HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN:

ASF17
Appellant

and

COMMONWEALTH OF AUSTRALIA
Respondent

OUTLINE OF ORAL SUBMISSIONS OF AZC20
SEEKING LEAVE TO INTERVENE OR BE HEARD AS *AMICUS CURIAE*

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PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Application for leave to intervene or be heard as amicus curiae

1 If, because of the reasoning or outcome in this proceeding, Kennett J was wrong to find that there was no real prospect of AZC20's removal from Australia becoming practicable in the reasonably foreseeable future, the visa held by AZC20 would:

1.1. be invalid because a precondition to the grant of the visa was not satisfied, namely the circumstance in reg 2.20(18) did not exist; or

10 1.2. alternatively, be liable to ceasing under cl 070.511(c)(i) on the Minister's satisfaction that AZC20's removal from Australia is reasonably practicable;

and, in either event, AZC20 would be liable to immediate detention under s 189.

- *AZC20 v Secretary, Department of Home Affairs (No 2)* [2023] FCA 1497 at [7], [55], [66] (Kennett J) (**JBA v 5, Tab 16**);
- *Migration Regulations 1994* (Cth), regs 2.20(18), 2.25AA; Sch 2, cl 070.511(c)(i).

2 In that way, AZC20's visa — and therefore his liberty — is premised on the correctness of the judgment in his favour. The Commonwealth contests at least parts of that judgment: **RS [35]**. That provides a possible explanation for the Commonwealth's refusal to give an assurance to AZC20 that, absent any material change in facts, he would not be re-detained

20 on the basis of any reasoning in ASF17's case: **IS [10]**; **Verma Affidavit [13]-[15]**.

3 Accordingly, the reasoning and outcome in this proceeding is likely to affect AZC20's right to liberty, such that a "precondition" for leave to intervene is satisfied: **IS [8]**; cf **RS [57]**. He is not in the same position as "many other non-citizens" (whoever they may be): cf **RS [58]**.

- *Levy v Victoria* (1997) 189 CLR 579 at 601 (Brennan CJ) (**JBA v 3, Tab 11**).

4 The discretionary factors — which are similar in respect of intervention or being heard as *amicus curiae* — point in favour of AZC20 being granted leave: **IS [12]-[13]**. In particular, AZC20 seeks to make different and fuller submissions on how "non-cooperation" may be treated as a question of fact and inference-drawing (**IS [21]-[52]**);

30 and how that issue is dealt with in other comparable jurisdictions (**IS [39]**).

- *Levy* (1997) 189 CLR 579 at 602, 604 (Brennan CJ);
- *Garlett v Western Australia* (2022) 96 ALJR 888.

Submissions proposed to be advanced orally if leave is granted

5 Labels such as "non-cooperative" are unhelpful and potentially misleading: **IS [19]-[20], [33]-[35]**. There is no "duty to cooperate" placed upon individuals. And the notion of "non-cooperation" covers a wide spectrum of conduct. The Commonwealth nonetheless attempts to construct a new legal (constitutional) *rule* upon that amorphous notion: **RS [2], [25], [29]**. The overseas cases illustrate the dangers of attempting to draw bright lines in this area: **IS [39]**.

- *R (Lumba) v SSHD* [2012] 1 AC 245 at [127]-[128] (Lord Dyson);
- Anstis and Joeck, "Detaining the Uncooperative Migrant" (2020) 33 *Journal of Law and Social Policy* 38 at 39, 60-61 (**JBA Vol 7, Tab 31**).

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6 Such a rule would cut-across the holding in *NZYQ*. Whether there is no real prospect of a person's removal from Australia becoming practicable in the reasonably foreseeable future is a factual question: **IS [23]-[26]**. *Plaintiff M47* is to the same effect: cf **RS [31], [33]**. If that factual circumstance exists, it cannot be said that the purpose of the detention, objectively determined, is removal: cf **RS [24]**. In other words, if that factual circumstance exists, the constitutional limit identified in *NZYQ* has been transgressed.

- *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at [38]-[41], [44], [46], [54], [55], [62], [70] (**JBA Vol 5, Tab 22**).
- *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285 at [11], [13], [42] (Kiefel CJ, Keane, Nettle and Edelman JJ), [46], [49] (Bell, Gageler and Gordon JJ) (**JBA Vol 5, Tab 13**).

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7 Accordingly, in a proceeding for *habeas corpus* where a person alleges that their detention has transgressed the *NZYQ* limit, the factual question must be answered to determine that allegation. Issues of "non-cooperation" (carefully analysed on the facts) may be relevant to answering the factual question. In particular, such issues may be relevant to whether adverse inferences may be drawn against a plaintiff. The drawing of such inferences may prevent a plaintiff from discharging their initial evidential burden.

8 That approach is sensitive to the "real world" context in which the factual question must be answered, and the underlying constitutional justification for the *NZYQ* limit: **IS [30]-[33], [45], [48], [52]**; cf **RS [26]**. And it guards against a detained person turning any frustration to their "advantage": **IS [42]**.

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- *Plaintiff M47* (2019) 265 CLR 285 at [34] (Kiefel CJ, Keane, Nettle and Edelman JJ).

Dated: 17 April 2024

Craig Lenehan **Thomas Wood** **Julian R Murphy**