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TRANSCRIPT OF PROCEEDINGS

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MAGISTRATES COURT

BRASSINGTON, Deputy Chief Magistrate

MAG-195457/19(1)

DREW PAVLOU

Complainant

and

XU JIE

Defendant

BRISBANE

9.14 AM, MONDAY, 10 AUGUST 2020

DAY 1

Any Rulings that may be included in this transcript, may be extracted and subject to revision by the Presiding Judge.

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BENCH: Mr Morris.

5 MR A. MORRIS QC: Yes. May it please the court, I'm in the matter of Pavlou, a peace and good behaviour matter. An issue has arisen as to whether the diplomatic immunity extends to the Consul-General of China in respect of the conduct which is the subject of this proceeding. It is self-evidently a matter of some public interest.

BENCH: Yes.

10 MR MORRIS: And I would encourage your Honour to adopt the course of particularly letting representatives of the press to be present.

BENCH: I will. I will.

15 MR MORRIS: Yes. Thanks, your Honour.

BENCH: It's just I can't, just for public health and safety - - -

MR MORRIS: Of course.

20

BENCH: - - - of everyone in the court, we need to be able to separate everyone from every second chair. I'll give preference to members of the media and any immediate family or friends - - -

25 MR MORRIS: Thank you.

BENCH: - - - of Mr Pavlou and the parties in it. Probably, everyone else will have to leave the court.

30 MR MORRIS: And I think, to be complete, there may also be representatives from the Chinese Consulate present and, they, of course, would get priority as well.

BENCH: As well. So those are the matters: the court won't proceed until people disperse.

35

MR MORRIS: Yes.

40 BENCH: So those are the issues. As I said, I'll give preference to the members of the press, because they can communicate to others; Mr Pavlou's own family and friends; and the parties of the other type.

SGT H.E. RANTALA: Perhaps if every second person over here move - - -

45 BENCH: Every second person will have to stand and go. As I said, the court will not proceed until it happens.

MR MORRIS: Yes.

BENCH: I'm not going to place my court staff and other persons at risk. The media can distribute, perhaps, if we can get a seat at the front. But we can only take 12. We're only supposed to take 12 people.

5 MR MORRIS: Would your Honour consider allowing the media to sit in the dock? Many in our community - - -

BENCH: I will. I will.

10 MR MORRIS: - - - would like to see that.

BENCH: But I'm not going to force them to.

SGT RANTALA: But that would look quite – yes.

15

MR MORRIS: Yes.

SGT RANTALA: I agree with my learned friend on that course.

20 BENCH: But it's the only options I have, as I said. People are not to sit next to each other. And the court will, if I have to, have to bring security, but I certainly won't be proceeding.

SGT RANTALA: Does your Honour consider - - -

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BENCH: I'm happy to if someone wants to volunteer. There are – you don't actually have to go in to the dock. If you – Sergeant, if you just close that plastic window, that will give – we don't want to lock it. We will move a couple of chairs to the front as well. Sorry. All right. You right? I'm sorry. My clerk will put a seat there. All right. Good. We'll put one at the end. Good. Excellent. So that's one, two, three – my clerk will put a seat – now, there's three people sitting together there. You'll have to separate out. All right.

30

35 **ADJOURNED** [9.18 am]

RESUMED [9.20 am]

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BENCH: All right. Thank you. Mr Morris.

MR MORRIS: May it please the court, Anthony Morris QC, on behalf of the applicant, Mr Pavlou.

45

BENCH: Yes. There's no appearance – and there hasn't been – from Mr Xu Jie?

MR MORRIS: No.

BENCH: Thank you. Yes.

5 MR MORRIS: Your Honour, an issue's been raised as to diplomatic immunity. May I say, I've been asked to become involved on Mr Pavlou's behalf to address that matter, but it is an incredibly important point. And I see my function, if I may say so, more as amicus curia to assist your Honour in dealing with that issue.

10 The situation arises under the Federal Consulate Privileges and Immunities Act of 1972, which, relevantly, adopts the provisions of the Vienna Convention on Diplomatic Immunity. The key provision for our present purposes is Article 43 of the Convention, which stipulates that consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the
15 receiving state in respect of acts performed in the exercise of consular functions. The term "consular functions" – sorry.

MR MORRIS: Before I leave Article 43(1), it is accepted that the respondent is a consular officer and, therefore, is prima facie entitled to the protection of this
20 provision if he was, relevantly, performing acts in the exercise of consular functions. That takes us to Article 5, which defines the relevant consular functions. And your Honour will see that they are quite broadly described. Paragraph (a) is:

25 *Protecting in the receiving State the interests of the sending State and of its nationals.*

It also includes, in item (e):

30 *Helping and assisting nationals, both individuals and bodies corporate, of the sending State.*

Item (g):

35 *Safeguarding the interests of nationals, both individuals and bodies corporate, of the sending States in cases of succession mortis causa –*

and so on. Item (h) is:

40 *Safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity*
–

and, in item (m), a sort of catch-all that refers to:

45 *Performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are*

referred to in the international agreements in force between the sending State and the receiving State

5 Mr Pavlou's complaint against the Chinese Consul-General is that, following a protest on the grounds of the University of Queensland, at which Mr Pavlou was personally assaulted on two occasions, the Consul-General issued – or the Consulate-General issued a public release – a sort of media statement, if you like – which, according to Mr Pavlou's case, set out to do two things: it certainly praised the persons who committed the assault, describing them, relevantly, as patriotic citizens; 10 secondly, it sought to tarnish Mr Pavlou and those with whom he was involved in the demonstration as having ulterior motives of carrying out anti-China separatist activities and attempting to split the country, that is, to split China, using the occasion, certainly, the release said:

15 *...as an excuse to provoke the confrontation between students from mainland China and from Hong Kong and to incite anti-China sentiment.*

Those words, although, on their face, a bit anodyne, create a genuine concern on the part of Mr Pavlou that they were intended to, and did incite, violence or threats of 20 violence against himself. And he points out that separatism under the law of the People's Republic of China is a capital offence. So to accuse a person of provoking separatism or, for ulterior motives, carrying out anti-China separatist activities, is to state in as many words that Mr Pavlou is someone who has committed conduct warranting the death penalty under Chinese law.

25 BENCH: But this doesn't refer in any way to Mr Pavlou, does it?

MR MORRIS: Yes. The – the publication doesn't use his name.

30 BENCH: No, that's what I mean.

MR MORRIS: Yes, yes.

35 BENCH: And it is a press release by the Consulate-General that indicates, in the final paragraph, that they would safeguard the legitimate rights of the overseas Chinese students.

MR MORRIS: Yes.

40 BENCH: Now, it just seemed – upon – that is the basis of the whole complaint for a peace and group behaviour.

MR MORRIS: Yes, it is.

45 BENCH: That seems – forgetting the issues which I've raised already with Mr Pavlou and his legal representatives, forgetting - - -

MR MORRIS: Yes.

BENCH: - - - the issues of jurisdiction – but that his belief has to be based on reason.

5

MR MORRIS: Yes.

BENCH: Obviously, the Peace and Good Behaviour Act is to target particular threats. It always seems to me that to rely upon this press release to ground it is going – presents some significant issues and problems.

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MR MORRIS: I accept that, your Honour. And I'm not here, as it were, to argue the merits of the application, apart from - - -

15 BENCH: I – I appreciate that. Yes.

MR MORRIS: But, your Honour, on the question of diplomatic immunity - - -

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BENCH: Yes, that's a – yes.

MR MORRIS: - - - it would be my respectful submission that your Honour – it would be open for your Honour to conclude that the Chinese Consul-General was pursuing, in his view, matters to protect the interest of nationals of the receiving state, that is, to protect the interests of Chinese people living or working or studying in Australia; that he was, in his view, helping and assisting Chinese nationals present in Australia; and that he was performing functions intended to advance the interests of China as a country within Australia.

25

This is not a political court. And the court is not invited to form a view as to whether those were politically legitimate or correct ways of protecting China's interests. It would be sufficient for your Honour to be satisfied that the Chinese Consul-General was directing his conduct towards enhancing the interests of Chinese nationals and the Chinese State. And it's then a matter for Australia's Department of Foreign Affairs to consider whether or not that is a proper use of a consular position.

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BENCH: That's how I see it. Yes.

MR MORRIS: Yes.

40 BENCH: That once the court finds that it would be objectively within those - - -

MR MORRIS: Yes.

45

BENCH: - - - then it is a matter for high public interest.

MR MORRIS: Yes.

BENCH: High public consideration on the political realm, not in the court.

5 MR MORRIS: I – I can't say a word to the contrary of that. I should also direct your Honour's attention to a decision of the New South Wales Court of Appeal, a case of Zhang v Zemin [2010] 79 NSWLR 513. And your Honour may think that what is said in that is fairly trite, but far be it from me to say that of any [indistinct] by the New South Wales Court of Appeal, that the immunity arises automatically; it doesn't have to be invoked - - -

10 BENCH: Yes.

15 MR MORRIS: - - - by a party; that it applies both to present and former officers of the sending state and, in item 3, in the headnote, it exists in respect of conduct engaged in by a person who was, at the time of that conduct, an officer of the foreign state for the purposes of the section if, by the time of the commencement of the proceedings, that person has ceased to be an officer and it exists in respect of civil claims arising out of even torture. Now, I emphasise that, because whatever one says about the conduct to which Mr Pavlou - - -

20 BENCH: Yes.

MR MORRIS: - - - subjected, it falls well short of torture, but even torture is protected by this legislation. Those are my submissions.

25 BENCH: Thank you, Mr Morris. Very helpful, can I say.

TAKE IN DECISION