HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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Details of Filing

File Number:	M84/2022
File Title:	AZC20 v. Minister for Immigration, Citizenship, Migrant Serv
Registry:	Melbourne
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Important Information

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IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY **NO M84 OF 2022**

BETWEEN: **AZC20**

Appellant

AND: **MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS**

First Respondent

COMMONWEALTH OF AUSTRALIA

Second Respondent

SECRETARY, DEPARTMENT OF HOME AFFAIRS

Third Respondent

NO M85 OF 2022

BETWEEN: **AZC20**

Appellant

AND: **MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS**

First Respondent

COMMONWEALTH OF AUSTRALIA

Second Respondent

SECRETARY, DEPARTMENT OF HOME AFFAIRS

Third Respondent

RESPONDENTS' OUTLINE OF ORAL SUBMISSIONS

PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

A. Ground 1(i) – Full Court's jurisdiction to hear and determine the appeals

2. The appeals to the Full Court involved a "matter" for four reasons, any one of which is sufficient to answer ground 1(i).

On appeal, the "matter" relates to the correctness of the orders made below

3. The existence of a "matter" calls for a different analysis in appellate jurisdiction than in original jurisdiction. Once a court makes orders, those orders crystallise the rights of the parties, which merge in the judgment. The orders resolve the justiciable controversy between the parties and, when made by a superior court, are binding until set aside. The reasoning necessary to support those orders also has precedential effect. In those circumstances, an appeal, being a controversy about whether the orders below were properly made, is necessarily "with respect to a 'matter' which was the subject-matter of the legal proceedings at first instance". That is so even if the outcome of the appeal will not affect the "rights" of the parties to the appeal: *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289 at 297, 303-306 (**Vol 4, Tab 22**); *Commonwealth v Helicopter Resources Pty Ltd* (2020) 270 CLR 523 at [26]-[27], [30] (plurality), [35]-[37] (Edelman J); *Ruhani v Director of Police (No 2)* (2005) 222 CLR 580 at [18], [81], [83] (**Vol 7, Tab 36**); *Minister for Immigration v SBAN* [2002] FCAFC 431 at [12]-[15].

4. That contention is consistent with *Unions NSW v NSW* [2023] HCA 4 **(**cf. **Reply [1])**. That case was heard in this Court's original jurisdiction. It concerned whether an applicant had a sufficient interest to obtain a declaration that a law was invalid where the law had been repealed and no past contravention was alleged. It does not address the position where orders have been made granting relief, and a subsequent change of circumstances occurs that bears on the practical effect of that relief. The Court reaffirmed the broad understanding of "matter" explained in *Mellifont*: *Unions NSW v NSW* [2023] HCA 4 at [14] (**Vol 4, Tab 77**).

5. The Minister has a constitutional responsibility to administer the law, which normally should be done in accordance with any relevant decisions of a court. The Minister's interest in the correction of error therefore extends beyond any interest arising from the

binding effect of the orders in a particular case, so as to include an interest in correcting erroneous decisions that will otherwise operate as precedents. There is an important systemic interest in permitting the Executive to invoke judicial appellate processes to correct erroneous precedents. The Full Court correctly recognised that: FC [37]-[38].

6. The "matter" requirement serves a particular constitutional value: that federal courts not answer questions of law divorced from the administration of the law. No violence is done to that value where an appellate court is called upon to determine an issue that already has been fixed by the concrete factual record and adversarial contest at first instance.

Alternatively, the appeals affected the parties' rights, duties and liabilities

7. The appeals also involved a "matter" on three additional bases, which involve different ways in which the appeal affected the rights and duties of the parties.

8. **First**, the appeal and the s 198 mandamus proceeding were aspects of the same "matter": *Re Wakim, Ex parte McNally* (1999)198 CLR 511 at [129]-[140], [147] **(Vol 7, Tab 35)**; *Palmer v Ayres* (2017) 259 CLR 478 at [26] **(Vol 5, Tab 26)**. Those proceedings arose from a common substratum of facts: **ABFM 284: ln 28-30**. The connection between the proceedings was recognised by the judges hearing each proceeding: FC [21], [36]; **ABFM 223**. The appeal determined part of that single matter, by resolving the live controversy between the parties about the Court's power to make detention arrangements orders (being orders still sought by the appellant in the s 198 mandamus proceeding): **RS [29]**.

9. **Second**, the appeals concerned the correct identification of the relevant statutory removal power that was applicable to the appellant, which affected the parties' rights, duties and liabilities in the pending s 198 mandamus proceeding: FC [36] (CAB 89); **RS [32]-[34]**.

10. **Third**, as the appellant concedes **(AS [32])**, an appeal seeking to set aside an order as to costs is sufficient to establish the existence of a "matter": *Bonan v Hadgkiss* (2007) 160 FCR 29 at [8]-[10] (**Vol 8, Tab 45**); *Al-Masri* (2003) 126 FCR 54 at [18]-[21] (**Vol 9, Tab 63**). By the time the amended Notice of Appeal was filed, the parties had already incurred all the costs of conducting the appeal. The disposition of those costs depended on the order ultimately made by the Full Court, not the terms of the amended notice of appeal. The filing of amended notices of appeal did not deprive the Court of jurisdiction to make such orders as it thought appropriate to resolve the appeal (including as to costs).

B. Remaining grounds of appeal

11. As to ground 2(a), sub para (a) of the definition of "immigration detention" in s 5 of the Act does not allow a court to require a detainee be held at a particular place. That is because: (a) detention under sub para (a) of the definition cannot be limited to detention at a particular location; (b) the order impermissibly interfered with the decisional freedom of the detaining officers; and (c) the form of detention required by the order did not involve detention in "company of" and "restrained by" an officer (**RS [43]-[44] and [46]**). This reasoning does not depend upon any temporal or purposive limitation upon the power to detain.

12. As to ground 2(b), if the Full Court's description of the temporal and purposive nature of the power is correct, the detention arrangement orders did not have the requisite temporal quality to fall within para (a), given the primary judge's acceptance that removal might take "weeks, or months or longer" **(FC [82]; CAB 98)**.

13. As to ground 2(c), neither ss 22 nor 23 of the FCA Act confer the power to make the detention arrangement orders. **First**, if grounds 2(a) and (b) fail, ground 2(c) necessarily fails, as ss 22 and 23 cannot authorise relief contrary to the terms of a statute. **Second**, while s 23 extends to such orders that are reasonably required to ensure that the Court's order is effective **(FC [102]; CAB 103)**, the detention arrangement orders were not of that character, as they neither facilitated removal, nor advanced nor supported the performance of the removal duty **(RS [50])**. **Third**, separate reliance on s 22 is misplaced**:** that provision is concerned with avoiding a multiplicity of proceedings, and does not confer powers on the Court wider than s 23 **(**cf. **AS [70]);** *Thomson Australian Holdings Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 161.

14. As to ground 1(ii), whether refusal of leave to appeal from an interlocutory decision would result in "substantial injustice" is a factor which provides general guidance, but that does not tie the Court's hand in respect of the exercise of its discretion to grant leave: *Décor Corp v Dart Industries* (1991) FCR 397 at 399 **(Vol 8, Tab 54)**. The grant of leave to appeal here did not disclose error **(RS [40])**.

Dated: 11 May 2023

Stephen Donaghue Patrick Knowles Naomi Wootton