Mr Likumbo Makasa – a short story of honest confrontation

By Awais Ahmad

In a battle that went just under 10 years ending in the High Court - *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430, Awais Ahmad (Maurice Byers Chambers) took on pro bono the case of Likumbo Makasa. Awais's long-term mentor Kevin Connor SC asked him to write a note of his experience, which was then circulated to his colleagues. What follows is an edited version of that note.

Dear Kevin,

Thank you for friendship and support over the years. You've asked me to set out Likumbo Makasa's story for you. I do so as follows:

The background history of these proceedings is both unfortunate and remarkable.

On 31 August 2006, by his admission, Mr Likumbo Makasa (Li), then aged 22, engaged in three counts of sexual intercourse with a person over the age of 14 years and under the age of 16 years resulting in a conviction pursuant to s 66C(3) of the *Crimes Act 1900* (Cth) (the s 66C offences).

The complainant was 15 years and eight months at the time of the offending.

For the s 66C offences, the appellant was sentenced to concurrent terms of two years imprisonment on each count with a non-parole period of 12 months.

The events related to the s 66C offences resulted in four criminal trials (three of which were aborted for various reasons). Li was on remand for the majority of the duration of the relentless pursuit against him and his co-accused.

The criminal trials also concerned various allegations of alleged sexual offending involving him and his co-accused and the complainant, said to have taken place in the late hours of 30 August 2006. By way of appeal, the New South Wales Court of Criminal Appeal acquitted the appellant and his co-accused in relation to the events of 30 August 2006.

The sentencing judge stated that it would have been perverse to have found that the complainant was not consenting on 31 August 2006. It was plain that the complainant and Li spent the day together and shared food. It was accepted that Li was neither violent nor coercive. The trial judge went to some length to identify Li's good character.

Li is a Zambian national but has no ties to that country, having left when he was 17. He has two children living in Australia (one of whom suffers from Down Syndrome) as well as many other significant ties that connect him to the country. He has a strong employment record in Australia and has contributed in many meaningful ways to Australian society.

In around July 2011, I was 26 years old and a reader of two months at Maurice Byers Chambers. An email was circulated to members of the floor seeking pro bono counsel assistance for a 'merits review' to the Administrative Appeals Tribunal (AAT) in relation to a s 501(2) visa cancellation decision. I didn't know what the AAT was, what a 'merits review' really was and I certainly didn't know what s 501(2) stated.

As I began to read the papers I felt the justice of the case taking grip, and even at that early stage I contemplated that these proceedings might well conclude in the High Court.

Grant Mason, a wonderful lawyer and wonderful human being, instructed me through his pro bono secondment at a national Australian law firm.

To this day, he and I are in contact, forever bonded by the trials and tribulations we both witnessed and endured in this case.

Later that year, I appeared in the Tribunal against Naomi Sharp (now of Senior Counsel) before Senior Member Ettinger and P Taylor SC.

As the Tribunal later noted, it is a rare case in which the Tribunal is confronted with unproven allegations concerning conduct for which an applicant is required to answer. Conduct of which he or she has already been acquitted. However, this was exactly such a case.

Upon the conclusion of a fraught two days concerning the apparent risk Mr Makasa posed to the Australian community, including a purported re-hearing of the criminal hearing, I was fortunate enough to have the following remarks addressed to me:

> MR TAYLOR: Ms Sharp, you will probably appreciate the reasons why we consider it appropriate to address some remarks to Mr Ahmad personally. And they are these, your industry, your discipline to passion and your perseverance do you much credit and we are grateful for your assistance. We will adjourn.

Despite the inspiring and gracious remarks received from the Tribunal, we lost that case.

Later that year, with the assistance of Simeon Beckett (now of Senior Counsel) from Maurice Byers Chambers, we raised asserted jurisdictional error in the Tribunal decision based on the Tribunal's risk assessment. It was a difficult case but one that was successful before Perram J and was upheld before the Full Court of the Federal Court.

The matter was remitted and heard before the Tribunal again for a seven-day hearing before Deputy President, former Federal Court judge, Bryan Tamberlin QC, in November 2013.

At this point, Li had been in immigration detention since early 2011.

On remittal, the hearing was one of the most tense and difficult experiences of my

personal life. Ms Sharp was once again my opponent and was incredibly formidable.

For various reasons, I found myself in tears in the bathrooms of the AAT – on more than one occasion. Li's stepfather committed suicide. The pressures of two years at the Bar were beginning to take their toll. My personal life was in trouble.

I began to worry, too, about the ongoing effects of detention on Mr Makasa. Li would tell me stories of others in Villawood, those who would self-harm, those who would not eat so that their plight would be heard. He told me of his flashbacks to waking suddenly before sunrise to the banging of border force securing his detention at his door.

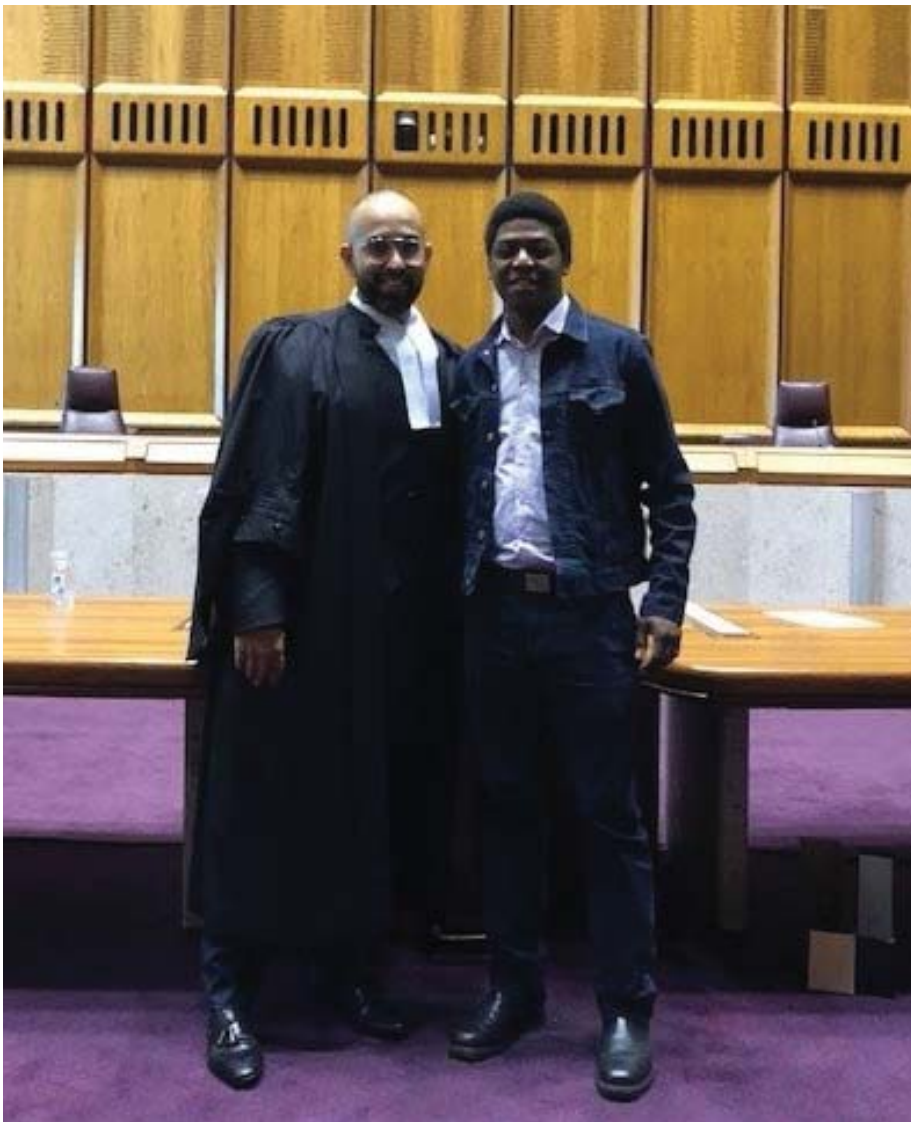
As things looked increasingly pessimistic before the Tribunal I had to have an honest conversation with Li. I recall saying to him, 'you don't have to go back to Villawood – we can end this if you want to.' There was a form of liberty available to him in Zambia. It wasn't the first time I had said that, and it wouldn't be the last. He always listened earnestly, looking me directly in the eye. He never responded. But he always turned up.

So many nights I spent wondering what Li was doing in his room in detention. How the uncertainty of it all might affect him after these many years. I couldn't help but let myself wonder: what would happen if Li ended his own suffering? A thought and a seed that I had to supress.

On one occasion, after throwing my hands in the air in response to a question forcefully put by the Minister during his cross-examination of Li's sister, Deputy President Tamberlin QC lost his patience with me. 'Mr Ahmad, this is not a place for gesticulations, it is not a circus.' I was reprimanded. Regrettably, I responded with force, 'sadly, this is a circus.'I deeply regret that response; it displayed a lack of maturity and dignity. It was one of the moments that triggered my teary breakdown. The former Chief Justice in Equity, Justice Bergin, often remarked that us counsel needed the three 'Cs': 'Courage, Courtesy... and Competence.' I'll leave it to you to consider which of those Cs were on display that day; perhaps none. But I also discovered then that the line between Courage and Courtesy can be at times a fine one.

I remember apologising to the former Federal Court judge later that afternoon in open session. I remember he replied, in all his humility, that 'none was needed.'Nevertheless, at the conclusion of the proceedings, I was sure that I had 'stuffed it up' for Li.

However, as it turned out, the Deputy President did not hold a similar view. He substituted the decision not to cancel the visa.



That decision has stayed with me as the most significant thing I could have done at the Bar. As my friend and great mentor – you, Kevin – shared with me, 'these moments do not come around often.'Mr Makasa was released from detention and given the liberty to sleep in his bed, in his home, with his family.

It is important to note that at this stage, while Li's criminality was a feature of this case, his humanity to me was always manifest. He was a good-natured, respectful person, full of love and warmth. He never felt entitled to pro bono legal representation. He knew the suffering of those he was residing with in detention. He had every reason to feel victimised. The proportionality of his conduct with the consequences that followed was, in my view, open to serious question.

This reading of his character was no doubt evident through my interactions with him, his mother and his support network.

My training as an advocate has allowed me to understand the significance of dispassionate yet fierce legal representation. However, in this case, despite my personal reluctance to embrace religion, I felt there was a soulfulness to Mr Makasa. I believed in him. This shined through in all of his activities, from his contributions to his community to his regular employment; in other words, in the way he lived his life.

I was now 28. Mr Makasa was of similar age. I couldn't help wondering how differently our lives were tracking.

On 3 May 2017, Mr Makasa was convicted of driving with mid-range PCA.

I wonder about this offence. What does it say about one's enduring moral qualities? What are the prerequisites of living a life of moral perfection; did Li, or others, ever have access to them?

In or around June 2017, the Minister sent a notice of intention to cancel Mr Makasa's visa. Mr Makasa approached Michael Doyle, a solicitor through Salvos Legal, the day before his time for response expired. I am told that Li said to Michael, 'whatever you do – *do not contact Awais Ahmad*.'

Li later told me he was filled with shame that he had let me down with his PCA offending, and that he could not bring himself to ask for more of my help.

At that time, now 32, I received a call from Michael Doyle (who had said he 'didn't care to listen to Li's caution'). Michael remarked at a recent dinner, 'I thought Awais might say get stuffed. but I was going to take my chance.'I find that suspicion curious. In any event, he told me that he had a former client of mine, Likumbo Makasa, who was in trouble with the Minister. My heart sank. He said, 'He has no money and I need some guidance.' I said, 'count me in.'I engaged the assistance of a dear friend, Jason Donnelly, who I met while we were both tipstaff at the Supreme Court of NSW in 2010. Jason was the former tipstaff to the honourable Chief Justice of Common Law, Peter McLellan. I was tipstaff to Justice George Palmer, a commanding judge of humanity, dignity and singular devotion to the rule of law to whom I looked with great admiration. His human sensibility was equal to his fierce command of complex corporations' law. He was the Protective List and Adoptions List judge, also writing extensively in the *parens patriae* jurisdiction. I owe him an incredible debt for giving me the chance to work with him (or, better described, to watch him work). I note that my time with George, as he lets me call him, has informed my approach to the law and to humanity since.

Jason Donnelly was of great assistance and I will always be grateful for his support. As I remarked to him personally, I would not have been able to stand before the court in that continued fight without his passion, his friendship and his intellectual prowess.

Together we appeared before his Honour Burley J on 31 October 2018, who dismissed our application for judicial review – which was now the fourth executive decision as to Li's visa.

Jason shared with me his view that we had low prospects for appeal. I said that we needed to fight on.

We considered the arbitrariness and the capriciousness of the decision-making, suggesting not only that the decision was legally unreasonable by reference to its intelligible justification, but that the power of the executive had to be curtailed by reference to the existing satisfaction of the jurisdictional facts.

On 24 December 2019, the Full Court of the Federal Court, which had convened a five-member bench, set aside the orders of Burley J and upheld our appeal. The plurality, clearly mindful of Li's time spent in detention, made orders to release Li, on Christmas Eve, with the reasons to be delivered subsequently.

As a proud Muslim – in the sense of a personal identity, not necessarily a moral philosophy – it was a very sweet Christmas.

At the time of the orders of Christmas Eve 2019, in addition to having been placed on remand during a large portion of his criminal proceedings, Li had spent just under *five years* in immigration detention.

Li tells me that a PTSD diagnosis has since been made in respect of the circumstances and nature of his detention. We waited with bated breath to see if the Minister would seek special leave to the High Court.

2020 rolled around with its new challenges: lockdowns, the doom and gloom of COVID-19. On 12 June 2020, the High Court granted special leave to appeal on the papers without hearing from the putative respondent. Heartbroken, I called you, Kevin. You said simply, 'I'm sorry.' My other

dear friend and mentor, Richard Schonell SC (now Justice Schonell), with whom I was when I found out, said in his usual, humbling, self-deprecating manner that I needn't worry, and recounted the time the 'hose' was still open for him following his own grant of special leave.

I spoke to Michael and Jason. We agreed that I would let Li know.

I will never forget the sadness of telling Li about this revelation. It was one of the most difficult conversations I have ever had. It made me wonder whether the Minister and those that inform him understood the grave impact their decisions can have on people's lives.

Li must have known by now how all this was affecting me. Such was his sensibility. He reassured me, insisting that whatever happened, he would always be grateful. He told me that his presence in Australia, despite it being largely in detention, had allowed a meaningful relationship to develop with his children, including his stepdaughter.

That did give me comfort. But this story isn't about me. At this stage it seemed to be about judgment, the imperfect trajectory of everything we plan and do. Perhaps it was also about underprivilege and access to justice, it's about structural barriers to equality before the law and the power we have – however we measure it – to ameliorate them. In a word, it's about humanity.

The Chief Justice's comments in *Hands*[1] at [3], a now oft-cited passage of immeasurable significance, stated in part that genuine consideration of the human consequences demands *honest confrontation of what is being done to people***.** These comments were apt to Li's plight. But in my experience of this case, they were not at the fore of the Commonwealth's actions.

In any event, we prepared to fight this case, to develop a fierce argument concerning the nature of the exercise of power and the spent nature of final administrative decisions.

At the back of my mind, I wondered how I would pick myself up if I had to see Li taken back into detention. I wondered how I would continue the work of counsel. Yet that was my own self-interest eclipsing what was really important in this case. Again, this story was never about me. What about Li?

I spoke with colleagues. It would be wise to engage senior counsel, many said. My great friend and confidant, a mentor to all new barristers at Maurice Byers Chambers, David O'Neil, now a magistrate of the Local Court of NSW, said, 'Awais, people do hundreds of CCA appeals before they appear in the High Court unled.' Like many things David told me, and to use an apt cricketing analogy, I let it go through to the keeper. I couldn't ignore it. It just made me more aware of my off-stump.

Jason, Michael and I met with Li. We explained the value of senior counsel and the likely receptiveness of the court to that approach. Li again listened earnestly to all of us. He politely declined.

It was a bold decision for Li to say to me, 'I don't think anyone will put more into this case than you.' I had to explain that jurisdictional error isn't necessarily found by displaying passion. But of course, I was as excited as I was daunted, moved and inspired as I was by Li's faith in me.

In these circumstances, we did all we could do: we pressed on. We traversed established and novel legal doctrine, considering principles of statutory construction (legality, proportionality and materiality of jurisdictional error). We considered the separation of powers in practice (a question of checks and balances, or of blind leading the blind?) How did the *Acts Interpretation Act 1901* (Cth) work? What is the common law doctrine of functus officio? How does that apply to decisions in the exercise of executive power? How would we confront a seemingly contrarian Full Court authority?

Using Zoom technology at the height of the pandemic, Jason and I prepared for hours on end. We challenged each other endlessly on the various constructional choices open to the court.

I cleared my diary for one month before the hearing, reading every High Court authority closely, watching streamed oral argument on Friday nights or else on my phone at every possible juncture.

When we travelled to Canberra, we did so with tempered hope. As responsible advocates, we hoped that, at best, we would be heard and respected, and that the dignity of Li's life and liberty would be considered with open hearts and minds. We had a goal to leave the court with a reminder to consider the coherence of principle, as well as the impact that the Commonwealth's decision had on Li's life and the lives of those who loved him.

We got more than that.

On 12 November 2020, just after midday, the High Court unanimously dismissed the Minister's appeal. The court afforded Mr Makasa the dignity of an immediate and certain outcome. A certainty and finality that was sorely missing from the repeated exercise of the Minister's cancellation power.

The decision brought finality to the 14-year span of litigation to which Mr Makasa was subject, originating in his conduct on 31 August 2006.

See:http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCATrans//2020/190.html.

As the members of the High Court strode off the bench, and with my face-mask on due to protocol, my eyes closed and tears filled them. I embraced Jason for a moment, and saw Li's figure: a tall, dark man standing at the edge of the public gallery, tears also rolling down his own cheeks, waiting to embrace me. I embraced him.

As much as Li thanks me for what I had done for him, Li could never appreciate how my humanity has been developed by this case. Maybe that is the sense in which this story is also about me.

Since the decision, Li – the man who was always, at every stage of proceedings, following along with each page number of the court books in earnest, the man who has called me so often, telling me what he is doing and how he is feeling – that man says he is walking with his shoulders tall. He said he has read the transcript umpteen times. I wonder how much he understands; I wonder if that matters. He tells me his favourite is the last line. 'Appeal dismissed. We will adjourn.'It's been 11 years since I have started as counsel. I've appeared in criminal jury trials, complex (and not so complex – but emotionally testing) family law proceedings, personal injury and professional negligence matters and much in between. I am now 38. Li is 39.

Litigation between practitioners can be visceral, and become personal. It can be a breeding ground for insecurity, imposter syndrome, and a sense of personal failing. Perhaps everyone is doing their best, but the Bar can be a cold place. Personal and intellectual honesty can both feel, at times, hard to find.

And so as much as the Makasa case has been hard to grapple with, it has been just as much a profound directional steer for my professional integrity. Maybe, then, this story has also been about me.

It is why, in my view, as Chief Justice Allsop remarked extra judicially in 'The future of the independent Bar in Australia' (FCA) [2018] FedJSchol 24, I must always 'stay conscious that what may seem a routine case, represents the most significant and potentially catastrophic event in the lives of the people involved.'[2] BN

ENDNOTES

1 (2018) 267 FCR 628 at [3].

2 (FCA) [2018] FedJSchol 24.