTS

Ex parte QUOC PHU NGUYEN

APPLICANT

Re East & Ors; Ex parte Nguyen (M53-1997) [1998] HCA 73

Date of Order: 5 August 1998

Date of Publication of Reasons: 3 December 1998

ORDER

Application dismissed with costs.

Representation:

C H Francis QC with R A R Lewis and D A Perkins for the applicant (instructed by Kuek & Associates) at the hearing on 10 December 1997

P N Vickery QC with D A Perkins for the applicant (instructed by Kuek & Associates) at the hearing on 5 August 1998

J D McArdle with T P Burke for the first respondent (instructed by Solicitor for Public Prosecutions (Victoria))

No appearance for second, third and fourth respondents

Interveners:

H C Burmester QC, Acting Solicitor-General for the Commonwealth, with A K Lukeman intervening on behalf of the Attorney-General for the Commonwealth (instructed by Australian Government Solicitor)

D Graham QC, Solicitor-General for the State of Victoria, with N D Hopkins intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

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

CATCHWORDS

Re East & Ors; Ex parte Nguyen

Constitutional law – Original jurisdiction of the High Court – Matters arising under any treaty – Treaty implemented by statute – Whether statute implementing treaty provides exclusive regime for remedying contravention – Whether application raises a "matter" – Constitution, s 75(i).

Criminal law – Procedure – Fair trial – Interpretation of evidence from English language – Entitlement of accused to understand evidence – Duty of judge – Whether any risk of miscarriage of justice where no request made.

Words and Phrases – "matter", "Arising under any treaty", "requires".

Constitution, s 75(i)

Racial Discrimination Act 1975 (Cth), ss 9, 10, Pt III.

1 GLEESON CJ, GAUDRON, McHUGH, GUMMOW, HAYNE AND CALLINAN JJ.
The applicant, Quoc Phu Nguyen, commenced proceedings in the original jurisdiction of the Court seeking orders of certiorari and declaratory relief. On 31 July 1997, a Justice of the Court ordered pursuant to O 55 r 2 of the High Court Rules that the application be made by notice of motion to the Full Court. At the conclusion of a hearing on the issue of jurisdiction, the Court dismissed the application with costs, stating that reasons for the decision would be given at a later date. The following are our reasons.

2 The proceedings arose out of a sentence of imprisonment imposed upon the applicant by the Chief Judge of the County Court of Victoria. The applicant made two applications to the Supreme Court of Victoria for remedies in the nature of prerogative relief. Those applications failed. This Court refused his applications for special leave to appeal from the decisions of the Court of Appeal dismissing his appeals. In the present proceedings, the applicant has joined, as respondents, the person in whose name the charge against him was laid, the Magistrates' Court of Victoria at Sunshine, the County Court of Victoria, and the Governor of Fulham Prison. The second, third, and fourth respondents have submitted. The Attorney-General of Victoria and the Attorney-General of the Commonwealth have intervened in support of the first respondent.

3 There arose a question whether the proceedings come within the original jurisdiction of this Court and whether any *prima facie* basis of a claim for relief had been shown. If the question had been answered favourably to the applicant, then issues of fact would have arisen for determination and it would have been appropriate for the matter to be remitted to another court for their resolution.

4 The applicant was one of a group of young males who, on 21 August 1995, took part in an armed robbery at an amusement parlour. He threatened the manager of the amusement parlour with a knife, and made off with a sum of money. On 24 August 1995 he was arrested, and charged with armed robbery, theft, and making a threat to kill. He was remanded on bail to appear before a magistrate for a committal hearing. He obtained legal aid, and retained a solicitor. On 1 April 1996 it was agreed that the applicant would plead guilty to one charge of armed robbery, and that the remaining charges against him would be withdrawn. He was not required to plead before a magistrate, but was committed to the County Court.

5 On 18 September 1996, the applicant came before Chief Judge Waldron in the County Court of Victoria. He was represented by counsel, and pleaded guilty to the charge of armed robbery. On 18 October 1996 he was sentenced by the Chief Judge, who made a Community Based Order for two years. The order was

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subject to various conditions, including a condition that the applicant perform 500 hours of unpaid community work.

6 According to the authorities, the applicant failed to comply with the conditions of the Community Based Order. It was alleged that he failed to report for unpaid community work on two occasions as required, that he was unacceptably absent from supervision on four other occasions, and that he failed to participate in a drug and alcohol monitoring programme as required. He was charged with breaches of the Community Based Order, and came before the Magistrates' Court at Sunshine. He was legally represented. There was no investigation at the hearing of the merits of the allegations against him. Without entering a plea to the charge, he was remanded on bail to appear before the County Court of Victoria.

7 The applicant again came before Chief Judge Waldron in the County Court. He was represented by counsel, who admitted the alleged breaches on his behalf. He gave evidence in mitigation, and was cross-examined. He was found guilty of breaches of the Community Based Order, and was re-sentenced for the original offence of armed robbery. Counsel submitted that the matter could be dealt with adequately by the imposition of a fine. However, the Chief Judge took a serious view of the case, and sentenced the applicant to imprisonment for a period of two years and three months with a minimum period of twelve months before he became eligible for parole.

8 The applicant, who is aged 23, was born in Vietnam, and is of Vietnamese nationality. He immigrated to Australia with his family in 1991, and has lived here continuously since then. It is contended on his behalf that his lack of ability in speaking and understanding the English language meant that, without an interpreter, when confronted with the allegations relating to the breaches of the Community Based Order, he was not able either to give to his legal representatives adequate instructions, or to understand and properly defend the charges against him, either at the Sunshine Magistrates' Court or before Chief Judge Waldron.

9 As was noted above, this contention raises certain factual issues which may have required investigation. The applicant speaks some English. He gave evidence on oath before Chief Judge Waldron, and from a reading of the transcript of the evidence it might appear, superficially at least, that he understood the essence of the allegations against him, and the questions he was being asked about them. His legal representatives did not seek the services of an interpreter either at the Magistrates' Court or in the County Court when he was being dealt with in relation to the breaches of the Community Based Order. Indeed, during the 1996

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proceedings, the Chief Judge had asked counsel whether the applicant required an interpreter and was told that he did not. The applicant conferred with his counsel before appearing before the Chief Judge for the purposes of the breach proceedings, and during part of that time he was accompanied by his father. In the course of the breach proceedings before the Chief Judge there was no suggestion, either by the applicant, or by his father, or by counsel, that he was unable to understand what was going on. Reliance is now placed upon evidence from a linguistics expert that the limit of his ability to speak and understand English is that "he is able to satisfy all survival needs and limited social needs." What exactly is meant by that, and its practical significance, might have required further examination. For the present purposes, however, it is unnecessary to go more deeply into the subject. It suffices to say that the applicant maintained that, by reason of his lack of ability in speaking and understanding English, and the absence of an interpreter at the Magistrates' Court or the County Court, or whilst he was giving instructions to his lawyers, he was a victim of racial discrimination of a kind rendered unlawful by the *Racial Discrimination Act* 1975 (Cth) ("the Act"), and in particular by s 9 of the Act.

10 The applicant also wished to raise an unrelated argument based upon the manner in which the matter was dealt with in the Magistrates' Court, and the failure of the Magistrate to undertake any consideration of the merits of the allegation against him. That, however, may for present purposes be put to one side. It explains some of the grounds of the application for relief, which are set out below.

11 The grounds upon which the applicant relied were as follows:

"(1) There was a miscarriage of justice as the Prosecutor/Applicant was denied, or not afforded, the rights and protection arising from the International Convention on the Elimination of all Forms of Racial Discrimination, such rights and protection having been enacted into the Racial Discrimination Act 1975.

(2) The Prosecutor/Applicant was denied natural justice and/or procedural fairness before the Magistrates' Court at Sunshine in that he was not provided with:

(a) a copy of the breach report of the first respondent translated into the Prosecutor/Applicant's first language, and -

(b) the assistance of an interpreter.

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- (3) The Prosecutor/Applicant was denied natural justice and/or procedural fairness before the County Court at Melbourne in that he was not provided with:
- (a) a copy of the breach report of the first respondent translated into the Prosecutor/Applicant's first language, and -
 - (b) the assistance of an interpreter.
- (4) As there is no record that the second respondent had been relevantly satisfied on 11 March 1997 that the Prosecutor/Applicant had committed a breach of the Community Based Order the second respondent had no power to remit the Charge against the Prosecutor/Applicant to the County Court of Victoria.
- (5) As there was no record before the third respondent on 17 March 1997 that the second respondent had been relevantly satisfied that the Prosecutor/Applicant had committed a breach of the Community Based Order the third respondent had no power to hear the Charge against, and sentence the Prosecutor/Applicant to gaol for two years and three months.
- (6) There was a miscarriage of justice in that the third respondent sentenced the Prosecutor/Applicant upon the basis that all the breaches alleged in the said breach report had been proved against him."

12 Grounds (2) to (6) inclusive, if they stood apart from ground (1), would not have brought the proceedings within the original jurisdiction of this Court. Indeed, they appeared to raise arguments that either were, or could have been, taken in the unsuccessful proceedings in the Supreme Court of Victoria.

13 It is ground (1) which was said to attract the original jurisdiction of the Court. That, it was claimed, brought the application for certiorari and declaratory relief within the jurisdiction conferred by s 75(i) of the Constitution on the basis that this was a matter arising under a treaty. However, that submission raises a threshold question as to the construction of s 75(i) and this question must first be determined.

14 A proceeding which is said to attract the original jurisdiction of this Court with respect to one of the nine descriptions of "matter" contained in the five paragraphs of s 75 of the Constitution and the four paragraphs of s 76 may contain

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within it, or involve at its threshold, a matter within another one or more of those heads of original jurisdiction¹.

15 The present application provides an example. This Court has original jurisdiction with respect to matters arising under the Constitution or involving its interpretation: Constitution, s 76(i); *Judiciary Act* 1903 (Cth), s 30(a). The construction of the phrase "matters ... Arising under any treaty" itself may give rise to such a matter. If it be decided adversely to the applicant that here there is no matter arising under any treaty, then his case under s 75(i) falls away and his application must be dismissed.

16 Differing views have been expressed, by judges and commentators, as to the operation, if any, of the words "Arising under any treaty" in s 75(i) of the Constitution².

17 The applicant relied in particular upon the view taken by McLelland J in *Bluett v Fadden*³ that "where the terms of the treaty have by legislation been made part of the law of the land, it is in a very real sense the treaty which is being interpreted" and "[i]n such cases, the matter in question arises under the treaty". The result would be that even if, as is the case here with the Act, the law did not confer original jurisdiction upon this Court in matters arising under that law, within the meaning of s 76(ii) of the Constitution, this Court would have original jurisdiction by force of s 75(i) itself.

18 However, it is unnecessary and therefore inappropriate to go into that question in the present case. This is because, even if the applicant be correct in his reliance upon *Bluett v Fadden*, nevertheless, in order to attract jurisdiction under s

1 See *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529 at 539.

2 eg *Bluett v Fadden* (1956) 56 SR (NSW) 254; *R v Donyadideh* (1993) 115 ACTR 1; Cowen, *Federal Jurisdiction in Australia*, (1959) at 29-30; Howard, *Australian Federal Constitutional Law*, 2nd ed (1972) at 224; Saunders, "Articles of Faith or Lucky Breaks? - The Constitutional Law of International Agreements in Australia", (1995) 17 *Sydney Law Review* 150. See also *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 480; Starke, "The High Court of Australia and the rule in *Walker v Baird* [1892] AC 491", (1974) 48 *Australian Law Journal* 368.

3 (1956) 56 SR (NSW) 254 at 261.

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75(i), it would be necessary for the applicant to identify a justiciable controversy arising under a treaty. The applicant fails at this anterior stage. There is no "immediate right, duty or liability to be established by the determination of the Court"⁴.

19 Under Art 5 of the International Convention on the Elimination of all Forms of Racial Discrimination, the States parties undertook to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of certain specified rights, including the "right to equal treatment before the tribunals and all other organs administering justice"⁵. The entry into that treaty by Australia created no enforceable rights or obligations under Australian municipal law⁶. However, the Parliament, by enacting the Act, adopted its chosen method of giving effect to Australia's treaty obligations, by enacting laws creating certain rights and obligations and providing certain remedies.

20 The identification of what (if any) private rights are conferred by the Act, either by its express terms or by necessary implication, requires an examination of the nature, scope and terms of the statute "including the nature of the evil against which it is directed, the nature of the conduct prescribed, the pre-existing state of the law, and, generally, the whole range of circumstances relevant upon a question of statutory interpretation"⁷.

21 It is to be observed that, when addressing the subject of equal treatment before tribunals and other organs administering justice, the Parliament was legislating in a context which included the provisions of Ch III of the Constitution, the principles of the common law, and Federal and State statute law concerning the role of the courts and the administration of civil and criminal justice. The ideal

4 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265.

5 International Convention on the Elimination of all Forms of Racial Discrimination, Art 5(a).

6 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-287, 298; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 212.

7 *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 at 405.

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of equal treatment is part of our legal culture, and is reflected in a variety of ways in our institutions and procedures, and the rules of substantive law.

22 Section 10 of the Act is the provision which most directly relates to the subject of equal treatment before the law. It provides:

"10. (1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

(2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.

(3) Where a law contains a provision that -

(a) authorizes property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or

(b) prevents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander;

not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provision shall be deemed to be a provision in relation to which subsection (1) applies and a reference in that subsection to a right includes a reference to a right of a person to manage property owned by the person."

23 However, as the case was argued before this Court, no attempt was made to suggest that s 10 provided any foundation for the relief claimed by the applicant.

24 It was upon s 9 of the Act that the applicant's argument turned. That section provides:

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"9. (1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

(1A) Where:

- (a) a person requires another person to comply with a term, condition or requirement which is not reasonable having regard to the circumstances of the case; and
- (b) the other person does not or cannot comply with the term, condition or requirement; and
- (c) the requirement to comply has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by persons of the same race, colour, descent or national or ethnic origin as the other person, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life;

the act of requiring such compliance is to be treated, for the purposes of this Part, as an act involving a distinction based on, or an act done by reasons of, the other person's race, colour, descent or national or ethnic origin.

(2) A reference in this section to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes any right of a kind referred to in Article 5 of the Convention.

(3) This section does not apply in respect of the employment, or an application for the employment, of a person on a ship or aircraft (not being an Australian ship or aircraft) if that person was engaged, or applied, for that employment outside Australia.

(4) The succeeding provisions of this Part do not limit the generality of this section."

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- 25 Before considering the way in which the argument for the applicant sought to demonstrate a contravention of s 9 in the present case, it is convenient to refer to other relevant features of the scheme of the legislation. The Act binds the Crown (s 6). Unlawful acts are not offences unless the Act expressly so provides (s 26). There is no such provision in relation to a contravention of s 9. Leaving to one side the presently irrelevant creation of particular offences, it is in Pt III of the Act that there are to be found the procedures and remedies applicable to cases of unlawful discrimination. Central to the operation of Pt III is the role of the Human Rights and Equal Opportunity Commission and of the Race Discrimination Commissioner. Complaints of unlawful acts may be lodged with the Commission by persons aggrieved (s 22). The Commissioner is to conduct inquiries into such acts and is obliged to endeavour, by conciliation, to effect a settlement (s 24). There are procedures designed to assist such consultation (eg ss 24C, 24D). If matters cannot be settled they are referred to the Commission (s 24E). The Commission is empowered to conduct inquiries into complaints (s 25A). The Act confers upon the Commission various powers to enable it to undertake such inquiries. After holding an inquiry, the Commission may either dismiss the complaint or find the complaint substantiated and make determinations including declarations as to what the respondent to a complaint should do (s 25Z(1)). However, such a determination is not binding or conclusive between the parties (s 25Z(2)). The enforcement of determinations is a matter for the Federal Court (Div 3A). In certain circumstances damages may be awarded (s 25ZG).
- 26 The elaborate and special scheme of Pt III of the Act was plainly intended by the Parliament to provide the means by which a person aggrieved by a contravention of s 9 of the Act might obtain a remedy, and thus was regarded by Parliament as fulfilling Australia's treaty obligations, bearing always in mind the legal structure and system which formed the context in which the Act was to operate.
- 27 The present case provides a good example of the practical significance of that context. The matters of which the applicant complains, if made out, would have constituted grounds for review or appeal in the Victorian State Courts, of, or against, the decisions of the judicial officers before whom the applicant appeared. In fact, the applicant unsuccessfully invoked the ordinary criminal procedures of review and appeal, claiming that he was not treated fairly and that there was a miscarriage of justice. His failure in those proceedings resulted not from any inability of the general law, or the legal system, to provide a remedy for the alleged unfairness or injustice, but from the view which the Victorian Courts took of the facts of the case.

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28 It is argued that the two persons whose acts or omissions contravened s 9 of the Act were the magistrate and the Chief Judge. (The respondents, however, are their respective courts). Enough has been said above about the facts of the case to indicate the problems in such an argument. In effect, it is claimed that the failure to insist that the applicant have an interpreter when he, and his lawyers, never asked for one, amounted to unlawful conduct under s 9. To identify from these circumstances any act of the magistrate or the Chief Judge as an act "based on race", within the meaning of sub-s (1), or to demonstrate the imposition of any requirement which was "not reasonable having regard to the circumstances of the case", involves torturing the language of the statute.

29 However, apart from the particular facts of this case, there are more fundamental problems with the notion that either a judicial officer, or a court, may be subject to legal redress, on the ground of an alleged contravention of s 9 of the Act.

30 First, there is a well established immunity from suit which protects judicial officers from actions arising out of acts done in the exercise of their judicial function or capacity⁸. There is nothing in the Act which suggests that it was the intention of the Parliament to override that immunity.

31 Secondly, as was noted above, the scheme of the Act demonstrates that, in cases where there is a remedy for a contravention of s 9, it is to be found in Pt III of the Act. The procedures under Pt III have not been invoked by the applicant. Senior counsel for the applicant observed, correctly, that in some respects such as, for example, the requirement of conciliation, the provisions of Pt III would be incongruous in their application to judicial officers of courts. That is true, but the circumstance that Parliament did not intend those procedures of Pt III to apply to judicial officers and courts, (consistently with well established common law principles of immunity from suit), does not deny the exclusiveness of those procedures to the extent to which they are operative.

32 The facts alleged by the applicant do not establish any right, duty or liability of any of the parties, and they cannot do so because the Act provides its own, exclusive regime for remedying contraventions. The only right that the Act creates is a right to engage the processes prescribed by it and the duties or liabilities that are created are correlative to that right.

8 *Rajski v Powell* (1987) 11 NSWLR 522; *Mann v O'Neill* (1997) 191 CLR 204.

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33 It is unnecessary to consider a further difficulty in the way of the applicant's claim, concerning the availability of the remedy of certiorari in a case such as the present.

34 The applicant has failed to identify an immediate right, duty or liability to be established by the determination of the Court as a justiciable controversy constituting a matter arising under a treaty. Accordingly, the application was dismissed.

- 35 KIRBY J. Is an application for a writ of certiorari to quash orders of Victorian courts on the ground that the procedures followed were contrary to a federal Act (and an international treaty given effect by that Act) within the original jurisdiction of this Court? That is the question which was severed from process initiated in this Court and ordered to be argued separately⁹.

The background facts

- 36 The facts necessary to understand the jurisdictional question were stated in affidavits filed in the application. Although some of the evidence, and the interpretation of it, was contested, the basic history was not in doubt.

- 37 Mr Quoc Phu Nguyen ("the applicant") was born in Vietnam. His nationality, ethnic origin and primary language are Vietnamese. On arrival in Australia in 1991 he did not speak English. In August 1995, then 19 years of age, he was apprehended by police in connection with an attack by three young men on an attendant in an amusement parlour in Russell Street, Melbourne. It was alleged that the applicant had held a knife against the attendant, threatening to kill him. An accomplice took money and the three offenders ran off. The applicant was apprehended. When an interview was organised by police it was temporarily suspended to make arrangements for an interpreter in the Vietnamese language to be present. When the interview was resumed, the applicant acknowledged an understanding of the English language ("[j]ust a little bit"). He answered questions, some of them through the interpreter, but most of them without. Many of his answers were monosyllabic, being confined to "yes" or "no". On occasions, he indicated that he did not understand the police questions. The interpreter was then used. In the result, the applicant was charged with armed robbery.

- 38 The Crown case was overwhelming. Parts of the offence had been recorded by video camera. The applicant signified an intention to plead guilty to the charge. In September 1996 he came before the Chief Judge of the County Court of Victoria (Chief Judge Waldron). He was legally represented by counsel. Although a letter had been sent by the applicant's solicitor to the Office of Public Prosecutions requesting the presence of an interpreter, that letter had not been acted upon. No interpreter was present. At the commencement of the proceedings Chief Judge Waldron asked whether the services of an interpreter were needed. Counsel for the applicant said:

"I was able to conduct a conference without the need of an interpreter. The records of interview with my client are conducted without an interpreter. If

9 *Re East & Ors; Ex parte Nguyen*, Application for special leave to appeal, High Court of Australia, 10 December 1997 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

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matters are presented clearly to my client, then there is no need for an interpreter. It's just [a] little bit slow".

The statement about the records of interview was not accurate. The judge persisted with his questions to establish "authoritatively whether an interpreter is required". Counsel for the applicant said emphatically that he was not seeking an interpreter. In such circumstances, Chief Judge Waldron proceeded with the arraignment. However, he indicated that he would keep under review whether the applicant required an interpreter¹⁰.

39 The applicant's father and sister were called. In the course of their evidence, they deposed to difficulties he had with the English language¹¹. The matter was stood over to permit a pre-sentence report to be obtained. In the light of that report, Chief Judge Waldron sentenced the applicant to a Community Based Order. Under the Order, the applicant was required to perform 500 hours unpaid community work over a period of 24 months; subject himself to drug and alcohol testing; receive appropriate psychological and psychiatric treatment as directed; and be supervised by a Community Corrections Officer. The applicant was asked whether he agreed to the making of the Order. He signified that he did. The transcript discloses a warning by the judge, in simple language which would certainly have been clear to a native English speaker, that failure to comply with the conditions of the Order would result in a custodial sentence¹².

40 In March 1997, Ms Rosemary East, the Community Corrections Officer with responsibility for the applicant ("the first respondent"), filed a report on the applicant's breaches of the conditions of his sentence. The report recounted the steps that had been taken after the sentence to explain to the applicant the "rules and regulations ... in detail" and his acknowledgment of his understanding of the requirements and signature to documents which set them out, copies of which were provided to him. The report records the opinion that the applicant had shown "minimal commitment" towards the obligations imposed on him and that he had stated that he was "too busy to attend". It records that he had provided no acceptable reasons for his default. A claim that he had been ill was unverified. Claims that he was "too tired to work" on the community work assigned to him

10 *R v Tien Van Nguyen and Quoc Phu Nguyen*, Transcript of Proceedings, County Court of Victoria, 16 September 1996 at 1.

11 *R v Tien Van Nguyen and Quoc Phu Nguyen*, Transcript of Proceedings, County Court of Victoria, 16 September 1996 at 15, 19.

12 *R v Quoc Phu Nguyen*, Transcript of Proceedings on Sentencing, County Court of Victoria, 18 October 1996.

were regarded as unsatisfactory. The first respondent recommended that the Order be cancelled and the applicant re-sentenced.

41 It was this report which resulted in a fresh charge alleging that the applicant had failed, without reasonable excuse, to comply with the conditions of the Order¹³. That charge came before the Magistrates' Court at Sunshine in March 1997. Without requiring a plea to the charge, the magistrate remanded the applicant on bail to appear before the County Court. He was referred to a legal aid solicitor. The County Court proceedings were returned before Chief Judge Waldron on 17 March 1997. By that time, Victoria Legal Aid had arranged for the applicant to be represented by counsel, although one different from the legal representative who had appeared in the earlier proceedings. On behalf of the applicant, counsel confirmed that breach of the Order was admitted. Chief Judge Waldron stated that he recalled the case. Counsel for the applicant, in his address on the plea, recounted in some detail what the applicant had told him, presumably at a pre-hearing conference. He conceded "seven failures to comply" with the Order. In effect, he asked, on behalf of the applicant, for a further chance. But he went further. He called the applicant to give evidence on the plea. Such evidence was given without an interpreter. Most of the answers to questioning, including cross-examination, were monosyllabic. But some of them were stated in greater detail. All of them appear to have been responsive. At no stage did the applicant indicate a lack of comprehension of the questions or request the facility of an interpreter. Nor did his then counsel do so on his behalf.

42 Having concluded that the applicant had failed to take advantage of the opportunity of reform, Chief Judge Waldron cancelled the Order. He ordered that the applicant be imprisoned for a period of two years and three months. He fixed a minimum term of 12 months imprisonment before the applicant would be eligible for parole.

Subsequent legal proceedings

43 Following these orders, the applicant sought leave to appeal to the Court of Appeal of Victoria against his conviction and sentence. The challenge to his conviction was subsequently abandoned. Whilst the application for leave to appeal against sentence was pending, two separate motions were filed in the Supreme Court of Victoria. These sought orders directed to the County Court. The first motion was dealt with by Byrne J on 6 May 1997. It concerned the complaint that the applicant had been denied natural justice by reason of the failure to afford him the assistance of an interpreter in the breach proceedings. An affidavit of a linguistics expert (Ms Marie Jensen) was placed before Byrne J. It stated that the applicant had no more than "survival proficiency" in the English language. It was argued that, in those circumstances, the lack of an interpreter had led to a

13 *Sentencing Act* 1991 (Vic), s 47(1).

misapprehension of the facts relevant to the breach of the Order. This, in turn, had resulted in a miscarriage of justice in the proceedings. Byrne J was unimpressed. He noted that breach of the Order was uncontested. He regarded as "without substance" the suggestion that the failure to put evidence before Chief Judge Waldron as to the extent and circumstances of non-compliance had resulted from the absence of an interpreter.

44 The second motion was heard in June 1997 by Chernov J. This concerned a complaint about the correctness of the procedures adopted in the Magistrates' Court when the breach charge was referred to the County Court. Chernov J dismissed that application in which the alleged linguistic disabilities of the applicant do not appear to have been raised.

45 An application for leave to appeal from the orders of Byrne J and of Chernov J was refused by the Court of Appeal in July 1997. It was in this context that the applicant launched concurrent proceedings in this Court. The first was an application for special leave to appeal from the order of the Court of Appeal just mentioned. The second was a motion asking this Court, in its original jurisdiction, to make declarations, to cause writs of certiorari to issue to the Magistrates' Court and the County Court of Victoria, and to issue a writ of habeas corpus directed to the Governor of Fulham Prison, where the applicant was by then held. The last-mentioned writ was designed to oblige the Prison Governor to deliver the applicant, presumably in consequence of the successful outcome of the primary relief which he claimed.

46 Dawson J ordered that the motion should be returned before a Full Court¹⁴. That was done. On the return, the summons for leave to appeal was first heard. That summons was dismissed, the Court being of opinion that no error on the part of Byrne J or of Chernov J had been established and hence no error on the part of the Court of Appeal. When the applicant's then counsel proceeded to argue the remaining motion for relief, questions were raised as to the jurisdiction of the Court to provide such relief. The hearing was stood over to permit the constitutional questions raised by the motion to be argued, with notice to the law officers. Such notice was given. It resulted in the intervention of the Attorneys-General for the Commonwealth and of the State of Victoria. Each intervened to support the submissions of the first respondent objecting to the jurisdiction of this Court. The other named respondents, namely, the Magistrates' Court of Victoria at Sunshine (second respondent), the County Court of Victoria at Melbourne (third respondent) and the Governor of Fulham Prison (fourth respondent), submitted. They took no part in the proceedings.

47 When the motion was first heard, the Court was informed that the Court of Appeal had stood over the outstanding application for leave to appeal against

14 Pursuant to High Court Rules, O 55 r 2.

sentence, the applicant being granted bail pending the hearing in this Court. Following an intimation by this Court, the Court of Appeal, in March 1998, heard that application and dismissed it. In the result, the applicant's bail was cancelled. By the time the hearing in this Court was concluded the applicant had served most of his minimum term.

- 48 I have recounted the history of these proceedings for a purpose. It indicates how the applicant, within the established procedures of appeal and judicial review available to a person in his position within the Australian judicial system, fully utilised the many facilities of challenge available to him. It is within that system that complaints concerning an injustice alleged to have resulted from a refusal to permit, or failure to provide, interpretation of the language of the court are ordinarily dealt with¹⁵. The Australian judicial system properly affords protection against risks of injustice occasioned by linguistic disadvantage alleged to have affected a trial. This fact would have been well known to the Executive Government of the Commonwealth when, on behalf of Australia, it ratified the International Convention on the Elimination of all Forms of Racial Discrimination ("the Convention")¹⁶. It would have been known to the Parliament when it gave approval to such ratification by Australia and when it enacted the *Racial Discrimination Act* 1975 (Cth) ("the Act"). The Convention was ratified and the Act enacted against the background of the fundamental commitment of the Australian judicial system, relevantly, to the fair trial of all criminals accused and, specifically, to the provision of language interpretation where that facility is necessary or desirable to avoid unfairness in a trial. I shall return to this point.

The Act and the Convention

- 49 The applicant asserted that it was his right to bring his complaints directly to this Court. He contended that the Constitution and federal law afforded him that right and that it was this Court's duty to hear and determine his entitlement to relief. The claim for declarations fell away in the manner in which the motion was argued. The claim for a writ of habeas corpus was not eventually pressed. The relief claimed was the issue of writs of certiorari to quash the order of the Magistrates' Court referring the proceedings to the County Court and the order and sentence of the County Court made on the breach proceedings. The applicant submitted that both courts had erred in a way fundamental to the proper exercise of their jurisdiction, in effect, by proceeding to deal with him in a way that denied him the right to equal treatment provided by the Convention as given effect, in Australian domestic law, by the Act.

15 See eg *Saraya* (1993) 70 A Crim R 515.

16 In Schedule to *Racial Discrimination Act* 1975 (Cth).

50 Cutting away the immaterial words, the relevant provisions of the Convention include Art 2, by which "States Parties condemn racial discrimination and undertake to pursue ... a policy of eliminating racial discrimination in all its forms". Pursuant to this undertaking, by Art 2.1(a), "[e]ach State Party undertakes to engage in no act or practice of racial discrimination against persons ... and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation". By Art 5 of the Convention, and "[i]n compliance with the fundamental obligations laid down in article 2", States Parties undertake to:

"eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race ... national or ethnic origin, to equality before the law, notably in enjoyment of the following rights:

(a) The right to equal treatment before the tribunals ... administering justice".

51 It was against the requirements of these provisions that the applicant argued the Act was to be construed. This was because the Act was expressed to provide the approval of the Parliament for the ratification by Australia of the Convention¹⁷. The preamble to the Act includes a paragraph asserting a parliamentary conclusion that it was desirable "to make provision for giving effect to the Convention".

52 The applicant based his case principally on s 9 of the Act. Again, eliminating immaterial words, the section reads:

"9. (1) It is unlawful for a person to do any act involving a distinction ... based on race ... descent or national or ethnic origin which has the ... effect of ... impairing the ... exercise, on an equal footing, of any human right or fundamental freedom in the ... field of public life.

17 Act, s 7. The Convention was ratified by Australia on 30 September 1975.

(1A) Where:

- (a) a person requires another person to comply with a ... requirement which is not reasonable having regard to the circumstances of the case; and
- (b) the other person ... cannot comply with the ... requirement; and
- (c) the requirement to comply has the ... effect of ... impairing the ... exercise, on an equal footing, by persons of the same race ... descent or national or ethnic origin as the other person, of any human right or fundamental freedom in the ... field of public life;

the act of requiring such compliance is to be treated, for the purposes of this Part, as an act involving a distinction based on ... the other person's race ... descent or national or ethnic origin.

- (2) A reference in this section to a human right or fundamental freedom ... includes any right of a kind referred to in Article 5 of the Convention.

...

- (4) The succeeding provisions of this Part do not limit the generality of this section."

53 Section 9 is succeeded by a number of provisions rendering it unlawful to do certain things in the fields of access to places or facilities¹⁸; dealing in land, housing or other accommodation¹⁹; providing goods and services²⁰; affording membership of trade unions²¹; providing employment²²; publishing advertisements²³; and inciting unlawful acts²⁴. By s 10 of the Act (titled "Rights to equality before the law") provision is made, notwithstanding anything contained

18 s 11.

19 s 12.

20 s 13.

21 s 14.

22 s 15.

23 s 16.

24 s 17.

in a federal, State or Territory law, for persons of one race, colour or national or ethnic origin to enjoy the same rights as are enjoyed under such law by persons of another race²⁵.

54 Provision is made elsewhere in the Act²⁶ for the Commission (meaning the Human Rights and Equal Opportunity Commission established by the *Human Rights and Equal Opportunity Commission Act 1986* (Cth)) to "inquire into alleged infringements of Pt II ... and endeavour by conciliation to effect settlements of the matters alleged to constitute those infringements"²⁷. Other relevant functions are enacted to secure the promotion of the purposes of the Act, the conduct of research, the publication of guidelines and otherwise to advance the objectives of the Act and hence the fulfilment of the obligations of Australia as a State Party to the Convention. Procedures are laid down for handling complaints which allege that a person has done an act that is unlawful by virtue of a provision of Pt II²⁸. Such procedures involve inquiry by the Race Discrimination Commissioner, established by the Act²⁹, with review, in certain circumstances, by the President of the Commission³⁰. Provision is also made for attendance at compulsory conferences³¹; reference of the matter to the Commission where it cannot be settled by conciliation³²; inquiry by the Commission itself in certain circumstances³³; and further provisions for attempted conciliation by the Commission³⁴. After holding an inquiry, the Commission is empowered, amongst other things, to make a declaration that the respondent has engaged in conduct rendered unlawful by the Act and should not repeat or continue such unlawful conduct³⁵. To enforce such declarations, the Commission or the complainant may apply to the Federal Court

25 s 10(1).

26 Pt III.

27 s 20(1)(a).

28 s 22(1).

29 s 19. See also s 24.

30 See ss 24AA, 24AB.

31 ss 24C, 24D.

32 s 24E.

33 ss 24F, 25, 25A.

34 s 25Q.

35 s 25Z(1)(b)(i).

of Australia for an order³⁶. If that court is satisfied that the respondent has engaged in conduct or committed an act that is unlawful under the Act, it is empowered to make orders which extend to a declaration of right³⁷, and an interim injunction³⁸. Among other remedies available is an order of the Federal Court enforcing a determination of the Commission to the effect that the respondent should pay to the complainant damages by way of compensation³⁹. The Act makes it clear that, except as expressly provided, nothing in its provisions makes it a criminal offence to contravene the Act. The only exceptions concern provisions upholding the operation of the Act itself.

The arguments of the applicant

- 55 The applicant argued that, following the institution of the breach proceedings, both the magistrate, and Chief Judge Waldron had acted in an unlawful way. This was because each had made a distinction affecting him based on an inherent characteristic of his race, descent or national or ethnic origin, namely his lack of facility in the English language when compared to the advantages he would have enjoyed if he had been a native English speaker. The distinction was alleged to be in the failure to ensure that in both courts, the applicant had the facility of an interpreter. This had the effect of impairing his exercise, on an equal footing, of a human right or fundamental freedom. Relevantly, this was the right to equality before the law and equal treatment before two tribunals administering justice as mentioned in the Convention⁴⁰. It also involved impairment of the enjoyment of the human right or fundamental freedom provided by another international treaty to which Australia was a party, namely the International Covenant on Civil and Political Rights ("ICCPR"). That Covenant contains an express requirement that:

36 s 25ZC(1).

37 s 25ZC(2).

38 s 25ZC(3).

39 See sub-ss 25ZC(1) and (2) with cross-reference to s 25Z(1)(b)(iv).

40 Convention, Art 5(a).

"In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

...

- (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court".⁴¹

56 The applicant initially relied upon this provision of the ICCPR to give content to the "human right or fundamental freedom" mentioned in sub-ss 9(1) and (2) of the Act of which he claimed he had been denied. However, in argument, his case was confined to the alleged deprivation of the rights provided by the Convention. I shall proceed on that footing.

57 To assist in proof of the unlawfulness relied upon, the applicant also invoked s 9(1A) of the Act. He asserted that the requirement that he should answer the charge of breach of conditions of the Order without an interpreter was not "reasonable" having regard to the circumstances of the case. These included, so it was submitted, the evidence of the linguistics expert and other evidence which the applicant would seek to place before the Court if jurisdiction were found. It was argued that the evidence already before the Court, in the form of an affidavit of the applicant asserting that he was "scared" and "confused" and "did not understand all of what was happening" in court, together with further evidence which he would hope to give, would establish the preconditions laid down in s 9(1A). Whatever might have been the subjective intention of the magistrate or the County Court judge, the effect of what they had done was that of impairing the applicant's exercise, on an equal footing, of the fundamental freedom to equality before the law which he would enjoy had he been a person of the majority race, descent or national or ethnic origin in Australia and thus a fluent English speaker. The result was that the requirement imposed on him by the successive judicial officers was deemed to be an act based on the prohibited ground⁴². It was thus unlawful⁴³. The procedures of complaint, inquiry, determination by the Commission and order of the Federal Court were not, so it was submitted, exhaustive of other remedies for such unlawfulness. They were not even appropriate for dealing with unlawful conduct on the part of judicial officers. In such cases, the appropriate remedy was the one traditionally provided where a court of limited jurisdiction has acted unlawfully and, in particular, in a way that deprived a litigant of procedural

41 ICCPR, Art 14.3(f). See also European Convention for the Protection of Human Rights and Fundamental Freedoms, Art 6.3(e): *Luedicke, Belkacem and Koc v Federal Republic of Germany* (1978) 2 EHRR 149.

42 Act, s 9(1A).

43 Act, s 9(1).

fairness. Certiorari would issue to quash the courts' orders which were contaminated by unlawfulness. So went the applicant's arguments.

The issues

58 A number of objections were raised to the jurisdiction of this Court. In summary they were:

1. That there was no evidence that anything done by any "person" (relevantly the magistrate and Chief Judge Waldron) constituted unlawful racial discrimination within s 9 of the Act and hence that the application for relief was manifestly without foundation and should be peremptorily dismissed. (The no evidence point).
2. That the propounded foundation for invoking the original jurisdiction of this Court, viz s 75(i) of the Constitution, did not apply as any "matter" which existed was not one "arising under any treaty". At the most, it was a matter arising under a law made by the Parliament⁴⁴, viz the Act. But in that respect, the Parliament had made no provision in the Act conferring original jurisdiction on this Court. Hence no such jurisdiction existed. (The "arising under [a] treaty" point).
3. That if the applicant's claim did arise under a treaty, namely the Convention, in the sense of arising indirectly thereunder, it did not amount to a "matter" within the requirements of the Constitution. There was no "immediate right, duty or liability to be established by the determination of the Court" founded on an existing claim of right provided by law⁴⁵. At most, the Act afforded procedures of negotiation and conciliation. It did not confer legal rights enforceable against members of the judiciary, or their courts. (The "matter" point).
4. That if, notwithstanding the foregoing, there was a "matter" and this Court had original jurisdiction under s 75(i) of the Constitution, the application for certiorari was bound to fail in the discretion of the Court having regard to the history of the litigation and the availability of the points now argued in other courts and specifically within the appellate procedures available for challenge to the orders complained of. (The discretionary point).

44 Constitution, s 76(ii).

45 *In Re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265.

23.

5. That certiorari, not being one of the writs expressly named in the Constitution⁴⁶, was not available, or was only available as an adjunct to, and in order to perfect, relief provided by the Court in some other permissible form⁴⁷. (The certiorari point).
6. That, if all the foregoing obstacles could be overcome and certiorari was available, it did not lie against officers of a State and in particular it did not lie against judicial officers operating within State courts exercising State jurisdiction whose relationship to this Court was limited to the appellate jurisdiction expressly provided for in the Constitution⁴⁸. (The State court point).

Common ground

59 Before dealing with the identified issues, it is appropriate to note certain matters upon which there was common ground or about which there was no dispute for the purposes of the jurisdictional arguments:

1. To establish the facts upon which this Court was invited to answer the reserved question concerning its jurisdiction, it was agreed that the Court could treat the affidavits as being before the Court. From this material it was undisputed that the applicant was in breach of the Order when called before the Magistrates' Court and the County Court. At no stage did the applicant ask the magistrate or the judge for the assistance of an interpreter. It was not contested that the judicial officers concerned were unaware that he needed an interpreter. His legal counsel, whose conduct generally bound him, had informed Chief Judge Waldron in the original proceedings that the matter could safely go ahead without an interpreter. In the subsequent proceedings, the subject of the present application, Chief Judge Waldron had, additionally, the opportunity to assess the applicant's needs because the latter gave oral evidence. In argument, counsel for the applicant made it clear that he was not submitting that an interpreter had to be supplied in every case where an

46 Section 75(v) of the Constitution mentions Mandamus, prohibition and injunction. The Constitution of the United States of America provides for the judicial power in Art III. It makes no express reference to the writ of certiorari. However, as is well known, that remedy is regularly availed of and certiorari commonly issues. Certiorari is provided for by the High Court Rules, O 55 rr 1, 17. See also *Judiciary Act* 1903 (Cth), ss 31, 32.

47 *Re Jarman; Ex parte Cook* (1997) 188 CLR 595 at 645-646; cf *Pitfield v Franki* (1970) 123 CLR 448; *In re Booth; Ex parte Administrative and Clerical Officers' Association* (1978) 52 ALJR 460 at 464.

48 Constitution, s 73(ii).

accused person was not a native born English speaker. He simply contended that, in the facts now known, it was necessary in the applicant's case.

2. As eventually presented, the applicant did not contend that this was a case of error on the face of the record of the Magistrates' Court or the County Court⁴⁹. Instead, he sought to elaborate the record in order, by evidence, to demonstrate breaches of the rules of procedural fairness and relevancy of the requirements of the Act, non-compliance with which, it was submitted, would render the actions of the judicial officers concerned unlawful. The applicant asked, if jurisdiction of this Court were upheld, that the opportunity should be afforded to him to resolve the conflicts in the evidence revealed in the affidavits filed for the contesting parties. It was agreed that if it were necessary to resolve factual disputes, such questions would have to be remitted to the Supreme Court of Victoria or to the Federal Court. That was where, the applicant argued, the suggested lack of evidentiary merit ought to be determined.
3. The applicant did not contest the proposition that the Act was written against the background of the established principles of the Australian legal system by which judicial officers are personally immune for their conduct in the course of performing their judicial duty⁵⁰. However, according to the applicant, that fact simply demonstrated the unsuitability of the negotiation, conciliation and other procedures provided in Pt III of the Act. It left the unlawfulness on foot for which, it was argued, this Court would afford a remedy in the form of certiorari⁵¹.
4. The applicant did not invoke any suggested implied doctrine of legal equality guaranteed by the Constitution itself⁵² or of constitutional due process applicable to the proceedings affecting him⁵³. I will deal with this case

49 cf *Craig v South Australia* (1995) 184 CLR 163 at 176, 180-183.

50 *Rajski v Powell* (1987) 11 NSWLR 522 at 534-536; cf *Mann v O'Neill* (1997) 191 CLR 204; *Yates v Lansing* 5 Johnson's Rep 282 (1809); *Pierson v Ray* 386 US 547 at 553-554 (1967).

51 Relying on *R v Electricity Commissioners; Ex parte London Electricity Joint Committee Co* (1920) [1924] 1 KB 171; *R v Town of Glenelg* [1968] SASR 246.

52 cf *Leeth v The Commonwealth* (1992) 174 CLR 455 at 485, 488-490; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 44-45, 63-68, 94-97, 112-114, 142, 153-155.

53 cf *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 501-503; *Dietrich v The Queen* (1992) 177 CLR 292 at 326, 362; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 480 at 544-545.
(Footnote continues on next page)

without regard to any foundation for the Court's jurisdiction other than that which the applicant nominated.

The no evidence point

60 The first respondent submitted that one ground for rejecting the jurisdiction asserted by the applicant was that, if all his other arguments succeeded, the applicant had failed at the threshold to establish that the challenged orders were made in circumstances that were unlawful under the Act. Similar submissions were advanced for the interveners. The failure of a party who seeks prerogative or like relief to establish an evidentiary foundation for the provision of such relief is normally fatal⁵⁴. The Court will not spend valuable time resolving complex questions of jurisdiction and power if, were they to be established, the case would on no account attract the provision of relief⁵⁵. To say this is to say no more than that courts conserve their attention to the determination of claims having arguable legal merit.

61 Accepting to the fullest the applicant's evidence as it currently stands, there are obvious difficulties in squeezing the facts into an arguable case that would attract the application of s 9 of the Act and a conclusion that what was done to the applicant was "unlawful". Approaching the matter, as the applicant did, on the footing that he required s 9(1A) to bring his case within the unlawfulness provided by s 9(1), many difficulties arise. First, although the word "person" is used with perfect generality in s 9, should it be taken to apply to a judicial officer acting as such and subject, where applicable, to the ordinary controls of appeal and prerogative review? The kinds of conduct mentioned in the succeeding sections of the Act and the procedures for redress afforded by Pt III suggest that judicial officers, not least those of a State, were not intended to fall within the ambit of the section at all. Assume for the moment that they did, how could it be said that either the magistrate or Chief Judge Waldron "required" the applicant to comply with the unreasonable requirements (presumably of participating in judicial proceedings without an interpreter) when he made no request for an interpreter? The applicant was represented by a qualified legal practitioner who at no stage asked that the proceedings be adjourned for interpretation and on the contrary (at an earlier phase of the proceedings) had asserted that such facility was unnecessary and addressed

CLR 51. See also Gageler and Glass, Ch 3, "Constitutional law and human rights" in Kinley (ed), *Human Rights in Australian Law* (1998) 47.

54 *Re Brennan; Ex parte Muldowney* (1993) 67 ALJR 837; 116 ALR 619; *Re Australian Nursing Federation; Ex parte Victoria* (1993) 67 ALJR 377 at 382; 112 ALR 177 at 183.

55 cf *Lindon v Commonwealth [No 2]* (1996) 70 ALJR 541 at 544-545; 136 ALR 251 at 256.

the judge with apparently full instructions, presumably gathered without the benefit of an interpreter. When the applicant volunteered to give evidence in the breach proceedings before Chief Judge Waldron, he raised no request for an interpreter. He answered all of the questions he was asked. In these circumstances, it is strongly arguable that the applicant acted as he did on his own election and, with professional advice available to him, acquiesced in the conduct of the proceedings and was not "required" to comply with an unreasonable requirement, contrary to the Act.

62 Assuming that these points were decided in favour of the applicant, how could it be said that any requirement imposed by the magistrate and the County Court judge was "not reasonable having regard to the circumstances of the case"? Not only was the applicant legally represented. The statement of his representative to Chief Judge Waldron makes it clear that the latter had canvassed the allegations of the breaches alleged and, by implication, felt confident that he had adequate instructions to deal with the charges. If at no stage during any of the hearings in which the applicant was present did he raise the suggested need of an interpreter, still less the complaint now made that the absence of that facility was an unlawful discrimination against him, the circumstances of the case suggest that it would have been perfectly reasonable to "require" him to proceed as he did, if that is what occurred. Given the way in which criminal trials are conducted in this country, it is ordinarily reasonable for a judicial officer to rely on a legal representative to raise the need for an interpreter if such a need exists. Different considerations arise where a party is not legally represented; where the person with a language difficulty is not a party but an important witness; or where the course of proceedings demonstrates the need for an interpreter although none has been sought by a party or that party's legal representative. But these were not the present case. To render conduct unreasonable, and allegedly unlawful, on the ground of prohibited discrimination a minimum requirement to suggest disadvantage falls upon the alleged victim.

63 Allowing fully for the purpose of s 9(1A) to facilitate proof of the basis for a discriminatory distinction alleged, the sub-section is still aimed at establishing that the person whose actions are alleged to be unlawful has based the acts complained of on the basis of the other person's "race, colour, descent or national or ethnic origin". There appears to be no evidence whatever that, in this case, any such considerations entered into the decisions either of the magistrate or of Chief Judge Waldron. The deeming provisions of s 9(1A) do not fill this gap.

64 There are many other problems in the way of applying the provisions of the Act (assuming them to be applicable) to the evidence which the applicant has thus far placed before the Court. In such circumstances, the proposition that the Court should not trouble itself about the purported invocation of its original jurisdiction was an attractive one. Were it to be upheld the Court would simply dismiss the motion for want of an evidentiary foundation. However, as the issue of the jurisdiction of the Court was separated, made the subject of notices under the

Judiciary Act 1903 (Cth)⁵⁶ and of detailed submissions, I will assume that a real controversy as to the existence or otherwise of jurisdiction arises for determination. Furthermore, the applicant made plain his desire to tender additional evidence if jurisdiction were upheld. Whilst doubting that any further evidence could contradict the transcript and other material already placed before the Court, I am prepared to proceed on the footing that peremptory disposal of the matter for want of evidentiary merit was not an appropriate course. I turn to the remaining issues of law.

Jurisdiction "arising under [a] treaty"

65 The sole basis which the applicant nominated to attract the original jurisdiction of this Court was that appearing in s 75(i) of the Constitution. By that sub-section it is provided that "[i]n all matters: - (i) arising under any treaty; ... the High Court shall have original jurisdiction".

66 I will concentrate first on the words "arising under any treaty". I assume for the moment the existence of a "matter". The first respondent submitted that any "matter" which existed arose out of rights which the Act conferred on the applicant and duties imposed by the Act on the judicial officers concerned. It did not arise under a treaty, namely the Convention. It did not do so, whether directly or indirectly.

67 This Court has not previously purported to exercise jurisdiction under s 75(i)⁵⁷. Thus, little guidance is available for the ascertainment of the meaning of the provision. Its historical origin appears in the equivalent section of the Constitution of the United States of America by which it is provided that "[t]he judicial power shall extend to all cases ... arising under ... treaties made, or which shall be made, under their authority"⁵⁸. There was no equivalent provision in the draft of the Constitution by the 1891 Australian Convention, although cases affecting "public ministers, consuls or other representatives of other countries" were included in that draft⁵⁹. The words "arising under any treaty" were added at the Adelaide session in 1897 or, as Quick and Garran point out, "rather, transferred from the subjects as to which Parliament had power to give jurisdiction"⁶⁰. At the

56 s 78B.

57 *Lane's Commentary on The Australian Constitution*, 2nd ed (1997) at 558.

58 Constitution of the United States of America, Art III s 2.

59 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 764. See now s 75(ii).

60 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 765.

Melbourne session of 1898, a motion was presented to omit the sub-clause on the ground that it was outside the proper scope of the judicial power. This was defeated⁶¹.

- 68 It was well known at the time of the Convention debates that English law, as applicable in Australia, drew a distinction not observed in the law of the United States of America. Whereas in the United States, by the terms of the Constitution, a treaty is declared to be the law of the land⁶², such was not the case in English law. Because of constitutional history and different arrangements for the ratification of treaties, the mere entry into force of a treaty provided no foundation for the Crown to alter the legal rights and obligations of its subjects⁶³. This is why, in our legal system, with certain exceptions not presently material, the general rule is the treaty of itself does not form part of Australia's domestic law unless its provisions are validly incorporated by law⁶⁴. If not so incorporated, the treaty provisions do not operate as a direct source of individual rights and obligations⁶⁵. Treaties may influence Australian domestic law in other ways. This is particularly so where they declare fundamental human rights as recognised by international law and accepted by civilised countries⁶⁶. In such circumstances the provisions of treaties expressing international law may, by analogy, contribute to judicial reasoning to resolve ambiguities in the Australian Constitution⁶⁷, or other legislation⁶⁸ and in the development of the common law⁶⁹. However, this process

61 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 765.

62 *Foster v Neilson* 2 Pet 253 at 314 (1829) [27 US 164 at 202].

63 *Walker v Baird* [1892] AC 491; *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326 at 347.

64 Starke, "The High Court of Australia and the rule in *Walker v Baird* [1892] AC 491", (1974) 48 *Australian Law Journal* 368.

65 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287.

66 cf *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42.

67 cf *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 657-661; *Kartinyeri v Commonwealth* (1998) 72 ALJR 722 at 765-766; 152 ALR 540 at 598-600.

68 *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262 at 274-276.

69 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42; *Dietrich v The Queen* (1992) 177 CLR 292 at 306, 321; cf *Tavita v Minister of Immigration* [1994] 2 NZLR 257 at 266.

is interstitial. It does not afford to the judiciary the means, by the "backdoor"⁷⁰, of incorporating a treaty, with its detailed rights and obligations, as part of Australia's domestic law without the irksome necessity of parliamentary implementation.

69 The first respondent and the interveners submitted that any rights enjoyed by the applicant (and any duties imposed on the judicial officers concerned) arose solely under the Act and not under the treaty. This, it was submitted, was fundamental to Australian legal doctrine by which treaty provisions must be incorporated into domestic law in order to give rise to enforceable rights and duties.

70 Various arguments were marshalled to support the first respondent's position:

1. The origin of the provision can certainly be traced to the United States Constitution. The fact that its provisions have rarely been invoked, despite the proliferation of treaty-making, tended to confirm the general acceptance that treaties, being between States or with international organisations, will rarely give rise to legally admissible questions, susceptible to attracting the original jurisdiction of a court such as this on the initiative of individual parties.
2. Weight must be given to every word of s 75(i). The "matter" in question must be one "arising" under the treaty, ie arising in fact not simply in potential⁷¹. In the analogous case of the meaning of "arising under" where appearing in s 76(ii) of the Constitution, the Court has said that the "right or duty in question" must owe its existence to, or depend upon, federal law for its enforcement whether or not the determination of the controversy involves the interpretation (or validity) of the law⁷². If there is no reason for a different view to be taken of the language of s 75(i), this simply illustrates the difficulty of according meaning to its terms conformable with the accepted doctrine that treaties, of themselves, do not give rise to justiciable rights and duties. Only when incorporated into local law do they do so and then by virtue of that law.
3. This view is further reinforced by contrasting the provisions of s 75(i) and s 76(i) of the Constitution. Thus, it was put, where the Constitution envisaged a wider ambit ("or involving its interpretation"), it said so. It

70 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 288.

71 *Miller v Haweis* (1907) 5 CLR 89 at 93; *R v Maryborough Licensing Court; Ex parte Webster & Co Ltd* (1919) 27 CLR 249 at 253-254.

72 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 154; cf *Felton v Mulligan* (1971) 124 CLR 367 at 387.

refrained from so saying in the case of matters "arising under any treaty". By juxtaposition, the fact that the interpretation of the treaty might be raised would not, so it was argued, be sufficient to enliven s 75(i) and to confer original jurisdiction on this Court.

4. The meaning of the provision has practical importance because the Parliament, by s 38 of the *Judiciary Act*, has provided that the jurisdiction of this Court shall be "exclusive of the jurisdiction of the several Courts of the State" in (relevantly) "matters arising *directly* under any treaty"⁷³. This provision invites attention to two decisions. In *Bluett v Fadden*⁷⁴ McLelland J, in the Supreme Court of New South Wales, took a broad view. He held that the section in the Constitution "must ... be taken to refer to cases where the decision of the case depends upon the interpretation of the treaty"⁷⁵. A contrary view was adopted by Miles CJ in *R v Donyadideh*⁷⁶. His Honour there concluded that it was not enough that recourse was to be had to the treaty in order to decide the matter in question. It was necessary that the right, duty or liability in question should owe its existence to the treaty, or depend on the treaty for its enforcement, or have its source in the treaty⁷⁷.
5. In support of the narrower approach it was argued that to treat cases involving the interpretation of a treaty as falling within s 75(i) would significantly extend the original jurisdiction of this Court, given the large number of matters now arising in which domestic law, incorporating treaty provisions, would fall for interpretation. Several recent instances were cited to suggest that such a construction would open up a new and potentially wide area of original jurisdiction⁷⁸. The spectre of a flood of cases was presented to indicate the unpalatability of such a construction of s 75(i).

71 Notwithstanding these arguments, I prefer the broad view of the ambit of s 75(i) adopted in *Bluett v Fadden*. My reasons are as follows:

73 Emphasis added.

74 (1956) 56 SR (NSW) 254.

75 (1956) 56 SR (NSW) 254 at 261.

76 (1993) 115 ACTR 1.

77 (1993) 115 ACTR 1 at 6.

78 *Project Blue Sky Inc v ABA* (1998) 72 ALJR 841 at 852; 153 ALR 490 at 505; *Qantas Airways Ltd v Christie* (1998) 72 ALJR 634 at 663; 152 ALR 365 at 405-406.

1. The provision appears in a constitutional text, intended to endure indefinitely. As experience has taught, the Constitution is difficult of formal amendment, yet necessarily must adapt to domestic and international circumstances wholly different from those of the times in which it was devised⁷⁹. The issue of treaties is a case in point. At the time the Constitution was adopted, it was certainly not contemplated that the Commonwealth, on behalf of Australia, would be engaged in the kind of treaty participation which has marked recent decades⁸⁰. Initially, s 51(xxix) of the Constitution included a reference to treaties. However, this was deleted in the drafting stages. These historical facts demonstrate the unwisdom of stamping on the Constitution preconceptions as to the way in which the powers conferred would be used in terms of the expectations of 1901. Once adopted, the Constitution was set upon a sea of fortune whose horizons were unchartered but to whose necessities and vagaries the Constitution has to adapt.
2. It is a conventional rule of construction, in the case of the grant of a power to a court, that such provisions should be given a broad meaning unless there is something in the grant to indicate to the contrary. The reason for this approach was explained by Gaudron J in *Knight v F P Special Assets Ltd*⁸¹. It lies in the fact that "[p]owers conferred on a court are powers which must be exercised judicially and in accordance with legal principle ... The necessity for the power to be exercised judicially tends in favour of the most liberal construction, for it denies the validity of considerations which might limit a grant of power to some different body, including, for example, that the power might be exercised arbitrarily or capriciously or to work oppression or abuse."⁸² How much stronger are the reasons for affording an ample construction to a constitutional provision which confers jurisdiction on a court, and specifically on this Court, and in terms of a fundamental law intended to have a large and enduring operation.
3. In construing a constitutional conferral of jurisdiction, it would not readily be assumed that the provision had been adopted by mistake or oversight; or that it had no continuing operation. As McHugh J said in *Newcrest Mining*

⁷⁹ *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 81, 85; *Victoria v The Commonwealth* (1971) 122 CLR 353 at 396; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 645-646.

⁸⁰ Saunders, "Articles of Faith or Lucky Breaks? - The Constitutional Law of International Agreements in Australia", (1995) 17 *Sydney Law Review* 150.

⁸¹ (1992) 174 CLR 178.

⁸² (1992) 174 CLR 178 at 205.

(*WA Ltd v The Commonwealth*)⁸³, "[e]ffect must be given to every word of the Constitution that is capable of a sensible meaning". No other paragraph of s 75 affords jurisdiction in relation to a subject matter that is said to be misconceived, irrelevant or now redundant. The heads of jurisdiction appearing in s 75 are inalienable, in the sense that they exist by virtue of the Constitution itself. They do not require an Act of Parliament to make them effective. By inference they were regarded as being of central importance. They were such as should inhere in this Court from its establishment. This makes it all the more unlikely that one such head of jurisdiction should be treated as completely unnecessary. Instances do exist where events have overtaken the constitutional enactment so that provisions have no continuing utility or application⁸⁴. But it was no part of the first respondent's argument that s 75(i) had a significance in 1901 which had now evaporated. Her argument was that the provision never had significance and manifestly so because justiciable "matters", apt to enliven the original jurisdiction of this Court, could not arise under a treaty then or now. This view was encapsulated in the Commonwealth's submission that the provision was adopted from the United States Constitution as a result of "unintelligent copying of an inappropriate American precedent"⁸⁵. The result was language that was "somewhat meaningless"⁸⁶. Only absolute necessity would drive me to such a construction of a provision of the Constitution conferring jurisdiction on this Court.

4. The proposition that s 75(i) was unnecessary because legislation would always be required to confer rights or impose duties, consequent upon a treaty, once again assumes the redundancy of s 75(i) in a way that is incompatible with the language of the Constitution. By s 76(ii), ample provision is made for the Parliament to confer original jurisdiction on this Court in any matter "arising under any laws made by the Parliament". The ordinary rules of statutory construction applicable to the Constitution⁸⁷ suggest that one should reject a construction founded on the proposition that a provision, appearing in the successive drafts of the Constitution and pressed despite opposition in the debates, is to be regarded as mistaken or redundant.

83 (1997) 190 CLR 513 at 577.

84 See eg Constitution, ss 69, 93, 94.

85 Quoting Cowen and Zines, *Federal Jurisdiction in Australia*, 2nd ed (1978) at 30.

86 Renfree, *The Federal Judicial System of Australia*, (1984) at 158. Renfree cites the comment of Mr Owen Dixon KC to the Royal Commission on the Constitution that "no one yet knows what is meant by the expression" (at 159).

87 cf *McGinty v Western Australia* (1996) 186 CLR 140 at 230-235 per McHugh J.

5. It is true that s 76(i) contains, in the case of matters arising under the Constitution, the additional phrase "or involving its interpretation". It is also true that the additional phrase is missing from s 75(i). However, the dangers of adopting the *expressio unius* principle of construction have often been stated by this Court⁸⁸. Even greater caution must be exercised in this regard in the construction of provisions of the Constitution which appear in sparse language, adopted after protracted debate, approved by the people and intended to have a continuing operation in a vast range of circumstances, many still unknown and unknowable.
6. As we now appreciate, treaties have become an important feature of the political and economic environment in which Australia exists in the world and in its region. Far from supporting a narrow construction of s 75(i), this fact suggests that a broad construction should be adopted which reflects the growing importance of treaties to Australia's domestic law. It is an importance which is certain to increase, and not diminish. There is no particular inconvenience in affording original jurisdiction to this Court in all matters which arise under a treaty, in the sense of indirectly or derivatively so arising. On the contrary, given the present and likely future importance of treaty law as an influence on Australian domestic law, there may be good reason for ensuring an immediate role to this Court in all such matters. There is no reason in s 75 why the jurisdiction of this Court needs to be exclusive of other courts having jurisdiction, federal, State or Territory. Whilst it is true that the *Judiciary Act* confers exclusive jurisdiction in some cases, it does so in this instance only where the matter in question arises *directly* under a treaty⁸⁹. Even then, such exclusive jurisdiction is subject to the power of this Court to remit a matter or part of a matter to another Australian court⁹⁰.

72 A matter arises under a treaty if, directly or indirectly, the right claimed or the duty asserted owes its existence to the treaty, depends upon the treaty for its enforcement or directly or indirectly draws upon the treaty as the source of the right or duty in controversy. This view accords with attribution to s 75(i) of a meaning and effectiveness which the narrow construction, inappropriate to the task of constitutional interpretation, would deny. It avoids ascribing ignorant stupidity to the founders, who were well aware of the trite law governing the translation of

88 *Houssein v Under Secretary of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88 at 94 applying *Colquhoun v Brooks* (1888) 21 QBD 52 at 65.

89 *Judiciary Act*, s 38.

90 *Judiciary Act*, s 44.

treaty provisions into justiciable rights and duties⁹¹. But whatever their purpose was, it is the proper construction to give to s 75(i) in the context in which the provision falls to be interpreted today. Such a view was certainly adopted by Isaacs J in *Pirrie v McFarlane* where he said:

"[L]ooking at sec 75, the 'matter' would not necessarily be simply that part of the controversy *depending on the construction or effect of a treaty*, or that part of the controversy relating to a consul or the Commonwealth. There might be other necessary parties and other essential questions, all of which would be factors constituting the 'matter'." ⁹²

Isaacs J construed s 75(i) as sufficiently enlivened if the "matter" had no other connection with a treaty than that it "depend[ed] on the construction or effect" of the treaty. So would I.

- 73 The attempt of the first respondent to defeat the applicant's invocation of the original jurisdiction of this Court on the basis that, if there was a "matter", it was not one "arising under [a] treaty" is therefore rejected. The purpose of the Act was to give effect to the Convention. The Convention was scheduled to the Act. In construing the provisions of s 9 of the Act, relied upon by the applicant, the meaning and operation of the Convention were clearly relevant. It was essential to the applicant's argument that the unlawfulness for which s 9 provided, in the case of a court, was enacted precisely in order to provide the "equality before the law" and "equal treatment before the tribunals ... administering justice" which Art 5 of the Convention stated. This challenge to jurisdiction therefore fails.

The requirement of a legal adjudication

- 74 *Requirement of a "matter"*: The more fundamental objection of the first respondent was that the precise controversy tendered to the Court by the applicant was not a "matter" as required by s 75 of the Constitution and as that word has been explained in authority⁹³. To be a "matter" there must be "some immediate right, duty or liability to be established by the determination of the Court" which the party invoking jurisdiction propounds⁹⁴. A determination of law (such as concerns the meaning of the Act or the Convention) is not authorised unless it

91 *Lane's Commentary on the Australian Constitution*, 2nd ed (1997) at 556. The early constitutionalists were similarly aware of this law: Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 769; Moore, *The Constitution of The Commonwealth of Australia*, 2nd ed (1910) at 489.

92 (1925) 36 CLR 170 at 198. Emphasis added.

93 *In Re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265-267.

94 *In Re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265.

arises in an attempt to administer the law in a concrete instance. These requirements have been held to flow both from the concept of "matter" and the language and structure of Ch III of the Constitution by which the judicial power of the Commonwealth is exclusively vested in specified courts⁹⁵. It is true that once the controversy is held to be a "matter" every issue or aspect of the controversy before the Court will be included so that it does not have to be dealt with "piecemeal by different tribunals", federal and State⁹⁶. It is also true that the "matters" referred to in s 75 are not the proceedings but the subjects of the controversy which are amenable to judicial determination in the proceedings⁹⁷. However, the party asserting jurisdiction must be able to demonstrate the existence of a legal right or duty which is apt to judicial determination; not mere "abstract questions of law without the right or duty of any body or person being involved"⁹⁸. The full rigour of these words has undoubtedly been affected by the judicial extension, in the course of this century, of the beneficial remedy of declaration. They may need reconsideration one

95 Constitution, s 71.

96 *Pirrie v McFarlane* (1925) 36 CLR 170 at 198; cf *Fencott v Muller* (1983) 152 CLR 570 at 607-608.

97 *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 491; *Fencott v Muller* (1983) 152 CLR 570 at 591; *Crouch v Commissioner for Railways (Q)* (1985) 159 CLR 22 at 37; *Croome v Tasmania* (1997) 191 CLR 119 at 124-125.

98 *In re Judiciary and Navigation Act* (1921) 29 CLR 257 at 267.

day⁹⁹. However, the present proceedings were conducted on the footing that the applicant had to demonstrate a right or duty in law, the enforcement of which he came to the Court to secure.

- 75 *The "matter" propounded:* The applicant acknowledged that there was nothing either in the Convention itself or in the Act which expressly conferred upon him rights directly enforceable in a court (still less this Court). Nor could he point to duties, expressly imposed upon the successive judicial officers, stated in terms in the Act, that were enforceable by legal proceedings. Instead, he sought to establish the legal controversy on which he relied by the combination of the provision in s 9 declaring certain acts unlawful and a principle of the common law affording the necessary means of relief where the statute itself was silent. The principle in question is well known. It was stated long ago in *Doe v Bridges*¹⁰⁰, where Lord Tenterden CJ said:

"If an obligation is created, but no mode of enforcing its performance is ordained, the common law may, in general, find a mode suited to the particular nature of the case." ¹⁰¹

More recently, the same principle was stated by Lord Simonds in *Cutler v Wandsworth Stadium Ltd*:

"[I]f a statutory duty is prescribed but no remedy by way of penalty or otherwise for its breach is imposed, it can be assumed that a right of civil action accrues to the person who is damnified by the breach. For, if it were not so, the statute would be but a pious aspiration." ¹⁰²

- 76 There have been many applications of this principle¹⁰³. It rests on the assumption that, ordinarily, a legislature would intend courts to enforce its will where it declares particular activities to be lawful or unlawful. It was on this foundation that the applicant sought certiorari as the remedy of the common law most apt to a case where a judicial officer in a court of limited jurisdiction had acted unlawfully, ie contrary to s 9 of the Act. The express reference in the Convention to the obligation to ensure equality before the law and equal treatment before tribunals was a reason, so it was argued, for assuming that an Act of the

⁹⁹ cf *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 666-667.

¹⁰⁰ (1831) 1 B & AD 847 [109 ER 1001].

¹⁰¹ (1831) 1 B & AD 847 at 859 [109 ER 1001 at 1006].

¹⁰² [1949] AC 398 at 407.

¹⁰³ See eg *Pasmore v Oswaldtwistle Urban Council* [1898] AC 387 at 394.

Parliament designed to authorise the ratification of the Convention and to implement its terms would be so construed.

77 *No "matter" is demonstrated:* As Lord Simonds pointed out in *Cutler*¹⁰⁴, the general rule by which the common law affords a remedy where none is stated by Parliament is subject to exceptions. One of these arises where the language and scheme of the legislation affords remedies but not ones apt to the interests of the applicant. In such a case, a court may not supplement the remedies afforded by Parliament. That would not be to fill an obvious gap but to provide enforceable rights (and impose co-relative duties) which the legislators had held back from doing. Such is the case here. For a number of reasons, I would reject the applicant's assertion that the Court can supplement the Act by providing a remedy to him which the Act does not contain.

78 First, the Act is written against the background of a developed legal system which establishes independent courts in which persons accused of criminal offences are tried. Those courts have their own procedures for appeal and judicial review, the operation of which is demonstrated by the facts of this very case. If a further avenue of redress, by way of prerogative process were the purpose of the Parliament, it might have been expected that this would have been spelt out in plain terms. To find it by inference and then to afford remedies not expressly provided by the Act is to work changes to the legislation which go beyond the properly limited functions of a court. The contrary inference is overwhelming. The Parliament stated it in respect of criminal proceedings arising out of breach of the Act¹⁰⁵. If its purpose had been to afford a remedy of certiorari, or some other remedy directly enforceable in a court of law, the Parliament would have said so.

79 Secondly, this conclusion is reinforced when one examines the detailed statutory pathway through which a complaint of unlawful activity must pass. The whole scheme of the Act places emphasis upon inquiry, conference and agreement, where possible, rather than adjudication, a hearing and imposition of a decision. Given the large number of activities which are rendered "unlawful" by s 9 and the succeeding sections of the Act, it is unsurprising that the remedies afforded by the Parliament should be of such a character, limiting to a very small class those enforceable by a court¹⁰⁶ and then only after exhausting the procedures designed

104 [1949] AC 398 at 407. Note that s 80 of the *Judiciary Act* imports the common law where the provisions of the laws of the Commonwealth are insufficient to carry them into effect but only so far as it is "applicable and not inconsistent with the Constitution and the laws of the Commonwealth"; cf *The Commonwealth v Mewett* (1997) 71 ALJR 1102 at 1123-1124, 1140-1141; 146 ALR 299 at 328, 351.

105 Act, s 26.

106 Act, s 25ZC.

to explore other remedies¹⁰⁷. To superimpose upon such a delicate statutory scheme a direct avenue of approach to the original jurisdiction of this Court which the Parliament never mentioned would defy the apparent objectives of the Parliament in enacting legislation in the terms it chose.

80 Thirdly, when the Act was enacted the Parliament would have been well aware of the importance of the independence of judicial officers and of their immunity from personal suit or other proceedings in respect of conduct performed judicially. If it had been the object of the Parliament to render such conduct, in a particular case, unlawful, well established principle would require that the Parliament should say so expressly¹⁰⁸. If independent judicial officers were to be subject to complaint of allegedly "unlawful" conduct before agencies of the Executive Government, longstanding principle would require that this be expressed in plain terms¹⁰⁹. In particular, if it had been the purpose of the Parliament to render judicial officers of State courts amenable to such federal remedies (assuming that to be possible), it might have been anticipated that the Parliament would have said so. These considerations make it unthinkable that the unlawfulness mentioned in s 9 was intended to apply to judicial officers at all and, in particular, to the judicial officers of a State, such as those against whom the applicant sought relief.

81 Fourthly, the answer to the applicant's complaint that this presents a disharmony between the aspirations of the Convention and the provisions of the Act is not hard to find. It does not lie in the response that this is a case where the Act fell short of giving effect to an obligation of equality before the law and equal treatment before tribunals for which the Convention provides¹¹⁰. Rather, it lies in the recognition by the Parliament that Australian courts are independent, have their own mechanisms of appellate and other review and already subscribe to, and enforce, as an attribute of fair trial, the principles of equality and non-discrimination for which the Convention and the Act stand. Although instances doubtless occur in our courts which fall short of the full attainment of these principles, the departures are rightly regarded as error. If not remedied by the trial judge, procedures of appeal and review exist to afford redress. If an injustice is demonstrated, redress will be afforded. If it is not afforded by Australian courts, in a proper case, where a breach of Australia's obligations under the ICCPR can be

107 For example, Act, s 25Z(1).

108 cf *P v P* (1994) 181 CLR 583 at 602.

109 As is the case with the *Judicial Officers Act* 1986 (NSW), s 17; *Rajski v Powell* (1987) 11 NSWLR 522 at 527.

110 Convention, Art 5.

shown¹¹¹, persons affected have the right to communicate their complaint to the Human Rights Committee of the United Nations and to seek redress there¹¹².

82 In the context of criminal trials it is accepted law in Australia that the trial must ordinarily take place in the presence of the accused¹¹³. This requires not only the accused's corporeal presence but that he or she should understand the evidence and be in a position to make decisions as a result of it affecting the conduct of the case¹¹⁴. Such decisions will include giving instructions to the legal representative (if any) appearing in the accused's interests. It is the duty of a judicial officer conducting criminal proceedings to ensure the fair trial of the accused. Where a trial would be unfair because of the absence of an interpreter, it is the duty of the judicial officer to endeavour to ensure that an interpreter is provided¹¹⁵. Where the accused is legally represented, the judicial officer can usually rely upon the legal representative to communicate to the court the needs and wishes of the accused. But even then, the judicial officer will not be relieved of the obligation to ensure a fair trial if it should subsequently appear (from something said or done in the trial) that an interpreter is needed.

83 The entitlement to an interpreter is not specifically a language right, as such, or a feature of the public character of a trial so much as an aspect of the commitment of the judicature to fairness of the trial process¹¹⁶. It has been said that the right extends to the provision of translations of documents essential to the proper conduct of the trial¹¹⁷. In some countries the right to an interpreter in a trial

111 ICCPR, Art 14. See *Human Rights and Equal Opportunity Commission Act 1986* (Cth), Sched 2.

112 This was done in *Toonen v Australia*, UN Human Rights Committee, 31 March 1994, Communication No 488/1992 (UN Doc. CCPR/C/50/D/488 (1992)) extracted in Martin et al, *International Human Rights Law & Practice*, (1997) at 675-684. Following the Committee's decision the *Human Rights (Sexual Conduct) Act 1994* (Cth) was enacted. See generally *Croome v Tasmania* (1997) 191 CLR 119.

113 *Lawrence v The King* [1933] AC 699 at 708.

114 *R v Willie* (1885) 7 QJL (NC) 108; *R v Kwong Leung* (1909) 4 Hong Kong L R 161; *R v Lee Kun* [1916] 1 KB 337 at 341; *Ebatarinja v Deland* (1998) 72 ALJR 1499 at 1504; 157 ALR 385 at 391.

115 *Kunnath v The State* (1993) 98 Cr App R 455 (PC) distinguished *The State v Gwonto* [1985] LRC (Const) 890 (SC Nigeria).

116 *MacDonald v City of Montreal* [1986] 1 SCR 460 at 499.

117 *Alwen Industries v Collector of Customs* [1996] 3 NZLR 226.

appears expressly stated in the constitutional text¹¹⁸ or has been found to be an implication from a constitutional provision¹¹⁹ or from a statutory bill of rights¹²⁰. In Australia the right is no less effective because its source has been taken to be the common law. Many cases exist where appellate courts, concerned at the risk of a miscarriage of justice, have set aside a criminal conviction and ordered a retrial where the accused has established that there was a lack of understanding at the trial for want of an interpreter¹²¹. In the light of this developed jurisprudence, and its regular application in the courts of Australia, it is unsurprising that the Parliament had not made express provision in the Act to give effect to the obligations of Art 5(a) of the Convention. Those obligations were already part of the settled law of this country. They remain so.

- 84 *No legal controversy:* The consequence of this analysis is that the applicant's attempt to draw from s 9 of the Act a legal entitlement which he could enforce against the magistrate and the County Court judge who dealt with him, or their courts and orders, fails. No such right is conferred by the Act. No such duty was imposed on the judicial officers concerned. Upon this basis there was no "matter" within the meaning of s 75 of the Constitution. No other ground to establish a "matter" being suggested, the foundation for the applicant's invocation of the original jurisdiction of this Court is knocked away. This Court had no jurisdiction to do anything but to dismiss the applicant's motion.

Discretion, certiorari and State officers

- 85 The foregoing conclusion relieves me of the obligation to consider the other attacks which were mounted to repel the applicant's application, assuming he could establish jurisdiction under s 75(i). As the points, or some of them, may have had substance and may one day re-appear in proceedings where a decision upon them is required, I shall refrain from saying anything about them.

118 As is the case in Mauritius. See *Kunnath v The State* (1993) 98 Cr App R 455 (PC); cf *R v Tran* (1994) 117 DLR (4th) 7 (Canada).

119 *U S v Mosquera* 816 F Supp 168 at 173 (1993) referring to the Sixth Amendment in the Constitution of the United States of America.

120 As in New Zealand: *Alwen Industries v Collector of Customs* [1996] 3 NZLR 226 at 232 referring to the *New Zealand Bill of Rights Act* 1990, s 24(g).

121 See eg *Saraya* (1993) 70 A Crim R 515; cf in civil trials: *Dairy Farmers Co-operative Milk Co Ltd v Acquilina* (1963) 109 CLR 458 at 464; *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414; *Adamopoulos v Olympic Airways SA* (1991) 25 NSWLR 75 at 77-78, 80-81, 84.

41.

Order

86 On 5 August 1998, at the conclusion of the hearing, the Court dismissed with costs the applicant's motion. The foregoing are my reasons for joining in that order.