

# Momcilovic v The Queen (2011) 245 CLR 1

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## I Introduction

In *Momcilovic v The Queen*,<sup>1</sup> the High Court considered several issues of major public importance.<sup>2</sup> These included the effect of ‘reverse onus’ provisions and whether Victorian legislation was inconsistent with Commonwealth law and therefore invalid under s 109 of the *Australian Constitution*. This case note instead focuses on how key provisions of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (*Charter*) were construed and whether the operation of that Act altered the orthodox approach to statutory construction.

## II Background

The appellant, an intellectual property lawyer, occupied an apartment with her partner. The prosecution alleged that their apartment was a minor amphetamine factory: methylamphetamine was stored in a bar fridge, in the crisper section of another refrigerator, and in a Moccona coffee jar in a kitchen cupboard. Drug paraphernalia was located, together with A\$165 900 cash in a shoe box in the walk-in wardrobe.

The appellant was charged with having trafficked a drug of dependence. Section 71AC of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) (*Drugs Act*) provides that a person who ‘trafficks or attempts to traffick in a drug of dependence is guilty of an indictable offence’.<sup>3</sup> Under s 70(1)(c), ‘traffick’ includes to ‘have in possession for sale’. Section 5 provided that ‘any substance shall be deemed for the purposes of this Act to be in the possession of a person so long as it is upon any land or premises occupied by him ... unless the person satisfies the court to the contrary’. The appellant was unable to so satisfy the Court and was convicted.

The appellant argued before the Court of Appeal of the Supreme Court of Victoria that s 5 of the *Drugs Act* required only the discharge of an evidential burden, rather than a legal onus of proof. This proposition was said to be consistent with s 25(1) of the *Charter*, which provides that a person charged with a criminal offence has the right to be presumed innocent until proven guilty according to law. Section 32(1) of the *Charter* provides that, so far as is possibly consistent with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights. Under s 32(2), international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered when interpreting a statutory provision. However, under s 7(2), a

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<sup>1</sup> (2011) 245 CLR 1 (*Momcilovic*).

<sup>2</sup> The appeal included interventions by the Commonwealth, New South Wales, South Australia, Western Australia, Tasmania and the Australian Capital Territory and amicus curiae submissions from the Human Rights Law Centre.

<sup>3</sup> The *Drugs Act* s 71AC was said to be inconsistent with the *Criminal Code Act 1995* (Cth) s 302.4, which gave effect to the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, opened for signature 20 December 1988, 1582 UNTS 95 (entered into force 11 November 1990).

human right may be subject under law to such reasonable limits as can be justified in a free and democratic society based on human dignity, equality and freedom, taking into account all factors, including certain specified ones, such as the nature of the right. Under s 36(2), 'if in a proceeding the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, the Court may make a declaration to that effect'.

The Court of Appeal upheld the conviction and reduced the sentence, but declared that the 'reverse onus' provision of s 5 of the *Drugs Act* could not be interpreted consistently with the presumption of innocence under the *Charter*, and issued a s 36(2) declaration.<sup>4</sup>

### III The High Court of Australia Judgment

First, the High Court held by a six-to-one majority that s 32 of the *Charter* was valid.<sup>5</sup> The s 32 requirement that 'statutory provisions must be interpreted in a way which is compatible with human rights' referred to no more than the ordinary judicial task of statutory interpretation; that is, consideration of a provision's terms, context and purpose.<sup>6</sup> For courts, the 'task imposed by s 32(1) is one of interpretation and not of legislation' to give effect to *Charter* rights.<sup>7</sup> Interpretation under s 32(1) merely reflects 'what courts have traditionally done'.<sup>8</sup>

When applying s 32, human rights must be determined having regard to the reasonable limits to which human rights are subject under s 7(2).<sup>9</sup> Justice Heydon considered that the *Charter* should not be interpreted narrowly: 'Australia's benighted isolation on a lonely island lost in the middle of a foggy sea must be terminated.'<sup>10</sup> However, his Honour found that the functions conferred by ss 7(2) and 32 impermissibly delegated the power to make legislation and could not be conferred consistently with the judicial character.<sup>11</sup> 'Judicial fires which have sunk low may burn more brightly in response to a call to adventure.'<sup>12</sup> Section 7(2) turns upon criteria incapable of judicial resolution and s 32(1) causes statutes to be 'changed radically' so that the whole of the *Charter* is invalid.<sup>13</sup> By contrast, French CJ and Crennan and Kiefel JJ held that the interpretive task under s 32 had first to be completed when interpreting statutory provisions before consideration could be given to the reasonable limits justified under s 7(2).<sup>14</sup>

Second, s 36 of the *Charter* was also found to be valid by a four-to-three majority. French CJ and Bell J held that making a s 36 declaration was not an exercise of judicial power, nor was it incidental to that.<sup>15</sup> By contrast, Crennan and Kiefel JJ held that, although a s 36 declaration was not an exercise of judicial power, it was incidental or

<sup>4</sup> *R v Momcilovic* (2010) 25 VR 436.

<sup>5</sup> *Momcilovic* (2011) 245 CLR 1, 47 [46], 50 [50]–[51] (French CJ), 84 [146](vi), 92 [171] (Gummow J), 123 [280] (Hayne J), 217 [565]–[566], 227 [600] (Crennan and Kiefel JJ), 250 [684] (Bell J), 175 [439], 183 [454], 184 [456] (Heydon J, dissenting).

<sup>6</sup> *Ibid* 92 [170]–[171] (Gummow J), 123 [280] (Hayne J), 217 [565]–[566] (Crennan and Kiefel JJ).

<sup>7</sup> *Ibid* 250 [684] (Bell J).

<sup>8</sup> *R v Momcilovic* (2010) 25 VR 436, 458 [77].

<sup>9</sup> *Momcilovic* (2011) 245 CLR 1, 92 [168] (Gummow J), 123 [280] (Hayne J), 247 [677], 249 [683] (Bell J).

<sup>10</sup> *Ibid* 154 [389] (Heydon J).

<sup>11</sup> *Ibid* 163–4 [408]–[409], 170 [427], 171–5 [430]–[439].

<sup>12</sup> *Ibid* 184 [455].

<sup>13</sup> *Ibid* 175 [439], 181 [450], 184 [456].

<sup>14</sup> *Ibid* 44 [35]–[36] (French CJ), 220 [575] (Crennan and Kiefel JJ).

<sup>15</sup> *Ibid* 67–8 [95]–[97], 70 [101] (French CJ), 241 [661] (Bell J).

ancillary to it. However, it was inappropriate for a declaration to have been made because a court was upholding a conviction while simultaneously acknowledging the denial of *Charter* rights.<sup>16</sup> Gummow and Hayne JJ concurred with French CJ and Bell J regarding s 36. However, the section provided for a ‘novel regime’ which offended the *Kable* principle<sup>17</sup> because a court could not be empowered to formally set in train a process which may lead to executive consideration of legislative change.<sup>18</sup> Section 36 could be severed from the rest of the *Charter*.<sup>19</sup> Heydon J agreed that the s 36 power was non-judicial and invalid.<sup>20</sup>

Third and finally, the High Court, with the exception of Heydon J, held that the phrase ‘have in possession for sale’ in the definition of ‘trafficking’ under s 71AC of the *Drugs Act* is a composite expression that did not attract the operation of the deeming provision of s 5 of that Act. The trial judge had accordingly misdirected the jury and a retrial was ordered.<sup>21</sup> In this way, a mere finding of statutory construction was sufficient to dispose of the appeal. Since this was the ratio of the decision, all judicial observations on the construction, operation and validity of key *Charter* provisions were strictly obiter. Only French CJ relied on the *Charter* to reach this conclusion, and even then his Honour observed that the common law principle of legality provided the same result.<sup>22</sup> The High Court remains free to alter or clarify its position in future cases.

#### IV A Critique of the Judgment

The High Court offered little optimism for human rights proponents. The judgment unremarkably affirmed the principle that statutory provisions are construed in order to achieve consistency with their language and purpose.<sup>23</sup> The interpretative provisions of the *Charter* are subject to orthodox principles of statutory construction. Indeed, statutory provisions will remain unchanged and it is *Charter* rights that will yield.

The outcome was influenced by judicial perceptions of the propriety of the respective roles of the courts, the executive and Parliament. This is consistent with the opinion that the judicial function of applying rules of law must be safeguarded against the ‘lofty aspirations’<sup>24</sup> of human rights. The *Charter* might reflect ‘what is best and most enlightened in the human spirit’,<sup>25</sup> but two virtues — originality and adherence to key values associated with the rule of law (certainty and non-retrospectivity) — could not be ‘claimed for it’.<sup>26</sup> Thus, the universality of values reflected in national or international human rights statements did not diminish the importance of referring to Australia’s distinctive

<sup>16</sup> Ibid 228–9 [603]–[605] (Crennan and Kiefel JJ).

<sup>17</sup> A state Parliament cannot confer upon a state court a function which substantially impairs its institutional integrity: *Kable v DPP (NSW)* (1996) 189 CLR 51, 96 (Toohey J), 103 (Gaudron J), 116–19 (McHugh J), 127–8 (Gummow J).

<sup>18</sup> *Momcilovic* (2011) 245 CLR 1, 96 [184] (Gummow J). A court ‘does not purport to advise as to law reform’: at 227 [600] (Crennan and Kiefel JJ).

<sup>19</sup> Ibid 93 [172], 97 [188] (Gummow J), 123 [280] (Hayne J).

<sup>20</sup> Ibid 185 [457] (Heydon J).

<sup>21</sup> Bell J held that s 5 of the *Drugs Act* did apply to s 71AC, but that the jury had still been misdirected: *Momcilovic* (2011) 245 CLR 1, 253–4 [696]–[699].

<sup>22</sup> Ibid 46 [43] (French CJ). For the presumption that Parliament does not intend to interfere with common law rights and freedoms except by clear and unequivocal language, see *Coco v The Queen* (1994) 179 CLR 427, 437.

<sup>23</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381.

<sup>24</sup> *Re Limbo* (1989) 92 ALR 81, 81–3 (Brennan J).

<sup>25</sup> *Momcilovic* (2011) 245 CLR 1, 152 [380].

<sup>26</sup> Ibid 152 [380] (Heydon J).

constitutional framework. The proposition that the *Charter* requires processes of statutory construction ordinarily understood and applied by Australian courts is 'accepted by all arms of government in the system of representative democracy' as adopted in Australia.<sup>27</sup>

The judgment clarified that a court exercising federal jurisdiction can apply s 32 to read Victorian statutory provisions, so far as possible, consistently with the human rights set out in the *Charter*. The adoption by a majority of a narrow interpretation of s 32(1) secured the *Charter*'s continuing validity. However, the judgments do not provide any clear practical guidance for Victorian courts when interpreting legislation in accordance with the *Charter*. Only Bell J attempted to identify the steps to be followed.<sup>28</sup> Indeed, by avoiding a finding that the presumption of innocence was engaged, courts could simply apply ordinary rules of statutory construction to achieve consistency with the *Charter*.

In light of the outcome, the value of declarations of inconsistent interpretation under s 36 of the *Charter* is questionable. In this case the declaration was set aside by a five-to-two majority, because either s 36 was invalid or the declaration should not have been made. In any event, if the making of a s 36 declaration is not an exercise of judicial power or incidental thereto, no appeal can lie to the High Court.<sup>29</sup>

Finally, limited assistance can be gleaned from overseas jurisprudence, although decisions under the *Bill of Rights Act 1990* (NZ) evidently have greater comparative utility.<sup>30</sup> Australian courts may, without express statutory authority, refer to judgments of international and foreign domestic courts that have logical or analogical relevance where they concern a term identical to or substantially the same as the statutory provision being interpreted.<sup>31</sup> However, foreign judgments should be consulted with discrimination and care, particularly where they interpret the human rights legislation or constitutional provisions of other states, because they arise within a different constitutional framework.<sup>32</sup> The tests used in the human rights legislation of other states are not necessarily identical to those under the *Charter*.<sup>33</sup>

## V Conclusion

Overall, *Momcilovic* will effect a restrained interpretation of human rights legislation elsewhere in Australia.<sup>34</sup> It is also a modest contribution to the debate for a national bill of human rights.<sup>35</sup> Fortunately, *Momcilovic* is not the final word. The 'odour of human rights sanctity is sweet and addictive', 'a comforting drug stronger than poppy or mandragora or all the drowsy syrups of the world', the effect of which can only be maintained 'by increasing the strength of the dose',<sup>36</sup> which the High Court cannot resist.

<sup>27</sup> Ibid 235 [638] (Crennan and Kiefel JJ), citing *Zheng v Cai* (2009) 239 CLR 446, 456.

<sup>28</sup> *Momcilovic* (2011) 245 CLR 1, 246–7 [675]–[678] (Bell J).

<sup>29</sup> *Australian Constitution* s 73; *Momcilovic* (2011) 245 CLR 1, 70 [101] (French CJ).

<sup>30</sup> *Momcilovic* (2011) 245 CLR 1, 42 [28]–[29] (French CJ), 211 [547], 217 [566] (Crennan and Kiefel JJ) and 246 [676] (Bell J).

<sup>31</sup> Ibid 36 [18] (French CJ).

<sup>32</sup> Reference to a House of Lords judgment demonstrated a 'fascination to the point of obsession' (*Momcilovic* (2011) 245 CLR 1, 90 [160]) and the human rights systems of other states offered 'imperfect analogues': at 83 [146]; see also 90 [159] (Gummow J). Selective resort to comparative human rights jurisprudence was 'sophistry': at 183 [453] (Heydon J).

<sup>33</sup> Ibid 213 [554], 215 [561] (Crennan and Kiefel JJ).

<sup>34</sup> See, eg, *Human Rights Act 2004* (ACT).

<sup>35</sup> The Court made reference to Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (Melbourne, 2005).

<sup>36</sup> *Momcilovic* (2011) 245 CLR 1, 183 [453] (Heydon J).