Shigeo Kitano – – – – – – – – – *Petitioner*

v.

The Commonwealth of Australia – – – – *Respondent*

FROM

THE HIGH COURT OF AUSTRALIA

REASONS FOR THE REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 6TH MAY 1975

Present at the Hearing:

LORD WILBERFORCE
VISCOUNT DILHORNE
LORD EDMUND-DAVIES
LORD FRASER OF TULLYBELTON
SIR THADDEUS MCCARTHY

[*Delivered by* LORD WILBERFORCE]

The Petitioner has sought special leave to appeal *in forma pauperis* to Her Majesty in Council from a judgment of the Full Court of the High Court of Australia dated 22nd August 1974. By that judgment the Full Court dismissed an appeal by the Petitioner against a judgment of the High Court of Australia (Mason J.) in its original jurisdiction dated 4th December 1973.

A preliminary objection to the competence of the Petitioner to present the Petition was taken on behalf of the Respondent, The Commonwealth of Australia, and argument was heard by their Lordships on this objection without entering, at that stage, upon the merits of the Petition.

The objection was founded upon the Privy Council (Limitation of Appeals) Act 1968, an enactment of the Parliament of the Commonwealth of Australia. This Act was reserved for Her Majesty's pleasure, and was assented to on 10th June 1968. The Queen's assent was made known by proclamation of the Governor-General on 30th July 1968 which appeared in the Commonwealth of Australia Gazette of 6th August 1968.

Section 3 of the said Act is as follows:

> "(1) Special leave of appeal to Her Majesty in Council from a decision of the High Court may be asked only in a matter in which the decision of the High Court was a decision that—
>
> (*a*) was given on appeal from a decision of the Supreme Court of a State given otherwise than in the exercise of federal jurisdiction; and

(*b*) did not involve the application or interpretation of—

(i) the Constitution;

(ii) a law made by the Parliament;

or

(iii) an instrument (including an ordinance, rule, regulation or by-law) made under a law made by the Parliament.

(2) The last preceding sub-section does not apply in respect of a decision of the High Court given in a proceeding that was commenced in a court before the commencement of this Act."

It is clear, in their Lordships' opinion, that the Petitioner is prevented from seeking special leave of appeal by the terms of this section. The proposed appeal is from a decision of the High Court which, itself, was not given on appeal from a decision of the Supreme Court of a State. Since, in order for a petition for special leave to be admissible, the requirements of both paragraphs (*a*) and (*b*) must be satisfied, and since that of paragraph (*a*) is clearly not satisfied, the section, unless its validity can be attacked, is conclusive.

It was contended for the Petitioner that section 3 of the said Act was not validly enacted, in accordance with the Constitution of Australia, and this contention must now be examined. The relevant section of the Constitution is section 74 which is as follows:

"No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure."

The relevant part of this section is the last sentence, and it is no doubt under this sentence that the Act of 1968 was purportedly passed. The main argument for the Petitioner was based upon the word "limiting", the contention being that this word did not extend to authorise complete abolition of the right to seek special leave of appeal from the High Court and that the Act of 1968 did amount to such complete abolition. Their Lordships cannot accept this argument. Whether or not the words "limiting" and "limitation" are to be read in the restricted sense contended for, the Act of 1968 does not amount to a complete abolition of the right to seek special leave of appeal from the High Court. Under section 73 (ii) the High Court has jurisdiction to hear appeals from the Supreme Court of any State or from any other Court of any State from which, at the establishment of the Commonwealth, an appeal lay to the Queen in Council. Appeals from the High Court in such matters unless they involve the exercise of federal jurisdiction are untouched by the

Act of 1968, the Act is therefore a "limitation" in the narrowest sense of the word.

A second argument was based upon the use of the word "matters" in the last sentence of section 74, the suggestion being that any limitation must be by subject matter, which must be specified in the limiting enactment and which must be one of the matters mentioned in sections 75 and 76. In their Lordships' opinion however, the word "matters" which also appears in sections 75 and 76 (relating to the original jurisdiction of the High Court) is not to be so read. However necessary it may be, in view of the terms of sections 75 and 76, to limit the application of "matters" in those sections, their Lordships have no doubt that in section 74 a general construction must be applied to the word. This appears to conform with the view of the High Court expressed in a number of decisions. (See *In re Judiciary and Navigation Acts* (1921) 29 C.L.R. 257, *Carter v. Egg and Egg Pulp Marketing Board (Vict.)* (1942) 66 C.L.R 557, 577-9, *Collins v. Charles Marshall Pty. Ltd.* (1955) 92 C.L.R. 529 and *Cockle v. Isaksen* (1957) 99 C.L.R. 155). In their Lordships' view the word as used in the 1968 Act is within the general meaning which must be given to it in section 74 of the Constitution.

For these reasons their Lordships, on the hearing of the preliminary objection, ruled that the Petition was incompetent and decided that it must be dismissed.

In the Privy Council

SHIGEO KITANO

v.

THE COMMONWEALTH OF AUSTRALIA

DELIVERED BY

LORD WILBERFORCE

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