HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY **NO M 112 OF 2020**

BETWEEN: **MINISTER FOR HOME AFFAIRS**

Applicant

AND: **ABDUL NACER BENBRIKA**

Respondent

ATTORNEY-GENERAL OF THE COMMONWEALTH

Intervener

RESPONDENT'S OUTLINE OF ORAL ARGUMENT

PART I INTERNET PUBLICATION

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

The *Lim* principle

2. *Lim* stands as authority for the principle that, exceptional cases aside, a person cannot be detained in custody of the state except pursuant to an order made by a court in the exercise of the judicial power of the Commonwealth in adjudging and punishing criminal guilt.

- ***Lim* (1992) 176 CLR 1 at 27-28 (JBA Vol 2, Tab 9)**

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3. The principle in *Lim* is not confined to detention imposed as punishment for breach of the law (cf **Cth [22]**). The constitutional concern is with both substance and form. Thus, the detention of aliens by the executive may become punitive and invalid if not confined to what is reasonably capable of being seen as necessary for an immigration purpose.

- ***Lim* (1992) 176 CLR 1 at 27, 33 (JBA Vol 2, Tab 9)**

4. While the historically based exceptional cases can be understood as involving detention that is not penal or punitive in character, the pursuit of a non-punitive purpose alone is not a sufficient basis to justify that detention for the purposes of the *Lim* principle.

5. This Court's later jurisprudence considered the scope for executive detention pursuant to Commonwealth law but the cases do not involve a departure from the *Lim* principle outside of the established exceptions or their analogues.

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- ***Kruger* (1997) 190 CLR 1 at 109-111 (JBA Vol 4, Tab 16)**
- ***Al-Kateb* (2004) 219 CLR 562 at [44], [258], [287] (JBA Vol 2, Tab 6)**
- ***Behrooz* (2004) 219 CLR 486 at [20]-[21], [218] (JBA Vol 2, Tab 8)**
- ***Vasiljkovic* (2006) 227 CLR 614 at [34], [108]-[109] (JBA Vol 7, Tab 27)**
- ***NAAJA* (2015) 256 CLR 569 at [37]-[38], [97]-[99], [236]-[237] (JBA Vol 5, Tab 20)**
- ***Falzon* (2018) 262 CLR 333 at [16]-[29], [81]-[82], [96] (JBA Vol 2, Tab 10)**

Gummow J's reasoning

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6. The Court should adopt the reasoning of Gummow J in *Fardon*, with which Kirby J agreed, and to which Gummow and Crennan JJ (Heydon J agreeing) adhered in *Thomas*.

- ***Fardon* (2004) 223 CLR 575 at [68]-[85] (JBA Vol 2, Tab 11)**
- ***Al-Kateb* (2004) 219 CLR 562 at [135]-[139] (JBA Vol 2, Tab 6)**
- ***Thomas* (2007) 233 CLR 307 at [114]-[116], [651] (JBA Vol 6, Tab 26)**

7. Gummow J's reasoning did not "critically depend" (**Cth [43]**) on rejecting a distinction between punitive and non-punitive purposes. Rather, his Honour recognised that, exceptions aside, detention is punitive, and no less so because the detention is in order to protect the community.

- ***NAAJA* (2015) 256 CLR 569 [97]-[98], [103] (JBA Vol 5 Tab 20)**

Division 105A of *Criminal Code* is punitive

10 8. Based on the above principles, Div 105A is penal or punitive in character or nature because: (a) detention in custody of the state is penal or punitive; (b) the detention is in prison (s 105A.3(2)); (c) a continuing dentention order operates to extend the duration of the offender's current imprisonment (s 105A.3(1)); (d) Div 105A makes no provision for treatment or care; and (e) indefinite detention is provided for under Div 105A (s 105A.7(6)(f)). If it be relevant the overlap between the past punitive, and the prospective protective, detention is substantial (ss 105A.3(1), 105A.7(1)(a), 105A.8(1)(e), (f), (h), 105A.23).

- ***Fardon* (2004) 223 CLR 562 at [69], [70], [74], [108], [196]-[197] (JBA Vol 2 Tab 11)**

20 9. The power in s 105A.7 is no less punitive because: (a) a purpose of the detention is the protection of the Australian and/or international community (s 105A.1); and (b) it might be thought desirable for the judiciary, rather than the executive, to be vested with the power in this instance.

Distinguishing *Thomas v Mowbray*

10. *Thomas* is distinguishable because (a) it involved a restraint on liberty less than imprisonment; and (b) appropriate historical analogues supported the conclusion that the control orders were proper exercises of judicial power.

- ***Thomas* (2007) 233 CLR 307 at [18], [116] (JBA Vol 6, Tab 26)**

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Distinguishing State preventative detention regimes

11. State preventative detention orders can be made in the exercise of State judicial power. But State judicial power does not have the limitations imposed under Ch III on the judicial power of the Commonwealth.

- ***Fardon* (2004) 223 CLR 575 at [85]-[87], [219] (JBA Vol 2, Tab 11)**
- ***Kable [No 1]* (1996) 189 CLR 51 at 85 (JBA Vol 3, Tab 15)**

Kable* and *Kable [No 2]

12. While this Court in *Kable [No 2]* characterised the detention order made by Levine J in *Kable* as an exercise of judicial power, this Court was not asked to determine, and did not determine, whether the order made fell within the exclusive judicial power of the Commonwealth. Rather, the issue resolved was whether the order was a judicial order of a superior court of record.

- ***NSW v Kable* (2013) 252 CLR 118 at [25] (JBA Vol 5, Tab 19)**

13. If it is necessary to determine whether Levine J's order was made in the exercise of State judicial power, we contend there were two matters: (a) the validity of the NSW Act; and (b) whether to make an order under the NSW Act. That is so because: (c) the issues did not arise from the same substratum of facts; and (d) the power to order detention was not picked up and applied by s 79 of the *Judiciary Act 1903* (Cth).

- ***Kable [No 1]* (1996) 189 CLR 51 at 87, 114 (JBA Vol 3, Tab 15)**
- ***Kable [No 2]* (2013) 252 CLR 118 at [18], [37], [77] (JBA Vol 5, Tab 19)**
- ***Rizeq* (2017) 262 CLR 1 at [63] (JBA Vol 6, Tab 24)**

Orders

14. There is no dispute about severability. Division 105A is invalid in its entirety.

15. If the respondent is unsuccessful, he seeks an opportunity to make submissions on costs, which might conveniently be made to a single Justice.

Ron Merkel Christopher Tran Eleanor Jones

10 December 2020