NICHOLSON-BROWN V JENNINGS

Federal Court of Australia (Middleton J)
3 May 2007
[2007] FCA 634

Administrative law – judicial review of ministerial decision – requirement to consult – ultra vires – irrelevant considerations failure to have regard to relevant considerations – improper purpose – breach of natural justice.

Facts:

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ('the Commonwealth Act') prescribes a regime for the preservation and protection of areas and objects that are of particular significance to Aboriginals. Part IIA of the Commonwealth Act (now repealed) was concerned with Victorian Aboriginal cultural heritage, and provided for the making of emergency declarations of preservation where there were reasonable grounds to believe that an Aboriginal place or object is under threat of injury or desecration. Emergency declarations were able to be made by, inter alia, inspectors who were appointed under the Commonwealth Act by the Minister. Section 21R of the Commonwealth Act conferred upon the Minister the power to suspend inspector appointments.

The *Aboriginal Heritage Bill 2006* (Vic) ('the Victorian Bill') was introduced into parliament on 4 April 2006. The Victorian Bill was part of a new scheme which, in conjunction with the repeal of Part IIA of the Commonwealth Act, would provide greater oversight in respect of the making of emergency declarations. It set new criteria for the appointment of inspectors which differed to those specified under the Commonwealth Act.

Ms Vicki Nicholson-Brown and Ms Ella Anselmi ('the applicants') were two inspectors appointed under the Commonwealth Act who had acted in that capacity since 1991. On 10 April 2006 Ms Nicholson-Brown lawfully exercised her power to make an emergency declaration. On 21 April 2006 the Minister for Aboriginal Affairs for the State of Victoria ('the respondent') purported to suspend all inspector appointments, including the appointments of the applicants, and asked all inspectors to show cause as to why they should not be permanently removed. The respondent referred to the need to 'smooth the transition' to the new legislative regime and made reference to the community reaction to the making of Ms Nicholson-Brown's emergency declaration.

The applicants protested and wrote to the respondent to justify the continuation of their roles as inspectors.

The respondent permanently removed each applicant as an inspector on 23 June 2006. The applicants sought judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) of both the decision to suspend their appointments and the subsequent decision to remove them as inspectors.

The Victorian Bill commenced as an Act on 28 May 2007, after the date of judgment.

Held, dismissing the application:

1. As a matter of statutory construction, the power of the Minister to appoint an inspector under section 21R of the Act did not require consultation, in the sense that it was not contingent upon the recommendation, or subject to the approval or consent, of a local Aboriginal community: [16].

2. Section 33(4) of the *Acts Interpretation Act 1901* (Cth) did not apply to section 21R of the Commonwealth Act, because section 33(4) is concerned with a requirement to act only upon a recommendation, approval or consent, which is not the same as a requirement to consult: [19].

3. The term 'instrument' in a statute refers to all instruments, whether of a legislative character or of an administrative or executive character: [25]; *X v Australian Crime Commission* (2004) 139 FCR 413 followed.

4. Section 33(3) of the *Acts Interpretation Act 1901* (Cth), which relates to the making, granting or issuing of an instrument, does not limit or operate to constrain the effect of section 33(4), which relates to the making of an appointment: [29]; *Laurence v Chief of Navy* (2004) 139 FCR 555 applied.

5. Even if there was a requirement of consultation with a local Aboriginal community prior to the suspension or removal of an inspector, breach of that requirement would not lead to the invalidity of such a suspension or removal, as it is foreseeable that such a power may need to be exercised in circumstances where consultation would not be relevant: [30]; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 applied.

6. The respondent did not have regard to irrelevant considerations, and was entitled to act upon his perceptions concerning community reaction, as this was an influence to which he was legitimately subject: [43]-[45]; *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 applied.

7. The respondent had regard to all relevant considerations: [51].

8. The respondent did not exercise the power to suspend and remove for an improper purpose: [54].

9. There was insufficient evidence to make a finding that the applicants' reputations had been adversely affected by the suspension decision: [63], and consequently there was no breach of natural justice: [66]. In fact, the evidence showed that procedural fairness was accorded to the applicants, and that the matter merely involved an acceleration of the end of the current legislative regime: [66]-[68].