Judgment Summary
Supreme Court
New South Wales

Kassam v Hazzard; Henry v Hazzard [2021] NSWSC 1320

Beech-Jones CJ at CL

The Supreme Court has dismissed the proceedings in Kassam v Hazzard and Henry v Hazzard and has published its reasons.

In accordance with the Court's policy, the following is a summary of its published reasons for judgment. This summary is not to be taken as a substitute for those reasons.

The highly contagious variant of COVID-19 known as the Delta variant was first detected in the community in New South Wales in June 2021. Since that time, it has spread rapidly. In response to the threat to public health it poses, the Minister for Health and Medical Research, the Honourable Bradley Hazzard, made various orders under s 7(2) of the Public Health Act 2010 which on any view significantly affect the freedoms of the citizens of this State and impose greater burdens on those who are not vaccinated. The main focus of the two proceedings the subject of the Court's judgment is those aspects of those orders which prevented so called "authorised workers" from leaving an affected "area of concern" that they resided in, and prevent some people from working in the construction, aged care and education sectors, unless they have been vaccinated with one of the approved COVID-19 vaccines.

One of the proceedings was brought by Mr Al-Munir Kassam and three other persons. They all state that they have made an informed choice to refuse to be vaccinated. They sue the Minister, the Chief Medical Officer, Dr Kerry Chant, the State of NSW and the Commonwealth of Australia. They contend that the Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021 (NSW) ("Order (No 2)"), and s 7 of the Public Health Act are invalid.

The plaintiffs in the Kassam proceedings relied on various grounds to establish the invalidity of Order (No 2) namely that: the Minister did not undertake any real exercise of power in making the order; that Order (No 2) is either outside of the power conferred by s 7 or represents an unreasonable exercise of the power because of its effect on fundamental rights and freedoms; and the manner in which Order (No 2) was made was unreasonable. The plaintiffs in the Kassam proceedings also contended that Order (No 2) confers powers on police officers that are inconsistent with the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW).

The plaintiffs in the Kassam proceedings also argued that Order (No 2) and s 7 of the Public Health Act are rendered invalid by s 51(xxiiiA) of the Constitution. They further contended that they are inconsistent with the Australian Immunisation Register Act 2015 (Cth).

The other proceedings were brought by Ms Natasha Henry and five other persons (the "Henry proceedings"). Like the plaintiffs in the Kassam proceedings, they also refuse to be vaccinated. They sued the Minister only. They sought declarations that Order (No 2) is invalid along with the Public Health (COVID-19 Aged Care Facilities) Order 2021 (NSW) (the "Aged Care Order") and the Public Health (COVID-19 Vaccination of Education and Care Workers) Order 2021 (NSW) (the "Education Order"). They contend that, because of their effect on rights and freedoms, these orders are beyond the scope of s 7(2) of the Public Health Act; that they were made for an improper purpose, that in making them the Minister failed to have regard to various relevant considerations; asked the wrong question or took into account irrelevant considerations; was obliged to but failed to afford them natural justice and acted unreasonably.

On the evening of 3 October 2021, when the hearing of the proceedings was still to be completed, the Minister made Public Health (COVID-19 General) Order 2021 which repealed Order (No 2) with effect from the beginning of 11 October 2021. Despite this, it was not contended by any party that the challenges to Order (No 2) were rendered futile. Both sets of plaintiffs confirmed that they sought declaratory relief concerning its invalidity. Further the Aged Care Order and the Education Order continue to have effect.

Leaving aside the constitutional challenge raised by the plaintiffs in the Kassam proceedings, in considering the grounds of challenge raised in both proceedings, the Court noted that it is not its Court's function to determine the merits of the exercise of the power by the Minister to make the impugned orders, much less for the Court to choose between plausible responses to the risk to public health posed by the Delta variant. It is also not the Court's function to conclusively determine the effectiveness of some of the alleged treatments for those infected or the effectiveness of COVID-19 vaccines especially their capacity to inhibit the spread of the disease. The Court observed that these are all matters of merits, policy and fact for the decision maker and not the Court. Instead, the Court noted that it's only function is to determine the legal validity of the impugned orders which includes considering whether it has been shown that no Minister acting reasonably could have considered them necessary to deal with the identified risk to public health and its possible consequences.

One of the main grounds of challenge in both cases concerns the effect of the impugned orders on the rights and freedoms of those persons who chose not be vaccinated especially their "freedom" or "right" to their own bodily integrity. The plaintiffs contended that, as a matter of statutory construction, the broad words of s 7(2) of the Public Health Act do not authorise orders and directions that interfere with those rights or that they are otherwise unreasonable because of their effect on those rights. They sought to deploy the "principle of legality" which is a rule of statutory construction to the effect that, in the absence of a clear indication to the contrary, it is presumed that statutes are not intended to modify or abrogate fundamental rights. However, the Court noted that it is only a rule of construction

and the assistance to be gained from the presumption will vary with the context in which it is applied. At least so far as the abrogation of particular rights are concerned, the presumption is of little assistance in construing a statutory scheme when abrogation is the very thing the legislation sets out to achieve.

Although it was contended that the impugned orders interfere with a person's right to bodily integrity and a host of other freedoms, the Court found that the impugned orders curtailed freedom of movement which in turn affects a person's ability to work (and socialise). So far as the right to bodily integrity is concerned, the Court found that it was not violated as the impugned orders do not authorise the involuntary vaccination of anyone. So far as the impairment of freedom of movement is concerned, the degree of impairment differs depending on whether a person is vaccinated or unvaccinated. The Court found that curtailing the free movement of persons including their movement to and at work are the very type of restrictions that the Public Health Act clearly authorises. Hence it was found that the principle of legality does not justify the reading down of s 7(2) of the Public Health Act to preclude limitations on that freedom.

Further, the Court observed that any consideration of the unreasonableness of an order made under s 7(2) is to be undertaken by reference to the objects of the Public Health Act which are exclusively directed to public safety. Orders and directions made under the Public Health Act that interfere with freedom of movement but differentiate between individuals on arbitrary grounds unrelated to the relevant risk to public health, such as on the basis of race, gender or the mere holding of a political opinion, would be at severe risk of being held to be invalid as unreasonable. However, the differential treatment of people according to their vaccination status is not arbitrary. Instead, it applies a discrimen, namely vaccination status, that on the evidence and the approach taken by the Minister is very much consistent with the objects of the Public Health Act. Accordingly, the Count rejected this aspect of both challenges.

As for the balance of the grounds of challenge:

(i) It was not demonstrated that the making of Order (No 2) was not a genuine exercise of power by the Minister, that the making of the impugned orders by the Minister involved any failure to ask the right question or any failure to take into account relevant considerations much less that it was undertaken for an improper purpose. The Minister was not obliged to afford the plaintiffs or anyone else procedural fairness in making the impugned orders;

(ii) It was otherwise not demonstrated that either the manner in which the impugned orders were made was unreasonable or that the operation and effect of the orders could not reasonably be considered to be necessary to deal with the identified risk to public health and its possible consequences;

(iii) Order (No 2) was not shown to be inconsistent with the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW);

(iv) Order (No 2) does not effect any form of civil conscription as referred to in s 51(xxiiiA) of the Constitution and, even if it did, the prohibition on civil conscription does not apply to laws made by the State of NSW; and
(v) There is no inconsistency between Order (No 2) and the Australian Immunisation Register Act 2015 (Cth).

As all the grounds of challenge were rejected, the Court dismissed both proceedings. The Court also made orders for the parties to address on costs.