

42/10; [2010] VSC 392

SUPREME COURT OF VICTORIA

**GARGAN v COMMONWEALTH OF AUSTRALIA**

Robson J

22, 23 July 2010

**PRACTICE AND PROCEDURE – STANDING – PROCEEDINGS TAKEN IN THE FEDERAL COURT OF AUSTRALIA UNDER THE MIGRATION ACT 1958 (CTH) BY MR BUUTLJENS – PROCEEDINGS DISMISSED – ATTEMPT BY MR BUUTLJENS TO FILE APPEAL REFUSED BY REGISTRAR OF THE FEDERAL COURT – APPLICATION BY MR BUUTLJENS AND MR GARGAN TO MAGISTRATES' COURT FOR A MANDATORY INJUNCTION TO RESTRAIN THE REGISTRAR OF THE FEDERAL COURT FROM PERVERTING THE COURSE OF JUSTICE – APPLICATION REFUSED BY MAGISTRATE – APPLICATION TO SUPREME COURT BY MR GARGAN TO REFER MATTER BACK TO MAGISTRATES' COURT WITH DIRECTIONS TO HEAR – APPLICANT MR GARGAN HAD NO INTEREST IN THE FEDERAL COURT PROCEEDINGS – WHETHER *CRIMES ACT 1914* (CTH) GAVE THE APPLICANT STANDING – APPLICANT HELD TO HAVE NO STANDING – APPLICATION DISMISSED: *CRIMES ACT 1914* (CTH), s13.**

Mr Buultjens took proceedings in the Federal Court to compel an officer attached to the Department of Immigration to submit a request to the relevant Minister for a special intervention order to permit Mr Buultjens to remain in Australia. The proceeding was dismissed as was leave to appeal. The Registrar of the Federal Court refused to accept documents for filing on the grounds he had no right of appeal. Mr Buultjens and G. applied to the Magistrates' Court for an interlocutory injunction restraining the Commonwealth of Australia from continuing to attempt to deny access to an appeal to a Full Court of the Federal Court. The Magistrate refused the application and ordered that Mr Buultjens and G. pay an amount of costs. On a summons on an originating motion—

**HELD: Summons and originating motion dismissed.**

1. Standing should be considered in light of the particular relief sought. On the issue of standing in relation to G. it was clear that G. had no interest in the application concerning Mr Buultjens' proceedings in the Federal Court of Australia. No private right of G. was being violated, nor did he suffer any special damage.

2. In relation to the argument that G had standing in view of the fact an order for costs was made against him by the Magistrate, the originating motion did not seek any order reviewing the decision of the Magistrate. As it was, the originating motion and the summons did not seek to attack the order for costs in the Magistrates' Court.

3. In relation to the argument that G. had standing pursuant to s13(a) and (b) of the *Crimes Act 1914* (Cth), none of the matters constituted an application by any person to institute proceedings for the commitment for trial or the summary conviction of either the Registrar or the Commonwealth. In relation to G.'s application that the Commonwealth of Australia pay Mr Buultjens the sum of \$165,000 plus the \$750 costs of filing, such an application and originating motion of just one line did not constitute the institution of proceedings, for the commitment for trial of the Registrar or the Commonwealth, or the institution of proceedings for the summary conviction of the Registrar or the Commonwealth.

4. Accordingly, G. had no standing to bring the summons and the originating motion.

**ROBSON J:**

1. Mr Gargan seeks orders under an originating motion and by a summons dated 19 July 2010. I will come to the orders in a moment, but first it is convenient to set out the matters underlying the application.

2. Llewellyn Frederick Buultjens is a Sri Lankan who has been living in Australia for the last thirteen years. He claims the Department of Immigration has informed him that he must leave Australia and he has been seeking to avoid deportation. He made an application to the Federal Court of Australia seeking a writ of mandamus to compel a Mr Robertson, who I take to be an officer attached to the Department of Immigration, to submit to the Minister for Immigration and Citizenship Mr Buultjens' request for special ministerial intervention under s351 of the *Migration*

Act 1958 (Cth). The application was refused by order of Marshall J of the Federal Court of Australia on 18 December 2009. In his reasons, Marshall J said that the Minister had previously considered and rejected a request by Mr Buultjens that he intervene under s351 of the Act to permit Mr Buultjens to remain in Australia.

3. In the matter before Marshall J, Mr Robertson objected to the competency of the application. Marshall J held that the objection to competency was made out. He dismissed the proceeding pursuant to s31A of the *Federal Court of Australia Act 1976* (Cth), as the Court was satisfied that Mr Buultjens had no reasonable prospects of successfully prosecuting the proceedings.

4. Mr Buultjens sought leave to appeal from the decision of Marshall J. His application was heard before Gray J of the Federal Court of Australia. His application for leave was dismissed.

5. On 25 February 2010, Mr Buultjens sought to file an appeal from the decision of Gray J of the Federal Court. The Registrar refused to accept his documents for filing on the grounds he had no right of appeal.

6. Mr Buultjens then applied to the Magistrates' Court of Victoria at Melbourne on 26 February 2010. The application before the Magistrate stated that the Registrar of the Federal Court of Australia and the Commonwealth were summoned before the Court on the hearing of an application by Mr Gargan and Mr Buultjens for an interlocutory injunction under s80 of the *Trade Practices Act 1974* (Cth) restraining the defendants from

“continuing to attempt to deny access to an appeal to a Full Court constituted by three judges on an alleged claim that a single judge can be a Full Court when the statute, the *Federal Court of Australia Act 1976* clearly in s14 defines a Full Court as three or more judges and one judge, Gray J, cannot be a Full Court so as to deny any appeal to such a court.”

The application went on to state that:

“A Registrar when he/she refuses to accept such a process is acting in an administrative capacity and amenable to an injunction, under s18X of the *Federal Court of Australia Act 1976*”.

Further, it said:

“When exercising Federal jurisdiction under s39(2) *Judiciary Act 1903*, a State magistrate has the same jurisdiction as a Federal Court of Australia judge, and may injunct a proposed breach of s43 *Crimes Act 1914* (Cth) which guarantees the integrity of Federal judicial process”.

7. On 25 June 2010, the Magistrate, F. Holzer, ordered that the application between Mr Gargan, Mr Buultjens and the Registrar of the Federal Court of Australia be refused. He also ordered that Mr Gargan and Mr Buultjens pay the Registrar of the Federal Court's costs of \$2,200 and provided a stay of 30 days.

8. I now turn to the summons on the originating motion. The orders sought are as follows:

(1) An order under s15A *Crimes Act 1914* (Cth) and s61 *Supreme Court Act 1986* (Vic) that the Commonwealth purge its contempt of the Magistrates' Court in Victoria by paying to the applicant (Mr Gargan) the penalty prescribed by s43 *Crimes Act 1914* (Cth), the sum of \$165,000, in respect of its conduct on Friday 20 June 2010 in the said Court.

(2) An order under s36 *Supreme Court Act 1986* (Vic) declaring that a magistrate in Australia has power, under s80 *Trade Practices Act 1974* (Cth) and s12GD *Australian Securities and Investment Commission Act 2001* (Cth), to issue an injunction, to restrain anyone who would attempt to pervert the course of justice in respect of the judicial power of the Commonwealth or fail to abide by the Constitution and the laws made by the Parliament of the Commonwealth under that Constitution, and otherwise restrain breaches of Commonwealth statute laws, and award liquidated penalties and order restitution when laws are broken.

(3) A declaration under s36 *Supreme Court Act 1986* (Vic) that an order dismissing an application for an injunction ordering restitution and liquidated damages, does not preclude a person from attempting to obtain such an order from another magistrate, or judge having similar jurisdiction, and no *Anshun* estoppel can occur unless a jury trial has been had or orders are made by consent freely given.

(4) An order under the *Courts (Case Transfer) Act* 1991 (Vic), transferring this matter to the Magistrates' Court with the above directions, or in the alternative:

(5) An injunction restraining the Commonwealth from removing Llewellyn Frederick Buultjens from Australia, until such time as the judicial power of the Commonwealth has been properly applied and functions of the judicature, Chapter III complied with.

(6) Such other order as the Court deems meet.

(7) That the defendant pay the plaintiff the sum of \$165,000 plus \$750 costs of filing.

9. The defendant has raised as a preliminary point, the standing of Mr Gargan to bring the summons on the originating motion and, secondly, the jurisdiction of the Supreme Court to make orders concerning migration decisions when under s484 of the *Migration Act* 1958 (Cth) only the High Court, Federal and the Federal Magistrates' Court have jurisdiction in relation to migration decisions.

10. On the issue of standing, it is convenient first of all to consider the standing of Mr Gargan to have made the application to the Magistrates' Court seeking the orders against the Registrar of the Federal Court of the Commonwealth of Australia. It is clear that Mr Gargan had no interest in the application concerning Mr Buultjens' proceedings in the Federal Court of Australia.<sup>[1]</sup> No private right of Mr Gargan was being violated, nor did he suffer any special damage.

11. Mr Gargan says, however, that he does have standing in the Supreme Court as an order for costs was made against him in the Magistrates' Court proceeding. The originating motion does not seek any order reviewing the decision of the Magistrate. As it is, the originating motion and the summons does not seek to attack the order for costs in the Magistrates' Court. But the question of standing is not limited to this point. Standing should be considered in light of the particular relief sought. Insofar as Mr Gargan seeks the relief referred to in paragraphs 1, 2, 3, 4, 5 and 6 referred to above, he clearly has no interest, save for the argument he has under the *Crimes Act* 1914 (Cth), which I will now elaborate on.

12. Under s43 of the *Crimes Act* 1914 (Cth) any person who attempts in any way not specifically defined in the Act to obstruct, prevent, pervert or defeat the course of justice in relation to the judicial power of the Commonwealth shall be guilty of an offence.

13. Mr Gargan alleges that the actions of the Registrar and the Commonwealth, being vicariously responsible for the Registrar's actions, constitute obstruction preventing, perverting, or defeating the course of justice within the meaning of s43. As I am only considering the question of standing I will not indicate any view whether or not the actions of the Registrar may or may not have constituted an attempt to pervert justice.

14. Mr Gargan's argument then moves to s13(a) and (b) of the *Crimes Act* 1914 (Cth) which provide as follows:

"Unless the contrary intention appears in the Act or Regulation creating offence any person may (a) institute proceedings for the commitment for trial of any person in respect of any indictable offence against the law of the Commonwealth or (b) institute proceedings for the summary conviction of any person in respect of any offence against the law of the Commonwealth punishable on summary conviction".

15. In my view, proceedings for the commitment for trial under sub-paragraph (a) or proceedings for the summary conviction of the Registrar or the Commonwealth, under sub-paragraph (b) were not brought in the Magistrates' Court nor have they been sought in the Supreme Court. What is sought in the Supreme Court, and I will not state the orders in detail again, is:

(1) An order that the Commonwealth purge its contempt;

(2) An order for a declaration;

(3) An order under s36 of the *Supreme Court Rules* for an order dismissing an application for an injunction;

- (4) An order under the *Courts (Case Transfer) Act* 1991 (Vic) transferring this matter;
- (5) An injunction restraining the Commonwealth; and
- (6) Such other orders the court deems meet.

16. None of those matters constitute an application by any person to institute proceedings for the commitment for trial or the summary conviction of either the Registrar or the Commonwealth.

17. Mr Gargan also seeks an order that the defendant pay the plaintiff the sum of \$165,000 plus the \$750 costs of filing. In my opinion, such an application and originating motion of just one line does not constitute the institution of proceedings, for the commitment for trial of the Registrar or the Commonwealth, or the institution of proceedings for the summary conviction of the Registrar or the Commonwealth.

18. The originating motion refers to s15A of the *Crimes Act* 1914. As it transpired, the submission under that ground was not proceeded with, and is not applicable.

19. In my opinion, therefore, Mr Gargan has no standing to bring the summons and the originating motion. The summons on originating motion merely repeats the originating motion, and in view of the circumstances I accept the submissions of Mr Knowles that it is appropriate not only to dismiss the summons but also to dismiss the originating motion, which I now do with an order for costs.

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[1] See *Australian Conservation Foundation Incorporated v The Commonwealth of Australia* [1980] HCA 53; (1980) 146 CLR 493.

**APPEARANCES:** For the plaintiff Gargan: Mr I Hone, solicitor. For the defendant Commonwealth of Australia: Mr R Knowles, counsel. Australian Government Solicitor.

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