HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: **JZQQ**
Appellant

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

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PART I INTERNET PUBLICATION

This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Context

1 In each of ***Pearson*** *v Minister for Home Affairs* (2022) 295 FCR 177 and *Tapiki v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 10 (***Tapiki No 1***), the Full Court quashed or declared invalid decisions of a delegate of the Minister and the Administrative Appeals **Tribunal**, only because a sentence, taken into account in making the decision, was imposed in respect of 2 or more offences.

2 After the Appellant had commenced the proceeding, but before judgment in it, namely ***JZQQ*** *v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 168, Parliament enacted the *Migration Amendment (Aggregate Sentences) Act 2023* (Cth) (the **Amending Act**). The Appellant contended item 4 was invalid as being inconsistent with Ch III. {CAB 65 [5], 83 [79(3)], 90 [100]}

3 In *JZQQ* at [102], the Full Court held that *Australian Education Union v General Manger of Fair Work Australia* (2012) 246 CLR 117 (**AEU**) and *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83 (**Duncan**) stood in the way of the Appellant's contention for reasons given in *Tapiki v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 167 (***Tapiki No 2***). In *Tapiki No 2*, at [24], the Full Court said that item 4 of the Amending Act "sets at naught the declarations made and the writ of certiorari granted by the Full Court" in *Tapiki No 1* and "validates the cancellation decision", and that "[t]hat which was quashed by the Full Court is no longer quashed; and the declarations of right made by the Court no longer bind the parties".

Item 4 goes further than the legislation in *AEU*

4 Item 4(5)(b)(i) of Sch 1 to the Amending Act purported to apply item 4(1)–(4) to judicial proceedings that had concluded before commencement, including *Pearson* and *Tapiki No 1*. Compare *AEU* at [52]-[53]; [90], [96]. {Appellant's submissions (**AS**), [43]–[44]}

5 The *JZQQ* proceeding fell within item 4(5)(b)(ii). By applying item 4(1)-(4) to (5)(b)(i), Parliament purported to alter the Full Court's decision in *Pearson*, which the Full Court in *JZQQ* was required to follow, unless plainly wrong. {AS [17], [55]; CAB 90 [100]}

6 In each case, Item 4(5)(b) thereby directed the Full Court "as to the manner and outcome of the exercise of their jurisdiction": *Chu Kheng* ***Lim*** *v Minister for Immigration, Local*

Government and Ethnic Affairs (1992) 176 CLR 1 at 36-37 (Brennan, Deane and Dawson JJ). It "seek[s] to make lawful what was previously unlawful": *Lim* at 64.3 (McHugh J). {AS [35]–[37], [55]}

Item 4 is different from the legislation in *Duncan*

7 *Duncan* was not argued, or decided, on a premise that the legislation attempted to affect a judicial order or process. The respondent submitted it "does not designate as wrong or comprise a legislative reversal of a judicial order" (at 86.7).

8 Clause 35(5) of the legislation there (at [8] 93) is different from item 4(5) here, and formed no part of the argument or decision. {AS [51]}

9 An important point of distinction is that item 4(5) of the Amending Act purported to apply to judicial proceedings concerning the lawfulness of executive detention under statutory provisions enacted in the exercise of s 51(xix) of the Constitution, which is "subject to" Ch III in the specific way described in *Lim*. {AS [54]}

10 In *Lim*, ss 54L and 54N satisfied the principle stated by the plurality at 33.2–5, and were therefore valid, because the executive detention for which they provided was "limited" by the Parliament: *Lim* at 33–34. Section 54R was invalid, because it denied the judiciary supervision of those limits: *Lim* at 36–37. As to habeas corpus, in this connection, see also *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at [156] (Gageler J); *Nicholas v The Queen* (1998) 193 CLR 173 at [14] (Brennan CJ).

11 When the Appellant invoked the judicial power, in this proceeding, Parliament had directed visa cancellation and detention (for removal, absent revocation) by s 501(3A)(a)(i), (6)(a) and (7)(c). Those provisions formed part of a scheme that satisfied the *Lim* principle, because its limits were certain and examinable by a Ch III court.

12 Rather than the Executive seeking to justify detention by reference to the existing law, Parliament purported to justify the visa cancellation and ongoing detention of the Appellant by, in effect, retroactively redrawing the line in s 501(7)(c). That departed from the premise on which the scheme of which s 501(7)(c) formed part at the time the Appellant's visa was cancelled, and the proceeding was commenced, satisfied the *Lim* principle.

The decision by the Tribunal was not "under" the Migration Act for item 4(1), (2)

13 This proceeding was for judicial review of a decision of the Tribunal, under s 43 of the *Administrative Appeals Tribunal Act 1975* (Cth) (the **AAT Act**) to affirm a decision of a delegate of the Minister under s 501CA(4) of the *Migration Act 1958* (Cth) (the **Migration Act**).

14 Item 4(1) applies only to a "thing done, or purportedly done" if, apart from item 4, that thing would be wholly or partly invalid only because a sentence, taken into account in "doing, or purporting to do, the thing" was imposed in respect of 2 or more offences. "Do a thing" includes "make a decision": item 2.

15 The only relevant decision made in fact was that of the Tribunal, which could only have ("valid") or lack ("invalid") legal effect "under" s 43 of the AAT Act. Thus item 4(1) has effect, if at all, only in respect of a "thing done, or purportedly done" "under" the AAT Act. {AS [21]–[22]}

16 Alternatively, s 25(1) of the AAT confers jurisdiction on the AAT: *Re Brian Lawlor Automotive Pty Ltd & Collector of Customs* (1978) 1 ALD 167, 178–180 {AS [26]}. That jurisdiction is enlivened by an application under s 500 of the Migration Act, but s 500 does not confer "jurisdiction" in any way that would engage item 4 of the Amending Act.

Dated: 9 October 2024

Emrys Nekvapil **Julian R Murphy**

Bret Walker