

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S ECI 2022 00027

ZHANYU ZHONG

Plaintiff

v

ATTORNEY-GENERAL OF VICTORIA

Defendant

JUDGE: Ginnane J
WHERE HELD: Melbourne
DATE OF HEARING: 23 March 2023
DATE OF JUDGMENT: 1 November 2023
CASE MAY BE CITED AS: Zhong v Attorney-General of Victoria
MEDIUM NEUTRAL CITATION: [2023] VSC 634

JUDICIAL REVIEW - Plaintiff's conviction for incitement of another (an undercover policeman) to murder his de facto wife - Plaintiff's appeals dismissed and petitions for mercy refused - Further petition for mercy and request for its referral to the Court of Appeal - Attorney-General's exercise of discretion refusing referral - No judicial review grounds established - Proceeding dismissed - *Criminal Procedure Act 2009* ss 321G, 327; *Charter of Human Rights and Responsibilities Act 2006* ss 8, 21, 24,25, 38.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	In person	
For the Defendant	Mr L Brown SC and Ms C Marcs	Victorian Government Solicitor's Office

HIS HONOUR:

1 The plaintiff, Mr Zhanyu Zhong, seeks judicial review of the Attorney-General's decision to refuse to refer his petition for mercy to the Court of Appeal under s 327(1)(a) of the *Criminal Procedure Act 2009* ('CPA'). That provision states:

327 Reference by Attorney-General

(1) If a person convicted on indictment or found unfit to stand trial or found not guilty because of mental impairment petitions for the exercise of His Majesty's mercy in relation to the conviction or finding, or the sentence imposed on the person, the Attorney-General –

(a) may refer the whole case to the Court of Appeal; or

(b) may refer any point arising in the case to the judges of the Trial Division of the Supreme Court for their opinion.

(2) If the Attorney-General refers the whole case to the Court of Appeal, the Court of Appeal must hear and determine the case as if it were an appeal by the person.

(3) If the Attorney-General refers a question to the judges of the Trial Division of the Supreme Court, those judges or any three of them must consider the point and provide the Attorney-General with their opinion.

(4) Nothing in this Chapter affects the prerogative of mercy.

Background

2 In August 2000, the plaintiff was arrested and charged with inciting the murder of his wife.¹ The person that the plaintiff allegedly incited was an undercover operative ('Mark'), so no harm was done to his wife.² The following year, a jury found the plaintiff guilty,³ and he was sentenced to six years imprisonment with a non-parole period of three-and-a-half years.⁴

3 In 2003, the plaintiff sought leave to appeal against his conviction, but the Court of Appeal refused his application.⁵ The plaintiff, after his release on parole in 2004, sought special leave to appeal to the High Court of Australia. Again, his application was refused.

1 *R v Zhan Yu Zhong* [2001] VSC 524, [8].

2 *Ibid* [14].

3 *Ibid* [1].

4 *Ibid* [23].

5 *R v Zhan Yu Zhong* [2003] VSCA 56.

4 Having exhausted his appellate rights, the plaintiff, after he had served his sentence, filed a petition for mercy with the Attorney-General in 2010 ('first petition').⁶ He requested that his case be referred to the Court of Appeal pursuant to s 327(1)(a) of the CPA. Two years after the plaintiff lodged his first petition, the Governor informed him that his application had been denied.⁷

5 Undeterred, the plaintiff wrote to the Attorney-General again in 2018, seeking consideration of another petition ('second petition'). When the Governor advised him that his second petition had been denied, the plaintiff sought to have the decision judicially reviewed. In a judgment delivered in May 2020, Croucher J dismissed the plaintiff's application.⁸ His Honour did however, make the following remarks in *obiter*:⁹

... all may not be lost for Mr Zhong...

... I have a nagging doubt that Mr Zhong ever really formed a concluded intention that his wife should be killed at all, or that he really intended or believed that his wife would be killed by Mark, the would-be hitman.

As also indicated earlier, I would go so far as to say that, even on the limited material before this Court, if, as a member of the Trial Division, I had been asked (along with other judges) to provide an opinion to the Attorney pursuant to ss 327(1)(b) and (3) of the CPA, I would have opined that she should refer the whole case to the Court of Appeal pursuant to s 327(1)(a).

6 The plaintiff applied for leave to appeal his Honour's decision on 8 July 2020,¹⁰ but it is uncertain if that appeal is proceeding. The Court of Appeal refused the plaintiff's application to bring a second appeal on 2 March 2023.¹¹ I discuss that decision later in this judgment.

7 On 3 August 2020, the plaintiff lodged a third petition for mercy with the Attorney-General ('third petition').¹² The Attorney-General's decision to refuse that petition is

⁶ *Zhong v Attorney-General* [2020] VSC 302, [4] ('Croucher J decision').

⁷ *Ibid.*

⁸ *Ibid* [461]-[462].

⁹ *Ibid* [466]-[467].

¹⁰ Proceeding S EAPCI 2020 0061; see Defendant's submissions dated 17 March 2023, [1].

¹¹ *Zhong v The King* [2023] VSCA 35.

¹² Second Affidavit of Julia Freidgeim dated 19 January 2023, [5].

the subject of this proceeding. The third petition is contained in a letter addressed to the Attorney-General, with the subject line 'Re: My offer to settle the appeal Proceeding S EAPCI 2020 0061 with your approval of my fresh petition.'¹³ The letter stated that the plaintiff had decided to file a fresh petition for mercy, and included an offer to negotiate a settlement of his ongoing appeal proceeding. The plaintiff's letter also claimed that Croucher J concluded that there had been a miscarriage of justice in the plaintiff's trial and initial appeal, and that the Attorney-General's previous decision, refusing the second petition, amounted to *Wednesbury*¹⁴ unreasonableness. As well as this, the plaintiff claimed that the State of Victoria had breached his rights under ss 8, 24 and 25 of the *Charter of Human Rights and Responsibilities Act 2006* ('Charter').

8 A document attached to the plaintiff's letter titled 'Outlined loopholes of potential systematic corruption and other material of law and fact to file fresh petition' described the plaintiff's concerns with Victoria's criminal procedure. It made allegations of judicial and police corruption during the plaintiff's trial and included suggestions for reform. The letter and the 'Outlined loopholes' document were accompanied by attachments, including documents that he had prepared for his previous court proceedings.¹⁵

9 On 20 December 2020, Mr Thomas Danos and Ms Johann Ollquist of counsel sent submissions in support of the plaintiff's third petition.¹⁶ The submissions structured the plaintiff's claim, and provided three separate arguments in support of a referral. The first was the 'Massie issue', which claims that the trial judge incorrectly applied the reasoning in the Court of Appeal's judgment in *R v Massie*,¹⁷ the facts of which were distinguishable and that he did not direct the jury about s 321G(2)(b) of the *Crimes Act 1958* which concerns the intention required to establish the crime of incitement. Stemming from the 'Massie issue', the second point was that the verdict

¹³ Ibid [5], exhibit JF-2 (pages 5-8).

¹⁴ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

¹⁵ Second Affidavit of Julia Freidgeim dated 19 January 2023, [5].

¹⁶ Ibid [7].

¹⁷ *R v Massie* [1999] 1 VR 542 ('Massie').

was unsafe or uncertain because of the alleged dates when the purported crime occurred and the plaintiff's vacillation in his conversations with the undercover police about his wish for his wife to be harmed.¹⁸ The third point was that new evidence which could impact on the verdict.¹⁹

10 After two years had elapsed without the plaintiff receiving a response to his petition, he commenced this proceeding by filing an originating motion on 5 January 2022. He claimed that the Attorney-General had: 'endlessly delayed and failed her duty referring [his] whole case to the Court of Appeal under S327(1)(a)' of the CPA. He sought judicial review remedies including declarations that the Attorney-General had failed to have regard to his human rights and an order that she refer his petition to the Court of Appeal.²⁰

Attorney-General's refusal and her reasons

11 On 25 October 2022, the Attorney-General refused the plaintiff's petition.²¹ Her letter stated:

Dear Mr Zhong

I write to provide you with an update on the petition for mercy you made in August 2020.

I have considered your petition for mercy carefully pursuant to my statutory powers under section 327 of the *Criminal Procedure Act 2009* (Vic) and have decided not to refer your case to the Court of Appeal or any point arising from your case to the judges of the Trial Division of the Supreme Court for their opinion.

The Governor can exercise other forms of mercy under the Royal Prerogative of Mercy. I have sent your petition to the Premier, the Hon Daniel Andrews MP, who will provide your petition to the Governor. The Governor's Official Secretary will write to you to advise you of the outcome of the Governor's decision.

...

12 After receiving this letter, the plaintiff wrote to the Attorney-General seeking her

¹⁸ Danos and Ollquist Submissions, [12]-[13].

¹⁹ Ibid [2] and [14]-[15].

²⁰ An amended originating motion was filed on 13 September 2022.

²¹ First Affidavit of Julia Freidgeim dated 15 December 2022, [4].

reasons for refusing to refer his petition to the Court of Appeal. She provided four pages of reasons on 2 November 2022 ('the reasons').²²

13 The Attorney-General's reasons commenced by describing the material upon which she considered the plaintiff's petition. The material included the *Charter* and the following documents:

1. All correspondence and enclosures received from Mr Zhong since 4 August 2020, including:
 - a. Letter to the Attorney-General dated 3 August 2020 with one enclosure;
 - b. Letter to Alexandra McKinlay of the Victorian Government Solicitor's Officer dated 3 August 2020 with nine enclosures; and
 - c. Email to the Attorney-General dated 28 April 2021 with three enclosures
2. Submissions from Counsel on behalf of Mr Zhong dated 20 December 2020.
3. Judgment relating to the judicial review of a decision of the previous Attorney-General not to refer an earlier petition for mercy by Mr Zhong under section 327 of the CPA – *Zhong v Attorney-General* [2020] VSC 302.
4. Judgments relating to previous appeals by Mr Zhong against his conviction – *The Queen v Zhan Yu Zhong* [2003] VSCA 56 and *Zhan Yu Zhong v The Queen* [2005] HCA Trans 058.
5. Plea and sentencing remarks from Mr Zhong's trial – *R v Zhong* [2001] VSC 524.
6. Transcripts and depositions from Mr Zhong's trial.

14 Next, the Attorney-General summarised the four grounds raised in the plaintiff's petition and accompanying documents. Ground one, the '*Massie* issue', alleged that the trial judge had misdirected the jury about the elements of s 321G of the CPA. This was because (a) the trial judge wrongly considered himself bound by the Court of Appeal's decision in *R v Massie*; and (b) the Court of Appeal itself was incorrect in its construction of s 321G.

²² Ibid [6].

- 15 Ground two, the timing issue, alleged that the trial judge failed to direct the jury on the requirement that they reach a unanimous verdict on when the plaintiff formed a concluded intention to have 'Mark' murder his de facto wife. The plaintiff held a number of meetings with 'Mark' over a five-month period, and his vacillating intention was apparent throughout their conversations. The failure to direct the jury that they needed to be unanimous about when he formed the intention to incite the murder meant that there may have been uncertainty in the verdict.
- 16 Ground three, the new evidence ground, relied on two pieces of evidence which were not before the jury and which the plaintiff alleged would have materially impacted their verdict if they had been adduced at the time. This evidence was the plaintiff's loan of \$5000 to a Mr Hu, and an increase in the plaintiff's family health insurance cover. The loan evidence showed that Mr Zhong was lying to the undercover operative about having insufficient funds for the deposit, and the health insurance evidence suggested that he expected that his wife would live beyond August 2000.
- 17 Ground four, the corruption/unfairness issue, was not detailed. The defendant described this point as encapsulating the many arguments the plaintiff had made about police corruption, corruption and bias by the trial judge, and the incompetence of his legal representation at trial and on appeal, which had led to a substantial miscarriage of justice.
- 18 The Attorney-General rejected the plaintiff's petition, and found that 'overall, [the plaintiff's] petition for mercy does not raise a reasonable possibility that the Court of Appeal would allow an appeal if the matter was referred to it under s 327 of the CPA.' In particular, she did not accept that the verdict was unreasonable or that it could not be supported by the evidence led at the plaintiff's trial. Nor did she accept that an error or irregularity had occurred in the trial that had caused a substantial miscarriage of justice for any other reason. The Attorney-General's supporting reasons for those conclusions were in summary as follows.

The decision in Massie

19 The Attorney-General accepted that Croucher J's observations about the correct interpretation of s 321G(2)(b) were arguable. However, she considered that the preferable view was that the trial judge was correct to consider himself bound by the Court of Appeal's decision in *Massie* about the proper construction of s 321G(2)(b). Any difference between the facts in the plaintiff's case and in *Massie* was immaterial to the Court of Appeal's reasoning as to the interpretation of the provision. She also considered that the Court of Appeal in *Massie* was correct in its interpretation of s 321G(2)(b). As a result, she found that the plaintiff's concerns about defects in his conviction arising from the trial judge's reliance on *Massie* were unlikely to be accepted by the Court of Appeal as indicating a deficiency in the jury's verdict and did not raise a reasonable possibility that it would allow an appeal if she referred the matter to it under s 327 of the CPA.

Timing

20 The Attorney-General accepted that it would have been 'preferable' for the jury to have been directed on the requirement of unanimity in their verdict as to when the plaintiff formed a concluded intention to incite the murder of his de facto wife. However, she rejected the idea that this matter was sufficient to establish that the jury's verdict was unreasonable, or unsupported by the evidence. Instead, she considered it was open to the jury to be persuaded of the plaintiff's guilt either by the totality of the conversations that they heard, or by the content of the final meeting between the plaintiff and 'Mark' on 3 August 2000. On that basis, she did not consider that the absence of a unanimity direction raised a reasonable possibility that the Court of Appeal would allow an appeal if a referral was made under s 327.

New evidence

21 The Attorney-General expressed significant doubts about the veracity and admissibility of both the evidence of the loan to Mr Hu and the evidence of the increase in the plaintiff's family health insurance. She did not believe that he had adequately explained why that evidence, that was reasonably available to him at the time of his trial, was not adduced at trial. Nor did she accept that the inclusion of

this evidence would have materially affected the jury's verdict. Even if the Court of Appeal allowed this evidence to be adduced, she did not consider it was cogent evidence capable of impacting upon the jury's verdict or demonstrating to the Court of Appeal that there was reasonable doubt about that verdict. Accordingly, she did not consider that the new evidence assisted in demonstrating that there was a reasonable possibility of a miscarriage of justice or that there was any other reason to refer the matter to the Court of Appeal.

Corruption/unfairness

- 22 The Attorney-General considered that this ground was misconceived and unsupported by any credible evidence. In particular, she did not believe that the material before her provided any legitimate basis for the plaintiff's concerns about corruption, bias of the trial judge or incompetence of his legal representation.

Concluding remarks

- 23 The Attorney-General did not consider that the plaintiff's petition raised a reasonable possibility that the Court of Appeal would allow an appeal if a referral were made. Nor did she consider that the petition otherwise suggested that his conviction and sentence were unlawful. As a result, she did not consider that any rights the plaintiff had under the *Charter* would be affected by her decision not to exercise her power under s 327 of the *CPA*.
- 24 In addition to this, having regard to the material the plaintiff had provided and the arguments that he had made, the Attorney-General did not consider that she would be assisted by an opinion from the Trial Division of the Supreme Court about any point arising from his case. Further, she did not consider that there was any other reason for her to take action under s 327 of the *CPA* in relation to his case.

Aftermath

- 25 On the basis of the Attorney-General's decision, in a letter dated 15 November 2022, the Victorian Government Solicitor's Office ('VGSO') invited the plaintiff to

discontinue this proceeding.²³ The VGSO noted that the plaintiff would have the opportunity to present his arguments to the Court of Appeal about why he said that he has been wrongly convicted in the event that his second application for leave to appeal against conviction was granted (proceeding S EAPCR 2022 0040).

26 The plaintiff replied in a letter dated 16 November 2022, and stated that the defendant's decision that his petition did not raise a reasonable possibility that the Court of Appeal would allow his appeal, breached the *Wednesbury* principle. The defendant's decision about the '*Massie* issue', the timing of intention and fresh evidence was reached without a factual and jurisdictional basis. He made three proposals. First, he requested that the defendant refer his petition to the Court of Appeal on the grounds that the verdict could not be supported by police evidence and that there was a substantial miscarriage of justice. Secondly, that his two Court of Appeal proceedings (S EAPCI 2020 0061 and S EAPCR 2022 0040) be consolidated into one. Thirdly, that the defendant and the Director of Public Prosecutions ('DPP') agree to allow him to raise the '*Massie* issue' and the 'timing of intention issue' in his second application for leave to appeal against conviction, should he discontinue this proceeding. This agreement would be recognised in a memorandum of understanding signed by the defendant, the DPP and the Court of Appeal.

27 On 28 November 2022, the Court of Appeal registry sent an email to the plaintiff in response to his request to have his appeal proceedings consolidated. The registry declined to consolidate the matters because of the different issues to be considered in the matters such as their background, the underlying conviction, the fact that they were not all criminal matters and that the potential outcome in each matter might be different. They also noted that the respondents to the proceedings had opposed the listing of all matters together.

28 On 15 December 2022, the VGSO responded to the plaintiff's letter of 16 November 2022, and stated that the defendant was in the process of considering his proposals

²³ First Affidavit of Julia Freidgeim dated 15 December 2022, Exhibit JF-1, 19.

for discontinuing the proceeding.

29 On 2 March 2023, the Court of Appeal refused the plaintiff's application for leave to bring a second appeal against conviction under s 326A of the *CPA*. I discuss that decision later in these reasons.

Justiciability: Section 327 and the Royal prerogative of mercy

30 Some discussion occurred at the hearing as to whether the Attorney-General's decision was justiciable. Section 327(4) of the *CPA* refers to the prerogative of mercy, which is a similar, yet distinct, power to that contained in s 327(1). The authorities suggest that the Governor's exercise of the prerogative of mercy is non-justiciable.²⁴

31 Counsel for the defendant adopted the same position that had been taken in the proceedings before Croucher J, that the Attorney-General's power under s 327 of the *CPA* was not reviewable.²⁵ The defendant submitted that I should take a neutral position on the issue, as Croucher J had taken and that none of the plaintiff's grounds could succeed in any event.²⁶ In view of the conclusion that I reach in this judgment, I do not consider it necessary to decide the issue of justiciability.

Grounds of review

32 The plaintiff relies on three grounds in support of his application for judicial review. Ground one is that by failing to fulfil her executive duty to consider whether the plaintiff was wrongly convicted, the defendant violated his fundamental human rights under ss 8, 24(1), 25 and 38 of the *Charter* that are equivalent to arts 2, 14 and 16 of *International Covenant on Civil and Political Rights* ('ICCPR'), and the matters that arise under s 75(i) of the *Australian Constitution* which concerns all matters arising under any treaty.

33 Ground two is that the defendant had a duty to refer the plaintiff's petition to the

²⁴ See *Horwitz v Connor* (1908) 6 CLR 38; *R v Toohey; ex parte Northern Land Council* (1981) 151 CLR 170; *Eastman v Attorney General (ACT)* (2007) 210 FLR 440; *Ogawa v Attorney-General (No 2)* (2019) 373 ALR 689.

²⁵ Transcript of Proceedings (*Zhong v Attorney General*, Supreme Court of Victoria, S ECI 2023 00027, Ginnane J, 23 March 2023) 49 ('T').

²⁶ T 62.

Court of Appeal under section 327(1)(a) of the *CPA*. This 'duty' is said to have arisen out of three 'jurisdictional kernels' which were:

- (a) Croucher J's judgment in *Zhong v Attorney-General*²⁷ which it is contended agreed that the plaintiff's conviction could not be proved by the police and that the Court jurisdictionally erred in law by unlawfully convicting him and omitting to consider the statutory operation of s321G(2)(b) of the *Crimes Act 1958*;
- (b) Fresh evidence proved that the jury wrongly convicted the plaintiff as the police and the trial judge violated his human rights and denied him a fair trial according to law and admissible evidence, and interfered to create a gender biased jury.
- (c) (a) and (b) exonerate the plaintiff and prove his innocence.

34 Ground three is that the defendant failed in her duty to protect human rights and eliminate sex discrimination by breaching ss 15 and 44 of the *Equal Opportunity Act 2010*. The defendant discriminated against the plaintiff, by endlessly and unlawfully delaying or refusing to implement her executive duty to refer the plaintiff's petition to the Court of Appeal. Pursuant to s 38 of the *Charter*, the defendant was obliged to fulfil her duty to protect the plaintiff's human rights without any delay.

Plaintiff's submissions

35 The plaintiff's submissions mostly discussed the merits of the Attorney-General's decision and the plaintiff's arrest, trial and appeal. They did not address in detail the grounds that are usually relied on in judicial review proceedings.

36 As mentioned, in ground one, the plaintiff claims that the Attorney-General had a positive 'duty' to refer his petition to the Court of Appeal. This 'duty' is said to arise out of the plaintiff's wrongful conviction. I took the plaintiff to contend that the defendant had acted unreasonably by refusing to refer the petition to the Court of

²⁷ Croucher J decision.

Appeal. He made such a submission in various forms. In his 'Oral Debates' which were a form of submission, he argued that:²⁸

...the Attorney-General refused to let the court review the conviction according to full term of S321G of Crimes Act 1958...

...Her reason to refuse me a referral is baseless and illogical with subjective manipulations.

Her unreasonableness, irrationalness in fixed illogical beliefs clearly breached Wednesbury principle...

37 In his submissions dated 15 February 2023, the plaintiff stated:²⁹

Although [the Attorney-General] has discretion under s 327(1) of CPA 2009 to refer the whole case to the Court of Appeal... it never confers her unlimited arbitrary and baseless discretionary power to make her baseless, illogical and unlawful decision by breaching...

...

Wednesbury principle of common laws...

...

38 The plaintiff likewise contended that:³⁰

...Her reasons were baseless and illogical to breach the principle of Wednesbury...

39 The essence of the plaintiff's submission was that the body of evidence supporting his application for a referral was so convincing that the Attorney-General simply had to order a referral or was acting unreasonably. It is in that sense that the plaintiff used the term 'duty'.

40 However, the plaintiff's grounds are not directly related to an unreasonableness argument. They contain many assertions made without explanation. He filed a number of submissions:

(a) Oral debates base on Submissions about Proceeding Utility dated 15/03/2023;

²⁸ Plaintiff's 'Oral Debates' dated 23 March 2023, 6-7 [2.1], [2.2] and [2.3].

²⁹ Plaintiff's 'Outlined Replies' dated 15 February 2023, 1, [1] and [1.3].

³⁰ Ibid [3].

- (b) Submissions about Proceeding Utility
- (c) Outlined Replies (Per Order 8 of the orders made by Judicial Registrar Baker on 9 March 2022); and
- (d) Outlined Written Submission (Per Order 8 of the orders made by Judicial Registrar Baker on 9 March 2022);
- (e) Petition Remedies Sought Relied Upon The Grounds of Miscarriage of Justice;
- (f) Outlined Submission Guide.

41 The plaintiff also filed a number of affidavits.

42 I will next summarise the plaintiff's submissions.

Ground 1 submissions - 'Human rights'

43 In ground 1, the plaintiff alleges that the State of Victoria has violated his human rights. He referred to the rights under ss 8, 24(1), 25(1), 25(2), 25(d), 25(4) and 38 of the Charter. He contended that the violation of those rights had caused a substantial miscarriage of justice.

44 The plaintiff claims that the trial judge violated his human rights by 'pressuring' his counsel to represent him 'inadequately'. He also claims that he was not afforded his *Charter* rights under s 25(2)(b), as the State denied him adequate time to prepare his case by allegedly withholding audio tapes from him.

45 The plaintiff argued that s 327 does not confer absolute power on the Attorney-General, enabling her to disregard her obligations under sections 32, 38 and 39 of the *Charter*.

46 The plaintiff argued that the defendant's reasons for refusing his petition were 'baseless and illogical' and, in breach of s 38 of the *Charter*. This was because the defendant delayed and failed to regard his unlawful conviction as caused by the State's violation of his human rights and in her duty to refer his full case to the Court of Appeal. The defendant did not afford the plaintiff the presumption of

innocence. By refusing to refer his case to the Court of Appeal, when Croucher J found errors of law on the face of the record, she violated s 8 of the *Charter*. As a result, she undermined confidence in the rule of law and the criminal justice system.

47 The plaintiff alleged that the defendant did not perform her duty because she failed to accept that he was wrongfully convicted. This wrongful conviction is said to have been caused by 'the State' violating the plaintiff's rights under sections 8, 24(1) and 25 of the *Charter* and s 75(i) of the *Constitution*. Those *Charter* sections state:

8 Recognition and equality before the law

- (1) Every person has the right to recognition as a person before the law.
- (2) Every person has the right to enjoy their human rights without discrimination.
- (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

...

24 Fair hearing

- (1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

...

25 Rights in criminal proceedings

- (1) A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.
- (2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees –

...

- (d) to be tried in person, and to defend themselves personally or through legal assistance chosen by that person or, if eligible, through legal aid provided by Victoria Legal Aid under the Legal Aid Act 1978; and

...

48 Section 75 of the *Constitution* states:

75. Original jurisdiction of High Court

In all matters:

(i) arising under any treaty;

...

the High Court shall have original jurisdiction.

Ground 2 submissions

49 The plaintiff's second ground is that the defendant had a duty to refer his petition to the Court of Appeal, on the basis of three 'jurisdictional kernels'.³¹ Each of these kernels relate to alleged prosecutorial misconduct during the plaintiff's trial and original appeal.

Kernel 1 - Decision of Croucher J

50 The plaintiff argued that Croucher J found errors of law on the face of the record and conceded a miscarriage of justice had occurred. By not referring the plaintiff's petition to correct errors of law that the Court of Appeal made, the defendant has undermined the integrity of the justice system.

Kernel 2 - Fresh evidence

51 The plaintiff alleged that fresh evidence had arisen that would establish he was wrongfully convicted. He described the four pieces of fresh evidence:³²

Fresh evidence that police falsified evidence about Mark's designed noisy meeting location for purposes of tampering tape recordings to conceal police corruptions and exculpatory evidence of my defence.

...

Fresh evidence that [Trial Judge], had been actually biased, conspired with, incited, aided and abetted police crimes of attempting to pervert the course of justice, and perverting course of the justice. [The Trial Judge] had done so to enable police to falsify their evidence in my critical defence issues ...

...

The evidence dated 04/01/2006 that I lent Mr Huayu Hu \$,5000 on 04/08/2000, and the insurance letter dated 16/11/2004 are the 2 facts being consistent with the elemental facts agreed, that I never committed acts of incitement to murder RHM, and I had no conclusive intention to commit the acts of incitement to murder RHM in relation to elements S321G(1) and

³¹ Plaintiff's Amended Originating Motion, see 'Ground 2'.

³² Plaintiff's 'Outline Submissions Guide' dated 23 February 2022, 12.

S321G(2)(b) of the alleged offence. The two pieces of evidential facts should be reasonably regarded as the fresh evidence ...

...

52 The plaintiff again alleged that both the police and the trial judge were 'biased', and did not afford him a fair trial according to law and admissible evidence. It was not logically open to the jury to convict him. Part of this argument also involved the 'Massie' issue. The plaintiff argued that the trial judge wrongly applied the reasoning of the Court of Appeal in *R v Massie*. By failing to acknowledge this, and follow the decision in *R v Said*,³³ the Attorney-General 'chose not [to] let the Court of Appeal correct the errors of law that they had made in both the plaintiff's original appeal, and in *Massie* itself.'³⁴ He alleged that the Attorney-General erred because there was no objective material facts or evidence that he committed the physical acts of incitement to murder. In addition to the physical element of incitement, the prosecution had to prove that he intended that 'Mark' would kill his *de facto* wife and that his intention or belief existed at the time when 'Mark' was expected to kill her.

Kernel 3 - 'Proof of innocence'

53 The plaintiff argued that the first two 'kernels' exonerated him and proved his innocence. This was not so much a distinct argument as a concluding remark.

Ground 3 submissions - 'Sex discrimination'

54 The plaintiff argued that the jury at his trial was disproportionately female and was gender biased.

55 He explained that following the empanelment of the jury, an issue was raised about one juror, who it was thought that some juror had some indirect association with the plaintiff and it was sought to have the one juror removed. Instead, the trial judge ordered the empanelment of a new jury. A total of 18 people formed the panel for the selection of the second jury. Of those 18, 15 were female and 3 were male.³⁵ The plaintiff had already exhausted his six challenges, and so the final jury consisted of 9

³³ [2009] VSCA 244.

³⁴ Plaintiff's 'Oral debates' dated 23 March 2023, 7 [2.5].

³⁵ T 18-19.

females and 3 males.³⁶ The plaintiff claimed that one male juror in his trial diary, which in some way had been published, expressed a feeling of 'peer pressure' from the females.³⁷

56 The plaintiff argued that the defendant discriminated against him by disregarding the fact that there was interference with jury selection to create the gender bias. He argued that the defendant breached ss 5, 10 and 15 of the *Equal Opportunity Act 2010* and s 8 of the *Charter* through her discrimination against him.

The defendant's submissions

Ground 1

57 The defendant submitted that the ICCPR and s 75(i) of the *Constitution* conferred no rights on the plaintiff that could be vindicated by this Court. While the Attorney-General is a public authority for the purposes of the *Charter*, it was unclear how any rights upon which the plaintiff relied were engaged by her decision to refuse to refer the matter to the Court of Appeal. It was not apparent how any delay by the Attorney-General in making her decision breached the plaintiff's *Charter* rights. In any event, she had now made her decision and there would be no utility in granting relief based on the delay.

Ground 2

58 The defendant submitted that s 327(1)(a) imposed no duty on the Attorney-General. Rather it gave her power to refer a case to the Court of Appeal, but it remained for her to decide whether to exercise that power in any particular case. If the plaintiff sought to rely on fresh evidence, he could attempt to do so by a second or subsequent appeal or application for leave to appeal, in the Court of Appeal, as the plaintiff had done in his pending appeal.

Ground 3

59 The defendant submitted that no duty under the *Equal Opportunity Act* was cast on

³⁶ Ibid.

³⁷ Ibid.

the Attorney-General in relation to the plaintiff's application.

The applicability of the ICCPR

60 The plaintiff made references to his rights under the ICCPR. However, it is a well-established that the ratification of international treaties has no legal effect upon the domestic law of Australia, unless legislation is passed to implement them.³⁸ For this reason, I must confine my analysis to the plaintiff's arguments under the *Charter*, except to the extent that the ICCPR may assist in interpreting a provision.³⁹

Ground 1 - analysis

61 I do not consider that s 327 of the *CPA* imposes any duty on the Attorney-General to refer a petition to the Court of Appeal. It gives her a power in the form of a discretion which is to be exercised by reference to the facts and legal issues of particular cases.

62 Justice Croucher's judgment addressed in detail many of the issues that have again been raised in this proceeding. His Honour ultimately concluded that:⁴⁰

...Mr Zhong asserts, in effect, that the Attorney was simply manifestly wrong to fail to refer the case to the Court of Appeal because there was no other result available in view of these (and other) alleged defects in his trial, as well as the availability of new (or perhaps fresh) evidence.

...

... given the nature of most of Mr Zhong's grounds, it seems that he is in effect asserting that the Attorney's decision is afflicted with something akin to "*Wednesbury* unreasonableness".

63 On the evidence, I do not find that the plaintiff has established that the Attorney-General breached any of his *Charter* rights when making her decision. No trial or hearing was being conducted and the determination of the petition was not a criminal proceeding. The plaintiff was given an opportunity to present his case in writing to the Attorney-General and she gave written reasons for her decision not to

³⁸ *Dietrich v The Queen* (1992) 177 CLR 292, 305 (Mason CJ and McHugh J); *Minster for Immigration and Ethnic Affairs v Teoh* (1994) 183 CLR 273, 286-287 (Mason CJ and Deane J).

³⁹ See s 32(2) of the *Charter*.

⁴⁰ [2020] VSC 302 [59] and [124].

refer the petition to the Court of Appeal. Nor do I find that s 75(i) of the *Constitution* is relevant to the issues that I must decide. For present purposes, it suffices to say that I am not persuaded that the plaintiff's Charter rights were infringed or limited by the Attorney-General. The issue before the Court was whether the Attorney-General had made a jurisdictional error in refusing to refer the petition to the Court of Appeal. For the purposes of this proceeding, in which the State of Victoria is not a separate party, it is the actions of the Attorney-General that are relevant.

64 The plaintiff also claims that the defendant herself had limited or breached his ss 8 and 38 rights under the *Charter*. Section 38 states in relevant parts:

38 Conduct of public authorities

(1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

(2) Subsection (1) does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.

Example

Where the public authority is acting to give effect to a statutory provision that is incompatible with a human right.

(3) This section does not apply to an act or decision of a private nature.

...

65 The plaintiff alleged that the Attorney-General failed to appropriately consider his Charter rights in making her decision as s 38 of the Charter required her to do.⁴¹ The plaintiff relied especially on the right to equality before the law contained in s 8. His complaint appeared to arise from allegations of gender bias in the jury. As I later conclude that no breach of the *Juries Act 2000* or *Equal Opportunity Act* occurred in the empanelment of the second jury, it cannot be contended that the Attorney-General acted incompatibly with his s 8 rights by not referring the petition to the

⁴¹ See *Bare v Independent Broad-based Anti-corruption Commission* (2015) 48 VR 129, 203 [235] as to the duty imposed by s 38(1) of the Charter.

Court of Appeal based on that ground.

Ground 2 - analysis

66 The plaintiff's second ground seeks to establish why the Attorney-General had a duty to refer his petition to the Court of Appeal. The essence of the ground is that a miscarriage of justice occurred in the plaintiff's original trial and appeal. As I have mentioned, the first sub-ground is that the decision of Croucher J in *Zhong v Attorney-General*⁴² exonerated the plaintiff. The second sub-ground is that fresh evidence had arisen that proved the plaintiff's innocence. I will address each in turn.

The decision of Justice Croucher

67 The Attorney-General in her reasons stated that she had carefully considered Croucher J's judgment. In my opinion, his Honour's decision does not establish that the plaintiff was wrongfully convicted. Nor did his Honour find that the Court made a jurisdictional error associated with his conviction. Even if his Honour had made such findings, although the plaintiff's case would have been strengthened, the Attorney-General would not have been under a mandatory duty to refer the petition to the Court of Appeal.

68 Despite dismissing the plaintiff's proceeding, Croucher J in an epilogue outlined his concerns about the plaintiff's conviction. He acknowledged his 'nagging doubt' about whether the plaintiff had formed a concluded intention that his wife should be killed at all. He identified four concerns. The first, was in relation to the plaintiff's new evidence. His Honour stated:⁴³

I think it is reasonably possible that both the alteration to the family's health insurance arrangements and the loan to Mr Hu are, together with other evidence at trial, capable of supporting Mr Zhong's innocence of the charge or, at least, are capable of raising a reasonable doubt in the minds of the Court of Appeal.

69 His Honour stated that the plaintiff needed to establish that the new evidence could not, with reasonable diligence, have been led at trial and he had not done so.

⁴² Croucher J decision.

⁴³ Ibid [470].

70 His Honour's second concern was about the *Massie* issue and the directions that a jury should receive where an accused is charged with incitement under s 321G(2)(b) of the *Crimes Act*. His Honour stated:⁴⁴

I am troubled that the trial judge did not direct the jury in accordance with the requirements in s 321G(2)(b) of the *Crimes Act*. Despite my view that his case is distinguishable from *Massie* and that Brooking JA's remarks on that provision were only *obiter*, realistically, this complaint can be resolved only if the Court of Appeal were to reconsider those remarks in *Massie*.

71 However, Croucher J declined to quash the Attorney-General's decision on that basis. He stated:⁴⁵

... while I think *Massie* is wrongly decided on s 321G(2)(b), I do not think that that alone is a basis for setting aside the Attorney's decision to decline to refer the matter to the Court of Appeal pursuant to s 327(1)(a) of the CPA. Nor do I think that the fact that the Court's remarks on s 321G(2)(b) are strictly *obiter*, or that Mr Zhong's case is distinguishable from *Massie*, are additional reasons compelling that course.

72 His Honour's third concern was that the guilty verdict may have been 'uncertain'.⁴⁶ This meant that unless directions had been given to the jury requiring unanimity that at least one of the meetings between the plaintiff and 'Mark' amounted to proof of the offence, 'there may well be an unacceptable risk that the verdict is uncertain'.⁴⁷ This was not a point taken by the plaintiff and Croucher J acknowledged that without the full trial transcript, he would be unable to properly determine whether the point had merit or not.⁴⁸ This led to his Honour's fourth and final concern:⁴⁹

I am troubled that neither the Attorney nor this Court was favoured with the full transcript of the trial or all of the trial exhibits. Not only did that make it all the more difficult adequately to assess Mr Zhong's grounds for review, it left me with a sense of unease concerning whether something important might have been missed by either the Attorney or me – for either or both parties.

⁴⁴ Ibid [473].

⁴⁵ Ibid [344].

⁴⁶ Ibid [474].

⁴⁷ Ibid [476].

⁴⁸ Ibid [474].

⁴⁹ Ibid [479].

73 However, on this occasion, the Attorney-General in her decision considered a variety of materials, including transcripts and depositions from the plaintiff's trial.⁵⁰

74 His Honour stated that there would be a proper basis for the Attorney-General to consider a further petition drawn in a 'far more targeted and appropriate fashion'.⁵¹ He also noted that he hoped the plaintiff would be legally represented in his endeavour.⁵²

75 The matters raised by Croucher J do not, by themselves, enable a conclusion to be drawn about whether the Attorney-General made a judicially reviewable error in her decision.

Fresh evidence

76 As a separate point, the plaintiff claimed that fresh evidence had arisen that would exonerate him and establish a miscarriage of justice. The Attorney-General submitted that the Court of Appeal in its judgment in March this year had dealt comprehensively with the fresh evidence point and concluded that none of the evidence raised was either fresh or compelling.⁵³ Moreover, the defendant argued that many of the plaintiff's complaints had been, or could have been, raised during the previous court proceedings that he had commenced.

Court of Appeal judgment

77 In March this year, the Court of Appeal rejected the plaintiff's application for leave under s 326A of the CPA to bring a second appeal against his conviction.⁵⁴ The Court of Appeal may only grant such leave if it is satisfied that there is 'fresh and compelling evidence that should, in the interests of justice, be considered on appeal'.⁵⁵ In the Court of Appeal, the plaintiff sought to rely on six categories of

⁵⁰ First Affidavit of Julia Freidgeim dated 15 December 2022, Exhibit JF-1, 11.

⁵¹ *Zhong v Attorney-General* [2020] VSC 302, [484].

⁵² *Ibid.*

⁵³ T 51.

⁵⁴ *Zhong v The King* [2023] VSCA 35.

⁵⁵ *Ibid* [13].

material, which he claimed constituted fresh and compelling evidence:⁵⁶

- (i) the transcript of evidence given by the applicant at the *voir dire* hearing referred to above, on 1 October 2001 ('the *voir dire* evidence');
- (ii) the transcript of closed court pre-trial hearings from which the parties and their legal representatives were excluded, conducted on 2, 3, 5 and 8 October 2001 ('the closed court evidence');
- (iii) an affidavit sworn by the applicant on 4 April 2002 ('the 4 April affidavit');
- (iv) an affidavit sworn on 4 January 2006 by Huayu Hu, in which he deposes that he borrowed \$5,000 from the applicant on 4 August 2000 ('the Hu affidavit');
- (v) a letter dated 14 November 2004 from Medibank Private to the applicant confirming that, on 17 August 2000, the applicant requested that the health insurance policy covering the applicant, Ms Miao and their child, be changed from a 'Healthy Plus' policy to an 'Advantage Plus' policy ('the Medibank Private letter'); and
- (vi) a letter dated 19 May 2004 from Victoria Legal Aid to the applicant stating, among other things, the reasons why Victoria Legal Aid refused the applicant's request for a change of solicitor made one month before the hearing of his first application for leave to appeal against conviction ('the VLA letter').

78 The Court of Appeal decided that none of the material was 'fresh and compelling' evidence, and dismissed the appeal.⁵⁷

79 The Court decided that the *voir dire* evidence was not fresh evidence as it 'could,

⁵⁶ Ibid [22].

⁵⁷ Ibid [51].

with the exercise of reasonable diligence, have been adduced by [the plaintiff's] counsel at the trial.⁵⁸

80 The closed court evidence was not 'compelling'. Their Honours described as baseless the allegation of a conspiracy between the trial judge and the prosecutor to tamper with the audio tapes of covertly recorded conversations between the plaintiff and Mark. It did not consider that the transcript of the closed court pre-trial hearings could have been 'highly probative in the context of the issues in dispute at the trial', nor would it have 'substantially weakened the prosecution case'.⁵⁹ The transcript raised matters that did not bear on the issues in dispute at the trial.⁶⁰

81 The Court rejected the 4 April affidavit as fresh evidence because it could have been obtained at trial by the exercise of reasonable diligence:

...The applicant was aware at trial that 'Mark' had denied, in his evidence, that the applicant asked for a refund at their fourth meeting. It was accepted, however, that the applicant had told 'Mark' on that occasion that he was thinking of not proceeding or wanted to cancel. It was put to 'Mark' that an unnecessarily noisy location had been chosen for the meeting, and it was suggested that there was some 'design' in doing so, in order that the recording equipment would not capture everything the applicant said. 'Mark' denied this and said that the place chosen was near the train station and that a park which was quieter was two kilometres away.

The applicant now asserts that the park was only 800 metres from the station and there were quiet locations even closer. There is nothing fresh about this evidence. It could have been obtained at the trial by the exercise of reasonable diligence.⁶¹

82 The Hu affidavit was also rejected. The Court noted that, although the plaintiff contended that he had lost contact with Mr Hu while he was in prison after his arrest, he was still legally represented, and there was no evidence that any attempt was made to locate Mr Hu. The Court of Appeal did not accept that Mr Hu could not have been found with reasonable diligence so that his evidence could have been

⁵⁸ Ibid [33].

⁵⁹ Ibid [37].

⁶⁰ Ibid [38].

⁶¹ Ibid [41]-[42].

adduced.⁶²

83 Nor did the Court of Appeal consider the Medibank Private letter fresh evidence. Their Honours found no expert evidence of the applicant's mental health preventing him from adducing the evidence through the exercise of reasonable diligence.⁶³ Nor did their Honours consider the evidence compelling; in their view, although being relevant, it was equivocal. The plaintiff might have obtained the increase in health cover, to give the impression that he did not intend to have his wife killed.⁶⁴

84 The Court considered that the VLA letter refusing him a different solicitor in his first application for leave to appeal was irrelevant to his trial. While it was fresh evidence, it had no bearing on the trial and was therefore not compelling.⁶⁵

85 The Court of Appeal therefore decided that the evidence relied on by the plaintiff was neither fresh nor compelling.⁶⁶

Fresh evidence conclusion

86 The Attorney-General made her decision before the Court of Appeal gave its judgment. But, that judgment supports her approach and conclusion in refusing to refer the petition to the Court of Appeal on the basis of fresh evidence.

Ground 3 - analysis

87 Ground three of the plaintiff's application for judicial review cannot be accepted. Sections 15 and 44 of the *Equal Opportunity Act* do not impose any duty on the Attorney-General, and the plaintiff presented no argument to establish the contrary. Section 15 deals with the duty to eliminate discrimination, sexual harassment and victimisation. Section 44 deals with discrimination in the provision of services. Neither of these sections is relevant to the defendant's decision on whether to refer the petition to the Court of Appeal.

⁶² Ibid [45].

⁶³ Ibid [48].

⁶⁴ Ibid [49].

⁶⁵ Ibid [50].

⁶⁶ Ibid [51].

88 The plaintiff has not established any impropriety or invalidity in the empanelling of the second jury. The trial judge has the power to discharge individual jurors under s 43 of the *Juries Act*. If no evidence has been led when the juror is discharged, judges may consider discharging the whole jury and commencing a new empanelment.⁶⁷ This is because there is no power to replace a juror with another member from the panel once the accused is placed in the charge of the jury.⁶⁸

89 The process of selecting a jury is entirely random. It begins when the Victorian Electoral Commission prepares jury rolls on the request of the Juries Commissioner,⁶⁹ which are prepared by random selection of as many names as requested by the Juries Commissioner from the electoral roles in a jury district.⁷⁰ There is no requirement that jury consist of any minimum number of either men or women.⁷¹

Unreasonableness – overall analysis

90 I return to the plaintiff's underlying submission that the Attorney-General's decision was unreasonable in the *Wednesbury* sense by failing to refer his application to the Court of Appeal. It is important to keep in mind that this proceeding seeks the judicial review of the Attorney-General's decision. It is not a further appeal from the jury's verdict. Statutory discretions must be exercised reasonably as the legislature is taken to have intended that a discretionary power, statutorily conferred, will be exercised reasonably.⁷² Even a discretion as broad as s 327 is limited by the subject matter, scope and purpose of the legislation under which it is conferred.

91 Unreasonableness, in the legal sense, is applied to a decision that was so unreasonable that no reasonable repository of the power could have taken the impugned decision or action.⁷³ Although the High Court in *Minister for Immigration*

⁶⁷ *R v Panozzo & Iaria* (2003) 8 VR 548.

⁶⁸ *Pollock & Cameron v The Queen* [2020] VSCA 218.

⁶⁹ *Juries Act 2000* s 18.

⁷⁰ *Ibid* s 19.

⁷¹ Cf. *R v Badenoch* [2004] VSCA 95.

⁷² (2013) 249 CLR 332, [63].

⁷³ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36 (Brennan J).

and *Citizenship v Li*⁷⁴ defined unreasonableness with more flexibility, it has since been confirmed that a ‘stringent’ approach is required. Unreasonableness is therefore, a difficult ground for a plaintiff to establish.

92 Nevertheless, to consider an argument based on unreasonableness, it is first necessary to identify the subject-matter, scope and purpose of the defendant’s discretion under s 327. The reasonableness of a decision is to be assessed against the statement or implication in legislation of the factors that a decision-maker should take into account in reaching a decision.

93 I would not accept that the discretion conferred by s 327 is so broad that the Attorney-General would be acting within her power to refuse a petition, even when there was a strong case establishing a miscarriage of justice.⁷⁵ But, this is not such a case. On the material before her, the Attorney-General was entitled to conclude that:

I have carefully considered the petition and material before me. I have concluded that, overall, Mr Zhong’s petition for mercy does not raise a reasonable possibility that the Court of Appeal would allow an appeal if the matter was referred to it under s 327 of the CPA. In particular, I do not accept there is a reasonable possibility that:

- the verdict of the jury was unreasonable or cannot be supported having regard to the evidence led in Mr Zhong’s criminal trial
- there was an error or irregularity in the trial that caused a substantial miscarriage of justice, or
- there was a substantial miscarriage of justice for any other reason.

94 These reasons establish that the Attorney-General determined that the plaintiff did not have a ‘reasonable possibility’ of success in the Court of Appeal. They explain her conclusions on legal and factual issues.

95 In *Minister of Immigration and Citizenship v Li*, French CJ stated:⁷⁶

Where the discretion is conferred on a judicial or administrative officer without definition of the grounds upon which it is to be exercised then “the real object of the legislature in such cases is to leave scope for the judicial or

⁷⁴ *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, 551 [11] (Kiefel CJ).

⁷⁵ T 59.

⁷⁶ [23] (citations omitted).

other officer who is investigating the facts and considering the general purpose of the enactment to give effect to his view of the justice of the case.” That view, however, must be reached by a process of reasoning.

96 Accordingly, the Attorney-General’s view ‘of the justice of the case’ and the object of the legislation were relevant to the exercise of her discretion under s 327. Logan J in *Martens v Commonwealth of Australian*,⁷⁷ a case concerning an analogous power under s 672A of the *Criminal Code 1899 (Qld)*, made the following remarks:⁷⁸

Further, it seems to me to follow from the role consigned to the Court of Appeal on a reference under s 672A that it is no part of the role of the Minister, in deciding as a matter of discretion whether to refer a case himself, to apply a test to the whole of the case, including the new evidence, higher than that which the court would itself apply in evaluating the case were it to be referred.

The existence of a discretion undoubtedly means that a convicted offender has no right to the reference of his case. That the reference power is discretionary indicates that it was contemplated that the Minister would make some evaluative judgment as to whether a reference ought to be made but not in so doing usurp the role that was consigned to an appeal court in the event of a reference. In this sense, the Minister is a “gatekeeper” who has a role in ensuring that the public interest in the administration of justice as furthered by the efficient allocation of judicial resources is not subverted by the referring of cases to the Court of Appeal which must inevitably fail....

97 The Attorney-General had regard to the many materials to which I have referred and drew conclusions based on them. She gave reasons for her conclusions and no factual error or unreasonable decision is apparent. In undertaking this analysis, the Attorney-General was exercising the power and discretion given to her under s 327.

98 At this point, and at the risk of repetition I will return to each of the issues the Attorney-General identified in the plaintiff’s petition for mercy and the accompanying documents and consider whether her decision to reject them was an unreasonable decision.

The Massie issue

99 The Attorney-General considered that ‘the preferable view is that the trial judge was

⁷⁷ (2009) 174 FCR 114.

⁷⁸ Ibid [52]-[53].

correct to consider himself bound by the Court of Appeal's decision in *Massie*'.⁷⁹ While she acknowledged Croucher J's reasons, she concluded that the plaintiff's 'concerns about defects in his conviction arising from the trial judge's reliance on *Massie* were unlikely to be accepted by the Court of Appeal'.

100 I do not consider that the Attorney-General's conclusions about the trial judge's reliance on *Massie* was legally unreasonable because the Court of Appeal had already considered the application of *Massie* during the original appeal in 2003. No subsequent Court of Appeal decision has suggested that *Massie* was wrongly decided. I do not consider that the decision in *R v Said*,⁸⁰ required the Attorney-General to reach any different conclusion.

The timing of the intention

101 Croucher J referred to this issue in his reasons, naming it the 'uncertainty' issue. The Attorney-General summarised the point as being the trial judge's failure to direct the jury as to the requirement for unanimity in their verdict as to when the plaintiff formed a concluded intention to have 'Mark' murder the plaintiff's de facto wife. Given the number of meetings the plaintiff with 'Mark' over a five-month period and the apparent vacillation in these conversations, the failure to direct the jury that they needed to be unanimous on the question of when he formed the intention to incite the murder means that there may have been uncertainty in the verdict.

102 Ultimately, the Attorney-General concluded that the issue about the timing of the intention was not 'sufficient to establish that the verdict [was] unreasonable or not supported by the evidence.'⁸¹ Moreover, that 'it was open to the jury to be persuaded of the plaintiff's guilt by the totality of the conversations they heard, or by the content of the final meeting on 3 August 2000.'⁸² Again, I find that in coming to this conclusion, the Attorney-General was not acting unreasonably. On the material provided to her, it was open for her to make that finding.

⁷⁹ Page 2 of her reasons, under the heading 'The *Massie* issue'.

⁸⁰ [2009] VSCA 244.

⁸¹ First Affidavit of Julia Freidgeim dated 15 December 2022, Exhibit JF-1, 13.

⁸² Ibid.

New evidence

103 The defendant concluded that she had ‘significant doubts about the veracity and admissibility of both the evidence of the loan to Mr Hu and the evidence of the increase in the plaintiff’s family health insurance.’⁸³ So too, she decided that the plaintiff had ‘not adequately explained why both pieces of evidence, that were reasonably available to him at the time of his trial, were not adduced at trial.’⁸⁴

104 The Court of Appeal considered that this new evidence fell short of reaching the threshold requirement of ‘fresh and compelling’.⁸⁵ The Attorney-General did not err in reaching a substantially similar conclusion.

Corruption, bias, incompetence and unfairness

105 The plaintiff argued generally that police corruption, corruption and bias by the trial judge, and the incompetence of his legal representation at trial and on appeal, led to a substantial miscarriage of justice. The generality of these accusations alone make them difficult to accept. No credible evidence was produced in support of the claims. The Attorney-General stated ‘I do not consider the material before me provides any legitimate basis for [the plaintiff’s] concerns about corruption, bias... or incompetence of his legal representation.’

106 I conclude that the plaintiff has not established that the Attorney-General exercised her power unreasonably by refusing to grant a referral of his petition to the Court of Appeal on the bases he contends. Other than the plaintiff simply asserting that the Attorney-General’s decision was wrong, he has not proved any ground that establishes that she failed to exercise her power and discretion validly.

Conclusion

107 The plaintiff’s proceeding is dismissed.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ *Zhong v The King* [2023] VSCA 35, [51].