

Right to a Fair Trial in Civil Proceedings and Obligation to Interpret Legislation Compatibly with Human Rights

Capital Property Projects (ACT) Pty Ltd v ACTPLA [2008] ACTCA 9 (21 May 2008)

The ACT Court of Appeal has held that the obligation under s 30 of the *Human Rights Act 2004* (ACT) to interpret laws compatibly with human rights may be engaged even where the words of a statute are clear and there is no ambiguity. In particular, the Court held that a requirement that leave to appeal certain decisions only be granted where 'substantial injustice' would otherwise occur was potentially incompatible with the positive right to a fair trial under s 21 of the *HRA*. The Court considered that it may be necessary to 'modify' the reference to 'substantial injustice' as 'something less than a substantial injustice may well result in an unfair trial'.

Facts

This matter involved an application for leave to appeal against an interlocutory decision by Gray J in a case concerning a long running planning dispute. In 2006, the ACT Planning and Land Authority had approved a development application by a Direct Factory Outlet company to develop a factory outlet retail complex in Fyshwick. This development was opposed by the applicants who are each associated with the Brand Depot complex near the Canberra airport. The applicants sought judicial review of the planning decision under the *ADJR Act 1989*. One issue which arose in those proceedings was whether the applicants could adduce evidence which had not been before ACTPLA when it made the decision, in order to show that the development was inconsistent with the Territory Plan (established under ACT legislation) and the Capital Plan (established under federal legislation). Each statute prohibits a Territory authority from approving any development which is inconsistent with the respective plan, and the applicants claimed that ACTPLA had exceeded its jurisdiction in approving the development. Justice Gray had ruled that this evidence was inadmissible.

Section 37E(4) of the *Supreme Court Act 1933* (ACT) provides that 'an appeal may be brought against an interlocutory order of the court constituted by a single judge only with leave of the Court of Appeal.'

Decision

Justice Refshauge granted leave to appeal to the Court of Appeal against the interlocutory decision.

His Honour considered the rationale for the requirement for leave to appeal against interlocutory decisions, and the common law principles which have been developed to determine whether leave should be granted. Among other criteria, this case law suggests that an applicant for leave may need to satisfy the court that 'substantial injustice' would result if leave were refused.

His Honour considered that the right to a fair trial in s 21 of the *Human Rights Act* might impact upon these principles, as something less than substantial injustice may still render a trial 'unfair.' His Honour noted that the right to a fair trial in the *Human Rights Act* is broader than the right in the *European Convention*, and clearly applies to public law rights and obligations. His detailed discussion of the interpretation issue is worth quoting in full (at paras 37-41):

Further, consideration needs to be given of the role that s 21 of the *Human Rights Act 2004* (ACT) plays in this. This Act, of course, operates principally on statutory material.

Appeals are, however, creatures of statute and their limit and extent are to be found in statute...

In construing the provision for leave to appeal, then, an interpretation that is consistent with human rights as far as possible is to be preferred. This was required by s 30(1) of the *Human Rights Act 2004* (ACT) as at the date of hearing of this application, though I note that since then it has been amended, on 17 March 2008, to strengthen the requirement for consistency with human rights. I do not need to consider whether the amendment applies to this application. On either provision, the construction of the legislation for leave to appeal to make it consistent with the right to a fair trial would, it seems to me, require that the reference to 'substantial injustice' be modified. Something less than a substantial injustice may well result in an unfair trial.

Of course, matters such as delay in or fragmentation of a trial may also affect its fairness and these factors too must be taken into account. It is also clear that the trial has to be fair, not perfect. No trial is likely to pass a test for perfection. It must, however, be positively fair; that is to say, if there was a position where a trial was neither fair nor unfair (conceptually possible, but difficult to see how it could practically exist) that would not suffice, as the trial must be fair.

As no specific argument was addressed to this issue, I do not feel able to formulate a test, including what limits may be appropriate; for example, a minor injustice (if such is possible) may not render a trial unfair and some decisions the subject of challenge may not have any relevant effect on the fairness of the actual trial at all.

His Honour went on to briefly consider the arguments raised by the applicants and respondents regarding the construction of the Territory and federal planning legislation, and whether the prohibition on a Territory authority approving a development inconsistent with the Territory Plan or Capital Plan was a test of objective inconsistency going to the jurisdiction of ACTPLA, or a subjective issue to be determined by ACTPLA without review. Justice Refshauge noted that this construction of the Territory law might again be affected by the *Human Rights Act*:

This raises what has become a somewhat problematic question with respect to statutory construction in the Territory. It appears that it is no longer enough to presume that one can start by assuming that the legal meaning of a legislative provision 'will correspond with the grammatical meaning of the provision' (*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384). A court has now to comply with legislative directives, such as in s 139 of the *Legislation Act 2001* (ACT) and s 30 of the *Human Rights Act 2004* (ACT), which directives may require a construction that might not have arisen from the resolution of ambiguity: *R v Lambert* [2002] 2 AC 545.

His Honour did not need to make a final determination of the construction issue, but considered that the applicants had an arguable case for their interpretation of the legislation, and that this raised sufficient doubt to warrant reconsideration of the decision of Justice Gray by the Court of Appeal.

Comment

This decision is notable for the detailed references to the legislative interpretation issues raised by s 30 of the *Human Rights Act*, which have not often been explicitly considered by the Supreme Court. Justice Refshauge's acknowledgement that s 30 may require human rights to be brought into play in the interpretation of Territory legislation even where there is no obvious ambiguity to

be resolved is particularly useful (although it is interesting that he referred to the decision of the House of Lords in *R v Lambert*, rather than the Lord's more recent doctrine on interpretation in *Ghaidan v Godin-Mendoza*). The application of s 30 to the interpretation of the leave provision is also useful in clarifying that the *Human Rights Act* may require the modification of common law doctrine which has been developed around a statutory provision. Finally, his Honour's comments on the requirements of a fair trial in this context are notable in confirming a positive requirement for fairness, rather than simply the avoidance of unfairness.

The decision is available at

http://www.courts.act.gov.au/supreme/judgmentsca/capital_property.htm.

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(<http://acthra.anu.edu.au/index.html>)