



HIGH COURT OF AUSTRALIA

11 October 2013

BONANG DARIUS MAGAMING v THE QUEEN

[2013] HCA 40

Today the High Court, by majority, upheld the validity of a provision of the *Migration Act 1958* (Cth) ("the Act") which prescribed a mandatory minimum term of imprisonment for the offence of facilitating the bringing or coming to Australia of a group of at least five non-citizens with no lawful right to come to Australia. The High Court held that the provision was not beyond the legislative power of the Commonwealth Parliament and did not confer judicial power on prosecuting authorities.

On 6 September 2010, a boat carrying 52 passengers and four crew members was intercepted near Ashmore Reef. The appellant, Mr Magaming, was one of the crew members. The passengers on the boat were not Australian citizens and none had a lawful right to enter Australia. Mr Magaming was charged with one count of facilitating the bringing or coming to Australia of a group of at least five unlawful non-citizens contrary to s 233C(1) of the Act. The offence under s 233C(1) of the Act was an aggravated form of the people smuggling offence created by s 233A(1) of the Act, which prohibited facilitating the bringing or coming to Australia of an unlawful non-citizen. That offence carried no mandatory minimum term of imprisonment, whereas the offence under s 233C(1) of the Act carried a mandatory minimum sentence of five years' imprisonment with a minimum non-parole period of three years.

Mr Magaming pleaded guilty in the District Court of New South Wales and was sentenced to the mandatory minimum term of five years' imprisonment with a non-parole period of three years. He sought leave to appeal to the Court of Criminal Appeal of the Supreme Court of New South Wales, alleging that the provision prescribing the mandatory minimum term of imprisonment was invalid. The Court of Criminal Appeal granted leave to appeal but dismissed the appeal, concluding that the relevant provision was valid. By special leave, Mr Magaming appealed to the High Court.

In the High Court, Mr Magaming contended that in circumstances where prosecuting authorities could choose between charging an offence that carried a mandatory minimum sentence and charging another offence that carried no mandatory sentence, the prosecuting authorities impermissibly exercised judicial power. He also contended that the provision of the Act prescribing the mandatory minimum sentence was incompatible with the institutional integrity of the courts and that it required a court to impose a sentence that was arbitrary.

By majority, the High Court dismissed the appeal. The High Court held that although prosecuting authorities had a choice as to which offence to charge, that choice did not involve an exercise of judicial power or confer on prosecuting authorities an ability to determine the punishment to be imposed for the same conduct, even where one available offence prescribed a mandatory minimum sentence. The High Court also held that the imposition of a mandatory minimum sentence was not inconsistent with the institutional integrity of the courts and did not involve the imposition of an arbitrary sentence.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*