PUBLIC INTERNATIONAL LAW

IN THE HIGH COURT

Author: Dr Adam McBeth

Date: 15 December, 2015

FOLEY'S LIST

Volume 1, Issue 1 December 2015

[THINK FOLEY'S FIRST]

THE BACKSHEET - FOLEY'S LIST

PUBLIC-ADMINISTRATIVE LAW NEWSLETTER

Public international law in the High Court

by Dr Adam McBeth

In a rare moment, the High Court is currently a hotbed of public international law. (Of course, this is all relative, and a hotbed in this context means three cases.)

The first of these, handed down on 2 December 2015, is *Firebird Global Masterfund II Ltd v Republic of Nauru* [2015] HCA 43, involving the registration of a foreign judgment against the government of another state, raising questions of foreign state immunity. The second case, handed down the same day, is *Macoun v Commissioner of Taxation* [2015] HCA 44, also raising a question of immunity, this time in relation to the taxation status of a Specialized Agency of the United Nations.

The third case, heard by the Full Court in October, with judgment reserved, is *Plaintiff M68/2015 v Minister for Immigration and Border Protection*, which seeks to challenge the validity of the refugee detention and processing regime in Nauru, being a regime purportedly run under Nauruan law but effectively controlled by Australia.

This note considers the first two of those cases.

Firebird Global Masterfund II Ltd v Republic of Nauru

Firebird is a private equity fund that had purchased Japanese bearer bonds issued in 1988-89 pursuant to a guarantee by the government of Nauru. Firebird obtained judgment against Nauru in the District Court of Tokyo and sought to enforce the judgment in the Supreme Court of New South Wales in order to access Nauru's Westpac bank accounts in Australia. Nauru has no central bank and so keeps a large proportion of its funds in the Westpac accounts.

The NSW Supreme Court initially registered the judgment and made a garnishee order against Westpac, but subsequently set aside the registration and the garnishee order following Nauru's application that it was entitled to foreign state immunity.

The *Foreign Judgments Act* 1991 (Cth) provides that registration of a foreign judgment can be set aside if the defendant "was a person who under the rules of public international law was entitled to immunity from the jurisdiction of the courts of the country of the original court and did not submit to the jurisdiction of that court" (s7(4)(c)). The High Court therefore had to determine whether Nauru had immunity under public international law in the original proceeding in the District Court of Tokyo.

The Court considered the position of public international law in relation to the restricted scope of state immunity, particularly the exception to immunity for commercial transactions, which is reflected in s11 of the *Foreign State Immunities Act* 1985 (Cth). French CJ and Kiefel J referred to the

Dr Adam McBeth
T 9225 7777
E adam.mcbeth@vicbar.com.au

Foley's List Clerking Team
(click name to email a clerk)

John Kelly	T 9225 7654
Andrew Turner	T 9225 8954
Matt Parnell	T 9225 6084
Kate Conners	T 9225 7882

Clerk's Office
T 9225 7777
F 9225 8480
M 0412 360 174 (24/7)
A 250 William Street
Melbourne, VIC 3000
DX 92 Melbourne
W **www.foleys.com.au**

International Court of Justice decision in *Jurisdictional Immunities of the State* [2012] ICJ Rep 99, among other sources, concluding that state immunity generally prevents execution of a judgment against state property that was being used for some governmental, non-commercial purpose, even if the judgment itself concerned a commercial transaction.

Accordingly, all members of the Court held that state immunity prevented Firebird from executing the Tokyo judgment against Nauru's bank accounts in Australia.

Macoun v Commissioner of Taxation

The *Convention on the Privileges and Immunities of the Specialized Agencies* ('Specialized Agencies Convention'), ratified by Australia and given effect through the *International Organizations (Privileges and Immunities) Act* 1963 (Cth) ('IOPI Act'), exempts the payments by Specialized Agencies of the United Nations of "salaries and emoluments" from national taxation.

Mr Macoun had been a sanitary engineer with the International Bank for Reconstruction and Development ('IBRD', part of the World Bank Group), which is a UN Specialized Agency and therefore covered by the tax exemption. The question for the High Court was whether the monthly pension payments Mr Macoun received from the IBRD was exempt from Australian tax as a "salary or emolument of an official" of the IBRD.

In a unanimous judgment, the High Court held that Mr Macoun's pension payments were not exempt from Australian tax, primarily because he was not an "official" at the time of the payment within the meaning of the *IOPI Act*.

The Court determined that the *IOPI Act* and various related regulations should be interpreted consistently with international law if such a construction was open. Having found that such a construction was not open, the High Court proceeded to undertake treaty interpretation anyway.

The High Court referred to the travaux préparatoires of the *Specialized Agencies Convention* and to state practice, including decisions of the Administrative Tribunal of the United Nations and to various court and tribunal decisions in European countries. It highlighted the objective of the exemption in international law being to secure the independence of UN agencies by not subjecting their personnel to the taxation jurisdiction of any national government. Once a person ceases to serve the Agency, that purpose disappears.

Following that exercise, the Court concluded that state practice was inconsistent and there was nothing to suggest Australia was precluded in international law from levying income tax on Mr Macoun's pension.

The most remarkable part of the decision, though, is the fact that the High Court embarked on this exercise at all, given the Court has traditionally avoided consideration of public international law whenever possible. That is all the more surprising when the Court had already determined that the construction of the statute was not open to considerations of international law.

The next international law case?

It may be that the decision in *Plaintiff M68/2015* will reveal the extent to which we are seeing a renaissance of public international law in the High Court. Although primarily framed as a constitutional case, principles of international law received a significant airing in the oral hearing. Time will tell.

AREAS OF PRACTICE

Commercial
Consumer Protection Law

Public/Administrative
Civil and Human Rights
Constitutional Law
Disciplinary Proceedings
Discrimination
Extradition
Immigration Law
Judicial Review and administrative law
Privacy/Freedom of Information

Appellate
Civil Appeals
Criminal Appeals

Inquests/Inquiries

International Law

Alternative Dispute Resolution