

THOMAS v MOWBRAY & ORS (M119/2006)

Date special case referred to Full Court: 2 October 2006

This special case concerns the validity of Division 104 of the *Criminal Code Act 1995* (Cth) ("the Code"), the object of which is stated to be: "to allow obligations, prohibitions and restrictions to be imposed on a person by a control order for the purpose of protecting the public from a terrorist act".

In March 2001, the plaintiff, an Australian citizen, travelled to Pakistan and Afghanistan, where he undertook paramilitary training at the Al Farooq training camp for three months. He was arrested in Pakistan in January 2003, but returned to Australia on 6 June 2003. In November 2004 the plaintiff was charged with various offences under Part 5.3 of the Code and the *Passports Act 1938* (Cth). He was found guilty in the Supreme Court of Victoria of intentionally receiving funds from a terrorist organisation and of possession of a passport that had been falsified. The Victorian Court of Appeal set aside the convictions on 18 August 2006, but has not yet decided whether to order a retrial.

On 27 August 2006, on the application of the Australian Federal Police ("the AFP"), an interim control order in respect of the plaintiff was made by the Federal Magistrates Court, under Division 104 of the Code. The AFP contended, inter alia, that the plaintiff had received training from Al Qa'ida; he had heard Usama Bin Laden speak at the training camp on several occasions, and he had attempted to join the Taliban after September 11 2001. The plaintiff was not notified of the hearing, which was held on an ex parte basis. The interim control order was served on him on 28 August 2006. On 22 September 2006, the plaintiff filed an application for an order to show cause in this Court, seeking, inter alia, a writ of certiorari to quash the order of the Federal Magistrate, and an injunction restraining the Commonwealth from acting upon the order. The parties have agreed in stating the questions of law arising in the proceeding in the form of a special case for the opinion of the Full Court. The Attorneys-General of New South Wales, Western Australia and South Australia have given notice of their intention to intervene in the proceeding.

The special case raises the following issues:

- Is Division 104 of the *Criminal Code Act 1995* (Cth) invalid because it confers on a federal court non-judicial power contrary to Chapter III of the Constitution?
- Is Division 104 invalid because, in so far as it confers judicial power on a federal court, it authorises the exercise of that power in a manner contrary to Chapter III of the Constitution?
- Is Division 104 invalid because it is not supported by one or more express or implied heads of legislative power under the Commonwealth Constitution?