



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
SYDNEY REGISTRY

BETWEEN:

MJZP

Plaintiff

and

Director-General of Security

First Defendant

Commonwealth of Australia

Second Defendant

**OUTLINE OF ORAL ARGUMENT
OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING**

PART I: INTERNET PUBLICATION

1. This outline of oral argument is in a form suitable publication on the Internet.

PART II: ORAL PROPOSITIONS

Framing the issue: procedural fairness and the general rule

2. The doctrine of procedural fairness directs attention to “*the statutory setting, the characteristics of the parties involved, what is at stake for them, the nature of the decision to be made, and steps already taken in the process*”: NSW [22] reproducing *Shrestha v Migration Review Tribunal* (2015) 229 FCR 301 at [49] cited in *SDCV v Director-General of Security* (2022) 277 CLR 241 (*SDCV*) at [141] (Gageler J, as his Honour then was) (**JBA 7/2906**). That process should not be limited to the s 44 appeal. Those matters determine the framing of the issue for determination.
3. Here the issue is: if the ASIO Minister has issued a s 39B(2)(a) certificate under the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**) does s 46(2) of the AAT Act permit the Federal Court to accord both parties to an appeal under s 44 of the AAT Act procedural fairness by avoiding practical injustice so as not to infringe Ch III of the Constitution? NSW [8]. The answer is “yes”. Answering that question does not involve considering whether the law is “*no more than is reasonably necessary to protect a compelling public interest*”: contra **Plaintiff’s submissions [43]**, NSW [7].

Reopening SDCV, Pompano and Gypsy Jokers

4. As to *SDCV*, NSW adopts the Second Defendant’s submissions.
5. As to *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 (**Gypsy Jokers**) and *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 (**Pompano**) (see **Reply [10]** and **s 78B notice of 1 November 2024 [5]**): the cases were decided based upon the principles in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 and have been relied upon by the NSW Parliament. See:
 - a. The *Crimes (Criminal Organisations Control) Act 2012* (NSW), Pt 3B (**JBA 2/568-580**), which is based on the legislation upheld in *Pompano*: see the explanatory note (**JBA 11/3950**) and the second reading speech (**JBA 11/3954**); and
 - b. The *Terrorism (High Risk Offenders) Act 2017* (NSW), Pt 5 (**JBA 2/592-599**). The validity of the scheme with respect to “terrorism intelligence” in div 5.3 was upheld in *Lawrence v NSW* (2020) 103 NSWLR 401 including because of its similarity to

the schemes upheld in *Gypsy Jokers* and *Pompano*: at [80]-[96] (Bathurst CJ, Bell P and Leeming JA agreeing) (**JBA 9/3334-3338**).

Procedural fairness and practical injustice

6. If, “[t]here are circumstances in which competing circumstances compel some qualification to the general rule of procedural fairness”, and legislation provides for a novel procedure which departs from that general rule, the question is “whether, taken as a whole, the court’s procedures for resolving the dispute accord both parties procedural fairness and avoid ‘practical injustice’”: see *Pompano* at [157] (Hayne, Crennan, Kiefel and Bell JJ) (**JBA 3/842**); see also *SDCV* at [50], [66] (Kiefel CJ, Keane and Gleeson JJ), [175]-[176] (Gordon J) (**JBA 7/2876, 2884-2885, 2918-2919**).
7. Procedural fairness is defined by “by practical judgments about its content and application which may vary according to the circumstances”, not by reference to “attributes plucked from a platonic universe of ideal forms”: *Pompano* at [68] (French CJ) (**JBA 3/814**).
8. If *SDCV* is re-opened, the plurality’s judgment should be affirmed for the reasons given. The *Kable* line of cases including *Pompano* apply: **NSW [11]**; *SDCV* at [58] (Kiefel CJ, Keane and Gleeson JJ) (**JBA 7/2881**).
9. It is well recognised that security, defence and international relations may make it impossible to disclose the grounds on which the executive acts: **NSW [37]-[40], [45]**. Parliament can alter the balance of competing public interests to preclude disclosure of material: *SDCV* at [85] (citing *Nicholas v The Queen* (1998) 193 CLR 173 at [233]), [90], [94] (Kiefel CJ, Keane and Gleeson JJ) (**JBA 7/2890-2891, 2892-2893, 2894**). So much was accepted by the Plaintiff during argument.

Application of the above principles to s 46(2) of the AAT Act

10. The AAT Act provides a special type of merits review of an Adverse Security Assessment. Parliament has created a novel and nuanced scheme of merits review and then appeal to a court, while protecting against disclosures which would be contrary to the public interest, namely security, defence and international relations.
11. There are measures the Court can take, at least in some cases, to minimise the departure from the general rule: see *SDCV* at [157] (Gageler J), [193] (Gordon J), [252] (Edelman J), and [291], [294] (Steward J) (**JBA 7/2911, 2926, 2945, 2958, 2959**) noting

the Court may sometimes, but not always, be able to give an appellant the “gist” of the information subject to a certificate. A form of “gisting” occurred in the Tribunal: see Special Case Book (SCB) 119/[50]. The Court would not be prevented from disclosing the “gist” where disclosure would pose a trivial risk to security or defence or international relations: contra *SDCV* at [193] (Gordon J), [246] (Edelman J) (**JBA 7/2926, 2943**). That is because “*Parliament was not dealing with trivialities in conferring the certification power*” (see *SDCV v Director-General of Security* (2021) 284 FCR 357 at [33] (Rares J) (**JBA 9/3446**)) – under s 39B(2)(a) of the AAT Act, the Minister must determine that disclosure of information “*would* [i.e not ‘might’] *prejudice the security or the defence or international relations of Australia*”.

12. Focusing on the statutory appeal without regard to the other appeal avenues available to the Plaintiff, including challenges under s 75(v) of the *Constitution* or s 39B of the *Judiciary Act 1903* (Cth), distorts the assessment of practical injustice because it does not consider the broader statutory and constitutional setting of the statutory appeal and the steps already taken (and those not taken) in the process: *SDCV* at [13]-[14], [77]-[78], [82], [101] (Kiefel CJ, Keane and Gleeson JJ) (**JBA 7/2866-2867, 2888, 2889-2890, 2896**), NSW [23], [45]-[48]. It also ignores that practical injustice requires consideration of identified persons and their characteristics and what is at stake for them. Further, the s 39B(2)(a) certificates made in this case could have been, but were not, challenged in the Tribunal or by judicial review: *SDCV* at [276] (Steward J) (**JBA 7/2953**), NSW [36].
13. Notwithstanding the s 39B(2)(a) certificate, the Plaintiff and its representatives were able to participate in the proceedings in the Tribunal: NSW [42]-[43]. Indeed, the Tribunal said that the Plaintiff “*had been accorded due process*” before it: **SCB 115/[34]**.
14. It may be beneficial to the Plaintiff for the Federal Court to have the material that was before the Tribunal for ground 5 of its notice of appeal being the only ground of present relevance (**SCB 125**): *SDCV* at [79] (Kiefel CJ, Keane and Gleeson JJ) (**JBA 7/2889**), NSW [48]. Public interest immunity could be expected to prevent the use of such material otherwise: *SDCV* at [81] (Kiefel CJ, Keane and Gleeson JJ), [313] (Steward J) (**JBA 7/2889, 2968**).

Dated: 13 December 2024



James Renwick SC

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