IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY No M251 of 2015

BETWEEN

JULIAN KNIGHT
Plaintiff

and

THE STATE OF VICTORIA
First Defendant

ADULT PAROLE BOARD
Second Defendant

WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

Part I Form of Submissions

1. These submissions are in a form that is suitable for publication on the internet.

Part II Basis of Intervention

2. The Attorney General for the State of New South Wales ("NSW Attorney") intervenes pursuant to s 78A of the Judiciary Act 1903 (Cth) in support of the defendants.

Part III Constitutional and Legislative Provisions

3. The NSW Attorney adopts the first defendant's statement of applicable legislative provisions at [15]-[21].

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Part IV Argument

Issues presented

4. In summary, the NSW Attorney submits as follows:

   (a) At all relevant times, the statutory concept of an expired non-parole period operated as a legal qualification to having the question of parole considered by the Parole Board. Any right to have the question of parole considered by the Parole Board would exist, if at all, independently of Hampel J's decision, under the Corrections Act once the plaintiff's non-parole period expired.

   (b) The second defendant cannot alter the sentence imposed by Hampel J, whatever statutory criteria it uses to determine whether the plaintiff should be released on parole. As with s 154A of the Crimes (Administration of Sentences) Act 1999 (NSW) ("CAS Act"), the validity of which was upheld in Crump v New South Wales (2012) 247 CLR 1 ("Crump") and on which s 74AA of the Corrections Act 1986 (Vic) ("Corrections Act") was modelled, s 74AA does not, as a matter of form or substance, interfere with, intrude into, or vary the plaintiff's sentence.

   (c) The plaintiff's second argument as to the "enlistment" of judicial officers raises an issue that is at present entirely hypothetical. It would not lead to the invalidity of s 74AA even if it were accepted. It should not be accepted, however, because the features of s 74AA are not such as to permit or authorise Victorian judicial officers to participate in a process incompatible with the exercise of federal jurisdiction by State courts.

Alleged interference with sentencing decision

5. It should be recalled that the principle first set out in Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51 ("Kable") was concerned with legislation that conferred a function on a court – being a court in which federal jurisdiction had been invested under Ch III of the Constitution – that was incompatible with that exercise of jurisdiction. The principle extends to legislation that confers what would otherwise be an appropriate function on the court in question, but requires the function to be carried out in a way that is inconsistent with the nature of judicial

power. This was the finding in relation to the legislation in question in International Finance Trust Co Limited v New South Wales Crime Commission (2009) 240 CLR 319 and in Wainohu v New South Wales (2011) 243 CLR 181 ("Wainohu") (notwithstanding the fact that in the latter case the legislative direction concerned a function conferred on a judicial officer not as a member of the relevant court, but as a *persona designata*).

6. In deciding whether a law offends Ch III of the Constitution, its operation and effect will define its constitutional character. The question of infringement of the principle in Kable requires examination of the relevant provisions and the impact of those provisions, if any, upon the institutional integrity of the court, including the reality and appearance of its independence and impartiality: North Australian Aboriginal Legal Aid Service Inc v Bradley (2004) 218 CLR 146 at [29]-[30] per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ; Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (2008) 234 CLR 532 at [11] per Gummow, Hayne, Heydon and Kiefel JJ; K-Generation Pty Ltd v Liquor Licensing Court (2008) 237 CLR 501 at [90] per French CJ; South Australia v Totani (2010) 242 CLR 1 at [47]-[69] per French CJ; Attorney General (NT) v Emmerson (2014) 253 CLR 393 at [40] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.

7. Section 74AA is not a law that operates on the sentence imposed by Hampel J. It is a law that directs the second defendant to order the release of the plaintiff on parole only in certain specified circumstances (of which the second defendant must be independently satisfied). It is, therefore, a direction to the second defendant – which is obviously not a court – by the legislative branch and says nothing to or about the sentence imposed by the Supreme Court.

8. The issue of whether a prisoner should be granted parole is (and has at all relevant times been) a decision for the second defendant. The practical effect of fixing a minimum term under the Corrections Act was described by Dawson, Toohey and Gaudron JJ in Bugmy v The Queen (1990) 169 CLR 525 ("Bugmy") at 536 as being "that thereafter the Parole Board may, but of course need not, grant the prisoner parole.'

9. That is consistent with the description of the "authority" of parole bodies in Power v The Queen (1973) 131 CLR 623 ("Power") at 628-629 per Barwick CJ, Menzies, Stephen and Mason JJ, namely, "to release the prisoner conditionally from confinement in accordance with the sentence imposed upon him" without "interfer[ing] with" that sentence, because "[i]n truth there is but one sentence, that imposed by the trial judge, which cannot be altered by the paroling authority". Their Honours explained (Power at 629) that the legislature's intention in providing for the fixing of minimum terms was "to provide for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom, *when appropriate*, once the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to all the circumstances of his offence" [emphasis added]; see also Bugmy at 536. As Mason CJ and McHugh J (dissenting in the result) stated in Bugmy (at 532), "[r]elease on parole is a concession made when the Parole Board decides that the benefits accruing by way of rehabilitation and the recognition of mitigating factors outweigh the danger to the community of relaxing the requirement of imprisonment".

10. Release on parole under the Corrections Act requires (and has at all relevant times required) the making of a parole order. Under the Corrections Act as in force immediately before the commencement of s 74AA, s 74(1) provided that:

> The Board may by instrument order that a prisoner serving a prison sentence in respect of which a non-parole period was fixed be released on parole at the time stated in the order (not being before the end of the non-parole period) and, unless the Board revokes the order before the time for release stated in the order, the prisoner must be released at that time.

11. At that time, in deciding whether to make a parole order, the Adult Parole Board was required to give "paramount consideration to the safety and protection of the community": s 73A. Before making a parole order, the Board was required to consider any victim submissions it received, giving them such weight as it saw fit in determining to make a parole order: s 74B(1). The prospect of a parole order being made was conditional on the decision of the Parole Board, which was made having formed a view that a prisoner should be released on parole. That view was formed after taking certain steps and having regard to prescribed considerations.

12. Prior to the commencement of s 74AA, the plaintiff was subject to a sentence of life imprisonment in respect of each of the seven counts of murder. As the joint judgment of French CJ, Gummow, Hayne, Crennan and Kiefel JJ pointed out in considering the South Australian sentencing regime in PNJ v The Queen (2009) 83 ALJR 384 at [11], it may "greatly be doubted that the punishment imposed on an offender is sufficiently described by identifying only the term which the court fixes as the least period of actual incarceration that must be served" because "it is always necessary to recognise that an offender may be required to serve the whole of the head sentence that is imposed". The effect of the minimum sentence of 27 years set by Hampel J was to provide "a benefit to the prisoner" which lay in "providing ... a basis for hope of earlier release and in turn an incentive for rehabilitation": Bugmy at 536 per Dawson, Toohey and Gaudron JJ, citing Iddon & Crocker v The Queen (1987) 32 A Crim R 315 at 325-326. Chief Justice Mason and McHugh J nevertheless observed in Bugmy (at 531) that "although the fixing of a minimum term confers a benefit on the prisoner, it serves the interests of the community rather than those of the prisoner".

13. The plaintiff was eligible to be considered for release on parole on or about 8 May 2014, but only in accordance with the then current parole legislation, which by that time included s 74AA. The introduction of s 74AA required the plaintiff (or someone on his behalf) to apply for parole under 74AA(1) and (2), and the Parole Board to form a view as to the matters specified in s 74AA(3) before making a parole order in respect of the plaintiff. Justice Hampel's judgment stands in its entirety, as it would, for example, had the Parole Board decided not to make a parole order on the basis of risk to the community of the type referred to in s 73A. Section 74(1) has subsequently been amended, so that it is now relevantly subject to s 74AAB, concerning the release on parole of a person imprisoned for a sexual offence or a serious violent offence (as in the plaintiff's case).

14. The plaintiff's argument depends on the proposition, set out in summary form in his submissions ("PS") at [41], that as a matter of "substance", s 74AA varies the sentence previously imposed on him by the Supreme Court (as a result, Crump is said to be distinguishable): PS at [25]-[29]. That is said to be so for three reasons: first, that "in substance" s 74AA's "preconditions" deny the plaintiff access to a parole regime;

second, that it is "akin to" a bill of attainder; and third, that it "substantially legislates" Hampel J's setting of a minimum term "out of existence": PS at [35]-[41].

15. None of those reasons can be made good. The nature of the plaintiff's "access to a parole regime" (PS at [36]) was at all times determined by the legislative scheme governing parole, not by Hampel J's judgment. The setting of a minimum term simply enabled the plaintiff to satisfy the requirement in s 74(1) of the Corrections Act in relation to the making of parole orders only for those prisoners in respect of whom minimum terms had been set. He remains able to satisfy that requirement, so Hampel J's minimum term has in no way been "legislated out of existence" (cf PS at [39]).

16. The setting of the minimum term did not entitle the plaintiff to have his parole considered in any particular manner or using any particular criteria. In other words, it did not create any right or entitlement in the plaintiff to release on parole and, in that regard, had "no operative effect": Crump at [60] per Gummow, Hayne, Crennan, Kiefel and Bell JJ; see also Baker v The Queen (2004) 223 CLR 513 at [29] per McHugh, Gummow, Hayne and Heydon JJ. Before and after the enactment of s 74AA, the plaintiff retained "access to a parole regime", albeit that the requirements for actual release have been altered by the commencement of that section. As French CJ stated in Crump (at [35]), by reference to the provision on which s 74AA was modelled, "[i]t may be said to have altered a statutory consequence of the sentence. It did not alter its legal effect". Any prospect of the plaintiff actually being released has at all relevant times been subject to the formation of a view by the Parole Board.

17. By contrast to a bill of pains and penalties, s 74AA does not impose any punishment on the plaintiff consequent on legislative determination of a breach of some antecedent standard of conduct: see Duncan v New South Wales (2015) 255 CLR 388 ("Duncan") at [43]; Haskins v The Commonwealth (2011) 244 CLR 22 at [26] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ. As explained by the Court in Duncan (at [46]), "[l]egislative detriment cannot be equated with legislative punishment". Contrary to the plaintiff's argument (PS at [39]), s 74AA does not express any "legislative opinion" at all about the sentence imposed by Hampel J, which remained in place in its entirety. At all relevant times, the Corrections Act provided that until a

parole period elapses or a person is discharged from the sentence, even if a person is released on parole, they are "to be regarded as being still under sentence": s 76.

18. The plaintiff seizes on s 74AA's "*ad hominem* nature" in support of his submission that s 74AA imposes a penalty on him: PS at [27], [36]. Even putting to one side French CJ's recognition of an "ad hominem component" to the objects of s 154A of the CAS Act at issue in Crump (Crump at [22]), the fact that s 74AA is concerned with the plaintiff alone does not provide a basis to distinguish Crump, in circumstances where the effect of s 74AA on the plaintiff's sentence (as imposed by Hampel J) is in form and in substance identical to the effect of s 154A of the CAS Act on the determination of Mr Crump's sentence by McInerney J in April 1997. Although the *ad hominem* nature of the Community Protection Act 1994 (NSW) in Kable was relevant (see eg Fardon v Attorney-General (Qld) (2004) 223 CLR 575 at [16] per Gleeson CJ, [34] per McHugh J, [91], [100] per Gummow J), it was not the sole basis for the invalidity of that Act.

Alleged unlawful "enlistment" of judicial officers

19. The plaintiff's second argument assumes the involvement of a sitting judge in a decision applying s 74AA. This at present raises a hypothetical, for the reasons set out in the First Defendant's Submissions at [39]-[43]. There has not yet been an appointment of a sitting judge to the relevant Division of the Parole Board. Even if such an appointment were made by the chairperson (pursuant to s 74AAB(1)(c) of the Corrections Act), and even if the plaintiff was correct that such an appointment would be repugnant to or incompatible with the institutional integrity of Victorian courts because it "enlisted" State judges in a decision making process that undermined their judicial independence, it would not follow that s 74AA is invalid: see Wilson v Minister for Aboriginal and Torres Strait Islander Affairs (1996) 189 CLR 1 at 10 ("Wilson") per Brennan CJ, Dawson, Toohey, McHugh and Gaudron JJ; 23 per Gaudron J. As in Wilson, should the plaintiff succeed on this aspect of its argument, the result would be that a sitting judge could not be appointed to the relevant Division of the Parole Board.

20. This second limb of the plaintiff's argument relies upon Wainohu: see PS at [43]-[46]. The vice of the provision at issue in Wainohu, as described by Gummow, Hayne,

Crennan and Bell JJ (at [105], [109]), was that it permitted, but did not require, an eligible judge to give reasons for making a decision in that capacity. In the absence of reasons, the judge, in his or her capacity as an individual, could exercise the functions conferred by the legislation in a contested application with an outcome that could not be assessed according to the terms in which it was expressed. The opaque nature of the outcome made any collateral attack on the decision, and any application for judicial review for jurisdictional error, more difficult. It was also problematic in light of the subsequent use of that outcome to make other orders under the relevant statute, such as control orders.

21. Section 74AA of the Corrections Act is not a provision of that character. The function it requires the Parole Board to exercise is not one that would lead to the perception of government influence on judges serving on that Board through some "advice or wish of the Legislature or Executive Government, other than a law or instrument made under the law": see Wilson at 17.

22. The five features on which the plaintiff relies (PS at [59]-[63]) are not, either individually or collectively, such as to be repugnant to the institutional integrity of Victorian courts capable of exercising federal jurisdiction. The plaintiff accepts that the fact that the Board exercises executive power and that it is not bound by the rules of natural justice are not by themselves such as to preclude the involvement of judges in making decisions about parole in their capacity as members of the Board: PS at [59], [63]. But the remaining three features he identifies (the *ad hominem* character of s 74AA, the requirement that the Board be satisfied "on the basis of" the Secretary's report and the "paramount consideration" of community safety under s 74, together with the potential for the Secretary to sit on the Board: PS at [60]-[62]) do not establish that State judges serving on the Parole Board have been "enlisted" in such a manner as to contravene the Kable principle.

23. As to the *ad hominem* character of s 74AA, clearly (and by contrast to the position in Kable) a decision of the Parole Board is not a decision made by any court. It is not "cloaked" with the appearance of an exercise of judicial power: cf PS at [64]. Nor does the role of the Secretary's report as information before the Board involve the Board performing any function on the instructions or advice of the Victorian executive. There is no requirement in s 74AA(3)(a) that the Board accept the advice

of the Secretary in the report prepared pursuant to that paragraph, and the Board is further required to be independently satisfied of the matter in s 74AA(3)(b). Any potential for the perception of apprehended bias on the part of the Board as a result of the Secretary sitting as a member of the Board may be avoided by appropriate appointment practices under s 74AAB(1)(c).

Part V Estimate of time for oral argument

24. It is estimated that 10 minutes will be required for oral argument.

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