Federal Court of Australia

Re Patrick Leo Cusack v Australian Electoral Commissioner [1984] FCA 328 (6 November 1984)

FEDERAL COURT OF AUSTRALIA

Re: PATRICK LEO CUSACK

And: AUSTRALIAN ELECTORAL COMMISSIONER

No. QLD G122 of 1984

Administrative Law

COURT

IN THE FEDERAL COURT OF AUSTRALIA

QUEENSLAND DISTRICT REGISTRY

GENERAL DIVISION

Spender J.

CATCHWORDS

Administrative Law - applicant seeking review of decision not to accept applicant's nomination for House of Representatives Election unless accompanied by deposit of $250.00 - decision in accordance with precise terms of Commonwealth Electoral Act 1918 - provisions of Act said to be in conflict with Magna Carta and therefore invalid - no error of law.
Administrative Decisions (Judicial Review) Act 1977

Commonwealth Electoral Act 1918 ss.170, 172, 173, 327

HEARING

BRISBANE

6:11:1984

ORDER

1. Application be dismissed.
2. The applicant pay the respondent's costs to be taxed, including reserved costs, if any.

DECISION

This is an application for an order of review under the Administrative Decisions (Judicial Review) Act 1977 by Patrick Leo Cusack.
2. The decision which he seeks to have reviewed is that made by Mr P. Taylor, who is the Divisional Returning Officer for the Division of Ryan. The decision is that Mr Cusack's nomination for the 1 December 1984 House of Representatives Election would not be accepted unless a deposit of $250.00 in legal tender or by banker's

cheque was lodged with that nomination. That decision was made by Mr Taylor on 30 October 1984 and was confirmed by a letter dated 30 October handed to Mr Cusack yesterday, 5 November 1984.

3. Mr Taylor in that letter makes it quite clear that he would not accept a nomination for the 1 December House of Representatives Election unless a deposit of $250.00 in legal tender or banker's cheque was lodged with the nomination. In so acting, Mr Taylor would be acting in accordance with the precise terms of sub-s. 170(c)(ii) of the Commonwealth Electoral Act 1918 ("the Act"), and it is also important to bear in mind that s.172 of the Act provides in sub-s. (1) that the nomination shall be rejected by the officer to whom it is made if, and only if, the provisions of, inter alia, s.170, have not been complied with in relation to the nomination.

4. Mr Cusack in his material concedes that the decision has been taken in accordance with the particular provisions of s.170 and on its face would appear to be correct.

5. His submissions essentially are four, the first of which is that in some way, which is by no means clear to me, there has been a breach of the rules of natural justice. In that respect none of the material before me indicates any such breach. I need not trouble myself any further with that particular ground.

6. In relation to the three other grounds, they are that there has in some way been an improper exercise of power by Mr Taylor; alternatively, his decision involved an error of law, not immediately apparent; or that the decision was otherwise contrary to law. Each of these aspects of Mr Cusack's argument involve the same general thrust; namely, that the requirements of s.170, boosted as they are by the forfeiture provisions of s.173, are in conflict with either rights conferred or at least recognised by s.327 of the Act, or cardinal, old-established inherent rights which derive from the Magna Carta, or other long-standing statutory provisions.

7. In respect, for instance, of his argument in relation to an improper exercise of power, Mr Cusack says that the making of a decision not to accept a nomination on the basis stated is an improper exercise of the power insofar as it fails to take relevant consideration into account in the exercise of the power, namely s.327, which is in conformity he says with cardinal, old-established and inherent statutes, particularly Cap. 29 of the Great Charter of Liberties. He says further that the decision, while appearing to be correct, involves a conflict between the provisions of ss. 173 and 327, and that the more general provision, s.327 of the Act, should prevail; and finally, that in relation to the decision being contrary to law, that the making of a decision which would involve conflict of the deposit and forfeiture provisions on the one hand with the electoral offences provisions and with the old-established and inherent statutes, in particular Magna Carta, on the other, is such that a decision based on s.170 would be unlawful.

8. Involved in all of those submissions is the suggestion that a legislative provision that is in conflict with Magna Carta is for that reason invalid.

9. I think it is necessary to make it as clear as I can to Mr Cusack and perhaps others that there has been involved in this whole approach a misconception of the constitutional provisions that apply to legislation passed by the Australian Parliament. Sir Samuel Griffith made it clear in Chia Gee v. Martin [1905] HCA 70; (1906) 3 CLR 649 that it is not open to argument that a law of the Commonwealth is invalid because it is not in conformity with Magna Carta. In that particular case, it was argued on behalf of Chinese immigrants, who had been charged with offences of being unlawful immigrants, that the language test requirement under the Immigration Restriction Act 1901 was invalid as being contrary to Magna Carta. The Chief Justice said at p.652-3:

> "A number of objections have been taken to
>
> the convictions in this case, all of which

> are unsubstantial. ... The first point made by Mr Le Mesurier was that the Immigration Restriction Act 1901 was unconstitutional, because its provisions were contrary to the provisions of Magna Charta, and the Statues which had since confirmed it, and also inconsistent with certain treaties. The contention that a law of the Commonwealth is invalid because it is not in conformity with Magna Charta is not one for serious refutation. As to the objection that the provisions of the Act are invalid as being in conflict with treaties, it is sufficient to say that some day perhaps that question may be raised for decision, but it is not raised now."

His Honour makes it clear that an argument that a law is invalid because it is in conflict with Magna Carta is not a substantial one. His Honour then deals with the other point that it may be inconsistent with certain treaties in this manner: as to the objection that the provisions of the Act are invalid as being in conflict with treaties, it is sufficient to say, some day perhaps that question may be raised for decision but it is not raised now, and it may be the case that some Commonwealth legislation is invalid because it conflicts with treaties.

10. So that at the core of the argument that has been addressed to me by Mr Cusack is a misconception as to the basis upon which Commonwealth legislation may be declared invalid, and the primary submission by Mr Cusack that Magna Carta is in some sense a guarantee that no legislation can be enacted in conflict with it is a fallacious one.

11. As to the other aspect of the grounds to which I have referred in some detail, that is, that there is some invalidity attached to ss. 170 and 173 by virtue of the existence of the provisions contained in s.327; I say simply

that no such conflict appears, and in any event, on ordinary principles of statutory interpretation, the provisions of ss. 170 and 173 are not invalid for that reason.

12. It therefore follows that Mr Taylor was right to reject the nomination that did not comply with the requirements of sub-s. 170C(ii) of the Act. The decision that Mr Taylor made is not reviewable within the powers that are given to this Court pursuant to the provisions of the Administrative Decisions (Judicial Review) Act. No error of law of any sort has been demonstrated in respect of that decision and the application is dismissed.

13. I have no doubt as to the Applicant's genuineness but on ordinary and proper principles this is a case where I think the costs should follow the event.

14. I order that the applicant pay the respondent's costs, those costs to be taxed, including reserved costs, if any.