

AUSTRALIA / JUDGMENT

Shafran v Repatriation Commission (No 2) [2020] FCA 1072

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FEDERAL COURT OF AUSTRALIA

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Shafran v Repatriation Commission (No 2) [2020] FCA 1072

File number: QUD 424 of 2019

Judge: LOGAN J

Date of judgment: 28 July 2020

Catchwords: COSTS – where there was a wider public interest to be served by the application – where the first respondent had a particular interest in the correction of imperfect understandings of the relevant legislation – whether each party should bear its own costs or, alternatively, whether costs in favour of the applicant should be fixed or awarded on a percentage basis

Legislation: Administrative Decisions (Judicial Review) Act 1977 (Cth)

Federal Court of Australia Act 1976 (Cth) s 43

Judiciary Act 1903 (Cth) s 39B

Veterans' Entitlements Act 1986 (Cth) ss 147, 183, 184

Cases cited: Belton v General Motors Holden's Ltd (No 1) (1984) 58 ALJR 352

Cocoa Cola Amatil (PNG) Ltd v Yanda [2012] PGSC 52

Melbourne Steamship Co Ltd v Moorehead (1912) 15 CLR 333

Oshlack v Richmond River Council (1998) 193 CLR 72

R v Australian Broadcasting Tribunal; Ex parte Hardiman (1980) 144 CLR 13

Shafran v Repatriation Commission [2019] FCA 1833

Shelton v Repatriation Commission (1999) 85 FCR 587

Singh v Minister for Immigration and Multicultural Affairs (unreported, Burchett J, 20 July 1998)

Date of hearing: Determined on the papers

Date of last submissions filed by the Applicant: 11 November 2019

Date of last submissions filed by the First Respondent: 13 November 2019

Registry: Queensland

Division: General Division

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Category: Catchwords

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Solicitor for the Applicant: IAMCU Legal Pty Ltd

Counsel for the First Respondent: Ms E Longbottom

Solicitor for the First Respondent: Australian Government Solicitor

ORDERS

QUD 424 of 2019

BETWEEN: GEOFFREY SHAFRAN

Applicant

AND: REPATRIATION COMMISSION

First Respondent

VETERANS' REVIEW BOARD

Second Respondent

JUDGE: LOGAN J

DATE OF ORDER: 28 JULY 2020

**THE COURT ORDERS
THAT:**

1. The first respondent pay the applicant's costs, including reserved costs, if any, of and incidental to the proceeding on and from the filing on 30 August 2019 of the amended originating application (including those relating to the preparation, filing and service of that amended application), including the costs of and incidental to the costs of the application for costs pursuant to the Court's order of 8 November 2019, to be assessed by a registrar if not agreed.
 2. Save as aforesaid and without prejudice to the costs order made on 29 July 2019, there be no order as to costs.
- Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

REASONS FOR JUDGMENT

LOGAN J:

1 On 8 November 2019, I made orders disposing of the substantive issues in judicial review proceedings instituted by a veteran, Mr Geoffrey Shafran against the Repatriation Commission (Commission) and the Veterans' Review Board (Board). I reserved for later application and related submissions in writing any questions relating to the costs of the proceedings. These reasons for judgment must be read in conjunction with those delivered on 8 November 2019: *Shafran v Repatriation Commission* [2019] FCA 1833 (principal judgment). There has been no subsequent appeal.

2 Mr Shafran subsequently applied for an order that the costs of the proceedings, including reserved costs, be awarded in his favour and paid by the Commission. For its part, the Commission submitted that each party should bear his or its costs or, alternatively, that I should make an order fixing costs in an amount of \$5,000.00 or no more than 30% of Mr Shafran's assessed party and party costs.

3 Unfortunately, though the costs application and related submissions were made within the time envisaged, the same cannot be said for these reasons for judgment. I am afraid that a combination of a rather intense period of judicial duties both in Australia and in Papua New Guinea in the remaining weeks of term in 2019, followed by the Summer non-sitting period and a transition in chambers staff have meant that the need to resolve an outstanding costs issue has

"slipped through the cracks". The responsibility for that is mine. I express my sincere apology to the parties for this occurrence.

4 One necessary starting point is to recognise that, subject to any applicable statutory exception or qualification, and none is applicable in this case, "the award of costs is in the discretion of the Court or Judge": s 43(2), Federal Court of Australia Act 1976 (Cth) (FCA). In a non-exhaustive way, s 43(3) of the FCA sets out particular types of costs orders which might be made in the exercise of that discretionary power. It is quite clear from the terms of s 43(2) and s 43(3) of the FCA that the Court has power to make the types of costs orders respectively promoted by the active parties.

5 Another necessary starting point is to acknowledge that, although in this case the power to award costs is the subject of an unfettered discretion, that discretion must be exercised judicially, which ordinarily but not necessarily means that costs follow the event: *Oshlack v Richmond River Council* (1998) 193 CLR 72, at 96, per McHugh J. The circumstances of a given case, including the conduct of a party and the extent of forensic success enjoyed by a party may, exceptionally, warrant a departure from the ordinary way in which the costs discretion is exercised.

6 An overarching consideration is that the purpose of awarding costs is not punitive but rather indemnification.

7 In his submissions ([19]), Mr Shafran seeks an order that, "the Respondent pay the Applicant's costs of the application". In a proceeding to which there are two respondents, especially in circumstances where one of which has filed a submitting appearance save in respect of costs, this absence of precision is lamentable.

8 I rather think that this absence of precision prompted the following submission on behalf of the Commission ([8(f)]):

The relief ultimately granted by the Court was against the Board who has filed a submitting appearance as to costs. Any costs order against the Board should therefore only be considered after the Board has had the opportunity to make submissions on this issue.

9 As I recorded in the principal judgment, the Board, quite properly, adopted the position of abiding the order of the Court: *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13. Of course, no order for costs could be made against the Board without first offering to it an opportunity to be heard and then considering such submissions as it made. To do otherwise would violate one of the cardinal rules of natural justice. If only for Mr Shafran's benefit, it was useful for the Commission to have highlighted this in its submissions. In the circumstances of this case, there could be no question of any costs order being made against the Board.

10 That the relief ultimately granted was solely directed to the Board does not mean that it would be inappropriate to make a costs order against the Commission.

11 The Board was always a necessary party to the proceeding, albeit one which an applicant always ought to have anticipated would choose to file a submitting appearance. Given its statutory function of, subject to the Minister, administering the Veterans' Entitlements Act 1986 (Cth) (VEA)

and that it is always a party to a review proceeding before the Board (s 147(1)(b), VEA), the Commission was also appropriately joined. It was always an appropriate contradictor. The outcome of the proceeding bound not just the Board but also the Commission as to the meaning and effect of the VEA. Having assumed the role of contradictor, the Commission is amenable to an order for costs.

12 Lament though I might his absence of precision, reading Mr Shafran's submissions fairly and as a whole, it is tolerably clear that it is only against the Commission that he seeks an award of costs.

13 True it is that Mr Shafran did not succeed on all of the points that he raised but he had to initiate and prosecute proceedings in order to succeed to the extent revealed in the principal judgment. The Commission made no concession in relation to the substantive issues in the proceeding at the hearing, only that the utility of its objection to competency had dropped away once Mr Shafran came to understand that the basis for the exercise of the Court's jurisdiction in the circumstances lay not under the Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act) but rather under s 39B of the Judiciary Act 1903 (Cth) (Judiciary Act) and to file an amended originating application claiming relief under s 39B on 30 August 2019.

14 The Commission submitted that there should be some recognition of Mr Shafran's initial misapprehension in relation to the appropriate jurisdictional foundation for the proceedings. I agree.

15 It was hardly inappropriate for the Commission to have filed an objection to competency, given the absence in the circumstances of any decision to which the ADJR Act might apply. Reasonable minds might perhaps, in my respectful view, reasonably differ, in terms of Crown practice, having regard to the observations of Griffith CJ in *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, at 342, but especially in a case concerning a veteran, as to whether, in highlighting in advance of the filing of a formal objection to competency, an asserted absence of jurisdiction under the ADJR Act, it was appropriate to highlight the existence of the jurisdiction under s 39B of the Judiciary Act. I make that observation because there was always, in my view, a certain inevitability about that subject arising in any event at a case management hearing, if only via a question from the bench. In response to a question about the availability of s 39B of the Judiciary Act as a source of jurisdiction, the Commission could only ever correctly have answered that it was a source of jurisdiction. In these circumstances and subject, obviously, to not being in jeopardy of paying costs thrown away, I do find it difficult to see how the Commission's (and therefore the Crown in right of the Commonwealth's) interests would have been prejudiced by highlighting to Mr Shafran's legal representatives the existence of s 39B at the same time as giving notice of a proposal to object to the competency of the originating application in the form filed.

16 However that may be, as soon as the originating application was amended so as to invoke this Court's jurisdiction under s 39B of the Judiciary Act, the proceedings were competent and the Commission's objection to competency became otiose: *Belton v General Motors Holden's Ltd* (No 1) (1984) 58 ALJR 352; *Cocoa Cola Amatil (PNG) Ltd v Yanda* [2012] PGSC 52; SC1221.

17 As it happens, Mr Shafran does not seek any order for costs in respect of any work done prior to the drafting and filing of the amended originating application on 30 August 2019. It will, in my view, adequately recognise his hitherto absence of forensic understanding and thereby not unfairly burden the Commission if I make such a limitation in the costs order.

18 The issues in the proceeding all touched in one way or another on practice and procedure in and in relation to the Board. The related provisions in the VEA are by no means easy to construe. As the principal judgment reveals, in and in relation to an application for review by the Board, the VEA distributes roles as between the Secretary, the Commission and the Board itself. Understanding that distribution and the respective roles and the construction of the provisions is, as the principal judgment also reveals, assisted by an understanding of the history of the Australian system of repatriation, its origins in the societal bargain for military service recognised by the then Prime Minister, the Rt Hon W M Hughes during the First World War and continued to this day and in Parliament's related, enduring recognition of entitlements for veterans and that the voice of the individual veteran needed to be heard in the administration of his or her case and that the voice of veterans collectively needed to be heard at the highest levels of administration of prevailing legislation.

19 The principal judgment highlighted an imperfect understanding without, it must be emphasised, any hint whatsoever of any bad faith on the part of the Secretary, the Commission and the Board as to how the VEA operates once an application for review by the Board has been made. This had not hitherto been the subject of detailed judicial consideration. It is not without irony that one result of that imperfect understanding was that Mr Shafran could not and did not succeed in obtaining a writ of prohibition against the Board.

20 Also highlighted, as Parliament had always intended by the VEA, was that a role, indeed a duty, of the Commission was, in particular circumstances, to call into question the legality of a decision made by the Secretary or a delegate of the Secretary acting otherwise than as a delegate of the Commission. The VEA contemplates that the Secretary may, not must, be appointed either as a commissioner or as both a commissioner and President of the Commission: s 184, VEA. In terms of accepted, commercial sector, corporate governance principles in Australia, it is generally recommended that the offices of board chairman and managing director/chief executive officer (CEO) not, for reasons of independence, be held by the same person, although the presence on a board of a managing director/CEO is unremarkable: (see Australian Institute of Company Directors (AICD) Role of the chair – Governance relations, p 2: AICD website: aicd.companydirectors.com.au > director-tools > pdf and Australian Stock Exchange (ASX) Corporate Governance Council, Corporate Governance Principles and Recommendations (the Fourth Edition), p 15, Recommendation 2.5: available to be downloaded, ASX website: <https://www.asx.com.au/regulation/corporate-governance-council.htm>). The AICD and ASX are each

endorsed as a source of corporate governance guidance by the Australian Securities and Investments Commission (ASIC): (ASIC website, corporate governance guidance page: <https://asic.gov.au/regulatory-resources/corporate-governance/>). It is a matter of public record that, currently and at the times material to this proceeding, the offices of Secretary of the Department and President of the Commission are and were held by the same person. This, of course, is a matter for the value judgment of the Governor-General in Council (s 183, VEA), not for the courts, but that does not diminish the public interest served by the issues raised by Mr Shafran in highlighting how, in public administration as well, similar independence issues can arise.

21 Given the increase over the last two decades in the number of operational service veterans, especially younger such veterans, the enduring public importance of highlighting (and correcting) the imperfect understanding mentioned, and that the Commission is not a cypher for the Secretary, is considerable.

22 The Commission submitted, as relevant to the costs discretion, that Mr Shafran had precipitated the proceeding by seeking a ten year extension of time. On the whole of the evidence, it may, with respect, very well be that Mr Shafran is something of an agitator, not just in his own interest but, as he sees it, in the interests of veterans generally. If so, he is, in our society, entitled to be just such an agitator. The proceeding was not a vexatious one. Further, it needs to be remembered that it was a delegate of the Secretary who chose to approve the extension request. It was this approval, not the request per se, which precipitated the actions by the Board.

23 The Commission also submitted that I should take into account in determining how to award costs, the costs of the failed stay application by Mr Shafran. That interlocutory application was filed on 23 July 2019 during a period when I was absent on leave. As it happened, it was never prosecuted. Instead, and by consent, another judge, as duty judge, approved the making of an order on 29 July 2019 that the stay application be dismissed with no order as to costs. In light of that costs order, there could be no question either of including costs relating to that application in any later order in favour of Mr Shafran or, for that matter, in some way either by set off or by percentage reduction, recognising costs in favour of the Commission in respect of that application.

24 The Commission's primary submission was that each party should bear its own costs. One reason advanced for that was, surprisingly in light of the earlier consensual costs order mentioned, that the stay application had failed. Another was that it was not until the hearing in November 2019 that Mr Shafran abandoned the ADJR Act aspect of the application. That is true but neither by then had the Commission formally abandoned its objection to competency. By then that objection, for the reason already given, had itself become incompetent.

25 The Commission submitted that, in all of the circumstances, I ought to assess Mr Shafran's costs in gross at \$5,000.00 or award him 30% of his party and party costs. As mentioned, I accept that I have power to fix costs in gross and to award costs on a percentage basis. I do not consider that I have a sufficient evidentiary foundation to award costs in the amount suggested. The lack of evidence is not attributable to Mr Shafran, as he sought no such fixing of costs. The percentage

suggested does not, in my view, adequately recognise the extent of forensic success enjoyed by Mr Shafran or, for that matter, the extent of the imperfect understanding of the operation of the VEA revealed. Especially given the functions consigned to it under the VEA, the Commission had a very particular interest in the correction of each of the imperfect understandings revealed.

26 In *Singh v Minister for Immigration and Multicultural Affairs* (unreported, Burchett J, 20 July 1998) (Singh) Burchett J stated:

... It seems to me that the discretion of the court in respect of costs in administrative law matters raises problems going beyond those in ordinary private litigation. Governmental authorities always have a particular interest in the due making of administrative decisions. Indeed, the administration of the Commonwealth, if our democratic institutions are to remain healthy and acceptable, must be capable of having its errors corrected and of being kept within the bounds of the law. For this reason, one must look carefully at an application that costs should be borne by an individual who exercises a right given to him by the law to have an administrative decision reviewed by the court.

27 Later, in the Full Court, in *Shelton v Repatriation Commission* (1999) 85 FCR 587, at [10] (Shelton), Burchett J joined with RD Nicholson and Finkelstein JJ in making observations to like effect:

... The Statement of Principles, although we have reached a firm view of its correct construction, is worded in less than ideal language, and indeed somewhat confusingly. In literal terms, it suggests the meaning the appellant gave it. In that situation, and bearing in mind that the legislation authorising the Statement of Principles is beneficial legislation, it cannot be said the application to the Court was unreasonable. Often, in administrative law, such an application as this was clarifies the law in a wider interest than that of the applicant. Indeed, it is as essential to good administration as it is important in the interests of individual justice that administrative decisions should be open to accessible review. Persons affected by administrative decisions should not be overmuch deterred by the threat of costs orders in such cases, and the very wide discretion given to the Court by the Federal Court of Australia Act 1976 (Cth) should not be automatically exercised adversely to the losing party.

28 Singh and Shelton offer examples of cases where it was regarded as a relevant consideration in relation to the exercise of the costs discretion in an administrative law case that a wider public interest in government according to law could be seen to be served. In Singh and Shelton, the taking into account of this consideration led to a departure from the ordinary position that costs followed the event.

29 In modern times, Parliament has seen fit, notably with respect to veterans, to enact ever more complicated legislation which can be difficult for the public, including the veterans community, to understand and correspondingly difficult for those engaged in public administration such as the Commission, the Secretary and the Board to administer in good faith.

30 The present case offers a paradigm example. One might hope and expect that it is unusual that the Commission would have to discharge its duty of questioning the legality of a decision by the Secretary. However, there is no indication in the circumstances of the present case that it would have done so but for Mr Shafran's initiative in instituting the proceeding. Yet it was on the basis of a conclusion as to illegality of decision by the Secretary that prohibition did not go against the Board. Though not named as a party, the Secretary, as a Commonwealth public servant, could hardly depart from the outcome achieved by Mr Shafran and the Commission in the present case. The Secretary, too, has no interest other than in administering the VEA according to law.

31 In the circumstances of the present case, it seems to me that the consideration regarded as relevant in Singh and Shelton is also relevant in deciding if and to what extent costs should be awarded in Mr Shafran's favour. Another way of looking at this case, albeit a way in which the Commission is not, as is evident from its submissions, disposed to look, is that, to the extent that he has not succeeded, Mr Shafran has, by the proceeding, prompted a clarification of pervasively important principles of practice and procedure in and in relation to a review by the Board of a decision of the Commission. As I emphasised in the principal judgment, the VEA is not just beneficial legislation; it confers entitlements on veterans and their dependents in return for the undertaking of particular types of military service. It is a contemporary manifestation of our country's bargain with her veterans.

32 Another factor which I take into account is that the present was always a one day case for its hearing, even had Mr Shafran raised just the issues upon which he succeeded. He did not raise additional issues which caused the case to go beyond a single day to hear. That, in turn, provokes the thought that any issues or percentage based costs reduction would operate truly at the margin.

33 In light of all of the above, I am not disposed to reduce Mr Shafran's costs by any percentage, only to limit the date upon which costs operate in his favour.

34 That does not mean that he is entitled to all of the costs that he may seek. In the absence of agreement and in accordance with the Court's current practice, his costs will fall for assessment by a registrar.

35 For the guidance of the registrar and in light of two further subjects raised by the Commission, I should make the following additional observations:

- (a) The Commission is correct that any costs awarded in Mr Shafran's favour should not include his personal costs of attending court. The proceeding was held in public and he was absolutely entitled to attend and hear it. But he appeared via his solicitor and the purpose of the costs order is to offer a form of indemnity for his legal costs, not his personal travel costs. The position would have been different, in my view, had he appeared in person.
- (b) The Commission also submitted that no travel costs should be allowed to his solicitor, because his solicitor was based in Far North Queensland (Freshwater). This, with all due respect, is a rather surprising submission. The law reports are replete with numerous

examples of cases in which the Commission, for its own reasons, and notwithstanding the presence of a local Bar replete with numerous competent counsel, has chosen to engage interstate counsel to appear. However that may be, the jurisdiction of the Court is national. The location of a party's lawyers can be relevant to deciding where to sit. It is certainly not determinative. The Court can and does sit in Far North Queensland, usually at the Cairns Courthouse, thanks to splendid co-operative federalism in relations between this Court and the Supreme Court of Queensland in relation to the use, where available, of regional courthouses. Had I sat in Cairns under such an arrangement, Mr Shafran's solicitor would have been advantaged and the Consolidated Revenue of the Commonwealth burdened not just by the costs related to the attendance of me, my Associate and of locally engaged court staff for that purpose but also the costs associated with the attendance of counsel for the Commission perhaps accompanied by a Brisbane based solicitor, perhaps alternatively instructed at additional expense by a Cairns agent. There may be some particular reason why Mr Shafran chose to engage a legal representative not based in Brisbane. Perhaps that was for like reasons to those which motivate the Commission so to do from time to time. Perhaps it was just where he could find a lawyer willing to take on his case on terms he could afford. It does not do to speculate. I prefer to leave the subject, at least in the first instance, to the good sense and judgment of a registrar on an assessment. In the event that the Commission presses the point, doubtless it can become the subject of evidence and explanation before that registrar.

36 Mr Shafran has substantially succeeded in his application for costs and thus any assessment must make allowance for this, as I shall do formally in the costs order itself.

37 There will be orders accordingly.

I certify that the preceding thirty-seven (37) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Logan.

Associate:

Dated: 28 July 2020

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