IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY **NO M47 OF 2018**

BETWEEN: **PLAINTIFF M47/2018**

Plaintiff

AND: **MINISTER FOR HOME AFFAIRS**

First Defendant

THE COMMONWEALTH OF AUSTRALIA

Second Defendant

DEFENDANTS' SUBMISSIONS

Filed on behalf of the Defendants by:

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PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II ISSUES

2. The substantive questions presented by the Revised Special Case (**RSC**) [SCB 46] and the position of the Defendants (**the Commonwealth**) on those questions are as follows.

3. *First*, does the RSC support an inference that there is "no real possibility, prospect or likelihood that the plaintiff will be removed from Australia during the course of his natural life" (as the Plaintiff contends) or "no real likelihood or prospect of removal in the reasonably foreseeable future" (the finding by the trial judge in *Al-Kateb v Godwin*)?[1] The Commonwealth submits that neither inference should be drawn. For that reason, the correctness of *Al-Kateb* does not arise: unless either inference is drawn, ss 189 and 196 of the *Migration Act 1958* (Cth) (**the Act**) undoubtedly authorise the Plaintiff's detention.

4. *Secondly*, assuming one of those inferences is drawn, is *Al-Kateb* distinguishable and, if not, should the Court grant leave to re-open it? The Commonwealth submits that *Al-Kateb* is not distinguishable, that leave to re-open it should be refused, and that even if such leave is given the Court should decline to overrule *Al-Kateb*.

5. *Thirdly*, if *Al-Kateb* is distinguishable, or if leave to re-open it is granted:

   5.1. Do ss 189 and 196, properly construed, authorise the present detention of the Plaintiff? The Commonwealth submits that they do.

   5.2. If so, are ss 189 and 196 to that extent contrary to Ch III of the Constitution? The Commonwealth submits that they are not.

6. The questions in the RSC should be answered: (1) Yes; (2) No; (3) None; (4) The Plaintiff.

PART III SECTION 78B NOTICE

7. The Plaintiff's notice filed 13 April 2018 is sufficient.

PART IV FACTS

8. The facts are set out in the RSC at SCB 46–62.

[1] (2004) 219 CLR 562 (*Al-Kateb*).

PART IV ARGUMENT

The correctness of *Al-Kateb* does not arise

9. The Plaintiff submits that ss 189 and 196 of the Act do not authorise his detention where there is "no real possibility, prospect or likelihood that the plaintiff will be removed from Australia during the course of his natural life": PS [18]. The Plaintiff thus seeks to persuade the Court to draw a more extreme inference than the fact found by the trial judge in *Al-Kateb*, which was that there was "no real likelihood or prospect of removal in the reasonably foreseeable future".[2] For the following reasons, the Court should not draw either the inference sought by the Plaintiff, or the inference that there is "no real likelihood or prospect of removal in the reasonably foreseeable future".[3]

10. *First*, the investigations into the Plaintiff's identity are ongoing: RSC [73.3], SCB 488. It is true that the Department has conducted extensive identity investigations over the last 9 years, but that is not determinative of the prospects of the ongoing lines of inquiry: cf PS [14], [30]. That is especially so here, where the protracted nature of the investigations is in part due to the Plaintiff having made many different and inconsistent claims about his identity, date and place of birth, and relatives' whereabouts since his arrival in Australia, and his admissions about multiple occasions on which he travelled on false passports: see RSC [14]–[31]. Among other things, the Department continues to engage with the Moroccan Embassy, including providing it with a language analysis performed by a private Swedish company which concluded, with a confidence rating of 4 out of 5, that the Plaintiff speaks Arabic consistent with a Moroccan dialect: RSC [78.1]; SCB 507 [53]. The Moroccan Embassy has requested further information concerning the Plaintiff, which it has been given, and it is considering that information. The Department continues to attempt to arrange a further meeting between the Plaintiff and officials from the Moroccan and Algerian High Commissions in Canberra: RSC [78.2].

11. *Secondly*, many aspects of the inconsistent information given by the Plaintiff are not explicable by genuine uncertainty or ignorance, so that it cannot be assumed that it is beyond his power to provide further information concerning his identity. For example, from 2010 to 2013 the Plaintiff claimed his parents were dead and he had no relatives:

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2 *Al-Kateb* (2004) 219 CLR 562 at 603 [105] (Gummow J) (emphasis removed).

3 The suggestion in PS [20] that "the defendants acknowledged that he cannot be removed in the foreseeable future" is incorrect. There is no such acknowledgment in RSC [76]–[77].

RSC [19]–[21]. This changed in 2013, when he claimed he had a Norwegian wife and son: RSC [24]. It changed again in 2014, when he claimed his parents were living in Western Sahara and he had three brothers living in Algeria: RSC [28]. It changed again in 2017, when he admitted he did not have a son in Norway: RSC [47]. And it changed again when he filed an affidavit in this proceeding claiming to have no information about his father: RSC [13.4]. Similarly, despite being able to speak Arabic, and doing so when interviewed by officials from the Moroccan Embassy on 31 May 2012, the Plaintiff refused to speak Arabic during his interview with officials from the Algerian Embassy on 28 June 2012: RSC [75]; SCB 494 [15]–[16]). That is particularly significant given, prior to the interviews, the Plaintiff had identified himself as an Algerian (RSC [23]), and both the officials of the Moroccan Embassy at the time and the latest identity investigation report concluded that the Plaintiff is most likely Algerian: SCB 487, 501–502 [33]–[36], 508 [56]. The latest identity investigation report concludes that the Plaintiff is likely "concealing details as his memory is extremely strong in some aspects and extremely weak when it comes to areas that are more pertinent to confirming his identity": SCB p 503 [39]. Given these matters, the Court cannot infer that there is no real prospect of further information being given *by the Plaintiff himself* which might lead to his identity, and in turn his nationality and/or right of entry to other countries, being established.

12. *Thirdly*, the Court should not infer that the Plaintiff is stateless: cf PS [2], [13]. The allegation that he is stateless was disputed on the pleadings and is not an agreed fact in the RSC. Further, the agreed facts do not enable any inference of statelessness to be drawn. The Plaintiff's reliance (PS fn 5) on findings by administrative decision-makers made many years ago, for different purposes and on the basis of different factual material, is misplaced. The inclusion in the RSC of the decisions containing those findings establishes only that the findings were made. It does not establish their accuracy as facts that must be accepted by the Court: cf PS [12]. Further, the more recent decision-makers have not made findings of statelessness. For example, the view of the delegate who decided on 2 January 2018 to refuse the Plaintiff a Safe Haven Enterprise Visa was that while he *claimed* statelessness, it was not clear whether or not he is *in fact* stateless: SCB 467. The latest identity investigation report declines to reach a conclusion that the Plaintiff is stateless and, instead, concludes he is most likely Algerian: SCB 508 [56].

13. *Fourthly*, the Department is taking steps to identify third countries that might accept the Plaintiff, *whether or not* he has a right to enter or reside in such countries and despite the

fact that his identity is uncertain: RSC [77]–[78]. The Plaintiff makes no submissions on that topic, and therefore says nothing that would justify the inference that no country will *ever* agree to accept him as part of a diplomatic agreement, or on humanitarian or other grounds, notwithstanding the length of his detention.

14. The Commonwealth cannot say that any *particular* line of inquiry is *likely* to succeed in establishing the Plaintiff's identity: RSC [76]. Accordingly, it cannot say that any *particular* matter is *likely* to lead to his removal. The same was true in *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship*,[4] where Crennan, Bell and Gageler JJ nevertheless refused to draw the relevant inference. The question is not whether the Commonwealth can identify a particular line of inquiry as *likely* to succeed. It is whether the Plaintiff has established that there is no real likelihood or prospect that he will ever be removed from Australia during his natural life. Given the matters above, the Court ought not draw that inference. For the same reasons, it should not infer that there is "no real likelihood or prospect of removal in the reasonably foreseeable future".

Al-Kateb is not distinguishable

15. The Plaintiff submits that if the Court infers there is "no real possibility, prospect or likelihood that the plaintiff will be removed from Australia during the course of his natural life" (the more extreme inference) this is a basis for distinguishing *Al-Kateb*: PS [18], [26]. That submission should be rejected. It is true that *Al-Kateb* was decided in the context of a factual finding that there was "no real likelihood or prospect of removal in the reasonably foreseeable future". However, the *ratio* of the decision was to reject *any* implied limitation on the duration of detention for which s 196 provides by reference to the likelihood or prospect of removal being achieved.[5] The way in which the majority reasoned to its conclusion makes clear that, even if there had been no real prospect of Mr Al-Kateb *ever* being removed, the result would have been the same. So much is evident from the fact that the prospect of detention of Mr Al-Kateb for the rest of his life was directly confronted by Hayne J in his reasons.[6]

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4 (2013) 251 CLR 322 (***Plaintiff M76***) at [147]. The Plaintiff's submission that the facts that caused Gummow and Bell JJ to draw a like inference in *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1 (***Plaintiff M47/2012***) were "similar (albeit less extreme)" to those in this case should be rejected: cf PS [14]. In that case, there was no issue as to the Plaintiff's identity. Instead, the removal of the plaintiff was restricted by his status as a refugee, and by the fact that he was the subject of an adverse security assessment.

5 *Al-Kateb* (2004) 219 CLR 562 at 581 [34] (McHugh J), 638-639 [226] (Hayne J), 661-662 [298] (Callinan J). McHugh and Heydon JJ agreed with Hayne J.

6 *Al-Kateb* (2004) 219 CLR 562 at 651 [268].

16. Alternatively, the Plaintiff submits that *Al-Kateb* is distinguishable because of subsequent amendments to the Act, namely the insertion of Subdiv B into Div 7 of Pt 2 (dealing with residence determinations) and s 195A: PS [19], [35], [42]. For the reasons given at [36]–[42] below, these amendments do not provide a basis to distinguish *Al-Kateb*. To the contrary, they strengthen the submission that it should be followed.

***Al-Kateb* should not be re-opened**

17. For these reasons, *Al-Kateb* cannot be distinguished. The Plaintiff cannot challenge that decision without leave.[7] Such leave should not be given, for the circumstances in which the Court might properly depart from *Al-Kateb* do not exist. While the Court has power to depart from its previous decisions, that course should not be lightly undertaken.[8] It is not enough that members of the Court believe that an earlier decision is wrong.[9] The "power to disturb settled authority is … one to be exercised with restraint, and only after careful scrutiny of the earlier course of decisions and full consideration of the consequences".[10] When considering this issue, the Court often refers to the factors in *John v Federal Commissioner of Taxation*.[11] Their evaluation should be "informed by a strongly conservative cautionary principle".[12] Here, those factors should be analysed as follows.

18. *First*, the constructional issue in *Al-Kateb* that divided this Court had been thoroughly analysed over a succession of cases before it reached the Court:[13] cf PS [49]. The ultimate

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7 See, eg, *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311 at 316 (Gibbs CJ, Mason, Murphy, Wilson, Brennan and Dawson JJ). See also at 313 (Gibbs CJ, in argument): "It would reduce the operation of the Court to an absurdity if it were permissible for counsel to keep on challenging settled decisions with full argument."

8 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ). See also *Plaintiff M76* (2013) 251 CLR 322 at 382 [192] (Kiefel and Keane JJ); *Wurridjal v The Commonwealth* (2009) 237 CLR 309 (***Wurridjal***) at 352 [70] (French CJ).

9 *Plaintiff M47/2012* (2012) 251 CLR 1 at 137-138 [350] (Heydon J).

10 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 71 [55] (Gleeson CJ, Gaudron and Gummow JJ).

11 (1989) 166 CLR 417 at 438-439 (Mason CJ, Wilson Dawson, Toohey and Gaudron JJ). See also *Plaintiff M76* (2013) 251 CLR 322 at 381-382 [191] (Kiefel and Keane JJ); *Plaintiff M47/2012* (2012) 251 CLR 1 at [120] fn 210 (Gummow J), 137-138 [350] (Heydon J), 189-190 [525] (Bell J).

12 *Wurridjal* (2009) 237 CLR 309 at [70] (French CJ), cited with approval in *Plaintiff M76* (2013) 251 CLR 322 at 372 [148] (Crennan, Bell and Gageler JJ), 382 [192] (Kiefel and Keane JJ); *Plaintiff M47/2012* (2012) 251 CLR 1 at 191 [527] (Bell J).

13 The cases were summarised in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54 (***Al Masri***) at 95-97 [167]-[173] (the Court). The first instance decision of Merkel J in *Al Masri v Minister for Immigration and Multicultural Affairs* (2002) 192 ALR 609 had been followed in *Al Khafaji v Minister for Immigration and Multicultural Affairs* [2002] FCA 1369 (Mansfield J); *NAKG of 2002 v Minister for Immigration and Multicultural Affairs* [2002] FCA 1600 (Jacobson J, with reservations about

decision was reached after "a very full examination of the question", and no compelling consideration or important authority was overlooked.[14] In particular, as Kiefel and Keane JJ explained in *Plaintiff M76*,[15] the majority in *Al-Kateb* did *not* overlook the principle of legality: cf PS [50]. Arguments based on the principle of legality were at the heart of the submissions of both the appellant and intervener.[16] The principle of legality was expressly addressed by Hayne J,[17] with whom McHugh and Heydon JJ agreed. It was separately addressed by McHugh J, observing that the words of ss 189, 196 and 198 were "too clear to read them as being subject to a purposive limitation *or an intention not to affect fundamental rights*".[18] Callinan J rejected the reasoning in *Al-Masri*, which squarely addressed the principle of legality.[19] Finally, McHugh and Callinan JJ examined foreign cases that were decided on the basis of essentially the same interpretive principle.[20]

19. *Secondly*, as recognised by Kiefel and Keane JJ in *Plaintiff M76*,[21] there was no material difference between the reasons of the majority in *Al-Kateb*. Contrary to PS [51], that reasoning was followed in *Re Woolley; Ex parte Applicants M276/2003*.[22]

20. *Thirdly*, the question whether *Al-Kateb* achieved "no useful result but on the contrary had led to considerable inconvenience" is not directed to the merits of the majority's construction in a general or policy sense. It is directed to whether there are unacceptable difficulties or uncertainties about the content or application of that construction.[23] There

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the correctness of Merkel J's decision at [59]) and *Applicant WAIW v Minister for Immigration and Multicultural Affairs* [2002] FCA 1621 (Finkelstein J), but not *WAIS v Minister for Immigration and Multicultural Affairs* [2002] FCA 1625 (French J); *NAES v Minister for Immigration and Multicultural Affairs* [2003] FCA 2 (Beaumont J); *Daniel v Minister for Immigration and Multicultural Affairs* (2003) 196 ALR 52 (Whitlam J); *SHFB v Minister for Immigration and Multicultural Affairs* [2003] FCA 29; *SHDB v Minister for Immigration and Multicultural Affairs* [2003] FCA 30 (Selway J); *SHFB v Goodwin* [2003] FCA 294 (von Doussa J); *NAGA v Minister for Immigration and Multicultural Affairs* [2003] FCA 224 (Emmett J).

14 *Attorney-General (NSW) v Perpetual Trustee Company Ltd* (1952) 85 CLR 237 at 243-244 (Dixon J). See also *Wurridjal* (2009) 237 CLR 309 at 350-353 [65]-[71] (French CJ).

15 (2013) 251 CLR 322 at 378 at [177]–[178].

16 *Al-Kateb* (2004) 219 CLR 562 at 564–565, 567, 569.

17 *Al-Kateb* (2004) 219 CLR 562 at 643 [241].

18 *Al-Kateb* (2004) 219 CLR 562 at 581 [33] (emphasis added).

19 *Al-Kateb* (2004) 219 CLR 562 at 662 [300], rejecting *Al Masri* (2003) 126 FCR 54 at 67 [48], 75-77 [82]–[86].

20 *Al-Kateb* (2004) 219 CLR 562 at 587-588 [53]–[54] (McHugh J), 661 [296] (Callinan J).

21 (2013) 251 CLR 322 at 382 [193].

22 (2004) 225 CLR 1 (***Woolley***) at 30–33 [71]–[78], 36–38 [87]–[96] (McHugh J), 75–77 [220]–[228] (Hayne J), 85–86 [261]–[265] (Callinan J). Heydon J agreed with Hayne J.

23 *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 563 [114] (Gaudron, McHugh and Gummow JJ).

are not: it is clear and gives rise to no difficulties or uncertainties. By contrast, the minority's construction would give rise to considerable difficulties: see [31]–[32] below.

21. *Fourthly*, the Department has been required to administer the Act consistently with *Al-Kateb* since it was handed down:[24] cf PS [52]. If *Al-Kateb* is overruled, that would alter — with retrospective effect — the understanding of the Act upon which unlawful non-citizens have been detained since 2004. Further, as Kiefel and Keane JJ explained in *Plaintiff M76*,[25] the Parliament has acted on the basis of the correctness of *Al-Kateb* in inserting s 195A into the Act: see further [38] below. It is reasonable to infer that the same is true of Pt 8C, which was introduced by the same Bill: see [40] below.

Sections 189 and 196 of the Act authorise the Plaintiff's detention

22. If, contrary to the above, the questions of construction and validity of ss 189 and 196 of the Act are reached, the conclusions reached in *Al-Kateb* should be upheld.

The statutory scheme

23. Section 4(1) provides that the object of the Act is to "regulate, in the national interest, the coming into, and presence in, Australia of non-citizens". Section 4(2) states that, to "advance its object", the Act "provides for visas permitting non-citizens to enter or remain in Australia and the Parliament intends that this Act be the *only source* of the right of non-citizens to so enter or remain" (emphasis added). Section 4(4) states that, to "advance its object", the Act also "provides for the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted by this Act".

24. Since September 1994, on commencement of the "radical change" made by the *Migration Reform Act 1992* (Cth), the three principal features of the scheme of the Act have been:[26]

    24.1. *first*, non-citizens may enter Australia only if they have permission (in the form of a visa) to do so, and they may remain in Australia only for so long as they have permission (again in the form of a visa) to do so;

    24.2. *secondly*, if a non-citizen has entered Australia without permission, or no longer has permission to remain here, that non-citizen must be detained; and

[24] *Plaintiff M47/2012* (2012) 251 CLR 1 at 130-131 [334] (Heydon J).
[25] (2013) 251 CLR 322 at 382-383 [195]–[197].
[26] *Al-Kateb* (2004) 219 CLR 562 at 633–634 [204]–[210], 637–638 [223] (Hayne J).

24.3. *thirdly*, the detention of a non-citizen is to end upon that person's removal or deportation from Australia or upon the person obtaining a visa.

25. These three features of the Act remain, subject to a minor qualification to the second feature arising from Subdiv B of Div 7 (a qualification that arises *only* if the Minister chooses to exercise the non-compellable power conferred by that subdivision).[27] Those features demonstrate that the Plaintiff's proposed construction of ss 189 and 196 is not open. Acceptance of that construction would require the Court to accept that the Act contemplates a category of non-citizen (ie, those who cannot be removed from Australia in the reasonably foreseeable future) who can live and work in the Australian community though they do not have a visa permitting them to do so (that being intended to be the "only source" of the entitlement of a non-citizen to remain in Australia: s 4(2)). Non-citizens within that category would be entitled to live in the Australian community until their removal became possible, regardless of their circumstances, including the risk they may pose to the Australian community (whether on national security grounds, or because of serious criminal records or other character concerns). That would leave a gap in the statutory scheme.[28] That is the very outcome the *Migration Reform Act* sought to avoid.[29] The Plaintiff's proposed construction does violence to the statutory scheme. It does not "best achieve" the objects of the Act, but instead directly undermines them.[30]

The text of ss 189 and 196

26. Particularly when construed in the context of the scheme summarised above, ss 189 and 196 are clear and unambiguous.[31] Section 189(1) provides an officer "must" detain a person where the "officer knows or reasonably suspects that [the] person [is] in the

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27 In the Second Reading speech for the Migration Amendment (Detention Arrangements) Bill 2005, the Minister said that the "broad framework of the government's approach is unaltered" and "the government remains committed to its existing policy of mandatory detention": *Hansard* (House of Representative), 21 June 2005, 55. The assertion at PS [35] that the 2005 amendments "materially changed" the mandatory nature of immigration detention is directly contrary to those statements.

28 *Plaintiff M47/2012* (2012) 251 CLR 1 at [269] (Heydon J); *Plaintiff M76* (2013) 251 CLR 322 at 381 [189] (Kiefel and Keane JJ).

29 For that reason, certain persons already in Australia without visas were deemed to have been granted visas on the commencement of that Act: see, eg, s 34 (absorbed persons visas) and the *Migration Reform (Transitional Provisions) Regulations 1994* (Cth), analysed in *Nystrom v Minister for Immigration and Multicultural Affairs* (2006) 228 CLR 566 at 575–579 [15]–[27] (Gummow and Hayne JJ), 601–603 [106]–[112] (Heydon and Crennan JJ). See also *Plaintiff M76* (2013) 251 CLR 322 at 379 [182], 380 [184] (Kiefel and Keane JJ).

30 Contrary to the *Acts Interpretation Act 1901* (Cth), s 15AA.

31 *Al-Kateb* (2004) 219 CLR 562 at 581 [33] (McHugh J), 643 [241] (Hayne J), 661 [298] (Callinan J).

migration zone (other than an excised offshore place) [and] is an unlawful non-citizen". Section 196 establishes the duration of the required detention. Section 196(1) provides the person "*must be kept* in immigration detention *until*" one or more of the events listed in s 196(1) occurs: the person is removed from Australia under ss 198 or 199; an officer begins to deal with the person under s 198AD(3);[32] the person is deported under s 200; or the person is granted a visa. The word "keep" suggests an ongoing or continuous process and, when used in conjunction with "until", conveys that the relevant state of affairs (detention) is to be maintained up to the time that the relevant event (eg removal or visa grant) occurs. That is, s 196 requires that detention "must continue until removal, or deportation, or the grant of a visa".[33] It is not open on the text to construe s 196(1)(a) as providing that the detention that is required by the Act must cease at some earlier time. That s 196(1) was intended to be exhaustive of the circumstances in which a person could be released is confirmed by s 196(3), which provides: "To avoid doubt, [s 196(1)] prevents the release, even by a court, of an unlawful non-citizen (otherwise than as referred to in paragraph 1(a), (aa) or (b)) unless the non-citizen has been granted a visa".[34]

27. Section 196 must, of course, be read together with s 198. Section 198 requires an officer to remove "as soon as reasonably practicable" an unlawful non-citizen who (inter alia) asks the Minister in writing to be so removed (s 198(1)) or where the person's visa application has been finally determined or cannot be granted and they have not made another visa valid application (s 198(6)). Thus, the event described in s 196(1)(a) ("removed from Australia under section 198") "is an event the occurrence of which is affected by the imposition of a duty, by s 198, to bring about that event 'as soon as reasonably practicable'".[35] Crucially, the time for the performance of the duty to remove under s 198 only arises once removal *is* "reasonably practicable".[36]

28. The result is that, when read together, ss 196(1)(a) and 198 require that detention continue until the point that removal *becomes* reasonably practicable,[37] and that detention cease (and removal occur) once removal is "reasonably practicable". For that reason, the

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[32] Section 196(1)(aa), which refers to s 198AD, was inserted by the *Migration Legislation (Regional Processing and Other Measures) Act 2012* (Cth), and thus post-dated *Al-Kateb*.

[33] *Al-Kateb* (2004) 219 CLR 562 at 643 [241] (Hayne J); see also 581 [34] (McHugh J).

[34] *Al-Kateb* (2004) 219 CLR 562 at 581 [35] (McHugh J). Of course, s 196(3) cannot oust the Court's jurisdiction to order a person's release from *unlawful* detention: *Al-Kateb* (2004) 219 CLR 562 at 574 [10] (Gleeson CJ).

[35] *Al-Kateb* (2004) 219 CLR 562 at 638 [226] (Hayne J).

[36] *Al-Kateb* (2004) 219 CLR 562 at 639 [227] (Hayne J).

[37] *Al-Kateb* (2004) 219 CLR 562 at 581 [34] (McHugh J); 640 [231] (Hayne J).

Plaintiff is wrong to submit that the period of detention authorised by s 196(1) is limited to the period "during which removal under s 198 is reasonably practicable": PS [55.2]. In fact, the Act contemplates that detention will *end* once that period starts, because once removal *becomes* practicable there is a duty to remove under s 198, such removal marking one possible end-point of detention under s 196(1)(a)).

29. It is not open on the language of ss 189, 196(1) and 198 to construe those provisions as providing that detention is not authorised if it appears that removal is *not* "reasonably practicable" in the reasonably foreseeable future. As Hayne J observed in *Al-Kateb*,[38] the minority's reasoning (which the Plaintiff now adopts: PS [55]) takes the temporal element of the command in s 198 (to remove as soon as reasonable practicable) and converts it into a "different temporal limitation" on s 196: instead of being an obligation to detain *until* removal is reasonably practicable, it becomes an obligation to detain until removal is reasonably practicable *or* it appears removal will not be reasonably practicable in the reasonably foreseeable future. There is no foundation in the text of either s 196 or s 198 to warrant the transformation of the condition expressly imposed on s 198 into an entirely different, and unexpressed, condition on s 196(1).

30. In substance, the Plaintiff's case amounts to an attempt to imply into s 196 a limitation that has no foundation in the text. As such, the Plaintiff must confront the well-established proposition that "[i]t is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do".[39] There is no clear necessity here. The terms of s 196 and the scheme of the Act as a whole work coherently without the limitation sought by the Plaintiff; conversely, its implication leads to incoherence and impracticability (addressed immediately below). Further, the claim of necessity is undermined by the very amendments upon which the Plaintiff relies in his attempt to overturn *Al-Kateb*. As explained below, those amendments address the prospect of indefinite detention that was identified in *Al-Kateb*. They leave no room for any implication to address that same prospect differently.

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[38] *Al-Kateb* (2004) 219 CLR 562 at 641 [237] (Hayne J).

[39] *Thompson v Goold & Co* [1910] AC 409, Lord Mersey at 420, cited in, eg, *Minogue v Victoria* (2018) 92 ALJR 668 at 678 [43] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

Impracticable consequences of the Plaintiff's construction

31. The words "reasonably practicable" in s 198 recognise that the ability to remove a person from Australia is likely dependent upon a complex matrix of factors, including the "cooperation of persons, other than the non-citizen and the officer".[40] This includes the cooperation of third countries, which may be affected by changing conditions or attitudes of officials engaged in sensitive negotiations.[41] These matters are difficult to predict and may change rapidly.[42] The consequence is that the possibility of removal will often be uncertain, and its prospects may shift from day to day. The Act ensures that, absent non-compellable Ministerial intervention (discussed below), detention must continue until uncertainties are resolved and removal is reasonably practicable.

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32. It is one thing to require officers to assess whether removal *is* "reasonably practicable", as s 198 does. It is another thing to require them *also* continually to assess whether the point has been reached that there is no real prospect of removal in the reasonably foreseeable future (however that period is to be defined) such as to require the non-citizen's release even though the non-citizen does not have a visa. Further, the Plaintiff's construction involves the power and duty to detain *reviving* if and when there is a real prospect of removal (PS [21]), meaning officers will also be required continually to assess the position of non-citizens who have been released into the community in order to determine whether the "real prospect" has re-emerged. The Plaintiff's construction thus involves substantial difficulties in its application,[43] which should be avoided.[44]

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The principle of legality and international law

33. The Plaintiff invokes the principle of legality (PS [46], [54]) and the AHRC also submits that legislation should be construed consistently with international law "so far as its

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40 *Al-Kateb* (2004) 219 CLR 562 at 638 [226], see also 636 [218] (Hayne J).

41 *Al-Kateb* (2004) 219 CLR 562 at 659 [290] (Callinan J).

42 Eg the removal of Mr Al Masri took place approximately 4 weeks after Merkel J had held that there was no real likelihood or his removal in the reasonably foreseeable future: *Al Masri* (2003) 126 FCR 54 at 61 [18].

43 *Al Kateb* (2004) 219 CLR 562 at 641 [235]–[237] (Hayne J).

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44 *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth)* (1981) 147 CLR 297 at 304–305 (Gibbs CJ), 320–322 (Mason and Wilson JJ); *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ); *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1 at 24-28 [46]–[55] (French CJ, Hayne, Kiefel and Nettle JJ).

language permits": AHRC [24]-[37]. Neither principle is of any assistance because, for the reasons already addressed, the language of ss 189 and 196 is clear.[45]

34. In any event, the Plaintiff's reliance on the principle of legality is misconceived. The Plaintiff identifies the "fundamental common law right" at issue as the "liberty of the subject": PS [16]. However, the "detention to be examined is not the detention of someone who, but for the fact of detention, would have been, and entitled to be, free in the Australian community".[46] The entitlement of non-citizens to enter and reside in Australia is derived from, and limited by, the Act. For that reason, as Kiefel and Keane JJ pointed out in *Plaintiff M76*,[47] a non-citizen's "right to be at liberty in the Australian community is to be approached as a matter of statutory entitlement under the Act rather than as a 'fundamental right'". Further, that statutory entitlement is one that Parliament has conferred only in limited terms, having sought to balance it against other rights and interests, including the security of the Australian community. In that context, the proposition that a purposive approach to construction "may be of little assistance where a statutory provision strikes a balance between competing interests" because legislation "rarely pursues a single purpose at all costs"[48] is apt. It is overly simplistic in cases where Parliament has directed its attention to confining a statutory right, and has done so in order to protect a countervailing public interest, to make an *a priori* assumption that Parliament intended the least possible restriction of that statutory right.

35. AHRC [42] submits that the reasoning in English authorities applies equally to a discretionary power to detain and a mandatory obligation. That submission should be rejected. In *Al-Kateb*,[49] Hayne J distinguished English cases applying the "*Hardial Singh* principles" on the basis that they apply to discretionary powers whereas ss 189 and 196 mandate detention. That distinction is sound. As explained in *Regina (O) v Secretary of State for the Home Department (Bail for Immigration Detainees)*,[50] while the English

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45 See also *Plaintiff M76* (2013) 251 CLR 322 at 379–381 [180]–[189] (Kiefel and Keane JJ).

46 *Al-Kateb* (2004) 219 CLR 562 at 637 [219] (Hayne J). See also at 662 [299] (Callinan J).

47 (2013) 251 CLR 322 at 380 [184].

48 *Carr v Western Australia* (2007) 232 CLR 138 at 142–143 [5]–[7] (Gleeson CJ), approved in *CFMEU v Mammoet Australia Pty Ltd* (2013) 248 CLR 619 at 632 [40] (the Court). The same point has been made about the principle of legality: see *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 310-311 [314] (Gageler and Keane JJ); *R (Belhaj) v Director of Public Prosecutions (No 1)* [2018] 3 WLR 435, 471 [14] (Lord Sumption JSC; Baroness Hale PSC agreeing), 480-482 [41]–[42] (Lord Lloyd-Jones JSC; Lord Wilson JSC agreeing).

49 (2004) 219 CLR 562 at 643 [240] (Hayne J).

50 [2016] 1 WLR 1717 at [14], [49] (Lord Wilson JSC).

regime in some respects appears to impose an obligation to detain, it is in each case coupled with a power in the Secretary of State to order release. Accordingly, the apparent obligation to detain is only a "*conditional* mandate to detain". While there may be "no difference in *effect*" between a provision conferring a discretion to detain and one imposing an obligation to detain that is coupled with a discretion to release, that follows because under such a regime there may be a duty to exercise the discretion to release in some cases. By contrast, under ss 189 and 196 detention is mandatory, and the powers to release (discussed below) are expressly non-compellable.

Amendments since Al-Kateb

36. The legislative history of the Act since *Al-Kateb* has not undermined the majority's construction: see PS [35]–[43]. To the contrary, it has confirmed it.

37. *First*, the Act, including ss 189 and 196(1),[51] has been amended multiple times since *Al-Kateb* without altering the majority's construction. It is therefore to be presumed that Parliament has accepted that construction.[52]

38. *Secondly*, s 195A was inserted by the *Migration Amendment (Detention Arrangements) Act 2005* (Cth) (**the 2005 Amendment Act**). It gives the Minister a non-compellable power to grant a visa to a person in immigration detention where satisfied that it is in the public interest to do so. The relevant Explanatory Memorandum referred to using s 195A to grant a Removal Pending Bridging Visa "where the detainee has no right to remain in Australia but removal is not practicable in the foreseeable future".[53] As Kiefel and Keane JJ said in *Plaintiff M76*,[54] s 195A was "an attempt by the Parliament to ameliorate individual hardship that might follow from the decision in *Al-Kateb*", and was premised upon its correctness. The insertion of s 195A is also important given Gleeson CJ's view in *Al-Kateb* that the existence of such a discretionary power would make it easier "to

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[51] See *Migration Legislation (Regional Processing and Other Measures) Act 2012* (Cth) (inserting s 196(1)(aa)); *Migration Amendment (Detention Arrangements) Act 2005* (Cth) (inserting note to s 189).

[52] *Plaintiff M76* (2013) 251 CLR 322 at 382 [194] (Kiefel and Keane JJ); *Plaintiff M47/2012* (2012) 251 CLR 1 at 131 [334] (Heydon J). See generally *Platz v Osborne* (1943) 68 CLR 133 at 141 (Rich J), 145–146 (McTiernan J), 146–147 (Williams J); *Thompson v His Honour Judge Byrne* (1999) 196 CLR 141 at 157 [40] (Gleeson CJ, Gummow, Kirby and Callinan JJ).

[53] Explanatory Memorandum, Migration Amendment (Detention Arrangements) Bill 2005 (Cth) at [10], [21]. The visa, created by the *Migration Amendment Regulations 2005 (No 2)* (Cth), could be granted where, inter alia, a non-citizen was in immigration detention and the Minister was satisfied that their removal from Australia was not reasonably practicable and they had done everything possible to facilitate removal.

[54] (2013) 251 CLR 322 at 383 [197]. See also *Plaintiff M47/2012* (2012) 251 CLR 1 at [334] (Heydon J).

discern a legislative intention to confer a power of indefinite administrative detention";[55] cf PS [43].

39. *Thirdly*, the 2005 Amendment Act also inserted Subdiv B into Div 7 of Pt 2 of the Act, which confers a non-compellable power on the Minister, if he or she thinks it in the public interest to do so, to make a residence determination that enables an unlawful non-citizen to live in the community while retaining the status of being in "immigration detention": ss 197AB, 197AE. While the extrinsic materials did not expressly refer to this power being used where there is no real prospect of removal, it is plainly capable of being used in that situation.

40. *Fourthly*, the 2005 Amendment Act also inserted Pt 8C into the Act, which gives the Ombudsman a role in reviewing the cases of persons in immigration detention for a period totalling at least two years. That role includes making recommendations addressing the situation of non-citizens in long-term detention, including recommending another form of detention (such as a residence determination) or release into the community on a visa: see s 486O. This oversight role forms part of a legislative response that recognises and responds to the construction adopted in *Al-Kateb*, without seeking to reverse it.

41. There is no foundation for the submission that the powers conferred by ss 195A and 197AB contradict the "intractable" language of ss 189 and 196 or "materially change" their operation: cf PS [35], [39], [42]. The 2005 Amendment Act made no relevant change to the language of s 189, 196(1) or 198, or the fundamental scheme of the Act described at [23]–[25] above.[56] Sections 189 and 196 continue to mandate the detention of all unlawful non-citizens until one of the specified events occurs. One event has always been the grant of a visa (s 196(1)(c)). Section 195A simply confers an additional power to grant a visa (a power akin to, but broader than,[57] those conferred by ss 351 and 417, which were in the Act when *Al-Kateb* was decided).[58] Section 197AB makes no change to the basic scheme concerning the mandatory detention of unlawful non-citizens. While it allows the Minister to approve arrangements that the Act deems to constitute immigration

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[55] *Al-Kateb* (2004) 219 CLR 562 at 578 [22] (Gleeson CJ)

[56] See also Explanatory Memorandum, Migration Amendment (Detention Arrangements) Bill 2005 (Cth) at [14], where it is said that the amendments "will maintain the integrity of the mandatory detention regime for unlawful non-citizens"; fn 27 above.

[57] Note also the wide power to grant a special purpose visa the Minister already possessed (s 33(2)(b)).

[58] Cf PS [41], which suggests that s 195A(3) was a new development. In fact, it has an equivalent in s 417(2).

detention,[59] if the Minister chooses *not* to exercise that power, which is not compellable (s 197AE), ss 189, 196 and 198 apply in *exactly the same way* as when *Al-Kateb* was decided. In such a case, the "very nature" of immigration detention is not "transformed": cf PS [38]. It is not even altered. Accordingly, the enactment of ss 195A and 197AB, conferring powers the Plaintiff concedes were not *required* to be considered or exercised,[60] provides no basis to imply into ss 189 and 196 a limitation the effect of which is that a court may release non-citizens into the community even when the Executive has refused such admission in accordance with the Act. That is all the more so given that such a limitation would require the release of non-citizens in circumstances quite different to those identified in the statutory provisions said to support that implication.

10 42. The AHRC submits that regard should also be had to s 196(4), (4A) and (5), which were inserted by the *Migration Amendment (Duration of Detention) Act 2003* (Cth). It submits that s 196(5) implies that, in cases *not* controlled by (4) and (4A), "the likelihood of removal *is* a matter which bears upon the permissible duration of detention under s 196": AHRC [19]. That submission should be rejected. Section 196(5) is expressly "[t]o avoid doubt". In any event, as noted at AHRC [20], the amendments addressed a particular issue: a series of Federal Court decisions in which interlocutory orders had been made releasing persons from immigration detention, the visas of many of whom had been cancelled on character grounds, pending final determination of the lawfulness of their detention.[61] Thus, s 196(4), (4A) and (5) were intended to clarify that, where a person's
20 visa had been cancelled on character grounds, the Court could not make an interlocutory order for their release prior to the resolution of their substantive proceedings. That the legislature did not at that time legislate to reverse *Al Masri* is readily explicable by the fact that *Al-Kateb* had by then been removed to the High Court. Of course, there was no need to legislate once this Court gave judgment.

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[59] Noting that the Act applies to a person subject to a residence determination "as if the person were in immigration detention" (s 197AC(1)) and the words "detain", "detainee" and "immigration detention" as
30 defined in s 5(1) "extend ... to persons covered by residence determinations" (see notes to those definitions).

[60] Mandamus is unavailable: *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at 359 [99]–[100] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

[61] Supplementary Explanatory Memorandum, Migration Amendment (Duration of Detention) Bill 2003 (Cth) at [5].

Sections 189 and 196 are valid

43. The majority in *Al-Kateb* (only Gummow J dissenting on this point) correctly held that ss 189 and 196 are not invalid on the ground that they are contrary to Ch III.

44. The Plaintiff's argument purports to rest on *Chu Kheng Lim v Minister for Immigration*[62] and the cases which have followed it. It is therefore important to appreciate the principle for which *Lim* actually stands. Brennan, Deane and Dawson JJ (with whom Mason CJ relevantly agreed) noted that the provisions of Ch III constitute "an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested"[63] and that, accordingly, the grants of legislative power "do not permit the conferral upon any organ of the Executive Government of any part of the judicial power of the Commonwealth".[64] Their Honours said that there are some functions that, by reason of their nature or because of historical associations, are "essentially and exclusively judicial in character" and identified within that class the function of adjudging and punishing criminal guilt under a law of the Commonwealth.[65] In the course of explaining that the concern of the Constitution is with "substance and not mere form", their Honours said:[66]

> It would, for example, be beyond the legislative power of the Parliament to invest the Executive with an *arbitrary power to detain citizens in custody* notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt. The reason why that is so is that, *putting to one side the exceptional cases to which reference is made below, the involuntary detention of a citizen in custody by the State is penal or punitive in character* and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.

45. However, as Gaudron J observed in *Kruger v Commonwealth*,[67] in comments that have been cited with approval many times:[68]

> *[I]t cannot be said that the power to authorise detention in custody is exclusively judicial except for clear exceptions* ... The exceptions recognised in *Lim* are neither clear nor within precise and confined categories. For

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62 (1992) 176 CLR 1 (***Lim***).

63 *Lim* (1992) 176 CLR 1 at 26.

64 *Lim* (1992) 176 CLR 1 at 27.

65 *Lim* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ).

66 *Lim* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ) (emphasis added).

67 (1997) 190 CLR 1 at 110 (emphasis added).

68 See, eg, *Al-Kateb* (2004) 219 CLR 562 at 648 [258] (Hayne J); *Woolley* (2004) 225 CLR 1 at 24–27 [57]–[62] (McHugh J); *Thomas v Mowbray* (2007) 233 CLR 307 at 330 [18] (Gleeson CJ), 431 [355] (Kirby J); *South Australia v Totani* (2010) 242 CLR 1 at 146–147 [382]–[383] (Heydon J).

> example, the exceptions with respect to mental illness and infectious disease point in favour of broader exceptions relating, respectively, to the detention of people in custody for their own welfare and for the safety or welfare of the community. Similarly, it would seem that, if there is an exception in war time, it, too, is an exception which relates to the safety or welfare of the community.
>
> Once exceptions are expressed in terms involving the welfare of the individual or that of the community ... it is not possible to say that, subject to clear exceptions, the power to authorise detention in custody is necessarily and exclusively judicial power.

46. The feature that distinguishes detention that can be imposed only as an incident of the exercise of judicial power from permissible detention by the Executive is whether the detention is imposed as punishment for a breach of the law.[69] That feature formed the basis of the analysis of the "exceptions" identified by Brennan, Deane and Dawson JJ in *Lim*.[70] It was also the basis for the actual decision in *Lim*, which upheld legislation authorising the detention of aliens by the Executive for the purposes of preventing their entry into Australia or removing them from Australia, because such detention "is neither punitive in nature nor part of the judicial power of the Commonwealth".[71] The distinction between detention imposed for punitive and non-punitive purposes has been adopted in later decisions of this Court,[72] and should be accepted as the doctrine of this Court:[73] cf PS [59].

47. For those reasons, it is wrong to speak of persons having a constitutional immunity from detention otherwise than consequent upon judicial adjudication of guilt, subject to limited "exceptions": cf PS [57]. The "exceptions" extend to any non-punitive purpose for which Parliament, in the exercise of legislative power, decides to authorise detention (quarantine and detention on remand being obvious examples). For the same reasons, although the

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[69] *Duncan v New South Wales* (2015) 255 CLR 388 at 407–410 [41]–[51] (the Court); *Pollentine v Bleijie* (2014) 253 CLR 629 at 650 [45] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) and 656–657 [72]–[73] (Gageler J).

[70] *Lim* (1992) 176 CLR 1 at 28 (Brennan, Deane and Dawson JJ).

[71] *Lim* (1992) 176 CLR 1 at 32 (Brennan, Deane and Dawson JJ).

[72] *Al-Kateb* (2004) 219 CLR 562 at 584 [45], 586 [49] (McHugh J), 648 [255]–[256] (Hayne J), 658 [289] (Callinan J). See also *Woolley* (2004) 225 CLR 1 at 13 [19] (Gleeson CJ), 75 [222], 77 [227] (Hayne J); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 592–593 [36]–[38] (French CJ, Kiefel and Bell JJ); *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 (***Plaintiff M68***) at 69–70 [40] (French CJ, Kiefel and Nettle JJ), 86 [98], 87 [100] (Bell J), 111 [184] (Gageler J), 124 [238] (Keane J); *Falzon v Minister for Immigration and Border Protection* (2018) 92 ALJR 201 at [29], [33] (Kiefel CJ, Bell, Keane and Edelman JJ).

[73] Gummow J's contrary reasons in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 613 [84] have not been accepted by the Court. They are not consistent with the analysis in *Lim*.

issue does not arise in these proceedings, it is *not* the case that the only circumstances in which legislation may authorise the detention of an alien are the purposes referred to in *Plaintiff S4/2014 v Minister for Immigration and Border Protection*[74] (quoted at PS [25], [60]). That passage should not be read as limiting the constitutionally permissible purposes of detention, but instead as describing the purposes for which detention was in fact authorised by the Act as it then stood.[75] No Ch III issue arose in that case.

48. When *Lim* is properly understood, the Plaintiff's submission must be that, once there is no real prospect of a non-citizen's removal in the reasonably foreseeable future, the detention authorised and required by ss 189 and 196 transforms from permissible (non-judicial, non-punitive) detention into impermissible (judicial, punitive) detention. Whether that submission is accepted depends upon the proper characterisation of the nature and purpose of the detention authorised and required by ss 189 and 196.[76]

49. In this case, the relevant purpose of the detention authorised and required by s 189 and 196 is the removal of the Plaintiff from Australia as soon as it is reasonably practicable to do so, the Executive having exercised its undoubted power to refuse to admit him to the Australian community in accordance with the Act. It is an aspect of that purpose that the Plaintiff be segregated from the Australia community pending removal, both to give effect to the decision not to admit him and to ensure that he is available for removal when it becomes reasonably practicable to remove him.[77] Contrary to PS [60], that is not a different purpose from the purpose of removal: permissible immigration detention has never been said to be limited to the time during which an non-citizen is physically removed from Australia. That is illustrated by the recent unanimous decision of this Court in *Plaintiff M96A*, which rejected an argument that it would be unlawful for the duration of detention to be predicated not on the effectuation of removal itself, but on an unrelated

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[74] (2014) 253 CLR 219 (***Plaintiff S4***) at [26] (the Court).

[75] In *Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582 (***Plaintiff M96A***) at 594 [22], the plurality noted the Commonwealth's submission to this effect but did not need to resolve the issue.

[76] See *Al-Kateb* (2004) 219 CLR 562 at 651 [267] (Hayne J); *Woolley* (2004) 225 CLR 1 at 15 [28], [30] (Gleeson CJ), 26 [60], 27 [62] (McHugh J).

[77] *Al-Kateb* (2004) 219 CLR 562 at [45], [49] (McHugh J), [255]–[256] (Hayne J), [289] (Callinan J); *Woolley* (2004) 225 CLR 1 at 77 [227] (Hayne J); *Plaintiff M76* (2013) 251 CLR 322 at 385 [207] (Kiefel and Keane JJ).

factum (the need to be in Australia for the medical treatment).[78] In so holding, six Justices cited *Al-Kateb* and *Plaintiff M76* in observing: [79]

> detention does not become an exercise of judicial power merely because the precondition, and hence *the period of detention, is determined by matters beyond the control of the Executive*. This will frequently be the case where ... questions arise as to whether it is reasonably practicable to remove a person from Australia.

That observation highlights that detention may be for the non-punitive purpose of removal regardless of whether there is a real prospect of removal in the reasonably foreseeable future. Removal may not be reasonably practicable now, or in the reasonably foreseeable future, but the purpose of the detention continues to be to effect removal once it becomes practicable. That is not denied by length of the Plaintiff's detention: cf PS [64].

50. The Plaintiff relies on the observation of Brennan, Deane and Dawson JJ in *Lim* that legislation authorising or requiring detention for the purpose of removal will be valid only "if the detention which they require and authorize is limited to what is reasonably capable of being seen as necessary for the purposes of deportation"[80] and submits that where "removal is not, or has ceased to be, reasonably practicable", such detention is not capable of being seen as "necessary for the purposes of deportation": PS [20], [32], [57], [62]. This submission is misconceived. *First*, that observation was directed to the permissible *duration* of detention, not whether detention is necessary to achieve the purpose for which it is imposed:[81] cf PS [16]. *Secondly*, the submission mischaracterises the purpose of detention. As submitted above, the purpose of the detention is to remove the plaintiff *when that becomes reasonably practicable*. The duration of detention authorised by the Act is closely tied to that purpose because, by s 198, an officer *must* remove the Plaintiff *as soon as* it is reasonably practical to do so.

51. The Plaintiff also submits that his detention is unlawful because its duration is not "capable of being determined at any time, from time to time", citing *Plaintiff S4*:[82] PS

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[78] See, eg, *Plaintiff M96A* (2017) 261 CLR 582 at 595-596 [27]–[28] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ) ("the purpose for which the plaintiffs are detained during their medical treatment is the purpose of *subsequent* removal from Australia"), 600 [44] (Gageler J) ("The purpose is removal ... once the temporary purpose identified at the time of the person being brought to Australia ... no longer exists).

[79] (2017) 261 CLR 582 at 598 [33] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ) (emphasis added).

[80] *Lim* (1992) 176 CLR 1 at 33.

[81] *Plaintiff M76* (2013) 251 CLR 322 at 369 [138] (Crennan, Bell and Gageler JJ).

[82] (2014) 253 CLR 219 at 232 [29] (the Court).

[63], [65]; see also AHRC [13]. That submission involves the error identified in *Plaintiff M96A*, where the Court explained that *Plaintiff S4* does not suggest that the *actual* duration of detention must be able to be determined at any time. Instead, the principle is that "Parliament cannot avoid judicial scrutiny of the legality of detention by criteria which are too vague to be capable of objective determination".[83] In *Plaintiff M96A*, the Court held that the validity of detention under ss 189 and 196 was able to be objectively determined at any time, and from time to time, because "[a]t any time it can be concluded that detention in Australia will conclude if any of the various preconditions [listed in s 196(1)] are met":[84] cf PS [32]. That conclusion is applicable in this case. This is not denied by the fact that the Minister has power under s 195A to grant the Plaintiff a visa and thus bring his detention to an end at an *earlier* time: cf PS [65]. That is the case for *any* unlawful non-citizen. The fact that the Minister has a power to bring detention to an end by the grant of a visa *before* the time when removal becomes reasonably practicable plainly does not mean that all detention is at the unconstrained discretion of the Executive.

PART V ESTIMATE

52. It is estimated that 2 hours will be required to present oral argument.

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[83] *Plaintiff M96A* (2017) 261 CLR 582 at 597 [31] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).

[84] (2017) 261 CLR 582 at 597 [32] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ); see also 600 [45] (Gageler J). See also *Plaintiff M68* (2016) 257 CLR 42 at 112 [185] (Gageler J), where the duration of detention was found to be capable of objective determination "by reference to what remains to be done by the regional processing country to fulfil its role as specified in the arrangement".