CITATION:	*The Queen v Calica* [2021] NTSCFC 2
PARTIES:	THE QUEEN v CALICA, Yves
TITLE OF COURT:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	ON REFERENCE from the Supreme Court exercising Territory jurisdiction
FILE NO:	21922685
DELIVERED:	26 May 2021
HEARING DATE:	29 May 2020
JUDGMENT OF:	Grant CJ, Southwood, Kelly, Blokland & Barr JJ

CATCHWORDS:

SENTENCING – Mitigating factors – Consequences under *Migration Act 1958* (Cth)

SENTENCING – Relevant factors on sentence – Establishing relevant matters

SENTENCING – Subjective considerations on sentence – Deportation

Sentencing may not take into account the prospect of an administrative order for deportation arising from the offending in order to craft a sentence designed to avoid the prospect of deportation – The prospect of deportation is not generally a relevant consideration in determining whether or not to fix a non-parole period –Subject to the facts being established by evidence, the prospect of hardship suffered as a result of deportation, and loss of the opportunity to settle permanently in Australia may, in appropriate circumstances, be taken into account in mitigation of sentence – The sentencing court cannot be asked to speculate about that prospect or as to the impact of deportation on the offender – The same principles concerning liability to deportation have application to the cancellation of the approval of citizenship.

Sentencing Act 1995 (NT), s 5(2)
Crimes Act 1914 (Cth), s 16A

Guden v The Queen (2010) 28 VR 288, *The Queen v Shrestha* (1991) 173 CLR 48, followed.

AC v R [2016] NSWCCA 107, *Bensegger v The Queen* (1979) WAR 65, *Breuer and Chaney* (1986) 32 A Crim R 1, *Christodoulou v R* [2008] NSWCCA 102, *Cohen v Western Australia (No 2)* [2007] WASCA 279, *Da Costa v The Queen* (2016) 258 A Crim R 60, *Dauphin v R* [2002] WASCA 104, *Director of Public Prosecutions (Vic) v Zhuang* (2015) 250 A Crim R 282, *Haddara* (1997) 95 A Crim R 108, *HAT v The Queen* (2011) 256 FLR 201, *Hickling v Western Australia* [2016] WASCA 124, *Houghton v Western Australia* [2006] WASCA 143, *Konamala v The Queen* [2016] VSCA 48, *Kristensen v The Queen* [2018] NSWCCA 189, *Markovic v The Queen* (2010) 30 VR 589, *Maxwell v R* [2020] NSWCCA 94, *Moh v Pine* [2010] ACTSC 27, *Monim and Osman v The Queen* (unreported, Western Australian Court of Criminal Appeal, 21 June 1972), *Muldrock v The Queen* [2011] HCA 39, *Norris v The Queen* [2020] NTCCA 8, *Ponniah v The Queen* [2011] WASCA 105, *R v Aniezue* [2016] ACTSC 82, *R v Arrowsmith* [2018] SASCFC 47, *R v Berlinsky* [2005] SASC 316, *R v Bob; ex parte A-G (Qld)* [2003] QCA 129, *R v Chapman* (1971) 1 NSWLR 544, *R v Chi Sun Tsui* (1985) 1 NSWLR 308, *R v Daetz* (2003) 139 A Crim R 398, *R v Da Silva* [2020] QCA 176, *R v Do* [2005] NSWCCA 258, *R v Griffiths* (Unreported, Victorian CCA, 29 April 1998), *R v Jap* (unreported, NSW Court of Criminal Appeal, 20 July 1998), *R v Kansiz* (Unreported, Victorian CCA, 7 December 1982), *R v Kwon* [2004] NSWCCA 456, *R v Latumetan and Murwanto* [2003] NSWCCA 70, *R v Leka* [2017] SASCFC 77, *R v Leng Khem* [2008] VSCA 136, *R v MAO; Ex parte Attorney-General (Qld)* (2006) 163 A Crim R 63, *R v McLeod* (2007) 16 VR 682, *R v Mesdaghi* [1979] 2 NSWLR 68, *R v Minor* (1992) 59 A Crim R 227, *R v Mirzaee* [2004] NSWCCA 315, *R v Norris; Ex parte Attorney-General* [2018] QCA 27, *R v Pham* [2005] NSWCCA 94, *R v Qin; Qin v Regina* [2008] NSWCCA 189, *R v Riche* [1977] 2 NSWLR 876, *R v S* (2003) 1 Qd R 76, *R v Schelvis* [2016] QCA 294, *R v UE* [2016] QCA 58, *R v Zhang* (2017) 265 A Crim R 117, *Schneider v The Queen* [2016] VSCA 76, *Silvano v The Queen* [2008] NSWCCA 118, *TAN v The Queen* (2011) 216 A Crim R 535, *The Queen v MAH* [2005] NTCCA 17, *Urahman v Semrad* (2012) 229 A Crim R 11, *Veness v The Queen* [2020] NTCCA 13, *Weng Kong Chan* (1989) 38 A Crim R 337, *Zaharoudis and Salihos* (1986) 22 A Crim R 233, referred to.

REPRESENTATION:

Counsel:

Crown:	G Dooley
Defendant:	I Read SC with N Redmond

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Defendant:	Northern Territory Legal Aid Commission

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IN THE FULL COURT OF THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Calica [2021] NTSCFC 2
No. 21922685

BETWEEN:

THE QUEEN

AND:

YVES CALICA

CORAM: GRANT CJ, SOUTHWOOD, KELLY, BLOKLAND AND BARR JJ

REASONS FOR JUDGMENT

(Delivered 26 May 2021)

GRANT CJ, KELLY, BLOKLAND AND BARR JJ:

[1] On 20 February 2020, Yves Calica pleaded guilty to one count of causing serious harm to Callien Jensen contrary to s 181 of the *Criminal Code 1983* (NT). The maximum penalty for the offence is 14 years' imprisonment.

[2] During the course of sentencing submissions, counsel for Mr Calica informed the court that Mr Calica was 22 years old and was 21 at the time of the offending. He was born in the Philippines city of Marikina and migrated to Australia with his family at the age of 16. Both of his parents are also from the Philippines, and he and his immediate family lived and worked in Alice Springs. He is a permanent resident of

Australia, but not an Australian citizen and is liable to cancellation of his visa and deportation[1] upon sentence or upon completion of his sentence, subject to a discretion in the Minister to grant him a fresh visa.[2]

[3] In addition, counsel for Mr Calica drew the Court's attention to the fact that Mr Calica has had his approval for Australian citizenship withdrawn or suspended, it is not clear which. Apparently he had approval for citizenship but had not yet taken the oath when he was charged with the offence.

[4] Counsel for Mr Calica submitted to the sentencing judge that the Court should have regard to the likelihood of Mr Calica being deported when sentencing him, and that the withdrawal of approval for him to become an Australian citizen was likewise a relevant consideration.

[5] Counsel for Mr Calica acknowledged that the decision of the Court of Criminal Appeal in *The Queen v MAH*[3] was to contrary effect, and drew

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1 Although the term "deportation" is most commonly used in this context, the process is now more accurately described as one of "visa cancellation and removal". Various amendments to the *Migration Act 1958* (Cth) reduced the significance of the original deportation provisions. By 2005, the Commonwealth had largely abandoned reliance on criminal deportation provisions in favour of the wide powers to cancel visas on character grounds, detention and removal: see *Minister for Immigration and Multicultural Affairs and Indigenous Affairs v Nystrom* (2006) 228 CLR 566. The term "deportation" is used in most of the cases under discussion, and we have for convenience used that term compendiously in these reasons to include visa cancellation and removal.

2 Section 501(3A) of the *Migration Act* effectively provides for automatic visa cancellation if a person is sentenced to imprisonment for 12 months or more and serves any part of that sentence on a full-time basis in a custodial institution. In those circumstances it is mandatory for the visa to be cancelled. Application may be made under s 501CA of the *Migration Act* to the Minister or Minister's delegate to overturn the cancellation.

3 *The Queen v MAH* [2005] NTCCA 17.

the Court's attention to conflicting decisions in other jurisdictions. Accordingly, the sentencing judge has reserved the following questions of law for the consideration of the Full Court pursuant to s 21 of the *Supreme Court Act 1979* (NT):

> **Question 1:**
> Is a sentencing court prohibited from taking into account the prospect of an administrative order for deportation arising from the offending which is the subject of the proceedings?
>
> **Question 2:**
> Is a sentencing court prohibited from taking into account the cancellation of the approval of citizenship arising from the offending which is the subject of the proceeding?

The Queen v MAH

[6] *The Queen v MAH* involved an unsuccessful appeal against conviction on the ground that the verdict was unreasonable or could not be supported having regard to the evidence, and a successful Crown cross-appeal against inadequacy of sentence.

[7] One of the grounds of the Crown cross-appeal was that the sentencing judge had erred in taking into account as a relevant consideration the fact that, if sentenced to a term of imprisonment for 12 months or more, the respondent may not be granted a visa to remain in Australia, or alternatively that his existing visa may be cancelled. In the relevant part of the sentencing remarks, the sentencing judge said:

> You are here under a temporary protection visa. The *Migration Act* permits the Minister to refuse to grant a visa or to cancel a visa if the person does not pass the character test. A person will fail the

> character test if the person has a substantial criminal record. A person has a substantial criminal record if the person has been sentenced to a term of imprisonment of twelve months or more. Such a sentence would leave you vulnerable to action of that kind.
>
> In my view, the prospect of such exposure is not a matter that should lead me to impose a sentence that I would not otherwise regard as appropriate. The exposure is a consequence of you committing an offence of this level of seriousness. However, in a case such as this where the appropriate head sentence is in the order of imprisonment for twelve months, it is permissible to take that consequence into account in determining where, within the appropriate range, to fix the head sentence. I have adopted that approach.[4]

[8] On appeal, Mildren J (with whom Thomas and Southwood JJ agreed) said: "In my opinion, the possibility of deportation is an entirely irrelevant matter for sentencing purposes." In support of that proposition, his Honour quoted the following passage from the Western Australian Court of Appeal in *Dauphin v R*:

> In my opinion, this submission is without merit. In *R v Chi Sun Tsui* (1985) 1 NSWLR 308 at 311, Street CJ (with whom the other members of the Court were in agreement) said that "the prospect of deportation is not a relevant matter or consideration by a sentencing Judge, in that it is the product of an entirely separate legislative policy area of the regulation of society". Those remarks were cited with apparent approval by Brennan and McHugh JJ in *R v Shrestha* (1991) 173 CLR 48 at 58. Furthermore, as McPherson JA explained in *R v Simard* [2001] QCA 531 at [6], taking the prospect of the applicant's deportation into consideration has the potential to "produce a regime under which visitors or non-permanent residents [are] sentenced more leniently than Australians who [have] committed the same kind of offence. That cannot be a proper result in the administration of justice".[5]

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4 *The Queen v MAH* [2005] NTCCA 17 at [40].

5 *Dauphin v R* [2002] WASCA 104 at [22].

[9] His Honour also cited the New South Wales cases of *R v Pham*[6] and *R v Do,*[7] and the Queensland case of *R v S*[8] in support.

[10] In the same case, Southwood J noted that there was a dichotomy between authorities in Western Australia and New South Wales on the one hand, and Victoria on the other, in relation to whether the prospect of deportation of an offender is a relevant sentencing consideration, and expressed the view that the approach adopted by Western Australia and New South Wales was the correct one. His Honour said:

> In my opinion the approach adopted by the Court of Appeal in New South Wales and the Supreme Court in Western Australia is the correct approach. The risk of deportation is a risk that is a product of an entirely separate legislative policy area of the regulation of society. To take such a risk into account is potentially to undermine that legislative policy. It also has the potential to produce a regime under which visitors or non-permanent visitors may be sentenced more leniently than Australians who have committed the same kind of offence. I agree with Steytler J [in *Dauphin v R* (supra)] that such a result cannot be a proper result in the administration of justice.[9]

Subsequent Northern Territory authority

[11] In *Urahman v Semrad,*[10] Southwood J heard appeals against two sentences imposed on the appellant by the Court of Summary Jurisdiction for two Commonwealth offences; engaging in conduct that

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6 *R v Pham* [2005] NSWCCA 94 at [13]-[14] per Woods CJ at CL (with whom Hislop and Johnson JJ agreed).

7 *R v Do* [2005] NSWCCA 258 at [24] per Buddin J (with whom Brownie AJA and Latham J agreed).

8 *R v S* (2003) 1 Qd.R. 76 at [5] per McPherson JA (with whom Thomas JA and Mullins J agreed).

9 *The Queen v MAH* [2005] NTCCA 17 at [64].

10 *Urahman v Semrad* (2012) 229 A Crim R 11; [2012] NTSC 95.

caused harm to a Commonwealth public official, and causing damage to property owned by the Commonwealth. The sentencing magistrate recorded convictions on both charges and sentenced the appellant to three months' imprisonment (fully suspended) on the first charge and a 12 month good behavior bond on the second charge.

[12] The appellant, who was a refugee in immigration detention, appealed against both sentences, *inter alia*, on the ground that the sentencing magistrate had erred in failing to exercise his discretion under s 19B(1) of the *Crimes Act 1914* (Cth) not to record a conviction, because convictions may result in the Minister for Immigration refusing to issue him with a visa.

[13] In dealing with that ground of appeal, Southwood J noted that there were uncertainties about whether the Minister would issue the appellant with a visa, but that if the convictions were not set aside there would be a greater risk that the Minister may refuse to issue a visa because the appellant failed the character test. His Honour reviewed the authorities in the various jurisdictions. He noted that in New South Wales, Queensland, Western Australia and the Northern Territory the approach seemed to be that it was impermissible for a sentencing judge to reduce an otherwise appropriate sentence in order to avoid the risk of an administrative authority making a decision adverse to the person. Conversely, in Victoria the prospect of the administrative authority making an adverse decision is a factor which

may be relevant to the impact that a sentence of imprisonment will have on an offender, and should therefore be taken into account on sentencing (subject to production of evidence that such an adverse decision is likely). Similarly, the loss of the opportunity to live permanently in Australia might also be taken into account in mitigation as an extra-curial punishment. Southwood J concluded by saying:

> There is some force in the Victorian authorities in a case such as this where a refusal to grant the appellant a visa may result in him remaining in immigration detention indefinitely. However, courts in the Northern Territory are bound by the decision of the Court of Criminal Appeal in *R v MAH* and they must disregard the possibility that a person such as the appellant may be refused a visa if they are convicted of a crime committed while they are in immigration detention.[11]

[14] Counsel for the accused acknowledges that the authority prevailing in this jurisdiction would appear on its face to preclude a sentencing court from taking into account for sentencing purposes the prospect of an administrative order for deportation or the cancellation of the approval of citizenship. The question which presents on this reference is whether that authority does in fact preclude a sentencing court from taking liability to deportation into account for any sentencing purpose, and, if so, whether it should be overruled. Previous decisions of the Court of Appeal and the Court of Criminal Appeal should only be overruled in exceptional circumstances, and the power to do so must be

11 *Urahman v Semrad* [2012] NTSC 95 at [61].

exercised with caution and only when compelled to the conclusion that the earlier decision is fundamentally wrong or plainly erroneous.

Contexts in which liability to deportation has been considered

[15] The question of whether a court sentencing a foreign offender to imprisonment in this country may or should take into account the prospect of the offender being deported has been considered in Australian courts in three different contexts.

[16] First, courts have considered whether it is proper to take the prospect that the offender may be deported into account in determining whether to fix a non-parole period ("the non-parole cases").

[17] Second, courts have considered whether it is proper to take the prospect of deportation into account so as to impose a sentence designed to avoid such a consequence ("the threshold cases").

[18] Third, courts have considered whether a sentencing judge may or should take the prospect of deportation into account in mitigation of sentence as one aspect of the offender's personal circumstances ("the mitigation cases").

[19] Notwithstanding that different considerations apply in each of these three contexts, cases in one category have been cited from time to time as authority in cases from a different category.

The non-parole cases

[20] The issue considered in these cases is whether the court should refuse to fix a non-parole period (or "minimum term") on the ground that the offender was a non-citizen liable to be deported at the end of his sentence. The non-citizen appellants argued that the fact that they were going to be deported was not a relevant consideration and that, by taking it into account, sentencing judges had wrongly deprived them of the benefit of a non-parole period.

The New South Wales authorities

[21] Initially, the New South Wales Court of Criminal Appeal took the view that many aspects of parole are not appropriate in the case of an offender who will be deported as soon as he is released from custody.[12]

[22] This approach was reversed by the New South Wales Court of Criminal Appeal in *R v Riche*.[13] That case involved an appeal by a non-citizen of French origin who had been sentenced to five years' imprisonment on a charge of unlawfully importing opium. He had no prior convictions and otherwise creditable antecedents. The sentencing judge refused to fix a non-parole period on the ground that the offender was a French national liable to the prospect of deportation. The offender appealed to the New South Wales Court of Criminal Appeal

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12 *R v Chapman* (1971) 1 NSWLR 544, following the approach in *R v Hull* (1969) 90 WN(NSW) 488 and *R v Macaulay* (1969) 90 WN(NSW) 682; These cases are referred to by Brennan CJ and McHugh J in *The Queen v Shrestha* (1991) 173 CLR 48 at 57.

13 *R v Riche* [1977] 2 NSWLR 876.

against the severity of his sentence and the failure to fix a non-parole period. The appeal was allowed. Street CJ (with whom Begg and Lusher JJ agreed) opined that the considerations relevant to the determination of whether to fix a non-parole period were those set out in the parole legislation, ie the nature of the offence and the antecedent character of the offender. With respect to the submission that the earlier decision in *R v Hull*[14] was to contrary effect, Street CJ stated:

> The case is not, in my view, to be regarded as laying down as a proposition of law that a non-parole period should be withheld when the person being sentenced is a foreign national or an alien and faces a prospect, be it certain or merely contingent, of being deported in consequence of that sentence.[15]

[23] The Court ultimately held that the discretion of a judge to withhold the specification of a non-parole period was only exercisable if by reason of the nature of the offence or the antecedent character of the person convicted the judge formed the view that it was undesirable to specify a non-parole period. The fact that a person was not a national of Australia and faced the prospect of deportation on completion of the sentence was, by itself, no justification for not specifying a non-parole period. As a consequence, the earlier cases following the decision in *R v Riche* turned on the construction of the New South Wales legislative provisions concerning the fixing of non-parole periods

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14 *R v Hull* (1969) 90 WN(NSW) 488.

15 *R v Riche* [1977] 2 NSWLR 876 at 878; also referring to *R v Macaulay* (1969) 90 WN NSW 683 and explaining and distinguishing *R v Chapman* [1971] 1 NSWLR 544.

which specified the matters that the court should take into consideration when deciding whether to fix a non-parole period.

[24] That was confirmed in *R v Mesdaghi*,[16] which involved an application for leave to appeal against the severity of a sentence of five years' imprisonment for arson, the major complaint being that the sentencing judge had declined to fix a non-parole period. Street CJ again pointed to the statutory grounds as the only basis on which a non-parole period could be withheld and stated (footnotes omitted):

> It should be made plain, as apparently there still is some doubt about the effect of *R v Riche*, that, notwithstanding whatever merit there might be, in point of general penal philosophy of parole, in withholding a non-parole period for persons facing the prospect of being deported, the discretion to withhold a non-parole period is, by the terms of the statute, expressly limited and confined to one or both of the two grounds specified in s 4(3), that is to say the nature of the offence, or the antecedent character of the person convicted. The prospect of deportation is not an admissible or relevant factor in deciding whether or not to exercise the discretion under s 4(3) of the Act. It is for the legislature, not the courts, to decide whether this is an element to be weighed.[17]

[25] The parole legislation was subsequently amended to allow a court to decline to fix a non-parole period "for any other reason which the court considers sufficient", after which the rationale for not taking the prospect of deportation into account also changed. The New South Wales Court of Criminal Appeal took the view that whether a person

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16 *R v Mesdaghi* [1979] 2 NSWLR 68.

17 *R v Mesdaghi* [1979] 2 NSWLR 68 at 71. Street CJ added that to the extent *Hull*, *Chapman* and *Macaulay* suggest or decide otherwise, they are to be regarded as no longer correctly stating the law on this matter of discretion.

would be deported at the end of an appointed minimum term was a matter for the Executive Government; and that the courts should deal with foreign offenders in the same way as domestic offenders.[18]

[26] That approach was determined in *R v Chi Sun Tsui*,[19] which was an appeal against severity of sentence decided after the legislative amendment. The appellant was an illegal immigrant from Hong Kong who had pleaded guilty to a charge of receiving stolen property. There was evidence that the appellant had connections to a criminal Chinese gang. One ground of appeal was that the sentencing judge had refused to specify a non-parole period. In so deciding, the sentencing judge had said:

> Thus it is that in no circumstances, if parole were granted, would the prisoner ever serve any portion of his sentence within the community under rehabilitative supervision. Were this the first occasion that this man had entered this country illegally, and were it the first occasion he had offended against the law, perhaps other considerations would apply. However, satisfied as I am that the very reason for his being here was to perpetrate a criminal lifestyle established, on the evidence before me, elsewhere, it would be unrealistic for the court to consider that the provision of parole, namely, the supervised service of part of his sentence in the community, has any application to the circumstances of this case.[20]

[27] The Court of Criminal Appeal sought and obtained evidence from the New South Wales prison authorities and the Commonwealth

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18 See, for example, *R v Jap* (unreported, NSW Court of Criminal Appeal, 20 July 1998) per Sully J (with whom Smart J agreed).

19 *R v Chi Sun Tsui* (1985) 1 NSWLR 308.

20 *R v Chi Sun Tsui* (1985) 1 NSWLR 308 at 309.

immigration authorities as to their policies and practices, in light of which Street CJ (with whom Slattery CJ at CL and Roden J agreed), stated:

> The two matters of serving out sentences passed by criminal courts and of implementing the immigration laws stand in entirely separate compartments. The Commonwealth stands back in order to allow the criminal and penal laws and orders to be carried through to the point where the criminal is freed from custody. The Commonwealth then proceeds in accordance with the policy enunciated by the Minister on its behalf.[21]

[28] Save for the first sentence, this was a conclusion based on that evidence and not a statement of principle or public policy. The Court went on to consider whether the amendment to the legislation would allow a court to take into account the prospect of deportation as a relevant factor weighing against specifying a non-parole period, and held that it did not. In so holding, Street CJ referred to a provision of the *Probation and Parole Act 1983* (NSW), which provided that the Parole Board was not authorized to refuse parole to a prisoner by reason only that the prisoner may become liable to be deported and said:

> The legislature has in [the relevant section of the *Probation and Parole Act*] answered the policy consideration in terms which indicate that the rehabilitative philosophy that underlies the parole legislation is not to be regarded as impinging in any way upon the deportation of a prisoner, once that prisoner is free from the custodial restraints of a State or Commonwealth sentence. The discretion to withhold a non-parole period is exercisable for the

21 *R v Chi Sun Tsui* (1985) 1 NSWLR 308 at 310.

> two specific reasons enunciated in s 21(1)(a) as well as "for any other reason which the court considers sufficient": s 21(1)(b). Holding the view, as I do, that the prospect of deportation is not a relevant matter for consideration by a sentencing judge, in that it is the product of an entirely separate legislative and policy area of the regulation of our society, I do not consider that that prospect can be weighed as "for any other reason" within s 21(1)(b).[22]
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> (Emphasis added)

[29] This approach was followed in *R v Jap*,[23] *R v Latumetan and Murwanto*[24] and *R v Mirzaee*.[25] In each of those cases, the sentencing judge had refused to fix a non-parole period on the ground that the offender was liable to be deported and would therefore not be able to serve a period of supervision in the community; and in each case the Court of Criminal Appeal held that this approach was in error.

[30] In *R v Jap*, Sully J (with whom Smart J agreed) said:

> [W]hether such a person will or will not be deported at the end of an appointed minimum term is not a matter for the Courts, but for the Executive Government; and that, so far as the Courts are concerned, such a person should be dealt with as though he or she were a national of this country, it being left to the proper processes of the Executive Government, and the public administration machine otherwise, to deal with the question of deportation.[26]

[31] In *R v Mirazee*, Kirby J (with whom Sperling J agreed) said:

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22 *R v Chi Sun Tsui* (1985) 1 NSWLR 308 at 311.

23 *R v Jap* (unreported, NSW Court of Criminal Appeal, 20 July 1998).

24 *R v Latumetan and Murwanto* [2003] NSWCCA 70.

25 *R v Mirzaee* [2004] NSWCCA 315.

26 *R v Jap* (unreported, NSW Court of Criminal Appeal, 20 July 1998) at 6. These remarks are *obiter dicta* as the Court dismissed the appeal.

> Where an offender would otherwise qualify for a finding of special circumstances, because it is recognised that he or she would benefit from a longer than usual period of supervision, then such a finding should be made. The sentencing Judge should not refrain from such a finding because it is believed likely that the offender may be deported at the end of the non-parole period, and that supervision therefore would not be provided in Australia.[27]

[32] In *R v Latumetan and Murwanto* the Court articulated a broader principle, potentially applicable to circumstances other than non-parole cases. Studdert J (with whom Shaw J agreed) said:

> It is well settled that the prospect of deportation was not a matter properly to be taken into account for sentencing purposes. In being so influenced by this factor, her Honour fell into error; see *R v Chi Sun Tsui* (1985) 1 NSWLR 308; *R v Shrestha* [1991] HCA 26; (1991) 173 CLR 48; *R v Montenegro* (unreported) NSWCCA 15 February 1991; *R v Chase* (unreported) NSWCCA 19 October 1990; *R v Ferus* (unreported) NSWCCA 23 August 1991; *R v Ndubuisi* (unreported) NSWCCA 27 March 1992 and *R v Jap* (unreported) NSWCCA 20 July 1998.[28]

[33] It should be noted for these purposes that all of the cases cited in support of this broader proposition were non-parole cases.

The Western Australian authorities

[34] There is also a line of Western Australian authority on the question whether the immigration status of an offender should be taken into account in determining whether to fix a non-parole period (referred to in that jurisdiction as a "minimum term"). In Western Australia too,

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27 *R v Mirzaee* [2004] NSWCCA 315 at [21]. *Mirazee* was decided after the High Court had considered the question in the Western Australian context in *The Queen v Shrestha* (1991) 173 CLR 48.

28 *R v Latumetan and Murwanto* (2003) NSWCCA 70 at [19].

the early cases largely depended on the construction of the relevant Western Australian legislation.

[35] That legislation was amended a number of times. When the earlier cases were decided, the relevant Western Australian statute provided that where a court sentences a person to a term of imprisonment of 12 months or more, "the court shall … fix a minimum term … during which ... the convicted person is not to be eligible to be released on parole." The following sub-section provided that the court "is not required to fix a minimum term if the court considers that the nature of the offence and the antecedents of the convicted person render the fixing of a minimum term inappropriate." As was the case in New South Wales when the legislation was amended to provide for a broader discretion as to whether to fix a minimum term, the basis for the decisions became correspondingly more generalized.

[36] The early Western Australian cases concerned Commonwealth offences. The relevant Commonwealth statute provided that the law relating to the fixing of non-parole periods (minimum terms) in the jurisdiction in which the offender was tried would apply, but that if a non-parole period was fixed, the discretion whether to grant parole after the expiration of that period would be exercisable by the Governor General, not the parole authority in the jurisdiction in which the sentence was imposed. It also provided that it must be a condition

of any parole so granted that the offender be under the supervision of a parole officer.

[37] In *Bensegger v The Queen*,[29] the appellant was convicted of importing and possessing 12.67kg of heroin in eight packages hidden under an imported Jaguar. He was sentenced to 10 years' imprisonment on each charge to be served concurrently. The sentencing judge declined to fix a minimum term because of the nature of the offence, stating: "In addition he was a Foreign National who initially planned the offence outside Australia and came to Australia on a one month visa for the purpose of completing the offences." The appellant appealed against the sentence on the ground, *inter alia*, that the sentencing judge erred in declining to fix a minimum term.

[38] In considering the appeal, Burt CJ pointed out that the legislation did not confer a discretion to fix a minimum term: it conferred a discretion not to fix a minimum term. Further, that discretion could only be exercised on the grounds set out in the probation and parole legislation, namely that "the nature of the offence and the antecedents of the convicted person render the fixing of a minimum term inappropriate".

[39] The Court was told that "Commonwealth Executive Practice" where a minimum term was fixed, was for the Governor-General to order a federal prisoner to be released on parole as soon as the minimum term

29 *Bensegger v The Queen* (1979) WAR 65.

expired and, where the prisoner was a foreigner, for him to be deported by an order of the Commonwealth Minister under the Commonwealth *Migration Act*. The respondent argued that this meant that any minimum term became effectively the maximum term, and the parole provisions in the Commonwealth legislation (requiring supervision as a condition of parole) would be frustrated. Burt CJ rejected this submission as "both misconceived and misdirected", pointing out that under the *Migration Act* the Minister could deport the foreign prisoner at any time during his term of imprisonment or on the expiration of it, and said:

> But that is not a matter which in any way affects the exercise of the discretion of a judge exercising jurisdiction under the [relevant] Act to decline to fix a minimum term … and I emphatically reject the submission that in the exercise of that discretion the court should have any regard to the practice referred to by counsel. Indeed I think it would be improper and positively wrong to do so. It is unthinkable that a Court should ignore the criteria laid down for the exercise by it of its discretion and decline to make an order with the intention expressed or unexpressed that it should operate so as to deny the occasion for the exercise by the Governor-General of a discretion which has been conferred on him by statute. And this is so whether or not there exists such a "practice" by which the discretion of the Minister is or usually is exercised.[30]

[40] Burt CJ referred to and approved the earlier decision of the Court of Criminal Appeal in *Monim and Osman v The Queen*[31] to similar effect,

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30 *Bensegger v The Queen* (1979) WAR 65 at 71. The final reference to the discretion conferred by statute must in context be a reference to Governor-sentencing or fetter the breadth of

31 *Monim and Osman v The Queen* (unreported, Western Australian Court of Criminal Appeal, 21 June 1972).

in which the Court had set aside a decision of the sentencing judge not to fix a minimum term in the case of foreign offenders, saying:

> The fact that the applicants had their homes in Egypt and were likely not to remain in this State after their release from custody are not circumstances which can be said to relate to the nature of the offence and to their antecedents, both of which matters are required to be considered by the court to render the fixing of a minimum term inappropriate.

[41] His Honour also cited the New South Wales decision in *R v Riche* (supra), which he regarded as to the same effect. Lavan SPJ agreed with that result but expressed the view *obiter dicta* that "the term 'antecedents' is wide enough to include such a circumstance as the alien nationality of an offender".[32] Brinsden J (dissenting) considered that in determining whether it was inappropriate to fix a minimum term, it was necessary to remember the purpose sought to be achieved by fixing a minimum term, namely, "to provide for mitigation of punishment of the prisoner in favour of rehabilitation through conditional freedom, where appropriate, once the prisoner has served the minimum time that a judge determines justice required that he must serve having regard to all the circumstances of the offence." His Honour thought that purpose unlikely to be advanced if the prisoner were to be deported before any such period of conditional freedom had

32 *Bensegger v The Queen* (1979) WAR 65 at 76.

run its course.[33] In the result, the Court allowed the appeal by majority and fixed a minimum term of six years.

[42] The Western Australian legislation was subsequently amended to provide that the court may fix a minimum term if the court considers the nature of the offence, the circumstances of its commission or the antecedents of the offender or any of those things considered together renders the fixing of a minimum term appropriate.

[43] *Zaharoudis and Salihos*[34] was decided after that amendment. The two appellants had each been convicted and sentenced to imprisonment for 12 years for the federal offence of being knowingly concerned in importing large quantities of cannabis resin. They appealed against the severity of their sentences, including the failure to fix a minimum term. The sentencing judge had said:

> It has been suggested that I should set a minimum term so that in due course you can be released on parole and serve out part of your sentence in the community under supervision. That suggestion only has to be put to demonstrate its futility. You are all aliens in this country. You have no right to remain here as free citizens. To contemplate the prospect of you serving any period on parole would be a complete perversion of the parole system as it operates. Accordingly, I do not propose to set minimum terms.[35]

[44] The majority in the Court of Appeal held that the antecedents for sentencing purposes included that each applicant "with his eyes open,

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33 *Bensegger v The Queen* (1979) WAR 65 at 80.

34 *Zaharoudis and Salihos* (1986) 22 A Crim R 233.

35 *Zaharoudis and Salihos* (1986) 22 A Crim R 233 at 236.

came to Australia illegally and that each deceived the authorities as to the purpose of his visit, and each came for one purpose only, that being to import narcotics in bulk and for-profit."[36] Burt CJ (with whom Kennedy J agreed) concluded that those antecedents, together with the nature of the offence and the circumstances of its commission, could not sustain the opinion that the fixing of a minimum term was appropriate.[37] However, the majority reiterated, with reference to *Bensegger* and *R v Riche*, that an offender's liability to deportation is not by itself a sufficient or proper reason for refusing to fix a minimum term.[38]

[45] In *Breuer and Chaney*,[39] the applicants were convicted of bringing 1,775 kilograms of cannabis into Australia in Chaney's yacht. Each was sentenced to a term of imprisonment for 10 years and in both cases the sentencing judge declined to fix a minimum term. The relevant legislation was the same as it was when *Zaharoudis and Salihos* was decided. The applicants appealed against those sentences, including the failure to fix a minimum term.

[46] Burt CJ (with whom Kennedy J again agreed) repeated what he had said in *Zaharoudis and Salihos*, and said that the sentencing judges

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36 *Zaharoudis and Salihos* (1986) 22 A Crim R 233 at 238.

37 *Zaharoudis and Salihos* (1986) 22 A Crim R 233 at 238.

38 *Zaharoudis and Salihos* (1986) 22 A Crim R 233 at 236-238.

39 *Breuer and Chaney* (1986) 32 A Crim R 1.

would have erred had they found that liability to deportation of itself made the fixing of a minimum term inappropriate. However, if the fact that each applicant is a foreign national is regarded as being entirely neutral, the general question will remain whether, having regard to the matters referred to in the legislation, the fixing of a minimum term is appropriate. Burt CJ concluded that the nature of the offence, the circumstances of its commission and the offenders' antecedents sustained a positive judgment that it was not appropriate to fix a minimum term in either case.[40]

[47] Brinsden J agreed (referring to *Zaharoudis and Salihos*) that the fact that a person is a prohibited immigrant liable to deportation, standing alone, is not decisive of whether to fix a minimum term. However, the person's antecedents would include the person's nationality and status as a prohibited immigrant, and that was a matter which could be taken into account.[41]

[48] In *Weng Kong Chan*,[42] the Court of Appeal held that the sentencing judge's discretion had miscarried in failing to fix a minimum term for the sole reason that the prisoner would be deported on release. The sentencing judge had said:

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40 *Breuer and Chaney* (1986) 32 A Crim R 1 at 6-7.

41 *Breuer and Chaney* (1986) 32 A Crim R 1 at 10.

42 *Weng Kong Chan* (1989) 38 A Crim R 337.

> There is no point in my fixing a minimum term. I trust you will be deported as soon as your imprisonment is complete.[43]

[49] However, that miscarriage of the discretion notwithstanding, the Court of Appeal considered in all of the circumstances that the fixing of a minimum term was not justified. In making that finding, the Court adopted the approach taken in *Bensegger* and *Zaharoudis and Salihos*.[44]

[50] The legislation was amended again shortly thereafter to provide that the Court may order that a convicted person be eligible for parole. If the Court so ordered, the non-parole period was fixed by statute. The legislation provided further that in determining whether to make an order that the convicted person be eligible for parole the Court may have regard to all or any of:

(a) the nature of the offence;

(b) the circumstances of the commission of the offence;

(c) the antecedents of the convicted person;

(d) circumstances relevant to the convicted person which might be relevant at the time they would become eligible for release on parole; and

(e) any other matter the court thinks relevant.

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43 *Weng Kong Chan* (1989) 38 A Crim R 337 at 341.

44 *Weng Kong Chan* (1989) 38 A Crim R 337 at 344-345 per Malcolm CJ; 346-347 per Wallace J.

[51] The discretion given to the Court thereafter became one of declaring eligibility for parole in a general sense, rather than fixing a non-parole period, and the limitations on the matters the Court could take into account in determining whether to exercise the discretion, which had formed the basis of the reasoning in the earlier cases, had all but disappeared.

The decision of the High Court in *The Queen v Shrestha*

[52] The issue considered in the non-parole cases came before the High Court in 1991 in *The Queen v Shrestha*,[45] shortly after the amendments to the Western Australian legislation referred to immediately above. Shrestha was a foreign national who was convicted in Western Australia of three offences relating to the importation of heroin and sentenced to a total of 12 years' imprisonment. The sentencing judge declined to order that he be eligible for parole, saying:

> [T]he facts of your case, your personal circumstances and the fact of your immigration status in my view prevent me in this case from making you eligible for parole.[46]

[53] Shrestha was given leave to appeal against the severity of his sentence, including the refusal to order that he be eligible for parole. The Court of Criminal Appeal allowed the appeal, reduced his sentence to nine years and ordered that he be eligible for parole. The Crown was

45 *The Queen v Shrestha* (1991) 173 CLR 48.

46 *The Queen v Shrestha* (1991) 173 CLR 48 at 50.

granted special leave to appeal to the High Court against the order that the appellant be eligible for parole.

[54] Considering this question in light of the broader legislative provision, the majority in *Shrestha* (Deane, Dawson and Toohey JJ) said:

> All of the considerations which are relevant to the sentencing process, including antecedents, criminality, punishment and deterrence, are relevant both at the stage when a sentencing judge is considering whether it is appropriate or inappropriate that the convicted person be eligible for parole at a future time and at the subsequent stage when the parole authority is considering whether the prisoner should actually be released on parole at or after that time.[47]

[55] The majority went on to consider the benefits of fixing a non-parole period, which are not limited to giving the convicted person a period of conditional liberty in the community under supervision. They include providing an incentive to good behaviour while in prison in order to earn parole, and the fact that the retention by a prisoner of some control over his or her future fortunes is conducive to retaining self-respect and to eventual rehabilitation. The majority also emphasized the importance of ensuring that the parole authorities were given the ability to exercise compassion where appropriate, for example if the convicted person became terminally ill.

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47 *The Queen v Shrestha* (1991) 173 CLR 48 at 68-69.

[56] The majority rejected the contention that Australia has no interest in providing a regime intended to assist the rehabilitation of a foreign offender with no ties to the country, and held that Australia has:

(a) an interest in the well-being and rehabilitation of all people within its prisons; and

(b) moral and treaty obligations to treat all who are subject to criminal proceedings in this country humanely and without discrimination.

[57] The majority acknowledged that there was more force in the contention that deportation would remove the offender from the possibility of effective supervision and of a return to prison should the parole conditions be breached. However, they concluded that the likelihood of an offender being deported once released should not of itself compel a sentencing judge to conclude that it is inappropriate to fix a non-parole period. The reasons given for that conclusion included:

(a) that deportation is outside the control of the prisoner;

(b) that even if deportation is inevitable and supervision therefore impossible, other considerations (for example compassionate grounds) may make the granting of parole desirable; and

(c) that breach of an Australian parole order may have adverse consequences for the prisoner in the other country (for example

aggravating the seriousness of later offending which may be committed during the parole period).

[58] The majority also emphasized that the fixing of a non-parole period does not mean that the foreign offender will necessarily be granted parole. Considerations such as the impossibility of supervision can be taken into account by the parole board at the appropriate time.

[59] The majority concluded that factors such as the liability of a foreign offender to deportation and the consequent impossibility of supervision on parole do not <u>of themselves</u> compel a sentencing judge to decide that it is inappropriate for such an offender to even be considered for parole. Consequently, they upheld the decision of the Court of Criminal Appeal to order that the appellant be eligible for parole. In coming to that conclusion, the majority did not say explicitly that the fact that a foreign offender would be liable to be deported was not a factor that should be taken into consideration at all in determining whether or not to fix a non-parole period.[48] However, the tenor of the reasons (summarized above) suggests that the view of the majority was that this was a consideration more properly taken into account by the

48 The majority did not treat the prospect of deportation as a special case, but rather emphasised that all of the considerations which are relevant to the sentencing process are relevant when a sentencing judge is considering whether to fix a non-parole period; which only begs the question whether the prospect of the offender being deported is a relevant consideration.

parole authorities at the later stage of deciding whether or not to grant parole.[49]

[60] The minority (Brennan and McHugh JJ) were of the view that the fact that a foreign offender was likely to be deported was a relevant consideration for the Court to take into account in deciding whether the fix a non-parole period.[50] In doing so, they emphasized that eligibility for a parole order is part of the sentence and "calls for an evaluation of all the relevant circumstances and consideration of all the sentencing options".[51] They concluded that only in exceptional circumstances would it be appropriate for a court to fix a non-parole period in sentencing an offender who came to Australia on a short term visa in order to commit a serious offence, who has no ties to this country and is liable to deportation as a prohibited immigrant on his release from prison.

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49 After the Court of Appeal's decision, but before the High Court handed down its decision, the Western Australian legislation was amended to provide specifically that "a court is not precluded from fixing a non-parole period merely because the person, is, or may be, likely to be deported from Australia."

50 *The Queen v Shrestha* (1991) 173 CLR 48 at 63-66. Brennan CJ and McHugh J referred to "foreign nationals and foreign residents", by which they meant "non-citizens who do not ordinarily reside in Australia", but the case involved a person liable to deportation and the reasoning encompassed those who were unlikely to remain part of the Australian community as a result of deportation. Their Honours said at 65:

> *To take cognizance of the policy which affects the exercise of a power to deport is to have regard to a circumstance relevant to the evaluation of these matters. ..... If, forming the opinion that the offender is likely to be deported were he released on parole, the court determines that an eligibility-for-parole order should not be made, the court has not subordinated its function to the executive power; it has simply taken account of the effect of a likely and valid exercise of an executive power on the offender's availability to serve the remainder of his sentence on parole - a consideration which is material to the proper exercise of the court's discretion.*

51 *The Queen v Shrestha* (1991) 173 CLR 48 at 61.

The principles to be drawn from the non-parole cases

[61] The position after *Shrestha* is that a court is not precluded from fixing a non-parole period merely because the offender is liable to be deported. Further, the majority judgment suggests, but does not expressly decide, that the prospect of deportation will not generally be a relevant consideration in that determination, and is more properly considered by the parole authorities at the later stage of deciding whether to grant parole (in the event that the court determines to fix a non-parole period having regard to what are the relevant considerations). The focus of the majority in coming to those conclusions was on the purpose and utility of parole. That is, the prospect of deportation does not militate against the fixing of a non-parole period because there is a public interest in the well-being and rehabilitation of all people within Australian prisons, including foreign nationals.

[62] The position in Western Australia before *Shrestha* was that the prospect of an offender being deported was not, of itself, sufficient reason to decline to fix a non-parole period. However, there were conflicting statements about whether or not an offender's immigration status was to be taken into account as part of the offender's antecedents, or as an otherwise relevant factor in determining whether to set a non-parole period. The matter is now governed by statute.

[63] The position in New South Wales is that the prospect of deportation should not be taken into account when deciding whether to fix a non-parole period because it is a matter for the executive, not the courts, to determine whether a person will be deported at the end of an appointed minimum term, and the courts should deal with a foreign offender in the same way as a domestic offender. That rationale focuses on the division of responsibility between the courts and the executive, and broad notions of equal justice, rather than the purpose and utility of parole. This position has been maintained in New South Wales cases that post-date *Shrestha*.

[64] There have been more general statements of principle in some non-parole cases, originating with the passage from *R v Chi Sun Tsui* extracted above,[52] to the effect that the prospect of deportation is not a relevant matter for consideration by a sentencing judge because it is the product of an entirely separate legislative and policy area of societal regulation. These statements, although made in the context of non-parole cases, have been adopted and cited in support of the proposition that the prospect of deportation is not a relevant sentencing consideration at all, and is therefore precluded from being taken into account in mitigation of sentence.

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52 *R v Chi Sun Tsui* (1985) 1 NSWLR 308 at 311. In *R v Latumetan and Murwanto* [2003] NSWCCA 70 at [19] the Court expressed the principle in similarly general terms: "It is well settled that the prospect of deportation was not a matter properly to be taken into account for sentencing purposes."

[65] Some cases also quote *Shrestha* as authority for this proposition, although on proper analysis the reasoning of the majority turned on matters specific to non-parole periods. By way of example, it was said in *Dauphin v The Queen*[53] that the passage from *R v Chi Sun Tsui* was quoted without apparent disapproval by Brennan and McHugh JJ in *Shrestha*. That observation in *Dauphin v The Queen* has in turn been quoted in subsequent cases, including by the Northern Territory Court of Criminal Appeal in *The Queen v MAH* (supra). However, Brennan and McHugh JJ were in the dissenting minority in *Shrestha*; and, in any case, they came to the conclusion that only in exceptional circumstances would it be appropriate for a court to fix a non-parole period in sentencing an offender who came to Australia on a short term visa in order to commit a serious offence and is liable to deportation as a prohibited immigrant on his release from prison. That conclusion clearly contemplates that the prospect of deportation is a relevant sentencing consideration for parole purposes at least, and the minority said explicitly that it was "a consideration which is material to the proper exercise of the court's [sentencing] discretion".[54]

The threshold cases

[66] The question in the threshold cases is whether it is proper to take the prospect of deportation into account so as to impose a sentence

53 *Dauphin v The Queen* [2002] WASCA 104 at [22].

54 *The Queen v Shrestha* (1991) 173 CLR 48 at 65.

designed to avoid that consequence. In every case where this issue has been considered, the court has stated that it is not permissible to take into account the prospect of deportation for that purpose.

[67] In *R v S*,[55] the applicant was a US citizen who had applied for leave to appeal against a decision by the sentencing judge refusing to reopen a sentence of three years' imprisonment for child sex offences. The application to reopen the sentence had been made after the applicant received a notice from the Department of Immigration of an intention to consider revoking his visa on character grounds. Leave to appeal was refused. The Queensland Court of Appeal held that it would have been improper for the sentencing judge to re-open the sentence with a view to imposing a lesser sentence for the purpose of avoiding the consequence of deportation. McPherson JA (with whom Thomas JA and Mullins J agreed) said:

> I consider that the process of sentencing should not seek to anticipate the action that some other authority or tribunal, lawfully acting within the limits of a proper discretion, may take in future, by so adjusting the sentence as to defeat, avoid or circumvent that result. See, although in a different sentencing context, *R. v. Booth* [2001] 1 Qd.R. 393, 400, where it was said to be wrong to attempt to circumvent a specific legislative direction by deliberately imposing a lesser sentence in order to avert it.[56]

[68] McPherson JA saw this as an instance of the more general principle articulated by Street CJ in *R v Chi Sun Tsui* that "the prospect of

55 *R v S* [2003] 1 Qd R 76.

56 *R v S* [2003] 1 Qd R 76 at 78.

deportation is not a relevant matter for consideration by a sentencing judge in that it is the product of an entirely different legislative policy area of the regulation of society".[57]

[69] In *R v Bob; ex parte A-G (Qld)*,[58] the offender argued that the sentence should be re-opened because the judge had been misinformed that the prospect of deportation was enlivened only by a sentence of more than 12 months, rather than, as is the case, 12 months or more. De Jersey CJ, Davies JA and Atkinson J held that the trial judge rightly did not take the prospect of deportation into account. De Jersey CJ said:

> Indeed, as the Judge rightly pointed out during the reopening proceedings, what was proposed then, and what is renewed here now, that is "to fashion a sentence which would not otherwise be considered appropriate solely to circumvent the *Migration Act*", would not be a correct approach to the matter. Her Honour described that as "the very thing that ought not to occur, that is fashioning a sentence solely to defeat the exercise of a discretion under section 501 of the *Migration Act*". I respectfully agree.[59]

[70] In *R v MAO; Ex parte Attorney-General (Qld)*[60] the trial judge, in sentencing the respondent for indecent dealing with a female child under 12 years, took into account that a sentence in excess of 12 months' imprisonment could potentially expose the respondent to deportation pursuant to s 50C of the *Migration Act 1958* (Cth). He

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57 McPherson JA noted that this remark of Street CJ was cited without apparent disapproval in *Shrestha v The Queen* (1991) 173 CLR 48 at 58. However, it was cited on that page by the minority (Brennan and McHugh JJ) and, as already discussed above, they reached the opposite conclusion.

58 *R v Bob; ex parte A-G (Qld)* [2003] QCA 129.

59 *R v Bob; ex parte A-G (Qld)* [2003] QCA 129 at [6].

60 *R v MAO; Ex parte Attorney-General (Qld)* [2006] QCA 99.

therefore sentenced the respondent to 11 months and three weeks. On appeal by the Crown, the respondent argued that the risk of deportation came within the purview of "any other relevant circumstance" which the sentencing court was entitled to take into consideration under the relevant Queensland legislation. The Court of Appeal (de Jersey CJ, Williams and Keane JJA) rejected that argument. De Jersey CJ said, citing *R v S* (supra):

> It is impermissible for a Judge to reduce an otherwise appropriate sentence to avoid a risk of deportation. That is well-established by comparatively recent authority.[61]

[71] In *R v Kansiz*,[62] the Victorian Court of Criminal Appeal considered the case of an applicant who was found guilty of assaulting a police officer in the course of his duty and who pleaded guilty to a range of other offences. He was liable to be deported if he received a sentence of imprisonment for 12 months or more. He sought leave to appeal against the severity of his sentence of three years' imprisonment on a range of grounds, including that the sentencing judge failed to give any or any proper weight to the risk of the applicant being deported. McInerny J (with whom McGarvie J agreed) said:

> It was not necessary to decide whether it was relevant for the sentencing judge to take the prospect of deportation into account because he had decided that a sentence of imprisonment of more than 12 months was warranted.

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61 *R v MAO; Ex parte Attorney-General (Qld)* (2006) 163 A Crim R 63 at [18]

62 *R v Kansiz* (Unreported, Victorian CCA, 7 December 1982).

> So far as the authorities go, the view of this court has, I think, in general terms, been that deportation is an administrative decision which has nothing to do with the court and that the court must impose the sentence which in its view is appropriate irrespective of the possibility of deportation.
>
> Once the learned trial judge decided that a sentence of imprisonment for a period in excess of twelve months was appropriate, the risk of deportation had to be accepted by the applicant. It would not have been proper for his Honour to have imposed a substantially smaller sentence than the sentence which he thought appropriate simply to avoid the risk of deportation.

[72] In the subsequent Victorian case of *R v Griffiths*,[63] the applicant was a New Zealand citizen who was found guilty of a single charge of arson and sentenced to imprisonment for 15 months suspended after five months. He sought leave to appeal against both conviction and sentence. As the *Migration Act* then stood, the Minister had a discretion to deport him as he had been sentenced to imprisonment for 12 months or more. The sentencing judge was not informed of this and did not take into account the risk of deportation. The appellant contended that this was an error. Leave to appeal was not granted. Tadgell JA (with whom the other members of the Court agreed) said:

> Quite apart from anything else, it would be unseemly, as I think, for a court to attempt to formulate a sentence in order, on the one hand, to accommodate, or on the other hand, to avoid the possible exercise of an administrative decision.

63 *R v Griffiths* (Unreported, Victorian CCA, 29 April 1998).

[73] In the South Australian case of *R v Berlinsky*[64] (dealt with in more detail below), Doyle CJ said at [27]:

> In any event, at the end of the day the Judge had to impose an appropriate sentence having regard to the relevant circumstances. It would be wrong for the Judge to impose a lesser sentence than was appropriate on the basis that the shorter the sentence the better the prospects of the Minister permitting Ms Berlinsky to avoid deportation.

[74] In the same case, Bleby J (agreeing with Doyle CJ) made the following additional remarks at [46]:

> It is not for this Court to attempt to influence in any way the decision on the appellant's visa application, and the determination of the proper sentence in this case cannot be influenced in any way by the effect it may have on that decision.

[75] Gray J agreed (at [68]) that it was to be accepted that a court should not construct the sentence so as to avoid the operation of the provisions of the Commonwealth migration legislation. However, Gray J would have allowed the appeal on the basis that under the sentencing legislation, the relevant sentencing factors included the effect of the sentence on the appellant's infant child. He concluded that in this limited context it was appropriate to have regard to the probable consequences of the appellant's deportation on the child.

[76] The Northern Territory Court of Criminal Appeal decision in *The Queen v MAH* (supra) was also a threshold case. The error which the

64 *R v Berlinsky* [2005] SASC 316.

sentencing judge had committed was to hold that where, as in that case, the appropriate head sentence is in the order of imprisonment for 12 months (ie the threshold at which the risk of deportation arises) it is permissible to take that consequence into account in determining where, within the appropriate range, to fix the head sentence. However, the Court of Criminal Appeal expressed the principle in general terms to be that "the possibility of deportation is an entirely irrelevant matter for sentencing purposes." The other Northern Territory authority, *Urahman v Semrad* (supra), was also a threshold case.

[77] The principle underlying the approach adopted in the threshold cases is that the power to exclude or remove a non-citizen under the *Migration Act 1958* (Cth) is a fundamental incident of sovereignty over territory which cannot be curtailed or undermined by the courts. The legislative authority for the *Migration Act* is s 51(xix) of the *Constitution*, which confers authority on the Parliament to make laws with respect to "naturalization and aliens".[65] The power is expressed in unqualified terms. It authorizes the enactment of laws with respect to non-citizens generally. Such laws may either exclude the entry of non-citizens, or a particular class of non-citizens, into Australia or prescribe conditions upon which they may be permitted to enter and remain, and may also

65 See *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at [156]; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28*; MIMA v Nystrom* (2006) 228 CLR 566 at [63]; *Plaintiff M47/2012 v Director-General of Security and Others* [2012] HCA 46; (2012) 292 ALR 243 at [81].

provide for their detention and removal. In *Chu Kheng Lim v Minister for Immigration*,[66] Brennan, Deane and Dawson JJ stated that "the power to exclude or expel even a friendly alien is recognised by international law as an incident of sovereignty over territory". That principle has been long acknowledged in Australia.[67]

[78] Section 4 of the *Migration Act* sets out the object of the Act in terms which include the removal or deportation from Australia of non-citizens whose presence in Australia is not in the national interest. It is in recognition of the Parliament's power to make laws for those purposes and the fact that it has done so, and with regard to the principles of comity which govern the interaction between the various arms of government, that the courts do not design sentences in order to undermine those purposes.

The mitigation cases

[79] The question in the mitigation cases is whether liability to deportation is a matter connected to an offender which a sentencing court may properly take into consideration as meriting a lesser penalty. As noted at the outset, there is a dichotomy between authorities in Western Australia and New South Wales on the one hand, and Victoria,

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66 *Chu Kheng Lim* (1992) 176 CLR 1 at 29-30.

67 See, for example, *Robtelmes v Brenan* (1906) 4 CLR 395 at 400. The power of expulsion was referred to by Gleeson CJ in *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 170-174 and in *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at [18], and more recently by Crennan J in *CPCF v Minister for Immigration* (2015) 255 CLR 514 at [193], [216]-[218].

Queensland, the Australian Capital Territory and Tasmania on the other, in relation to whether the prospect of deportation of an offender is a relevant sentencing consideration which may operate in mitigation.

The New South Wales authorities

[80] There are conflicting decisions in New South Wales on whether the prospect of deportation can be taken into account in mitigation of sentence, and the matter has not yet been resolved. In *R v Kwon*,[68] which was the first case in which the New South Wales Court of Criminal Appeal considered the issue, the Court adopted the position now taken by the courts in Victoria. That case involved an unsuccessful appeal by the Director of Public Prosecutions against a sentence of 32 months' imprisonment with a non-parole period of 20 months imposed on the respondent for the crime of manslaughter. The Director contended that the sentence was manifestly inadequate.

[81] One of the factors mentioned by both Adams and Hulme JJ (with whom Tobias JA agreed) which led to the dismissal of the appeal was that the trial judge was correct in taking into account in mitigation the extra-curial punishment which the respondent would suffer a result of his inevitable deportation from Australia and the loss of the opportunity of becoming an Australian citizen. Hulme J said at [13]-[15]:

68 *R v Kwon* [2004] NSWCCA 456.

> One of the factors to which I refer as justifying the period of 4 years arises from the fact that the presence of the Respondent and his family in Australia was pursuant to a visa that allowed temporary residence. He hoped to settle in Australia but the result of his offence is that his family have had to leave, and on completion of the custodial portion of his sentence, he will also have to leave Australia. The second factor concerns the consequence of his custodial sentence. He has lost the tiling business which he had established and which was, it would seem, an asset of significant value. At the time of the offence he was tiling a 130 unit development for Meriton Apartments.
>
> These two matters are not insubstantial and one may fairly say, in practical terms, punishing consequences of his offending. I would regard an opportunity for someone in the situation of the Respondent of permanently settling in Australia with his family as something of real value to him. I should perhaps add that, while I have mentioned what has happened to the Respondent's family, I do not regard the hardship they suffer from not being allowed to settle here as falling within the highly exceptional.
>
> In light of these losses, the conclusion at which I have arrived is that his Honour's 4 years starting point, while lenient, was not manifestly inadequate.

[82] Adams J said at [48]:

> These considerations lead me to conclude that this offence falls well within the least culpable category of manslaughter, having regard also to the subjective features of the case: the respondent's remorse and contrition; his previous good character so far as non-immigration offences were concerned; the inevitability of his deportation following release, together with his family (especially distressing for his children) and the loss of the opportunity of becoming an Australian and of raising his family here; and the difficulties faced in gaol because of his limited English language skills. It follows that the learned trial judge's starting point of four years was at the high rather than the low end of appropriate punishment. The Crown appeal cannot succeed at this point.

[83] This approach was reversed in subsequent decisions. In *R v Pham,*[69] the Court relied on the principles established in the non-parole cases, and did not make reference to the decision in *Kwon.* That case involved an appeal by the Director of Public Prosecutions against a sentence of imprisonment for 18 months with a non-parole period of 12 months imposed following the respondent's plea of guilty to one count of escaping lawful custody. The maximum penalty for that offence was imprisonment for 10 years. One of the grounds of appeal was that the sentencing judge had inappropriately taken into account an expectation that the respondent would be deported as soon as the custodial portion of any sentence was served.

[84] Wood CJ at CL (with whom Hislop and Johnston JJ agreed) said at [13]-[14]:

> It is established principle that the fact of deportation is irrelevant as a sentencing consideration, it being a matter exclusively for the Executive Government: *R v Jap* NSWCCA 20 July 1998 and *R v Latumetan and Murwanto* [2003] NSWCCA 70. Moreover the High Court has held that a foreign national should receive the benefit of being eligible for release on parole: *Shrestha v The Queen* (1991) 173 CLR 48 at 71 per Deane, Dawson and Toohey JJ.
>
> The fact that the Respondent would be or might be deported to Vietnam, was accordingly an immaterial factor in structuring a sentence in this case and error would be demonstrated if it could be established that it became a factor in determining any aspect of the sentence including the selection of an appropriate commencement date.

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69 *R v Pham* [2005] NSWCCA 94.

[85] However, the reasons for sentence in that matter, which were described by the Court of Criminal Appeal as "exceedingly succinct", did not expressly state that liability to deportation had been taken into account in formulating the sentence. The Director relied on an implication said to arise from exchanges between the bench and counsel during the submissions on sentence. Ultimately, the Court of Criminal Appeal was not persuaded that the sentencing judge had erred in this respect.

[86] *Pham* and the non-parole cases were relied on in subsequent Court of Criminal Appeal decisions, although, given the result in *Pham,* the remarks by Wood CJ at CL which are extracted above were *obiter*. As already discussed, the non-parole cases involved arguably different considerations. That is particularly so in the High Court decision in *Shrestha*, in which the decision of the majority depended heavily on public policy considerations relating to the objects and value of having prisoners eligible for conditional release on parole.

[87] In *R v Do,*[70] the applicant sought leave to appeal against a sentence of eight years' imprisonment with a non-parole period of five years for importing a trafficable quantity of heroin into Australia. The applicant was a citizen of Vietnam and a holder of a Resident Visa which permitted her to remain in Australia indefinitely. The sentencing judge noted that it appeared likely that she would be deported on her release

70 *R v Do* [2005] NSWCCA 258.

from custody. One ground of appeal was that the sentencing judge "erred in failing to have regard to: (a) the applicant's loss of her right to remain in Australia; and (b) the effect of the applicant's deportation to Vietnam as a form of extra-curial punishment on the applicant."[71] The applicant contended that "[the applicant's] forced return to Vietnam is a significant extra-curial punishment and should have been taken into account as such".[72]

[88] Buddin J (with whom Brownie AJA and Latham J agreed) cited the passages from *Pham* extracted above with approval. His Honour added at [25]-[26]:

> Moreover, the sentencing judge did not have any evidence before him upon which to base a conclusion as to whether or not the applicant's deportation would eventuate at some time in the future.
>
> Even more fundamentally, there was no evidence before the sentencing judge that would enable a conclusion to be drawn that were the applicant to be deported, that such a state of affairs would necessarily constitute additional punishment in the relevant sense (as to the principles which apply to the question of "extra-curial" punishment, see *R v Daetz* (2003) 139 A Crim R 398). In the absence of any such evidence, it is quite impossible to know what weight, if any, should then be attributed to it. That in my view would be a sufficient basis upon which to dispose of the present ground.

[89] Buddin J went on to distinguish *Kwon* on the following grounds:

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71 *R v Do* [2005] NSWCCA 258 at [21].

72 *R v Do* [2005] NSWCCA 258 at [23].

(a) There was an evidentiary basis for the finding in *Kwon* that deportation would be an extra-curial punishment.

(b) The general principle concerning the hardship which the sentencing process will occasion to the offender's dependants was a matter that apparently played a part in influencing the court to take the course which it did in *Kwon*.

(c) People who commit offences of the kind which the applicant committed, involving as they do a contravention of the *Customs Act*, may well, for strong reasons of policy, stand in a very different position to that of the respondent in *Kwon*.

[90] Although these three factors may be valid points of distinction between the circumstances under consideration in *Kwon* and *Do*, they certainly do not suggest, either alone or in combination, that the prospect of deportation is never a relevant factor in sentencing. In fact, the approval of *Pham* notwithstanding, it would appear to have been accepted in *Do* there may be circumstances in which it is a relevant consideration.

[91] *R v Qin; Qin v Regina*[73] involved an appeal by the appellant against his conviction on charges of indecent assault and sexual intercourse without consent, and a Crown cross-appeal against sentence on the ground of manifest inadequacy. One of the grounds of the Crown

73 *R v Qin; Qin v Regina* [2008] NSWCCA 189.

appeal was that the sentencing judge impermissibly took into account the possibility of deportation. The sentencing judge had referred to *Shrestha* and *Mirzaee* as authority for the proposition that the threat of deportation is a relevant factor because those cases "focused upon not discriminating against potential deportees" in determining whether to fix a non-parole period, and the potential for deportation, even if not technically a punishment, was "at least something which increases the seriousness of the consequences of the sentence that is imposed."[74]

[92] In the Court of Criminal Appeal, Grove J (with whom McClellan CJ at CL and Blanch J agreed) questioned the correctness of the sentencing judge's approach. As his Honour pointed out, quite logically and correctly with respect, both cases referred to by the sentencing judge were about not taking potential deportation into account and "provided no basis for applying the converse".[75] Grove J cited *Pham* and relied on the passage from that case which is extracted above. However, Grove J concluded that the appeal was not a suitable vehicle for determination of any perceived dispute or doubt about the principle because there was no indication that the sentencing judge had in fact

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74 *R v Qin; Qin v Regina* [2008] NSWCCA 189 at [38]. The appellant was 52. He had lived in Australia for many years, had an adult daughter here, and had been in a relationship with an Australian woman for some years. He had applied for citizenship and had been informed that the application had been approved. His citizenship had not yet been granted, and the sentence had the potential to affect the decision whether he would be granted citizenship (as would the outcome of the appeal).

75 *R v Qin; Qin v Regina* [2008] NSWCCA 189 at [38].

taken the possibility of deportation into account by reducing the sentence which he otherwise would have imposed.

[93] In *AC v R*,[76] the Court of Criminal Appeal considered an application for leave to appeal against a sentence imposed for the offence of persistent sexual abuse of a 12-year-old girl. One ground of appeal was that the sentencing judge had erred in failing to consider whether to make a finding of special circumstances, one of which was said to be the risk of deportation. A finding of special circumstances was necessary before the sentencing judge could depart from the ratio between the head sentence and the non-parole period otherwise fixed by statute. As such, the proposed ground of appeal was not against a failure to fix a non-parole period. On proper characterisation, it was a contention that the risk of deportation should have been taken into account as a mitigating factor. Schmidt J (with whom Bathurst CJ and Wilson J agreed) said at [79]:

> It appears that the applicant is at risk of deportation once his sentence is served. This was not a relevant consideration on sentence, even in fixing the applicant's non-parole period. Deportation is a matter for the Executive Government (see *R v Van Hong Pham* [2005] NSWCCA 94 referring to *Shrestha v The Queen* [1991] HCA 26; (1991) 173 CLR 48).

76 *AC v R* [2016] NSWCCA 107.

[94] This approach was reaffirmed by the Court of Criminal Appeal in *Kristensen v The Queen*.[77] The appellant had been sentenced to imprisonment for one year and nine months for the federal offence of using a carriage service to send indecent material to a person under 16 years of age. He appealed on the basis that the sentencing judge did not have regard to the utilitarian value of his guilty plea. It was common ground on the appeal that the sentencing judge had made a material error in that respect. It then fell to the appeal court to resentence the offender.

[95] In the process of doing so, Payne JA (RA Hulme and Button JJ agreeing) made reference to the statements in *Pham* and *AC* to the effect that the risk of deportation was not a relevant consideration on sentence. His Honour then reviewed the different approach taken by the courts in Victoria and Queensland, and the amendments to the *Migration Act 1958* (Cth) made in 2014 inserting ss 501(3A) and 501CA. The former provision deemed the applicant to not meet the character test, on the ground that he had a "substantial criminal record" and/or he had been convicted of a "sexually based offence involving a child. The latter provision operated such that although the decision to cancel the applicant's visa was mandatory and automatic, the applicant could apply to have the decision revoked. It was common ground that

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77 *Kristensen v The Queen* [2018] NSWCCA 189.

there was no evidence about the making or outcome of any application to the Minister to revoke the cancellation of the applicant's visa.

[96] Having conducted that review, Payne JA stated at [34]-[35]:

> I see no reason based on the provisions of the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) to adopt any different approach to sentencing in New South Wales. It remains the case that, as in *Mirzaee*, *Pham* and *AC*, the applicant here is at risk of deportation once released from prison. True it is that the statute now has an automatic application, subject to safeguards and ultimately to review. The possibility of deportation was not, in *Mirzaee*, *Pham* and *AC*, a relevant consideration on sentence, even in fixing the offender's non-parole period. Deportation was a live issue in cases such as the present under the migration law prior to 2014. After the amendment, deportation remains a matter for the Commonwealth Executive Government, subject to review within the Constitutional structure.
>
> Even if the Victorian and Queensland approach to this question were to be adopted, this is a case where the evidence about the applicant's likely deportation does not rise beyond mere speculation. If there is to be a challenge to the long standing New South Wales approach to the relevance of possible deportation to sentencing, this case is not an appropriate vehicle for such a challenge. I do not propose to take the applicant's possible deportation into account.

[97] This approach was most recently reaffirmed by the New South Wales Court of Criminal Appeal of *Maxwell v R*,[78] which was delivered on 8 May 2020. Johnson J (with whom the other members of the Court agreed) stated at [123]-[124]:

> I have considered submissions made on the question of special circumstances. I do not regard the prospect of the Applicant's deportation to New Zealand as being a factor assisting him on the

78 *Maxwell v R* [2020] NSWCCA 94.

> question of special circumstances. The prospect of deportation is irrelevant to the structuring of a sentence and it is an error to use deportation to determine any aspect of a sentence: *R v Pham* [2005] NSWCCA 94 at [13]-[14]; *He v R* [2016] NSWCCA 220 at [23]. It is impermissible to consider the fact of deportation in determining the length of a non-parole period for an offender who is likely to be deported: *R v Mirzaee* [2004] NSWCCA 315 at [20]-[21]; *R v Pham* at [13]; *He v R* at [25]-[26], although an offender who is likely to be deported should not be denied a finding of special circumstances if the person would otherwise qualify for such a finding.
>
> I do not consider that the Court should reduce the sentence that would otherwise be imposed on the Applicant, or structure the sentence differently, because he is anxious about the prospect of deportation: *R v Quin* [2008] NSWCCA 189 at [38], [40].

[98] That remains the position in New South Wales.

The Western Australian authorities

[99] The Western Australian cases have applied the principles in the non-parole cases (including *Chi Sun Tsui* and *Shrestha*) in support of the conclusion that that the prospect of deportation is not a relevant consideration for sentencing purposes at all. In addition to the rationale in the non-parole cases – that deportation is a matter for the executive and not something that is proper for the courts to take into account – the Western Australian courts have placed emphasis on the fact that to take the prospect of deportation into account in mitigation of sentence would result in more favourable treatment being given to foreign offenders than to Australians who have committed similar offences, and that this would be unjust.

[100] In *Dauphin v The Queen*,[79] Steytler J (with whom Anderson and McKechnie JJ agreed) said at [21]-[22]:

> Counsel for the applicant informed the Court that she had recently been advised that the applicant will be deported to New Zealand at the completion of his sentence. She suggested that this should be taken into account by the Court when considering the appropriate sentence to be imposed, particularly in light of the prospect of reconciliation between the applicant and his de facto partner and the fact that the applicant no longer has any connection to his country of birth.
>
> In my opinion, this submission is without merit. In *R v Chi Sun Tsui* (1985) 1 NSWLR 308 at 311, Street CJ (with whom the other members of the Court were in agreement) said that "the prospect of deportation is not a relevant matter or consideration by a sentencing Judge, in that it is the product of an entirely separate legislative policy area of the regulation of society". Those remarks were cited with apparent approval by Brennan and McHugh JJ in *R v Shrestha* (1991) 173 CLR 48 at 58. Furthermore, as McPherson JA explained in *R v Simard* [2001] QCA 531 at [6], taking the prospect of the applicant's deportation into consideration has the potential to "produce a regime under which visitors or non-permanent residents [are] sentenced more leniently than Australians who [have] committed the same kind of offence. That cannot be a proper result in the administration of justice".

[101] In *Houghton v Western Australia*,[80] the appellant accepted that the possibility of deportation could not be taken into account as a reason for a reduction of sentence (on the authority of *Dauphin*).[81] However, he submitted that he would suffer hardship in the course of serving his sentence because the possibility of deportation had rendered him

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79 *Dauphin -v- The Queen* [2002] WASCA 104.

80 *Houghton v Western Australia* [2006] WASCA 143.

81 The appellant was born in the United Kingdom, but had lived in Australia for all but 12 months of his life. He had never taken out Australian citizenship, but had been a permanent resident for 10 years. As a result of his sentence, it was possible for the Minister to exercise discretion to cancel the appellant's permanent residency on character grounds.

ineligible for a minimum security rating, home leave or work release, and argued that such hardship should be taken into account.

[102] The Court of Appeal reviewed the authorities on when and how the additional hardship and deprivation likely to be endured by a prisoner because of his subjective circumstances may be taken into account by a sentencing court. Steytler P (with whom Murray AJA agreed) did not reach a conclusion about whether such matters could ever be taken into account, but held that even if such consequences could be viewed as giving rise to hardship of the kind that should be taken into account in considering whether the sentence imposed was appropriate, it was not appropriate in the circumstances of the particular case to alter the sentence which had been imposed upon the appellant. This was so even though Steytler P (with whom Murray AJA agreed) found that it was probable that the possibility of the appellant's deportation would result in the loss or diminution of the prospect that the appellant would achieve a minimum security rating and be accorded home leave and other privileges.[82]

[103] These issues were considered again in *Cohen v Western Australia (No 2)*.[83] The appellant was a long term resident of Australia with no

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82 Roberts-Smith JA considered that the consequences of the appellant's potential deportation did not give rise to hardship of the kind that should be taken into account in considering whether the sentence imposed was appropriate, on the ground that it could not be said that the consequences were probable as they all involved assessments and decisions yet to be made by the Executive.

83 *Cohen v Western Australia (No 2)* [2007] WASCA 279.

ties to his country of origin. After being convicted of certain drug offences he was declared a drug dealer and the house inherited from his mother was forfeited to the Crown. He argued that he would be suffering substantial additional punishment from the loss of the house and the fact that he was likely to be deported and refused re-entry into Australia. The evidence was that the Minister had not yet made a decision as to whether the appellant would be deported when he was released. There was additional evidence that, because he faced the possibility of deportation, the prison policy was that he would not be eligible for certain privileges (minimum security rating and day work release).

[104] The appeal was allowed and the appellant's sentence reduced on the ground that the sentencing judge should have taken into account the substantial additional punishment suffered as a result of the loss of the house, but not on the ground based on the prospect of deportation. The Court held that the prospect of deportation and the possible loss of privileges were too speculative to take into account. Steytler P (Buss JA concurring and McLure JA dissenting on a different point) said:

> There is no evidence that the appellant will be afforded the privilege (it is not a right) of being moved to a lower security prison if his visa is not cancelled. Nor is there any evidence of when he would have been moved to a lower security prison, if that was to have happened but will not now happen. Similarly, there is nothing to say that the appellant will definitely be granted the privilege of re-entry release (again, this is not a right) if he is not to be deported. If he is to be granted that privilege, it will commence, at the earliest, on 1 March 2012, six months before he

> is due to be released. As I have said, no decision has yet been made whether or not the appellant will be deported. Consequently, the prospect of ineligibility for these privileges is merely speculative at this stage. The possibility that privileges that are granted only at the discretion of the executive (and, hence, would not ordinarily have been taken into account when sentencing an offender) might be denied seems to me to be an insufficient basis for interfering with the sentences imposed.[84]

[105] *Dauphin* was affirmed in *Ponniah v The Queen,*[85] which was a Commonwealth sentencing case. In that case the Court took a more definitive stance. Mazza J (with whom Pullin and Buss JJA agreed) said at [48]:

> In my opinion, the prospect of deportation is not a mitigating factor. Whether or not a person is deported is an executive decision: *Chu Shao Hung v The Queen* (1953) 87 CLR 575, 583-584. In other cases, the prospect of deportation has been held to be an irrelevant sentencing factor: *Dauphin v The Queen* [2002] WASCA 104 [22].

[106] That position was repeated and amplified in *Hickling v Western Australia,*[86] which was a state sentencing case. Mazza JA and Mitchell J said at [57]:

> It is obvious that the effect of the prospect of deportation upon a prisoner has not been uniformly approached in Australia. However, the position in Western Australia has been long established. Senior counsel for the appellant did not expressly ask this court to overrule *Dauphin*. No request was made for a bench of five judges to hear this matter. We have not been persuaded that the decision in Dauphin is wrong. We respectfully agree with the reasoning of Steytler J in *Dauphin*. That reasoning is consistent

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84 *Cohen v Western Australia (No 2)* [2007] WASCA 279 at [29].

85 *Ponniah v The Queen* [2011] WASCA 105.

86 *Hickling v Western Australia* [2016] WASCA 124.

> with the approach in this State with respect to other decisions of the executive arm of government regarding release on parole and the prospect of an interstate prison transfer.

[107] The appellant contended that the Court should follow the decision of the Victorian Court of Appeal in *Guden v The Queen*[87] (discussed in further detail below). Mazza JA and Mitchell J rejected the proposition that it was appropriate to consider liability to deportation as a mitigating circumstance at [60]:

> Further, it is not apparent why, as a matter of principle, special mitigatory weight should be given to the effect which the 'prospect of deportation' may have on the impact which a sentence of imprisonment will have on the offender (*Guden* [25], [27]). Many offenders, if not every offender, sentenced to a term of imprisonment suffer uncertainty — even great uncertainty — in prison about matters such as whether their relationships will remain intact; their prospects of employment; whether they will have somewhere to live upon release and where that might be. For some, whether they will return home or back into the community or town in which they lived will be uncertain. These are regarded as matters which are unavoidable consequences of imprisonment and do not constitute mitigating circumstances. We are unable to see the qualitative difference between these factors and the prospect of deportation even under the new regime.

[108] The principles which Mazza JA and Mitchell J considered to govern the question may be summarised as follows:[88]

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87 *Guden v The Queen* (2010) 28 VR 288.

88 The appellant was subject to the "new regime" introduced by the 2014 amendments (discussed above), and the Minister was obliged to cancel his visa in the light of the imposition of a term of imprisonment of 12 months or more, subject to his power to revoke such a decision. Previously the legislation provided that the Minister had a discretion to deport. The change was not seen to be significant in in terms of the applicable principles.

(a) Parliament may confer discretionary administrative power on an executive officer, which is engaged only after a court exercising judicial power has imposed an appropriate sentence according to law. The determination of the appropriate sentence remains a matter for the exercise of the court's judicial discretion, applying appropriate sentencing principles.

(b) The sentencing discretion is not appropriately exercised by reference to predictions about how such an administrative discretion, which arises only after sentence, may be exercised in the future.

(c) No special mitigatory weight should be given to the effect which a prospect of deportation might have on the impact which a sentence of imprisonment may have on an offender. Many uncertainties arise as a consequence of imprisonment, and there is no qualitative difference between them and the prospect of deportation.

(d) In any event, even if the prospect of deportation was mitigatory, the appellant needed to demonstrate hardship as a result.

[109] McLure P referred to a passage in *Guden* suggesting that the burden of imprisonment may be greater for someone serving a term of imprisonment in the expectation of being deported following release; that the loss of the opportunity to settle permanently in Australia may be seen as a serious "punishing consequence"; and that in an

appropriate case it will be proper to take these matters into account. Her Honour determined not to follow the Victorian approach for the following reasons, at [7]-[9]:

> … [I]n order to assess the weight to be given to these matters in any particular case, evidence would be required sufficient to permit a sensible quantification of the risk of deportation and it would also be necessary for an offender to demonstrate that deportation in his or her case would in fact be a hardship …
>
> … [U]nder the current statutory framework, no assessment could be made at the time of sentencing in that case of the risk of deportation following the applicant's release and that deportation was therefore viewed as a completely speculative possibility.
>
> The law in Western Australia on the relevance of the prospect of deportation in the sentencing process predates *Guden*. The position in this State is that the prospect that an offender will be deported at the conclusion of his or her sentence is, without more, an irrelevant sentencing consideration. …. That is also the law in New South Wales and was the law in Queensland until the decision in *R v UE* [2016] QCA 58.

[110] McLure P also held (at [10], citing *Dauphin* with approval) that "the law relating to the deportation of offenders on character grounds reflects an entirely separate legislative policy"; further that "it is an affront to the proper administration of criminal justice that offenders who are liable to deportation are treated more leniently than Australian citizens"; and, finally, that "it is wrong to characterise the Commonwealth statutory administrative scheme for the deportation of non-citizens on character grounds as additional punishment for the offence(s) which trigger its application" because "the purpose of that scheme is not penal or punitive in character."

[111] That remains the position in Western Australia.

The Victorian authorities

[112] In *R v Kansiz*[89] (discussed above), the Victorian Court of Criminal Appeal did not consider the issues of extra-curial punishment or the possibility that prison may weigh more heavily on an offender anticipating deportation. The case was treated solely as a threshold case. *R v Griffiths*[90] (also discussed above), was also a threshold case but the Court appeared to express a principle of more general application. The Court held that the sentencing judge was "neither obliged nor entitled to speculate that what is a mere future possibility might or might not materialise into a reality."[91] The Minister's power was completely discretionary, and therefore the prospect of deportation was considered by the Court to be "a complete speculative possibility". The Court also said it was "unable to derive any assistance" from "cases which have considered whether a non-parole period may appropriately be fixed in the case of a foreign national to be sentenced in this country."[92]

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89 *R v Kansiz* (Unreported, Victorian CCA, 7 December 1982).

90 *R v Griffiths* (Unreported, Victorian CCA, 29 April 1998).

91 *R v Griffiths* (Unreported, Victorian CCA, 29 April 1998) at [9].

92 *R v Griffiths* (Unreported, Victorian CCA, 29 April 1998) at [10].

[113] In *R v Leng Khem,*[93] the applicant appealed against the sentence imposed on him for child sex offences on various grounds, including that the sentencing judge ought to have taken into account the possible effect upon the appellant of the prospect of deportation. The appellant had made Australia his home, he believed that the child born to his former *de facto* partner was his and he contended that his potential relationship with the child was important to him. It was submitted that the state of indecision brought about by the prospect of being forced to leave Australia and of the consequence of this upon the potential relationship with his child would in itself be burdensome upon the appellant. Not knowing whether he would be deported would, in these circumstances, constitute a form of extra-curial punishment sufficient to mitigate penalty, which the sentencing judge incorrectly disregarded.

[114] In dismissing the appeal, Pagone AJA said that although the sentencing judge had correctly put out of her mind the prospect or the possibility of the appellant's deportation as such, she did permissibly take into account the impact of the loss of the prospect of being able to form a relationship with the child in determining the weight to be given to the principle of specific deterrence. Her Honour had noted that the appellant had been punished for his actions in ways that were not reflected in the sentence, and accepted that the immigration

93 *R v Leng Khem* [2008] VSCA 136.

consequences had helped bring home to him the seriousness of his conduct, and firmed his resolve not to re-offend.

[115] That principle was picked up and refined in *Guden v The Queen*,[94] which has been the most influential of the Victorian cases. Guden was a Turkish national who was convicted following pleas of guilty to eight offences arising from a single incident involving an attack with a machete, including one count of making a threat to kill and two counts of intentionally causing serious injury. He was sentenced to a total effective sentence of eight years' imprisonment with a non-parole period of six years. The sentencing judge took into account as a mitigating factor the probability that the offender would be deported on his release from custody. The offender appealed against the sentence, contending that the sentencing judge "had attached insufficient weight to his probable deportation and its likely consequences".[95] The case was decided before the 2014 amendments, at a time when the Minister for Immigration had a discretion to revoke an existing visa or decline to renew one if that person was sentenced to a term of imprisonment of 12 months or more.

[116] The Court (Maxwell P, Bongiorno JA and Beach AJA) concluded (at [25]-[27]) that there is no sentencing principle which would justify a conclusion that the prospect of an offender's deportation is an

94 *Guden v The Queen* (2010) 28 VR 288.

95 *Guden v The Queen* (2010) 28 VR 288 at [14].

irrelevant consideration in the sentencing process. As with other factors personal to an offender, the prospect of deportation was a factor which could bear on the impact which a sentence of imprisonment would have on the offender, both during the currency of the incarceration and upon his/her release. Those potential impacts included the following matters.

(a) The fact that an offender would serve his/her term of imprisonment in expectation of being deported following release might well mean that the burden of imprisonment would be greater for that person than for someone who faced no such risk.

(b) Consistent with the view expressed by the New South Wales Court of Criminal Appeal in *Kwon* (supra), in an appropriate case the fact that a sentence of imprisonment might result in the offender losing the opportunity of settling permanently in Australia might operate as a punishing consequence.

[117] However, the Court went on to caution (at [28]-[29]), consistently with the view expressed in *Griffiths* (supra), that a sentencing court could not be asked to speculate as to the risk of deportation. In order properly to assess the weight to be given in any particular case to a risk of deportation, evidence would be required sufficient to permit a sensible quantification of that risk to be undertaken. If defence counsel on a plea in mitigation could say no more than that a term of imprisonment of more than 12 months would, upon its expiry, enliven

the power of the Minister for Immigration either to revoke an existing visa or to decline to renew one, then deportation might properly be viewed as a completely speculative possibility. In the absence of evidence or an appropriate concession by the Crown, there would be no error in a judge declining to take into account the possibility of deportation. It would also be necessary for a prisoner to demonstrate that deportation in his/her case would in fact be a hardship.

[118] In arriving at these conclusions, the Court gave express consideration to the judgment of Brennan and McHugh JJ in *Shrestha*, in which their Honours referred to the statement by Street CJ in *Chi Sun Tsui*, and stated at [19]:

> The oft-cited statement by Street CJ – that the prospect of deportation 'is not a relevant matter for consideration by a sentencing judge' – must therefore be understood as explained by, and limited to, the statutory context in which it arose and the particular issue which the Court was addressing – that of the fixing of a non-parole period. There was no occasion for Street CJ to make, nor do we think his Honour intended to make, any wider statement about the relevance of deportation as a factor in sentencing.

[119] The Court therefore concluded that *Shrestha* was also authority only for that more limited proposition.

[120] *Guden* has been followed in Victoria in a number of cases, including *TAN v The Queen*,[96] *Director of Public Prosecutions (Vic) v Zhuang*,[97]

96 *TAN v The Queen* (2011) 35 VR 109; 216 A Crim R 535 at [126].

97 *Director of Public Prosecutions (Vic) v Zhuang* (2015) 250 A Crim R 282 at [54].

Konamala v The Queen,[98] *Da Costa v The Queen*,[99] and *Schneider v The Queen*.[100] In *HAT v The Queen*,[101] the Victorian Court of Appeal (Redlich JA, Neave JA and Lasry AJA agreeing) summarised the position in these terms (citations omitted):

> [T]his Court made clear in *Guden* that the prospect of deportation is a factor which may be relevant to the impact that a sentence of imprisonment will have on the offender, both during the currency of their incarceration and upon his or her release, and therefore, subject to the state of the evidence that such deportation is likely, it should be taken into account when sentencing. The burden of imprisonment may be greater for a prisoner who knows that following his release he will be deported. Also, if the effect of receiving a sentence of imprisonment is that an offender will lose the opportunity of settling permanently in Australia, this may be taken into account as a form of additional punishment. But a sentencing judge is not required to speculate; there must be evidence that enables a sensible quantification of the risk that deportation will in fact occur, and proof that deportation would in fact be a hardship for that particular offender.

[121] *Guden* has now been followed in Queensland.

The Queensland authorities

[122] As discussed above, *R v S*[102] was a "threshold" case, however McPherson JA (with whom Thomas JA and Mullins J agreed) once again cited *R v Chi Sun Tsui* as authority for the broader proposition that "the prospect of deportation is not a relevant matter for

98 *Konamala v The Queen* [2016] VSCA 48 at [33]-[36].

99 *Da Costa v The Queen* (2016) 258 A Crim R 60 at [23]-[29].

100 *Schneider v The Queen* [2016] VSCA 76 at [21]-[26].

101 *HAT v The Queen* (2011) 256 FLR 201 at 218; [2011] VSCA 427 at [126].

102 *R v S* [2003] 1 Qd R 76.

consideration by a sentencing judge in that it is the product of an entirely separate legislative policy area of the regulation of society". *R v MAO; Ex parte Attorney-General (Qld)*[103] was likewise a threshold case, but, in that case too, de Jersey CJ cited *R v Chi Sun Tsui* as authority for the broader proposition. His Honour also referred back to remarks he had made in *R v Bob; ex parte A-G (Qld)*[104] which might have been seen to suggest that liability for deportation may be taken into account, and said at [31]:

> When I said that [the sentencing] Judge "was not obliged to take that significantly into account", referring to the possibility of deportation, my remark was no more than an obiter dictum. Insofar as it may imply a view that the possibility of deportation could have any relevance to the question of penalty, it should not be followed.

[123] However, in *R v UE*[105] the Queensland Court of Appeal undertook a review of the authorities and adopted the approach which had been taken in *Guden*. The applicant in *R v UE* was a Canadian who had lived and worked in Australia for more than 10 years. He sought leave to appeal against a sentence for drug charges of six years' imprisonment with a parole release date after serving three years and four months. He contended that the sentencing judge had erred in treating the risk of deportation as an irrelevant consideration.

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103 *R v MAO; Ex parte Attorney-General (Qld)* (2006) 163 A Crim R 63.

104 *R v Bob; ex parte A-G (Qld)* [2003] QCA 129.

105 *R v UE* [2016] QCA 58.

[124] Although dismissing the appeal on the ground that the sentencing judge was right to conclude there was insufficient evidence to establish that deportation would involve hardship to the applicant, Philippides JA, (with whom Morrison JA and North J agreed) stated that the reasoning that led the Victorian Court of Appeal to its conclusion in *Guden* was "compelling". Her Honour stated at [15]-[16] (citations omitted):

> The starting point for a discussion of the relevance of deportation is often the statement of Street CJ in *R v Chi Sun Tsui* that "… the prospect of deportation is not a relevant matter for consideration by a sentencing judge, in that it is the product of an entirely separate legislative and policy area of the regulation of our society". As Maxwell P explained in *Guden,* that statement was made in the context of whether the prospect of deportation was relevant when considering if a non-parole period should be specified under legislation which prohibited the Parole Board from refusing to release a prisoner on parole "by reason, only that, in the opinion of the Board, the prisoner may become liable to be deported". The statement is not to be regarded as one of general application. To the extent that the decision of this Court in *R v S* suggested in obiter remarks otherwise, it ought not to be followed.
>
> It is undoubtedly correct that, in an appropriate case, the prospect of deportation may be a relevant factor, personal to the offender, to be considered in mitigation of sentence. The prospect of deportation may affect the impact of a sentence of imprisonment, because it makes the period of incarceration more burdensome, and also because upon release, the fact of imprisonment will result in the offender being deprived of the opportunity of permanent residence in Australia. While the prospect of deportation may be a relevant mitigatory factor, the sentencing court cannot be asked to speculate about that prospect or as to the impact of deportation on the offender. Proof that deportation will in fact be a hardship for the particular offender will be required.

[125] That case was followed in the same year by *R v Schelvis*,[106] in which Fraser J (Morrison JA and Lyons JA agreeing) confirmed that liability to deportation was potentially a relevant consideration, but held at [81]–[82] that the sentencing judge was not in error by not taking into account by way of mitigation the hardship which may have been suffered by the offender as the prospect of deportation was entirely speculative.

[126] In the subsequent matter of *R v Norris; Ex parte Attorney-General*,[107] the respondent had pleaded guilty to trafficking in cannabis, producing a quantity of cannabis exceeding 500 grams, possessing in excess of 500 grams of cannabis, and possessing an array of things for use in the production of cannabis. For counts 1 and 2 the respondent was sentenced to four years' imprisonment and 12 months' imprisonment respectively, to be served concurrently. Each term of imprisonment was suspended forthwith with an operational period of five years. For count 3, the respondent was released on probation on conditions for a period of two years. For count 4 no additional penalty was imposed. The respondent was a citizen of New Zealand. He had resided in Australia on a visa since he was two years old. The immediate suspension of the sentences of imprisonment had the effect that the

106 *R v Schelvis* [2016] QCA 294.

107 *R v Norris; Ex parte Attorney-General* [2018] QCA 27.

respondent's visa was at risk of cancellation, rather than a certainty of being cancelled.

[127] The Crown appealed against the sentence, contending that the sentencing judge had infringed the principle set out in the threshold cases, referred to above. After reviewing the authorities, Gotterson JA (with whom Sofronoff P and Philippides JA agreed) affirmed the principle in those cases,[108] but found that the sentencing judge had not imposed the suspended sentences for that improper purpose, but rather "to minimise the risk of interruption to the respondent's rehabilitation that immigration detention beyond a fixed date would entail."[109] In coming to that conclusion, Gotterson JA reaffirmed the approach taken by the Court of Appeal in *UE*, saying at [41]:

> As the respondent correctly submits, *UE* has been consistently followed in this Court in its acceptance of the reasoned principle enunciated in *Guden*. I agree that that principle is correct and am of the view that it ought to continue to be applied by sentencing courts in Queensland.

[128] The relevance of these matters for sentencing purposes was reaffirmed by the Queensland Court of Appeal in *R v Da Silva*,[110] but in that case the Court considered that the emotional and financial hardship for the

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108 Quoting the judgment of McPherson JA (with whom Thomas JA and Mullins J agreed) in *R v S*, that "the process of sentencing should not seek to anticipate the action that some other authority or tribunal, lawfully acting within the limits of a proper discretion, may take in future, by so adjusting the sentence as to defeat, avoid or circumvent that result."

109 *R v Norris; Ex parte Attorney-General* was followed by the Queensland Court of Appeal in *R v GBD* [2018] 275 A Crim R 551 at [52]-[55].

110 *R v Da Silva* [2020] QCA 176.

family could not be regarded as exceptional because the applicant had separated from his wife more than 4 ½ years before the sentence was imposed, and the family had more than three years to become accustomed to the prospect of the applicant's likely deportation.

[129] Accordingly, the position now adopted by the courts in Queensland may be summarised as follows:

(a) in an appropriate case, the prospect of deportation may be a relevant factor personal to the offender to be considered in mitigation of sentence, because it may make the period of incarceration more burdensome;

(b) in an appropriate case, the prospect of deportation may also affect the impact of the sentence because the fact of imprisonment will result in the offender being deprived of the opportunity of permanent residence in Australia;

(c) the sentencing court cannot be asked to speculate about that prospect or as to the impact of deportation on the offender, and evidence will be required to establish those matters, including proof that deportation will in fact be a hardship for the particular offender.

The Australian Capital Territory authorities

[130] The position in the Australian Capital Territory has yet to be authoritatively determined by the Court of Appeal. The earlier case of

Moh v Pine[111] determined that the offender's deportation was not a relevant sentencing consideration. Conversely, in *R v Aniezue*,[112] Refshauge J affirmed the approach in *Guden*, in the context of federal child exploitation offences, stating at [64]–[65], [67] that:

> [I]n 2011, the [Victorian] Court of Appeal in *Guden v The Queen* [2010] VSCA 196; [25]–[27] held that the prospect of deportation is a factor that may be relevant to the impact that a sentence of imprisonment must have on an offender, both during the currency of the incarceration and upon his or her release, and that, therefore, the prospects of such deportation, subject to proper evidence about it, should be taken into account. This approach has been followed since then. See *Tan v The Queen* (2011) 216 A Crim R 535 at 568–9; [126]–[129]; *Konamala v The Queen* [2016] VSCA 48 at [23]–[38] and *Da Costa Junior v The Queen* [2016] VSCA 49 at [22]–[33].
>
> These courts have made it clear that the prospects of deportation is relevant to sentencing …
>
> On the basis of this authority, I consider that I should take into account as a factor that will bear heavily upon Mr Aniezue … that he will be deported.

[131] Having regard to these conflicting decisions by single judges of the Supreme Court, the position in the Australian Capital Territory remains unsettled.

The South Australian authorities

[132] In the South Australian case of *R v Berlinsky*[113] the appellant was given leave to appeal against her sentence of imprisonment for one year and six months for various fraud related crimes. She was a citizen of the

111 *Moh v Pine* [2010] ACTSC 27 at [43].

112 *R v Aniezue* [2016] ACTSC 82.

113 *R v Berlinsky* [2005] SASC 316.

United Kingdom and had gained entry into Australia (and permanent residency) on a false New Zealand passport. Her status as a permanent resident had been terminated, and she faced the real risk of deportation. At the date of sentencing, and at the hearing of the appeal, a final decision had not yet been made by the Minister. Her legal advice was that, if deported, she was unlikely to be permitted to take her son with her because the child's father was an Australian citizen. One of the grounds of appeal was that the sentencing judge erred in failing to take into account the risk of deportation and the consequent risk that she would lose her son. As described above, the appeal was allowed by the majority on other grounds, and by Gray J, including on this ground.

[133] Doyle CJ emphasised the principles applicable to threshold cases, and said at [27]:

> As Ms Abraham QC, counsel for the respondent, correctly pointed out, deportation is a matter for the Executive Government. It is irrelevant, as such, as a sentencing consideration.[114]

[134] Bleby J (agreeing with Doyle CJ) added at [46] that the effect on the child was purely speculative, given the uncertainties in the case.

[135] Gray J (dissenting on this point) said at [68]:

> It is to be accepted that, when re-sentencing, this Court should not construct the sentence so as to avoid the operation of the

114 His Honour cited *R v Shresthra* (1991) 173 CLR 48; *Giri and Karki* (1999) 109 A Crim R 499 at 507; *R v Latumetan and Murwento* [2003] NSW CCA 70 at [19]; *R v Satui* [2002] QCA 323; and *R v Pham* [2005] NSWCCA 94 as authority for this proposition.

> provisions of the *Migration Act 1958* (Cth). The task of the Court is to fix an appropriate sentence having regard to all relevant factors. Those factors include the effect of the sentence on a dependant infant child. Section 16A(2)(p) requires that these matters be brought to account in the sentencing process. In this limited context it is appropriate to have regard to the probable consequences of the appellant being deported.

[136] In contrast to the view of the majority in that case, in *R v Zhang*[115] Chivell AJ (with whom Kourakis CJ and Vanstone J agreed) adopted the approach which has more recently been taken by the Queensland Court of Criminal Appeal, in saying at [110]-[111], [113]:

> In *R v Schelvis* it was argued that the sentencing judge should have taken into account the effects of Ms Schelvis' deportation being 'almost inevitable … upon being released on parole' …
>
> Fraser JA (with whom Morrison JA and Peter Lyons J agreed) … referred to a line of authority in Queensland and Victoria which conflicted with authorities in Western Australia and in New South Wales about whether the prospect that an offender may be deported should be taken into account. His Honour accepted that 'the risk of removal from Australia (must) be assessable rather than merely speculative before it may be taken into account by way of mitigation', following *Guden v R*.
>
> …
>
> I respectfully agree with that analysis. Leaving aside the fact that the issue was not raised at the time of sentencing, the judge did not err in failing to take into account the prospect of deportation of Mr Zhang …

[137] In the same year that *Zhang* was decided, in *R v Leka*[116] the Full Court considered an appeal on the ground that the sentencing judge failed to take into account the additional hardship the appellant would suffer

115 *R v Zhang* (2017) 265 A Crim R 117.

116 *R v Leka* [2017] SASCFC 77.

during the term of his imprisonment because of the prospect that upon his release from prison he would be deported to Albania. The Court observed (per Stanley J, Peek J and Hinton J separately concurring), that there was conflicting authority in South Australia and across the States as to whether the prospect of deportation is a matter to be taken into account as a mitigatory consideration when fixing sentence. However, it was unnecessary to resolve the conflict on that appeal because it was accepted that a sentencing judge cannot speculate as to the prospect of deportation. There must be evidence before the court that enables both a sensible quantification of the risk that deportation will, in fact, occur, and proof that deportation would, in fact, be a hardship during any term of imprisonment for that particular offender. In this case, there was no evidence before the sentencing judge as to either of these issues.

[138] Most recently, these conflicting authorities were considered by the Full Court in the case of *R v Arrowsmith*.[117] Again, Parker J (Vanstone and Nicholson JJ agreeing) did not find it necessary to resolve the issue, stating at [35]–[38] that:

> The question of the relevance of possible deportation to sentencing came before the Court of Criminal Appeal in *R v Leka*. Stanley J, with whom Peek and Hinton JJ agreed, observed that *Zhang* may have been decided *per incuriam* as no reference was made to the earlier decision in *Berlinsky*. I note that *Berlinsky*

117 *R v Arrowsmith* [2018] SASCFC 47.

> does not appear to have been drawn to the Court's attention. Stanley J concluded that it was not necessary to resolve the conflict between the authorities in this State and interstate as the appeal could be decided on other grounds.
>
> The relevance of deportation to sentencing again came before the Court of Criminal Appeal in *R v Taheri*. Nicholson J, with whom Kourakis CJ and Peek J agreed, noted the conflicting approaches but found that it was unnecessary to resolve the question as the appeal could be decided on other grounds.
>
> I also consider that it is unnecessary to resolve the conflict between *Berlinsky* and *Zhang*. The approach adopted in *Berlinsky* (and also in New South Wales and Western Australia) is that the prospect of deportation is not a relevant consideration in sentencing. The alternative approach adopted in *Zhang* (and also in Victoria and Queensland) is that the prospect of deportation will be a relevant consideration if "the risk of removal from Australia … [is] assessable rather than merely speculative".
>
> The Court cannot speculate about a decision that is still to be made by the Commonwealth Minister or his delegate. Thus, the likelihood of the applicant being deported from Australia is, on the information before the Court, not assessable. For that reason it is immaterial which of the two lines of competing authority is correct. On either view, the risk of deportation cannot be taken into account in determining the Court's response to the applicant's repeated breaches of the recognisance release order.

[139] The conflicting authorities have not been resolved in any subsequent case, and the question whether deportation is a relevant sentencing factor remains unsettled in South Australia.

The position to be adopted in the Northern Territory

[140] As described above, the courts in all Australian States and Territories have adopted a uniform approach to the threshold cases. That is, it is not permissible to take into account the prospect of deportation in order to craft a sentence designed to avoid the prospect of deportation. There is no reason in principle to depart from that position, and it is

consistent in principle with what the Court of Criminal Appeal has said in relation to the threshold for minimum non-parole periods in *Norris v The Queen*.[118]

[141] In non-parole cases, Northern Territory courts are bound by the decision of the High Court in *Shrestha*. That is, a court is not precluded from fixing a non-parole period merely because an offender is liable to be deported. The prospect of deportation will generally not be a relevant consideration in determining whether to fix a non-parole period. It is more properly considered by the parole authority at the later stage of deciding whether to grant parole.

[142] That leaves the question whether liability to deportation is properly taken into account as a mitigating circumstance. The courts in New South Wales and Western Australia have at various times given four principal reasons for holding that the prospect of deportation is not relevant to sentencing and should not be taken into account in mitigation of sentence. They are:

(a) it is consistent with long-established authority (notably *Shrestha* and *R v Chi Sun Tsui*);

(b) it would be unfair and an affront to the proper administration of criminal justice if offenders who are liable to deportation were to be treated more leniently than Australian citizens on that account;

118 *Norris v The Queen* [2020] NTCCA 8 at [41]-[45].

(c) the purpose of the Commonwealth statutory administrative scheme for the deportation of non-citizens on character grounds is not penal or punitive in character, and therefore not properly categorised as an additional or extra-curial punishment for the offence(s) which trigger its application; and

(d) the law relating to the deportation of offenders on character grounds reflects an area of legislative policy entirely separate from the criminal law.

[143] Turning first to the question of authority, *Shrestha* and *R v Chi Sun Tsui* are the seminal cases relied upon for the proposition that the prospect of deportation is not a relevant sentencing consideration. As we have already observed, and has been observed by the courts of appeal in Victoria and Queensland, both are non-parole cases. The reasoning which led to the conclusion that courts should not refuse to fix a non-parole period on the ground that the offender may be liable to deportation does not necessarily support the conclusion that the prospect of deportation should never be taken into account for sentencing purposes.[119] It was unnecessary for the Court in *R v Chi Sun Tsui* to state the principle so widely, and the reasoning of the majority in *Shrestha* relied on principles peculiar to non-parole periods and the purposes and benefits of eligibility for parole.

119 See *Guden v The Queen* (2010) 28 VR 288; *R v Griffiths* (Unreported, Victorian CCA, 29 April 1998); *R v UE* [2016] QCA 58.

[144] Turning then to the concept of fairness, the criticism that it would be an affront to the proper administration of criminal justice that offenders liable to deportation are treated more leniently than other offenders could be levelled in relation to every matter of personal circumstances which the courts take into account in mitigation on the basis that they make prison more burdensome for the offender. For example, the likely impact of incarceration on an offender with young children is taken into account as a mitigating factor if the sentencing court is satisfied that anguish caused by that separation would make the experience of imprisonment more burdensome for the offender.[120] It is also uncontroversial that the physical and mental health of the offender leading up to the commission of the offence, a history of profound deprivation, and the risk of loss of employment may operate as mitigating factors. The result in each of these cases is that an offender is treated more leniently than he or she might otherwise be, and more leniently than another offender or class of offenders with different personal circumstances might be, but it is proper to do so on ordinary sentencing principles.

[145] It is no doubt correct to say that the purpose of the deportation regime is not penal or punitive, but rather is exercised for the protection of Australian society. However, it does not follow as a matter of principle that the prospect of deportation and the consequent loss of the

120 See *Veness v The Queen* [2020] NTCCA 13 at [45]; *Markovic v The Queen* (2010) 30 VR 589 at [20].

opportunity to settle permanently in Australia are excluded from consideration as extra-curial punishment or matters that may make prison more burdensome for the offender. There are many other types of consequence not penal or punitive in purpose which the courts routinely take into account as extra-curial punishment. By way of example, the purpose of removing a disgraced lawyer's practising certificate is community protection, not punishment, but consequences of that type are take into account in sentencing as an extra-curial punishment.[121] To take a quite different example, injuries sustained by an offender in the commission of the offence may be taken into account in mitigation of sentence.[122]

[146] Generally, the approach taken by the courts when taking into account a detriment as an extra-curial punishment has been to look at the consequences, rather than exclusively at the purpose, of the detriment under consideration. So it is that extra-curial punishment has been described as a "loss or detriment imposed on an offender by persons other than the sentencing court, for the purpose of punishing the offender for his offence or at least by reason of the offender having committed the offence".[123] In *R v McLeod,*[124] the Victorian Court of

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121 See, for example, *Einfeld v R* [2010] NSWCCA 87, in which the New South Wales Court of Criminal Appeal Court determined (at [92] and [95]) that the sentencing judge was entitled to take into account effective "punishment" of the applicant which arose beyond the confines of the sentences imposed by the Court including the revocation of his commission as Queen's Counsel and the non-renewal of his practising certificate.

122 *Haddara* (1997) 95 A Crim R 108; *Cohen v Western Australia (No 2)* (supra).

123 *Silvano v The Queen* [2008] NSWCCA 118 at [29].

Appeal confirmed that forfeiture of lawfully acquired property could be taken into account as a form of extra-curial punishment in mitigation of sentence, explaining:

> At common law, forfeiture of lawfully-acquired property has generally been regarded as a mitigating factor in sentencing, since it places the offender in a worse position than he/she was before the commission of the offence. That is, forfeiture has a punitive or deterrent effect.

[147] In a more general statement of principle, in *Christodoulou v R*[125] Campbell JA observed at [5]:

> The types of detriments that have been recognised as extra-curial punishment that can be taken into account as mitigating factors have all been detriments that have come to be imposed on the criminal after the crime has been committed in retribution for or as a consequence of, his having committed the crime, or detriments unintentionally arising from the criminal conduct.

[148] These statements of principle are certainly wide enough to encompass loss of the opportunity to settle permanently in Australia as a result of committing an offence for which an offender is sentenced to a term of imprisonment above the statutory threshold. As the Court said in *Guden,* on any practical approach the loss of the opportunity of settling permanently in Australia may well be viewed as a serious "punishing consequence" of the offending. The fact that the purpose of the deportation regime is not penal or punitive provides no compelling

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124 *R v McLeod* (2007) 16 VR 682 at 685; cited with approval in *HAT v The Queen* (2011) 256 FLR 201 at 218.

125 *Christodoulou v R* [2008] NSWCCA 102.

reason in principle for excluding liability to deportation from consideration entirely for sentencing purposes.

[149] In drawing that conclusion, we have had regard to certain observations made by the High Court in *Muldrock v The Queen*.[126] In that case the Court said at [61]:

> The *Sex Offenders Act* empowers the Supreme Court on the application of the State of New South Wales to order the continuing detention in custody or the extended supervision of a sex offender following the expiration of the offender's sentence. Section 24A(1)(b) of the *Sentencing Act* provides that a court must not take into account as a mitigating factor the fact that the offender has or may become the subject of an order under the *Sex Offenders Act*. The appellant submits that it remains open to the sentencing court to have regard to the availability of orders under the *Sex Offenders Act*, not as a mitigating factor, but because the statutory scheme provides the means for protecting the community from those sex offenders who pose a continuing risk of harm. From this it is said to follow that there is less justification for incorporating consideration of the protection of the community in the sentence imposed on a sex offender. The notion that a sentence might be reduced to take into account the existence of a regime outside the criminal law providing for the detention of sex offenders may be thought to have little to commend it as a matter of principle. The Court of Criminal Appeal was right to reject the submission. The expression "mitigating factor" in s 24A refers to a factor that is taken into account to reduce the sentence that would otherwise be appropriate. It is the function of the court sentencing an offender for a criminal offence to take into account the purposes of criminal punishment in determining the appropriate sentence. A purpose of punishment is the protection of the community from the offender. A court may not refrain from imposing a sentence that, within the limits of proportionality, serves to protect the community in a case that calls for it because at some future time the offender may be made the subject of an order under the *Sex Offenders Act*.

126 *Muldrock v The Queen* [2011] HCA 39.

[150] We do not take the High Court there to be saying that detrimental consequences arising from the operation of any regime outside of the criminal law may not be taken into account as mitigating circumstances. First, in that case the consequences of an order under the sex offenders legislation was expressly excluded as a mitigating circumstance by the sentencing legislation. Secondly, the Court's operative concern was that a possibility that the period of detention might subsequently be extended should not warrant the imposition of a sentence which did not adequately meet the purpose of community protection. That is no more than a specific application of the general sentencing principle that mitigating subjective factors cannot operate to lead to a sentence which is disproportionate to the crime. The sentence imposed must ultimately reflect both subjective factors and the objective seriousness of the offence committed, and cannot be less than the objective gravity of the offence requires.[127]

[151] We turn finally to consider the reason that "the prospect of deportation is not a relevant matter for consideration by a sentencing judge, in that it is the product of an entirely separate legislative and policy area of the regulation of our society". That proposition was first expressed in

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127 In *Muldrock*, the High Court cautioned against ignoring an established sentencing principle, namely, protection of the community, because of the existence of "a regime outside the criminal law providing for the detention of sex offenders". By contrast, the approach adopted by the Victorian and Queensland courts in taking into account the prospect that an offender may be deported as part of its consideration of the personal circumstances of the offender in the limited ways in which these courts have done so, involves an application of established sentencing principles.

R v Chi Sun Tsui,[128] and has been repeatedly quoted in subsequent cases. The principle has been expressed in a number of ways. It finds its clearest and most specific expression in the threshold cases. For example *R v S,*[129] McPherson JA (with whom Thomas JA and Mullins J agreed) said at 78:

> I consider that the process of sentencing should not seek to anticipate the action that some other authority or tribunal, lawfully acting within the limits of a proper discretion, may take in future, by so adjusting the sentence as to defeat, avoid or circumvent that result.

[152] As we have already indicated, that more limited proposition may and should be accepted. The broader proposition from *R v Chi Sun Tsui* has been expressed with varying degrees of clarity and specificity in the context of the non-parole cases. In *R v Chi Sun Tsui,* which was itself a non-parole case, the rationale for the proposition was said to be that the Commonwealth stands back in order to allow the criminal and penal laws and orders to be carried through to the point where the criminal is freed from custody, and the Commonwealth then proceeds in accordance with the policy enunciated by the Minister on its behalf. While that analysis would and does properly preclude the courts from discharging the sentencing function in a manner which would fetter or impair the exercise of discretion by the immigration authorities, it

128 *R v Chi Sun Tsui* (1985) 1 NSWLR 308 at 311.

129 *R v S* [2003] 1 Qd R 76.

provides no rationale for excluding liability to deportation from consideration as a mitigating circumstance.

[153] Similarly, the statements made in other non-parole cases provide no rationale for the broader proposition. In *R v Pham*, the only reason given was that the fact of deportation was "a matter exclusively for the Executive Government".[130] In *R v Jap*, the reason given was that whether the offender will or will not be deported at the end of the appointed minimum term is not a matter for the courts, and the question of deportation "should be left to the proper processes of the Executive Government, and the public administration machine …".[131] In *R v Kansiz*, which was primarily a threshold case, the Victorian Court of Criminal Appeal said only that deportation is an administrative decision which has nothing to do with the court, and that the court must impose the sentence which in its view is appropriate irrespective of the possibility of deportation.[132] As already described, the subsequent Victorian authorities did not seek to give that principle any broader application.

[154] The reason why the courts should not take the liability to deportation into account in determining whether or not to fix a non-parole period is, as expressed by the majority in *Shrestha*, because the risk of

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130 *R v Pham* [2005] NSWCCA 94 at [13].

131 *R v Jap* (unreported, NSW Court of Criminal Appeal, 20 July 1998) at 6.

132 *R v Kansiz* (Unreported, Victorian CCA, 7 December 1982).

deportation does not of itself undermine the purpose and utility of fixing a non-parole period, or a subsequent grant of parole, and is effectively an irrelevant consideration. It is not because the determination whether or not to fix a non-parole period might operate to trammel executive discretion in some relevant sense. Similarly, there is no risk of a court impinging or trespassing on the domain of the executive when considering what sentence is just in all the circumstances, including circumstances personal to the offender. In doing so, the court is acting entirely within its own domain. The operative sentencing principle is that all relevant matters personal to the offender should be taken into account in sentencing.[133]

[155] This principle is reflected in s 5 of the *Sentencing Act 1995* (NT). Among the things a sentencing court must have regard to are "any other relevant circumstance",[134] which includes, with some limitations not relevant for present purposes, matters which will render incarceration particularly burdensome and the fact that an offender will suffer additional punishing consequences outside the court process. Similarly, s 16A of the *Crimes Act 1914* (Cth) provides that, when sentencing an offender for a Commonwealth offence, the court must

133 See, for example, *R v Minor* (1992) 59 A Crim R 227 at 238; *R v Daetz* (2003) 139 A Crim R 398.

134 *Sentencing Act*, s 5(2)(s).

take into account "the character, antecedents, age, means and physical or mental condition of the person".[135]

[156] For these reasons, we have come to the conclusion that the prospect of deportation should be taken into account in the manner accepted by the courts in Victoria and Queensland, *viz*:

(a) that the burden of imprisonment may be greater for a person serving a term of imprisonment in expectation of being deported following release than for someone who faced no such risk; and

(b) that in appropriate cases, the loss of the opportunity to settle permanently in Australia may be taken into account as a form of extra-curial punishment.

[157] That conclusion is subject to two important qualifications. The first of those qualifications is expressed in many of the cases which have been canvassed above. That is, a sentencing court cannot speculate about a decision that is still to be made by the Commonwealth Minister or his/her delegate. The likelihood of the applicant being deported from Australia must be "assessable rather than merely speculative". If defence counsel on a plea in mitigation can say no more than that a term of imprisonment of 12 months or more would enliven the power of the Minister to deport the offender, then deportation is properly viewed as a completely speculative possibility which should not be

135 *Crimes Act*, s 16A(2)(m).

taken into account. The onus is on the defendant to establish on the balance of probabilities the existence of any matter relied on in mitigation, which means that the onus would be on the offender to establish the likelihood of deportation. The onus is also on the defendant to establish that deportation in his or her case would in fact be a hardship likely to make imprisonment more onerous, and such as to amount to extra-curial punishment.

[158] Allied to that qualification is the fact that the likelihood of deportation will not always result in a reduced sentence. If the evidence establishes that the offender is likely to suffer extreme hardship as a result of being deported – and perhaps even persecution and death – it is far from clear that releasing that offender earlier, to face those consequences sooner, would be an appropriate response. The result will always depend on the circumstances of the individual case.

[159] The second qualification relates to the view expressed in a number of the cases discussed above (most notably in *Kwon* and by Gray J in *Berlinsky*), that hardship which liability to deportation will occasion to the offender's dependants is a matter which might also operate in mitigation. That view should not be accepted. In the first instance, reducing the length of a sentence so as to accelerate the deportation process is unlikely to ameliorate hardship of that nature. Even leaving that aside, a sentencing court may only have regard to family hardship as a matter of mercy where the degree of hardship is "exceptional" and

considerably more severe than the deprivation that would be experienced in the ordinary course due to the imprisonment of a family member;[136] but even hardship of that nature will not warrant a sentence designed to avoid the prospect of deportation.

[160] The conclusions we have reached do not require any finding that the decision of the Court of Criminal Appeal in *The Queen v MAH*[137] or the decision of the Supreme Court in *Urahman v Semrad*[138] are *per incuriam* and should be overruled. As we have stated, both were threshold cases and the *rationes decidendi* are that it is not permissible for a sentencing court to take the consequence of deportation into account in fixing a head sentence in a manner calculated to avoid such a consequence. Neither decision is authority for the proposition that the possibility of deportation is an entirely irrelevant matter for sentencing purposes.

Answers to the questions referred to the Full Court

[161] In conformance with the reasons we have given, the questions of law reserved for consideration by the Full Court are answered as follows:

> **Question 1:**
>
> Is a sentencing court prohibited from taking into account the prospect of an administrative order for deportation arising from the offending which is the subject of the proceedings?

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136 See *Veness v The Queen* [2020] NTCCA 13 at [37]-[39].

137 *The Queen v MAH* [2005] NTCCA 17.

138 *Urahman v Semrad* (2012) 229 A Crim R 11.

Answer:

(a) The court may not take into account the prospect of an administrative order for deportation arising from the offending in order to craft a sentence designed to avoid the prospect of deportation.

(b) The prospect of deportation is not generally a relevant consideration in determining whether or not to fix a non-parole period.

(c) Subject to the facts being established by evidence, the prospect of hardship suffered as a result of deportation, and loss of the opportunity to settle permanently in Australia may, in appropriate circumstances, be taken into account in mitigation of sentence.

(d) The sentencing court cannot be asked to speculate about that prospect or as to the impact of deportation on the offender. The likelihood of the applicant being deported from Australia must be assessable on the evidence put before the court, rather than merely speculative. If defence counsel on a plea in mitigation can say no more than that a term of imprisonment of more than 12 months would enliven the power of the Minister to deport the offender, then deportation is properly viewed as a completely speculative possibility which should not be taken into account. The onus is on the defendant to establish on the balance of probabilities the likelihood of deportation, and to establish that deportation in his or her case would in fact be a hardship likely to make imprisonment more onerous, and such as to amount to extra-curial punishment

Question 2:

Is a sentencing court prohibited from taking into account the cancellation of the approval of citizenship arising from the offending which is the subject of the proceeding?

Answer:

The same principles expressed in answer to Question 1 concerning liability to deportation have application to the cancellation of the approval of citizenship.

SOUTHWOOD J:

[162] I have had the benefit of reading a draft of the reasons for judgment of the plurality of the Court. Save to the extent of any deviation which may appear below, I agree with their Honours' reasons for judgment and their Honours' answers to the questions which have been reserved for the Full Court.

[163] It seems to me that it is also useful to consider whether the manner in which Australian courts have approached the three different categories of cases dealing with visa cancellation and removal is anomalous, or whether the decisions, at least in Victoria, Queensland and the High Court, have reached a level of coherency which now reveals a consistent application of sentencing principles.[139]

[164] As described by the plurality of this Court, the courts in all Australian jurisdictions have consistently held that it is not permissible to craft a sentence in order to avoid the prospect of visa cancellation and removal from Australia (or to trigger it) under the *Migration Act 1958* (Cth). This is a perfectly orthodox position which is of narrow application. The approach is consistent with this Court's decision in *Norris v The Queen*[140] which among other things held that it was not permissible for a sentencing Judge to anticipate or evade a statutory

139 These matters are considered in a very helpful article by M Bagaric, T Alexander and B Bagaric, "Offenders Risking Deportation Deserve a Sentencing Discount – But the Deduction Should Be Provisional" (2019) 43(2) Melbourne University Law Review 423.

140 *Norris v The Queen* [2020] NTCCA 8 at [41]-[45].

consequence by imposing a sentence less than considered appropriate. There are sound reasons based on fundamental principles for the existing approach. The contrary approach is inconsistent with the provisions of the *Migration Act* and the sovereignty of Australia. The main object of the *Migration Act* is to regulate, in the national interest, the coming to, and presence in Australia of non-citizens which is an incident of sovereignty over territory. The object is peculiarly a matter for the Australian Parliament. Courts are not entitled to structure sentences with the aim of deliberately subverting a valid exercise of legislative power or undermining the purpose and object of the legislation.

[165] As to the non-parole cases, the decision of the High Court in *The Queen v Shrestha*[141] is consistent with the sentencing principles of proportionality and equal justice. It ensures that non-citizens do not receive a harsher sentence simply because they are liable to have their visa cancelled and be removed from Australia. A sentence without a non-parole period is a harsher sentence than a sentence which has a non-parole period fixed by a court.

[166] In *Shrestha,* the majority of the High Court stated at 70-73 that:

> The Crown's submission appears to us to be based upon pragmatism rather than principle. In almost all cases, a foreign offender who has "no ties to this country, and whose sole purpose

141 *The Queen v Shrestha* (1991) 173 CLR 48.

in entering Australia is to commit serious crimes" will, under current legislative provisions and executive policy, be immediately deported by the Commonwealth authorities if released on parole. It follows, so it is said, that it can never be appropriate that such a person should be eligible for release on parole. In essence, the argument advanced in support of that unqualified submission appears from the following extract from the Crown's written outline: "Parole is a regime intended to assist in the rehabilitation within the community of persons released from a term of imprisonment. ... Manifestly, this community has no interest in providing any such regime for foreign offenders with no ties to this country. Rather a trial judge sentencing such offenders should have regard only to the need to punish them adequately for their crimes, having regard to all relevant aggravating and mitigating circumstances, and then to ensure that this community is freed from their presence."

There are two aspects of that submission. The first would seem to be that this country has no interest in, or responsibility for, the rehabilitation of an offender of the kind described, notwithstanding that he is or has been imprisoned in an Australian gaol. The other aspect is that, since deportation will almost certainly render inappropriate or futile the supervision and other safeguards which control and regulate release on parole, the system cannot, and should not be concerned to, cope with such offenders.

It can be said at once that we find both aspects of the submission unpersuasive. In so far as the submission involves an assertion that the community is not concerned with the rehabilitation of a prisoner who has no ties with this country and who will be deported when released from gaol, it takes a blinkered view of community concerns and interests and unjustifiably confines them within strict territorial limits. This country has a direct and significant interest in the well-being and rehabilitation of all who are detained within its gaols, whether or not their origins, ties or future prospects lie in this or in some other country. It also has a responsibility, both moral and under international treaty, to treat all who are subjected to criminal proceedings in its courts or imprisonment in its gaols humanely and without discrimination based on national or ethnic origins (see, e.g., *International Convention on the Elimination of All Forms of Racial Discrimination*, (1965), Art.5(a); *Reg v Binder* [1990] VR 563, at 569-570). *To deny foreign offenders of the kind in question the opportunity for the amelioration of their situation and the incentive for reform and rehabilitation which the parole system offers is not to differentiate by reference to degrees of criminality*

or prospects of rehabilitation. It is to discriminate against prisoners of that class because of their origins, their place of residence and their family ties. There is, for example, no necessary difference in degrees of criminality between, on the one hand, a New South Wales resident, with no ties in Western Australia, who travels to that State solely for the purpose of committing a serious crime there and, on the other hand, a New Zealand resident, with no such ties, who travels to Western Australia solely for the purpose of participating in that crime. Indeed, the circumstances could well be such that the criminality of the New South Welshman was much greater, and the potential for rehabilitation much less, than that of the New Zealander. A Western Australian legal system which provided that, regardless of the degrees of criminality or prospects of rehabilitation, the advantages of eligibility for release from custody on parole should be available to the New South Wales resident but unavailable to the New Zealand resident would plainly discriminate between them by reference to the place whence they came, that is to say, on the grounds of residence or origin.

[…]

The other reason for rejecting the second aspect of the Crown's submission relates to the function of the sentencing judge. As has been said, a sentencing judge is not ordinarily required or empowered to determine whether a convicted person should in fact be released on parole at some future time. He or she is concerned to decide whether a prisoner should be eligible to be considered for release on parole at that future time. The likelihood of deportation, the lack of ties with this country and the difficulty or even impossibility of effective supervision and enforcement of parole conditions are all factors which will properly be taken into account by a parole authority when considering, at that time, whether the prisoner should be actually released on parole. Those factors may, however, conceivably vary, by reason of change of government policy or the intervention of special circumstances, between the time of sentencing and the time when the parole authority considers whether a prisoner should be released on parole. More important, once it is recognized that circumstances may well exist in which, notwithstanding those factors, a parole authority will be justified in releasing a foreign offender of the particular class on parole, those factors do not, of themselves, compel a sentencing judge to decide that it is inappropriate that such an offender should be eligible to be even considered for parole at that time.

(Emphasis by italics added)

[167] The approach of the majority of the High Court in *Shrestha* also recognises that in most Australian jurisdictions the fixing of a non-parole period does not fix the date when a prisoner is to be released from prison, it simply fixes the minimum period that must be served in prison before the executive may give consideration to releasing a prisoner on parole. Whether a prisoner is released on parole, or not, is usually a matter for the Parole Board in each jurisdiction.

[168] As to the third category of cases which are concerned with the relevance of visa cancellation and removal of an offender in the sentencing process, the paramount issue is whether these factors may, in an appropriate case, properly constitute mitigating factors which may result in a reduction in sentence.

[169] While it is true that:

(a) unfairness may arise if an offender who is liable to visa cancellation and removal from Australia receives a lower sentence but is ultimately not removed from Australia, and

(b) visa cancellation and removal from Australia are not sanctions which are imposed for the purpose of punishing an offender,

the reasons given for the approach adopted in New South Wales and Western Australia for not taking into account the prospect of visa cancellation and removal do not provide a valid basis for refusing to take that prospect into account as a relevant factor when sentencing an

offender. This is demonstrated by the plurality of the Court's analysis of those cases.

[170] The Victorian and Queensland cases have taken the prospect of visa cancellation and removal from Australia into account on the following bases:

(a) *the burden of imprisonment may be greater* for the person serving a term of imprisonment in *expectation* of being removed following release than someone who faced no such risk; and

(b) in appropriate cases, the loss of opportunity to settle permanently in Australia may be taken into account *as a form of extra-curial punishment*.

[171] Provided it is established on the balance of probabilities by credible and reliable evidence that:

(a) the offender will be removed from Australia at the end of that part of his or her sentence which is required to be served in prison, and

(b) the offender will suffer a loss or detriment as a result of his or her removal from Australia which is beyond the ordinary loss or detriment that a person suffers as a result of being imprisoned (not every offender who is removed from Australia will suffer a significant loss or detriment),

the factors identified in the Victoria and Queensland cases are factors which fall into the recognised categories of mitigating factors which may reduce the sentence which is imposed on an offender in an appropriate case. The ultimate reference point is whether an offender who is non-citizen and is removed at the end of his or her sentence will suffer more than an identically situated offender who is not removed.[142] Visa cancellation and removal from Australia are relevant because removal from Australia *may increase the impact of the sentence on the offender*. The key factors will be whether the offender's prospects of future prosperity and well-being will be significantly adversely affected by visa cancellation and removal, and whether they will lose contact with their family and community support upon entering the community in another country.

[172] There are four established or recognised categories of mitigating factors or circumstances.[143] The first category of mitigating factors are those relating to the offender's response to a charge and include pleading guilty, co-operating with law enforcement authorities, and remorse. In the second category are those factors which relate to the circumstances of the offence and which contribute to and to some

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142 Discussed in M Bagaric, T Alexander and B Bagaric, "Offenders Risking Deportation Deserve a Sentencing Discount – But the Deduction Should Be Provisional" (2019) 43(2) Melbourne University Law Review 423.

143 Victorian Sentencing Committee, *Sentencing Report of the Victorian Sentencing Committee* (1988) 359-360; M Bagaric, T Alexander and B Bagaric, "Offenders Risking Deportation Deserve a Sentencing Discount – But the Deduction Should Be Provisional" (2019) 43(2) Melbourne University Law Review 423 at 440-441.

extent explain the offending. These include provocation, duress, a history of deprived circumstances, and mental impairment. The third category includes matters personal to the offender, such as youth, previous good character, old age and good prospects of rehabilitation. *The fourth category* is concerned with *the effect or impact that the sanction of imprisonment* is likely to have on the offender or the offender's relatives. Of relevance, this category includes: (a) *hardship* to the offender that is above the usual incidents of imprisonment, (b) exceptional hardship to others, (c) *collateral consequences* of imprisonment which constitute a loss or detriment above the usual incidents of imprisonment, and (d) *extra-curial punishment*.

[173] Hardship to an offender includes the increased burden of imprisonment as a result of ill health or old age, unduly harsh prison conditions such as maximum security or extreme lockdown conditions, strict prison conditions such as those involved in protective custody, and circumstances where a person may come from abroad or a remote community and cannot speak English and will have no contact or very little contact with relatives. Where a sentencing court takes hardship into account the court may impose a lower sentence, reduce the non-parole period, impose a suspended sentence, or impose a non-custodial sanction. However, hardship to an offender does not justify the imposition of a sentence which is unacceptably disproportionate to the objective seriousness of the offence. The sentencing objectives of

punishment, protection of the community and deterrence remain important sentencing considerations.

[174] A sentence of imprisonment may result in collateral consequences which impose a burden or loss on an offender which goes beyond the usual incidents of imprisonment. Such consequences may include loss of employment, deprivation of reasonable opportunities for future employment, disbarment from employment in a particular field or profession, cancellation or suspension of trading or other licences, damage to career prospects, loss of future income, diminution of educational opportunities, loss of pension rights, public opprobrium or stigma.

[175] Subject to certain factors including:

(a) the level of seriousness of a particular offence,

(b) the crime involving an abuse of the offender's employment or professional position, and

(c) the risk of the loss or detriment being known and taken into account by the offender when the offender embarked on his or her course of criminal conduct,

where a court decides to take the collateral consequences of imprisonment into account the court may again impose a lower sentence, reduce the non-parole period or impose a suspended sentence of some other sentencing disposition. Once again, the sentencing aims

of just punishment and deterrence remain important sentencing objectives.

[176] Extra-curial punishment has been described as a "loss or detriment imposed on an offender by persons other than the sentencing court, for the purpose of punishing the offender for his offence *or at least by reason of the offender having committed the offence*".[144] In *R v Daetz*[145] James J stated:

> In sentencing [an] offender the court takes into account what extra-curial punishment the offender has suffered because the court is required to take into account all material facts *and is required to ensure that the punishment the offender receives is what in all the circumstances is an appropriate punishment and not an excessive punishment*. How much weight a sentencing Judge should give any extra-curial punishment will, of course, depend on all the circumstances of the case. Indeed, there may well be many cases where extra-judicial punishment attracts little or no weight.

[177] The above statement of James J in *R v Daetz* about extra-curial punishment applies equally to a sentencing judge's consideration of hardship and the collateral consequences of a sentence. The underlying rationale for taking the effect or impact of the sentence on the offender into account is the important sentencing principle of proportionality. Proportionality is the sentencing principle which requires a sentence to be proportionate to the gravity of the offence. The principle determines the upper and lower limits of the range of appropriate

144 *Silvano v The Queen* [2008] NSWCCA 118 at [29] per James J.

145 *R v Daetz* (2003) 139 A Crim R 398.

sentences. What is a proportionate sentence in a particular case is to be determined by reference to all of the circumstances of the case. The principle is a guiding determinant of the extent to which persons should be punished for their crimes. Logically, consideration of the extent to which a person should be punished must include consideration of the impact of the sentence on the particular offender.

[178] In my opinion, the prospect of visa cancellation and removal from Australia falls into the fourth category of mitigating factors and, in an appropriate case, is most fittingly categorised as *a hardship to the offender and a collateral consequence* of a sentence which may increase the impact of a sentence on an offender beyond the usual incidents of a sentence of imprisonment. Visa cancellation and removal are not additional punishments of the offender. This is particularly so under the current provisions of the *Migration Act* whereby visa cancellation, detention and removal from Australia are the direct consequences of a sentence at a specified level. They are not imposed to punish the offender for the crime he or she has committed. However, the prospect of visa cancellation and removal from Australia is relevant because it is directly linked to the crime for which an offender is sentenced and may mean that the burden of imprisonment will be greater for such an offender who (as is pointed out in the Victorian and Queensland cases) will serve the sentence in the expectation of being deported following release, and may not be able to

remain in Australia with the resulting loss of social security benefits, employment, prospects of future employment, or loss of business or assets.

[179] Analysed in this way it is apparent that: (i) consideration of visa cancellation and removal is an orthodox part of the ordinary sentencing process designed to ensure the offender receives in all the circumstances a proportionate and not excessive sentence; (ii) consideration of the prospect of visa cancellation and removal by a sentencing court is not unfair nor is it an affront to the administration of criminal justice; and (iii) the fact that the provisions of the *Migration Act* are not punitive and are concerned with an area of legislative policy entirely separate from the criminal law does not mean that the prospects of visa cancellation and removal from Australia are an irrelevant factors for sentencing purposes. For the reasons stated above visa cancellation and removal from Australia are clearly relevant sentencing considerations.

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