

SUPREME COURT
OF THE AUSTRALIAN CAPITAL TERRITORY

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Judgment Summary

6 October 2021

Collaery v The Queen (No 2) [2021] ACTCA 28

Murrell CJ, Burns and Wigney JJ

The Court of Appeal has unanimously allowed an appeal by Mr Collaery concerning the public disclosure of certain information that is likely to be given as evidence in his trial.

Mr Collaery is facing five charges alleging that he breached section 39 of the *Intelligence Services Act 2001* (Cth) by communicating information to various ABC journalists that was prepared by or on behalf of the Australian Secret Intelligence Service (ASIS) in connection with its functions, and that he conspired with “Witness K” to communicate information to the Government of Timor-Leste that was prepared by or on behalf of ASIS in connection with its functions.

On 26 June 2020, the primary judge made orders under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) prohibiting the public disclosure of certain evidence that may be given during the trial of Mr Collaery.

The nondisclosure orders were sought by the Attorney-General for Australia. They would mean that significant parts of the trial were not conducted in public and that persons involved in the trial, including jurors, and others, including the media, could not disclose parts of the evidence given at the trial. The prohibition would continue after the conclusion of the trial.

Mr Collaery accepted that some sensitive information should not be publicly disclosed. Ultimately, he sought public disclosure only of information relating to the truth of six specific matters, which he called the Identified Matters.

The primary judge considered that public disclosure of information relating to the truth of the Identified Matters posed a real risk of prejudice to national security. His Honour concluded that nondisclosure orders were appropriate because they would not have a substantial adverse effect on Mr Collaery’s right to receive a fair hearing, and the desirability of conducting the proceedings in public did not outweigh the need to protect national security. The appellant appealed from the order.

The Court of Appeal accepted that public disclosure of information relating to the truth of the Identified Matters would involve a risk of prejudice to national security. However, the Court doubted that a significant risk of prejudice to national security would materialise. On the other hand, there was a very real risk of damage to public confidence in the administration of justice if the evidence could not be publicly disclosed. The Court emphasised that the open hearing of criminal trials was important because it deterred political prosecutions, allowed the public to scrutinise the actions of prosecutors, and permitted the public to properly assess the conduct of the accused person.

The Court of Appeal remitted the matter to the primary judge to consider the admissibility and effect of further affidavits held by the Attorney-General that the primary judge has not yet considered, and which have not been provided to Mr Collaery or his lawyers. Subject to any impact that these affidavits may have, there may be public disclosure of information relating to the truth of the Identified Matters.

This summary is not intended to be a substitute for the reasons of the Court or to be used in any later consideration of the Court’s reasons. It is for general information only.