[2023] HCATrans 105

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Sydney

No S14 of 2023

B e t w e e n -

MINISTER FOR HOME AFFAIRS

First Applicant

SECRETARY, DEPARTMENT OF HOME AFFAIRS

Second Applicant

and

KATE PEARSON

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

Application for special leave to appeal

KIEFEL CJ
GLEESON J

TRANSCRIPT OF PROCEEDINGS

AT CANBERRA AND BY VIDEO CONNECTION

ON FRIDAY, 11 AUGUST 2023, AT 12.30 PM

KIEFEL CJ: In accordance with the protocol for remote hearings, I will announce the appearances for the parties.

MR C.L. LENEHAN, SC appears with **MS N.A. WOOTTON** and **MR J.G. WHERRETT** for the applicants. (instructed by Australian Government Solicitor)

MR E.M. NEKVAPIL, SC appears with **MR J.D. DONNELLY** for the first respondent. (instructed by Zarifi Lawyers)

KIEFEL CJ: There is a submitting appearance for the second respondent. Yes, Mr Lenehan.

MR LENEHAN: Thank you, your Honour. Your Honours have seen that the issue we wish to agitate is whether an aggregate term of imprisonment of 12 months or more imposed under State or Territory legislation is a term of imprisonment of 12 months or more within the meaning of section 501(7)(c) of the *Migration Act*. Your Honours know that the Full Federal Court held that it was not. In doing so, their Honours held that a person subject to an aggregate sentence of imprisonment of any length could not, by reason of that sentence, fail the character test. We say that is a surprising conclusion that cannot be right.

Can I accept immediately a somewhat awkward point for me, and that is by reason of legislative developments which your Honours have seen, the resolution of this question is unlikely to have any consequences for this particular case apart from cost, but I will come back to one particular aspect of Ms Pearson's response that may suggest a different view. Can I accept, entirely that for that reason, our application as we framed it is somewhat novel and that I have, I accept, some work to do in persuading your Honours that it is nevertheless appropriate to grant leave.

So, really, what our application comes down to is this proposition: this decision is so plainly wrong and has such potentially damaging consequences for other Commonwealth legislation that it falls within a special case where your Honours would grant leave to ensure the error does not remain uncorrected and is thus not

perpetuated through other statutory contexts and by other courts.

Can I just step back through that in a little more detail. Your Honours saw the Act that was provided yesterday – that is, the *Migration Amendment (Aggregate Sentences) Bill 2023* (Cth) – and that Act was given Royal Assent on 16 February 2023 and commenced the next day. Your Honours will have seen that the effect of that Act is to make it clear that a person who is sentenced to an aggregate sentence of 12 months or more fails the character test. It did so by inserting a new 5AB to the Act. Your Honours would also have seen that it applies both prospectively and retrospectively, and so we say applies to Ms Pearson's case. Of course, we say the enactment of that Act was unnecessary because we say the reasoning in the Full Court was wrong, but can I note that there - - -

KIEFEL CJ: I take it you accept that it puts beyond doubt that there is nothing further to be determined in this matter?

MR LENEHAN: So, two things there, your Honour. Apart from costs, and I accept it would be very unusual to grant leave on that basis, I am seeking to persuade your Honours that you nevertheless would. But the second point - - -

KIEFEL CJ: Does there continue to be a matter, Mr Lenehan?

MR LENEHAN: Given the position with costs, yes. Your Honours, of course, considered that very recently in the matter that Dr Donaghue and I argued before you. But, in this case, unlike that case, there remains the issue of costs. There is also this further issue, your Honours. If you look at our friends' response at 6, there is a somewhat mysterious observation where Ms Pearson states that the amending Act resolves a question of law:

for all cases other than this one) –

We do not quite what that is intended to mean, but can I speculate. A challenge has been brought in the Federal Court to the constitutional validity of the amending Act, one in circumstances where judgment was delivered before the amending legislation came into force – so, circumstances akin to Ms Pearson's case – and the other, where proceedings were pending at the time.

Those matters are to be heard by all courts of the Federal Court on 23 and 24 August 2023. I am briefed in one of them and not the other. They involve what I will call somewhat adventurous Chapter III and 51(xxxi) grounds. But the point about it is that it is not necessarily the case – subject to what Mr Nekvapil says about the mysterious observation

in 6 – that the parties are agreed that this case will no effect on – or our application will have no effect on Ms Pearson's rights.

It is, of course, our position that the Act is entirely valid, but it does not necessarily seem to us that Ms Pearson accepts that that is so. Even putting that to one side and assuming that there is no issue of validity, of course we would say, as I say, the Act is valid. We are seeking to persuade your Honours that, given that there are a number of pieces of federal legislation that use the term "a term of imprisonment" as the factum of which our provision operates to then dictate certain consequences – and there are also cognate phrases used in other Commonwealth legislation, and we have given your Honours the example that is in paragraph 6 of our leave application. That is the basis on which - - -

KIEFEL CJ: But, Mr Lenehan, why would this Court use this matter to determine questions of statutory interpretation arising under other statutes?

MR LENEHAN: Your Honour, of course we accept that you would not and could not. We nevertheless – and we have sought to make that clear in our reply, but what we do say is that *Pearson*, being a decision of an intermediate appellate court, on legislation that finds echoes – close echoes in some cases, in other Commonwealth Acts – it is undesirable that it remains uncorrected by this Court. I am accepting, entirely, that - - -

GLEESON J: Has it been applied in relation to other Acts?

MR LENEHAN: When we checked, it did not seem to have been, your Honour, no.

KIEFEL CJ: As a question of influential authority, it would be understood to have been stopped in its tracks, so to speak, by the Amendment Act, and, if the special leave is not granted here, the matter was not considered necessary to be determined by the High Court.

MR LENEHAN: Your Honour, I accept all that is so, and I do accept that the nature of our application is an unusual one. Having regard to some of the legislation . . . . . which uses similar terms – so, your Honours have seen that that includes the *Australian Citizenship Act* and the Electoral Act, we say that those consideration all weigh somewhat strongly in favour for grant of leave, but I am accepting that there are some things that I need to persuade your Honours of at the outset. If your Honours are against me then you probably would not need to hear the rest of what I was proposing to say on the substantive merits of our leave application.

Can I also note that when we were considering these questions, we did come across one other possible alternative in which, similarly, a

question of the validity of an amending Act had arisen. That was in a special leave application called *Deering (Australia) Ltd* and in that case, having decided not to grant leave immediately, what the Court did was to stand the matter out of the list. So, if your Honours were against me on the considerations that we say do weigh in favour of a grant of leave now, that is another course that your Honours could take.

Now, I am in your Honours' hands. Do your Honours wish me then to move then to the substantive merits of our leave application? Which I was proposing to do, unless your Honours tell me I should not.

KIEFEL CJ: No, of course, we are prepared to hear you in relation to your application.

MR LENEHAN: Thank you, your Honour. So, your Honours will have seen that we identify four key errors in the Full Court's reasons. The first of those is that we say that the Full Court never asked itself what the ordinary natural meaning of the words "term of imprisonment" in section 501(7)(c), and what it did instead was start with what I will call the contextual concern that the definition enlivens the mandatory cancellation power in 501(3)(a) – a provision your Honours are very familiar with – and then reasoned back from that to what we say is effectively a distorted textual conclusion.

Now, there is an immediate difficulty, we say, with that, which is this: the definition of "substantial criminal record" contained in subsection (7)(c) does not only apply to the mandatory cancellation provision in (3)(a). It is a definitional provision, and it operates also in respect of section 501(1), (2) and (3). So, that is, the discretionary cancellation and refusal provisions. Indeed, it existed in its present form well before the introduction of section 501(3)(a).

That seems to have been – your Honours will see starting in the book at page 126, in paragraph 41 of the court's reasons, their Honours' central focus – almost exclusive focus. So, you see, starting with paragraph 41, their Honours say:

> The significance of the proper construction of the character test stems from the terms of s 501(3A) which require the Minister to cancel a visa held by a person if the Minister reasonably suspects that the person does not pass the test –

and then refers to the conditions in "ss(7)(a), (b) or 501(6)(e)". Then their Honours move on in paragraph 42 to draw this conclusion:

> It is clear from the text of s 501 that mandatory cancellation of a person's visa on character grounds is reserved for the most serious offences – those attracting the death penalty, life imprisonment, a term of imprisonment of 12 months or more –

et cetera. And then:

> It is in that context the question of whether an aggregate sentence can be considered to be a term of imprisonment of 12 months or more is asked.

That continues to inform their Honours' approach to the question of construction. If your Honours go over a few pages to 130 of the book, at paragraph 47, their Honours say:

> Had Parliament intended that an aggregate sentence of 12 months or more should be subject to mandatory cancellation of a person's visa, it would have been a straightforward matter to say so. That it did not do so is consistent with the apparent purpose of section 501(3A), namely that only the most serious offending subjects a person to mandatory cancellation of a visa.

Now, that is ignoring the other important point of context I have noted; that is, these provisions apply equally to the discretionary cancellation and refusal provisions. So, what we say that the court has done there is, it has sided with an a priori assumption as to the purpose of these provisions derived from – and really, only from – subsection (3A), and then it has read down the words so as to conform to that assumption, which we say distracted it from the point that it should have started from, which, of course, is the orthodox point that one gives the words their natural and ordinary meaning unless it is plain that Parliament intended that they were to have some different meaning.

Your Honours will have seen that we say as a matter of ordinary language that the word "term" means a period specified by limits. And so, consistently with that, we say that the ordinary meaning with section 501(7)(c) applies where there is one term of imprisonment imposed and (d) applies where there are multiple terms of imprisonment imposed. Applying that to aggregate sentences, when a person is sentenced to an aggregate sentence, they are sentenced to a term of imprisonment, and if that term is 12 months or more they have a substantial criminal record.

Your Honours will have seen that we identify what would follow if that were not so. That would be the surprising consequence that a person – to give the colourful example – of an aggregate sentence of 30 years for murder and the infliction of grievous bodily harm, that person would not

fail the character test by reason of section 501(7)(c). We say that is an anomalous result that does not align with the obvious statutory purpose, being to select sentences of a particular length effectively, as an objective proxy for character. The murder example illustrates what has gone wrong in the Full Court's approach to the provisions. That is the first point we make.

The second point is that the Full Court's focus on what it perceived to be the purpose of the provision – derived, as I say, from 501(3A) – led it to ignore other important matters of context. Those are principally the matters of context that I have already identified – that is, 501(7)(c) has work to do in respect of both the discretionary and the mandatory cancellation provisions in section 501. We say, if the court had proper regard to those matters of context, it would have confirmed that, indeed, the words "term of imprisonment" do have their natural and ordinary meaning, which is the one that I have identified.

The third error that we identify is – your Honours will have seen that the court used the definition of "sentence", in section 501(12), in what we have described as a limiting way to read "term of imprisonment", as if it said, term of imprisonment for one offence. Your Honours see the reasoning on that issue in one paragraph, which appears at 127 of the book, paragraph 43. Their Honours there accept the point that we made, that section 23(b) of the *Acts Interpretation Act* would ordinarily compel the singular to include the plural, but they, nevertheless, discerned a contrary intention from the way in which the provisions dealt at various points with offences.

Your Honours will note that the example given of the use of singular language is 501(6)(aa). That is, in fact, a provision that your Honours have at 152 of the book – and if I can invite your Honours to quickly look at that, because it really makes our point. Your Honours see there that:

> a person does not pass the ***character test*** if:
>
> . . .
>
> (aa) the person has been convicted of an offence that was committed:
>
> (i) while the person was in immigration detention –

et cetera. That, we say, is a classic example where 23(b) would apply – that is, the person may have been convicted of one offence; the person may have been convicted of more than one offence, but in both those occasions, the character test would be enlivened, the person will fail to pass it.

We say that the discernment of the contrary intention involved error. We also say that the approach to section 501(12), which is expressed to be an inclusive definition, is also, for that reason, not correctly used as a basis for reading the notion of "term of imprisonment" in a limited way. The point of the inclusive definition here was to expand or clarify that the defined term "sentence" included:

> any form of determination of the punishment for an offence.

That was to avoid disputes about sentences imposed by foreign countries with different legal systems, as well as by military tribunals, noting that the definition of "court" also extends to military tribunals. So, we say too much has been drawn from section 501(12).

The final point that we make is that the decision is at odds with a substantial line of authority in the Full Federal Court, recognising federal considerations as an important contextual consideration in the construction of the Act. We have identified those at paragraph 31 of our leave application. They include *Te*, *Brown*, *Ali*, and *Nuon*. Each of those authorities recognise that the *Migration Act* as a Commonwealth statute can operate on persons who have been sentenced under the sentencing regimes of any of the States and Territories, and was therefore intended to accommodate differences in the approaches between those regimes.

We have noted that there were four State or Territory jurisdictions that had aggregated sentencing regimes before section 501(c) was introduced. We say that all of that now points to a lack of coherence in the Full Court authorities.

I note my time has concluded, your Honours.

KIEFEL CJ: Yes, thank you, Mr Lenehan. The Court will adjourn to consider the course that it will take.

AT 12.51 PM SHORT ADJOURNMENT

UPON RESUMING AT 12.54 PM:

KIEFEL CJ: We need not trouble you, Mr Nekvapil.

MR NEKVAPIL: If the Court pleases.

KIEFEL CJ: Given the enactment of the *Migration Amendment (Aggregate Sentences) Act 2023* (Cth), the validity of which is not challenged, the only matter which would fall for determination by this Court on an appeal would be the question of costs. The resolution of that matter is not a sufficient basis for the grant of special leave. Special leave is refused with costs.

The Court will now adjourn until 1.30 pm.

AT 12.55 PM THE MATTER WAS CONCLUDED