HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No. C16 of 2020

BETWEEN: **COMMONWEALTH OF AUSTRALIA**
Appellant

AND

10 **AJL20**
Respondent

No. C17 of 2020

BETWEEN: **COMMONWEALTH OF AUSTRALIA**
Appellant

AND

20 **AJL20**
Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Legend

AS [X] refers to the Appellant's submissions.

RS [X] refers to the Respondent's submissions.

Rep [X] refers to the Appellant's reply submissions

Part I. Form of submissions

1. This outline of oral submissions is in a form suitable for publication on the internet.

Part II. Outline of propositions that the Respondent intends to advance orally

A. Issues in the appeal

2. It is common ground that the Respondent is an unlawful non-citizen of Syrian nationality who has been involuntarily detained in the custody of the Executive since 2014 (**AS [10]**; **RS [8]**). Below, it was not contended that ss 189, 196, and 198 of the Act did not authorise his detention until 25 July 2019, being the date upon which the Minister declined to consider whether to grant him a visa (**RS [11]**). From that date, the only possible lawful purpose for detention has been removal under s 198 (including to Syria by reason of s 197C) (**RS [11]**). However the Executive has since 26 July 2019 failed and refused to pursue removal to Syria despite its power and duty to do so (see esp. **AS [2]**, **RS [20]**).

3. The issues re. the period since 26 July 2019, and the Respondent's answers, are as follows:

   (a) did ss 189, 196 and 198 of the Act, on their proper construction including in the light of Chapter III limitations, purport to authorise the continued detention in custody of the Respondent? (**No**)

   (b) if yes to (a), are the provisions valid under Chapter III? (**No**)

   (c) if no to (a) or (b), are damages available for the tort of false imprisonment and was habeas corpus properly granted? (**Yes to both**) (**RS [2]**, **[16]**)

B. The proper construction of ss 189, 196 and 198

4. These provisions, when read together, authorise and require Executive detention under s 196 subject to the purposive and temporal limits set by s 198 (**RS [41]**, **[59]**, **[73]**). Thus, in this case, since 26 July 2019, these provisions authorised detention until the event of removal, so long as the Executive complied with its obligation to take steps to bring about that event as soon as reasonably practicable.

5. The Commonwealth errs by divorcing the authority and duty in s 196 from the obligation in s 198. The obligation under s 198 to remove as soon as reasonably practicable is triggered upon the occurrence of an objective event—*e.g.*, written request by the unlawful non-citizen under s 198(1) or, relevantly, a final decision not to grant a visa under s 198(6) (see esp. **RS [29]**). Once the event occurs, the detention authorised under s 196 is detention <u>for the purpose of the Executive bringing about the required removal as soon as reasonably practicable</u>, not just detention simpliciter (see esp. **RS [28]–[31]**, **[41]**, **[53]–[54]**, **[62]–[66]**, **[68]**, **[73]**). Conversely, where, as here, it is established on the facts that the unlawful non-citizen is being kept in custody not with a view to removal as soon as reasonably practicable but because the Executive prefers prolongation of detention to performing its duty of removal, the custody becomes illegal (*ibid.*).

6. The right or duty must be distinguished from the remedy. Failure by the Executive to pursue the required purpose both renders the continued detention unauthorised and unlawful under s 196 and constitutes a failure to comply with the duty in s 198. The former results in the tort of false imprisonment against the non-citizen and a right to damages as well as the availability of the writ of habeas corpus; the latter results in the availability of the discretionary writ of mandamus.

7. The writs of habeas and mandamus serve different purposes and may bear different onuses (see esp. **RS [42] ft 20, [76]**). Habeas remedies the unlawful detention; mandamus remedies the failure to perform the removal duty. Different writs may be sought in
10 different cases, for different reasons. Parliament has not expressed, in ss 189, 196 and 198, a sufficiently-clear intent to authorise the Executive to detain the non-citizen in custody for such period of time as the Executive arbitrarily chooses to disobey the s 198 duty which is the only reason for the detention in the first place. That the period may or may not, at some unknown point, be foreshortened by mandamus is irrelevant to the legality of the continued detention (see esp. **RS [69]–[71]**).

8. This is the better construction of the provisions read on their own. If constructional choices are available, it is also to be preferred in the light of constitutional limitations.

C. The authorities bearing on construction

9. *Lim* (**RS [21]–[35]**): The ratio of *Lim* at 35–36, 52, 58 includes that:

20 (a) provisions authorising Executive detention will be valid only if the detention they require and authorise is limited to what is reasonably capable of being seen as necessary for the purposes of (relevantly) removal;

(b) ss 54L and 54N (now ss 189 and 196) satisfied such test and were valid only because they had attached to them a series of limits including those set by s 54P (now s 198), which limits if exceeded would render the detention unauthorised and unlawful;

(c) s 54R was invalid because it would prevent release on habeas even where limits on authority to detain (including s 54P, now s 198) were contravened (**RS [27]–[29]**).

10. The minority read s 54R down so that it did it did not have this effect; Mason CJ observing at 12 that a failure to remove a person as soon as reasonably practicable as required under
30 any of sub-s 54P(1), (2) or (3) (*i.e.,* including the present case under equivalent s 198(6)) would terminate lawful authority for detention (**RS [30]–[34], [70], [73], [74]**).

11. The Court thus construed the scheme, which is relevantly similar to the present scheme, such that compliance with limits arising from s 54P (now s 198) went to lawfulness of the detention. The provisions do not sit in silos.

12. The Commonwealth's attempts to avoid or downplay this reasoning in *Lim* (**Rep [6]–[9]**) should be rejected. In particular, the principle in *CSR Ltd v Eddy* 226 CLR 1 at [13] does not apply, both because none of the reasoning in *Lim* involved "assumptions" by

the Justices, and also because there was relevant argument. The Commonwealth has persistently declined to apply to reopen *Lim* (**Rep [9]**). Its appeal must therefore fail.

13. The provisions in Div 4B (still in the current Act at Pt 2 Div 6) were, as the Commonwealth rightly accepts, the "model" for the provisions now in Part 2 Divs 7 and 8 (ss 189, 196 and 198) (**Rep [6]**). Indeed, the 1992 Reform Act which enacted ss 189, 186 and 198 (then ss 54W, 54ZD and 54ZF) was assented to the day before *Lim* was decided. They are to be construed, and their validity assessed, in the same way as in *Lim*.

14. *Al-Kateb* (**RS [38]–[46]**): The Court construed and applied the then scheme in a context where the challenger had failed to obtain the critical finding of fact made here: Hayne J at

10 [197] (**RS [38]**). The argument rejected by the majority is not the argument put here (**RS [41]**). None of the majority judgments overturned what *Lim* said about s 54R. None of them support the Commonwealth's argument that "mandamus solves all" (**RS [42]**).

15. That said, Hayne J approached the matter on the basis that the temporal limits of s 198 could readily be "transferred" to s 196, but not "transformed" (being the burden of the quite-different construction of s 196 that he and others in the majority rejected) ([237]) (**RS [41]**); and with the implication that non-compliance with the limits of s 198 could go to the continued lawfulness of detention under s 196 ([226]–[231]) (**RS [40], [42]**). Likewise, McHugh J at [34] (**RS [43]**) and Callinan J at [291]–[294] (**RS [45]**).

16. The strong statements in *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 556, 581 and 586

20 cannot be dismissed as being hinged on any relevant difference in the regime (**RS [36], [90]** *cf.* **AS [56]**). The latter authorities of the Court will also be reviewed (**RS [47]–[67]**).

D. Chapter III

17. If the language of ss 189, 196 and 198 intractably compels the Commonwealth's construction (detain until the event of removal, regardless of purpose of detention in fact), then the provisions to that extent fail the *Lim* test (see [9(a)] above). Section 196(3) is invalid as was s 54R (and is current s 183) per the majority in *Lim*. Alternatively, if it can be read down (per the minority in *Lim*, per Gleeson CJ and Gummow J in *Al-Kateb* at [10], [113]), it does not prevent an order for release (**RS [88]**).

E. Remedy

30 18. There was no error in granting habeas. The writ was available, and was granted in particular factual circumstances which rendered it utile: **PJ [60]–[64], [175]** (**RS [4], [88]-[89]**). No other contention is made by the Commonwealth as to any *House v The King* error in the exercise of any discretion to refuse to grant habeas (**RS [71]** *cf.* **Rep [3]**).

19. Even if there were error in granting habeas, no error was made in Bromberg J's declaration that AJL20 was unlawfully detained in relevant periods. Damages should be assessed.

JUSTIN GLEESON

Banco Chambers
02 8239 0200
Justin.gleeson@banco.net.au