HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL, BELL, GAGELER AND KEANE JJ

BONANG DARIUS MAGAMING APPELLANT

AND

THE QUEEN RESPONDENT

Magaming v The Queen
[2013] HCA 40
11 October 2013
S114/2013

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation

N J Williams SC with J B King and D W Robertson for the appellant (instructed by Legal Aid Commission of NSW)

P W Neil SC with P M McEniery for the respondent (instructed by Commonwealth Director of Public Prosecutions)

Interveners

J T Gleeson SC, Solicitor-General of the Commonwealth with C P O'Donnell and G A Hill for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

M G Sexton SC, Solicitor-General for the State of New South Wales with J E Davidson for the Attorney-General for the State of New South Wales, intervening (instructed by Crown Solicitor (NSW))

M G Hinton QC, Solicitor-General for the State of South Australia with C Jacobi for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor (SA))

G R Donaldson SC, Solicitor-General for the State of Western Australia with T C Russell for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor (WA))

G J D del Villar for the Attorney-General of the State of Queensland, intervening (instructed by Crown Law Qld))

K L Eastman SC with H Younan for the Australian Human Rights Commission, as amicus curiae (instructed by Australian Human Rights Commission)

CATCHWORDS

Magaming v The Queen

Constitutional law – Judicial power of the Commonwealth – Constitution, Ch III – Appellant crew member of boat carrying passengers with no lawful right to come to Australia – Appellant convicted of aggravated offence of smuggling group of at least five non-citizens reckless as to whether they had lawful right to enter Australia under s 233C(1) of *Migration Act* 1958 ("Act") – Section 236B of Act prescribed mandatory minimum sentence for offence under s 233C(1) of five years' imprisonment with minimum non-parole period of three years – Whether ss 233A(1) and 233C(1) coextensive – Whether prescription of mandatory minimum sentence for offence under s 233C(1) conferred judicial power to determine punishment on prosecuting authorities – Whether s 236B incompatible with institutional integrity of courts – Whether s 236B required court to impose arbitrary and non-judicial sentence.

Words and phrases – "aggravated offence", "institutional integrity", "judicial power", "mandatory minimum penalty", "prosecutorial discretion".

Constitution, Ch III.
Migration Act 1958 (Cth), ss 233A(1), 233C(1), 236B.

FRENCH CJ, HAYNE, CRENNAN, KIEFEL AND BELL JJ.

The issues

1 The *Migration Act* 1958 (Cth) ("the Act") created two offences prohibiting a person organising or facilitating the bringing or coming to Australia of persons who are not citizens and have no lawful right to come to Australia. (Non-citizens with no lawful right to come to Australia were referred to in argument as "unlawful non-citizens" and it is convenient to adopt that usage.) One offence (called[1] "people smuggling") was to organise or facilitate the bringing or coming to Australia of another person who was an unlawful non-citizen. The other (described[2] as an "[a]ggravated offence of people smuggling (at least 5 people)") was to organise or facilitate the bringing or coming to Australia of a group of at least five persons, at least five of whom were unlawful non-citizens.

2 The first, simple, form of offence (created by s 233A(1)) carried no mandatory minimum sentence; the second, aggravated, offence (created by s 233C(1)) carried[3] a mandatory minimum term of imprisonment of five years with a minimum non-parole period of three years. A person who smuggled a group of five or more unlawful non-citizens could be charged with either offence.

3 Were the provisions creating the offences, or was the provision fixing a mandatory minimum term of imprisonment for the aggravated offence, beyond legislative power? Did all or some of the provisions confer judicial power on prosecuting authorities by giving those authorities a choice of which offence to prosecute when the choice affected whether an offender *must* be sentenced to imprisonment?

4 These reasons will demonstrate that none of the provisions was shown to be invalid.

---

1 s 233A, inserted by s 3 and Sched 1, item 8 of the *Anti-People Smuggling and Other Measures Act* 2010 (Cth) ("the 2010 Act").

2 s 233C, also inserted by s 3 and Sched 1, item 8 of the 2010 Act.

3 s 236B(3)(c) and (4)(b).

The facts and proceedings

5 On 6 September 2010, HMAS *Launceston* intercepted a boat near Ashmore Reef. The boat was carrying 56 persons: four crew and 52 passengers. The appellant was one of the crew. The passengers were not Australian citizens and none had a lawful right to enter Australia.

6 The appellant pleaded guilty in the District Court of New South Wales to one count of facilitating the bringing or coming to Australia of a group of five or more unlawful non-citizens contrary to s 233C of the Act. He was sentenced to the mandatory minimum term of five years' imprisonment. A non-parole period of three years was fixed.

7 In sentencing the appellant, the Chief Judge of the District Court (Chief Judge Blanch) said that it was "perfectly clear that [the appellant] was a simple Indonesian fisherman who was recruited by the people organising the smuggling activity to help steer the boat towards Australian waters". Chief Judge Blanch said that the seriousness of the appellant's part in the offence fell "right at the bottom end of the scale" and that, in the ordinary course of events, "normal sentencing principles would not require a sentence to be imposed as heavy" as the mandatory minimum sentence.

8 The appellant sought leave to appeal to the Court of Criminal Appeal, alleging that s 233C of the Act was invalid "insofar as it required ... the imposition of a mandatory minimum sentence of five years with a non-parole period of 3 years". (Because it was s 236B which provided for the mandatory minimum sentence, the reference to s 233C may have been inapt. Nothing was said to turn on this and argument in this Court proceeded without close attention to which of ss 233A, 233C and 236B was said to be invalid.) The appellant's application to the Court of Criminal Appeal was heard together with applications for leave to appeal against sentences imposed on four other applicants convicted of the same or substantially similar offences. The appellant and two of the other applicants in the Court of Criminal Appeal had been sentenced to the mandatory minimum term fixed by s 236B.

9 The Court of Criminal Appeal (Bathurst CJ, Allsop P, McClellan CJ at CL, Hall and Bellew JJ) granted leave to appeal but dismissed[4] the appeals, holding that the relevant provisions were not invalid.

---

4 *Karim v The Queen* (2013) 274 FLR 388.

10 By special leave the appellant appealed to this Court. The Attorneys-General of the Commonwealth, New South Wales, South Australia, Queensland and Western Australia intervened in support of the respondent. The Australian Human Rights Commission was given leave to make written submissions as amicus curiae.

The appellant's arguments

11 In this Court, the appellant submitted that the elements of the offences created by ss 233A and 233C were "identical save for the number of unlawful non-citizens concerned". Thus, so the argument continued, where the number of unlawful non-citizens concerned was five or more, "ss 233A and 233C are coextensive". Upon this platform, the appellant sought to build three closely related arguments: first, that the relevant provisions were incompatible with the separation of judicial and prosecutorial functions; second, that those provisions were incompatible with the institutional integrity of the courts; and third, that the provisions required a court to impose sentences that are "arbitrary and non-judicial".

12 In addition, the appellant sought to take the third proposition (about "arbitrary and non-judicial" sentences) and enlarge it into a distinct and more general submission that the mandatory minimum penalty imposed in this case was "incompatible with accepted notions of judicial power" because it distorted a judicial function affecting liberty in a manner "not reasonably proportionate to the end of general deterrence" which the law sought to serve.

13 It is convenient to deal first with the proposition that, for relevant purposes, "ss 233A and 233C are coextensive".

"Coextensive" offences?

14 There was, and could be, no dispute that the offences created by ss 233A and 233C had different elements. Section 233A required proof that the accused organised or facilitated the bringing or coming to Australia of another person; s 233C required proof that the accused organised or facilitated the bringing or coming to Australia of a group of at least five persons. Proof of the latter offence would constitute proof of the former, but that would be because proof of the latter offence would prove more than was required to prove the former.

15 In this respect, ss 233A and 233C followed a long-established and common pattern of legislating for criminal offences. There are now, and long have been, many statutory offences where one form of offence can be seen as an

aggravated form of another. The various statutory forms of the offence of assault[5] are a familiar example of this pattern. Proof of the aggravated form of offence will usually constitute proof of the simple offence and, in that way, the two offences can be seen to overlap. Statutory provisions[6] permitting a jury to return a verdict of guilt to the lesser offence, though the only offence expressly charged is the aggravated offence, reinforce this view of the two offences as overlapping. Likewise, statutory provisions and common law principles about double jeopardy[7], as well as relevant common law principles of sentencing[8], depend upon recognising the extent to which offences overlap.

16 But in no relevant sense can it be said that simple and aggravated forms of offence are "coextensive". The most that can be said is that the two offences (one simple, the other aggravated) have some (often many) common elements; at least one further element must be proved to establish the more serious offence. In many cases of that kind, it would be possible to describe the simple offence as a "lesser included offence": "lesser" in the sense of less serious, and "included" inasmuch as proof of the aggravated offence would necessarily establish the elements of the simple offence[9]. But the particular form of description that may be applied does not matter for present purposes. What does matter is that the offences have different elements and are distinct.

17 The offences created by ss 233A and 233C overlapped but they were not coextensive. Proof of an offence under s 233C required proof of an element different from, and additional to, the elements of the offence under s 233A. Proof of an offence under s 233C required proof that a group of five or more unlawful non-citizens was to be brought to Australia. Proof of an offence under s 233A required only proof that *one* unlawful non-citizen was to be brought to Australia.

---

5 See, for example, *Crimes Act* 1900 (NSW), ss 59 and 61.

6 See, for example, *Criminal Procedure Act* 1986 (NSW), ss 165-169.

7 See, for example, *Crimes Act* 1914 (Cth), s 4C(1) and (2); *Pearce v The Queen* (1998) 194 CLR 610; [1998] HCA 57; *Island Maritime Ltd v Filipowski* (2006) 226 CLR 328; [2006] HCA 30.

8 *R v De Simoni* (1981) 147 CLR 383; [1981] HCA 31.

9 *Island Maritime* (2006) 226 CLR 328 at 349-350 [60]-[62].

18 Contrary to the appellant's submission[10], the text and structure of s 233A and the Act as a whole do not permit[11] reading the relevant element of the offence created by s 233A as if it referred to one *or more* unlawful non-citizens. It may be accepted that proving that an accused had organised or facilitated the bringing or coming to Australia of several unlawful non-citizens would be *sufficient* to prove commission of an offence under s 233A. (It is not necessary to examine whether a charge framed in that way would be duplicitous or otherwise embarrassing.) But the proof in that case would go beyond what was *necessary* to establish contravention of s 233A. All that it was *necessary* to prove in order to establish the offence created by s 233A was that *one* unlawful non-citizen was the subject of the forbidden conduct. That was the relevant element of the offence created by s 233A.

19 Before turning to consider the different ways in which the appellant alleged that ss 233A, 233C and 236B (or some of them) were invalid, it is desirable to say something about the decision to lay a charge where prosecuting authorities reasonably consider that the facts which it is expected will be proved at trial would establish the commission of more than one offence.

Prosecutorial discretion

20 It is well established[12] that it is for the prosecuting authorities, not the courts, to decide who is to be prosecuted and for what offences.

21 Since February 1986, the Office of the Commonwealth Director of Public Prosecutions has published the guidelines that will be followed in making decisions relating to the prosecution of Commonwealth offences. Those guidelines, set out in the "Prosecution Policy of the Commonwealth", have been amended from time to time but it is not necessary to describe those changes. In

---

10 Developed by reference to s 23(b) of the *Acts Interpretation Act* 1901 (Cth) and its provision, when read with what is now s 2(2), that, subject to contrary intention, words in any Act in the singular number include the plural.

11 cf *Blue Metal Industries Ltd v Dilley* (1969) 117 CLR 651 at 656; [1970] AC 827 at 846; *Walsh v Tattersall* (1996) 188 CLR 77 at 90-91; [1996] HCA 26.

12 *Maxwell v The Queen* (1996) 184 CLR 501; [1996] HCA 46. See also *Likiardopoulos v The Queen* (2012) 86 ALJR 1168 at 1171 [2]-[4]; 291 ALR 1 at 3; [2012] HCA 37; *Elias v The Queen* (2013) 87 ALJR 895 at 904 [34]-[35]; 298 ALR 637 at 647-648; [2013] HCA 31.

accordance with long-established prosecutorial practice throughout Australia, the guidelines have provided for many years that "[i]n the ordinary course the charge or charges laid or proceeded with will be the most serious disclosed by the evidence". The guidelines set out considerations that may bear upon the decision not to follow that "ordinary course", but it is not necessary to describe those considerations.

22 Nearly twelve months after the appellant had pleaded guilty to, and been sentenced to the mandatory minimum term of imprisonment for, an offence against s 233C, the Attorney-General of the Commonwealth directed the Director of Public Prosecutions, in effect, to depart from the policy of charging the most serious offence disclosed by the evidence in respect of people smuggling offences. On 27 August 2012, the Attorney, acting under s 8(1) of the *Director of Public Prosecutions Act* 1983 (Cth), directed that the Director "not institute, carry on or continue to carry on a prosecution for an offence" under s 233C of the Act unless satisfied that the accused had committed a repeat offence, the accused's role in the people smuggling venture extended beyond that of a crew member, or a death had occurred in relation to the venture. The direction was expressed not to apply to proceedings, including appeals, in relation to an offence for which a person had been sentenced before the date of the direction. The direction, therefore, did not apply to the proceedings against the appellant.

The asserted grounds of invalidity

23 As has already been noted, the appellant submitted that the relevant provisions of the Act were invalid as "incompatible with the separation of judicial and prosecutorial functions", as "incompatible with the institutional integrity of the courts" or as requiring "the court to impose sentences that are arbitrary and non-judicial". It is convenient to take the first two of these points together and then deal with both the allegation of imposing sentences that are arbitrary and non-judicial and the related and larger proposition that the minimum sentence prescribed is incompatible with accepted notions of judicial power.

Alleged incompatibility

24 Central to the appellant's assertions about incompatibility was the argument that ss 233A and 233C gave prosecuting authorities a "choice" about what sentence an accused would suffer on conviction. The reference to "choice" about sentence conflated several distinct steps in the prosecution and punishment of crime and is apt to mislead.

25 Conduct of an accused may, if proved, establish the elements of more than one offence. Framing the charge or charges to be laid against an accused often requires a prosecutor to choose between available charges. The very notion of prosecutorial discretion about what charges will be laid depends upon the existence of a choice between charges.

26 The relevant offences may carry different sentences. In such a case, choosing the charge to be laid against an accused may well affect the punishment which will be imposed if the accused is convicted. If one of the offences has a mandatory minimum penalty, and the other does not, charging the accused with the former offence necessarily exposes the accused to that mandatory minimum penalty on conviction. But although the prosecutor chooses which charge to lay, the prosecutor does not choose what punishment will be imposed. The court must determine the punishment to be imposed in respect of the offence of which the accused has been convicted and the court must determine that punishment according to law.

27 It may be that, as Barwick CJ said[13] in *Palling v Corfield*:

> "It is both unusual and in general ... undesirable that the court should not have a discretion in the imposition of penalties and sentences, for circumstances alter cases and it is a traditional function of a court of justice to endeavour to make the punishment appropriate to the circumstances as well as to the nature of the crime."

Whether or not that is so, as Barwick CJ also said[14], "[i]f Parliament chooses to deny the court such a discretion, and to impose ... a duty [to impose specific punishment] ... the court must obey the statute in this respect assuming its validity in other respects".

28 The appellant did not go so far as to submit that the availability, or the exercise, of prosecutorial discretion about what charge would be laid against an accused, without more, entailed the conclusion that the provisions creating the relevant offences were beyond power as conferring judicial power on the prosecutor. That is, the appellant did not submit that the bare fact that a prosecutor had a choice between charges meant that the impugned provisions of

---

13 (1970) 123 CLR 52 at 58; [1970] HCA 53; cf *Fraser Henleins Pty Ltd v Cody* (1945) 70 CLR 100 at 122 per Starke J; [1945] HCA 49.

14 (1970) 123 CLR 52 at 58.

the Act were, or any of them was, invalid on that account alone. Rather, the appellant's argument depended upon giving determinative significance to the legislative provision for a mandatory minimum penalty for one offence but not the other.

29 The appellant founded his argument on the dissenting reasons of Jordan CJ in *Ex parte Coorey*[15]. To explain that opinion, it is necessary to say something about the legislation considered in it: the *Black Marketing Act* 1942 (Cth) and regulations made under the *National Security Act* 1939 (Cth) ("the National Security Regulations"). Jordan CJ concluded[16] that, subject to a few exceptional cases, the *Black Marketing Act* did not create new offences. Rather, his Honour considered[17] that the *Black Marketing Act* "takes a large number of acts which are already offences because breaches of National Security Regulations or Orders made thereunder, [and] stigmatizes them as black marketing".

30 The *Black Marketing Act* provided[18] that a person was not to be prosecuted for the offence of black marketing without the consent of the Attorney-General given after the Attorney had received a report from the Minister administering the relevant regulations and advice from a committee of three departmental representatives appointed by the Attorney.

31 The offence of black marketing was punishable by a minimum sentence of three months' imprisonment if prosecuted summarily and a minimum sentence of twelve months' imprisonment if prosecuted on indictment. Contraventions of the National Security Regulations could be punished under the *National Security Act* by fine or imprisonment or both.

32 To the extent to which an offence created by the *Black Marketing Act* was identical with an offence created independently of that Act, Jordan CJ concluded[19] that the *Black Marketing Act* purported "to invest a person who is

---

15 (1944) 45 SR (NSW) 287.

16 (1944) 45 SR (NSW) 287 at 299.

17 (1944) 45 SR (NSW) 287 at 299.

18 s 4(4).

19 (1944) 45 SR (NSW) 287 at 300.

not a competent Court with part of the judicial power of the Commonwealth, in that it purports to enable him at his discretion to *dictate* the penalty in particular cases" (emphasis added). The *Black Marketing Act* was said[20] to have this effect because "[i]t leaves the existing penalties [scil for breach of the National Security Regulations] generally operative, but it purports to authorise [the Attorney-General], in particular cases chosen by him, to dictate to a Court of Justice that at least a certain penalty shall be imposed in the event of conviction, no such minimum being generally operative".

33 By contrast, Davidson J[21] and Nicholas CJ in Eq[22] held that the impugned provisions did not confer judicial power on the Attorney or the committee advising the Attorney and were therefore valid. As Davidson J said[23], "the Legislature of the Commonwealth ... vested in the Attorney-General a power which is not judicial, and although it has the effect of limiting in some degree the discretion of the Court in imposing penalties, that limitation only operates in the future upon a contingency of a conviction by the Court".

34 A few months after the decision in *Ex parte Coorey*, the reasons of, and conclusion reached by, Jordan CJ in that case were advanced in this Court, in *Fraser Henleins Pty Ltd v Cody*[24], in support of an attack on the validity of the *Black Marketing Act* similar, if not identical, to that mounted in *Ex parte Coorey*. All five Justices rejected[25] the reasoning of, and conclusion reached by, Jordan CJ in *Ex parte Coorey*.

35 As in *Ex parte Coorey*, the premise on which this Court considered the validity of the relevant provisions of the *Black Marketing Act* in *Fraser Henleins* was that there were two identical offences carrying different penalties. Neither in *Fraser Henleins* nor in *Ex parte Coorey* was any consideration given to the

---

20 (1944) 45 SR (NSW) 287 at 300.

21 (1944) 45 SR (NSW) 287 at 313-315.

22 (1944) 45 SR (NSW) 287 at 319-320.

23 (1944) 45 SR (NSW) 287 at 314.

24 (1945) 70 CLR 100.

25 (1945) 70 CLR 100 at 118-120 per Latham CJ, 121-122 per Starke J, 124-125 per Dixon J, 131-132 per McTiernan J, 139-140 per Williams J.

validity of that premise, and its validity need not now be examined. For the purposes of this appeal, it is necessary to make only two points about the two decisions.

36 First, the essential premise for the opinion expressed by Jordan CJ in *Ex parte Coorey* (that the offences carrying different penalties were identical) was not established in this case. As has already been explained, the offences created by ss 233A and 233C of the Act were not identical and were not, as the appellant submitted, "coextensive" in their operation. The elements of the two offences were different.

37 Second, and more importantly, there is no reason to doubt the correctness of *Fraser Henleins*. The appellant's submission that *Fraser Henleins* was wrongly decided and should be reopened must be rejected.

38 It is to be noted that *Fraser Henleins* was later considered and applied by this Court in *Palling v Corfield*[26] and that no doubt was then cast upon what was said in the earlier decision. Nothing said or decided in *Palling*, or in subsequent cases, casts doubt upon the general proposition that it is for the prosecuting authorities (not the courts) to decide who will be prosecuted and for what offences. The decisions which a prosecutor makes about what offences to charge may well affect what punishment will be imposed if the accused is convicted. But that observation does not entail, as the appellant's argument necessarily assumed, that the prosecutor exercises judicial power in choosing to charge an aggravated form of offence rather than the simple form of that offence.

39 If, as in this case, one available charge is of an offence for which a mandatory minimum penalty is provided and there is another available charge of a different offence for which no minimum penalty is prescribed, the prescription of a mandatory minimum penalty for one of the offences does not lead to any different conclusion. Prosecutorial choice between the two charges is not an exercise of judicial power. In this respect, it is no different from the choice which a prosecutor must often make between proceeding summarily against an accused and presenting an indictment (which commonly will expose the accused to a penalty heavier than could be imposed in summary proceedings).

---

26 (1970) 123 CLR 52.

Prosecutorial choice between proceeding summarily and proceeding on indictment is not an exercise of judicial power[27].

40 Whether other considerations would arise if a prosecutor were to be given some power to invoke the application of a different and higher penalty by some means other than the laying of a distinct and separate charge[28] need not be examined. It is enough to conclude that the availability or exercise of a choice between charging an accused with the aggravated offence created by s 233C, rather than one or more counts of the simple offence created by s 233A, is neither incompatible with the separation of judicial and prosecutorial functions nor incompatible with the institutional integrity of the courts. Legislative prescription of a mandatory minimum penalty for the offence under s 233C neither permits nor requires any different answer. (It is, therefore, neither necessary nor profitable to consider whether, in the circumstances of this case, the appellant could have been charged with 52 counts of people smuggling contrary to s 233A.)

41 The limitation of prosecutorial discretion worked by the Attorney's subsequent direction about charging people smuggling offences is not to the point. As it happens, the direction ameliorated the position of persons facing charges of people smuggling. But if, instead of ameliorating the position, the Attorney's direction had required the charging of the most serious offence disclosed by the evidence, it would have done no more than reflect long-established prosecutorial practice. In either case, if the direction was validly given (and the contrary was not suggested), neither giving the direction, nor implementing it by charging offenders in the manner required, would constitute any exercise of judicial power. Neither giving the direction, nor implementing it, would be incompatible with the separation of judicial and prosecutorial functions or incompatible with the institutional integrity of the courts.

"Arbitrary and non-judicial" punishment?

42 The appellant's argument that the mandatory minimum penalty prescribed by s 236B for offences against s 233C was "arbitrary and non-judicial" was developed in three steps. It was said, first, that there was "no legislative

---

27 *Fraser Henleins* (1945) 70 CLR 100 at 120.

28 cf *Palling v Corfield* (1970) 123 CLR 52 and *National Service Act* 1951 (Cth), s 49(2) as inserted by s 22 of the *National Service Act* 1968 (Cth).

conclusion as to the irreducible seriousness of an offence against ss 233A and 233C", and second, that there were "insufficient statutory criteria of general application to take the decision whether to invoke the minimum penalty provision outside the description of arbitrary or capricious". It followed, so the argument continued, that there was "no fixed relationship between the seriousness of an offence against ss 233A and 233C and the sentence imposed, causing sentences to be unpredictable and therefore arbitrary and incompatible with Ch III" of the Constitution.

43 Two closely related propositions underpinned all of these aspects of the appellant's argument. First, the offences created by ss 233A and 233C were treated as identical for all relevant purposes. As has already been demonstrated, that is not right. The offences had different elements. And it is not right to say that there was "no legislative conclusion as to the irreducible seriousness" of the offence created by s 233C. The prescription of a mandatory minimum penalty for the offence created by that section was the Parliament's conclusion about what was the least penalty that should be imposed on any offender for a breach of that section.

44 Second, each aspect of this part of the appellant's argument assumed that, because proof of the aggravated offence created by s 233C would necessarily prove the simple offence under s 233A, no different questions about punishment could or should arise according to whether the aggravated offence had been charged and proved or only the simple offence. And because the simple offence carried no mandatory minimum penalty, the argument sought to characterise imposition of the mandatory minimum penalty on a person convicted of the aggravated offence as "arbitrary" or "non-judicial".

45 Shorn of the disapproving epithets, the appellant's submission amounted to the proposition that the Parliament cannot, consistent with Ch III of the Constitution, prescribe a mandatory minimum penalty for an aggravated offence if no mandatory minimum penalty is prescribed for the simple offence. How or why that should be so was not explained.

46 The larger proposition which the appellant advanced was that the legislative prescription of a mandatory minimum penalty for an offence under s 233C distorted "the judicial sentencing function" and that the distortion was "not reasonably proportionate to the end of general deterrence" which the law sought to serve. The proposition came very close to, perhaps even entailed, the still larger proposition that legislative prescription of a mandatory minimum penalty is necessarily inconsistent with Ch III.

47 As the appellant rightly submitted, adjudging and punishing criminal guilt is an exclusively judicial function. In very many cases, sentencing an offender will require the exercise of a discretion about what form of punishment is to be imposed and how heavy a penalty should be imposed. But that discretion is not unbounded. Its exercise is always hedged about by both statutory requirements[29] and applicable judge-made principles. Sentencing an offender must always be undertaken according to law.

48 In *Markarian v The Queen*, the plurality observed[30] that "[l]egislatures do not enact maximum available sentences as mere formalities. Judges need sentencing yardsticks." The prescription of a mandatory minimum penalty may now be uncommon[31] but, if prescribed, a mandatory minimum penalty fixes one end of the relevant yardstick.

49 The appellant may be right to have submitted, as he did, that, even at 1901, mandatory minimum custodial sentences were "rare and exceptional". But as the appellant's submission implicitly recognised, mandatory sentences (including, at 1901, sentence of death and, since, sentence of life imprisonment) were then, and are now, known forms of legislative prescription of penalty for crime. Legislative prescription of a mandatory minimum term of imprisonment for an offence was not, and is not, on that account alone inconsistent with Ch III.

50 Presumably with this proposition in mind, the appellant sought to attack the validity of prescribing the particular minimum sentence fixed in respect of an offence under s 233C by submitting that, if the penalty was fixed as a general deterrent, it was "*for an offender at the bottom end of the scale* ... manifestly disproportionate to the offence committed" (emphasis added).

51 This appeal to proportionality impermissibly mixed two radically different ideas. The appellant sought, by reference to statements made in *Monis v The Queen*[32] about how the relationship between a law and a constitutionally guaranteed freedom which is not absolute may be tested, to allege that the

---

29 See, for example, *Crimes Act* 1914 (Cth), s 16A.

30 (2005) 228 CLR 357 at 372 [30]; [2005] HCA 25.

31 *Wong v The Queen* (2001) 207 CLR 584 at 599 [36]; [2001] HCA 64.

32 (2013) 87 ALJR 340 at 408 [345]-[347] per Crennan, Kiefel and Bell JJ; 295 ALR 259 at 345-346; [2013] HCA 4.

prescription of the particular mandatory minimum penalty was not proportionate to the end it sought to serve. The appellant identified that end as general deterrence, thereby excluding from consideration any other purpose of punishment. How or why that exclusionary step should be taken was not explained. And the appellant also sought, by his reference to "an offender at the bottom end of the scale", to engage the accepted sentencing principle which requires a judge exercising a discretion about sentence to impose a sentence which is proportionate. The sentence imposed must be proportionate in the sense that it properly reflects the personal circumstances of the particular offender and the particular conduct in which the offender engaged when those circumstances and that conduct are compared with other offenders and offending.

52 The basic proposition which the appellant advanced was that the prescription of a mandatory minimum penalty for the offence created by s 233C of the Act contravened Ch III of the Constitution. No satisfactory reason was provided for applying proportionality reasoning of the kind described in *Monis* in determining whether Ch III was contravened. At what point of the analysis of that proposition proportionality reasoning would properly be deployed, or how it would be deployed, was not explained. All that was said, in effect, was that the sentence which had to be, and was, imposed on the appellant was too "harsh". But the standard of comparison implicitly invoked was not identified. The comparison sought to be made was not amplified beyond, or supported by more than, generalised assertions of what was "necessary" to work sufficient general deterrence of the proscribed conduct. How, or whether, this Court could decide what generally prescribed level of penalty is "necessary" or "not necessary" to deter certain conduct need not be considered in this appeal. It is enough to say that the appellant demonstrated no basis for applying proportionality reasoning or for forming the factual conclusions on which this aspect of his argument depended. If, as the appellant submitted, the sentence which the Act required the sentencing judge to impose on him was too "harsh" when measured against some standard found outside the relevantly applicable statutory provisions, that conclusion does not entail invalidity of any of the impugned provisions.

Conclusion and orders

53 For these reasons, the appellant's challenges to the validity of ss 233A, 233C and 236B of the Act should be rejected.

54 The appeal should be dismissed.

GAGELER J.

Introduction

55 Mr Magaming, an Indonesian fisherman then aged 19, was recruited by organisers of a people smuggling activity to steer a boat which brought a group of 52 unlawful non-citizens to Australia. The Commonwealth Director of Public Prosecutions ("the CDPP") might have charged him with one or more counts of the offence of people smuggling created by s 233A of the *Migration Act* 1958 (Cth) ("the Act"). The CDPP instead charged him with the aggravated offence of people smuggling created by s 233C of the Act.

56 The elements of the offence of people smuggling created by s 233A of the Act and the elements of the aggravated offence of people smuggling created by s 233C of the Act are identical save for the number of non-citizens whose bringing or coming to Australia, or whose entry or proposed entry into Australia, the offender must be proved to a court intentionally to have organised or facilitated, being reckless as to those non-citizens having no lawful right to come to Australia: one in the case of the offence of people smuggling; and a group of at least five in the case of the aggravated offence of people smuggling.

57 The offence of people smuggling carries a maximum penalty of 10 years' imprisonment. The aggravated offence of people smuggling carries a maximum penalty of 20 years' imprisonment. The aggravated offence also attracts the application of s 236B(3)(c) and (4)(b) of the Act, which make mandatory the imposition on conviction of a penalty of imprisonment of at least five years with a non-parole period of at least three years.

58 Mr Magaming pleaded guilty to the aggravated offence of people smuggling with which he was charged. He was sentenced to the mandatory minimum of five years' imprisonment with a three-year non-parole period. The sentencing judge made clear that the objective seriousness of Mr Magaming's conduct would have led to a lesser sentence absent the mandatory minimum.

59 Counsel for Mr Magaming advance on his behalf the proposition that a purported conferral by the Commonwealth Parliament on an officer of the Commonwealth executive of a discretion to prosecute an individual within a class of offenders for an offence which carries a mandatory minimum penalty, instead of another offence which carries only a discretionary penalty, amounts in substance to a purported legislative conferral of discretion to determine the severity of punishment consequent on a finding of criminal guilt and is for that reason invalid by operation of Ch III of the Constitution. They acknowledge that the unanimous war-time decision of the High Court in *Fraser Henleins Pty Ltd v*

Cody[33] stands against that proposition. They ask that *Fraser Henleins* be reopened and overruled. I would reopen and overrule *Fraser Henleins* and accept the constitutional proposition they advance.

60 Counsel for Mr Magaming then argue that s 236B(3)(c) and (4)(b) of the Act impart that constitutionally invalidating character to the CDPP's discretion to prosecute the aggravated offence of people smuggling created by s 233C, to which s 236B(3)(c) and (4)(b) attach, instead of prosecuting one or more counts of the offence of people smuggling created by s 233A. The prosecutorial discretion of the CDPP is an aspect of the general power of the CDPP to prosecute offences against laws of the Commonwealth conferred by s 9 of the *Director of Public Prosecutions Act* 1983 (Cth) ("the CDPP Act"). I would accept their argument and hold s 236B(3)(c) and (4)(b) of the Act to be invalid.

Chapter III, criminal punishment and prosecutorial discretion

61 The Commonwealth Parliament can choose to confer many functions on courts which are not exclusively judicial, in that Parliament might equally choose to confer the same functions on officers of the executive. The determination and punishment of criminal guilt is not one of those interchangeable functions. There has never been any doubt that "convictions for offences and the imposition of penalties and punishments are matters appertaining exclusively to [judicial power]"[34]. There has equally never been any doubt that the separation of the judicial power of the Commonwealth by Ch III of the Constitution renders those matters capable of resolution only by a court.

62 It has been said in this respect[35]:

> "There are some functions which, by reason of their nature or because of historical considerations, have become established as essentially and exclusively judicial in character. The most important of them is the adjudgment and punishment of criminal guilt under a law of the Commonwealth. That function appertains exclusively to and 'could not be excluded from' the judicial power of the Commonwealth. That being so, Ch III of the Constitution precludes the enactment, in purported pursuance of any of the subsections of s 51 of the Constitution, of any law

---

33 (1945) 70 CLR 100; [1945] HCA 49.

34 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 444; [1918] HCA 56.

35 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27; [1992] HCA 64 (footnotes omitted).

> purporting to vest any part of that function in the Commonwealth Executive."

To that it has been added[36]:

> "In exclusively entrusting to the courts designated by Ch III the function of the adjudgment and punishment of criminal guilt under a law of the Commonwealth, the Constitution's concern is with substance and not mere form."

63 Why that should be so is founded on deeply rooted notions of the relationship of the individual to the state going to the character of the national polity created and sustained by the Constitution. The separation of the judicial power of the Commonwealth by Ch III of the Constitution ensures that no individual can be deprived of life or liberty at the instance of an officer of the Commonwealth executive as punishment for an asserted breach by the individual of a Commonwealth criminal prohibition, except as a result of adjudication by a court of the controversy between the executive and the individual as to whether that breach has occurred and if so whether that deprivation of life or liberty is to occur. Whether guilt is to be found, and if so what, if any, punishment is to be imposed, are questions which arise sequentially in the resolution of that single justiciable controversy.

64 That structural necessity for adjudication by a court has the effect of applying to the determination of the underlying controversy between the executive and the individual "the Constitution's only general guarantee of due process"[37]. Due process is constitutionally guaranteed at least to the extent that the court must always be independent of the executive and impartial[38], that the procedure adopted by the court at the initiative of the executive must always be fair to the individual[39], and that the processes of the court must (at least ordinarily) be open to the public[40].

---

36 (1992) 176 CLR 1 at 27. See also *Nicholas v The Queen* (1998) 193 CLR 173 at 233 [148]; [1998] HCA 9.

37 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580; [1989] HCA 12.

38 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 81 [78]; [2006] HCA 44.

39 *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 at 477 [67], 494 [156], 497 [177]; 295 ALR 638 at 659, 681-682, 686; [2013] HCA 7.

40 *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 at 477 [67]; 295 ALR 638 at 659.

65 "The unique and essential function of the judicial power is the quelling of … controversies [including those between the executive and the individual as to life or liberty] by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion."[41] The exercise of the judicial power "involves the application of the relevant law to facts as found in proceedings conducted in accordance with the judicial process", which "requires that the parties be given an opportunity to present their evidence and [at least ordinarily] to challenge the evidence led against them"[42].

66 Those standard non-exhaustive descriptions of the nature of judicial power and the incidents of its exercise apply to the determination of criminal punishment no less than to the determination of criminal guilt. The facts relevant to each are limited to those facts permitted by law to be taken into account by a court. Subject to the requirement of s 80 of the Constitution that a trial on indictment must be by jury, the function of ascertaining those facts is exclusively judicial. That means, amongst other things, that in the ascertainment of the facts relevant to criminal punishment, no less than in the ascertainment of the facts relevant to criminal guilt, the parties must be given an opportunity to present, and at least ordinarily to challenge, evidence of facts in dispute[43].

67 Chapter III of the Constitution therefore reflects and protects a relationship between the individual and the state which treats the deprivation of the individual's life or liberty, consequent on a determination of criminal guilt, as capable of occurring only as a result of adjudication by a court. That adjudication quells a controversy, to which the individual and the state are parties, as to the legal consequences of the operation of the law on the past conduct of the individual. The adjudication quells that controversy by the application of the relevant law and, where appropriate, of judicial discretion to facts ascertained in accordance with the degree of fairness and transparency that is required by adherence to judicial process.

68 That understanding of the nature and incidents of the determination and punishment of criminal guilt underlies the reasons which have generally been given in Australia for treating executive decisions made in the prosecutorial process as ordinarily insusceptible of judicial review, an insusceptibility recently

---

41 *Fencott v Muller* (1983) 152 CLR 570 at 608; [1983] HCA 12.

42 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 359 [56]; [1999] HCA 9. Cf *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 at 500 [196]; 295 ALR 638 at 690-691.

43 Eg *R v Olbrich* (1999) 199 CLR 270 at 280-281 [24]-[27]; [1999] HCA 54; *Cheung v The Queen* (2001) 209 CLR 1 at 12-13 [14]; [2001] HCA 67.

described as having "a constitutional dimension"[44]. Thus, "[i]t has generally been considered to be undesirable that the court, whose ultimate function it is to determine the accused's guilt or innocence, should become too closely involved in the question whether a prosecution should be commenced"[45]. The same general perception of undesirability of close curial involvement in prosecutorial processes has applied to a question about whether a particular charge is to be laid, as well as to a question about whether a particular charge, having been laid, is to be proceeded with[46]. The main reason generally given is that the court's review of such an exercise of prosecutorial discretion would compromise the impartiality of the judicial process by involving a court in an inquiry into a forensic choice made by a participant in a controversy actually or potentially before the court[47]. A complementary reason often given is that a court's control over its own hearing and determination of whatever charge might in fact be laid and proceeded with in the exercise of prosecutorial discretion means that "the court has other powers to ensure that a person charged with a crime is fairly dealt with"[48].

69 There is, as the Solicitor-General of the Commonwealth properly points out, nothing unusual about prosecutorial discretion, as to the choice of charge or as to the mode of trial, affecting the maximum penalty which a court might impose on an individual as a result of a determination of criminal guilt. He also properly points out that there is nothing unusual about criminal laws enacted by a single legislature laying down a "base level" offence, the elements of which are then wholly subsumed within the elements of another, "aggravated" offence in the sense that conduct constituting the aggravated offence is conduct which also constitutes the base level offence.

70 But the problem encountered in the present case simply does not arise where, as is usual, the penalty for the aggravated offence remains within the discretion of the court. The punishment to be imposed as a result of a determination of criminal guilt remains in such a case for the determination of the court. The imposition of that punishment still involves in such a case only

---

44 *Elias v The Queen* (2013) 87 ALJR 895 at 904 [33]; 298 ALR 637 at 647; [2013] HCA 31.

45 *Barton v The Queen* (1980) 147 CLR 75 at 94-95; [1980] HCA 48.

46 *Maxwell v The Queen* (1996) 184 CLR 501 at 534; [1996] HCA 46.

47 *Maxwell v The Queen* (1996) 184 CLR 501 at 534; *Likiardopoulos v The Queen* (2012) 86 ALJR 1168 at 1171 [2], 1177 [37]; 291 ALR 1 at 3, 11; [2012] HCA 37.

48 *Barton v The Queen* (1980) 147 CLR 75 at 95. See also *Elias v The Queen* (2013) 87 ALJR 895 at 904 [35]; 298 ALR 637 at 647-648.

the application of the applicable law, and judicial discretion, only to facts ascertained by the court in accordance with the judicial process.

71 With the exception of the legislation upheld in *Fraser Henleins*, the Solicitor-General of the Commonwealth points to no Commonwealth legislation in which an aggravated offence, wholly subsuming a base level offence, has carried a mandatory minimum penalty. Consideration of the legislation in issue in that case highlights the potential for undermining the separation of the judicial power of the Commonwealth which unqualified acceptance of such a legislative model would entail.

Fraser Henleins

72 The legislation in issue in *Fraser Henleins* was the *Black Marketing Act* 1942 (Cth), the duration of which was limited to the then current war. The *Black Marketing Act* defined "black marketing" to mean, amongst other things, conduct proscribed by regulations made under the *National Security Act* 1939 (Cth). Contravention of those regulations was already a criminal offence under the *National Security Act* carrying a maximum but not a minimum penalty. The *Black Marketing Act* provided: that any person who engaged in conduct which constituted black marketing as so defined was guilty of the offence of black marketing; that the offence of black marketing was able to be prosecuted summarily or on indictment; that the punishment for black marketing was to carry maximum and minimum penalties; and that the offence of black marketing was not to be prosecuted without the written consent of the Attorney-General after both a report from the Minister administering the regulations, and advice from a Committee appointed by the Attorney-General consisting of a representative from each of three specified Commonwealth Departments.

73 *Fraser Henleins* was constituted as an application in the original jurisdiction of the High Court to review and quash convictions for offences of black marketing which had resulted from prosecutions on indictment. The grounds of the application included invalidity of the power conferred on the Attorney-General to consent to the prosecution of an offence under the *Black Marketing Act* carrying the mandatory minimum penalty, in light of the identical offence under the *National Security Act* carrying only a maximum penalty.

74 The validity of that power of the Attorney-General had some months earlier been upheld by majority in the Full Court of the Supreme Court of New South Wales in *Ex parte Coorey*[49]. The practical operation of the conferral of

---

49 (1944) 45 SR (NSW) 287.

that power had there been described by Davidson J, with whom Nicholas CJ in Eq formed the majority. Davidson J said[50]:

> "The peculiarity of the Black Marketing Act is that it merely attaches another name and exceedingly high minimum penalties to offences already created under the National Security Act … Then under … the Black Marketing Act, the Attorney-General is vested with the power of deciding upon facts and advice, which cannot be checked by cross-examination or by hearing the accused person, that the latter shall be exposed to the risk of much more serious punishment than is provided by the regulations made under the other Act which creates the offence that has been committed. The result is that, if on the evidence before the Court it is found that only a technical breach of the regulations has been committed, or there is no real criminality or moral turpitude, the minimum penalty provided by the Act must be imposed, although considered by the Court to be entirely unsuitable."

He explained[51]:

> "The gross injustice of such a procedure has already been exemplified in another proceeding which recently came before this Court ... There, possibly because other information was placed before the Committee and the Attorney-General than that which was submitted as evidence before the Court and which was, therefore, presumably inaccurate, the punishment inflicted was outrageously disproportionate to the offence of which the accused was found guilty."

Davidson J continued[52]:

> "No doubt the Legislature realized the extreme danger of persons being subjected to ignominious and serious punishment which the circumstances disclosed by the evidence might not warrant, and therefore endeavoured, by the advice of a preliminary secret investigation, to render the risk of such a result less likely. But in reality what has happened is that a member of the Executive has been furnished with the power to say with regard to offences, the punishment of which has already been provided for and vested in the Judiciary, that the latter shall no longer exercise their discretion in that respect, but in some instances, if there is a conviction,

---

50 (1944) 45 SR (NSW) 287 at 313-314.

51 (1944) 45 SR (NSW) 287 at 314, referring to *Ex parte Gerard & Co Pty Ltd; Re Craig* (1944) 44 SR (NSW) 370.

52 (1944) 45 SR (NSW) 287 at 314.

> shall award not less than the minimum penalty although that penalty may be considered, having regard to the facts, to be oppressive."

75 Notwithstanding that "reality" of an executive officer having power to say, on "the advice of a preliminary secret investigation" and by reference to information other than that to be placed before a court, that a minimum penalty was to be imposed in the event of conviction in a particular case, Davidson J held that the Commonwealth Parliament had "vested in the Attorney-General a power which [was] not judicial" because "although it [had] the effect of limiting in some degree the discretion of the Court in imposing penalties, that limitation only [operated] in the future upon a contingency of a conviction by the Court"[53]. The reasoning of Nicholas CJ in Eq was to similar effect[54].

76 Jordan CJ dissented. He said[55]:

> "The [Black Marketing] Act does not delegate to the Attorney-General the power to alter, by a legislative act operating generally, the penalties attached to certain offences. It leaves the existing penalties generally operative, but it purports to authorise him, in particular cases chosen by him, to dictate to a Court of Justice that at least a certain penalty shall be imposed in the event of conviction, no such minimum being generally operative."

After reiterating the bedrock constitutional principle that convictions for offences and the imposition of penalties and punishments pertain exclusively to the judicial power, Jordan CJ continued[56]:

> "In my opinion, as regards all acts which are offences independently of the Black Marketing Act, that Act purports to invest a person who is not a competent Court with part of the judicial power of the Commonwealth, in that it purports to enable him at his discretion to dictate the penalty in particular cases. If a Commonwealth statute provided that, if the Attorney-General when prosecuting a person for particular classes of offence inserted a specified word in the information or indictment, the Court in the event of a conviction should hold its hand, report the fact to him, and then impose such sentence as he might direct, the provision would be obviously bad. In my opinion, the fact that the penalty is

---

53 (1944) 45 SR (NSW) 287 at 314.

54 (1944) 45 SR (NSW) 287 at 319-320.

55 (1944) 45 SR (NSW) 287 at 300.

56 (1944) 45 SR (NSW) 287 at 300.

> dictated in advance of the trial does not make the encroachment on the judicial power of the Commonwealth any the less real."

77 The argument for invalidity put to the High Court in *Fraser Henleins* relied on that dissenting judgment of Jordan CJ in *Ex parte Coorey*. It was put that "[r]egard must be had to the substance and not to the form" of the *Black Marketing Act*[57].

78 All five members of the High Court who sat in *Fraser Henleins* rejected the argument. Latham CJ noted that it had "never been suggested that the sphere of judicial power is invaded when Parliament provides for a maximum or minimum penalty for offences which are duly proved in courts of law"[58]. He could see no judicial power being exercised by the Attorney-General or the Committee advising him, stating[59]:

> "[I]n all cases of public prosecutions, there must first be a decision by some public authority whether to prosecute or not to prosecute. The risk of infliction of a penalty depends upon the decision of a non-judicial authority or person as to whether any prosecution at all should be instituted. But such a decision is in no respect an exercise of judicial power."

Latham CJ said of the decision of the Attorney-General to present the indictment in that case[60]:

> "It is not a judicial decision because it makes no adjudication upon rights or duties or liabilities, or, indeed, upon anything. It imposes no penalties, though it does expose a person to the possibility of a particular penalty."

Latham CJ went on specifically to adopt the reasoning of the majority in *Ex parte Coorey*[61]. Starke J similarly said that the requirement for the consent of the Attorney-General "confers no judicial power upon anyone; it neither declares nor enforces any rights or liabilities"[62], and stated his agreement with the conclusion

---

57 (1945) 70 CLR 100 at 107.

58 (1945) 70 CLR 100 at 119.

59 (1945) 70 CLR 100 at 119-120.

60 (1945) 70 CLR 100 at 120.

61 (1945) 70 CLR 100 at 120.

62 (1945) 70 CLR 100 at 121.

of the majority in *Ex parte Coorey*[63]. Dixon J considered it enough to adopt without elaboration the reasoning of the majority in *Ex parte Coorey*[64]. McTiernan J merely adopted the conclusion of the majority in *Ex parte Coorey*[65]. Williams J said that the determination whether the accused was to be charged under the *Black Marketing Act* or under the *National Security Act* was "a purely administrative function" and that the Commonwealth Parliament was "entitled to make the punishment of an offence upon conviction what it likes, and to make it differ according to the alternative sections of an Act or Acts under which the charge is laid"[66].

79 The argument now made on behalf of Mr Magaming that *Fraser Henleins* should be reopened is compelling. The Solicitor-General of the Commonwealth makes no submission that *Fraser Henleins* has been relied on in the framing of subsequent Commonwealth legislation. Although unanimous, *Fraser Henleins* did not rest on a principle worked out in a prior succession of cases[67]. With one exception, it has received at most passing reference in subsequent decisions of the High Court.

80 The exception is *Palling v Corfield*[68]. There the reasoning of Latham CJ in *Fraser Henleins* was relied on in upholding a provision of the *National Service Act* 1951-1968 (Cth), which applied on conviction of an offence of failing to attend a medical examination upon being served with a notice under that Act. The provision enabled the prosecution to request that the court ask the offender to enter into a recognisance to attend and submit to a medical examination upon being served with any subsequent notice. The provision went on to require the court, if the offender refused, to sentence the offender to imprisonment in respect of the offence for a period of seven days whether or not any fine was imposed in respect of the offence. The offender was to be released from that imprisonment immediately if he chose to submit to an examination. *Palling v Corfield* did not involve a reconsideration of *Fraser Henleins* and itself stands for no wider principle than that "[i]f the satisfaction of a condition enlivening the court's statutory duty depends upon a decision made by a member of the Executive

---

63 (1945) 70 CLR 100 at 122.

64 (1945) 70 CLR 100 at 124-125.

65 (1945) 70 CLR 100 at 132.

66 (1945) 70 CLR 100 at 139.

67 Cf *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 351-352 [68]; [2009] HCA 2.

68 (1970) 123 CLR 52; [1970] HCA 53.

branch of government, it does not necessarily follow that the Parliament has thereby authorised the Executive to infringe impermissibly upon the judicial power"[69]. The decision made by a member of the executive branch of government in *Palling v Corfield* was of a peculiar nature. It enlivened a statutory duty on the part of a court, in effect, to present the offender with a choice. It did not enliven a statutory duty on the part of the court to impose a mandatory minimum sentence of imprisonment.

81 The reasoning in *Fraser Henleins* elevates form over substance. The reasoning is in that respect out of step with the modern purposive understanding of Ch III of the Constitution.

82 More significantly, the outcome in *Fraser Henleins* undermines the protections afforded by Ch III's separation of judicial power to such an extent that maintenance of *Fraser Henleins* as an authority, in my opinion, "is injurious to the public interest"[70]. To accept *Fraser Henleins* is to accept, in the language of Davidson J already quoted, that the Commonwealth Parliament can enact a law which operates in practice to empower an executive officer to determine that a minimum penalty is to be imposed in the event of conviction in a particular case, and to do so on the advice of a preliminary secret investigation and by reference to information never to be placed before a court. It is to accept that the Commonwealth Parliament can use such a legislative model formally to invoke but substantially to by-pass the structural requirement of Ch III that punishment of crime occur only as a result of adjudication by a court. It is to accept that the length of deprivation of liberty to be imposed as a punishment for criminal conduct can in practice be the result of an executive determination made on information which can remain hidden not only from the individual and the public but from the court whose formal duty it is to impose the minimum penalty in the event of conviction.

83 Reopening *Fraser Henleins*, I would overrule it and adopt the analysis in the dissenting judgment of Jordan CJ in *Ex parte Coorey*.

Applicable principle

84 Delivering judgment in the Privy Council in an appeal from Jamaica in 1975, Lord Diplock saw it as useful to consider "how the power to determine the length and character of a sentence which imposes restrictions on the personal

---

69 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 352 [49]; [2009] HCA 49.

70 *Perpetual Executors and Trustees Association of Australia Ltd v Federal Commissioner of Taxation* (1949) 77 CLR 493 at 496; [1949] HCA 4, quoting *The Tramways Case [No 1]* (1914) 18 CLR 54 at 69; [1914] HCA 15.

liberty of the offender is distributed" in accordance with what he described as "the basis principle of separation of legislative, executive and judicial powers that is implicit in a constitution on the Westminster model"[71]. In relation to the exercise of legislative power, he explained[72]:

> "Parliament may, if it thinks fit, prescribe a fixed punishment to be inflicted upon all offenders found guilty of the defined offence – as, for example, capital punishment for the crime of murder. Or it may prescribe a range of punishments up to a maximum in severity, either with or, as is more common, without a minimum, leaving it to the court by which the individual is tried to determine what punishment falling within the range prescribed by Parliament is appropriate in the particular circumstances of his case."

Lord Diplock explained[73]:

> "What Parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body … a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders."

85 Lord Diplock went on to acknowledge that the principle so formulated accorded with that earlier articulated by O'Dalaigh CJ in the Supreme Court of Ireland when he said[74]:

> "There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of a general rule, which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case. … The Legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule, and the application of that rule is for the Courts. … [T]he selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the Executive".

---

71 *Hinds v The Queen* [1977] AC 195 at 225.

72 [1977] AC 195 at 226.

73 [1977] AC 195 at 226.

74 *Deaton v The Attorney General and the Revenue Commissioners* [1963] IR 170 at 182-183.

86 The principle was applied by the Privy Council in an appeal from Mauritius in 1992 to hold invalid a sentencing law applicable to an offender convicted of an offence of importation of dangerous drugs as a drug trafficker in *Ali v The Queen*[75]. The law held to be invalid provided that the offender was liable to a maximum penalty of a fine and imprisonment if prosecuted in a lower court, but was required to be sentenced to death if prosecuted in the Supreme Court. In a judgment delivered by Lord Keith of Kinkel, the Privy Council noted that there was ordinarily no constitutional objection to a prosecutor having a choice to charge a person with a more serious offence rather than a less serious offence and that, similarly, there was ordinarily no constitutional objection to a prosecutor having a choice as to the court before which the person was to be tried[76]. Lord Keith explained[77]:

> "If in Mauritius importation of dangerous drugs by one found to be trafficking carried in all cases the mandatory death penalty and importation on its own a lesser penalty, the Director of Public Prosecution's discretion to charge importation either with or without an allegation of trafficking would be entirely valid. The vice of the present case is that the Director's discretion to prosecute importation with an allegation of trafficking either in a court which must impose the death penalty on conviction with the requisite finding or in a court which can only impose a fine and imprisonment enables him in substance to select the penalty to be imposed in a particular case."

87 The limitation on legislative power as articulated by Lord Diplock and by O'Dalaigh CJ, and as illustrated by *Ali*, should equally be recognised as a limitation on the legislative power of the Commonwealth Parliament arising from the separation of the judicial power of the Commonwealth by Ch III of the Constitution. It is the very limitation which Jordan CJ sought to invoke in *Ex parte Coorey*.

88 The limitation should not be thought to be capable of being transgressed only by legislative designs as egregious as those considered in *Ali* and *Ex parte Coorey*. The limitation will be transgressed by a Commonwealth law which purports to confer on an executive officer what is in substance a power to determine the punishment to be imposed by a court in the event of conviction of an offender in a particular case. Absent some ameliorating factor in the legislative scheme of which it might form part, a Commonwealth law will be likely to have that substantive effect if it allows an executive officer to prosecute

---

75 [1992] 2 AC 93.

76 [1992] 2 AC 93 at 103-104.

77 [1992] 2 AC 93 at 104.

some offenders within a class of offenders for an offence which carries a mandatory minimum penalty but to prosecute other offenders within that class for another offence which does not carry a mandatory minimum penalty or which carries a lesser mandatory minimum penalty.

89 In the language of Jordan CJ in *Ex parte Coorey*, already quoted, the legislative conferral of such a power on an executive officer is an "encroachment on the judicial power". In the almost identical language which has more recently been used in the context of Ch III of the Constitution to connote "[l]egislation that removes from the courts their exclusive function 'of the ajudgment and punishment of criminal guilt under a law of the Commonwealth'", it is a "usurpation of judicial power"[78].

Invalidity of s 236B(3)(c) and (4)(b) of the Act

90 Because the ultimate question of usurpation of judicial power is one of substance, it is unnecessary to resolve a question debated in argument as to the construction of s 233A of the Act. That question is whether the singular in s 233A is to be read as including the plural, with the result that the smuggling of a group of five or more non-citizens could be charged as a single offence against s 233A.

91 For present purposes, it is sufficient to recognise that the elements of the aggravated offence of people smuggling created by s 233C wholly encompass the elements of the offence of people smuggling created by s 233A in that the only element of aggravation which s 233C adds to s 233A lies in the smuggling being of a group of five or more non-citizens. The class of persons who commit the aggravated offence created by s 233C is therefore a class of persons who also necessarily commit at least one count of the offence created by s 233A.

92 The constitutional vice of s 236B(3)(c) and (4)(b) of the Act lies in their effect on the character of the discretion necessarily exercised by the CDPP in deciding to prosecute a person within that class for the aggravated offence created by s 233C instead of one or more counts of the offence created by s 233A. That effect is to empower the CDPP in effect to determine the minimum penalty to be imposed on the conviction of any individual within the class. If the CDPP decides to prosecute the individual for the aggravated offence created by s 233C, the individual must on conviction receive at least the minimum term of imprisonment required by s 236B(3)(c) and the minimum non-parole period required by s 236B(4)(b). If the CDPP decides instead to prosecute the individual for one or more counts of the offence created by s 233A, the minimum term and minimum non-parole period have no application.

---

78 Eg *Nicholas v The Queen* (1998) 193 CLR 173 at 220 [112].

93 Counsel for Mr Magaming illustrate that constitutional vice by calling attention to the practical consequences of a written direction given to the CDPP by the Attorney-General on 27 August 2012 ("the Direction")[79], after Mr Magaming had been convicted and sentenced. The Direction is not suggested by anyone to be beyond the power of the Attorney-General, conferred by s 8(1) of the CDPP Act, to give or furnish written directions or guidelines to the CDPP. The Direction recognises the reality that any member of the crew of a vessel bringing five or more unlawful non-citizens to Australia could fall within the class of persons who might be prosecuted for and convicted of the offences created by both s 233C and s 233A by reason of the conduct of his or her shipboard activities as a crew member.

94 The Direction directs the CDPP not to prosecute the aggravated offence created by s 233C of the Act against a person who was a member of the crew on a vessel involved in the bringing or coming, or entry or proposed entry, of unlawful non-citizens to Australia unless the CDPP is "satisfied" of one or more specified circumstances. One such circumstance is that "the person's role in the people smuggling venture extended beyond that of a crew member". Another is that "a death occurred in relation to the people smuggling venture".

95 The Direction goes on to direct that where it prevents the CDPP prosecuting a person for the aggravated offence created by s 233C of the Act, the CDPP must consider prosecuting the person for the offence created by s 233A of the Act in accordance with the "Prosecution Policy of the Commonwealth" ("the Prosecution Policy"). The relevant effect of the Prosecution Policy is that "[i]n the ordinary course the charge or charges laid or proceeded with" by the CDPP "will be the most serious disclosed by the evidence"[80].

96 Where the admissible evidence available to be placed before a court is sufficient to establish that an individual has engaged in smuggling a group of five or more non-citizens, the CDPP's decision to prosecute the individual for the aggravated offence created by s 233C is therefore ordinarily to turn on the CDPP's satisfaction of the existence of one or more of the circumstances specified in the Direction. Absent satisfaction of the existence of one or more specified circumstances, the CDPP is instead ordinarily to prosecute the individual for the offence created by s 233A.

97 The circumstances specified in the Direction are not found in s 233C of the Act, or elsewhere in statute. Their consideration requires the CDPP to form

---

79 "Director of Public Prosecutions – Attorney-General's Direction 2012", *Commonwealth of Australia Gazette*, GN 35, 5 September 2012 at 2318-2319.

80 Prosecution Policy at 10 [2.20].

and act on his own assessment about the seriousness of the offender's conduct. Whether or not the CDPP's satisfaction might be susceptible of judicial review, the decision-making processes able to be adopted by the CDPP do not attract the constitutionally entrenched requirements of fairness and transparency applicable to decision-making by a court. The satisfaction of the CDPP need not be based on admissible evidence available to be placed before a court. Once satisfied of a specified circumstance, the CDPP need not prove that circumstance in the ensuing prosecution, either to obtain a conviction or to obtain the mandatory minimum penalty on conviction.

98 The CDPP might, for example, decide to prosecute a crew member for the aggravated offence created by s 233C instead of the offence created by s 233A on being satisfied that his or her role in what the CDPP considered amounted to a "people smuggling venture" extended beyond that of a crew member. But conviction for the aggravated offence created by s 233C would result whether or not the CDPP proved to the court that the crew member had that extended role and imposition of the mandatory minimum penalty required by s 236B(3)(c) and (4)(b) would necessarily follow.

Conclusion

99 I would allow the appeal, set aside the decision of the Court of Criminal Appeal of the Supreme Court of New South Wales and make orders remitting the matter to that Court for Mr Magaming to be re-sentenced for the aggravated offence of people smuggling to which he pleaded guilty on the basis that no mandatory minimum penalty validly attaches to that offence.

100 KEANE J. I agree with French CJ, Hayne, Crennan, Kiefel and Bell JJ that the appeal should be dismissed. I agree with the reasons given by their Honours; and I would add only the following brief observations in relation to one aspect of the appellant's argument that s 236B(3)(c) of the Act, in its application to a person convicted of an offence against s 233C of the Act, is beyond the competence of the Commonwealth Parliament.

101 The appellant submitted that the sentence enacted by s 236B(3)(c), in its application to a "minor" offender such as the appellant, is manifestly disproportionate to the circumstances of the offence committed by him and his personal moral culpability. On that footing, it was argued that the mandate in s 236B(3)(c) for the imposition of that sentence is inconsistent with the integrity of the judiciary required by Ch III of the Constitution.

102 My concern is with the appellant's reliance on decisions of this Court which discuss proportionality in sentencing as authority to support that aspect of his argument. In this regard, the appellant cited *Veen v The Queen [No 2]*[81], *Wong v The Queen*[82], *Muldrock v The Queen*[83] and *Markarian v The Queen*[84].

103 The discussion of proportionality in sentencing in the decisions cited affords no support for the appellant's argument. The discussion of proportionality in sentencing in those cases proceeds by reference to legislated yardsticks. Each yardstick fixed by the legislature provides a necessary datum point from which the discussion of proportionality in sentencing may proceed. As was said in *Markarian v The Queen*[85] by Gleeson CJ, Gummow, Hayne and Callinan JJ: "Judges need sentencing yardsticks." The provision of those yardsticks is the province of the Parliament.

104 None of the decisions cited by the appellant offers any support for the notion that it is any part of the judicial function to ensure that the yardsticks legislated for various kinds of misconduct are "appropriately" calibrated to some assumed range of moral culpability in offenders. The work of the legislature in laying down norms of conduct and attaching sanctions to breaches of those

---

81 (1988) 164 CLR 465 at 472, 486, 490-491; [1988] HCA 14.

82 (2001) 207 CLR 584 at 609-610 [71], 612-613 [77]-[78]; [2001] HCA 64.

83 (2011) 244 CLR 120 at 140-141 [60]; [2011] HCA 39.

84 (2005) 228 CLR 357 at 372 [31], 379-380 [55]-[56], 383-384 [65], 385-386 [69]; [2005] HCA 25.

85 (2005) 228 CLR 357 at 372 [30].

norms is anterior to the function of the judiciary. As was said in the Supreme Court of Canada in *R v McDonnell*[86]:

> "[I]t is not for judges to create criminal offences, but rather for the legislature to enact such offences."

105 The enactment of sentences by the legislature, whether as maxima or minima, involves the resolution of broad issues of policy by the exercise of legislative power. A sentence enacted by the legislature reflects policy-driven assessments of the desirability of the ends pursued by the legislation, and of the means by which those ends might be achieved. It is distinctly the province of the legislature to gauge the seriousness of what is seen as an undesirable activity affecting the peace, order and good government of the Commonwealth and the soundness of a view that condign punishment is called for to suppress that activity, and to determine whether a level of punishment should be enacted as a ceiling or a floor.

106 In laying down the norms of conduct which give effect to those assessments, the legislature may decide that an offence is so serious that consideration of the particular circumstances of the offence and the personal circumstances of the offender should not mitigate the minimum punishment thought to be appropriate to achieve the legislature's objectives, whatever they may be.

107 It is ironic that the appellant should invoke the separation of powers effected by Ch III of the Constitution[87] because, in truth, the institutional integrity of the judiciary would be compromised by accepting the argument that the validity of s 236B(3)(c) of the Act is conditional upon acceptance by a sentencing judge that the sentence enacted by the legislature is no more than is appropriate to that judge's opinion of the culpability of the person convicted of the offence.

108 In summary, to argue that s 236B(3)(c) was an unnecessarily harsh way to pursue the end of deterring those minded to engage in the activity proscribed by s 233C is to make a point about the political wisdom of the law. Whether there is merit in that point is a matter for political judgment; but it has nothing to do with whether, as a matter of constitutional law, s 236B(3)(c) is inconsistent with the institutional integrity of a court obliged to enforce that law.

---

86 [1997] 1 SCR 948 at 974 [33].

87 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; [1956] HCA 10; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 543 [13], 555 [52], 574-575 [110]-[111]; [1999] HCA 27.