[2013] HCATrans 018

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Brisbane

No B43 of 2012

B e t w e e n -

RONALD OWEN

Applicant

and

RICHELLE MENZIES

First Respondent

RHONDA BRUCE

Second Respondent

ATTORNEY-GENERAL OF THE
STATE OF QUEENSLAND

Third Respondent

Application for special leave to appeal

FRENCH CJ
HAYNE J
CRENNAN J

TRANSCRIPT OF PROCEEDINGS

FROM CANBERRA BY VIDEO LINK TO BRISBANE

ON FRIDAY, 15 FEBRUARY 2013, AT 9.54 AM

MR R.W. HADDRICK: May it please the Court, I appear for the applicant. (instructed by SK Lawyers)

MR S.J. HAMLYN-HARRIS: May it please the Court, I appear with **MS S.B. ROBB** for the first and second respondent. (instructed by Caxton Legal Service)

MR G.J. DEL VILLAR: May it please the Court, I appear for the third respondent. (instructed by Crown Solicitor (Qld))

FRENCH CJ: Yes, Mr Haddrick.

MR HADDRICK: May it please the Court, there are effectively three issues in this application for special leave to appeal. The three issues are whether section 124A of the *Anti-Discrimination Act* should be read down consistent with implied freedom of political communication, whether QCAT being a State administrative tribunal should be classified as a court of the State for the purposes of section 77(iii) of the Constitution, and whether sections 131 and 132 of the QCAT Act deprive the Supreme Court of Queensland of decisional independence in respect of enforcing decisions on QCAT.

From the outset, I should identify that the draft notice of appeal is poorly constructed in that it includes other issues that should fall by the wayside, as this Court should not entertain some of the matters in the draft notice of appeal because there is no utility. Can I take your Honours to the draft notice of appeal, please, on page 160 of the application book? In essence, to sharpen up this application I propose to refine the grounds of appeal to reflect the matters that were properly canvassed by the Court of Appeal in June last year. By sharpening up I propose that the grounds of appeal be identified as the Court of Appeal erred in that it failed to read down section 124 of the *Anti-Discrimination Act* to comply with the implied freedom of political communication provided by the Constitution.

The second ground of appeal would be that the Court of Appeal failed to grant leave to amend the case stated and find that QCAT is not a court of a State for the purposes of section 77(iii) of the Constitution. The fourth ground is that the Court of Appeal failed to grant leave to amend the case stated and find that sections 131 and 132 of the QCAT Act are inconsistent with Chapter III of the Constitution.

There would be a fourth ground to give effect to the consequential or ancillary relief that the applicant seeks in the existing draft notice of appeal and that fourth ground would be pursuant to section 118(4) of the *Queensland Civil and Administrative Tribunal Act*. The court "failed to grant consequential or ancillary relief" to give effect to the findings in respect of appeal grounds 1, 2 and 3.

In that respect, if I could take your Honours to the substance of our arguments in respect of those points. Turning first to the issue of section 124A of the *Anti-Discrimination Act*, could I invite your Honours to consider the language of the provision. It is in volume 1 behind tab 1. In essence, the applicant makes six criticisms of the provision.

The first criticism the applicant makes of the provision is the use of the words "incite hatred towards". The second criticism is use of the words "serious contempt for". The third criticism is the use of the words "or severe ridicule of". The fourth criticism is the provision in subsection (2)(c) that "a public act, done reasonably", so there is use of the words "done reasonably". The fifth criticism is the use of the words "in good faith" or an absence of malice and the sixth criticism is the reference to "in the public" purpose also in subsection (2)(c).

FRENCH CJ: How would the reading down which you are seeking assist your client?

MR HADDRICK: Mr Owen would then be able to plead the implied freedom or the implied provision that should be in section 124 before the Tribunal - - -

FRENCH CJ: To say what?

MR HADDRICK: To cover the conduct which he is alleged to have committed.

FRENCH CJ: To permit him to say what?

MR HADDRICK: He made a number of remarks or is alleged to have made a number of remarks that might be described as hateful contempt speech in the context of a local government meeting where he was

previously a councillor at that local government meeting. Those remarks were either recorded at the council meeting or were articulated in media reports subsequent to the council meeting and it is the substance of those remarks that the complainants brought complaints against my client in respect of breaching section 124A. We say that if this Court read down, particularly the words "serious contempt for" in subsection (1) then that would change the goalposts in terms of the provision or the substance of the complaint against my client.

HAYNE J: Yes, of course it can change the goalposts, but where do you want the goalposts shifted to? What do you say would be the reading down?

MR HADDRICK: We say there should be implicit in subsection (2) an exclusionary matter that is a public act done for the purposes of political or governmental communication consistent with - - -

HAYNE J: You can say anything in the course of political debate?

MR HADDRICK: Absolutely not, your Honour. Our position is a law that protects threats or to protect the physical integrity of an elector is consistent, but a law designed to achieve civility of discourse is not consistent with the second limb. In that respect we rely upon the dicta of Justice Gummow and your Honour Justice Hayne in *Coleman* at paragraph 199 where their Honours identified "civility of discourse" as being a matter that is protected or should be protected by the implied freedom of political communication.

We also say that the expressions "hatred", "contempt" and "ridicule" are just the same as "insult" and "invective" which Justices Gummow and your Honour Justice Hayne mentioned in *Coleman.* They are two of the political persuasion consistent with representative government. We say that done reasonably is not consistent. The point of political communication is to convince some of the electorate of its reasonability. This provision defeats the point of the implied freedom, that is to convince the electorate. We also say that "in good faith" or, in other words, "a lack of malice" is entirely inconsistent with the way representative government has been practised since before Federation. Malice towards the - - -

HAYNE J: Can I interrupt you there? Political discourse you say can achieve reasoned debate on matters of political concern by reference to race, religion, sexuality or gender identity. Is that the proposition?

MR HADDRICK: That is correct, your Honour, and in particular we obtain some comfort by the words of Chief Justice Bathurst in the *Sunol* decision, which is in the bundle in volume 2 behind tab 13 at page 138,

where in paragraphs [42] and [43] his Honour the Chief Justice identifies with - in having regard to the first limb of the *Lange* test - that an almost identically worded provision in New South Wales does answer to the description or the answer is "yes", as the first sentence of paragraph [42] identifies. Then I invite your Honours to read paragraph [43] on the same page where his Honour very nicely identifies the relevance of that type of speech.

In respect of representative government it is the applicant's contention that representative government is government by representatives of the people who are chosen by the people. To achieve this candidates and electors must be able to campaign and engage in political communication and because candidates are always trying to convince voters and other Members of Parliament to support them they are always trying to convince some part of the electorate that what they advocate for is eminently reasonable.

A restriction on political communication or requiring that communication to be done reasonably or to be done in the public interest defeats the purpose of the implied freedom, that is to permit candidates and politicians to convince the electorate that their views should be accepted as reasonable, or that their policies are in the public purpose.

CRENNAN J: So you are saying, are you, that in relation to insult and invective in the context of political communication the freedom should be absolute? Are you challenging *Lange*? Is that the point that you are seeking to make?

MR HADDRICK: No, our position is the freedom should not be absolute. There is a qualitative difference between a law that protects an elector or a politician against threats, or protects the physical integrity of an elector, on one hand, versus a law which protects civility of discourse on the other hand. We aim our submissions at the second category and we say that section 124A is designed for the purposes of protecting civility of discourse, not to protect the physical integrity of individual electors or groups of electors.

FRENCH CJ: This is speech directed to particular, or against particular groups on the grounds of their race, religion, sexuality or gender identity.

MR HADDRICK: Yes, your Honour, it is. Can I take your Honour to the decision of the former Queensland Administrative Tribunal on page 6 of that decision? Your Honours will see in paragraphs 4 through to – yes, paragraph 4, you will see the matters that Mr Owen is said to have said and the context in which he is said to have said those matters, in particular several of the allegations relate to comments that he made at the now former

shire council that he was a member of and in the media reports of proceedings of that shire council. He was, at that point in time, an elected member of that shire council.

If I could move onto the second ground that we say that this Court should special leave to appeal for, that is QCAT is not a court of a State capable of hearing or determining the matters within the judicial power of the Commonwealth.

HAYNE J: How does that question arise when the case stated question directed to that issue was unnecessary to answer?

MR HADDRICK: On page 123 of the application book both the applicant and the first and second respondent jointly applied to the Court of Appeal, that the Court of Appeal should amend the case stated to give rise to two further questions in identical terms to questions 1 and 2 currently in the case stated so that the questions had utility. Your Honours will see that in paragraph [37] her Honour the President of the Court of Appeal declined to amend the case stated. These two applied for amendments to the case stated were designed to give the case stated before the Court of Appeal utility in considering these questions.

It is uncontested by the applicant that questions 1 and 2 of the case stated lack utility in that they refer to a tribunal that no longer exists in law and, therefore, the questions for the case stated should reflect the corresponding provisions in the successor tribunal that has carriage or can hear and determine the matter.

In respect of our second ground, QCAT not being a court of a State, can I please take your Honours to my outline and that is on pages 166 and 167 of the application book? In essence, it is the matters identified in paragraphs 8 and 9 that we say that when taking in toto this Court, or indeed the Court of Appeal, should have concluded that QCAT does not have the necessary characteristics that would constitute the description of a "court of a State" as that expression is used in section 77(iii) of the Constitution.

HAYNE J: How does any of that arise as a live issue in this proceeding where a case was stated to the Supreme Court, the issue was determined by the Supreme Court, neither QCAT nor its predecessor decided it, why is that not all an academic question having no utility?

MR HADDRICK: Because if your Honours are with us that section 124A should be read down, and implying into that provision an exclusionary matter, that is government and political communication, then it falls for QCAT to interpret what that means and therefore QCAT needs to be a body that can consider the judicial power of the Commonwealth. Even if that

question is irrelevant we then move onto the third ground and the third ground is the enforcement provisions.

If this Court agrees with the Court of Appeal that QCAT is "a court of a State" for the purposes of 77(iii), then the third ground becomes operative and that is how, in the applicant's submission, a body which is effectively part of the Executive Government of a State is able to make a decision, albeit in a court-like manner, and then have that decision registered in the registry of the Supreme Court of Queensland and enforced without any further curial process.

In that respect can I take your Honours to section 133 of the QCAT Act, which is behind tab 3 in the bundle? In particular, can I take you to page 90 of the authorised reprint? It is the applicant's position that if QCAT is not a court of a State, then it is a manifestation of the Executive Government of the State. The Supreme Court of Queensland, of course, is a Chapter III court and cannot be deprived of its decisional independence. Sections 131 and 132 of the QCAT Act provide for the words "On filing the documents . . . the final decision is taken to be an order of the court".

A law that requires the Supreme Court of a State to take the decision of a non-court as if it were a decision of the Supreme Court deprives the Supreme Court of its decisional independence. In particular, we draw your Honours' attention to those opening words of section 131(4), and 132(4), the use of the words:

> On filing the documents mentioned in subsection (2) . . . the final decision is taken to be an order of the court -

There is no curial process whereby the Supreme Court is empowered to consider whether that order should be enforced. The function of the Supreme Court has effectively been outsourced to QCAT to enforce its own – sorry, the QCAT functions have been outsourced to the Supreme Court to enforce QCAT decisions. This should be contrasted with the similar legislation which allows the registration and enforcement of other provisions, say, for instance, the *Foreign Judgments Act*. I think it is under section 8 or section 9 of that piece of legislation where to register a judgment, one must apply to the court.

There is a curial process involved in deciding whether that judgment should or should not be enforced. On the plain reading of sections 131 and 132 of the QCAT Act, there is no curial process for the review of the decision, thereby depriving the Supreme Court of its decisional independence. We say it is no justification on behalf of the Attorney-General, the third respondent, to say that a party is at liberty to commence further proceedings to judicially review the decision.

Simply to permit a party to commence another proceeding to shut down an earlier order is not satisfactory for the purposes of the curial supervision that is required for a decision of the Supreme Court to have decisional independence. In particular, in my outline, I have identified the words of your Honour the Chief Justice in *Totani* where your Honour places great significance upon the decisional independence required of a court so that a court might not breach the *Kable* principle. Those are the submissions of the applicant as to why those three grounds should move forward, and special leave should be granted.

There is a final point I should just mention, that in respect of section 124A of the *Anti-Discrimination Act*, there are a number of other pieces of legislation around Australia that uses almost identical text that a decision of this Court would have ramifications with respect to, in particular the *Anti-Discrimination Act* (NSW), sections 20B, 20C, 49ZS and 49ZT, and the *Racial and Religious Tolerance Act* 2001 (Vic), sections 8 and 11.

If your Honours were with us to grant special leave for section 124A, there is public importance by reason of the general application in your Honours deciding the correct construction and the constitutional implications upon the six criticisms that we make of section 124A. Those are the submissions of the applicant.

FRENCH CJ: Thank you, Mr Haddrick. We will not need to trouble the respondents.

The facts of this case, in our opinion, do not engage the constitutional principle which is asserted in such a way as to offer any prospects of ultimate success arising from its application. Other issues which the applicant seeks to agitate do not arise in the matter. Special leave will be refused with costs.

AT 10.14 AM THE MATTER WAS CONCLUDED