



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

P56/2021

BETWEEN:

PETER ROBERT GARLETT

Appellant

and

THE STATE OF WESTERN AUSTRALIA

First Respondent

THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA

Second Respondent

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APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Suitability for publication

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

Part II: Outline of oral propositions

2. The Appellant's circumstances will be addressed: AS [5]-[8]; Core AB 12, 14, 90-91.
3. The proper construction of the Act will be addressed: AS [10]-[20]. Section 392 of the *Criminal Code* is at 2 AB 291. The proper construction of section 7 of the Act has regard to the judgment of Corboy J at Core AB 55.
4. In determining validity of the Act there is a distinction between preventive orders and preventive detention: AS [37]-[38].
5. In determining validity of the Act it is relevant to inquire whether a s 71 Court could validly exercise the impugned power. The authority of *Lim, Fardon* and the majority judgment in *Benbrika* in this respect will be addressed. The Appellant's propositions in this respect are:
 - (a) legislation that empowers a s 71 Court to order the detention of a person otherwise than as a consequential step in the adjudication of criminal guilt of that citizen for past acts will be invalid – in that it requires a s 71 Court to exercise

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a power that is not a judicial power – unless it falls within one or other of the exceptional cases identified in *Lim* or is analogous to any such exceptional case:

- (b) characterisation of a power of detention as preventive does not *per se* render it judicial or valid: AS [52]-[56];
- (c) preventive detention will only be analogous to the *Lim* exception in respect of detention of the mentally ill where detention is a proportionate means by which the protective purpose can be achieved;
- (d) an example of this is; the ordering of detention is a judicial power where the object of detention is “preventive or protective” and where the criminal activity from which the community is to be protected is of the most serious kind and poses a singular or existential threat to Australian society [eg *Benbrika*]. That is not this case;
- (e) alternatively to (d); the ordering of detention is a *sui generis* judicial power where the object of detention is “preventive or protective” and where the community is to be protected from criminal activity that is of the most serious kind and which poses a singular or existential threat to Australian society [eg *Benbrika*]. That is not this case.

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6. As regards *Kable*, the appropriate mode of reasoning to determine validity of the Act is illustrated by the majority judgment in *Vella* [56]-[75].

20 7. The Appellant’s propositions in respect of *Kable* are:

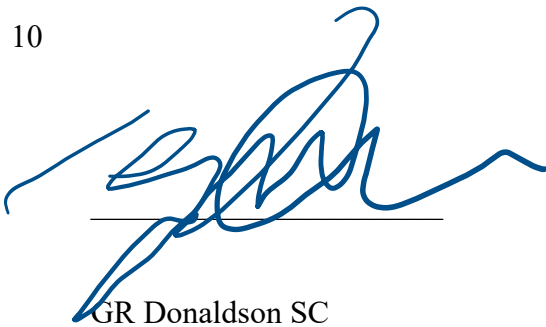
- (a) *Fardon* and *Benbrika* do not compel a finding of validity;
- (b) there are distinctions between the “terrorism and sexual offender preventive order regimes” considered in *Fardon* and *Benbrika* and this case;
- (c) the principled relevant distinction emerges from the nature of offences from which the community will be protected: AS [57]-[58], [72]-[75]; ARS [11];
- (d) *Fardon* involved preventive detention where that from which the community was to be protected was criminal activity of the most serious kind and where detention was a proportionate means by which the protective purpose of the legislation could be achieved - because the criminal activity was inherently harmful to a vulnerable segment of society.

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- (e) in this case, detention is not a proportionate means by which the protective purpose of the legislation could be achieved;
- (f) to empower a court to order detention, where detention is not a proportionate means by which the protective purpose of the legislation could be achieved, affects the institutional integrity of that court;
- (g) it diminishes public confidence in the court to require it to consider ordering detention where detention is disproportionate.

Dated: 10 March 2022

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GR Donaldson SC



R Young