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
PERTH & SYDNEY REGISTRIES

BETWEEN: **KINGSTON TAPIKI**
Appellant

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
Respondent

KATHERINE ANNE VICTORIA PEARSON
Plaintiff

and

COMMONWEALTH OF AUSTRALIA
First Defendant

MINISTER FOR HOME AFFAIRS
Second Defendant

ADMINISTRATIVE APPEALS TRIBUNAL
Third Defendant

APPELLANT'S AND PLAINTIFF'S JOINT OUTLINE OF ORAL SUBMISSIONS

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

A. Decision not made "under" the *Migration Act*

1 Ms Pearson adopts JZQQ's oral submissions with respect to the construction argument.

B. Reversal or usurpation of judicial power (in Mr Tapiki and Ms Pearson's matters)

2 A complaint of this nature requires attention in the first place to the "matter" that was the subject of the previously concluded exercise of Ch III power. In particular, it requires attention to the rights, duties and liabilities that were the subject of the quelled controversy and that merged in the judgment. See, generally, *Nicholas v The Queen* (1998)193 CLR 173, 185 [13] – 187 [18] (Brennan CJ) (JBA vol 5, no 37, p 1181ff).

The controversy that was quelled, and the rights that merged

3 Mr Tapiki was at liberty from any Commonwealth power of detention until 29 October 2020 when his visa was cancelled by a delegate. The purported legal effect of that decision was to render him liable to be detained in immigration detention and, ultimately, to be removed from Australia: ss 189, 196 and 198.

4 Mr Tapiki's challenge to that decision (and the Tribunal's decision) in the Federal Court invoked that Court's jurisdiction to finally determine his entitlement to the visa and, therefore, to liberty and continued presence in Australia. The Full Court determined those entitlements by quashing the Tribunal's decision, declaring the delegate's decision to be invalid and, importantly, declaring Mr Tapiki to continue to hold a visa (ABFM pp 41 – 44).

5 Before turning to authority, it can be observed that – at least as a matter of practical reality, and as was understood by those administering the Act (ABFM pp 157, 161 – 165) and by Parliament (JBA vol 11, no 74, p 3235) – the effect of the Aggregate Sentences Act was to disentitle Mr Tapiki to his visa and render him liable to be detained and removed.

The narrow constitutional principle at issue

6 It is accepted that Parliament can attach new legal consequences to historical acts that have been declared to be invalid by an exercise of Ch III judicial power. (Tapiki AS [29]; Pearson PS [34] – [35]).

7 However, Parliament cannot declare to be valid that which has been declared to be invalid by a concluded exercise of Ch III judicial power – at least not with effect as between the parties to that concluded exercise of Ch III judicial power (Tapiki AS [30]; Pearson PS [35]).

7.1. *R v Humby; Ex parte Rooney* (1973) 129 CLR 231, 242 – 243 (Stephen J, Menzies and Gibbs JJ agreeing), see also 239 (McTiernan J), 248 – 249 (Mason J). (JBA vol 6, no 40, p 1567ff).

7.2. *Re Macks; Ex parte Saint* (2000) 204 CLR 158, 175 – 176 [15], 178 [25], (Gleeson CJ), 201 [110] (McHugh J), 233 [210] (Gummow J), 281 [353] (Hayne and Callinan JJ), see also 192 [76] (Gaudron J). (JBA vol 6 no 41 p 1588ff).

8 The *Aggregate Sentences Act* purports to validate (*scil.* declare to be valid, and to have always been valid) precisely that which has been declared invalid and quashed by a concluded exercise of Ch III judicial power (Tapiki AS [42]; Pearson PS [34]). That can be seen from is text and context:

8.1. heading to Part 2 of Sch 1 and the heading of item 4 ("Validation of things done").

8.2. later references to "validated decision[s]" in sch 1 item 5(1)(a).

8.3. definition "***validated decision*** means a decision (however described) that would have been invalid except for item 4" in Sch 1, item 5(4).

8.4. wording of item 4 that applies to things done that "would, apart from this item, be wholly or partly invalid".

8.5. the explicit operation on conclusively determined civil and criminal proceedings in item 4(5)(b)(i).

8.6. Commonwealth, House of Representatives, *Parliamentary Debates*, 13 February 2023, p 43 (Giles) (JBA vol 11, no 70, p 3189).

8.7. Explanatory Memorandum to the Migration Amendment (Aggregate Sentences) Bill 2023 pp 2 – 3, see also p 14 (JBA vol 11, no 74, pp 3234 – 3235, 3246).

9 *AEU* is distinguishable because of differences in the legal and factual landscape on which the "validating" legislation operated.

9.1. No private rights merged in the judgment in *Lawler*: see *AEU* (2012) 246 CLR 117, 147 [70] (Gummow, Hayne and Bell JJ), 159 [109] (Heydon J) (JBA vol 3, no 20, pp 391, 403).

9.2. Further, the act of making the entry in the register the subject of the Court's judgment in *Lawler* remained "ineffective" and was not "restore[d]": *AEU* (2012) 246 CLR 117, 142 [52] (French CJ, Crennan and Kiefel JJ), 161 [117] (Heydon J) (JBA vol 3, no 20, pp 386, 405).

9.3. By contrast, here – as the Full Court recognised – "That 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" (CAB p 18 [24(b)]).

C. Acquisition of property (in Mr Tapiki's matter only)

10 Contrary to the Commonwealth respondents' arguments, the issue is "ripe".

10 10.1. No officer of the Minister could reasonably suspect Mr Tapiki to be an unlawful non-citizen after delivery of the judgment in *Pearson* which dealt with precisely the same issue that had been argued, and was reserved, in respect of Mr Tapiki.

10.2. The Full Court was right to proceed on the basis Mr Tapiki had "a cause of action for false imprisonment which has some monetary value" (CAB p 24 [46]).

11 Section 3B of the *Migration Act* does not apply in terms, because it operates where the *Migration Act* – not another statute – "results in" an acquisition of property.

12 Section 11B of the *Acts Interpretation Act* does not extend the application of s 3B to circumstances where another state, the *Aggregate Sentences Act*, results in an acquisition of property.

20 12.1. The text of s 11B is clear. It authorises the interpretation of the *Aggregate Sentences Act* as "part of" the *Migration Act*; it does not do the reverse.

12.2. In any event, the validating provision is a non-amending provision, which at least suggests a contrary intention.

12.3. Further indication that Parliament did not intend s 3B of the *Migration Act* to compensate for acquisitions of property resulting from the validating provision of the *Aggregate Sentences Act* is the latter's references to environmental and fisheries legislation.

Dated: 9 October 2024

David Hooke SC **Matthew Crowley** **Julian R Murphy**
For Mr Tapiki

David Hooke SC **Jason Donnelly** **Matthew Crowley**
For Ms Pearson