IN THE COURT OF CRIMINAL APPEAL
NEW SOUTH WALES
BETWEEN:

No. 2010/402476

FILED
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SAS

MURSID KARIM
Applicant

AND

REGINA
Respondent

SUBMISSIONS OF THE AUSTRALIAN HUMAN RIGHTS COMMISSION ON APPLICATION FOR LEAVE TO INTERVENE

(1) INTRODUCTION

1. By application filed on 8 October 2012, the Australian Human Rights Commission (**the Commission**) seeks leave to intervene pursuant to s 23 of the *Supreme Court Act 1970* (NSW) and/or the Court's inherent jurisdiction.

2. The applicant seeks leave to appeal his sentence, given on 27 July 2011, of five years imprisonment, with a non-parole period of three years, being the mandatory minimum sentence and non-parole period applicable to the offence of people smuggling under s 232A(1) of the *Migration Act 1958* (Cth) (**the Act**), of which he was convicted.[1] The applicant claims that s 233C(2) of the Act prescribing the mandatory minimum sentence and non-parole period is invalid on the grounds that it:

   2.1. is not supported by a head of federal legislative power;

   2.2. involves a usurpation of the judicial power of the Commonwealth; and

   2.3. is inconsistent with Chapter III of the Commonwealth Constitution.

3. The Commission seeks leave to intervene in support of the applicant's contentions on the following issues raised by the applicant's grounds of appeal:

   3.1. the relevance of the common law to the concepts of judicial power and the judicial process contemplated by Chapter III of the Constitution;

   3.2. the influence of international human rights on the development of the common law;

   3.3. the content of international human rights as they relate to mandatory minimum sentencing regimes; and

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1 Following the commission of the offence (22 April 2010), s 233C has been replaced by s 236B of the *Migration Act*, which applies to the so-called aggravated offences created by ss 233B, 233C and 234A.

3.4. the relevance of international human rights, as they relate to mandatory minimum sentencing regimes, to the concepts of judicial power and judicial process.

(2) BACKGROUND

4. The Commission adopts the factual background stated in the applicant's submissions (dated 2 May 2012) at [5]-[10].

(3) SUBMISSIONS ON THE APPLICATION FOR LEAVE TO INTERVENE

(a) Basis of the application

5. The Commission has the statutory function of intervening in legal proceedings that involve human rights issues where the Commission considers it appropriate to do so and with the leave of the court hearing the proceedings, subject to any conditions imposed by the court:[2] *Australian Human Rights Commission Act 1986* (Cth) (**the AHRC Act**), s 11(1)(o). The phrase "*human rights*" is defined in s 3 of the AHRC Act to include the rights and freedoms recognised by the 1966 International Covenant on Civil and Political Rights (**the Covenant**),[3] as the Covenant applies in relation to Australia.[4]

6. The Supreme Court of New South Wales has all jurisdiction which may be necessary for the administration of justice in New South Wales: s 23 of the *Supreme Court Act 1970* (NSW). The Court also has the power to grant leave to an individual to be joined as an intervener or as *amicus curiae* flowing from the Court's inherent jurisdiction to regulate its own procedures.[5] *A fortiori*, the Supreme Court sitting as the Court of Criminal Appeal has the inherent jurisdiction to permit intervention by a person with "*sufficient interest*" in the proceeding.[6]

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2 Leave to intervene does not afford a free licence to an intervener to address the court on issues beyond those affecting the special interest of the intervener: *The Queen v The Commonwealth Court of Conciliation and Arbitration; ex parte Ellis* (1954) 90 CLR 55 at 69 (Kitto J). The application for intervention proposes that the grant of leave be limited to the provision of a written outline of submissions (paragraph 3) in respect of certain issues (enumerated in paragraph 2).

3 [1980] ATS 23, which (except for Article 41) came into force generally on 28 March 1979, and for Australia on 28 January 1993 (having ratified the Covenant on 13 August 1980).

4 "*Covenant*" is defined in s 3 of the AHRC Act to mean the International Covenant on Civil and Political Rights, a copy of the English text of which is set out in Schedule 2 to the AHRC Act, as it applies to Australia.

5 See *Levy v State of Victoria* (1997) 189 CLR 579 at 601 (Brennan CJ). The general responsibility of the Supreme Court as a superior court of record of unlimited jurisdiction gives rise to its inherent power: see *Grassby v The Queen* (1989) 168 CLR 1 at 16 (Dawson J).

6 *Rushby v Roberts* [1983] 1 NSWLR 350 at 353G (Street CJ). Such an interest, also referred to as a "*substantial interest, a legal interest or one which is known and protected by the law*" (*R v Ludeke; ex parte The Customs Officers' Association of*

7. The Commission has the requisite legal interest by virtue of its statutory function, and considers it appropriate to intervene to the extent that the proceeding involves human rights issues; namely, the prohibition on torture or cruel or degrading treatment or punishment (Article 7, Covenant); the prohibition on arbitrary detention (Article 9(1), Covenant); the guarantee of a fair hearing (Article 14(1), Covenant); and, the right of appeal in criminal matters (Article 14(5), Covenant).[7] All three grounds of appeal are concerned with the nature of judicial power, in respect of which international human rights principles (through their influence upon the common law) are instructive.

(b) Reasons why leave to intervene should be granted

8. Leave to intervene should be granted in the exercise of the Court's discretion for the following reasons.[8]

 8.1. The Commission is an independent statutory body established by the AHRC Act vested with specific functions and responsibilities for the protection and promotion of human rights (as defined in the Act). This includes the function under s 11(1)(o) of the AHRC Act to seek leave to intervene in proceedings that involve human rights issues, such as the present case.

 8.2. The Commission has an interest and expertise in relation to the interpretation and application of Australia's international human rights obligations under customary international law and international conventions to which Australia is a party, including the Covenant.

 8.3. For the reasons developed in the body of the submissions that the Commission would make if leave is granted, universal human rights, including those embodied in the Covenant, are a legitimate source of influence upon the development of the common law of Australia which in turn supplies the content of the concept of judicial process protected by Chapter III of the Constitution.

 8.4. The applicant's submissions dated 2 May 2012 do not address the role or impact of international human rights principles on the sentencing exercise prescribed by s 233C of the *Migration Act*. The Commission may offer the Court assistance in relation to an understanding of the nature of judicial power that will likely not be offered by other parties.[9] As such, the Commission may provide submissions (developed below) that will contribute to the Court's reaching an informed decision. It is submitted

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Australia (1985) 155 CLR 513 at 522, per Mason J, in relation to statutory powers of intervention) is said to extend beyond intervention to contend for that which the proposed intervener considers to be a desirable state of the law: *Australian Railways Union v Victoria Railways Commissioners* (1930) 44 CLR 319 at 331 (Dixon J).

7 See Affidavit of Gillian Doreen Triggs sworn on 8 October 2012, para 6 et seq. See paragraphs 15-21 below as to the proper boundaries within which regard may be had to developments in international law in constitutional interpretation.

8 The discretion is said to be a broad one: *The Queen v The Commonwealth Court of Conciliation and Arbitration; ex parte Ellis* (1954) 90 CLR 55 at 68 (Kitto J).

9 See *Levy v Victoria* (1997) 189 CLR 579 at 603-4 (Brennan J).

that the significance of those arguments is sufficient to outweigh any expense and/or delay that may be caused to the parties by such intervention.[10]

8.5. This Court does not have the benefit of earlier judicial consideration in this country of the manner in which international human rights might apply in the context of mandatory sentencing (pursuant to s 233C of the Migration Act).

8.6. Finally, Article 50 of the Covenant provides that its provisions "*extend to all parts of federal States without any limitations or exceptions*". Compliance by Australia with its obligation to observe universal human rights depends in large part upon the interpretation and application of laws by State and Territory courts, and development of the single common law of Australia, consistently with those obligations.[11]

(4) ARGUMENT ON THE APPEAL IF LEAVE TO INTERVENE IS GRANTED

(a) Summary of principal contentions

9. At the relevant time, s 232A(1) of the *Migration Act* provided that:

"A person who:

(a) organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of 5 or more people to whom subsection 42(1) applies; and

(b) does so recklessly as to whether the people had, or have, a lawful right to come to Australia;

is guilty of an offence punishable, on conviction, by imprisonment for 20 years or 2,000 penalty units, or both."

10. Mandatory minimum penalties were prescribed for this offence at the relevant time by s 233C(2) and (3) of the *Migration Act*. Specifically, those provisions prescribed a sentence of imprisonment of at least 5 years and a minimum non-parole period of at least 3 years save where the offence is a repeat offence, in which case the minimum sentence of imprisonment that a court could impose was 8 years together with a minimum non-parole period of 5 years. In addition, s 233B of the Act excluded the statutory discretion under s 19B of the *Crimes*

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10 See *Levy v Victoria* (1997) 189 CLR 579 at 601 at 603 (Brennan J).

11 *Mabo v The State of Queensland (No 2)* (1992) 175 CLR 1 at 42 (Brennan J, with whom Mason CJ and McHugh J agreed). See also *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 288, 291 (Mason CJ and Deane J). Notwithstanding the doubt cast upon the correctness of *Teoh* in holding that ratification alone gives rise to a legitimate expectation that the norms contained in the convention will be taken into account by decision-makers (*Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1), it is submitted that no issue could be taken with the statement by Mason CJ and Deane J (at 291) that ratification is a positive statement by the executive government to the world that the executive government and its agencies will act in accordance with the Convention.

Act 1914 (Cth) to make an order to discharge the accused without proceeding to conviction (save where the accused was a minor).

11. For the reasons developed below, the Commission makes the following submissions:

    11.1. first, the common law provides content to the concepts of a fair trial and proper judicial process protected by implication by Chapter III of the Constitution, the precise content of which will change over time in line with contemporary values and standards;

    11.2. secondly, international human rights are an important and a legitimate influence on the development of the common law, including in relation to the concept of a fair trial and proper judicial process;

    11.3. thirdly, international human rights jurisprudence suggests that a sentencing process that prevents courts from considering the individual circumstances surrounding the offence and the offender in determining an appropriate sentence will not constitute a fair trial nor proper judicial process; and

    11.4. finally, in determining the content of the common law, any sentencing exercise that prevents a court from considering the individual circumstances surrounding the offence and the offender in determining an appropriate sentence, should equally be regarded as an anathema.

(b) Relevance of the common law to constitutional interpretation

12. The applicant contends (correctly in the Comission's submission) that the sentencing exercise prescribed by s 233C of the *Migration Act* requires courts exercising federal jurisdiction to:

    12.1. depart from the judicial process contemplated by Chapter III of the Constitution, which requires that federal judicial power be exercised in accordance with fundamental principles of equal justice, and not capriciously or arbitrarily (grounds 1 & 2); and

    12.2. act in accordance with the dictate of Parliament in prescribing a mandatory minimum sentence and non-parole period, thereby impairing the independence and impartiality of the courts (ground 3).

13. As to the former, the fundamental principles that determine proper judicial process consistent with the character of the court and the nature of judicial power are drawn from the common law. These include equality before the law and a fair trial according to law by a court that is both independent and impartial, and is perceived to be so.[12]

14. As to the latter, the separation of the judicial function from the other functions of government advances two constitutional objectives: (i) the guarantee of liberty; and, to that end, (ii) the real and perceived independence and impartiality of

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[12] *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at [56] (Gleeson CJ, Gaudron, MuHugh, Gummow, Hayne and Callinan JJ); *Nicholas v R* (1998) 193 CLR 173 at 208-209 (Gaudron J).

Chapter III courts and judges.[13] It has long been held that, by implication, s 71, when read with ss 1 and 61 of the Constitution, prohibits the Parliament of the Commonwealth from exercising the judicial power of the Commonwealth.[14]

15. Constitutional principles, including those governing the exercise of judicial power, may be interpreted and applied having regard to the changing context of contemporary values,[15] which, in turn, includes international values or standards as reflected in the common law. This is not to suggest that that the Constitution must be read to conform to, or so far as possible with, the rules of international law.[16] Rather, later generations may, as a consequence of political, social or economic developments both within and outside Australia, deduce propositions from the words of the Constitution that earlier generations did not perceive (McHugh J in *Al-Kateb* at [69]). As McHugh J in *Al-Kateb* explained further (at [71]):

> "*No doubt from time to time the making or existence of (say) a[n international] Convention or its consequences may constitute a general political, social or economic development that helps to elucidate the meaning of a constitutional head of power. But that is different from using the rules in that Convention to control the meaning of a constitutional head of power.*"[17]

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[13] *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ). See also *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 11 (Jacobs J); *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at [40] (Gleeson CJ, Gaudron, Gummow, McHugh, Hayne and Callinan JJ), where the determination of criminal guilt is viewed as one of the basic rights necessarily protected and enforced by the judicial branch of government.

[14] See, for example, *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330; *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434; *Victorian Stevedoring & General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 97 and 98 (Dixon J); *The Queen v Davison* (1954) 90 CLR 353 at 364-365 (Dixon CJ and McTiernan J), 380-381 (Kitto J); *R v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 249-50 (Mason J); *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 26 (Brennan, Deane and Dawson JJ), 54-55 (Gaudron J), 66 (McHugh J).

[15] See, for example, *Victoria v Commonwealth* (1971) 122 CLR 353 at 396-397 (Windeyer J); *Cheatle v The Queen* (1993) 177 CLR 541 at 549, 552, 560-1; *Singh v Commonwealth* (2004) 222 CLR 322 at [18], [27] (Gleeson CJ), [159]-[160] (Gummow, Hayne and Heydon JJ), [249] (Kirby J); *Roach v Electoral Commissioner* (2007) 233 CLR 162 at [6]-[7] (Gleeson CJ).

[16] *Al-Kateb v Godwin* (2004) 219 CLR 562 at [69], [71] (McHugh J).

[17] McHugh J explained further (at [72]) that, in *Lawrence v Texas* (2003) 539 US 558, Kennedy J (delivering the majority decision) relied on a decision of the European Court of Human Rights to rebut the claim made in the earlier United States case of *Bowers v Hardwick* (1986) 478 US 186 that private homosexual acts had been subject to state intervention throughout the history of Western civilization. The Supreme Court did not apply any *rule* of international law. It used European case law to reject the major premise of *Bowers* that the Due Process Clause of the US Constitution did not protect private homosexual conduct because such conduct had been condemned throughout the history of Western civilisation.

16. Similarly, Gleeson CJ pointed out in *Roach v Electoral Commissioner* (2007) 233 CLR 162 at [7], that "*changed historical circumstances*" include "*legislative history*", which circumstances are constitutionally relevant and render the words in ss 7 and 24 of the Constitution (which require that the senators and members of the House of representatives be "*directly chosen by the people*" of the State or the Commonwealth respectively) as a constitutional protection of universal adult suffrage.[18] This is so notwithstanding that in 1901 those words did not mandate that standard.

17. As Gleeson CJ explained in *Singh v Commonwealth* (2004) 222 CLR 322 at [6]:

> "*It is in the nature of a written, federal Constitution that a division of governmental power, necessarily involving limitations upon such power, agreed upon in the past, binds future governments. That the terms of the agreement were to have that future operation is a matter relevant to an understanding of their meaning, but the role of a court is to understand and apply the meaning of the terms, not to alter the agreement.*"

18. Furthermore, in explaining that meaning is always influenced, and sometimes controlled, by context, the Chief Justice explained (at [12]) that context:

> "*... includes the whole of the instrument, its nature and purpose, the time when it was written and came into legal effect, other facts and circumstances, including the state of the law, within the knowledge or contemplation of the framers and legislators who prepared the Constitution or secured its enactment, and developments, over time, in the national **and international** context in which the instrument is to be applied.*" [emphasis added]

19. The Chief Justice concluded (at [18]) that: "*Changing times, and new problems, may require the Court to explore the potential inherent in the meaning of the words, applying established techniques of legal interpretation.*"[19]

20. Equally in determining whether the Parliament is impermissibly interfering with the character of a court as a Chapter III court or with the exercise of judicial power, developments in the national and international context may provide meaning to the proper judicial process and function.

21. These principles mark the proper limits within which international law is brought to bear upon the interpretation and application of constitutional principles.

(c) Relevance of international law to the development of common law

22. Applying these principles, it is legitimate for the court to have regard to international human rights setting the minimum requirements of a fair trial and proper judicial process in determining the content of those concepts at common law today.

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[18] See also *Mulholland v Australian Electoral Commissioner* (2004) 220 CLR 181 at [232]-[233] (Kirby J).

[19] See also *Singh v Commonwealth* (2004) 222 CLR 322 at [37] (McHugh J); [249] (Kirby J); cf. Callinan J at [295].

23. Thus it has long been recognised that the development of common law principles is susceptible to the influence of international customary law and treaty obligations.[20] As Brennan J (with whom Mason CJ and McHugh J agreed) stated in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42:

> "*The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.*"[21]

24. The development of sentencing principles in the criminal law in conformity with Australia's international human rights obligations would accord with the contemporary values of the Australian people. As Kirby P (as he then was) stated in *R v Greer* (1992) 62 A Crim R 442 at 450, the basic rights expressed in the Covenant are rights that the common law in Australia will ordinarily respect.[22] Those rights are of significance in determining what the common law provides.[23]

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[20] See also *Dietrich v The Queen* (1992) 177 CLR 292 at 306-307 (Mason CJ and McHugh J: where the approach at international law was similar to that which the Australian common law must take), 319-321 (Brennan J: responsibility for keeping common law consonant with contemporary values), 337 (Deane J: trial will be unfair if does not accord with Covenant right), 360 (Toohey J: where the common law is unclear, an international instrument may be used by a court as a guide to that law, citing Kirby P in *Jago v District Court (NSW)* (1989) 12 NSWLR 558 at 569), 373-374 (Gaudron J: drawing upon comparative law on the question of legal representation); *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 499 (Mason CJ and Toohey J).

[21] His Honour held (at 42) that a common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration as it is contrary both to international standards and to the fundamental values of the common law to entrench such a discriminatory rule. It has also been said that where the common law is uncertain, the Court should prefer an answer in conformity with international norms: *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 at 688E (Gleeson CJ), 699D, 709F (Kirby P). It would be incongruous that Australia should adhere to the Covenant unless Australian courts recognise the entitlements contained therein: *Dietrich v The Queen* (1992) 177 CLR 292 at 321 (Brennan J).

[22] For example, in *Australian National Industries Ltd v Spedley Securities & Ors* (1992) 26 NSWLR 411 at 418E, Kirby P stated that the High Court evidenced a clear tendency to uphold the very high standards of manifest neutrality and impartiality which are to be observed by every judicial officer in the courts of Australia, but that such instruction does no more than to reflect a "*fundamental principle of the international law of human rights*", namely Article 14(1) of the Covenant (see below). Similarly, in *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683, Kirby P (with whom Campbell and James JJ agreed) stated (at 692D) that the right of a person convicted of an offence to have a conviction and sentence

25. The sentencing exercise prescribed by s 233C of the *Migration Act* raises issues relating to human rights in relation to which Australia, as a result of ratifying a number of international human rights treaties (including the Covenant) has assumed obligations to "*respect and to ensure*" to all individuals within its territory and subject to its jurisdiction (Article 2(1) of the Covenant).

(d) Application of relevant international human rights

26. Relevant international human rights principles encompass the prohibition of arbitrary detention, and of cruel, inhuman or degrading treatment or punishment, as well as the guarantee of fair hearing, including the right of review of conviction and sentence. They are concerned both with the appropriate body to determine sentence, as well as the (rational or proportionate) correlation of the sentence with the circumstances of the offence and the offender. As such, they confirm the universality of the common law principles upon which the applicant seeks to rely and, more particularly, the way in which those human rights have been interpreted and applied internationally is supportive of the applicant's contention that a mandatory minimum sentence is inconsistent with those principles.

(i) Prohibition of cruel, inhuman or degrading treatment of punishment

27. Article 7 of the Covenant provides, relevantly, that: "*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. ...*".[24] A review of international authority reveals that an irreducible mandatory sentence is likely to be viewed as "*grossly disproportionate*" to the gravity of the crime at the moment of its imposition, by virtue of requiring the sentencing court to disregard mitigating factors that are generally understood as indicating a significantly lower level of culpability on the part of the defendant. This has been held recently by the European Court of Human Rights in *Vinter & Ors v United Kingdom* [2012] ECHR 61 to constitute inhuman or degrading punishment contrary to Article 3 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (**European Convention**) (the equivalent of Article 7 of the Covenant) "*or equivalent constitutional norms*".[25]

"*reviewed by a higher tribunal according to law*" is recognised as a fundamental human right by Article 14(5) of the Covenant.

23 See *Civil Aviation Authority v Australian Broadcasting Corporation* (1995) 39 NSWLR 540 at 558C (Kirby P). His Honour also refers to the common law as "*illuminated by international principles of human rights*" (*Director of Public Prosecutions for the Commonwealth v Saxon* (1992) 28 NSWLR 263 at 274D).

24 In *R v Boyd* (1995) 81 A Crim R 260, in determining the question of severity of sentence, Gleeson CJ considered (at 260-269) that, while the prohibition of cruel and unusual punishment was to be found in the *Bill of Rights 1688* (UK), which was in force in New South Wales as a result of the *Imperial Acts Application Act 1969* (NSW), if the punishment in question were cruel and unusual, then the appellant would be entitled to succeed on ordinary principles, without resort to the Bill of Rights.

25 See the survey of international and comparative law in the decision of the European Court of Human Rights in *Vinter & Ors v United Kingdom* [2012] ECHR 61(17 January 2012) at [55]-[73] (imposition under the *Criminal Justice Act 2003* (UK) of a mandatory life sentence without the possibility of parole was found not, in the circumstances of

28. In so holding, the European Court of Human Rights explained that "*gross disproportionality*" is a widely accepted and applied test for determining when a sentence will amount to inhuman or degrading punishment (or equivalent constitutional norms), but that it will only be on rare occasions that the test will be met.[26] However, the Court pointed out that:

> "*The vice of any mandatory sentence is that it deprives the defendant of any possibility to put any mitigating factors or special circumstances before the sentencing court.*"[27]

29. The Court considered that a mandatory sentence of life imprisonment without the possibility of parole is not *per se* incompatible with the European Convention.[28] Rather, such a sentence is:

> "*...much more likely to be grossly disproportionate than any of the other types of life sentences, especially if it required the sentencing court to disregard mitigating factors which are generally understood as indicating a significantly lower level of culpability on the part of the defendant*".

30. Moreover, even in the absence of "*gross disproportionality*", the Court considered that an issue will arise for the purpose of the prohibition of cruel, inhuman or degrading punishment, if it can be shown that: (i) the applicant's continued sentence can no longer be justified on any penological ground; and (ii) the sentence is irreducible *de facto* and *de iure*.[29]

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the instant case, to violate Article 3 of the European Convention). This case-by-case assessment of "*gross disproportionality*" is followed by the Supreme Court of Canada (in application of s 12 of the Canadian Charter of Rights and Freedoms, which provides that everyone has the right not to be subjected to cruel and unusual treatment or punishment): see, for example, *R v Smith (Edward Dewey)* [1987] 1 SCR 1045 (a mandatory minimum sentence of 7 years imprisonment for a narcotics offence was found to be grossly disproportionate); *R v Latimer* [2001] 1 SCR 3 (a mandatory minimum sentence of life imprisonment without eligibility for parole for 10 years for murder was not considered grossly disproportionate). See also the Constitutional Court of South Africa in, for example, *Dodo v The State* 2001 (3) SA 382 (5 April 2001) (Ackerman J) (statutory provision which required High Court to impose life sentence for murder in certain aggravated circumstances unless "*substantial and compelling circumstances*" existed did not infringe the separation of powers principle). The US Supreme Court has followed a similar approach in consideration of the Eighth Amendment (prohibiting cruel and inhuman punishment) in, for example, *Harmelin v Michigan* 501 US 956 (1991) (imposition of mandatory term of life in prison without possibility of parole for cocaine possession was not unconstitutional).

26 *Vinter & Ors v United Kingdom* [2012] ECHR 61(17 January 2012) at [88]-[89].

27 *Vinter & Ors v United Kingdom* [2012] ECHR 61(17 January 2012) at [93].

28 *Vinter & Ors v United Kingdom* [2012] ECHR 61(17 January 2012) at [93].

29 *Vinter & Ors v United Kingdom* [2012] ECHR 61(17 January 2012) at [93]. This approach is followed in the United Kingdom: see, for example, *R (Wellington) v Secretary of State for the Home Department* [2009] 1 AC 335 (House of Lords) (a mandatory life sentence without possibility of parole was *de jure* reducible where the governor had the power to pardon a prisoner or commute the sentence to one of imprisonment with the possibility of parole).

31. Consequently, even though the Court assessment of "*gross disproportionality*" in this context suggests a case-by-case approach, the Court nonetheless indicated that the Article 3 prohibition may be contravened where the sentence cannot be justified and that sentence is irreducible. In any event, this assessment of proportionality in the context of the Article 3 prohibition relates exclusively to the impact upon the offender,[30] such as to warrant cruel or inhuman punishment. It does not limit the assessment of proportionality in the context of ***other*** international human rights, which are considered below.

(ii) Prohibition of arbitrary detention and guarantee of a fair hearing

32. The assessment of 'proportionality' is also relevant to the assessment of the arbitrary nature of the deprivation of liberty, as provided for in Article 9(1) of the Covenant, as well as to the provision of equal justice and the characterisation of the court as "*independent and impartial*", in accordance with Article 14(1) of the Covenant.

33. Article 9(1) of the Covenant provides that: "*Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*"

34. The core notion in Article 9(1) is that of the ***arbitrary*** deprivation of liberty. This is where the notion of proportionality is critical. Thus, where there is no rational or proportionate correlation between the deprivation of liberty (in the present case, in terms of the imposition of a custodial sentence) and the circumstances of the offence and the offender – relevantly by virtue of the fact that no such assessment is permitted by the statutory sentencing regime in relation to the minimum sentence and non-parole period - it can be said that the deprivation of liberty is arbitrary. Moreover, the deprivation may be characterised as arbitrary at the point of the statutory imposition of the minimum sentence. In other words, the question of proportionality or 'arbitrariness' need not be assessed on a case-by-case basis but can in this context be determined *a priori*.[31]

35. Article 14(1) of the Covenant provides that:

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[30] See the Joint Partly Dissenting Opinion of Judges Garlicki, David Thor Bjorgvinsson and Nicolaou in *Vinter & Ors v United Kingdom* [2012] ECHR 61, who held that there was a "*procedural infringement*" by reason of the absence of some mechanism that would remove the hopelessness inherent in a sentence of life imprisonment from which, independently of the circumstances, there is no possibility whatsoever of release while the prisoner is still well enough to have any sort of life outside of prison. While this assessment focuses on the impact on the offender, as warranted by consideration of violation of Article 3 of the European Convention, their Honours suggested a systemic violation of the provision (at the point of imposition of the sentence) where the individual circumstances of the offender bear no relevance to continuity of punishment.

[31] This is to be distinguished from the approach of the European Court of Human Rights, as well as that of the United Kingdom and Canadian courts, to "*gross disproportionality*" in the context of the prohibition of cruel, inhuman or degrading treatment of punishment.

> *"All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. ...".*

36. The right provided for in this article is enshrined in many international human rights instruments,[32] and is essential to the maintenance of a free and democratic society based on the rule of law.[33] For example, Article 2.02 of the Universal Declaration on the Independence of Justice (cited *inter alia* by Gleeson CJ in *Northern Aboriginal Legal Aid Service v Bradley)*[34] states that:

> *"Judges individually shall be free, and it shall be their duty, to decide matters before them impartially, in accordance with their assessment of the facts and their understanding of the law without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."*

37. It has been held that this human right requires both a rational or proportionate correlation between the sentence and the circumstances of the offence and offender:

    37.1. so as to provide for equal justice, which requires identity of outcome in cases that are relevantly identical, and a different outcome in cases that are relevantly different; and

    37.2. so as to ensure that the ***judiciary*** determines the appropriate custodial sentence in accordance with the requirement of a fair hearing by an independent and impartial tribunal, the sentencing function being a classic exercise of judicial power.

38. Thus, in the context of the imposition by the Home Secretary of a minimum non-parole period for murder ('the tariff') pursuant to s 29 of the *Crime (Sentences) Act 1997* (UK), the House of Lords has held that, notwithstanding that the Constitution of the United Kingdom has "*never embraced a rigid doctrine of separation of powers*",[35] Article 6(1) of the European Convention[36]

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[32] For example, Article 10 of the 1948 Universal Declaration of Human Rights (UN Doc. A/811) provides: *"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."* See also Article 2.02 of the Universal Declaration of the Independence of Justice and in the Beijing Statement of Principles of the Independence of the Judiciary In the LAWASIA Region (cited by Gleeson CJ in *Northern Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at [3]). See also *Johnson v Johnson* (2000) 201 CLR 488 at [36]-[39] (Kirby J).

[33] *Mackin v New Brunswick (Minister of Finance)* [2002] 1 SCR 405 at [34]; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3 at [9]-[10].

[34] (2004) 206 ALR 315 at [3]. See also *Mackin v New Brunswick (Minister of Finance)* [2002] 1 SCR 405 at [35].

[35] *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 at 886 [39] (Lord Steyn).

(which equates to Article 14(1) of the Convenant) "*requires effective separation between the courts and the executive, and further requires that what can in shorthand be called judicial functions may only be discharged by the courts*".[37] To that end, the House of Lords considered that in fixing the tariff, the Home Secretary "*assesses the term of imprisonment which the offender should serve as punishment for his crime*". The Court concluded that this was a "*classical sentencing function*" and could not be performed by the Home Secretary as a member of the executive.[38] Accordingly, s 29 of the *Crime (Sentences) Act* was held to be incompatible with Article 6(1) of the European Convention.[39]

39. The finding of incompatibility in that case was based on the determination by the Home Secretary of the minimum period of a sentence following conviction (albeit taking into account the circumstances of the offender). Equally, it must follow that the determination by the legislature of a minimum period of sentence *prior to* conviction in circumstances that deny the sentencing court the power to determine a minimum sentence based on the individual circumstances of the offence and the offender offends the separation of powers and is contrary to the human right in Article 14(1) of the Covenant.

(iii) Right to review of sentence

40. Furthermore, an irreducible mandatory sentence deprives the applicant of the right to appeal his sentence (on the basis of factors peculiar to the offence and the offender), contrary to Article 14(5) of the Covenant. This Article provides that: "*Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.*"

41. The United Nations Human Rights Committee[40] took the view in *Cesario Gomez Vazquez v Spain* (Communication No. 701/1996, UN Doc

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36 Article 6(1) of the European Convention on Human Rights provides that: "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*"

37 *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 at 886 [40] (Lord Steyn). His Lordship noted that it has been long settled in Australia that the power to determine responsibility for a crime, and punishment for its commission, is a function which belongs exclusively to the Courts. The underlying idea, based on the rule of law, is a characteristic feature of democracies, and is the context in which Article 6(1) should be construed (at 891C-D [50]).

38 *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 at 876E [13] (Lord Bingham). See also at 892C-D [52] (Lord Steyn); 899F [76] and 900D [78] (Lord Hutton).

39 This led to the enactment of Chapter 7 of the *Criminal Justice Act 2003* (UK) and schedules 21 and 22 to that Act, which were the subject of the consideration of the European Court of Human Rights in *Vinter & Ors v United Kingdom* [2012] ECHR 61 (17 January 2012).

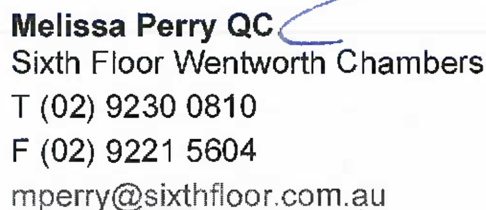
40 The United Nations Human Rights Committee is established under Article 28 of the Covenant and is comprised of experts who are nationals of States parties to the Covenant, monitor compliance of States with the Covenant, and consider complaints of breaches of the Covenant where (as is the case with respect to Autralia) a State is a party to the Optional Protocol to the Covenant. While general comments by the

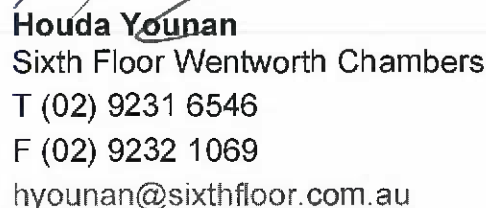
CCPR/C/69/D/701/1996 (2000) adopted 11 August 2000) at [11.1] that *"the lack of any possibility of fully reviewing [the complainant's] conviction and sentence, the review having been limited to the formal or legal aspects of the conviction, means that the guarantees provided for in article 14, paragraph 5, of the Covenant have not been met."* Specifically, in that case, the failure to make any provision on review for a re-evaluation of the evidence was critical (at [3.2]). The complainant was therefore found to have been denied the right to a review of his conviction and sentence contrary to Article 14(5) of the Covenant. Equally, on that view, it would follow that the absence of the capacity on appeal to evaluate any evidence that could potentially mitigate the mandatory minimum sentence imposed, constitutes a violation of the human right protected by Article 14(5).

(5) CONCLUSION

42. A consideration of relevant international jurisprudence leads to the conclusion that a sentencing exercise that prevents a court from considering the individual circumstances surrounding the offence and the offender in determining an appropriate sentence constitutes a violation of the rights guaranteed by Articles 9(1), 14(1) and 14(5) of the Covenant. These articles enshrine rights that equally form part of the common law of Australia, and receive constitutional protection against legislative impariment to the extent that they speak to the guarantee of liberty and the independence of Chapter III courts. As such, the assessment of proportionality undertaken by foreign and international bodies in the context of Articles 9 and 14 of the Covenant, is instructive in determining the application of those constitutional principles, and supportive of the result for which the applicant contends.

Dated: 26 October 2012





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Committee are not binding upon States, nonetheless they are regarded as persuasive as to the interpretation of the Covenant.