



HIGH COURT OF AUSTRALIA

10 February 2021

MINISTER FOR HOME AFFAIRS v BENBRIKA [2021] HCA 4

Today, the High Court answered a question reserved for the consideration of the Court of Appeal of the Supreme Court of Victoria that had been removed into the High Court. The question concerned Div 105A of the *Criminal Code* (Cth) ("the Code"), which empowers the Supreme Court of a State or Territory, on the application of the Minister for Home Affairs ("the Minister"), to order that a person who has been convicted of a terrorist offence be detained in prison for a further period after the expiration of his or her sentence of imprisonment. The Court held, by majority, that the power to make a continuing detention order ("CDO") under s 105A.7 of the Code is within the judicial power of the Commonwealth and has not been conferred, inter alia, on the Supreme Court of Victoria contrary to Ch III of the Commonwealth *Constitution*.

On 15 September 2008, Mr Abdul Nacer Benbrika was convicted by the Supreme Court of Victoria of being a member of a terrorist organisation and directing the activities of a terrorist organisation. At trial, the Crown case was that Mr Benbrika and others were members of a Melbourne-based terrorist organisation that was fostering or preparing the doing of a terrorist act in Australia or overseas. Mr Benbrika was sentenced to an effective term of imprisonment of 15 years with a non-parole period of 12 years. His sentence expired on 5 November 2020. On 4 September 2020, the Minister commenced proceedings in the Supreme Court of Victoria, seeking a CDO in respect of Mr Benbrika. On 24 December 2020, it was ordered that Mr Benbrika be subject to a CDO to be in force for a period of three years.

Mr Benbrika's principal argument relied on the principle, articulated in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 and derived from the separation of powers provided for by the *Constitution*, that, exceptional cases aside, the involuntary detention of a citizen in custody by the State is penal or punitive in character and exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt ("the *Lim* principle"). It was contended that the scheme for preventative detention provided for by Div 105A neither complies with, nor falls within a recognised exception to, this principle and so may not be conferred as federal judicial power.

A majority of the Court held that a scheme that is appropriately tailored to protecting the community from the singular threat posed by terrorist criminal activity is capable of coming within an exception to the *Lim* principle analogous to other established exceptions that share a purpose of protection of the community from harm, such as detention of those suffering from mental illness or infectious disease. Taken as a whole, particularly as the power to make a CDO under Div 105A is conditioned on a judge being satisfied not only that the risk of the commission of certain offences is "unacceptable" but also that no other, less restrictive measure would be effective in preventing that risk, the division is rightly characterised as directed to ensuring the safety and protection of the community from the risk of harm posed by the threat of terrorism. Accordingly, Div 105A validly confers the judicial power of the Commonwealth on the Supreme Court of a State or Territory.

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