Majority of High Court upholds constitutionality of terrorist detention

Minister for Home Affairs v Benbrika [2021] HCA 4

By Belinda Baker

Background

In September 2008, Abdul Nacer Benbrika was convicted by the Supreme Court of Victoria of two terrorist offences. The offences, which took place between July 2004 and November 2005, related to Benbrika's membership and direction of the activities of a Melbourne-based terrorist organisation.

Division 105A of the *Criminal Code 1995* (Cth) empowers the Supreme Court to make a continuing detention order (CDO) in respect of a person determined a terrorist offender, after the completion of the person's term of imprisonment.

In September 2020, shortly before the expiry of Benbrika's term of imprisonment, the Minister for Home Affairs commenced proceedings in the Supreme Court of Victoria, seeking a CDO in respect of Benbrika for a term of three years. The order was made by Tinney J, however, on Benbrika's application, his Honour also reserved a question as to the constitutionality of the CDO provisions for the consideration of the Court of Appeal. This question, on the application of the Commonwealth Attorney-General, was then removed into the High Court.

In the High Court, Benbrika contended that, exceptional cases aside, the power to order the penal or punitive detention of citizens is exclusively judicial, subject to the exceptions established in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1. Benbrika submitted that the preventative detention provided for by Div 105A of the *Criminal Code* did not fall within a recognised exception and was hence invalid.

A majority of the High Court (Kiefel CJ, Bell, Keane and Steward JJ, with whom Edelman J agreed; Gageler and Gordon JJ dissenting) upheld the constitutionality of Div 105A.

The plurality judgment (Kiefel CJ, Bell, Keane and Steward JJ)

Central to the plurality's reasoning was the recognition that terrorism 'poses a singular threat to civil society' (at [36]). Although the plurality acknowledged that

Division 105A did not fall into one of the established categories of exceptions in *Lim*, their Honours found that the purpose behind the Division, namely, the protection of the public from this threat of terrorism, was analogous to recognised exceptions, such as the detention of the mentally ill or the quarantining of those with infectious diseases (at [35] – [36]). In so holding, the plurality rejected the contention that the *Lim* exceptions should be '*confined by history*' (at [36]).

In analysing the content and effect of the provisions, their Honours emphasised that the object of Division was to protect the community from harm (at [39]). Their Honours held that 'correctly understood' a CDO could only properly be made where the risk of reoffending carries a threat of harm to members of the community that is sufficiently serious to make the risk of commission of the offence 'unacceptable' to the Court (at [47]).

Accordingly, the plurality held that the power to make a CDO is within the judicial power of the Commonwealth and so conferring the Division on the Supreme Court of Victoria was not contrary to Ch III of the Commonwealth Constitution.

Justice Gageler (dissenting)

Like the majority, Gageler J accepted that the *Lim* categories were not closed (at [75]). His Honour reasoned that whether or not the conferral on a court of a power to deprive a person of liberty fell into an exception to the *Lim* principle depended on constitutional acceptability of the justification for the conferral; that is, whether the justification is 'reasonably capable of being seen as necessary for a legitimate non-punitive objective' (at [78], citing *Kruger v The Queen* (1997 190 CLR 1 at 162).

His Honour accepted that the prevention of grave and specific harm was such a legitimate non-punitive purpose, but emphasised that 'mere prevention of a criminal offence' was not (at [79]). His Honour contrasted the legislation considered in cases such as *Fardon v Attorney General (Qld)* (2004) 223 CLR 575, which was concerned with the protection of 'public safety', with Div 105A of the *Criminal Code*. His Honour found that not all of the terrorist offences that fell within Div 105A involved conduct that sufficiently or directly posed a risk to public safety. Rather, 'a serious Pt 5.3 offence can involve conduct many steps removed from doing or supporting or facilitating any terrorist act' (at [93]). (His Honour had previously noted, at [57], that a young Australian woman had been found guilty of such an offence when she had attempted to travel to Turkey with the intent of being a nurse or a bride for Islamic State.)

His Honour was of the view that it was possible to read down Div 105A, such that a CDO could be made only in circumstances where the terrorist offence in question posed such a risk to public safety as to enliven an exception to the *Lim* principle (at [102]). (In other words, that some, but not all, terrorist offences prescribed in the Division could constitutionally give rise to a CDO.) However, in view of the conclusions of the majority, and in the absence of argument and/ or evidence on these issues, his Honour did not consider it appropriate to embark upon a consideration of which offences could constitutionally give rise to a CDO, but rather limited his conclusion to the statement that Div 105A was 'not wholly compatible with Ch III of the *Constitution*' (at [102]).

Justice Gordon (dissenting)

Justice Gordon acknowledged the novelty of the question raised for consideration, noting that no previous case had determined the constitutionality of Commonwealth legislation that empowers a Chapter III court exercising judicial power to order the imprisonment of a person other than as punishment for criminal wrong (at [132]).

Her Honour outlined the foundational principles of both the separation of powers and the *Lim* principle and ultimately concluded that the validity of Division 105A would turn on whether the Division fitted within an exception to the *Lim* principle (at [142]).

Like Gageler J, Gordon J found that some of the offences that would allow for a CDO to be sought were not sufficiently well-connected to the legitimate purpose of preventing serious harm to the community: 'The problem that arises is that, under Div 105A, a Supreme Court is authorised to make a CDO without being satisfied that the person subject to the order poses an unacceptable risk of committing a terrorist act, or that the person will aid, abet, counsel or procure another person to commit a terrorist act' (at [170]). Her Honour was of the view that it was unnecessary to consider whether Division 105A fell within a new exception to the *Lim* principle: 'if there were to be such an exception, then Div 105A goes further than necessary to achieve its objective' (at [177]). As Division 105A was not sufficiently tailored to its stated purpose, her Honour concluded that an order made pursuant to the Division could not be proper exercise of Commonwealth judicial power.

Justice Edelman (concurring with the majority)

Justice Edelman considered that it was a 'category error' to reason that Div 105A was not punitive because it aims to protect the community by preventing the commission of offences (at [183]). His Honour emphasised that there is no dichotomy between protection and punishment, and stated that the scheme set out in Division 105A could be considered to be 'protective punishment' (at [182]).

His Honour considered that such 'protective punishment' would be unable to be justified in two cases: (i) whether the purpose of the protective punishment could easily be met to the same extent by reasonable alternatives (such as less restrictive control orders) and; (ii) where the purpose for the protective punishment, is 'so slight or trivial that it cannot justify detention of an individual' (at [226]). His Honour stated that 'as with other instances where structured proportionality applies', subject to reading down, severance or disapplication, 'it will only be in extreme cases that justification will fail on this latter basis: the very integrity and impartiality of the courts which the principle protects would be seriously impaired if the judiciary could generally refuse to implement statutory provisions on the grounds of an objection to legislative policy': at [226].

In analysing Div 105A, Edelman J, like the plurality, focussed on the word 'unacceptable' in the statutory requirement that there be an 'unacceptable risk' of a 'terrorist offence' before a CDO may be made. His Honour held that consideration of whether a risk of a terrorist offence was 'unacceptable' turned both on the probability of the occurrence and on the magnitude of harm likely to be caused (at [236]). In this respect, his Honour noted that the legislative purpose of s 105A 'concern[ed] the protection of the community from offences which can be aimed at the very destruction of society' (at [237]), and that the Division placed clear limits on the making of a CDO (such as a limited maximum term and requirements for review). Accordingly, while Edelman J ultimately accepted that a CDO did entail 'punishment' within the broader meaning of that term, his Honour concluded that the power to make orders conferred by Division 105A amounted to a proper exercise of judicial power (at [239]). BN