HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	B15/2024
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Important Information

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY **No S126 of 2023**

BETWEEN: **KATHERINE ANNE VICTORIA PEARSON**
Plaintiff
and
COMMONWEALTH OF AUSTRALIA
First Defendant
and
MINISTER FOR HOME AFFAIRS
Second Defendant
and
ADMINISTRATIVE APPEALS TRIBUNAL
Third Defendant

PERTH REGISTRY **No P10 of 2024**

BETWEEN: **KINGSTON TAPIKI**
Appellant

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
Respondent

BRISBANE REGISTRY **No B15 of 2024**

BETWEEN: **JZQQ**
Applicant
and
MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
First Respondent
and
ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

OUTLINE OF ORAL ARGUMENT OF THE COMMONWEALTH PARTIES

PART I FORM OF SUBMISSIONS

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

2. The *Migration Amendment (Aggregate Sentences) Act 2023* (**Act**) operates to change the law in all cases. Prospectively, this is achieved by the addition of s 5AB to the *Migration Act 1958* (Cth) (**Migration Act**) and by the operation of item 3 of Sch 1 to the Act.

3. Item 4 is "retrospective" only in the limited sense that it takes particular legal consequences and applies them to and from the occurrence of historical acts ("things done"). It is not a retroactive change to the law which purports to declare what the law was at the time of the prior decisions: *Commonwealth v SCI Operations* (1992) 192 CLR 285 at [57].

Notice of Contention (*JZQQ*)

4. The Full Court's decision should be upheld because it ought to have dismissed ground 5 below on the basis that JZQQ's aggregate sentence of 15 months' imprisonment is a "term of imprisonment of 12 months or more" within the meaning of s 501(7)(c) of the Migration Act: **JZQQ AB 103**. The constitutional issue is therefore not reached in his case.

5. The ordinary meaning "sentenced to a term of imprisonment" is apt to include being sentenced to an aggregate term of imprisonment: **JZQQ RS [11]**. Context and purpose support that construction: Migration Act, s 501(7)(c), (d); *Nuon v Minister for Immigration* (2022) 295 FCR 429 (**JBA Vol 9, Tab 59**) at [46]; Commonwealth of Australia, House of Representatives, *Hansard* (24 September 2014) at 10326 (**JBA Vol 11, Tab 68**).

Construction: Tribunal's decision is a "thing done" (*JZQQ/Pearson*)

6. The Tribunal's affirmation of a decision is a "thing done" under the Migration Act, as it is the "performance of a function" conferred in part by that Act: Act, Sch 1, Part 2, item 2: defn "do a thing"; Migration Act, s 500(1)(ba); AAT Act, s 25(1)(a); *Williams v Minister for Immigration* (2014) 226 FCR 112 (**JBA Tab 67**) at [71]-[72]; FC [89]-[94] (**JZQQ AB 86**).

7. The argument based on *Powell* and *Madafferi* rests on a false dichotomy between being done "under" the Migration Act and the AAT Act. There is nothing in the broad validating language of items 2 and 4 to support such a rigid dichotomy: *Valuer-General v Sydney Fish Market Pty Ltd* [2023] NSWCA 52 at [38]-[40]; FC at [91]-[95] (**JZQQ AB 87-88**).

8. Parliament did not intend to validate decisions of the Minister's delegates, but to leave invalid Tribunal reviews of those same decisions, particularly in circumstances where the Tribunal on re-exercising its review function would be required to apply s 5AB and reach the same result as the error that is validated.

No impermissible interference with concluded exercise of judicial power (*Pearson/Tapiki*)

9. Pearson and Tapiki's argument is foreclosed by *Australian Education Union v General Manager, Fair Work Australia* (2012) 246 CLR 117 (***AEU***) (**JBA Vol 3 Tab 20**). *AEU* accepted that a validating statute which provided that a purported but invalid administrative act was "taken to be valid and always to have been valid" was consistent with Ch III, because it attached the legal consequences of a valid registration to a purported registration: *AEU* at [36], [52]-[53] (French CJ, Crennan and Kiefel JJ), [89]-[90], [96] (Gummow, Hayne and Bell JJ), [115]-[117] (Heydon J).

10. No distinction arises from the references in the judgment to the "entry on the register". *AEU* accepted that the effect of the third order in *Lawler* was to quash the legal consequences of an invalid administrative act (the act of making the entry on the register), and the validating legislation applied those consequences to the invalid historical acts: *AEU* at [10]-[11], [38], [46], [52]-[53] (French CJ, Crennan and Kiefel JJ), [67]-[69], [89]-[90], [96] (Gummow, Hayne and Bell JJ), [115]-[117] (Heydon J). That is what has been done here.

11. That understanding of *AEU* was adopted and applied in ***Duncan*** *v ICAC* (2015) 256 CLR 83 (**JBA Vol 3 Tab 23**) at [21]-[26], [31] (French CJ, Kiefel, Bell and Keane JJ), [40]-[42] (Gageler J), [45]-[46] (Nettle and Gordon JJ). The *Tapiki* Full Court correctly held that *AEU* is a complete answer: FC [35] (**Tapiki AB 19**).

12. *AEU* is consistent with a long line of authority, has been relied upon in enacting validating statutes, and should not be re-opened: *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 (**JBA Vol 3 Tab 25**) at 173, 174 (Isaacs J); *Nelungaloo v Commonwealth* (1947) 75 CLR 495 (**JBA Vol 5 Tab 36**) at 579 (Dixon J); *R v Humby; ex Parte Rooney* (1973) 129 CLR 231 (**JBA Vol 6 Tab 40**) at 243-244 (Stephen J, Menzies and Gibbs JJ agreeing), 239 (McTiernan J), 248-250 (Mason J); *Autonomous Sanctions Amendment Act 2024* (**JBA Vol 2 Tab 11**), Sch 1, Part 2, Item 3.

13. Overseas authority is not consistent with Pearson and Tapiki's argument and in any event provides no reason to depart from the settled Australian position: *AEU* at [51] (French CJ, Crennan and Kiefel JJ), [117] (Heydon J).

No impermissible interference with pending exercise of judicial power (*JZQQ*)

14. The Act operates to change the substantive legal rights of persons, including those who are parties to pending proceedings. That does not spell invalidity: *H A Bachrach Pty Ltd* (1998) 195 CLR 547 (**JBA Vol 4 Tab 30**) at [17], [19], [24] (the Court); *Duncan* (2015) 256 CLR 83 at [26], [30]-[31] (French CJ, Kiefel, Bell and Keane JJ).

15. No different result obtains because of a reference to "pending proceedings" in item 4(5), including because there is no direction as to how specific proceedings should be decided by reference to those proceedings.

No interference with grant of jurisdiction in s 75(v) (*JZQQ*)

16. There is no ouster of this Court's jurisdiction conferred by s 75(v), because the Act simply amends the substantive law to be applied within that jurisdiction: *Duncan* (2015) 256 CLR 83 at [29] (French CJ, Kiefel, Bell and Keane JJ). JZQQ's argument would require overruling all of the federal authorities including *AEU*, and likely the State authorities including *Duncan* (in view of *Kirk*). There is no analogy with obiter comments in *Futuris* and *Bodruzza* about "no invalidity" clauses (cf **JZQQ AS [63]**) because JZQQ was still able to, and did, seek judicial review on (four) other grounds.

No acquisition of property (*Tapiki*)

17. Tapiki has not identified a sufficient factual foundation that either he had a right of property, or that the Act acquires it: *Bainbridge* (2010) 181 FCR 569 at [41]-[42] (**JBA Vol 7 Tab 46**); *Thoms v Commonwealth* (2022) 96 ALJR 635 at [41]-[43], [45], [84], [87]. As the Act could be severed or partially disapplied if necessary, so as not to acquire any cause of action, it is appropriate to apply the prudential approach and decline to answer this question: *Knight v Victoria* (2017) 261 CLR 306 (**JBA Vol 4 Tab 33**) at [32]-[33].

18. In any event, s 3B of the Migration Act supplies just terms for any acquisition: **Tapiki RS [52]**, *Acts Interpretation Act 1901*, s 11B (**JBA Vol 2 Tab 7**); *Bainbridge* (2010) 181 FCR 569 at [12], [14]; FC [61] (**Tapiki AB [60]-[64]**). Item 4 "amends" the Migration Act: *Duncan* (2015) 256 CLR 83 at [12] (French CJ, Kiefel, Bell and Keane JJ), or alternatively the Act as a whole amends the Migration Act: ss 11B(1), (2).

Dated 9 October 2024

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Craig Lenehan	**Zelie Heger**	**Michael Maynard**