



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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BETWEEN:

ENT19
Plaintiff

and

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Minister for Home Affairs
First Defendant

Commonwealth of Australia
Second Defendant

PLAINTIFF'S OUTLINE OF ORAL ARGUMENT

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PART I: This outline is in a form suitable for publication on the Internet.

PART II: Propositions to be advanced in oral argument

1. The plaintiff refers to his chronology for the identification of relevant facts.

The decision contravenes Ch III, alternatively it is not authorised by the Act

2. Ch III of the *Constitution* precludes the conferral on the Executive of any part of the judicial power of the Commonwealth. Adjudgment and punishment of criminal guilt is essentially and exclusively judicial (**PS [23], [29], PR [11]**).

- *Chu Kheng Lim v Minister* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ) (**Tab 6 JBA**); *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at [71] (Kiefel CJ, Keane and Gleeson JJ), [158] (Gordon J), [235] (Edelman J) (**Tab 22 JBA**); *Garlett v Western Australia* (2022) 96 ALJR 888 at [132]-[134] (Gageler J) (**Tab 29 JBA**).

3. Subject to exceptional cases, the involuntary detention of a person by the State is punitive and exists only as an incident of that exclusively judicial function of adjudging or punishing criminal guilt. An exception applicable to detention of unlawful non-citizens is limited by purpose: segregation to allow a determination whether to admit or pending removal. There is no exception, where administrative detention is for a punitive purpose, as distinct from a legitimate non-punitive purpose (**PR [10], [24]**).

- *Falzon v Minister* (2018) 262 CLR 333 at [16]-[17] (Kiefel CJ, Bell, Keane and Edelman JJ), [80]-[81] (Gageler and Gordon JJ) (**Tab 7 JBA**); *Commonwealth v AJL20* (2021) 95 ALJR 567 at [44] (Kiefel CJ, Gageler, Keane and Steward JJ) (**Tab 25 JBA**).

4. The Minister's exercise of the powers in ss 47 and 65, in the context of the Act's mandatory detention scheme, will be contrary to Ch III (alternatively not authorised by the Act and the Regulation) if the powers were exercised for a punitive purpose (**PS [23]-[25], PR [24]**).

Analysis of purpose must occur at the correct level of abstraction. And, although a distinction between punitive and protective in the exercise of a power may be elusive, it is analytically important: *Alexander* at [103]-[104], [107], [110]-[111] (Gageler J) (**Tab 22 JBA**); *AJL20* at [146]-[147] (Edelman J) (**Tab 25 JBA**).

Exercise of executive powers will be punitive if:

- a. its sole or substantial justifying factor is the deterrence of others from committing a crime (**PS [23]-[27]**): *Alexander* at [240], [246] (Edelman J) (**Tab 22 JBA**); *ENT19 v Minister* (2021) 289 FCR 100 at [126]-[134] (Katzmann J) (**Tab 27 JBA**); *NBMZ v Minister* (2014) 220 FCR 1 at [28]-[31] (Allsop CJ and Katzmann J) (**Tab 33 JBA**); *Djalil v Minister* (2004) 139 FCR 292 at [76] (Tamberlin, Sackville and Stone JJ) (**Tab 26 JBA**);
- b. its purpose is to sanction (already) proscribed conduct (**PS [26]-[28]**): *Alexander* at [157] (Gordon J), [240]-[241], [246] (Edelman J) (**Tab 22 JBA**);

- c. it leads to detention for a period not reasonably capable of being seen as necessary for the purposes of removal or to enable an application for a visa to be made and considered (PS [30]-[34], PR [7], [14]): *AJL20* at [44] (Kiefel CJ, Gageler, Keane and Steward JJ), [80] (Gordon and Gleeson JJ), [108] (Edelman J) (Tab 25 JBA).
5. It is possible, when Parliament has vested a broad discretionary power, or has authorised the Executive to make delegated legislation that in turn enables an exercise of power by reference to a broad criterion (here, cl 790.227), for an exercise of that statutory power to infringe the separation with judicial power (even when in other cases it will not do so).
- *Palmer v Western Australia* (2021) 95 ALJR 229 at [68] (Kiefel CJ and Keane J), [122]-[123] (Gageler J) (Tab 34 JBA). (A case not concerned with the separation of powers principle, and a power that is typically purely judicial being validly vested by Parliament in the Executive only for particular purposes, but with the issue of how s 92 of the *Constitution* may affect the exercise of discretionary powers.)
 - Cf *AJL20* at [43]-[44] (Kiefel CJ, Gageler, Keane and Steward JJ) (Tab 25 JBA). (A case where the purpose for which a decision had been made by the Executive, as a consequence of which decision the detention of the individual would continue, was not in issue.)
6. The decision by the Minister, to exercise the powers in ss 47 and 56 of the Act adversely to the plaintiff, is punitive / was made for a punitive purpose:
- a. As disclosed by the Minister's reasons: the decision was for the substantial purpose of general deterrence and to further sanction proscribed conduct (Decision [22]-[25] AB 62-63, [39]-[40] AB 66; PS [19]-[22], PR [20]-[22], [25]).
 - b. As disclosed by its effect: the necessary and only realistic consequence of the decision, which the Minister appreciated, was and is the plaintiff's prolonged, likely indefinite, detention in custody, which is both inherently punitive and operates as an additional punishment to the consequence already provided by the Act for the proscribed conduct (Decision [32]-[36] AB 64-65; PS [20]-[21], [31]-[34], PR [19], [24], [26]-[29]).
 - c. As disclosed by the operation of the new legislative scheme: the plaintiff's detention, resulting from the Minister's decision to refuse to grant him a protection visa and new s 197C(3) operating with ss 189, 196(1)(a) and (c), 198(2) (by reference to 193(1)(b)), (as well as the refusal to consider s 195A), is not reasonably capable of being seen as necessary for the legitimate non-punitive purpose of segregation pending removal. The plaintiff poses no ongoing risk to the Australian community / raises no character concerns (cf *AJL20* at [1], [6], [117]), and, importantly, he is a refugee within the meaning of the Act (cf *Al-Kateb* at [99], JBA Tab 4) (Decision AB [3] 59, [25] 63, [32]-[36] 64-65; also AB 260; PS [31]-[36], [47], PR [9]-[11], [13]-[15], [24]).

7. Alternatively, the powers in ss 47 and 65 did not authorise the Minister to refuse to grant a protection visa for the purposes and with the consequences described above. The concept of the national interest is not unbounded (**PS [35]-[37]**).

- *Graham v Minister* (2017) 263 CLR 1 at [57] (Kiefel CJ, Bell, Gagler, Keane, Nettle and Gordon JJ) (**Tab 8 JBA**). See also *Plaintiff S297/2013 v Minister* (2015) 255 CLR 231 at [20]-[21] (the Court) (**Tab 16 JBA**).

Misunderstanding of the law

8. The totality of the evidence reveals the Minister proceeded on an incorrect understanding of the law, namely that she, acting personally, could not grant a visa to the plaintiff. But for the Minister's misunderstanding of the law, there is a realistic possibility a different decision could have been made (**Submission [17]-[30] AB 529-530; PS [38]-[41], PR [30]-[34]**).

- *Wei v Minister* (2015) 257 CLR 22 at [33] (Gageler and Keane JJ) (**Tab 19 JBA**); *Nathanson v Minister* (2022) 96 ALJR 737 at [32] (Kiefel CJ, Keane and Gleeson JJ) (**Tab 32 JBA**).

Denial of procedural fairness

9. The Minister's decision was affected by jurisdictional error by reason of the Minister's failure to give the plaintiff particulars of the "considerable media coverage" of the plaintiff's conviction for people smuggling, as relevant information specifically about the plaintiff that was part of the reason for refusing to grant the visa (**Decision [24] AB 62-63, also AB 538-540; PS [42]-[46], PR [35]-[38]**).

- Act, s 57; *SZBEL v Minister* (2006) 228 CLR 152 at [32] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ) (**Tab 17 JBA**).

Failure to have regard to a relevant consideration

10. Having elected to determine the matter on the basis, in part, that not refusing to grant a protection visa to a person convicted of people smuggling may undermine public confidence in Australia's protection visa program, the Minister was bound also to consider the matters set out in **PS [47](a) to (d) (Decision [23]-[24] AB 62-63; PS [47]-[50], PR [39]-[41])**.

Relief

11. By reason of the matters at [5]-[7] above, the plaintiff's ongoing detention is not authorised. There being no basis upon which the Minister could lawfully conclude that it is in the national interest to (again purport to) refuse to grant a protection visa (**cf DS [61]**), and all other criteria for the visa being satisfied, writs of habeas corpus and peremptory mandamus should issue (**PS [32]-[35], [51]-[57], PR [42]-[43]**).

Dated: 8 December 2022

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Jason Donnelly

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