Federal Court of Australia

Rushton v Commonwealth of Australia [2023] FCA 1357

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| File number(s): | ACD 22 of 2023 |
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| Judgment of: | **BROMWICH J** |
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| Date of judgment: | 22 September 2023 |
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| Date of publication of reasons: | 7 November 2023 |
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| Catchwords: | **HUMAN RIGHTS –** complaint of breach of human rights made to Australian Human Rights Commission regarding alleged conduct of police in process of arrest and subsequent detainment – whether a claim of a breach of human rights other than discrimination under a Commonwealth anti-discrimination Act can invoke the jurisdiction of the Federal Court – whether a claim for trademark infringement arises from police officers taking photographs of and fingerprints of applicant following arrest – whether judicial review claim arises in circumstances where decision maker has not yet made reviewable decision – interlocutory application by respondent for summary judgment or in the alternative partial striking out or in the alternative full striking out – summary dismissal of originating application due to claims failing to engage Federal jurisdiction  |
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| Legislation: | *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5*Age Discrimination Act 2004* (Cth)*Australian Human Rights Commission Act 1986* (Cth) ss 20(2)(c)(iib), 46PO*Disability Discrimination Act 1992* (Cth)*Federal Court of Australia Act* *1974* (Cth) s 31A*Judiciary Act 1903* (Cth) s 39B*Sex Discrimination Act 1984* (Cth)*Trademarks Act 1995* (Cth) s 120*Federal Court Rules 2011* (Cth) r 26.01*International Covenant on Civil and Political Rights*. Opened for signature 19 December 1996, and entered into force on 23 March 1976) |
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| Cases cited: | *Spencer v Commonwealth* [2010] HCA 28; 241 CLR 118 |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Number of paragraphs: | 20 |
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| Date of hearing: | 22 September 2023  |
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| Counsel for the Applicant: | The Applicant was self represented |
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| Counsel for the Respondent: | Ms P Bindon |
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| Solicitor for the Respondent: | Ms R Whittle of Norton Rose Fulbright |

ORDERS

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|  | ACD 22 of 2023 |
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| BETWEEN: | BEN ANTHONY RUSHTONApplicant |
| AND: | COMMONWEALTH OF AUSTRALIARespondent |

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| order made by: | BROMWICH J |
| DATE OF ORDER: | 22 SEPTEMBER 2023 |

THE COURT ORDERS THAT:

1. The respondent’s application for summary judgment of the whole of the applicant’s proceeding pursuant to s 31A of the *Federal Court of Australia Act 1974* (Cth) and r 26.01 of the *Federal Court Rules 2011* be granted.
2. The applicant pay the respondent’s costs as assessed or agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

Revised from transcript

BROMWICH J

1. On 31 March 2023 the applicant, Mr Ben Anthony Rushton, commenced a proceeding in this Court by way of an originating application, ostensibly under the *Australian Human Rights Commission Act* *1986* (Cth). The initial respondent was named as the “Australian Federal Police”, but as that is not a legal entity, and with the agreement of the applicant, the name of the respondent was changed to the “Commonwealth of Australia” which is a legal entity able to be sued.
2. The originating application annexes a complaint that Mr Rushton made to the Australian Human Rights Commission (**AHRC)** on 10 December 2021. It also annexes a letter from the Magistrates Court of the Australian Capital Territory (**ACT**), which is not presently relevant, and a letter from the AHRC dated 14 March 2023, signed by a delegate of the President. The letter from the AHRC advised Mr Rushton that the delegate had decided under s 20(2)(c)(iib) of the *Australian Human Rights Commission Act 1986* (Cth) not to continue to inquire into the complaint that Mr Rushton had made.
3. Pages 2 and 3 of Mr Rushton’s complaint to the AHRC, being pages 18 and 19 of the originating application, include his responses to questions in the AHRC complaints form. Those questions included asking what kind of discrimination he had suffered, and the categories of potential discrimination, running from age and disability through to social origin, and incorporating the areas of discrimination for which there are rights bestowed under Commonwealth statutes such as the *Age Discrimination Act 2004* (Cth), the *Sex Discrimination Act 1984* (Cth) and the *Disability Discrimination Act 1992* (Cth). In response to each listed category of discrimination Mr Rushton answered “no”, indicating that he has not been subject to any of the kinds of discrimination identified by the form. Mr Rushton’s complaint was therefore in terms not brought in relation to discrimination under any of the Commonwealth anti-discrimination Acts.
4. Only discrimination under one of those anti-discrimination Acts gives rise to a cause of action in this Court, most commonly by reason of a termination of such a complaint because it has been unable to be resolved by conciliation. Mr Rushton’s AHRC complaint, not having identified a type of discrimination to which he has been subjected, instead expresses a belief by Mr Rushton that his human rights have been breached by a Commonwealth Government agency. The complaint then goes on to describe an event in March 2020 when Mr Rushton was arrested, charged and detained by ACT police officers. In his retelling of what had taken place, he also referred to the police improperly taking his “private intangible intellectual property, such as fingerprints and [photographs]”. Mr Rushton sought to enforce various rights he asserted under, in particular, the *International Covenant on Civil and Political Rights*. Opened for signature 19 December 1996, and entered into force on 23 March 1976) (**ICCPR**).
5. The Commonwealth, by an interlocutory application dated and filed 4 July 2023, principally seeks an order for summary judgment of the whole of Mr Rushton’s proceeding pursuant to s 31A of the *Federal Court of Australia Act* *1974* (Cth) and rule 26.01 of the *Federal Court Rules 2011* (Cth). Alternative relief is sought by way of partial summary judgment, being a partial striking out and, in further alternative, complete striking out. However, because I have formed the view that the principal relief sought of summary judgment must succeed it is not necessary to consider those alternatives.
6. I note, for completeness, that Mr Rushton also filed an interlocutory application dated 12 April 2023, which was lodged for filing and taken to have been filed on 14 April 2023. By that interlocutory application Mr Rushton sought injunctive relief and orders of specific performanceagainst the respondent, and potentially others. However, that interlocutory application could only proceed if the Commonwealth’s summary judgment application did not succeed, as otherwise there would be no proceeding within which to seek such interlocutory relief.
7. The Commonwealth, in support of its interlocutory application seeking summary judgment, submits, by reference to the leading authority on that topic, *Spencer v Commonwealth* [2010] HCA 28; 241 CLR 118, that Mr Rushton has no reasonable prospect of successfully prosecuting the claims before this Court, because this Court does not have jurisdiction to hear and determine his claims.
8. The three bases upon which jurisdiction is sought to be engaged that have been identified and addressed in oral and written submissions, by both the Commonwealth and by Mr Rushton, are as follows:
9. the complaint made to the AHRC;
10. a trademark infringement claim, and
11. a judicial review claim.
12. While Mr Rushton in his originating application has also made claims in tort relating to the arrest described in his AHRC complaint, and seemingly also negligence claims, the Commonwealth submits that the above-listed claims are the only ones which could conceivably attract this Court’s jurisdiction. I accept that submission and so do not need to address the torts and negligence claims further.
13. I shall deal with each of the above-listed claims in turn.
14. In relation to the AHRC claim, as I have already indicated, the complaint made by Mr Rushton did not purport to be one of discrimination of a kind for which Federal statutes give a cause of action, but, rather, is in relation to a breach of human rights under the ICCPR. As the Commonwealth correctly points out, the *Australian Human Rights Commission Act* does not entitle complainants to commence proceedings in this court in respect of breaches of human rights under the ICCPR, and does not confer on this Court any jurisdiction to entertain such complaints. That is because the Court’s jurisdiction is limited by that Act to complaints of “unlawful discrimination” under s 46PO. It follows that, to the extent that the originating application filed by Mr Rushton relies upon his complaint to the AHRC, that claim is incompetent. It cannot engage the jurisdiction of this Court, and therefore it cannot succeed.
15. The second basis upon which Federal jurisdiction is sought to be engaged is in relation to a trademark infringement claim. The only identified basis for that claim within the originating application, reading that expansively to include the references to the complaint made by Mr Rushton to the AHRC, is a reference to the process under which he says he was unlawfully detained, including the means by which he was processed in the Canberra City Police Station watchhouse after his arrest, and his objection to what he described as the taking of his private intangible intellectual property such as fingerprints and photographs, to which I have already referred.
16. Infringement of copyright is relevantly described in s 120 of the *Trademarks Act 1995* (Cth). Under s 120(1), being the only subsection of s 120 which could be conceivably applicable to Mr Rushton’s claim, “a person infringes a registered trade mark if the person uses as a trade mark a sign that is substantially identical with, or deceptively similar to, the trade mark in relation to goods or services in respect of which the trade mark is registered”. That kind of infringement does not arise on the facts asserted by Mr Rushton.
17. An alternative, under s 120(2), is the use of a trademark in a sign that is substantially identical with, or deceptively similar to, the trademark in relation to goods or services. Mr Rushton, in his affidavit affirmed 15 April 2023, annexed a certificate of registration of trademark for which he is the owner, that trademark being over the words “BEN ANTHONY RUSHTON”, in the class of administration of legal estates. The difficulty with any claim that the Commonwealth has infringed upon that trademark is that there is nothing to indicate that the police were using Mr Rushton’s name in any form as a trademark, let alone in the form of trade mark to do with the administration of legal estates.
18. It follows that there is no engagement of Federal jurisdiction in relation to trademarks, and to the extent that the originating application relies upon trademark infringement to engage Federal jurisdiction, it cannot succeed.
19. The third basis upon which Federal jurisdiction is sought to be engaged relates to a possible judicial review claim. Mr Rushton has not in terms asserted a claim for judicial review, but does in the originating application refer to seeking compensation under the Scheme for Compensation for Detriment caused by Defective Administration, or the CDDA scheme, administered by the Australian Federal Police. This scheme provides a mechanism for Non-Corporate Commonwealth Entities to compensate people who have experienced detriment as a result of that entity’s defective administration. Mr Rushton has made a compensation claim under that scheme, the basis of that claim again relating to his arrest and detention in March 2020.
20. There has not yet been a recommendation to the decision maker in relation to the claim made by Mr Rushton under the CDDA scheme, although at one stage it was contemplated that there might be a recommendation to reject that claim earlier this year. More recently the Federal Police have, according to Mr Rushton, advised him by way of correspondence dated 14 July 2023, which was not before me but is quoted from by Mr Rushton in his submissions, that no recommendation would be made regarding the application for compensation under the CDDA scheme until the conclusion of this legal proceeding, because that would enable the decision maker to consider the outcome of this proceeding, if relevant.
21. Accordingly, as Mr Rushton has advised, the decision on his CDDA scheme application has been postponed. There has been no decision made and no action therefore taken. That means that the general review available for decisions by Commonwealth officers under section 39B of the *Judiciary Act 1903* (Cth) has not been engaged. Additionally, there is no suggestion that there has been any decision made under an enactment which could engage s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).
22. As there is no identified reviewable decision, it follows that the third and final apparent basis for the engagement of jurisdiction of this court has not been able to be made good.
23. In all the circumstances there has been no engagement of Federal jurisdiction and the claim therefore has no jurisdictional foundation to proceed in this court. In those circumstances I have no alternative but to summarily dismiss the originating application in its entirety, with costs.

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| I certify that the preceding twenty (20) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Bromwich. |

Associate:

Dated: 7 November 2023