IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY No. M97 of 2016

BETWEEN: Aaron Joe Thomas Graham

Plaintiff

And

Minister for Immigration and Border Protection

Defendant

SUBMISSIONS ON BEHALF OF ATTORNEY GENERAL FOR THE STATE OF NEW SOUTH WALES, INTERVENING

Part I: Certification as to suitability for publication

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

Part II: Basis of intervention

2. The Attorney General for the State of New South Wales ("**NSW**") intervenes pursuant to s 78A(1) of the Judiciary Act 1903 (Cth).

Part III: Applicable constitutional and statutory provisions

3. The relevant constitutional and statutory provisions are set out in the Annexure to the plaintiff's annotated submissions ("**PAS**").

Part IV: Submissions as to constitutional issues

4. The plaintiff advances, in essence, two constitutional arguments. The first is that the scheme created by ss 501-501C of the Migration Act 1958 (Cth) ("**the Act**") infringes the separation of powers because it impairs the institutional integrity of federal courts and deprives them of essential characteristics of courts exercising judicial power.[1] While the requirement to preserve the separation of powers applies only to Commonwealth laws, the plaintiff invokes principles which have

[1] PAS at [11]-[32].

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developed in the context of challenges to State laws, where it has been contended that the law impairs the institutional integrity of Ch III courts and/or deprives such courts of their essential and defining characteristics. The plaintiff's second argument is that the statutory scheme infringes s 75(v) because it has the practical effect of "impair[ing] the judicial review of administrative action by denying the information upon which this depends".[2]

5. In dealing with each of these arguments, it is necessary to draw a careful distinction between the exercise of administrative power for which the Act provides and the related but separate exercise of judicial power which may arise as a consequence. The impugned provisions of the Act do not confer any particular powers or functions on any court.[3] As explained further below, this is an important point of contrast when it comes to considering statements made by the Court in cases such as Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police (2008) 234 CLR 532 ("**Gyspy Jokers**"), K-Generation Pty Ltd v Liquor Licensing Court (2009) 237 CLR 501 ("**K-Generation**") and Assistant Commissioner Condon v Pompano Pty Ltd (2013) 252 CLR 38 ("**Pompano**").

6. The impugned provisions relevantly confer on the Minister the power to cancel a visa on character grounds (s 501(2)) and the power to revoke such a decision following representations from the affected person (s 501C(4)). One feature of those administrative powers is that the Minister and other relevant officers are required to maintain the confidentiality of relevant information that has been communicated by a gazetted agency on condition that it be treated as confidential information: s 503A(1). One of the ways in which the statute operates to preserve the confidentiality of such information is by making it immune from compulsory production to a court: s 503A(2)(c).

7. These provisions have the effect of excluding the obligation that would otherwise arise for the Minister to make the affected person aware of the information in question. Such an obligation would ordinarily arise because of the requirements of natural justice, on the basis that it was relevant information to be relied upon by the Minister: Vella v Minister for Immigration and Border Protection (2015) 230 FCR 61 at 76, [61], 78, [69], 81, [84]. These aspects of the statutory scheme regulating

[2] PAS at [36].
[3] See Duncan v Independent Commission Against Corruption (2015) 256 CLR 83 at 98, [27].

the exercise of administrative power do not infringe any constitutional limitation. There is no doubt that it is within the competence of the legislature to modify or exclude the operation of the rules of natural justice in their application to an administrative decision.[4]

8. The plaintiff's argument seeks to focus not on the characteristics of the administrative decision-making, but rather on the way in which a court may undertake judicial review of an administrative decision made pursuant to the impugned provisions. The Act does not purport to exclude or even limit such review. The only connection between the impugned provisions and the exercise of judicial power is that, in circumstances where the affected person seeks judicial review of a decision made under s 501:

   a. confidential information that was relevant to the decision under review is immune from production: s 503A(2); and

   b. if the confidential information is so found to be immune from compulsory production, neither the affected person nor the court will have access to the confidential information and the judicial review will need to proceed without reference to that information.

9. As to (a), the status of the information as being immune from production is mandated by the Act. The substantive position is equivalent to the situation that pertains when a court upholds a claim of public interest immunity. The question then becomes what significance, if any, attaches to the fact that this outcome is reached by means of a different process. In contrast to the process that applies at common law when a court is called upon to resolve a public interest immunity claim in the context of an objection to production, the protected status of the confidential information under the Act does not depend upon the court performing an evaluative balancing exercise based on an assessment of the relative significance of the information and the degree of harm that would be caused to the public interest by disclosure: Sankey v Whitlam (1978) 142 CLR 1 ("**Sankey v Whitlam**"). Instead the court's role in determining the protected status of the confidential information is limited to determining whether the criteria in subparagraphs (a) and (b) of s 503A(2) are satisfied.

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[4] Pompano at 98, [152].

10. The plaintiff seeks to attach constitutional significance to this contrast between the division of responsibilities between the executive and the courts that is achieved by s 503A of the Act and the division of responsibilities that applies at common law in the resolution of public interest immunity claims. Evidently conscious of the improbability of the proposition, the plaintiff asserts that he is not seeking to "constitutionalise public interest immunity".[5] However, this is precisely what his argument entails.

11. There is nothing in the Act that purports to regulate the process by which the court resolves public interest immunity claims, either generally or in relation to confidential information of the kind referred to in s 503A. The most that can be said is that, by making specific provision for the non-disclosure of a certain class of information, the legislature has forestalled a process that would otherwise occur at common law involving the resolution of a public interest immunity claim over such information.

12. The starting point is the "fundamental principle" identified by Gibbs ACJ in Sankey v Whitlam at 41 that otherwise admissible evidence should be withheld "only if, and to the extent, that the public interest renders it necessary". The plaintiff apparently accepts (at least for this part of his argument) that there is no constitutional difficulty with relevant and otherwise admissible evidence being immune from production and therefore rendered unavailable to litigants and the courts. The courts have long recognised that there may be conflicting aspects of the public interest when it comes to the potential disclosure of information that is relevant to judicial proceedings, and that the public interest in maintaining the confidentiality of certain information may in some circumstances prevail over the public interest in the administration of justice.[6] The provisions of the Act are entirely consistent with this fundamental principle.

13. On the plaintiff's case, there is only one constitutionally permissible mechanism by which to resolve the conflict between the public interest in preserving the confidentiality of otherwise relevant information and the public interest in the administration of justice. That mechanism is the process which has developed at common law for resolving public interest immunity claims, whereby the relevant

[5] PAS at [23].
[6] See Pompano at 47, [5], 72, [69].

court tests the asserted confidentiality of the information in question and balances the competing interests before arriving at a judicial determination of the claimed immunity. These steps in the process are said to be uniquely within the province of the Ch III courts, so that it is beyond the competence of the Parliament to seek to classify particular information as being confidential and immune from production.

14. One difficulty with the plaintiff's argument is that even as a matter of common law the procedure that the plaintiff seeks to enshrine as a constitutional minimum of judicial power only came to be accepted long after Federation. In Duncan v Cammell, Laird & Co Ltd [1942] AC 624 ("**Duncan v Cammell**") the House of Lords held that a Ministerial certificate was conclusive for the purposes of a public interest immunity claim. This was the prevailing approach in Australia following Federation as reflected in Griffin v South Australia (1925) 36 CLR 378. The procedure at common law subsequently evolved: see Sankey v Whitlam; Conway v Rimmer [1968] AC 910 ("**Conway**"). It follows that there is no historical basis for the assertion that Ch III of the Constitution is founded on a principle that it is an essential characteristic of a court exercising judicial power that it must retain the power to carry out the evaluative balancing exercise involved in resolving public interest immunity claims. Nor can it be said that resolving the conflict between competing aspects of the public interest concerning disclosure is a uniquely judicial function.

15. More broadly, there is no constitutional principle which leads to the conclusion that the prevailing common law procedure for resolving public interest immunity claims is the only model compatible with the institutional integrity of the courts. The existing common law procedure is no more than that - a procedure that has developed for resolving competing aspects of the public interest where it becomes necessary in the context of a judicial proceeding. Novelty and departure from hitherto established judicial processes does not of itself signal an exercise which is repugnant to, or incompatible with, the institutional integrity of courts.[7]

16. The legislature is entitled to express its own judgement as to the characterisation of a particular class of information as being confidential and as to the priority that should be given to the preservation of that confidentiality, notwithstanding that it

[7] Pompano at 94, [138] per Hayne, Crennan, Kiefel and Bell JJ.

may be relevant to judicial proceedings. The plaintiff in fact concedes that it is within the competence of the legislature to strike a different balance from that which may be struck by a court or to alter the procedure for resolving the immunity of particular information.[8] Those concessions are fatal to the plaintiff's argument. If the legislature is entitled to strike its own balance and to define the procedure to be applied by a court in resolving any claim for immunity, there is no meaningful sense in which the common law relating to public interest immunity "provides the essential baseline"[9] for the purpose of identifying the limits of Commonwealth legislative power stemming from Ch III.

17. One of the ways in which the legislature may legitimately strike a different balance from that which may be struck by a court is by resolving, in the form of a statutory rule, that a particular class of information, as identified by the executive from time to time, is immune from production. This reflects a legislative evaluation that information having the specified characteristics is of such sensitivity that confidentiality should be preserved. It is beside the point that the legislature may have had other options for resolving the conflict between different aspects of the public interest.[10] There is nothing in Ch III that compels the legislature to make any particular choice among available options, including by adopting a legislative solution that gives the courts a role which is analogous to the role of the court under the common law procedure for resolving public interest immunity claims. There is nothing uniquely judicial about the function of resolving the conflict between competing aspects of the public interest that arises where there is a prospect of disclosure of information that ought to be kept confidential in the public interest. Indeed as Spigelman CJ observed in Lodhi v The Queen (2007) 179 A Crim R 470 ("**Lodhi**") at 485, [48] (Barr and Price JJ agreeing), in circumstances where the resolution of that conflict is left to the judiciary, the evaluative exercise which is required is closely analogous to a legislative task.

18. The rules of evidence are a related area in which the legislature may strike a balance between competing aspects of the public interest. In Lodhi at 486-487, [59]-[66] Spigelman CJ observed that the impugned provisions of the National

[8] PAS at [23].
[9] See PAS at [23].
[10] PAS at [29]-[30].

Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) (which regulated public interest immunity claims in relation to the production of certain intelligence) struck a different balance between competing interests in the same way as s 15X of the Crimes Act 1914 (Cth) had done in relation to the admissibility of evidence, as considered in Nicholas v The Queen (1998) 193 CLR 173 ("**Nicholas**"). The majority in Nicholas held that s 15X did not usurp judicial power. Hayne J said at 274, [238]:

> Once it is accepted that the legislature may make or change the rules of evidence it is clear that it may make or change the rules governing the discretionary exclusion of evidence. In particular, it may make or change rules governing the factors which a court is to take into account in exercising that discretion. In the case of this particular discretion, the exercise of which depends upon the balancing of competing considerations, I see no intrusion on the judicial power by the legislature saying that in some kinds of case, one consideration (that of preserving the reputation of the courts by their not being seen to condone law breaking) is to be put to one side in favour of the consideration that persons committing a particular kind of crime should be convicted and punished.

19. Gummow J at 239, [167] observed that the admissibility of illegally obtained evidence was a matter of public policy in respect of which views may differ and "[f]or the legislature to prefer one such view to another is not, of itself, to undermine, in a constitutionally impermissible manner, the integrity of the judicial process in the exercise of the judicial power of the Commonwealth."

20. The development of common law procedures for resolving public interest immunity claims should not be taken as involving the expression of principles about the inviolable characteristics of judicial power. Sankey v Whitlam and Conway were not concerned with the division of constitutional responsibilities in this context between the legislature and the judiciary. To the extent that there was any question in those cases of the division of constitutional responsibilities,[11] it was limited to the question of what status the courts should accord to an expression of opinion by the executive as to the confidentiality of particular information. Hence the

[11] Noting the observation of Viscount Simon LC in Duncan v Cammell at 629 that the question at issue in that case was one of "high constitutional importance".

observation of Lord Reid in Conway at 938C that the Court was concerned with the "proper relation between the powers of the executive and the powers of the courts". To similar effect in Sankey v Whitlam at 38-39 Gibbs ACJ concluded that the balancing of competing public interests was "in all cases the duty of the court, and not the privilege of the executive government". The development in the common law from a process which involved deference to the views certified by the executive (as in Duncan v Cammell) to a process which required the courts to form an independent view about the harm to be caused to the public interest by disclosure says nothing about the capacity of the legislature to express a legislative judgment about such matters. It is therefore not appropriate to treat Sankey v Whitlam and Conway v Rimmer as answering, in a constitutional sense, the question "[w]ho determines what is in the public interest?".[12]

21. The plaintiff contends that an essential characteristic of judicial power is judicial fact-finding and that the Act deprives the court of that function.[13] The Act does not purport to deprive any court of the function of finding facts relevant to the exercise of judicial power. Like any law, it sets criteria which provide the framework for such judicial fact-finding. For example, as a consequence of the criteria prescribed in s 503A, a court called upon to determine whether certain information is required to be treated confidentially in accordance with the statute must make a finding as to whether the relevant agency that communicated the information is a "gazetted agency". This was the decisive aspect of the exercise of judicial power performed by the court in Evans v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 135 FCR 306.

22. The plaintiff's complaint that the Act denies the courts the ability to engage in judicial fact-finding should therefore be understood as a complaint that the Act regulates the process of judicial fact-finding by making the confidentiality of certain information turn on particular objective criteria. That is, the Act attaches legal significance to certain facts which do not of their nature depend upon the court making an evaluative judgment by balancing different aspects of the public interest. Understood in these terms, there is nothing unorthodox about the Act. It is commonplace for legislation to specify the criteria by reference to which judicial

[12] Contra PAS [19].
[13] PAS at [15]-[16].

fact-finding occurs, including in purely objective terms. The determination of whether certain objective criteria are satisfied, based on facts as found by the court, is entirely in keeping with the "methods and standards which have characterised judicial activities in the past".[14]

23. The plaintiff refers to passages in K-Generation, Gypsy Jokers and Pompano in which the Court emphasised, as a factor pointing to constitutional validity, elements of the impugned statutory schemes that preserved aspects of judicial discretion in a manner that was analogous with common law procedures. Those passages must be understood in their proper context. In each case, the impugned State law had the effect of imposing a function on State courts and regulating the associated procedure in a way which contemplated the court relying on information that was kept confidential from one party. This in turn gave rise to a constitutional question of whether the exercise of such a function, in accordance with the statutory procedure, required the State court to act in a manner incompatible with its institutional integrity, including by compromising the independence of the court, requiring the court to act in a procedurally unfair way and/or dictating the exercise of judicial power.

24. In K-Generation, the statutory feature that was said to give rise to invalidity was the requirement for the court to maintain the confidentiality of information classified as criminal intelligence, in circumstances where the court itself could rely on that information in determining whether or not to grant a licence under the Liquor Licensing Act 1997 (SA). In Gypsy Jokers the relevant provision prohibited the disclosure of information that might prejudice the operations of the Commissioner of Police, in circumstances where the information was available for use by the court in reviewing a fortification warning notice. In Pompano the Supreme Court of Queensland was empowered to declare a particular organization to be a criminal organisation and for the purposes of determining an application for such a declaration the Court was authorised to conduct closed hearings during which it could receive *ex parte* criminal intelligence. In each case, the High Court considered the powers to be exercised and procedures to be applied by the State courts as a whole in order to assess whether there was an impairment of their institutional integrity. The continuing capacity of the court in each case to make an

[14] Thomas v Mowbray (2007) 233 CLR 307 at 355, [111].

independent evaluation of the confidentiality of the material that it was being asked to rely upon, without disclosure to the adversely affected party, was highlighted as a significant factor in avoiding invalidity.[15]

25. It is not appropriate to extrapolate from these cases a general proposition that "laws are less likely to be regarded as unconstitutional if they have a common law analogue or if they ensure that courts have the power (whether statutory or inherent) to maintain their independence and impartiality and safeguard the administration of justice".[16] Different considerations arise where a statute confers on a court a particular function and stipulates that the court may in the exercise of that function act on the basis of material which will not be disclosed to an affected party. That is far removed from the present case.

26. The plaintiff's list of factors indicative of repugnancy in PAS [31] does not withstand scrutiny. The first proposition is that institutional integrity suffers because information that is relevant to the exercise of power under review is immunised from production. The implicit premise is that it is an essential characteristic of the exercise of judicial power by Ch III courts that all relevant evidence that is available must be capable of being relied on by the court. That is plainly not so. For a variety of sound public policy reasons, recognised at common law and regulated by statute, litigants and courts may be denied the benefit of relevant evidence. As Spigelman CJ observed in Lodhi at 488, [69] "[i]t is a characteristic of all the forms of privilege which the common law has long recognised, that potentially relevant facts will be withheld from a litigant". The withholding of relevant evidence is one example of a broader class of qualifications to the judicial process that are justified by competing interests. As French CJ observed in Pompano at 78, [86]:

> That a law imposes a disadvantage on one party to proceedings in order to restrict, mitigate or avoid damage to legitimate competing interests does not mean that the defining characteristics of the court required to administer such a law are impermissibly impaired.

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[15] See, for example, Pompano at 102, [167].
[16] See PAS at [28].

27. In Church of Scientology Inc v Woodward (1982) 154 CLR 25 ("**Woodward**") at 76 Brennan J observed that "the public interest in national security will seldom yield to the public interest in the administration of justice".

28. The second of the plaintiff's propositions is that authorising members of the executive to certify that particular information must be treated confidentially impairs the independence of the court. Requiring a Ch III court to apply a law which happens to operate by reference to such an executive decision does not impair the "independence" of the court. It is an orthodox instance of the court applying the law as made by the legislature. The court's "independence" could only be impaired if the function of resolving the conflict between competing aspects of the public interest concerning the disclosure of sensitive information is a uniquely judicial function. For the reasons set out above, it is not.

29. The third item on the plaintiff's list focuses on the Minister's discretionary power to disclose material. That does not logically impact on the independence or impartiality of the court itself. In any event, that argument suggests that the constitutional vice lies in the Minister's power to disclose, rather than in the provisions requiring confidentiality to be maintained as the plaintiff otherwise contends.

30. The final item on the plaintiff's list is, in substance, a restatement of the first. The plaintiff's constitutional complaint is not advanced by pointing out that the information in question will not be available to the court and will not be taken into account in the judicial review of the Minister's decision. As noted above, the capacity of the relevant State court to rely on secret information was a factor that jeopardized, rather than helped safeguard, the independence and institutional integrity of the court in K-Generation, Pompano and Gypsy Jokers. The capacity of each court to safeguard its own processes by verifying the need for confidentiality, declining to exercise jurisdiction or by staying proceedings, was a relevant ameliorating factor only because of the one-sided nature of the process that the court was otherwise required to undertake. It was in that context that the High Court was concerned to ensure that the State courts were not being required to exercise judicial power in an unfair way, in particular by denying procedural

fairness to one party in the judicial proceedings.[17] Hence the observation of Hayne, Crennan, Kiefel and Bell JJ in Pompano at 100, [157]:

> ... if legislation provides for novel procedures which depart from the general rule [ie that opposing parties will know *what* case an opposing party seeks to make and *how* that party seeks to make it] ... , the question is whether, taken as a whole, the court's procedures for resolving the dispute accord both parties procedural fairness and avoid 'practical injustice'.

31. By contrast, in any judicial review of a decision by the Minister under s 501C of the Act, the parties and the Court will be treated equally in accordance with orthodox judicial process by reference to a body of material that is available to all. As there will be no prospect of the Court itself relying on the confidential information, no concern arises as to the Court being required to act in a procedurally unfair way.

Section 503A of the Act is not incompatible with s 75(v) of the Constitution

32. The plaintiff's alternative argument is that, contrary to s 75(v) of the Constitution, the statutory scheme has the practical effect of impairing judicial review of the Minister's decision by "denying the information upon which this depends".[18] The argument erroneously assumes that where the Constitution requires that certain courts retain the jurisdiction to review the validity of administrative decision making (whether through s 75(v) or through the entrenched jurisdiction of State Supreme Courts to review for jurisdictional error recognised in Kirk v Industrial Court (NSW) (2010) 239 CLR 531), it is a necessary incident of such jurisdiction that the Court have access to all of the material relevant to the decision under review. There is no such constitutional principle.

33. The rules of privilege mean that relevant evidence may be denied to both parties and courts, including in judicial review proceedings. That is just one example of an aspect of the public interest being accepted as prevailing over the public interest in the due administration of justice through relevant evidence being available to parties and courts.

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[17] See Pompano at 105, [177], 111, [197], 113, [204] per Gageler J.
[18] PAS at [36].

34. Public interest immunity is a further example. In Gypsy Jokers at 556, [24] Gummow, Hayne, Heydon and Kiefel JJ noted that the practical consequence of a successful claim for public interest immunity is that a court may determine an application for judicial review without the benefit of relevant evidence. While this situation handicaps an applicant forensically, the court is still engaged in an exercise of its ordinary jurisdiction. Their Honours quoted with approval the observations of Mason J in Woodward at 61 to the same effect.

35. In South Australia v Totani (2010) 242 CLR 1 the High Court rejected the conclusion of the South Australian Supreme Court that the provisions of the Serious and Organised Crime (Control) Act 2008 (SA), which prevented the disclosure of "criminal intelligence" (being information relevant to a decision by the Attorney General to declare an organisation) rendered such a decision unreviewable. Hayne J at 79, [195] acknowledged that the non-disclosure of relevant criminal intelligence would present "very large" forensic difficulties for a party seeking to challenge the validity of a decision. But it did not follow that the decision was unexaminable for jurisdictional error. French CJ, at 27-28, [27], and Crennan and Bell JJ at 153, [415] agreed with this passage. Heydon J (who was in dissent in the result) said at 105, [269] that the impugned provision was "simply an illustration of the difficulty created by the existence of immunities or privileges from production. The form which these immunities or privileges take represents the result of legislative or judicial choices between conflicting interests or principles."

36. Consistently with these authorities, the New South Wales Court of Appeal held in A v Independent Commission Against Corruption (2014) 88 NSWLR 240 at 245, [7], 255-256, [47]-[53], 277-279, [179]-[184] that s 111(3) of the Independent Commission Against Corruption Act 1988 (NSW), which confers a broad immunity from production, does not deprive the Supreme Court of its constitutionally entrenched judicial review jurisdiction.

37. No relevant analogy can be drawn between a law which regulates the information required to be disclosed in judicial review proceedings and a time bar which precludes applications for judicial review being made beyond a specified time, as considered in Bodruddaza v Minister for Immigration and Multicultural Affairs

(2007) 228 CLR 651 ("**Bodruddaza**").[19] The Court in Bodruddaza was concerned with laws which had the practical effect of preventing an applicant from engaging the jurisdiction of the Court under s 75(v), not with laws which may have the practical effect of making it more difficult for such an applicant to achieve success in the judicial review. Laws of the former kind have the practical effect, in certain circumstances, of denying the Court the jurisdiction entrenched by s 75(v). Laws of the latter kind do not. The plaintiff overstates the effect of the Act when he submits that it denies "the information upon which [judicial review] depends".[20] As the defendant and Attorney General of the Commonwealth, intervening, note in their joint submissions at [55], Ch III courts have in fact exercised their judicial review jurisdiction to set aside decisions made under the impugned provisions of the Act, notwithstanding the forensic handicap imposed on applicants for review: see Taulahi v Minister for Immigration and Border Protection [2016] FCAFC 177; Roach v Minister for Immigration and Border Protection [2016] FCA 750. Unlike in Bodruddaza, the plaintiff cannot point to circumstances in which the effect of the impugned provisions of the Act is that the jurisdiction to engage in such review cannot be invoked. At most, it can be said that certain applicants who do seek judicial review are less likely to succeed because they will not have access to all of the information that was relevant to the decision under review. Section 75(v) cannot be said to entrench a form of judicial review that requires all relevant information to be available to litigants. To hold otherwise would require a radical reworking of the law regarding, among other things, public interest immunity and privilege.

Part V: Estimated time for oral argument

38. The Attorney General for the State of NSW estimates that 20 minutes will be required for the presentation of oral argument.

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[19] Contra PAS at [34]-[35].
[20] PAS at [36].