HIGH COURT OF AUSTRALIA

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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 REPLY

Part I: Certification

1. This reply is in a form suitable for publication on the internet.

Part II: Response to Respondent's submissions on the notice of contention

2. By notice of contention, the Commonwealth Respondents urge the Court to determine the appeal without reference to an enactment of Parliament that purports to deal precisely with the question the subject of the appeal. It is not open to this Court to ignore Parliament's command. To determine whether the Federal Court erred it is necessary for this Court to determine the content of the law that the court below was bound to apply – was it the Migration Act as amended by the Amending Act, or was it the Migration Act unamended? (The significance of the question is, of course, that if the new s 5AB of the Migration Act applied then it required the Federal Court to adopt a new interpretative approach to *all* of the provisions of the Migration Act, and *specifically* s 501(7)(c),[1] by which 'a single sentence imposed by a court in respect of 2 or more offences' is given statutory equivalence to 'a sentence imposed by a court in respect of a single offence': see RS [26].) It is only if this Court holds that the Amending Act did *not* apply (either because it was invalid or otherwise), that the correctness of ***Pearson*** *v Minister for Home Affairs*[2] would arise. However, even if this Court *could* avoid a constitutional question by determining the *Pearson* issue at the outset does not mean that it *should*.[3]

3. In any event, as will now be explained, *Pearson* was correct.

4. Section 501(7)(c) must be read in light of its 'statutory ancestry'.[4] Since the very inception of the regulation of migration into Australia, Parliament has been concerned to hinge statutory consequences upon a person's conviction, and/or sentence, for *an offence* (in the singular). As early as the *Immigration Restriction Act 1901* (Cth), Parliament designated as a 'prohibited immigrant' 'any person who has within three years been convicted of an offence … and has been sentenced to imprisonment for one year or longer therefor …'.[5] Similarly, when the Migration Act was first enacted it provided the Minister with a power to deport an immigrant who 'has been convicted in Australia of an offence punishable by death or by imprisonment for one year or longer …'.[6] The

[1] See the example at the foot of the new s 5AB. As to examples, see *Acts Interpretation Act 1901* (Cth) s 15AD.
[2] (2022) 295 FCR 177.
[3] *Private R v Cowen* (2020) 271 CLR 316, [107] (Gageler J), see also [159] (Edelman J).
[4] *Sciascia v Minister for Immigration and Ethnic Affairs* (1991) 101 ALR 321, 323 (French J), affirmed on appeal in *Minister for Immigration and Ethnic Affairs v Sciascia* (1991) 31 FCR 364.
[5] *Immigration Restriction Act 1901* (Cth) (as enacted) s 3(e) (emphasis added).
[6] *Migration Act 1958* (Cth) (as enacted) s 13(a) (emphasis added).

obvious logic to those provisions was that the actual sentence imposed for an offence, or the maximum penalty available, was an accurate indicator of offence seriousness and thus the desirability of deporting a person.[7]

5. That logic was unchanged in 1979 when the Act was amended 'without changing the basic concepts in existing legislation'[8] to apply to 'a person who has been convicted of 2 or more crimes and sentenced to imprisonment for periods aggregating not less than 1 year'.[9] This was the first time that the legislation expressly dealt with what have been called 'multiple offenders'.[10] However, the language was changed again in 1989 to apply to 'a person who had been convicted of 2 or more crimes and sentenced to imprisonment for a period totalling at least one year'.[11] This was a 'most significant' change.[12] Whereas the 1979 amendments focused on 'the arithmetical total of a number of discontinuous periods' the 1989 changes directed attention, by the words 'totalling' and the singular 'period', to 'cumulative terms of imprisonment amounting to or exceeding one year'.[13] Accordingly, the 1989 formulation was held not to apply to 'sentences of imprisonment imposed upon conviction for any series of individually minor offences'.[14] That was because 'Parliament had never barred, under this provision, a person who had not on some occasion been guilty of conduct of a significantly serious level.'[15]

6. It was the same logic that animated the concept of a 'substantial criminal record' when it was first introduced as a limb of the character test in 1998.[16] In particular, the statutory phrase 'sentenced to a term of imprisonment of 12 months or more' in s 501(7)(c) (together with the references in s 501(7)(a) and (b) to the death penalty and to a sentence of life imprisonment) was intended to operate as a proxy or '[d]eeming provision'[17] for a person's character (which has been understood to refer to 'enduring moral qualities'[18]).

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[7] *Sciascia v Minister for Immigration and Ethnic Affairs* (1991) 101 ALR 321, 326 (French J). See also *Minister for Immigration and Ethnic Affairs v Sciascia* (1991) 31 FCR 364, 370 (Burchett and Lee JJ).
[8] Commonwealth, House of Representatives, *Parliamentary Debates*, 10 May 1979, p 2096 (Groom).
[9] *Migration Amendment Act 1979* (Cth) s 10 (emphasis added).
[10] *Sciascia v Minister for Immigration and Ethnic Affairs* (1991) 101 ALR 321, 325 (French J).
[11] *Migration Legislation Amendment Act 1989* (Cth) s 6.
[12] *Sciascia v Minister for Immigration and Ethnic Affairs* (1991) 101 ALR 321, 327 (French J).
[13] *Sciascia v Minister for Immigration and Ethnic Affairs* (1991) 101 ALR 321, 327 (French J).
[14] *Minister for Immigration and Ethnic Affairs v Sciascia* (1991) 31 FCR 364, 371 (Burchett and Lee JJ).
[15] *Minister for Immigration and Ethnic Affairs v Sciascia* (1991) 31 FCR 364, 373–4 (Burchett and Lee JJ).
[16] *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998* (Cth) sched 1 s 23.
[17] Commonwealth, House of Representatives, *Parliamentary Debates*, 2 December 1998, p 1230 (Ruddock). The notion of a 'substantial criminal record' in s 501(7) is correctly understood to 'deem' failure of the character test via s 501(6)(a) because it looks simply at the outcome of the sentencing exercise rather than the quality of the underlying acts in contrast to s 501(6)(b)–(h).
[18] *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430, [48] (the Court).

7. That proxy only remains accurate so long as the sentence to which s 501(7)(c) directs attention accurately indicates 'the *quality of the offence* committed' by the person.[19]
8. The statutory logic thus depends on reading s 501(7)(a) to (c) with s 501(12) such that the sentences to which they refer are the 'determination of the punishment for *an* offence' (emphasis added). In this way, the statutory factum on which s 507(a) to (c) operates remains an accurate predictor of the seriousness of the underlying offence.
9. That purpose is skewed if the definition of 'sentence' in s 501(12) and, indirectly, 501(7)(a) to (c) is understood (contrary to its text) to mean 'determination of the punishment for an offence or offences'. In those circumstances, a person may have committed a series of individually minor offences that say little about their enduring moral qualities but that may attract individual sentences that add up to 12 months. That is why as s 501(7)(d) was initially framed, a person would only fail the character test based on multiple sentences if those sentences added up to two years, whereas a person failed the character test on the basis of a single sentence of 12 months' imprisonment.[20]
10. Of course, it is open to Parliament to depart from the original logic of the character test by bringing within it certain circumstances where a person has been sentenced for multiple minor offences. Parliament did so in two ways in 2014:[21] *first*, amending s 501(7)(d) such that multiple sentences adding up to 12 months' (rather than two years') imprisonment result in failure of the character test; and, *second*, enacting s 501(7A) responsive to a judicial decision concerning concurrent sentences.[22] In the absence of a similarly clear expression of parliamentary intent with respect to aggregate sentences, the Court should not impute to Parliament an intention to depart from the original logic of the 'character test' which was to focus on the duration of a sentence for *an offence*.
11. Indeed, the absence of express reference to aggregate sentences in s 501 rather suggests that Parliament chose *not* to deal with them.[23] As the Commonwealth Respondents acknowledge, four Australian jurisdictions had aggregate sentences on the statute books at the time s 501(7) was enacted (as did the Commonwealth itself[24]). In other

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[19] *Te v Minister for Immigration and Ethnic Affairs* (1999) 88 FCR 264, 272 (the Court, emphasis in original); *Brown v Minister Immigration and Citizenship* (2010) 183 FCR 113, [99] (Nicholas J, Moore and Rares JJ agreeing).
[20] *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998* (Cth) sched 1 s 23.
[21] *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) sched 1, items 13 and 15.
[22] *Minister for Immigration and Ethnic Affairs v Sciascia* (1991) 31 FCR 364.
[23] *Pearson* (2022) 295 FCR 177, [47] (the Court).
[24] *Crimes Act 1914* (Cth) s 4K.

circumstances, Parliament has chosen to deal expressly with particular sentencing dispositions (such as concurrent sentences[25] and periodic detention[26]) to ensure that they are caught by the character test. That Parliament chose not to do so here suggests that it was content to exclude aggregate sentences from the character test precisely because they do not accurately indicate the seriousness of any one underlying offence, indeed they have been held to 'obscure' individual offence seriousness.[27]

12. The above conclusion is not changed by noting the 'federated' system of criminal law (RS [15]). Courts have long acknowledged the inevitable differences in treatment of persons subjected to federal criminal law depending on the state in which they are tried and sentenced.[28] So too may it be expected that the Migration Act's provisions might sometimes apply differentially depending on where a person is sentenced. That is a constitutional fact of life that Parliament ordinarily accepts, and sometimes reacts to by enacting provisions like s 501(8).[29] It has not done so here.

13. Finally, provisions conferring the power to cancel a visa 'should be strictly construed' because they 'involve drastic interferences with the liberty of an individual'[30] and with a person's 'right of community'.[31] If there is any remaining doubt about whether an aggregate sentence falls within s 501(7)(c), that doubt should be resolved in favour of the subject and the ambiguity left for Parliament to clarify (which it has, by s 5AB).

Part III: Reply to Respondent's submissions on the appeal

14. On the construction argument, the Appellant relies on the reply submissions in *Pearson*.

15. On the direction principle, the Commonwealth Respondents and WA do not sufficiently consider the nuance in the authorities and commentary on this topic by characterising the Aggregate Sentences Act as 'simpl[y] amend[ing] the law which courts are required to enforce' (RS [29]; WA [38]). That submission does not engage with the features of an *amendment* which can warrant its characterisation as a *direction* (AS [48]–[49]).

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[25] See now s 501(7A). Compare *Minister for Immigration and Ethnic Affairs v Sciascia* (1991) 31 FCR 364.
[26] See now s 501(8). Compare *Brown v Minister Immigration and Citizenship* (2010) 183 FCR 113, [83]–[85] (Nicholas J, Moore and Rares JJ agreeing), referring to *Re Akuhata-Brown and Chesley and Minister for Immigration and Ethnic Affairs* (unreported, AATA, Gallup J, 20 March 1981) and *Minister for Immigration and Ethnic Affairs v Sciascia* (1991) 31 FCR 364, 375 (Burchett and Lee JJ).
[27] *Director of Public Prosecutions v Felton* (2007) 16 VR 214, [2] (Buchanan JA).
[28] *Leeth v Commonwealth* (1992) 174 CLR 455, 467 (Mason CJ, Dawson and McHugh JJ); *R v Gee* (2003) 212 CLR 230, [7] (Gleeson CJ).
[29] Section 501(8) was enacted to address the peculiar regime for periodic detention in NSW and ACT.
[30] *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 588 (Bowen CJ and Deane J). See also *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J).
[31] *Minister for Immigration and Ethnic Affairs v Sciascia* (1991) 31 FCR 364, 372 (Burchett and Lee JJ).

16. Further, it is not correct that the Aggregate Sentences Act is 'relevantly indistinguishable' from the legislation considered in *Duncan* (RS [33]). The text and context of the legislation is different (see AS [51] and [53]). Nor can it be said that *Duncan* 'swept away' (RS [36]) the considered comments of Gummow, Hayne and Bell JJ in *AEU* regarding the application of the direction principle to legislation which affects pending proceedings.

17. The issue between the parties is otherwise revealed by the Commonwealth Respondents' attempt to quarantine Stephen J's comments in *Humby* (RS [37]) and by the candid acknowledgment that their argument would require rejection of *BLF (NSW)* (RS [46]).[32]

10 18. Queensland's submissions fail to acknowledge the diversity of opinion within the recent US authorities and the criticism of them (Q [13]–[14]).[33] Roberts CJ described *Patchak v Zinke* as the 'highwater mark of legislative encroachment on Article III'.[34] This Court should not similarly endanger the core of the direction principle.

19. As to the entrenched minimum provision of judicial review, the Commonwealth Respondents have not engaged with the Appellant's analogy with the recognised limits on 'no invalidity' clauses (AS [63]). The omission is telling. By contrast, WA recognises that the analysis must proceed by reference to the 'constitutional purpose' of s 75(v) but fails to recognise that the Aggregate Sentences Act subverts that purpose (WA [42]).

20. If the Appellant's construction argument succeeds certiorari would not be futile. The
20 Tribunal proceedings at least would be conducted on a different legal and factual basis. Legally, the Appellant would have the benefit of a new ministerial direction with statutory force.[35] Factually, the Appellant would be able to point to the further passage of time without re-offending and his achievements in the community while briefly released as 'another reason'[36] why the visa cancellation should be revoked.

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[32] *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, [21] ()
[33] See *Appalachian Voices v. United States Department of the Interior*, 78 F.4th 71 (4th Cir. 2023); Evan C Zoldan, 'The Vanishing Core of Judicial Independence' (2021) 21 *Nevada Law Journal* 531.
[34] *Patchak v Zinke*, 583 US 244, 278 (2018) (Roberts CJ, dissenting).
[35] Ministerial direction 99, rather than 90, issued under s 499 of the Migration Act.
[36] *Migration Act 1958* (Cth) s 501CA(4)(b)(ii).