AURUKUN SHIRE COUNCIL & ANOR V CEO OFFICE OF LIQUOR GAMING AND RACING IN THE DEPARTMENT OF TREASURY

Full Court of the Supreme Court of Queensland (McMurdo P, Keane JA and Philippides J)
1 March 2010
[2010] QCA 37

Administrative law – decision to revoke liquor license under s 106 of the *Liquor Act 1992* (Qld) – consideration of s 10 of the *Racial Discrimination Act 1975* (Cth) – whether amendments made in 2008 to the *Liquor Act 1992* (Qld) are invalid due to inconsistency with provisions of the *Racial Discrimination Act 1975* – whether the amendments are special measures under s 8 of the *Racial Discrimination Act 1975* (Cth)

Facts:

This case involved two proceedings that concerned amendments made by the *Aboriginal and Torres Strait Island Communities (Justice, Land and Other Matters) and Other Acts Amendment Act 2008* (Qld) to s 106 of the *Liquor Act 1992* (QLD) ('*Liquor Act*') to provide that a local government, corporatised corporation or relevant public sector entity may not apply for or hold a general liquor licence. The amendments came into force on 1 July 2008. Previously, the general licences in a community area could only be held by a board or entity prescribed by regulation. Before 1 July 2008, the appellants in this case the Aurukun and Kowanyama Shire Councils held general liquor licences under the *Liquor Act 1992* (Qld).

Transitional provisions stipulated that existing liquor licences held by these bodies would lapse on 1 July 2008. The appellants submitted an application to declare these amendments invalid. They claimed that the relevant amendments were inconsistent with provisions in the *Racial Discrimination Act 1975* (Cth) ('*RDA*') and, therefore, invalid under s 109 of the *Constitution*. The primary judge refused the appellants application and this appeal was subsequently lodged.

The appeal centered on two primary issues. First, whether the relevant amendments to the *Liquor Act* offended s 10 of the *RDA,* which provides for rights to equality before the law. Second, whether the relevant amendments were special measures under s 8 of the *RDA* and, therefore, not subject to s 10, and, consequently, s 109 of the *Constitution*.

Held, refusing the application to adduce further evidence and dismissing the appeals, per McMurdo P:

1. Section 10 of the *RDA* creates a general personal right, regardless of race, to enjoy all rights enjoyed by persons of another race. A broad approach should be adopted in determining which rights fall under s 10 of the *RDA*: [30], [44]; *Gehardy v Brown* [1985] HCA 11, cited.

2. The appellants as local governments are not 'persons of a particular race' in the ordinary sense of the words of s 10. However, they are the bodies politic for communities with primarily Indigenous populations. In adopting the broad approach based on substance rather than form when interpreting international obligations and provisions like s 10 enacted in pursuance of them, there is no reason to deny standing to the appellants, as there is no contrary intention referred to in s 22(1) of the *Acts Interpretation Act 1901* (Cth) that is manifest in s 10(1). The appellants have standing to apply for the declarations they seek on the basis that they do not enjoy, in their own capacity, a s 10 right to the same extent as the non-Indigenous, and, on a representative basis, that their Indigenous constituents do not enjoy a right to the same extent as the non-Indigenous: [37], [38]; *Koowarta v Bjelke-Peterson* (1982)153 CLR 168, cited; *Woomera Aboriginal Corporation v Edwards* (1993) HREOC 24, cited; *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* [2007] FCA 615, followed.

3. The trial judges was incorrect in concluding that just because the relevant amendments apply to the few non-Indigenous people residing in the shires that they were not racially discriminatory. The relevant amendments infringe s 10(1) of the *RDA* in that they prevent the appellants' Indigenous constituents from enjoying equal treatment before the law and accessing a service intended for use by the general public, specifically the lawful service of alcohol in a public area within their communities. Therefore, the impugned provisions must be struck down under s 109 of the *Constitution* unless they come within the special measure exceptions under s 8 of the *RDA*: [45], [58], [71]; *Bropho v Western Australia and Others* (2008) 169 FCR 59, applied.

4. The liquor licences are property for the purposes of s 10, and the appellants did not receive any compensation for their withdrawl. The relevant amendments stop the appellants from enjoying a right, enjoyed by non-Indigenous holders of liquor licenses, not to be deprived arbitrarily of their property without compensation. However, the appellants' property rights in their liquor licences are outweighed by the rights of their constituents to security of the person and protection from alcohol incited violence. The relevant amendments aim to achieve a legitimate and non-discriminatory public goal and do not arbitrarily deprive the appellants of their property: [51], [64]–[69], [71]; *Bropho v Western Australia and Others* (2008) 169 FCR 59, applied.

5. The relevant amendments did not compromise the rights of the Indigenous community to freedom of peaceful assembly and association, as set out in art 5(d)(ix) of the *International Convention on the Elimination of All Forms of Racial Discrimination*:[53], [71].

6. The appellants have called no evidence to establish that the right to drink alcohol in a licensed public place is an Australian, a Queensland or an Indigenous cultural activity. The relevant amendments did not compromise the rights of the Indigenous community to equal participation in cultural activities, as set out in art 5(e)(vi) of the *International Convention on the Elimination of All Forms of Racial Discrimination*: [55], [71].

7. Broadly, special measures in this context are distinctions, exclusions, restrictions and preferences based on race which deny formal equality before the law for the purpose of achieving effective and genuine equality by alleviating the conditions of a disadvantaged class. In determining whether the relevant amendments were special measures under s 8, the legislature did not have to show that a direct benefit is positively conferred on the Indigenous constituents; it just has to be open to make such a political assessment. Weight can be given to the wishes of the beneficiaries, however, there is no evidence to suggest that in this case the amendments do not reflect the informed and free views of the majority of the intended beneficiaries: [77]-[82]; *Gerhardy v Brown* [1985] HCA 11, applied.

8. The relevant amendments are appropriate and adapted to achieving the legislature's objective, namely to protect the appellants' Indigenous constituents from alcohol induced violence. Before enacting the relevant amendments the legislature consulted widely both within the community and with experts. Therefore, s 10 of the *RDA* does not apply, as the relevant amendments can properly be classified as special measures under s 8 of the *RDA*: [92]-[95], [98].

9. The appeals are being dismissed on a basis which does not require the consideration of the potential future of liquor licensing in the communities in question. Accordingly, the respondent's application to adduce further evidence of that nature is refused: [96].

Held, dismissing the appeals, per Keane JA:

10. The primary judge erred in determining that because non-Indigenous persons, particularly mine workers, who attended the council taverns would also be denied access to alcohol, the relevant amendments treated all persons of whatever race equally. This comparison was not in line with the established understanding of the operation of s 10 of the *RDA*. However, the appellants contention that s 10 of the *RDA* assures equal enjoyment to the right of local residents to acquire alcohol from one's local government fails, as this right is not the kind of fundamental freedom or human right protected under s 10(1) of the *RDA*: [129]-[132], [141]-[155]; *Western Australia v Ward* [2002] HCA 28, *Bropho v Western Australia* [2008] FCAFC 100, applied.

11. Even if the approach taken to the scope of s 10 of the *RDA* is too narrow, there is a political value judgment made in enacting a law which balances competing claims of human rights under s 10 of the *RDA*. The role of the courts in enforcing s 10 is limited to instances of manifest unreasonableness. There is no authority for the application of a reasonable proportionality test in these circumstances:

[163]-[169]; *Bropho v Western Australia* [2008] FCAFC 100 applied, *Western Australia v The Commonwealth* [1995] HCA 47 cited.

13. The relevant amendments apply equally in that no resident of any local government area in Queensland will be able to obtain alcohol from a licensed local government authority. The appellants cannot rely on s 10 to ensure equality of opportunity as the resulting differences in the opportunity to obtain alcohol are not due to a discriminatory effect of the law, but rather to economic and geographical disparities: [179]; *Gerhardy v Brown* (1985) 159 CLR 70, cited; *Mabo v Queensland* [1988] HCA 69, cited; *Western Australia v Ward* (2002) 213 CLR 1, cited.

14. The appellants, as local governments, are outside the scope of s 10(1) as it only applies to natural persons: [185]; *Koowarta v Bjelke-Peterson* (1982)153 CLR 168, considered.

15. A licence issued under the *Liquor Act* does not amount to a property right in the nature of a human right or fundamental freedom of the kind referenced in the *RDA*, and statutory property rights are susceptible to statutory abrogation: [186]; *Bropho v Western Australia* [2008] FCAFC 100, applied.

16. In determining whether an Act is a special measure the court does not have to be satisfied that it is reasonably appropriate and adapted to achieving the advancement envisioned. The court will only refuse to give effect to the alleged special measure if the political judgment is one that a reasonable legislature could not have made. The amending Act is a special measure under s 8 of the *RDA*. The relevant amendments do not fall within the scope of s 10 of the *RDA* because they aim to achieve the legitimate and non-discriminatory public goal of securing the human rights of the women and children of Aurukun and Kowanyama: [211]-[215]; *Gerhardy v Brown* (1985) 159 CLR 70, considered.

Held, refusing the application to adduce further evidence and dismissing the appeals, per Philippides J:

18. A broad approach should be taken in determining whether a right is protected under s 10 of the *RDA*: [242].

19. The issue for the court to determine in relation to special measures is narrow in scope: it is that could the 'political assessment' that the advancement of a racial group, by the measure, is needed to ensure equality be reasonably made. In making this assessment, the degree to which the beneficiaries of a special measure have been consulted and the extent to which their opinions have been accommodated may reflect on whether that measure can be seen as appropriate and adapted to securing the particular advancement:[244], [249]; *Bropho v Western Australia* [2008] FCAFC 100, applied.

20. The relevant amendments do not restrict other parties from holding a liquor licence and accordingly to not limit the availability of alcohol in these communities. The limitations are the result of the existing community alcohol management plans and the operation of other measures. The question, therefore, is by revoking the licences of the appellants, with the consequence that those in the predominantly Indigenous communities in question are unable to acquire alcohol from licensed premises operated by their local government, a right protected by s 10 of the *RDA* is compromised: [256]–[258].

21. Section 10(1) of the *RDA* encompasses a right to equal protection of the law with respect to any particular public field and that includes a right to equal treatment in any statutory liquor licensing scheme in the State. However, the relevant amendments do not in substance or operation subject Indigenous communities to a different liquor licensing regime. The prohibition enacted relates only to the obtaining and holding of a licence by a local government, and applies to all local governments in Queensland: [262].

22. The relevant amendments do not infringe on the appellants right not to be arbitrarily deprived of property, as set out in art 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination* and art 17(2) of the *Universal Declaration of Human Rights*, as they were enacted with the aim of achieving a legitimate and non-discriminatory public purpose, namely remedying the inappropriateness of a local government sourcing its funding for social services from the sale of the alcohol, which potentially fuels alcohol related violence: [264]–[270].

23. The members of the Indigenous communities in question are not precluded from a right to participate in cultural activities as set out in art 5(e)(vi) of the *International Convention on the Elimination of All Forms of Racial Discrimination*. The right to access alcohol from the appellant's premises, by legislation applying to all local councils in Queensland, does not amount to preclusion of Indigenous people from participating in public life. While the appellants are now precluded from

selling alcohol, others may hold a license to sell liquor. The amendments, therefore, do not foster inequalities in any social, cultural or other field of public life: [275]; *Gerhardy v Brown* [1985] HCA 11, cited.

24. Section 10 is not engaged as no right under its protection is compromised by the relevant amendments. Accordingly, there is no need to consider the application of s 8 of *RDA*: [278].