



Précis Paper

Royal Prerogative of Mercy for People Smugglers and Statutory Referrals

A discussion of the recent decision in *Jasmin v The Queen* [2017] WASCA 122, and the treatment of individuals suspected of people smuggling offences who say that they are children

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1. In this edition of BenchTV, Sam Tierney (Senior Associate, Ken Cush & Associates, Canberra) and Ian Benson (Solicitor, AR Conolly & Company Lawyers, Sydney) discuss the recent decision in *Jasmin v The Queen* [2017] WASCA 122, and the treatment of individuals suspected of people smuggling offences who say that they are children.

Background

2. One evening, Jasmin was approached by an Indonesian gentleman who offered him some work carting goods between certain Indonesian islands. It is not uncommon in Indonesia for people to take up this type of piecemeal work, amongst fishing and other activities.
3. Jasmin accepted the job, was paid some money, and then put onto a boat with a number of other men that he did not know. That boat then set out into the ocean without touching land again.
4. 55 Afghani asylum seekers were transferred on to Jasmin's boat, which then proceeded to head out into international waters.
5. Jasmin's role in all of this was very minor – he was engaged to cook rice on the boat.
6. He had no intention of coming to, or staying in, Australia. Essentially, he was just a frightened young boy who played a very minor role in this whole affair.
7. The boat at one point started to sink. Fortunately, it was picked up by a customs boat and the asylum seekers were taken to immigration detention, and the crew members were likewise detained by customs and transferred to Darwin via Christmas Island.
8. Jasmin ultimately came to be in Darwin in late 2009.

Early proceedings

9. When Jasmin was in immigration detention in Darwin, he was interviewed by the officials there, during which he provided a date a birth which would have made him 14 yrs of age at the time.

10. A wrist x-ray was then undertaken. (The evils of the practice of wrist x-ray analysis as a means of assessing chronological age for the purposes of criminal prosecution were later revealed in this case.)
11. On the wrist x-ray analysis, it was determined that Jasmin was over 18 years of age, and a prosecution notice was issued by the Western Australian DPP, which cited a date of birth of 1990. This was contrary to the interviews he had given in which he had stated his year of birth to be 1996.
12. He was then transferred from immigration detention in Darwin to Hakea Prison in Perth, which is a maximum security prison for adult males, and where he was detained on remand.
13. He faced court in July 2010, at which point his solicitor at the time indicated to the court the concern that he was under the age of 18. The DPP indicated to the court that it would obtain an expert opinion as to the question of age from a clinical radiologist from WA.
14. Suffice it to say, the investigative process was very flawed – and through this flawed process, the AFP ultimately decided that aside from the birth certificate obtained via the Indonesian consulate, there was not sufficient evidence to withdraw the allegation that Jasmin was over 18.
15. There was a hearing in December 2010 before the WA District Court. At this time, no disclosure had been made by either the DPP or the defence as to the existence of the Indonesian birth certificate, of which an official translated copy had in fact been obtained.
16. The expert evidence was, however, put to the court. It was in later proceedings deemed by the court to have been extremely unreliable, and without scientific basis.
17. On the strength of the expert evidence, Jasmin was convicted in December 2010 for a 5 year term of imprisonment (with a 3 year mandatory non-parole period) under the *Migration Act 1958* (Cth).
18. The birth certificate stated Jasmin's year of birth to be 1996. The only reason Jasmin had said that he was born in 1990 was because the AFP had in fact told him that this was so.

Why did Jasmin receive such a long sentence?

19. The answer, in short, is because of the unfortunate operation of the relevant sections of the *Migration Act*, which is widely recognised as a draconian piece of legislation.
20. The offence under which Jasmin was charged - being aggravated people smuggling under s 233C of the *Migration Act 1958* (Cth) - is an absolute liability offence. This probably played a large part in why Jasmin pleaded guilty to the charge.

21. There would be of course very little evidence to dispute the necessary physical elements of this charge at a trial.
22. The operation of s 236B of the *Migration Act* then comes into force when the charge is made out. S 236B fixes a mandatory minimum penalty of 5 years imprisonment with a non-parole period of 3 years for someone in Jasmin's position, and so he was convicted and sent to prison.
23. In June 2011, after the conviction in December 2010, Jasmin instructed his then solicitor to run an appeal. The basis for the appeal was a challenge to the onus and standard of proof under s 233 of the *Migration Act*.
24. Unfortunately, the appeal was summarily dismissed by the Western Australian Supreme Court of Appeal. At this point, Jasmin resigned himself to having to serve out his time in the prison.

Australian Human Rights Commission Inquiry

25. It wasn't until the Australian Human Rights Commission in early 2012 began an inquiry into a number of children's cases (including Jasmin's) that attention was drawn to the high degree of unreliability of the wrist x-ray approach to determining age.
26. The President of the Human Rights Commission wrote to the Attorney-General about these issues. As a result, Jasmin was released on a licence by the Attorney-General and was repatriated back to Indonesia with a migration debt raised against him, which was essentially a warning not to come back to Australia or else he would be prosecuted under the migration debt as well.

Request for referral under the *Sentencing Act 1995* (WA)

27. At the time of his repatriation, LegalAid had made a request on Jasmin's behalf for his referral back to the WA Supreme Court. This referral process operates under s 140 of the *Sentencing Act 1995* (WA).
28. When Jasmin returned to Indonesia, he did not have access to lawyers, and assumed he did not have any rights to pursue anyway. When Sam and his firm were engaged in mid-2014, they wrote to the Attorney-General seeking that he act upon the request for referral, which was basically met with repeated stonewalling.

Judicial review & Federal Court proceedings

29. In December 2014, proceedings were filed in the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), seeking judicial review of this failure to make a decision. This was a decision to be made by the **Commonwealth** Attorney-General under the **Western Australian Sentencing Act**.
30. At first instance, Jasmin was not successful.
31. Once the proceedings were filed, the Australian Government Solicitor on behalf of the Attorney-General filed a notice challenging the competency of the proceedings on the basis that the Attorney-General had no duty to consider the request.
32. This time, the argument succeeded. It came down to a question of statutory interpretation – specifically, whether or not the referral power was divorced from the Royal Prerogative of Mercy. It was put by the Attorney-General that the referral power was tied to the Royal Prerogative of Mercy, which the High Court has determined for a number of years now is not capable of review by the courts.
33. It was Jasmin's position that the request for referral was a separate power, and was therefore amenable to review by the court.

Appeal to the Full Court of the Federal Court

34. After having been unsuccessful at first instance, an appeal was filed against the decision and heard by the Full Federal Court.
35. The Full Court found that there was in fact a duty on the part of the Attorney-General to consider the request for referral. It did so on a number of interesting bases, including:
 - the context of s 140 of the *Sentencing Act* as it sat within the broader scheme. This strongly supported the proposition that there was actually a difference between the Royal Prerogative and the referral power.
 - the nature of the referral power itself. The importance of the Attorney-General as the first law officer having the ability to re-open cases where necessary/where a miscarriage of justice has occurred weighed heavily on the Court's mind.
36. The relevant section from the judgment reads as follows:

The need to be able to correct a miscarriage of justice is a fundamental aspect of any system of criminal justice. It is more than a function performed to secure the interests of the individual who has been affected by the miscarriage of justice. It is integral to public confidence in the criminal justice system, and to ensuring

the system operates fairly and within the law, while acknowledging that any system operates imperfectly and what is important is that there is always a capacity for correction.

s 68 of the *Judiciary Act 1903* (Cth) & the question of jurisdiction

37. S 68 engages the power of the Attorney-General to act in relation to certain proceedings. There was some discussion in the decision about whether or not the scope of these proceedings encompassed the referral powers.
38. It was ultimately decided by both the Full Federal Court and the WA Court of Appeal that the Attorney-General did in fact have the power in accordance with s 68 to make the referral, and that s 68 of the *Judiciary Act* actually enlivened the ability of the Commonwealth Attorney to make the s 140 referral under the *WA Sentencing Act*.
39. So what did the Attorney-General then decide to in relation to s 140? The decision was made for a referral to be made to the WA Court of Appeal. S 140 grants the Attorney-General the power to dictate the terms on which a referral can operate.
40. In this case, the referral was made at large. The WA Court of Appeal found this to mean that it was able to review both errors of law and errors of fact. So it was almost an appeal *de novo*.

WA Supreme Court of Appeal decision

41. First, the referral was filed. S 140 dictates that the Court of Appeal must act on that referral. Being an all grounds appeal, the proceedings were basically instituted from scratch, and the court was empowered to take into account further evidence.
42. In this process, radiological and other documentary evidence was adduced and ultimately not challenged by the DPP, and they dispelled the myths that had been created by the radiological evidence adduced in the very first 2010 proceedings, and confirmed Jasmin's year of birth to have indeed been 1996.

Plea of guilty

43. At para [77], the WA Court of Appeal considered the following question: *is the Attorney General entitled to refer to this court pursuant to s 140 of the Sentencing Act a petition in relation to an offender who has been convicted on indictment following his or her plea of guilty?*
44. It was held that the Court could step in. This finding has some important implications, and establishes two key things:

- first, that those who have not exhausted all their rights of appeal will still be entitled to request the Attorney-General for a referral of their case
 - second, that there is a need for the prosecution to establish the jurisdiction of the court in which conviction is secured
45. The Court found that the prosecution's failure to establish jurisdiction in Jasmin's case were grounds for the conviction to be quashed.

Final outcome

46. The case resulted in Jasmin's complete acquittal - a very rare outcome. There is binding authority from the High Court in *Mallard v The Queen* [2005] on the proposition that the power to order a complete acquittal should be exercised most sparingly.
47. Ultimately in this case it came down to the question of whether the interests of justice had been properly served. Many factors were cited as having been considered, including:
- the public interest in not re-running these proceedings
 - the length of time that Jasmin had already served in prison
 - the indication by the DPP that it would not continue with the charge even if it were to be quashed and remitted for further trial
48. The decision that complete acquittal was the only appropriate outcome was unanimous.
49. Jasmin is now back in Indonesia. He has since lodged a complaint with the Australian Human Rights Commission on the grounds of racial discrimination. The complaint has now been joined together with another 60 Indonesian children's cases, all of which share similar factual circumstances to those of Jasmin.
50. We are now awaiting decision by the President of the Human Rights Commission about the complaint and what the next steps to take will be.
51. More detail can be found in the Australian Human Rights Commission's Report of July 2012 *An age of uncertainty: inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children*.

BIOGRAPHY

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Sam is a senior associate at Ken Cush & Associates and formerly an advisor to Australian credit unions on risk management. He graduated with a Bachelor of Economics from the University of Sydney and a Juris Doctor from the Australian National University. Sam is also the Treasurer of Civil Liberties Australia and a board member of Voice - a charity combatting human trafficking in Cambodia.

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Ian Benson is a solicitor at AR Conolly and Company and holds a First Class Honours degree in law.

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Jasmin v The Queen [2017] WASCA 122

Yasmin v Attorney-General of the Commonwealth of Australia [2015] FCAFC 145

Benchmark Link

[*Jasmin v The Queen* \[2017\] WASCA 122](#)

Judgment Link

[*Jasmin v The Queen* \[2017\] WASCA 122](#)

[*Yasmin v Attorney-General of the Commonwealth of Australia* \[2015\] FCAFC 145](#)

Cases

Mallard v The Queen [2005] HCA 68; 224 CLR 125

Legislation

Migration Act 1958 (Cth)

Sentencing Act 1995 (WA)

Administrative Decisions (Judicial Review) Act 1977 (Cth)

Judiciary Act 1903 (Cth)

Reports

[*Australian Human Rights Commission, An age of uncertainty: inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children, Australian Human Rights Commission Report \(July 2012\)*](#)