HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN: **ASF17**
Appellant

and

COMMONWEALTH OF AUSTRALIA
10 Respondent

APPELLANT'S SUBMISSIONS

Part I: FORM OF SUBMISSIONS

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

Part II: ISSUES

2. The appellant is a citizen of Iran detained in Australia. He has been detained by officers of the Commonwealth for over 10 years under the ***Migration Act** 1958* (Cth). He is bisexual.[1] The Commonwealth accepts that sexual intercourse between males
20 is illegal in Iran and can attract the death penalty.[2]

3. The appellant is not volunteering to assist the Commonwealth with removal to Iran. However, he has never objected, nor indicated an unwillingness to assist the Commonwealth, to being removed from Australia to any other place in the world. In fact, he has positively asked for it.[3] Nonetheless, the Commonwealth has not attempted to remove the appellant to any other place in the world than Iran. It

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1 Appellant's second affidavit affirmed 13 December 2023 ("**Appellant's Second Affidavit**"), [10]-[15] (**ABFM 119-120**).
2 Transcript of hearing on 20 December 2023, pg 104 line 15 (**ABFM 177**).
3 See paragraphs 16 and 23 below; Appellant's Second Affidavit, [26] (**ABFM 121**); transcript of hearing on 20 December 2023, pg 148 lines 33-46 and pg 149 lines 1-29 (**ABFM 221-222**).

continues to detain the appellant on the speculative contingency that he might change his mind and acquiesce in or positively assist with removal to Iran.

4. The appellant applied to the Federal Court for a writ of habeas corpus. That application was dismissed. Central to that determination was the primary judge's non-application of the constitutional limitation on the lawfulness of executive detention which this Court confirmed in *NZYQ*.[4]

5. The following legal issues now arise on this appeal:

   (1) Is the conduct of an unlawful non-citizen relevant in determining whether the constitutional limitation has been reached on the facts of a particular case?

10 (2) If "yes" to (1), is the constitutional limitation reached even if the unlawful non-citizen:

   (a) has contributed to the frustration of, or has deliberately frustrated, their removal from Australia;

   (b) has or is not cooperating in their removal from Australia;

   (c) has contributed to the frustration of, or has deliberately frustrated, their removal, or has or is not cooperating with their removal, to a particular place outside of Australia by reason of a genuine subjective fear of harm if removed to that place?

   (3) Was the constitutional limitation reached in this case?

20 6. The appellant's case is that the answer to question (1) is "no". That is enough for his success. If that is wrong, the answer to question (2) should be "yes", on the basis of at least (2)(c). The appellant only contributed to the 'frustration' of his removal or is failing to 'cooperate' with his removal to Iran because he does hold a genuine subject fear of harm if removed there, such that the answer to question (3) is "yes".

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4 ***NZYQ*** *v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005, 1018-1019 [55] and [60].

Part III: SECTION 78B NOTICE

7. On 26 February 2024, the appellant served notices on the Attorneys-General in compliance with s 78B of the *Judiciary Act 1903* (Cth).

Part IV: CITATION OF REASONS FOR JUDGMENT

8. The primary judge's reasons for judgment are unreported. The medium neutral citation for those reasons is [2024] FCA 7 ("**J**") (**CAB 4-46**).

Part V: FACTUAL BACKGROUND

9. The appellant was born on 31 May 1986 in Ilam, Iran.[5]

10. On 13 July 2013, he arrived in Australia. He was detained under s 189 of the
10 *Migration Act*.[6]

11. On 4 September 2013, and after an initial period of detention, the appellant was granted a bridging visa and released. That bridging visa was cancelled on 9 February 2014, leading to the appellant being detained again.[7]

12. On 13 August 2015, the bar under s 46A of the *Migration Act* was lifted to allow the appellant to make a valid visa application. On 1 April 2016, he lodged an application for a Safe Haven Enterprise Visa ("**SHEV**"): see J [86].

13. On 16 January 2017, a delegate of the then Minister for Immigration and Border Protection decided to refuse the appellant's application for a SHEV.[8] The appellant sought judicial review of that decision. His application for judicial review and
20 a subsequent appeal were unsuccessful, with the appeal being dismissed on 3 August 2018.[9]

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[5] Appellant's first affidavit affirmed 13 December 2023 ("**Appellant's First Affidavit**"), [4] (**ABFM 113**).
[6] Appellant's First Affidavit, [5]-[6] (**ABFM 114**).
[7] J [1]; Appellant's First Affidavit, [7]-[8] (**ABFM 114**).
[8] Appellant's First Affidavit, [12] (**ABFM 114**).
[9] Appellant's First Affidavit, [12]-[14] (**ABFM 114**); *ASF17 v Minister for Immigration and Border Protection* [2017] FCCA 24 and *ASF17 v Minister for Immigration and Border Protection* [2018] FCA 1149.

14. Since August 2018, officers of the Commonwealth have been under a statutory duty imposed by s 198 of the *Migration Act* to remove the appellant from Australia as soon as reasonably practicable: J [1].

15. Since August 2018, the appellant has "consistently maintained that he cannot return to Iran": J [115]. On 16 October 2018, he indicated to an officer of the Commonwealth that he could not go to Iran. He repeated that position to officers of the Commonwealth on 22 and 26 October 2018.[10] He was later described in May 2019 by an officer of the Commonwealth as "definitely still involuntary".[11]

16. On 22 May 2019, the appellant told officers of the Commonwealth that they could
10 send him "anywhere" but Iran.[12]

17. On 27 October 2020, the appellant confirmed to an officer of the Commonwealth that he was not willing to sign a request for voluntary removal to Iran.[13] A number of other interviews were conducted with the appellant, including on 3 September 2023. He maintained his position that he would not agree to voluntary return to Iran, citing problems with his return.[14]

18. On 8 November 2023, this Court gave its answers in *NZYQ* to each of the questions of law arising in the special case presented.

19. On 16 November 2023, the appellant commenced proceedings in the Federal Court of Australia seeking a writ of habeas corpus, along with declaratory relief.[15] In
20 support of his application, the appellant relied on affidavits in which he explained the reasons why he refused to be returned to Iran, including due to his genuine subjective fear of being harmed because of his sexuality.[16]

20. On 28 November 2023, the High Court published its reasons in *NZYQ*. The Court held that "the constitutionally permissible period of execution detention of an alien who has failed to obtain permission to remain in Australia [comes] to an end when

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[10] Affidavit of Edward Jones affirmed 28 November 2023 ("**Jones Affidavit**"), [21]-[22] and annexures "EJ-3" and "EJ-4" to that affidavit (**ABFM 14, 46-51**).
[11] Jones Affidavit, [23] and annexure "EJ-5" to that affidavit (**ABFM 14, 51**).
[12] J [117]; Jones Affidavit, annexure "EJ-5" (**ABFM 51**).
[13] Jones Affidavit, [24] and annexure "EJ-6" to that affidavit (**ABFM 14, 53**).
[14] Jones Affidavit, [32.7] (**ABFM 16**).
[15] The amended application is at **ABFM 4**.
[16] The Appellant's First Affidavit is at **ABFM 112**. The Appellant's Second Affidavit is at **ABFM 117**.

there is no real prospect of removal becoming practicable in the reasonably foreseeable future" ("**constitutional limitation**").[17]

21. On 30 November 2023, Kennett J delivered judgment in *AZC20*[18] in favour of an applicant who brought a similar application to the appellant. The appellant relied on that judgment in support of his application.

22. The appellant's application was heard on 19, 20 and 21 December 2023. The Commonwealth accepted that probable cause had been shown for the issue of the writ of habeas corpus and, as such, that it bore the legal and evidentiary burden of demonstrating that the writ should not issue. Its principal factual contention was that the appellant could be removed to Iran with his cooperation. Its associated legal contention was that the constitutional limitation had not been reached for that reason: J [8].

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23. The appellant's case was that, at all relevant times, the Commonwealth: (1) knew Iran would not issue travel papers for the involuntary removal of one of its citizens from Australia; (2) knew the appellant would not go to Iran voluntarily; and (3) never considered possible pathways to removal from Australia other than to Iran. The appellant accepted that, if he cooperated by taking certain steps, he could be removed to Iran: J [12] and [31]. But he gave reasons as to why he refused to cooperate with his removal to Iran, relating to his fear of harm if he were to be so removed: J [13].

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24. It is worth observing at this point that the appellant's claims of fear of harm (the reasons for his refusal to 'cooperate' with the Commonwealth and, *inter alia*, interact with Iranian authorities in Australia) included a claim about his sexuality, which had never been considered in any statutory protection visa process (or for that matter, any non-statutory process in aid of a subsequent statutory process such as a s 48B bar-lift request, or a s 195A consideration request).[19]

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17 *NZYQ*, 1018 [55].

18 *AZC20 v Secretary, Department of Home Affairs (No 2)* [2023] FCA 1497.

19 There is no finding by the primary judge that the fact such a matter had not been raised earlier was due to some "scheming" by the appellant. That is, the appellant's reasons for not expressly saying as much previously (though he had constantly said he "had a problem"), were not doubted to be genuine: see further paragraphs 60-62 below.

25. The primary judge dismissed the application on 11 January 2024, finding that the constitutional limitation had not been reached. His Honour found that, as a matter of general principle, "the detention of an alien does not lose the objectively determined purpose of removing the alien from Australia if the if the alien is choosing not to cooperate in achieving that purpose. In such circumstances, removal of the person remains 'practicable' in the foreseeable future": J [52] (see also J [26], [41], [53], [60] and [65]).

26. In reaching that determination, the learned primary judge made the following findings relevant to this appeal: (1) "there is no country other than Iran to which it may be possible to effect the applicant's removal" (J [131]); (2) "the Minister's department has a <u>policy</u> of not removing 'unlawful non citizens' to countries for which they do not have a right of residency or long term stay" and, as such, "[t]he only country to which the applicant may be removed <u>consistently with that policy</u> is Iran" (J [131]) (emphasis added); (3) the appellant's "present and recent sexual orientation is bisexual" (J [126](1)); and (4) "sexual intercourse between males is illegal in Iran and can attract the death penalty": J [132].

27. On 24 January 2024, the appellant filed a notice of appeal in the Full Court of the Federal Court appealing from the primary judge's judgment.[20]

28. On 16 February 2024, following an application for removal filed pursuant to s 40 of the *Judiciary Act 1903* (Cth) by the Attorney-General of the Commonwealth, Gageler CJ ordered that the entire cause be removed to this Court.[21]

Part VI: ARGUMENT

There is no general exception to the constitutional limitation arising in cases of "non-cooperation" by an alien

The 'exception' identified by the primary judge

29. The Commonwealth argued below, and the primary judge accepted, that (at J [8]):

> where a detainee is shown to be failing to cooperate as to matters that may assist in their removal then it remains the case, for the purposes of the constitutional limit on their detention, that the prospect of the detainee's removal may become practicable in

[20] **CAB 49-59**.

[21] **CAB 65-66**.

> the foreseeable future…[W]hether there is a practical prospect of removal is a matter to be adjudged on the basis that the detainee is cooperating.

30. That is, the primary judge accepted the submission that the testing for a practical prospect of removal is to be done on the hypothetical basis that the detainee will 'cooperate'. The primary judge explained this by reference to *Plaintiff M47*.[22]

31. *Plaintiff M47* was a special case with agreed facts. The circumstances were "highly unusual".[23] The plaintiff had made inconsistent claims about his nationality and identity and refused to assist the Department in establishing the truth. Despite that obfuscation, the plaintiff invited the Court to infer from the agreed facts that there
10 was no real prospect that he would be able to be removed from Australia in the reasonably foreseeable future.

32. This Court unanimously declined to draw the inference sought by the plaintiff. Based on that conclusion, and the absence of any other necessary factual foundation, this Court found that no question arose as to the lawfulness of the plaintiff's detention.[24] This Court's findings concerning the relevance of the plaintiff's non-cooperation are necessarily to be considered in that peculiar, unique context.

33. Kiefel CJ, Keane, Nettle and Edelman JJ found that the plaintiff had "adopted a posture that involves, at best, non-cooperation and, at worst, deliberate obfuscation and falsehood" and that "[n]o good reason [was] advanced for the adoption of this
20 posture".[25] The only conclusion available was that he had "deliberately failed to assist the defendants" in their enquiries.[26] (There is no issue of enquiries in the appellant's case.) Because he had adopted that position, "what might be established about his identity and nationality…cannot be known".[27] Bell, Gageler and Gordon JJ concurred, adding "[i]n the absence of his cooperation, it cannot be known whether the plaintiff's identity can be established, nor can the Court essay any conclusion as to the prospect or likelihood of his removal from Australia".[28]

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22 ***Plaintiff M47****/2018 v Minister for Home Affairs* (2019) 265 CLR 285.
23 *Plaintiff M47*, 294 [17] (Kiefel CJ, Keane, Nettle and Edelman JJ).
24 *Plaintiff M47*, 300 [42] (Kiefel CJ, Keane, Nettle and Edelman JJ); 302 [49] (Bell, Gageler and Gordon JJ).
25 *Plaintiff M47*, 297 [30] (Kiefel CJ, Keane, Nettle and Edelman JJ).
26 *Plaintiff M47*, 298 [34] (Kiefel CJ, Keane, Nettle and Edelman JJ) (emphasis added).
27 *Plaintiff M47*, 297 [31] (Kiefel CJ, Keane, Nettle and Edelman JJ).
28 *Plaintiff M47*, 302 [49] (Bell, Gageler and Gordon JJ).

A 'Plaintiff M47 exception' has no principled basis

34. There are several difficulties in the primary judge's reasoning which ought lead this Court to reject any general rule that non-cooperation will result in the constitutional limitation not being reached.

35. *First*, the "exception" cannot be accommodated by the *Lim*[29] principle. The primary judge did not explain, and it is otherwise not possible to see how, the "exception" reconciles with accepted principles of proportionality. Whether the correct understanding of proportionality is one of structured proportionality or via the simpler "verbal formula" in *Lim* of "reasonably capable of being seen as
10 necessary",[30] injection of the exception creates a result that does not withstand the scrutiny of the "necessity" consideration. The statute's purpose of deciding whether to "admit or deport"[31] the person can be achieved without needing to have detention persist beyond a present state of affairs of alleged non-cooperation.

36. Detention itself, as legislated, cannot reasonably be seen as catering for the contingency that people might need to be removed. This is because detention is selective. The most obvious example of why this is so is that people can enter Australia with a visa, but have it cease to be in force and yet not be under any obligation (because the *Migration Act* contains no such obligation) to surrender themselves to be ready for removal. Detention therefore, as legislated, in truth has
20 never been to ensure the individual can be ready for removal. Parliament itself has not regarded it as reasonably necessary and neither is it capable of being seen as such. Once that deliberate legislative gap is recognised, it cannot be said that it is reasonably necessary to have people detained, in alleged pursuit of an alleged purpose of removal that is contingent (i.e. not being pursued in fact).

37. Similarly, the existence of the power of the Minister to grant a visa to a detainee pursuant to s 195A of the *Migration Act* is a statutory reality standing against any argument that detention on the hope that the detainee might later change their mind

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29 *Chu Kheng **Lim** v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

30 *Jones v Commonwealth* (2023) 97 ALJR 936, 968 [151] (Edelman J); see also 946-947 [43]-[44] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

31 *Lim*, 10 (Mason CJ). See also *NZYQ*, 1015 [39]; *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219, 230 [23] (French CJ, Hayne, Crennan, Kiefel and Keane JJ).

and acquiesce in removal: Parliament itself envisages this other "exception", again confirmatory of a lack of "necessity".

38. Moreover, alternatives to detention for the purposes of deciding whether to "admit or deport" can be readily identified. Parliament itself has recently, and notoriously, amended the *Migration Act* to provide means to keep track of people in the community who constitutionally cannot be detained.[32]

39. Lest there also be any suggestion that the purpose is for "separation" of aliens from the community (which as a purpose is not constitutionally permissible[33]), the present case is not one concerned with character. Indeed, notably, the rearticulation of the
10 *Lim* principle in *NZYQ* is in terms of "persons", without any distinction between aliens and non-aliens.[34]

40. *Second*, this Court again confirmed in *NZYQ* that "the only purposes peculiarly capable of justifying executive detention" are "removal from Australia or enabling an application for permission to remain in Australia to made and considered".[35] The "continued viability" of those purposes "cannot be treated by the legislature as a matter purely for the opinion of the executive".[36] It would only emphasise the punitive—and thus constitutionally invalid—nature of the executive detention if Parliament were to purport to extend it in respect of a "non-cooperative" person for the purpose of detaining them <u>until and unless</u> they cooperated with their removal, in
20 circumstances where the constitutional limitation would otherwise be reached (with the result that cooperation may be forthcoming only under the threat of further, and possibly indefinite, deprivation of liberty). To adopt Gummow J's words from *Al-Kateb*: if "the prospects of removal to another country are so remote", "continued detention cannot be for the purpose of removal".[37]

41. Put another way, and related to the first point, the necessary "means and ends" enquiry reveals that the true characterisation of the detention power, if read with the

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32 *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* (Cth).
33 *NZYQ*, 1016 [49].
34 *NZYQ,* 1015 [39].
35 See *NZYQ,* 1016 [46]. See also 1015 [40]-[41] and 1018 [52].
36 *Al-Kateb v Godwin* (2004) 219 CLR 562, 613 [140] (Gummow J, dissenting).
37 *Al-Kateb v Godwin* (2004) 219 CLR 562, 601 [98] (Gummow J, dissenting). See also at 609 [125].

exception postulated by the primary judge, is that such power, "objectively determined", is not for a constitutionally permissible purpose.[38]

42. *Third*, *Plaintiff M47* is authority for no more than what it did decide.[39] No question was reached as to the lawfulness of the plaintiff's detention in that case. The primary judge was wrong to draw any broader proposition from *Plaintiff M47*: cf J [60]. As correctly earlier observed, *Plaintiff M47* was not "concerned with establishing any principle as to the extent of the constitutional limitation": J [43]. Moreover, there is nothing in *Plaintiff M47* which qualifies *Lim*. Indeed, because of the way the case unfolded, *Lim* was not considered.

10 43. *Fourth*, a broad exception of the kind posited by the primary judge assumes that a line can be easily drawn distinguishing those cases where an alien's non-cooperativeness ought automatically result in the ongoing lawfulness of their detention and those where it ought not.[40] The facts of the present case highlight those difficulties.

44. Some notion that every non-cooperative alien is "responsible" for the absence of a real prospect of their removal becoming practicable in the reasonably foreseeable future is wrong. If accepted, it would transform the *Lim* principle into one which, in its factual application, would require courts to make plainly political value judgments in individual cases. The difference in outcome compared to *AZC20*, turning on fine
20 distinctions of where to "draw the line", illustrates the problem.[41]

45. It is in this context that it is important to recall that the appellant's sexual orientation (which the primary judge accepted) has never been a claim the subject of any protection assessment, whether statutory or otherwise: cf J [61]. More generally, it is well within contemplation that fears of harm (*sur place* or otherwise) can be raised for the first time after a protection process, if there is ever one at all. There is no sound reason why administrative processes of assessing claims that Australia owes

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[38] *NZYQ*, 1016 [44].

[39] *CSR Ltd v Eddy* (2005) 226 CLR 1, 11 [13] (Gleeson CJ, Gummow and Heydon JJ).

[40] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCATrans 154 (8 November 2023), 8125-8137 (Jagot J and Solicitor-General).

[41] It is noteworthy that the primary judge appeared to accept the existence of a special category cases of "medical reasons or a lack of knowledge": J [60]. The identification of such a special category, and then the confining to that, is itself unprincipled.

protection obligations should feed directly and finally into the constitutional limitation question.

46. *Fifth*, the supposed exception must proceed on the assumed contingency that a presently-uncooperative detainee might in future decide to cooperate. This undesirably but necessarily invites speculation in a given case as to the likelihood of the detainee changing their behaviour. But the constitutional holding in *Lim* has never been explained to be contingent, or even fact-specific. Even more problematically, the logical conclusion of that contingency must be that from the moment when an applicant for a protection visa who has had their application
10 "finally determined" (as that expression is defined in s 5 of the *Migration Act*), the constitutional limitation is never capable of being reached.

47. In this regard, it is noteworthy that the primary judge's reasoning requires proceeding on the assumption of a hypothetical, no matter how implausible that scenario might be on the evidence.[42]

48. The requirement of speculating about such a hypothetical runs counter to the reasoning in *NZYQ*. As this Court explained at [61]:

> The notions of the practicability and the foreseeability of removal embedded in the expression of the constitutional limitation accommodate "the real world difficulties that attach to such removal". The real world context also entails that proof of a real
> 20 prospect must involve more than demonstration of a mere un-foreclosed possibility.

49. Moreover, as is now well-established, constitutionality of a law is determined at the level of an Act in all its applications, not at the level of each fact-specific application,[43] and nor, might it be added, on a hypothetical set of facts. Cases of deliberate obfuscation are resolvable in their fact-specific ways without the need to develop any exception to *Lim*, as *Plaintiff M47* demonstrates.

50. *Sixth*, to the extent the exception is said to be based on this Court's statement in *NZYQ* about "frustration" of "lines of enquiry" (J [10]),[44] tacking with the factual circumstances that this Court found in *Plaintiff M47*, the present case is not about lines of enquiry at all. There is no dispute about the appellant's country of origin or

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42 Compare *Sami v Minister for Home Affairs* [2022] FCA 1513, [157] (Mortimer J).
43 *Commonwealth of Australia v AJL20* (2021) 273 CLR 43, 69-70 [43] (Kiefel CJ, Gageler, Keane and Steward JJ).
44 *NZYQ*, 1019 [62].

identity. The only operative issue is the policy choices made by Iran which prevent his involuntary removal (and the failure of the Commonwealth, also by reason of policy, to discharge its duty to remove, which is not a duty to remove to a particular country). No "enquiry" is or will ever be needed. Thus the exception has no foundation in *Plaintiff M47* (or *NZYQ*).

51. *Seventh*, "the concern for the protection of personal liberty", whether it be for aliens or otherwise, is one that lies "at the core of our inherited constitutional tradition".[45] The exception identified by the primary judge stands against the common law presumption of liberty and against indefinite detention (detention itself being *per se*
10 exceptional).[46]

52. *Eighth*, the supposed exception would effectively require courts on applications for habeas corpus such as present to consider and determine whether the applicant comes to the court with clean hands. That may be relevant to grant of discretionary equitable relief. It is not relevant, in fact contrary to fundamental principles underpinning our constitutional foundations, to habeas corpus, which is a remedy as of right.[47]

53. *Ninth* (although at the level of statute rather than constitutional principle), the duties to detain and to effect removal are imposed on officers of the Commonwealth. "People in immigration detention…are not under any general obligation to cooperate
20 in the [removal] process".[48]

If there is an 'exception', it must be driven by evidence, not a hypothetical

54. If, contrary to the above, there is room in the *Lim* principle for conjecture about a hypothetical scenario, then, and following *NZYQ*, the better understanding of the

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[45] *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 610-611 [94]-[96] (Gageler J). In the context of applications for the writ of habeas corpus, see also *R v Home Secretary; ex parte Khawaja* [1984] AC 74, 111H (Lord Scarman): "…[e]very person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others. He who is subject to English law is entitled to its protection. This principle has been in the law at least since Lord Mansfield freed 'the black' in *Sommersett's Case* (1772) 20 St.Tr. 1.".

[46] *Al-Kateb v Godwin* (2004) 219 CLR 562, 616-617 [150] (Kirby J, dissenting).

[47] *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 283 FCR 602, 623 [77] (Besanko J) citing *Green v Secretary of State for Home Affairs* [1942] AC 274, 302 (Lord Wright). See also *Azam v Home Secretary* [1974] AC 18, 41 (Lord Justice Buckley) and 42 (Lord Justice Stephenson).

[48] *AZC20 v Secretary, Department of Home Affairs (No 2)* [2023] FCA 1497, [64] (Kennett J).

relevance of an alien not volunteering assistance is that it is to be considered as a matter of evidence. That is, the hypothetical scenario must be a realistic one, open to a proper fact-finding exercise concerned with the probabilities of future events.[49]

55. The description by Mortimer J (as her Honour then was) in *Sami*, of the fact-finding issues facing the Court in such circumstances, bears repeating:[50]

> [T]he Court is required to engage in fact-finding about the probabilities of a course of events in the future. It is not guessing. It is not hoping. It is not tossing a coin. The Court is applying the ordinary civil standard of proof to propositions about what may occur in the future. It must still be persuaded on the balance of probabilities, one way or the other. In that sense, the Court is not 'speculating'. It is drawing inferences from the facts on the evidence before it. Those inferences concern events to occur in the future, to be sure, but they are still inferences to be drawn from the evidence.

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56. Such an approach is consonant with what this Court said in *NZYQ*. The assumed valid purpose of the law "must be capable of being achieved in fact", and the fact in issue, being whether there is a real prospect of removal becoming practicable in the reasonably foreseeable future, is informed by a "prospective and probabilistic" assessment of the evidence (i.e. not a hypothetical), and that there must be an accommodation of the "real world difficulties that attach to such a removal", meaning more than a "mere un-foreclosed possibility" (i.e. a hypothetical).[51]

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57. Indeed, the observation about the "real world difficulties that attach to such a removal" accommodates, rather than counts against, a consideration of the subjective reasons for not wanting to "co-operate".

58. As in *Plaintiff M47*, if an alien challenged the lawfulness of their detention, and the available evidence indicated that they had not assisted in their removal without satisfactory explanation, the court may be prepared to draw an adverse evidentiary inference in respect of the alien's case (thus, in favour of the Commonwealth), in circumstances where the initial burden is discharged (such as that the alien is in fact in possession of information which may be suggestive of a prospect of removal, the absence of which it is impossible to know what those prospects in fact are). In such

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[49] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCATrans 154 (8 November 2023), 8139–43 (Edelman J): "It may be a question of evidence. So, in relation to loss of a chance, there has long been a line of authorities that say that where someone deliberately destroys the evidence, they do not get the benefit of any presumptions in their favour and usually presumptions are made against them". See also 8149 (Solicitor-General) and 8169-8170 (Edelman J).

[50] *Sami v Minister for Home Affairs* [2022] FCA 1513, [157]. See also at [158].

[51] *NZYQ,* 1015 [40] and 1019 [60]-[61].

circumstances, the constitutional limitation may not be reached. The availability of such inferences will necessarily be highly fact-specific and will turn on the facts of an individual case, including the presence of reasons for non-cooperation.

The appellant's key reason for not cooperating in his removal to Iran

59. The primary judge erred in finding that the constitutional limitation had not been reached, although the appellant gave a satisfactory reason for refusing to assist the Commonwealth in his removal to Iran.

60. A key aspect of the appellant's case was his fear that he would be harmed by Iranian authorities (and separately, his brothers) because of his sexuality: J [90]-[91].

10 61. The primary judge accepted that the appellant was bisexual and that "sexual intercourse between males is illegal in Iran and can attract the death penalty": J [126(1)] and [132]. Although the primary judge found that the appellant's bisexuality was only his "present and recent" orientation,[52] that qualification did not prevent the judge from accepting the appellant's stated sexuality. Further, despite that acceptance, the primary judge mischaracterised his case as being a fear arising due to "matters relating to his sexuality <u>that occurred in Iran</u>" (emphasis added): J [13].

62. That mischaracterisation infected the primary judge's assessment of the genuineness of this reason for non-cooperation. It led the primary judge to reason wrongly that the 20 appellant's fear of harm due to his sexuality "depended upon [the appellant's] account as to events that occurred in Iran" before he left that country: J [130]. But it did not. The Commonwealth having conceded the risk of harm for people engaging in same-sex acts, the primary judge could only have correctly concluded on the evidence available that the appellant's fear on this basis was genuinely held.[53]

63. To the extent it separately mattered, there was a further basis for why the primary judge ought to have accepted that the appellant's reason for not assisting was

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52 And as to "present" only, there was no evidence to support the Commonwealth's reply submission of "fluidity".

53 To the extent it is suggested that a person in the appellant's position should cooperate and avoid a future risk of harm by hiding or suppressing an innate characteristic, such as their sexuality, that suggestion should be rejected. See *Appellant S395 of 2004 v Minister for Immigration & Multicultural Affairs* (2003) 216 CLR 473.

genuine. By the time of the decision, the appellant had endured detention for nearly 10 years. He had consistently maintained that he could not be returned to Iran since at least August 2018 because he had "a problem in doing so": J [115].

64. The primary judge found that the appellant's "behaviour is…consistent with a singular focus upon being able to secure permission to be released into the Australian community rather than face economic difficulty if he was to be made to return to Iran": see J [116]-[118]. The inference that the appellant would endure 10 years of detention on the off-chance of better economic prospects at some unknown future point in time (arising from statements only made some 10 years earlier, and purely in

10 the context of an entry interview),[54] rather than because of a subjectively-held genuine fear of harm of being removed to Iran where his sexuality is criminalised, was glaringly improbable.[55] It was all the more so in light of contemporaneous records created by the Commonwealth's officers that the appellant had told them that he did not want to return to Iran, rather than that he wanted to stay in Australia (recalling again that the removal duty is removal from Australia, not removal to a particular place).[56] Moreover, the appellant was not cross-examined in any meaningful way on this topic of willingness to go anywhere but Iran.[57]

65. There was also evidence before the primary judge, not dealt with, which further precluded the inference that was drawn. It was the Commonwealth's officers

20 themselves who were pursuing Ministerial intervention for the appellant, rather than intervention being pursued at the appellant's instigation, cf. J [116]-[117].[58] It must be inferred there was an acceptance that the appellant had a proper reason for withholding assistance with his removal to Iran, and for that reason he would not change his mind, and that the Commonwealth was unwilling to take any steps to effect removal from Australia to any other place.

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[54] See J [97] and [99]. See also annexure "EJ-15" to the Jones Affidavit (**ABFM 87**).
[55] *Fox v Percy* (2003) 214 CLR 118, 128 [29] (Gleeson CJ, Gummow and Kirby JJ).
[56] See paragraphs 15-17 above.
[57] Transcript of hearing on 20 December 2023, pg 148 lines 33-46 and pg 149 lines 1-29 (**ABFM 221-222**).
[58] See the transcript of hearing on 20 December 2023, pg 70 lines 1-18 (cross-examination of Mr Jones) (**ABFM 143**).

66. The "roadblocks"[59] presented by Iran's policy with respect to involuntary returnees, and the appellant's longstanding position of not cooperating in his removal to Iran given his genuine fear, and the Commonwealth's inability to prove that there was a real prospect of a change in his position in the reasonably foreseeable future, meant that the constitutional limitation had well and truly been reached in the circumstances of this case.

67. The appellant should not remain in detention based only on the Commonwealth's hope, "triumphing over present experience, that at some future time" the present circumstances will change.[60] It is also important to remember that this result "is not
10 to be equated with a grant of a right to remain in Australia".[61]

Part VII: ORDERS SOUGHT

68. The appellant seeks the orders set out in his Notice of Appeal.

Part VIII: ORAL ADDRESS

69. It is estimated that 2 hours will be required for the presentation of the appellant's oral argument.

Dated: 8 March 2024

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[59] *Sami v Minister for Home Affairs* [2022] FCA 1513, [50] and [134].
[60] *Al-Kateb v Godwin* (2004) 219 CLR 562, 609 [125] (Gummow J, dissenting).
[61] *NZYQ*, 1020 [72].

IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN: **ASF17**
Appellant

and

COMMONWEALTH OF AUSTRALIA
10 Respondent

ANNEXURE TO THE SUBMISSIONS OF THE APPELLANT

Pursuant to Practice Direction No.1 of 2019, the appellant sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
Constitutional provisions			
1.	*Commonwealth Constitution*	Current	Ch III
Statutory provisions			
2.	*Migration Act 1958* (Cth)	Compilation No. 158 (8 December 2023 to present)	ss 189, 196, 198 and 195A
3.	*Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* (Cth).	Current	

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