HIGH COURT OF AUSTRALIA

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File Number:	S44/2023
File Title:	Delzotto v. The King
Registry:	Sydney
Document filed:	Form 27E - Reply
Filing party:	Appellant
Date filed:	28 Jul 2023

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN:

Enrico Robert Charles Delzotto

Appellant

and

The King

10 **Respondent**

APPELLANT'S REPLY

PART I CERTIFICATION

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

PART II REPLY

2. The Respondent's submissions (**RWS**) do not overcome the Appellant's main arguments, namely that:

   a. ***Bahar*** *v The Queen*[1] was wrongly decided, largely because of a failure to engage with the text of the *Migration Act 1958* (Cth) (Migration Act), including the notes to the offence provisions, and the false assumption that the legislation imposed a minimum penalty;[2]

   b. Neither the provisions of the Migration Act considered in *Bahar* nor s16AAB of the Crimes Act provide for a minimum penalty; rather, the provisions impose a constraint on a sentencing court which operates in particular circumstances;[3]

   c. If this construction is correct, there is no analogy with maximum penalties because the legislation does not impose a minimum penalty;[4]

   d. One of the basal premises underlying the reasoning in *Bahar* is missing in relation to s16AAB because it does not deprive the court of the option not to impose the minimum penalty;[5] and

   e. In the context of sentencing law, the tension between the systemic goal of equal justice and the right to personal liberty has never been resolved in favour of the former by increasing sentences. Clear and unambiguous words would be required to legislate for the opposite effect.[6]

A. Ground 2

3. The Respondent submits that the "relevant conduct" is "having possession or control of material that fits a particular description" and lists what are asserted to be three aspects of that description.[7] The first and third of them, that the material is in the form of data and that it is child abuse material, are characteristics of the material. The second, however, is not a characteristic of the material but conduct by the accused. This is clear from the text of the section: ss 474.22A(b) and (d) commence with the words "the

[1] (2011) 45 WAR 100.
[2] Appellant's submissions (**AWS**) at [31]-[37].
[3] AWS at [17]-[37]; [47]-[51].
[4] AWS at [32]-[34].
[5] AWS at [49].
[6] AWS at [42] and footnotes 63-65.
[7] RWS [16].

material is…", while ss (a) and (c) commence with "the person…", and then describe conduct.

4. The Respondent effectively invites the Court to read s 474.22A(1)(c) as if it said, "the material was obtained or accessed using a carriage service". However, those are not the words of the provision. A person is only guilty of an offence contrary to s 474.22A if the person has *both* possessed or controlled material *and* used a carriage service to obtain or access the material.[8] Ground 2 should be upheld.

B.1 Ground 1 – Statutory text

5. The use of the heading "Minimum Penalty" in the table to s16AAB is not determinative of the question whether the section imposes a penalty or operates as a constraint on the court's sentencing power in certain circumstances. For the reasons explained in AWS, the heading is ambiguous and does not necessarily refer to a penalty-creating provision.[9]

6. The Appellant's reliance on *Garth v R*[10] is not misplaced.[11] There, a provision headed "mandatory minimum sentence" was found not to create a penalty but to operate as a constraint on the sentencing court.[12] Likewise, in *Ngo v The Queen*,[13] the NSW CCA found that s 61(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), headed "Mandatory life sentences for certain offences", does not "enact any penalty at all",[14] but "directs a court … that, in the circumstances it specifies, a life sentence must be imposed".[15] In each of those cases, one provision was found to impose a penalty while the "mandatory" sentencing provision, which was directed to the court, did not.

7. The fact that 16AAB is located in a Part of the Crimes Act which concerns broad sentencing principles and procedures is only one aspect of the statutory context upon which the Appellant relies. A key plank of the Appellant's argument is that the operative text does not impose a penalty. The example of a *maximum* penalty provision being found in a different part of the *Corporations Act 2001* (Cth)[16] does not assist the Respondent's argument. Sections 1311, 1311A, 1311E and Schedule 3 of that Act include clear and explicit words of penalty creation and are not directed to a court.

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[8] Under s 474.22A(1)(a) and s 474.22A(1)(c) respectively.
[9] AWS [21]; [56].
[10] *Garth v R* (2016) 261 A Crim R 583; (2016) 341 ALR 620; [2016] NSWCCA 203.
[11] See RWS [69].
[12] See AWS at [36].
[13] (2013) 233 A Crim R 1221
[14] *Ngo* at [72] per Simpson J, Johnson J and Grove AJ agreeing.
[15] *Ngo* at [64] per Simpson J, Johnson J and Grove AJ agreeing.; See also *El-Zeyat v R; Aouad v R; Osman v R* [2015] NSWCCA 196 at [44].
[16] RWS [28] and footnote 14.

8. The Appellant submits that *Bahar* was wrongly decided and that there are additional reasons why the approach in that case is inapplicable to ss 16AAA and 16AAB. The Appellant does not concede that *Bahar* applies to s 16AAA, or that s16AAA imposes a generally applicable minimum penalty.

B.2 The comparison with jurisdictional limits

9. The Appellant draws an analogy between jurisdictional limits on summary disposition of criminal charges and the manner in which, he says, s16AAB imposes a constraint on the power of the sentencing court. It is not the only analogy. Other limits on sentencing courts, both offence-specific and otherwise, are common.[17] The Appellant's point is
10 that (a) there is no conceptual or other difficulty in a court arriving at a particular sentence by instinctive synthesis and then being required, by a limit or constraint imposed by statute, to impose another sentence and (b) to take such a limit or constraint into account in the process of instinctive synthesis would be wrong.

B.3 The analogy with maximum sentences

10. The Respondent asserts that there is a close and compelling analogy between minimum sentences and maximum sentences and that, if a maximum penalty is a yardstick, so too is a minimum penalty.[18] However, any such analogy can only work if the provision in question imposes a minimum penalty, which is the heart of the question in this case.

B.4 The statutory notes

20 11. The notes to the particular offence provisions in the Migration Act cannot be said to be "an irrelevance".[19] When the question to be decided in *Bahar* was whether certain provisions imposed a penalty or operated as a constraint on a court's sentencing power, a note which was part of the text of the legislation and which said that those provisions "limit conviction and sentencing options" is obviously relevant. *A fortiori* when the operative words of the provision were directed to the court and made no mention of creating a minimum penalty.

12. The Appellant has addressed the significance of the note to s16A in the AWS.

B.5 The legislative architecture

13. The Respondent claims that the continuing availability of s19B "goes nowhere in the
30 present debate". However, it is axiomatic that a maximum penalty is the most severe

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[17] See, for example, the limits in the *Crimes (Sentencing Procedure) Act 1999* (NSW) discussed *Stanley v Director of Public Prosecutions (NSW) & Anor* (2023) 97 ALJR 107; [2023] HCA 3 per Gordon, Edelman, Steward and Gleeson JJ at [58]. See also the following sections of the *Crimes Act 1914* (Cth): s19AB(1)(c); s19AC(1); s19AG; s20(1)(b)(ii) and (iii); s20AB(6).
[18] RWS [43]-[46].
[19] RWS heading to [49]ff; see RWS [52].

penalty which can be imposed for an offence on any offender in any circumstances. It is this characteristic which means that it can represent the sentence for a "worst possible case" and act as a "yardstick".[20] If the Respondent's asserted analogy with maximum penalties is to operate, there must be equivalence between what is understood by a maximum penalty and what is claimed to be a "minimum penalty".[21]

14. In *Bahar*, one of the fundamental premises was that the relevant provisions deprived a court of the option to do anything other than impose at least the mandated minimum which therefore acted as a "floor" with the maximum penalty as the "ceiling".[22]

15. Dismissal or discharge under s19B are among the orders referred to in s 16A(1) Crimes Act which a court may make in respect of a person for a federal offence. Section 19B remains available for all offences listed in ss 16AAA and 16AAB. Those sections do not, therefore, set the lower limit for a 'least worst' case and cannot be the counterpart of a maximum penalty. This is a material distinction from the provisions of the Migration Act considered in *Bahar*.

16. Even if s19B were unavailable, the "exceptions" in s16AAC and the lack of any minimum period of actual custody make it difficult to ascertain what is the sentence which represents a "least worst case" and can operate as a "yardstick" for an offence listed in s 16AAA or s 16AAB. The analogy with a maximum penalty breaks down.

B.6 Liberty

17. The Respondent, by pointing to the extrinsic material,[23] appears to accept that s 16AAB does not speak in clear and unambiguous terms of an intention to prioritise consistency over liberty and to effect an increase in sentences generally. It is submitted that, despite the claims of the Respondent, even the extrinsic material does not speak in such clear terms. Moreover, construction of s16AAB as imposing a constraint would further the same legislative aim. The lack of a minimum period in actual custody does not assist the Respondent. It does not alter the reality that a sentence of imprisonment is imposed nor that parole is not automatic and, historically, very often not granted for offences of the kind listed in ss 16AAA and s16AAB.[24]

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[20] *Markarian v The Queen* (2005) 228 CLR 357 at 372 [31].
[21] See *Magaming v The Queen* (2013) 252 CLR 381; [2013] HCA 40 at [43]; [48] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.
[22] *Bahar* at [53]-[54]; Cf *R v Hurt (No 2)* (2021) 294 A Crim R 473 per Mossop J (at [77]).
[23] s15AB *Acts Interpretation Act 1901* (Cth)
[24] Statistics from the Commonwealth Parole Office, received under the *Freedom of Information Act 1982* (Cth) by Legal Aid NSW.

18. Finally, the Respondent's submission does not grapple with two key points about the role of the right to personal liberty in the analysis of the operation of s 16AAB:
    a. What was said by this Court in *North Australian Aboriginal Justice Agency Ltd v Northern Territory*;[25] and
    b. The long established principle that parity (a manifestation of the principle of equal justice in sentencing) cannot lead to an increased sentence.[26]

B.7 Legislative purpose

19. The Respondent's submissions under this heading effectively focus on the various amendments in the amending Act and the extrinsic material. For reasons previously explained, while it is clear that the increases in maximum penalties were designed to effect an overall increase in sentences for those offences, it is not clear that this was the purpose of ss 16AAA and 16AAB. The extrinsic material is consistent with a purpose of ensuring that some offenders receive sterner sentences – i.e. those who otherwise may have avoided imprisonment or have been sentenced to "short" sentences.[27] Again, a construction of s16AAB as a constraint on the sentencing court fulfils that aim.

B.8 Miscellaneous matters

20. Many of the Respondent's submissions under this heading have been dealt with above.
21. The argument from the "re-enactment presumption" is a weak one in circumstances where many features of the Migration Act legislative scheme are materially different (as explained in the AWS and above) and because there was no mention of *Bahar* or any other cases in any of the extrinsic material.
22. For reasons explained in the dissenting judgment of Loukas-Karlsson J in *Hurt*,[28] "clear and unambiguous language is required if such a limit on judicial discretion is intended by Parliament."[29]

Dated: 27 July 2023

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[25] (2015) 256 CLR 569; [2015] HCA 41 at [11] per French CJ, Kiefel and Bell JJ – see AWS [39].
[26] AWS [42] and footnote 64.
[27] AWS [59] and footnote 88
[28] *Hurt v The Queen* (2022) 18 ACTLR 272; (2022) 372 FLR 312; [2022] ACTCA 49 at [90]-[91], citing McCallum J in *Dui Kol v Regina* [2015] NSWCCA 150 at [28]
[29] *Hurt v The Queen* (2022) 18 ACTLR 272; (2022) 372 FLR 312; [2022] ACTCA 49 at [91].