HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY B11 of 2024

BETWEEN

RODNEY MICHAEL CHERRY
Plaintiff

STATE OF QUEENSLAND
Defendant

OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

Part I Form of Submissions

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

Part II Argument

2. Section 175L of the Corrective Services Act 2006 (Qld) ("CS Act") does not impermissibly grant judicial power to the Parole Board Queensland ("Parole Board") to alter or vary a sentence imposed by the Supreme Court through the making of a "no cooperation declaration".

3. Section 175L does not confer judicial power on the executive. As Gordon ACJ, Steward and Gleeson JJ stated in R v Hatahet (2024) 98 ALJR 853 ("Hatahet") at 869 [19], there is a "fundamental distinction between the judicial function of sentencing an offender and the executive function of determining whether an offender should be released on parole". Once a person is sentenced, the judicial function is exhausted and the responsibility for the future release of the offender while still under sentence passes to the executive branch of government: see eg Baker v The Queen (2004) 223 CLR 513 at 528 [29]; Minogue v Victoria (2019) 268 CLR 1 ("Minogue") at 15 [14]; and Hatahet at 869 [19]. The making of a no cooperation declaration is an exercise of executive power which, in effect, does no more than alter the conditions that must be met before a prisoner can apply for, or be released on, parole: see submissions of the Attorney General for New South Wales ("NSW Submissions") at [15].

4. The making of a no cooperation declaration does not alter or vary the sentence imposed by the Supreme Court. The plaintiff's submission that it does so because a no cooperation declaration nullifies the non-parole period imposed by the sentencing judge (plaintiff's submissions ("PS") at [41]), and deprives the prisoner of the "opportunity" that was "granted" by the Supreme Court to be considered for release on parole at the expiry of his minimum term (PS [6]), is premised on a misapprehension as to the effect of a non-parole period. A determination of a minimum term does not "create any right or entitlement in the plaintiff to his release on parole" and, in that regard, has "no operative effect": Crump v State of New South Wales (2012) 147 CLR 1 ("Crump") at 26 [60]; NSW Submissions at [8]-[15] and [20].

5. At the time Dutney J sentenced the plaintiff to life imprisonment, his Honour's determination of a non-parole period gave rise to the *possibility* that the plaintiff may be released on parole after its expiry, subject to the statutory regime in force at the time. That was a statutory consequence, but not an element, of the sentencing judge's determination: Crump at 19 [35]; NSW Submissions at [15]. In this respect, the following comments of Kiefel CJ, Bell, Keane, Nettle and Gordon JJ in Minogue at 16-17 [16] may be applied to the plaintiff in this case:

> In the case of the plaintiff, at all times, there remained only one sentence – imprisonment for life. The fixing of the non-parole period … said nothing about whether the plaintiff would be released on parole at the end of that non-parole period. It left his life sentence unaffected as a judicial assessment of the gravity of the offence committed. Indeed, the plaintiff has no right to be released on parole and may be required to serve the whole of the head sentence. At best, the non-parole period provided the plaintiff with hope of an earlier conditional release but always subject to and in accordance with legislation in existence at the time governing consideration of any application for parole. Put in different terms, the fixing of a non-parole period does no more than provide a 'factum by reference to which the parole system' in existence at any one time will operate' (citations omitted).

6. The plaintiff attempts to distinguish the CS Act from the legislation considered in Crump, Knight v Victoria (2017) 261 CLR 306 ("Knight") and Minogue on the basis that, although the provisions considered in those cases "severely constrained" the circumstances in which the relevant parole authorities had power to grant parole, they did not render the offenders ineligible for parole, whereas the provisions of the CS Act do so (PS [5]-[6]; see also plaintiff's submissions in reply at [16]). This submission mischaracterises the "no body-no parole prisoner" scheme impugned in this case. Whilst

a prisoner who is subject to a no cooperation declaration is unable to make an application for parole whilst the declaration is in force, such a prisoner may apply to the President or a Deputy President of the Parole Board for the declaration to be reconsidered at any time, and the President and Deputy President have a discretion to call a meeting of the Parole Board to reconsider the making of the declaration at any time: ss 175R and 175T. If the Parole Board is satisfied that a prisoner has given satisfactory cooperation, the no cooperation declaration comes to an end (ss 175Q(c) and 175U(2)(a)), in which case the prisoner may make an application for parole.

7. In any event, the fact that the CS Act prevents prisoners from making an application for, and being released on, parole whilst a no cooperation declaration is in force does not render s 175L invalid. The power of the executive government of a State to order a prisoner's release on parole may be "broadened or constrained or even abolished by the legislature of the State": Crump at 19 [36].

8. The plaintiff's challenge to the validity of s 175E should also be rejected. Prisoners who are subject to a restricted prisoner declaration remain eligible for "exceptional circumstances parole", which can only be granted if the Parole Board is satisfied that the prisoner is in imminent danger of dying and is not physically able to cause harm to another person, or is incapacitated to the extent the prisoner is not physically able to cause harm to another person; the prisoner does not pose an unacceptable risk to the public; and the making of the parole order is justified in the circumstances. The legal and practical effect of a declaration of this kind is identical in substance to the legal and practical operation of the provisions found to be valid in Crump, Knight and Minogue.

Dated: 4 February 2025

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