FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Border Protection v CQZ15 and Another (No 2)*

[2018] FCAFC 19

Kenny, Tracey and Griffiths JJ

14 February 2018

Costs — Test case — Where appeal constitutes test case concerning proper construction of provisions of Migration Act 1958 (Cth) — Significant public interest in result — No order as to costs of appeal — Costs certificate granted — Federal Proceedings (Costs) Act 1981 (Cth), s 6.

This appeal was one of a number designed to serve as test cases for a significant number of pending appeals from the Federal Circuit Court, in which very similar issues arose concerning the admissibility of documents subject to a notification under Pt 7 of the *Migration Act 1958* (Cth) as evidence in judicial review proceedings. As a result, the unsuccessful respondent argued that the Court should exercise its discretion to find that there be no order as to costs, and that a costs certificate be granted under s 6 of the *Federal Proceedings (Costs) Act 1981* (Cth) (the FPC Act). In particular, he argued that the decision was concerned with fundamental rights, concerned clarification of the law and was complex and important.

Section 6 of the FPC Act provided relevantly that, where a federal appeal succeeded on a question of law, the appeal court could grant the respondent a costs certificate in respect of the appeal, to the effect that it would be appropriate for the Attorney-General to authorise payment of the costs incurred by the respondent.

Held: The provisions of the *Migration Act* in issue in each of the test cases raise new questions, and there is a significant public interest in ensuring that they are properly understood and observed by relevant decision-makers. There is therefore no order as to costs of this appeal, and the first respondent should be granted a certificate under s 6 of the FPC Act. [23]-[24], [28]-[29]

Minister for Immigration and Border Protection v BJN16 (2017) 253 FCR 21, followed.

Cases Cited

Alwar v Minister for Immigration and Multicultural Affairs (1999) 57 ALD 343.

Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities (No 3) [2012] FCA 744.

Families, Housing, Community Services and Indigenous Affairs, Secretary, Department of v Mouratidis (2012) 200 FCR 464.

*[EDITOR'S NOTE: See also *CQZ15* (2017) 253 FCR 1.]

Hussain v Minister for Foreign Affairs (2008) 169 FCR 241.

Immigration and Border Protection, Minister for v BBS16 (2017) 257 FCR 111.

Immigration and Border Protection, Minister for v BBS16 (No 2) [2017] FCAFC 199.

Immigration and Border Protection, Minister for v BJN16 (2017) 253 FCR 21.

Immigration and Border Protection, Minister for v CQZ15 (2017) 253 FCR 1.

Immigration and Border Protection, Minister for v Singh (2016) 244 FCR 305.

Immigration and Citizenship, Minister for v SZNVW (No 3) [2010] FCAFC 102.

Immigration and Multicultural Affairs, Minister for v Singh (2000) 98 FCR 469.

Immigration and Multicultural and Indigenous Affairs, Minister for v X (2005) 146 FCR 408.

Nouredine v Minister for Immigration and Multicultural Affairs (1999) 91 FCR 138.

Perrett v Commissioner for Superannuation (1991) 29 FCR 581.

Primary Industries, Parks, Water and Environment, Secretary, Department of v Tasmanian Aboriginal Centre Inc (No 2) [2016] FCAFC 137.

Ruddock v Vadarlis (No 2) (2001) 115 FCR 229.

Scherer v Counting Instruments Ltd [1986] 1 WLR 615.

Shelton v Repatriation Commission (1999) 85 FCR 587.

Appeal

C Horan QC with *L Brown*, for the appellant.

L De Ferrari with *CL Symons*, for the first respondent.

14 February 2018

The Court

1 On 29 November 2017 the Court made the following orders in this matter:

1. The appeal be allowed.
2. The judgment of the Federal Circuit Court of Australia delivered on 30 January 2017 be set aside.
3. The matter be remitted to the Federal Circuit Court of Australia for hearing and determination according to law.
4. Within 14 days of today, the parties each file and serve submissions on costs (limited to 5 pages) setting out the orders for which they contend and why, unless within that time they have filed proposed orders as to costs to which they each consent.
5. Any orders as to costs be made on the papers and without another oral hearing.

2 The reasons of the Court bear the following citation: *Minister for Immigration and Border Protection v CQZ15* (2017) 253 FCR 1 (*CQZ15*).

3 The parties were unable to agree on costs orders in accordance with order 4 and each has since filed brief written submissions in support of his position. As noted above, the Court ordered that it would determine what orders as to costs it would make on the papers and without a further hearing.

4 There was no disagreement that under s 43(2) of the *Federal Court of Australia Act 1976* (Cth), the disposition of costs is at the discretion of the Court, although it is well-established that this discretion must be exercised judicially, having regard to the relevant principles and the justice of the case in

all the circumstances. The disagreement between the parties in this case concerned the proper exercise of discretion in the circumstances of the case.

5 The appellant Minister submitted that the first respondent should pay the Minister's costs of the appeal, to be taxed if not agreed. In the alternative, the Minister proposed additional orders culminating in a Registrar's determination of a lump sum figure for the Minister's costs, to be paid by the first respondent.

6 The first respondent sought an order that the Minister pay the first respondent's costs of the appeal and, in the alternative, that there should be no order as to costs. The first respondent also sought an order under s 6(1) of the *Federal Proceedings (Costs) Act 1981* (Cth) (**Costs Act**) for the grant of a costs certificate.

7 For the following reasons, we would order that there be no order as to costs, and that, subject to the first respondent providing confirmation by affidavit that he has incurred costs in relation to the appeal, the first respondent be granted a costs certificate under s 6 of the Costs Act in respect of the appeal.

Some procedural background

8 The parties' costs submissions relied on aspects of the procedural background to the appeal. Briefly stated, on 20 February 2017, the Minister filed a notice of appeal from the judgment of the Federal Circuit Court of Australia (**FCC**), which set aside the decision of the Administrative Appeals Tribunal (**the Tribunal**). In substance, the two grounds of appeal were that the FCC erred in refusing to admit the affidavit of Vincenzo Murano affirmed 12 October 2016 (**the first Murano affidavit**) and in concluding that the Tribunal erred by denying the first respondent procedural fairness because it did not disclose two certificates issued under s 438 of the *Migration Act 1958* (Cth).

9 On 2 March 2017 the first respondent filed a notice of contention, in substance asserting that the FCC erred in failing to remove the first Murano affidavit from the Court file and in failing to find that the decision of the Tribunal was "vitiated by fact-finding that is objectively unreasonable".

10 By an email to the Court dated 22 March 2017, the first respondent requested that the appeal be listed for a directions hearing "as soon as possible" to deal with an issue in relation to a ground of the Minister's notice of appeal and other matters. By an email dated 4 April 2017, the Court informed the parties that there would be no directions hearing before the outcome of the application for special leave to appeal from the orders and judgment in *Minister for Immigration and Border Protection v Singh* (2016) 244 FCR 305 was known. After the High Court dismissed that special leave application, the first respondent again sought to have a directions hearing set down in advance of the hearing of the appeal. The Court took the view, however, that the interlocutory issues should be dealt with at the hearing of the appeal.

11 Prior to the hearing of the appeal, the Minister filed an affidavit in which Mr Murano deposed that he had exhibited a copy of the first Murano affidavit as "VM-1" to this, his second affidavit and the Court directed that the exhibit "VM-1" be placed in a sealed envelope prior to the hearing of the appeal.

12 Also prior to the hearing of the appeal, the first respondent filed an affidavit affirmed on 4 September 2017 by Ms Faram, as a consequence of which the

Court directed that a document exhibited to her affidavit and described as a proposed Further Amended Application be provided to the Court at the hearing of the appeal in a sealed envelope.

The parties' submissions

13 The Minister's primary submission was that the Court should apply the usual rule that costs follow the event because the Minister had filed his appeal as of right, and had succeeded in his response to all the issues raised by the first respondent in the FCC: see *CQZ15* at [68]-[90]. Further, the Minister submitted that he had been permitted to rely on certain grounds of appeal, notwithstanding the first respondent's opposition; and that the Minister was unnecessarily required to incur costs in dealing with the first respondent's requests to have the appeal listed for a directions hearing. The Minister noted that, in allowing the appeal, the Court found it unnecessary to consider any of the issues raised in the first respondent's notice of contention and that the Court made it clear that the filing of the first Murano affidavit was not in the circumstances an abuse of process.

14 The Minister opposed the orders sought by the first respondent, referring to a statement in *Scherer v Counting Instruments Ltd* [1986] 1 WLR 615 at 622 that an order that a successful party pay the costs of an unsuccessful party "can rarely, if ever, be justified". Amongst other things, the Minister further submitted that he had acted as a model litigant and not caused any unnecessary litigation or expense.

15 In support of the first respondent's submission that the Minister should pay his costs of the appeal, the first respondent drew attention to the Court's statement in its reasons for judgment in another appeal, *Minister for Immigration and Border Protection v BJN16* (2017) 253 FCR 21 (*BJN16*) at [83], which was heard two days after this appeal, that:

> The appeal is one of a number which serve as test cases for pending appeals from a significant number of decisions made by the FCC. In these circumstances the Minister, properly in our view, advised the Court that, in the event that he succeeded, he would bear BJN16's costs of the application for leave to appeal and the appeal.

The first respondent submitted that the Court should, consistently with *BJN16*, make a costs order that recognised the significance and character of the present appeal as a test case. The first respondent submitted that "in fundamental respects", this appeal was "relevantly indistinguishable" from *BJN16*.

16 There were, so the first respondent submitted, other considerations that might also inform the Court's exercise of discretion as to costs, including: (1) where the decision involves, or is ultimately concerned with, fundamental rights, including rights of the kind involved in this appeal; (2) where, as here, the appeal contributes to, or results in, a clarification of the law; (3) where, as in this case, the central question raised by the appeal has some complexity and importance; and (4) where, as in this case, the proceedings have the character of a test case. The first respondent cited the following authorities in support of these submissions: *Shelton v Repatriation Commission* (1999) 85 FCR 587 at 590; *Nouredine v Minister for Immigration and Multicultural Affairs* (1999) 91 FCR 138 at [16]; *Alwar v Minister for Immigration and Multicultural Affairs* (1999) 57 ALD 343 at [8]; *Perrett v Commissioner for Superannuation* (1991) 29 FCR 581 at 594; *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241 at [183]; *Buzzacott v Minister for Sustainability, Environment, Water,*

Population and Communities (No 3) [2012] FCA 744 at [27]; *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 at [17]; *Minister for Immigration and Multicultural and Indigenous Affairs v X* (2005) 146 FCR 408 at [15]; and *Minister for Immigration and Multicultural Affairs v Singh* (2000) 98 FCR 469 at [65].

17 The first respondent noted that the Minister had given an undertaking to pay the costs of the appeal in *BJN16* and submitted that, in these circumstances, "adherence to the 'usual order' would be productive of unfairness" and "create discord between decisions of this Court". The first respondent contended that it would be unfair to burden him with "a large debt" arising from errors made by the Tribunal and the FCC, especially if he were successful in the FCC on remittal.

18 The first respondent argued that his conduct in the appeal should not operate "so as to outweigh the considerations" to which he had referred.

19 The first respondent also submitted that it would be appropriate to grant him a costs certificate on the basis, first, that it would have been unreasonable to expect the first respondent to appear in the appeal, unrepresented, given the complexity of the issues; secondly, there are no matters that would make it inappropriate to grant the first respondent a costs certificate; thirdly, the appeal was in the nature of a test case; and finally, the existence of a debt to the Commonwealth may provide a basis for refusing the grant of a visa other than a protection visa: see *Migration Regulations 1994* (Cth), Sch 4, Item 4004.

Consideration

20 An award of costs will usually, though not invariably, be made in favour of a successful party against an unsuccessful party. As already stated, the disposition of costs is at the discretion of the Court and it is a discretion to be exercised judicially, having regard to the justice of the case in all the circumstances.

21 We accept that this appeal, like *BJN16* and *Minister for Immigration and Border Protection v BBS16* (2017) 257 FCR 111 (*BBS16*), was one of several appeals designed to serve as test cases for a significant number of pending appeals from the FCC in which the same or very similar issues arose. As already noted, the Minister properly recognised this characteristic of *BJN16* by undertaking to bear BJN16's costs irrespective of the outcome of the Minister's appeal in that case: see *Minister for Immigration and Border Protection v BBS16 (No 2)* [2017] FCAFC 199. As we have seen, the Minister did not adopt the same position here. In *BBS16*, the Court accepted, substantially for the reasons advanced by the Minister, that each party should bear its own costs of the appeal and that the Minister should bear 50% of BBS16's costs below.

22 The present appeal, like *BJN16*, was concerned with the admissibility of documents containing information subject to a notification under s 438(2) of Pt 7 of the *Migration Act* as evidence in a judicial review proceeding, either to establish that there has been no denial of procedural fairness or to show that relief should be denied in the exercise of the Court's discretion: see *CQZ15* at [56]. *BBS16* raised a variety of issues, including questions concerning the operation of the certificate provision in s 473GB in Pt 7AA of the *Migration Act*. The Minister was successful in all three of these cases. In *CQZ15*, the Court held that the reviewing court should have received in evidence the first Murano affidavit to which was exhibited the documents said to be covered by the s 438 notifications.

23 The provisions of the *Migration Act* in issue in all these test cases raise new questions. Further, the provisions of the *Migration Act* in issue in *BJN16* and *CQZ15* represent a departure from the procedures that the Tribunal would ordinarily be expected to follow. Perhaps unsurprisingly, judges of the FCC have taken different approaches to their correct interpretation and application. These appeals are part of the process of clarifying the law. Clarifying the law here was for the benefit of the parties, other individuals who are or might be affected by them, and the administrative process. In this context, there is a substantial public interest in ensuring that the provisions are properly understood and observed by relevant decision-makers. This public interest is heightened by the fact that the statutory provisions in question form part of the way in which Australia has chosen to discharge some of its important international obligations, including under the *Convention Relating to the Status of Refugees 1951*.

24 Bearing these considerations in mind, we consider that the proper order is that there be no order as to costs of the appeal. This result is broadly consistent with the numerous authorities to which the first respondent referred us.

25 We do not consider that the first respondent's conduct of the appeal should lead us to a different conclusion. In particular, we do not consider that the first respondent acted unreasonably in his pursuit of a directions hearing prior to the hearing of the appeal so as to occasion costs that the Minister should not bear. Nor do we consider that through his notice of contention the first respondent so increased the Minister's costs that another order is appropriate. It seems to us that the additional issues raised by the notice of contention did not occasion the Minister much additional work and they did not take up much time at the hearing of the appeal.

Costs certificate

26 The first respondent submitted that if the Court made no order as to costs, the circumstances of the case made it appropriate that he be indemnified as to the costs he incurred as a result of responding to the Minister's appeal by means of a costs certificate under s 6(1) of the Costs Act.

27 Section 6 of the Costs Act relevantly provides:

> Costs certificates for respondents — Federal appeals
>
> (1) Subject to this Act, where a Federal appeal succeeds on a question of law, the court that heard the appeal may, on the application of a respondent to the appeal, grant to the respondent a costs certificate in respect of the appeal.
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> …
>
> (3) The certificate that may be granted under subsection (1) … by a court to a respondent to a Federal appeal is a certificate stating that, in the opinion of the court, it would be appropriate for the Attorney-General to authorize a payment under this Act to the respondent in respect of:
>
> (a) the costs incurred by the respondent in relation to the appeal; and
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> (b) any costs incurred by an appellant in relation to the appeal that have been, or are required to be, paid by the respondent to the appellant in pursuance of an order of the court, not being costs to which a costs certificate granted under section 7 relates.

28 This appeal is a "Federal appeal" within the meaning of s 3(1) of the Costs Act, being an appeal to the Federal Court from a judgment of the Federal

Circuit Court. The appeal succeeded on a question of law: see *CQZ15* at [89]. The prerequisites for the grant of a costs certificate referred to in s 6(1) are satisfied. We note that the terms of s 6(3) show that it is open to grant a costs certificate to a respondent in respect of the costs incurred by the respondent in relation to an appeal, even though there is no costs order against the unsuccessful respondent: see *Secretary, Department of Families, Housing, Community Services and Indigenous Affairs v Mouratidis* (2012) 200 FCR 464 at [45] (Gray J, Reeves J agreeing at [129]); also at [125] and [128] (Flick J); and *Secretary, Department of Primary Industries, Parks, Water and Environment v Tasmanian Aboriginal Centre Inc (No 2)* [2016] FCAFC 137 (*Tasmanian Aboriginal Centre*) at [26].

29 The discretion to grant a certificate under s 6(1) of the Costs Act is broad and unfettered, although it must be exercised judicially. As already observed, this appeal was in the nature of a test case, with wider importance beyond the particular outcome of the case: compare *Minister for Immigration and Citizenship v SZNVW (No 3)* [2010] FCAFC 102 at [3]-[4] and *Tasmanian Aboriginal Centre* at [28]. For the reasons already indicated, we do not consider that there was any disentitling conduct by the first respondent in the course of the appeal. In these circumstances, but for one matter, we would grant the first respondent a costs certificate in respect of the appeal stating that, in the opinion of the court, it would be appropriate for the Attorney-General to authorise a payment under the Costs Act to the first respondent in respect of the costs incurred by the first respondent in relation to the appeal.

30 We note that the first respondent was represented on the appeal by Victoria Legal Aid and it is not clear to us whether the first respondent has in fact incurred any costs in relation to the appeal. It seems to us that the first respondent should not be granted a costs certificate unless he incurred such costs, since these are the costs in respect of which a certificate can only be granted in this case: see s 6(3)(a). We therefore propose to condition the grant of the certificate on the provision of confirmation by affidavit that the first respondent incurred costs in relation to the appeal.

Disposition

31 Amongst the orders made by the FCC on 30 January 2017 was an order that the Minister pay the first respondent's costs of the proceeding fixed in the sum of $7,206. This order was part of the judgment set aside by this Court on 29 November 2017. Neither the Minister nor the first respondent sought any order in its place.

32 For the reasons stated, we would order that there be no order as to the costs of the appeal. We would further order that, subject to the first respondent providing confirmation by affidavit that he has incurred costs in relation to the appeal, the first respondent be granted a certificate to the effect that in the opinion of the court it would be appropriate for the Attorney-General to authorise a payment under the Costs Act to the first respondent in respect of the costs incurred by the first respondent in relation to the appeal.

Orders accordingly

Solicitors for the appellant: *Clayton Utz*.

Solicitors for the first respondent: *Victoria Legal Aid*.

SARAH SOMERSET