HIGH COURT OF AUSTRALIA

23 June 2010

Manager, Public Information

OSLAND v SECRETARY TO THE DEPARTMENT OF JUSTICE

[2010] HCA 24

Today the High Court upheld an order of the Victorian Civil and Administrative Tribunal granting Heather Osland access to documents relating to her petition for mercy.

In 1996, Mrs Osland was convicted of the murder of her husband and sentenced to 14½ years imprisonment. She submitted a petition for mercy in July 1999 to the Victorian Attorney-General and, in September 2001, the Attorney-General issued a press release announcing that the petition had been refused. The press release referred to a memorandum of joint advice from a panel of three senior counsel that recommended that the petition be denied. The Attorney-General, however, had received advice from several other sources as well. Mrs Osland applied under the *Freedom of Information Act* 1982 (Vic) for access to all documents relating to the consideration of her petition. Access was refused by the Victorian Department of Justice. Mrs Osland sought a review of the refusal in the Victorian Civil and Administrative Tribunal, which set aside the decision and ordered access to be granted to the documents because the Tribunal was of the opinion that, notwithstanding that the documents were privileged, the public interest required access to be granted. In doing so, it was acting pursuant to s 50(4) of the *Freedom of Information Act*. On appeal to the Victorian Court of Appeal, the Tribunal's decision was reversed.

The High Court granted special leave to appeal against the Court of Appeal's decision on 14 December 2007. On 7 August 2008, the Court allowed the appeal. It did so because the Court of Appeal had not considered the Tribunal's advertence, in its reasons for decision, to the possible existence of differences between the joint advice and other advice received by the Attorney-General in relation to Mrs Osland's petition. On that basis, it was not possible for the Court of Appeal, without inspecting the documents, to conclude that the Tribunal had erred in granting access to those documents. The High Court set aside the orders of the Court of Appeal and remitted the matter to that Court to enable it to inspect the documents.

On 7 April 2009, the Court of Appeal, having inspected the documents, again reversed the Tribunal's decision. It did so despite finding that there were relevant and substantive differences between some of the advices received by the Attorney-General. On 12 February 2010, the High Court granted special leave to appeal from this second decision of the Court of Appeal.

The High Court today unanimously held that the Court of Appeal's decision on the remitter should be set aside and that the Tribunal's decision granting Mrs Osland access to the documents be upheld. The Court held that the Court of Appeal did not do what was required of it on the remitter.

Chief Justice French and Justices Gummow and Bell considered that the Court of Appeal's reasoning was logically independent of the actual contents of the documents to which Mrs Osland sought access. Their Honours held that the Court of Appeal was really addressing the question of law whether the evaluation of differences of any kind or degree between the advices received could attract the operation of the s 50(4). That question was precluded by the terms of

Address: PO Box 6309, Kingston ACT 2604 Telephone: (02) 6270 6998 Fax: (02) 6270 6868
Email: Hanna.Jaireth@hcourt.gov.au

the remitter from the High Court on the first appeal. The Court of Appeal should have first determined the question of law whether the actual differences between the advice provided to the Attorney-General could support the formation of an opinion that the public interest required access to be granted. If the formation of such an opinion was supportable, then the Court should have either remitted the matter to the Tribunal for further hearing or, having regard to the protracted nature of the proceedings, considered the public interest question for itself.

Justices Hayne and Kiefel (with whom Justice Heydon agreed on this point) considered that, on the remitter, the Court of Appeal was required to consider whether the Tribunal's reasoning about the requirements of the public interest manifested an error of law. Their Honours held that the Court of Appeal had misconceived the limited scope of its jurisdiction on the appeal from the Tribunal, which was in the nature of judicial review and not a rehearing. It did not review what the Tribunal had done for error of law but impermissibly assumed the role of the Tribunal and substituted its own decision.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*