IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S114 OF 2013**

On appeal from
Supreme Court of New South Wales Court of Criminal Appeal

BETWEEN: **BONANG DARIUS MAGAMING**
Appellant

AND: **THE QUEEN**
Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING) IN REPLY TO THE AUSTRALIAN HUMAN RIGHTS COMMISSION

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ORIGINAL

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A. INTRODUCTION

1. This submission is in a form suitable for publication on the Internet. This submission is made pursuant to leave granted on 16 July 2013, and replies to the submissions of the Australian Human Rights Commission (**AHRC**).

2. The Attorney-General does not oppose the AHRC's application for leave to be heard as *amicus curiae*, but contends that the application should be dealt with on the basis that the AHRC is seeking to be heard in support of the Appellant.[1] The AHRC's submissions in the Court below were in support of the Appellant's constitutional arguments.[2] The AHRC's proposed submissions in this Court are almost identical in substance to the submissions it put below, and at key points make arguments directed against the validity of s 236B of the *Migration Act 1958* (Cth) (**Migration Act**).[3]

B. RESPONSE TO AHRC ARGUMENTS

3. Before turning to more specific responses to the AHRC submissions, some initial notes of caution are necessary. First, the AHRC submissions roll together, somewhat indiscriminately, international law binding on Australia,[4] international law not binding on Australia,[5] and foreign law (which may[6] or may not[7] have international roots). Further, they gloss over the discrete constitutional and legal frameworks within which various pronouncements of legal principle have been made.

4. Second, to the extent that various international and foreign legal sources are relied on to derive a single "test" of "gross disproportionality" by which a court is able to review and override a legislature's determination as to the sentencing options for a particular offence, that term represents a conclusion rather than an identified process of reasoning; and once it is unpacked, it does not have any singular meaning across all jurisdictions.

5. Accordingly, to be of any assistance, one would have to look at the discrete bodies of law separately and in their own contexts, while recognising the possibilities of cross-fertilisation between them. This will be the way this reply proceeds, with a view to the conclusion that the AHRC's excursions into international and foreign law do not strengthen the case for a Ch III implication beyond that advanced in the Appellant's submissions.

International law binding on Australia: ICCPR

6. In part, the AHRC makes submissions as to the *content* of international law. Specifically, the AHRC contends that a "sentencing exercise that prevents a

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1 Cf AHRC submissions, [5] and [9] which contend that the AHRC does not seek to be heard in support of any particular party, and that it appeared in the Court below as *amicus curiae*.

2 See *Karim v R* [2013] NSWCCA 23 at [34]-[39] (Allsop P) (Appeal Book at 45-47).

3 AHRC submissions, [32] (last sentence), [37], [55] (second sentence) and [56]. The Attorney-General contends that the precise constitutional proposition that is being put by the AHRC is, however, unclear.

4 See eg the *International Covenant on Civil and Political Rights* (**ICCPR**) opened for signature 16 December 1966, [1980] ATS 23 (entered into force generally (except Article 41)) on 23 March 1976; entered into force for Australia (except Article 41) on 13 November 1980.

5 See eg the Convention for the Protection of Human Rights and Fundamental Freedoms commonly referred to as the *European Convention on Human Rights* (**ECHR**), opened for signature by the member States of the Council of Europe on 4 November 1950, entered into force on 3 September 1953.

6 See eg the *Human Rights Act 1998* (UK).

7 See eg the Bill of Rights to the US Constitution, the Canadian Charter of Rights and Freedoms and the South African Constitution.

court from giving proper effect to individual circumstances" violates Art 7 (cruel, inhuman or degrading treatment or punishment), Art 9(1) (arbitrary detention) and Art 14(1) (fair trial) of the ICCPR.[8] However:

6.1. No case is identified holding that a mandatory minimum sentence is contrary to Art 7. The better view is that it is not per se contrary to Art 7 (although it may be subject to greater scrutiny by treaty bodies).[9]

6.2. No case is identified holding that a mandatory minimum sentence is contrary to Art 9(1).[10] Equally, no case is identified holding that a mandatory minimum sentence is contrary to Art 14(1). It is unknown whether international jurisprudence will develop as the AHRC contends.

7. In addition, the AHRC makes submissions as to the *relevance* of international law to the Australian common law, and through the common law, the interpretation of the Australian Constitution. Specifically, the AHRC contends that Arts 7, 9(1) and 14(1) of the ICCPR enshrine rights that "form part of the common law" and are entrenched against legislative impairment to the extent that they "speak to" the "guarantee of liberty", the "independence of Ch III courts", or the "rule of law".[11] However:

7.1. Arts 7, 9(1) and 14(1) are not incorporated as such into the domestic law of Australia. As accepted by the AHRC, there is no principle that the Australian Constitution must conform to international law.[12] Any common law rights, including common law rights as developed in accordance with international law, are subject to contrary legislation.[13]

7.2. The common law may be relevant to determining the content of judicial power primarily by shedding light on the historical practice of courts.[14] However, contrary to the AHRC's submissions, the common law does not determine the content of judicial power.[15] And, by definition, current international law does not inform the historical practice of courts.

7.3. Chapter III entrenches only a certain structure, and is not a general guarantee of a right of liberty.[16] As explained in the Attorney-General's

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8 See eg AHRC submissions, [56].

9 See eg Human Rights Committee, *Thompson v St Vincent and The Grenadines* (806/1998) 17 February 1998, [8] (Mr David Kretzmer, Mr Abdelfattah Amor, Mr Maxwell Yalden and Mr Abdallah Zakhia, dissenting in the result). The majority did not need to deal with Art 7: at [8.3].

10 The test of "arbitrary" detention in international law is whether, in all the circumstances, the detention of an individual is appropriate and justifiable and reasonable, necessary and proportionate to the end sought: see eg Human Rights Committee, *A v Australia* (560/1993) 17 April 1997, [9.2]. This meaning of "arbitrary" goes well beyond any limits recognised in Ch III jurisprudence: see *Re Nolan; ex parte Young* (1991) 172 CLR 460 at 497 (Gaudron J); cf AHRC submissions, [46]. It is akin to the American concept of "substantive due process", which has been rejected in Australia: see eg *Kruger v The Commonwealth* (1997) 190 CLR 1 at 68 (Dawson J).

11 See AHRC submissions, [56].

12 AHRC submissions, [18]. See eg *AMS v AIF* (1999) 199 CLR 160 at 180 [50] (Gleeson CJ, McHugh and Gummow JJ); *Polites v The Commonwealth* (1945) 70 CLR 60 at 69 (Latham CJ), 74-75 (Rich J), 77 (Dixon J), 79 (McTiernan J), 80-81 (Williams J).

13 *Re Kavanagh's Application* (2003) 78 ALJR 305 at 308 [13] (Kirby J); see also *Dietrich v The Queen* (1992) 177 CLR 292 at 305-306 (Mason CJ and McHugh J).

14 Historical practice is relevant both to whether a power is judicial, and also in determining the essential attributes of the judicial process: Commonwealth principal submissions, fn 86.

15 Contra AHRC submissions, [26]. See *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 87 ALJR 410 at 421 [35] (French CJ and Gageler J): very few common law rules are "fundamental"; *Nicholas v The Queen* (1998) 193 CLR 173 at 232 [143] (Gummow J).

16 Commonwealth principal submissions, fn 68; see also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567 (the Court). Chapter III only protects liberty *indirectly*, by preserving the independence of judges and the separation of judicial functions: *Wilson v Minister for Aboriginal and Torres Strait Islander*

principal submissions, mandatory minimum sentences do not interfere with judicial process or undermine judicial independence.[17] Nor can values underlying the "rule of law" be given immediate normative operation.[18]

International law not binding on Australia: ECHR

8. Australia is not a party to the ECHR. However, as Arts 3 and 6 of the ECHR are analogous to (although narrower than) Arts 7 and 14(1) of the ICCPR, the Attorney-General offers the following specific responses to the AHRC's submissions in relation to the ECHR.[19]

9. Article 6 confers a right to have any criminal charge against a person determined by an "independent and impartial tribunal". However, contrary to the AHRC's submissions, there are no cases suggesting that this right imposes any limits on mandatory sentences.[20] In *R (Anderson) v Secretary of State for the Home Department*,[21] the vice of the English law under consideration was that the executive was given a sentencing function. The "tariff" set by the Home Secretary for an individual offender was, in substance, the non-parole period for that offender. By contrast, s 236B of the Migration Act prescribes a mandatory minimum sentence and non-parole period, but the courts still determine what sentence to impose on a particular individual (within the statutory range). Parliament has not usurped the sentencing function.

10. Article 3 prohibits torture or inhuman or degrading treatment or punishment. A sentence that is "grossly disproportionate" may amount to inhuman or degrading treatment or punishment under Art 3.[22] The cases do not explain "gross disproportionality" in any great detail, other than to say it will only be on "rare and unique" occasions that it will be met.[23] Moreover, mandatory sentences do not amount per se to inhuman or degrading treatment or punishment.[24] Article 3 may also be breached in cases where a mandatory life sentence can no longer be justified on legitimate penological grounds and is irreducible *de jure* and *de facto*.[25] However, that test applies to mandatory life sentences without the possibility of parole and other "very long sentences",[26] not mandatory *minimum* sentences.

Foreign law

11. Whatever the relevance of international law to the development of the Australian common law (and, through the common law, the interpretation of the Australian Constitution), the relevance of foreign constitutional provisions, and cases

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Affairs (1996) 189 CLR 1 at 12 (Brennan CJ, Dawson, Toohey, McHugh, Gummow JJ); contra AHRC submissions, [17].

17 Commonwealth principal submissions, [43]-[63].

18 *Re Minister for Immigration; Ex parte Lam* (2003) 214 CLR 1 at 23 [72] (McHugh and Gummow JJ).

19 See [7] above on the *relevance* of international law more generally.

20 Significantly, no authority is cited for the assertions in the AHRC submissions, [52].

21 [2003] 1 AC 837. The single penalty for murder was life imprisonment. The Home Secretary set a "tariff" for an individual offender to meet the requirements of retribution and deterrence. The offender could only apply for parole after that tariff had expired. Setting the tariff was held to be a sentencing function: at 881 [25]-[26] (Lord Bingham of Cornhill); 893 [56] (Lord Steyn); 896 [67], 900 [78] (Lord Hutton). The Home Secretary was not an "independent and impartial tribunal".

22 *Ahmad v United Kingdom* [2012] ECHR 609 (***Ahmad***) at [236]-[237]; *Vinter v United Kingdom* [2013] ECHR 645 (***Vinter***).

23 *Ahmad* at [237]-[238]; *Vinter* at [102]. The Court canvasses the approach to disproportionality in other countries: *Ahmad* at [134]-[156]; *Harkins v United Kingdom* [2012] ECHR 45 at [59]-[81].

24 *Vinter v United Kingdom* [2012] ECHR 61 at [93]; see also *Ahmad* at [137]-[156].

25 *Ahmad* at [243]; AHRC submissions, [43] and [44]. See also *Vinter* at [107]-[110], [120].

26 *Ahmad* at [235]; *Vinter* at [108]-[112].

interpreting those provisions, is even more tangential. The assistance (if any) depends on the extent of similarity between the underlying contexts.[27]

United States

12. First, United States courts have not accepted that the separation of powers limits Congress' power to prescribe mandatory minimum sentences.[28]

13. Second, to the extent that Congress' power to prescribe mandatory minimum sentences is limited, that limitation is sourced in the express prohibition on "cruel and unusual punishments" in the 8th Amendment to the US Constitution (a provision which has no analogue in the Australian Constitution[29]).

14. Third, even under the 8th Amendment, a mandatory minimum sentence is not necessarily "cruel and unusual" (unless it mandates death, or life without parole for a juvenile offender who did not commit homicide).[30] Whether or not it is so depends upon the application of what is described as a "narrow" proportionality test, where a court may intervene only in cases of "gross disproportionality".[31]

15. Fourth, the gross disproportionality test is said to be guided by "objective criteria", such as: (i) the gravity of the offence and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.[32] While some United States courts have had regard to foreign decisions in determining the "evolving standards of decency", this remains controversial.[33]

16. Fifth, the gross disproportionality test has been subject to judicial criticism. For example, Scalia J has stated that the narrow proportionality test is "an invitation to imposition of subjective values",[34] because there are no textual or historical standards for comparing the seriousness of offences, and proportionality only considers one object of punishment (retribution) and not deterrence or rehabilitation.[35] These criticisms further confirm that a test of gross disproportionality cannot be derived from the separation of judicial power.

Canada and South Africa

17. In Canada and South Africa, the constitutional limit on mandatory minimum sentences does not derive from the separation of powers, but rather from an

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27 See *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 221 [165]-[166] (Hayne J, dissenting in the result); see also 204 [101] (Gummow, Kirby and Crennan JJ). See further Adrienne Stone, "Comparativism in Constitutional Interpretation" [2009] *New Zealand Law Review* 45 at 59-60, 62-63.

28 See eg *Chapman v United States* 500 US 453 (***Chapman***) at 467 (1991) (Rehnquist CJ); *Harmelin v Michigan* 501 US 957 (***Harmelin***) at 994-995 (1991) (Scalia J with Rehnquist CJ agreeing).

29 See generally *Adelaide Company of Jehovah's Witnesses v The Commonwealth* (1943) 67 CLR 116 at 137 (Latham CJ). But see *Sillery v The Queen* (1981) 180 CLR 353 at 361-362 (Murphy J).

30 *Harmelin* at 994-995 (Scalia J with Rehnquist CJ agreeing); *Chapman* at 467 (Rehnquist CJ with White, Blackmun, O'Connor, Scalia, Kennedy, and Souter, JJ agreeing); *Graham v Florida* 130 S Ct 2011 (2010) (discussing juveniles).

31 See eg *Harmelin* at 997-998, 1001 (1991) (Kennedy J with O'Connor and Souter JJ agreeing); *Ewing v California* 538 US 11 (***Ewing***) at 20 (2003) (O'Connor J with Rehnquist CJ and Kennedy J agreeing).

32 *Solem v Helm* 463 US 277 at 290-291 (1983) (Powell J with Brennan, Marshall, Blackmun, Stevens JJ agreeing); see also *Harmelin* at 986-987 (Scalia J with Rehnquist CJ agreeing), 1000 (Kennedy J with O'Connor and Souter JJ agreeing).

33 See eg *Roper v Simmons* 543 US 551 at 608 (Scalia J, dissenting) (2005). Cf AHRC submissions, [29]-[30].

34 *Harmelin* at 986. See also *Cheng v The Queen* (2000) 203 CLR 248 at 298 [148] (McHugh J): the indeterminacy of the "cruel and unusual punishments" clause in the 8th Amendment has provoked much debate and corresponding uncertainty.

35 *Harmelin* at 988, 989 (1991) (Scalia J with Rehnquist CJ agreeing); see also *Ewing* at 31 (Scalia J), 32 (Thomas J).

express constitutional right or prohibition.

18. In Canada, the express prohibition of "cruel and unusual treatment or punishment" prohibits a mandatory minimum sentence that is grossly disproportionate.[36] This test is a demanding one,[37] and a mandatory sentence is not invalid per se.[38] The courts ask whether the sentence is "so excessive to outrage the standards of decency", or disproportionate to the extent that Canadians "would find the punishment abhorrent or intolerable".[39] Other relevant factors contain significant subjectivity and mutability; for example, whether it is "unacceptable to a large segment of the population", or "unusually severe and hence degrading to human dignity and worth".[40]

19. In South Africa, the express right not to be punished in a cruel, inhuman or degrading way prohibits a law from prescribing a punishment that is "grossly disproportionate".[41] In *Dodo*, the Constitutional Court emphasised that this test is demanding, and that its acceptance of this test did not necessarily involve acceptance of how that test had been *applied* in overseas cases.[42] A mandatory life imprisonment (which could be reduced only in "substantial and compelling circumstances") did not impose cruel, inhuman or degrading punishment.[43]

20. Significantly, *Dodo* held further that this mandatory sentence did not contravene the right to a "public trial before an ordinary court".[44] That was because the mandatory life imprisonment did not detract from judicial impartiality, nor did it constitute inappropriate or unwarranted interference with the judicial process. That reasoning is compelling, and applies equally to this case.

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36 *R v Ferguson* [2008] 1 SCR 96 at 105-106 [14] (***Ferguson***); *R v Smith* [1987] 1 SCR 1045 (*Smith*). Canadian Charter of Rights and Freedoms, s 12.

37 *R v Latimer* [2001] 1 SCR 3 at 11 [2]. The argument was upheld in *Smith* (mandatory minimum of 7 years for narcotics offences), but rejected in 6 other Supreme Court cases: *R v Luxton* [1990] 2 SCR 711 (mandatory life with 25 years non-parole for 1st degree murder); *R v Goltz* [1991] 3 SCR 485 (mandatory minimum of 7 days' imprisonment for driving when license suspended); *R v Morrisey* [2000] 2 SCR 90 (mandatory minimum of 4 years' imprisonment for negligence causing death with a firearm); *R v Latimer* [2001] 1 SCR 3 (mandatory life with 10 years non-parole for 2nd degree murder); *R v Wiles* [2005] 3 SCR 895 (mandatory weapons prohibition order when convicted of cannabis production); *R v Ferguson* [2008] 1 SCR 296 (mandatory minimum sentence of 4 years for manslaughter with a firearm).

38 *Smith* at 1077.

39 *Ferguson* at 106 [14]. On the divergence particularly between the United States and Canadian positions, see *Smith* at 1075 (Lamer J with Dickson CJ, Wilson, Le Dain and La Forest JJ agreeing); South Australian submissions, [42]-[49].

40 See the factors listed in *Smith* at 1068 (Lamer J with Dickson CJ, Wilson, Le Dain and La Forest JJ agreeing), 1097 (McIntyre J, dissenting).

41 *S v Dodo* 2001 (3) SA 382 (CC) (***Dodo***). South African Constitution, s 12(1)(e). The passage quoted in the AHRC submissions, [41] is later qualified. The Court ultimately decided the case on a narrower basis, namely that a law imposing punishment cannot be contrary to the Bill of Rights. *Dodo* at [33.5], read with [22], [26].

42 *Dodo* at [39].

43 *Dodo* at [40].

44 *Dodo* at [49]-[50]. South African Constitution, s 35(3)(c). The mandatory sentence also was not contrary to the "separation of powers": at [41].