ANDERSON V MINISTER FOR THE ENVIRONMENT, HERITAGE AND THE ARTS

Federal Court of Australia, NSW District Registry (Foster J)
10 February 2010
[2010] FCA 57

Administrative law – *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ss 9 and 10 – legislative and administrative decisions – failing to take into account relevant consideration – taking into account an irrelevant consideration – decisions only invalid when perverse or illogical

Facts:

This case was brought before the court by Indigenous siblings in a move to prevent housing development on important Aboriginal land. The applicants are both Senior Elders of the Numbahjing Clan within the Bundjalung Nation of Northern New South Wales. The contested land, known as Lot 208, is 10.52 ha and owned by North Angels Beach Development (Ballina) Pty Ltd. The proposed development on Lot 208 will compromise 67 housing lots, some cluster housing and associated works. In June 2008, the applicants lodged claims with the Minister seeking emergency and permanent declarations of land protection of Lot 208 under ss 9 and 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ('*Heritage Protection Act*').

The applicants sought protection on the grounds that a massacre of Bundajalung people occurred at North Angels Beach in the nineteenth century, and that a significant Aboriginal archaeological site existed below the beach. The Minister did not make either of the declarations sought, which led the applicants to seek judicial review pursuant to s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('the *ADJR Act*') and s 39B(1A) of the *Judiciary Act 1903* (Cth) ('the *Judiciary Act*').

The primary issue for the Federal Court to decide in relation to the s 9 decision was whether the Minister in making his decision failed to take into account relevant considerations or took into account irrelevant considerations. In relation to the s 10 decision the court had to decide whether the decision of the Minister was reviewable on the grounds of an error in law or of an error in fact and law.

Held, dismissing the appeal:

1. A declaration made by the Minister to protect significant Aboriginal land under s 9 or s 10 of the Heritage Protection Act would amount to a legislative decision and not be amenable to review under the *ADJR Act*. However, a *refusal* to make a declaration under either s 9 or s 10 leaves an applicant with no rule of general application. The Minister's decisions to refuse the ss 9 and 10 applications are therefore administrative in nature. They are amenable to review under both the ADJR Act and s 39B of the *Judiciary Act 1903* (Cth): [52]; *Chapman v Luminis Pty Ltd (No 4)* (2001) FCR 62, cited; *Minister for Industry & Commerce v Tooheys Ltd* [1982] FCA 128, followed; *Queensland Medical Laboratory v Blewett* 84 ALR 615, affirmed.

2. The applicants were given sufficient opportunity to present evidence and material to the Minister and his appointed counsel. The applicants took advantage of this opportunity and brought to the Minister's attention all relevant material: [76].

3. There is no utility in the applicants seeking relief for the s 9 decision. If the s 10 decision is upheld, then there would be no rational basis for the Minister to make an emergency declaration under s 9; conversely, if the s 10 decision is found to be unlawful and remitted to the Minister for consideration, the applicants would need to seek a new

s 9 application pending the outcome of that decision: [87], [89].

4. The Minister is not required to apply any particular standard of proof in deciding whether or not he is satisfied that an area of land is a 'significant Aboriginal area' within the meaning of the *Heritage Protection Act*. However, he must not act arbitrarily or capriciously. He must still take into account all relevant considerations, and not take into account any irrelevant considerations: [96]-[97]; *Yao-Jing v Minister for Immigration and Multicultural Affairs* (1997) 74 FCR 275, cited; *Buck v Bavone* [1976] HCA 24, cited.

5. The Minister considered all evidentiary material, and in order for the applicants to succeed, they would need to prove that the Minister acted perversely or had no logical basis for his decision: [105]; *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21, cited.

6. It was fairly open for the Minister to make the decision that he did, and the fact that the court might have reached a different decision does not suffice to render the Minister's actions unlawful. The Minister's decision is therefore upheld, and the application dismissed: [107].