HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN: **ASF17**
Appellant

and

COMMONWEALTH OF AUSTRALIA
Respondent

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

PART I: CERTIFICATION

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

PART II: BASIS OF INTERVENTION / LEAVE TO BE HEARD

2 A person known in proceedings as AZC20 seeks leave to intervene, alternatively to be heard as *amicus curiae*, in support of the Appellant on Grounds 1, 2 and 3(b) of the Notice of Appeal. He does so on the basis that he has an indirect but substantial legal interest in the outcome of the proceeding — namely, his ongoing liberty.

PART III: REASONS FOR LEAVE TO INTERVENE / BE HEARD AS *AMICUS*

3 AZC20 — a "human being" who has not been "convicted of any crime"[1] — was subjected to "an extraordinarily long deprivation of [his] liberty by way of executive detention".[2] His detention commenced when he was taken into immigration detention upon his arrival in Australia in July 2013. It concluded only when the Federal Court (Kennett J) issued a writ of *habeas corpus* requiring the Secretary of the Department of Home Affairs and the Minister for Immigration, Citizenship and Multicultural Affairs (together, **the Commonwealth**) to release him forthwith.[3]

4 That writ was issued on 30 November 2023, two days after the publication of reasons in ***NZYQ*** *v Minister for Immigration, Citizenship and Multicultural Affairs*.[4] It was issued over the objection of the Commonwealth, who argued that AZC20's case involved "deliberate frustration of removal efforts" of the kind referred to in ***Plaintiff M47/2019*** *v Minister for Immigration and Border Protection.*[5] The Commonwealth submitted that, accordingly, the Court should not "conclude that there is no real prospect that AZC20's removal to Iran will not become practicable in the reasonably foreseeable future".[6]

5 Kennett J correctly distinguished *Plaintiff M47*. His Honour did so having made the following factual findings (among others):[7]

1 ***AZC20*** *v Secretary, Department of Home Affairs (No 2)* [2023] FCA 1497 at [2] (Kennett J).
2 *AZC20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 674 at [1] (Kiefel CJ, Gordon and Steward JJ), quoting *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AZC20* (2022) 290 FCR 149 at [2] (Jagot, Mortimer and Abraham JJ).
3 *AZC20* [2023] FCA 1497 (order 1).
4 (2023) 97 ALJR 1005.
5 (2019) 265 CLR 285.
6 See Respondents' Submissions on *NZYQ* (filed 29 November 2023) at [4]: Affidavit of Sanmati Verma affirmed 21 March 2024 (**Verma Affidavit**), Exhibit SV-1.
7 *AZC20* [2023] FCA 1497 at [65(b)], [65(c)], [65(d)].

5.1 while AZC20 is "adamant that he will not return to Iran, he does not seek to prevent his removal from Australia to some other place. Rather, he has persistently sought that result";

5.2 AZC20's "opposition to being removed to Iran has its basis in a strong belief that he would suffer persecution if he were to return there";

5.3 AZC20 "has had mental health problems over a lengthy period, as a result of which [his Honour was] not persuaded that it is realistically within his power to change his approach to one of cooperation with removal to Iran".

6 In addition, as a matter of legal principle, Kennett J concluded that *Plaintiff M47* stands only for the proposition that an "alien who has no legal right to remain in Australia is not to be permitted to engineer their own release into the community by frustrating the efforts of officers to carry out their duty under s 198 of the Act", such that the relevant factual inquiry is directed only to whether "an unlawful non-citizen embarks on a deliberate strategy of preventing their removal from Australia".[8]

7 Six weeks later, in the judgment under appeal in the present proceedings (**J**), Colvin J concluded that Kennett J's reasoning on the legal principle to be extracted from *Plaintiff M47* was plainly wrong: **J[41], [53]**. His Honour held that the "subjective reasons" for a detainee's unwillingness to be removed to a particular country — for example, a genuine belief that they would be persecuted — are irrelevant to the constitutional limit identified in *NZYQ*: **J[53]-[54], [64]**. The only circumstance that Colvin J would have considered relevant to the constitutional limit was a detainee who "lacks the capacity to cooperate": **J[53]**.

8 In contrast, Kennett J's reasoning relied in part on AZC20's subjective reason for his unwillingness to return to Iran.[9] Accordingly, if Colvin J's conclusion on this issue is upheld by this Court, the Commonwealth may conclude that there is a real prospect of AZC20's removal becoming practicable in the reasonably foreseeable future and, as a consequence, that AZC20 is ineligible for his present visa (a Bridging Visa R) and must be re-detained. That demonstrates that the outcome of this proceeding will have (or is

8 *AZC20* [2023] FCA 1497 at [64], [65(a)].
9 *AZC20* [2023] FCA 1497 at [65(c)]; paragraph 5.2 above.

"likely"[10] to have) an indirect, but substantial, effect on AZC20's legal interests. That is sufficient to satisfy a "precondition" for leave to intervene.[11]

9 The Court then being reposed with a discretion as to whether to grant leave to intervene, should do so for four reasons.

10 *First*, the Court should take into account the conduct of the Commonwealth in presenting this issue to the Court.

10.1 On 24 January 2024, the Federal Court accepted for filing the Appellant's notice of appeal against Colvin J's judgment. The grounds of appeal set out in that notice are now to be determined by this Court.

10 10.2 On 25 January 2024, the Federal Court accepted for filing the Commonwealth's notice of appeal against Kennett J's judgment.[12] The first ground of appeal challenged the correctness of Kennett J's reasoning on the legal principle identified at paragraph 6 above. The second ground of appeal challenged the relevance of Kennett J's findings identified at paragraph 5 above. The third ground of appeal challenged the correctness of the finding at paragraph 5.3 above.

10.3 On that same day, the Federal Court wrote to the parties stating that the Court was "considering listing together, as early as practicable" the appeals from the decisions of Kennett J and Colvin J. The Court requested the availability of counsel for a hearing between 19 February 2024 to 8 March 2024.[13]

20 10.4 Thus, as at 25 January 2024, a Full Court of the Federal Court was proposing to resolve — on an expedited basis — any difference between the reasoning of Kennett J and Colvin J.

10.5 However, just one week later, on 2 February 2024, and without any prior notice to AZC20 or his legal representatives, the Federal Court accepted for filing a notice of discontinuance in relation to the Commonwealth's appeal against Kennett J's judgment.[14] That had the effect of an order of the Court dismissing

10 ***Levy*** *v Victoria* (1997) 189 CLR 579 at 602 (Brennan CJ).
11 *Levy* (1997) 189 CLR 579 at 602 (Brennan CJ). See also ***Roadshow Films*** *Pty Ltd v iiNet Ltd [No 1]* (2011) 248 CLR 37 at [2]-[3] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514 at [55] (Kiefel CJ, Gageler, Nettle and Gordon JJ).
12 Verma Affidavit, Exhibit SV-3.
13 Verma Affidavit, Exhibit SV-4.
14 Verma Affidavit, Exhibit SV-5.

the Commonwealth's appeal.[15] The Commonwealth did not provide any explanation for that abandonment.

10.6 On 15 February 2024, the Commonwealth applied for removal of the Appellant's appeal to this Court, which was granted on 23 February 2024.

10.7 On the same day, AZC20 wrote to the Commonwealth seeking assurance that AZC20 would not be re-detained on the basis of any reasoning in the Appellant's proceeding.[16] No substantive response was provided to that request.[17] As such, it appears that there remains a live controversy as between the Commonwealth and AZC20 as to some or all of the matters which were the subject of the Commonwealth's discontinued appeal.[18]

11 Instead of discontinuing the appeal against Kennett J's judgment, the Commonwealth could have sought to have the appeal removed into this Court, together with the Appellant's case. That would have enabled this Court to resolve the difference in reasoning between Kennett J and Colvin J with the benefit of having AZC20's case before it and submissions from AZC20 seeking to defend Kennett J's judgment. For no disclosed reason, the Commonwealth chose a different path, being one which nevertheless stands to have a substantial effect on AZC20's legal interests. The position can and should be rectified by permitting AZC20 to intervene in this proceeding.

12 *Second*, and relatedly, leave to be heard should be granted because AZC20 can provide the Court with "the benefit of a larger view of the matter before it than the parties are able or willing to offer".[19] In particular, in developing any legal principle, the Court will have the benefit of the perspective of an interested third-party whose factual circumstances bear both similarities to, and differences from, those of the Appellant.[20]

13 *Third*, AZC20's proposed submissions address matters not addressed in the submissions of the Appellant and, in some respects, depart from those submissions.[21] AZC20's primary and only argument broadly reflects, but substantially develops, the alternative

15 *Federal Court Rules 2011* (Cth), r 36.73(2).
16 Verma Affidavit, Exhibit SV-6.
17 See Verma Affidavit at [14]-[15].
18 See, by way of analogy, *Edwards v Santos Limited* (2011) 242 CLR 421 at [37] (Heydon J).
19 *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 312 (French CJ).
20 For an analogous and recent example, see *Garlett v Western Australia* (2022) 96 ALJR 888 at [92] (Kiefel CJ, Keane and Steward JJ), regarding Mr Ryan.
21 *Levy* (1997) 189 CLR 579 at 603 (Brennan CJ). See also *Roadshow Films* (2011) 248 CLR 37 at [6] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

argument of the Appellant that is set out, in relatively brief terms, at **AS [54]-[58]**. It does so by reference to matters otherwise not addressed, including the position in comparative jurisdictions, analogous principles in the domestic context, and matters of customary international law.

14 *Fourth*, a grant of leave would not add materially to the parties' preparation for the hearing or the length of the oral hearing itself.[22]

15 In the alternative, AZC20 would seek leave to be heard as *amicus curiae* for the above reasons and in particular because he "will make submissions which the Court should have to assist it to reach a correct determination", including submissions on issues "not fully argued" or not "fully covered" in the Appellant's submissions.[23]

PART IV: PROPOSED SUBMISSIONS

A THE ISSUE

16 *NZYQ* establishes that there is a constitutional limit on detention under ss 189 and 196 of the *Migration Act 1958* (Cth), which will be transgressed where there is "no real prospect" of the removal of a person from Australia "becoming practicable in the reasonably foreseeable future".[24]

17 *NZYQ* also establishes that whether that situation exists is a factual question.

17.1 Where the factual question falls to be determined in a trial on evidence, or where it is necessary to draw inferences from agreed facts, the detained person bears an "initial evidential burden" of establishing that there is a "reason to suppose" that his or her detention is unlawful because it transgresses the constitutional limit.[25]

17.2 If the initial evidential burden is discharged by the detained person, the detainer bears the legal burden of proving that the detention does not transgress the constitutional limit.[26] To discharge that burden, the detainer must prove that there exists a "real prospect" of the detained person's "removal from Australia

22 *Roadshow Films* (2011) 248 CLR 37 at [4] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).
23 *Roadshow Films* (2011) 248 CLR 37 at [6], [7(3)] and [7(5)] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).
24 (2023) 97 ALJR 1005 at [55] (the Court).
25 *NZYQ* (2023) 97 ALJR 1005 at [59] (the Court). See also *Plaintiff M47* (2019) 265 CLR 285 at [39] (Kiefel CJ, Keane, Nettle and Edelman JJ); ***McHugh*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 283 FCR 602 at [60] (Allsop CJ), [92] (Besanko J), [273] (Mortimer J); *Sami v Minister for Home Affairs* [2022] FCA 1513 at [36]-[37] (Mortimer J).
26 *NZYQ* (2023) 97 ALJR 1005 at [59] (the Court).

becoming practicable in the reasonably foreseeable future".[27] That burden is at the upper end of the civil standard because a person's liberty is in issue.[28]

18 The central issue for resolution in this proceeding is how the factual question may be resolved where the circumstances *include* the following: (1) the person has not consented to being removed to the country of which they are a citizen; and (2) in the absence of that consent, the country will not permit the person to enter and remain in the country.

19 Those circumstances exist in relation to both the Appellant and AZC20, among others.[29] A person in such a position is often pejoratively labelled by the Commonwealth as "involuntary" or "uncooperative". However, those labels do not have any statutory basis and do not form part of the statement of principle or the test for validity in *NZYQ*. As such, their use must not be permitted to obscure the nuance that exists in the underlying facts of each case.[30] The nature of the "involuntariness" or "non-cooperation" lies across a spectrum and may include mere passivity (in the sense of a refusal to make positive inquires at the recommendation of the Department), withholding information, refusal to meet with the staff of a particular country's embassy, and, at the furthest extreme, "deliberate obfuscation and falsehood".[31]

20 Moreover, the labels must not be permitted to obscure the legal reality that a person who is detained for the purposes of facilitating their removal from Australia is not under any duty to "cooperate" with that process: **AS [53]**.[32] The only duty imposed by s 198 of the *Migration Act* is upon officers of the Commonwealth and it is only they who can be required by court order to act in a certain way.[33]

27 *NZYQ* (2023) 97 ALJR 1005 at [60] (the Court); see also *McHugh* (2020) 283 FCR 602 at [61] (Allsop CJ)

28 See paragraphs 28 to 29 below.

29 Two others are "David" and "Adam": *David v Secretary of Department of Home Affairs* [2024] FedCFamC2G 178; *Adam v Secretary of Department of Home Affairs* [2024] FedCFamC2G 179. In both of those cases, the Commonwealth admitted, as a matter of fact, there was no real prospect of the removal of the relevant person in the reasonably foreseeable future. As the Court observed at [42] in each case, that admission appeared to "offer a complete answer to the case" against the Commonwealth. That observation is evidently correct, notwithstanding the attempt of the Commonwealth to "caveat" the admission by reference to matters of "non-cooperation".

30 In Canada, it has been observed "[w]hat precisely constitutes 'uncooperative' behaviour by a migrant facing immigration detention in Canada remains undefined and falls along a flexible and shifting spectrum in the jurisprudence … and in practice": Anstis and Joeck, "Detaining the Uncooperative Migrant" (2020) 33 *Journal of Law and Social Policy* 38 at 39, see also 60-61.

31 *Plaintiff M47* (2019) 265 CLR 285 at [30], [34]–[35] (Kiefel CJ, Keane, Nettle and Edelman JJ), [47] (Bell, Gageler and Gordon JJ).

32 *AZC20* [2023] FCA 1497 at [64] (Kennett J).

33 *Commonwealth v AJL20* (2021) 273 CLR 43 at [52] (Kiefel CJ, Gageler, Keane and Steward JJ).

21 Finally, although the circumstances identified in paragraph 18 above are common to the Appellant and AZC20, in any given case, the resolution of the factual question will ultimately need to take into account *all* of the circumstances of the detained person: see also **AS [54], [58]**; cf **AS [49]**. And, over time, as the factual question is resolved in a greater number of cases , "[r]ules and principles" will emerge to "guide or direct courts" in answering that question in future cases.[34] That reflects the fact that the concepts embedded in the factual question do not necessarily have "the clarity of clear, rigid rules". However, that "elasticity" is a strength, not a weakness,[35] particularly given it is impossible to foresee the myriad of complex circumstances in which the factual question might fall to be resolved. Of course, as Kennett J observed in *AZC20*,[36] that process of development takes place in the context of the constitutional principle identified in *NZYQ*.[37]

22 The submissions below explain why the correct focus of the inquiry in this context is a factual one (**Part B**), before exploring how the circumstances identified in paragraph 18 above intersect with that inquiry (**Part C**).

B THE FACTUAL QUESTION

B.1 The constitutional limitation

23 As noted, the question of whether the constitutional limit is transgressed in a particular case is a factual one. That is made abundantly clear by the content and structure of the Court's reasons in *NZYQ*. After identifying the constitutional limitation under the heading "Expressing the constitutional limitation" ([55]-[58]), the Court then considered the factual circumstances of the plaintiff under the heading "Applying the constitutional limitation" ([59]-[70]).

24 Consistent with that structure, the Court made the "necessary conclusion of fact" that "by the end of the hearing there was, and had been since 30 May 2023, no real prospect of the removal of the plaintiff from Australia becoming practicable in the reasonably foreseeable future".[38] That conclusion of fact meant that "ss 189(1) and 196(1) of

34 *Thomas v Mowbray* (2007) 233 CLR 307 at [91] (Gummow and Crenann JJ), quoting Zines, *The High Court and the Constitution* (4th ed, 1997) at 195. See also ***Vella*** *v Commissioner of Police (NSW)* (2019) 269 CLR 219 at [86] (Bell, Keane, Nettle and Edelman JJ); *AZC20* [2023] FCA 1497 at [27] (Kennett J).

35 *Vella* (2019) 269 CLR 219 at [87] (Bell, Keane, Nettle and Edelman JJ), quoting *In re Spectrum Plus Ltd (in liq)* [2005] 2 AC 680 at [41] (Lord Nicholls).

36 [2023] FCA 1497 at [29].

37 Compare the aspects of Colvin J's discussed at paragraph 25 below.

38 *NZYQ* (2023) 97 ALJR 1005 at [70] (the Court) (emphasis added).

the *Migration Act* did not validly apply to authorise the continuation of the plaintiff's detention then and had not validly applied to authorise the plaintiff's detention since 30 May 2023".[39]

25 Departing from that approach, some aspects of Colvin J's reasoning appear to suggest that, in examining the factual circumstances of a person, a court might undertake some free-standing inquiry into the "purpose" of the detention having regard to a person's "cooperation": see, eg, **J[52], [61]**. If that is what his Honour meant, he misunderstood the manner in which the Court in *NZYQ* explained the nature of the test and its application.[40] So too did the Commonwealth, in so far as it submitted that the answer to the Appellant's claim was a "legal one": see **J[8]** (a submission his Honour seemingly accepted — **J[60]**, **[65]**).

26 The only question to be determined by a court, in any given case, is a factual one. If the relevant fact is found — namely, that there is no real prospect of the person being removed from Australia in the reasonably foreseeable future — the necessary consequence is that the detention does not have as its purpose the removal of the person from Australia.[41] Accordingly, absent any other permissible purpose implemented by the Act, the detention of the person is not authorised by ss 189 and 196 of the Act. That is the end of the analysis.

B.2 The fact-finding exercise

27 Importantly for present purposes, in reaching the "necessary conclusion of fact", the Court in *NZYQ* made the following observations about the nature of the fact-finding exercise.

28 *First*, the nature of the "fact in issue" — whether there exists a "real prospect of the removal of the plaintiff from Australia becoming practicable in the reasonably foreseeable future" — is "prospective and probabilistic".[42]

29 *Second*, because of its nature, the fact is not to be determined on the "balance of probabilities": cf **AS [55]**.[43] Nonetheless, in determining the existence of the fact (or not),

39 *NZYQ* (2023) 97 ALJR 1005 at [70] (the Court) (emphasis added).
40 His Honour's reasoning also appears to be in tension with *Commonwealth v AJL20* (2021) 273 CLR 43 at [45], [71] (Kiefel CJ, Gageler, Keane and Steward JJ).
41 See especially *NZYQ* (2023) 97 ALJR 1005 at [46] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).
42 *NZYQ* (2023) 97 ALJR 1005 at [60] (the Court).
43 *NZYQ* (2023) 97 ALJR 1005 at [60] (the Court), citing *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 282-283 (Brennan CJ, Toohey, McHugh and Gummow JJ).

it must also be borne in mind that the existence of the fact (or not) will directly affect the liberty of the person.[44]

30 *Third*:[45]

> 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".[46] The real world context also entails that proof of a real prospect must involve more than demonstration of a mere un-foreclosed possibility.

31 The circumstances of the Appellant and AZC20 provide further illustrations of the "real world context": see also **AS [57]**; cf **J[49]-[51]**. As flagged at paragraphs 18 to 21 above, that context will generally require attention to many elements, of which these are the two most relevant for present purposes: (1) neither person has consented to being removed to Iran; and (2) in the absence of that consent, Iran will not permit the person to enter and remain in the country.

32 Before exploring the significance of those two elements to the factual question, it must be noted that this was *not* the "real world context" that confronted the Court in *Plaintiff M47*. Neither element was present in that case. Rather, the position there was that: (1) the identity and nationality of the plaintiff was unknown; and (2) the plaintiff was "contribut[ing] to the frustration of the pursuit of lines of inquiry" by the Department to resolve that outstanding issue.[47] That is a position that has arisen in other jurisdictions where the duration of immigration detention is similarly constrained by a statutory or constitutional limit similar to that stated in *NZYQ*.[48]

33 The point for present purposes is the "uncooperative" label applied by the Commonwealth to *Plaintiff M47* is not apt for either the Appellant or AZC20: see also **AS [50]**. As noted at paragraph 19 above, the use of labels such as "uncooperative" and "involuntary" risks masking the complexity of the real world and, as a consequence, distorting the fact-

44 *NZYQ* (2023) 97 ALJR 1005 at [60] (the Court); *McHugh* (2020) 283 FCR 602 at [2], [57], [60] (Allsop CJ), [90] (Besanko J), [294] (Mortimer J)

45 *NZYQ* (2023) 97 ALJR 1005 at [60] (the Court).

46 *WAIS v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1625 at [59] (French J).

47 See *NZYQ* (2023) 97 ALJR 1005 at [62] (the Court).

48 See, eg, in the United States, *Pelich v INS*, 329 F 3d 1057 (9th Cir, 2003) (where petitioner was inconsistent as to whether he was a Polish national or a German national; would not complete documentation which directly impeded Poland's ability to determine whether he qualified for Polish travel documents; and gave "conflicting information regarding his name, his parents' names, his parents' birthplaces and residences, his birthplace and his nationality": at 1058-1059); *Lema v INS,* 341 F 3d 853 (9th Cir, 2003) (where the Ethiopian government held "confusion" over the petitioner's nationality and the petitioner did not cooperate with the US government to "dispel" that confusion: at 857).

finding exercise. A more granular analysis of the "factual reality" is required.[49] Further, the difference in circumstances highlights that, contrary to significant portions of Colvin J's reasons (see **J[26]-[28], [54], [60]**), there is little utility in seeking to draw generalised conclusions from cases that, in truth, address very different circumstances.

34 The only generalisation that can safely be made is that refusing to provide information about one's identity or citizenship is likely to provide a more significant obstacle to removal (the factual findings concerning *Plaintiff M47*) than withholding consent to be removed to a particular country (the factual findings concerning the Appellant and AZC20). That is because an inquiry into a person's identity and citizenship is necessarily an inquiry that must be undertaken before any approach can be made to a country of which the person is a citizen.[50]

35 Moreover, as a matter of logic, an inquiry into a person's identity and citizenship is an inquiry that must be undertaken before any approach can be made to *any* country. That is significant, bearing in mind that the various duties to remove under s 198 are not duties to remove to a specific country, but to remove from Australia.[51] Thus, when a person adopts a posture of non-cooperation and deploys falsehoods to defeat an inquiry into their identity and citizenship, that effectively forecloses the possibility of their removal to any country. The same is not true of the position taken by the Appellant and AZC20.

36 Finally, at least in the case of AZC20, he has shown a genuine willingness to be removed to any country other than Iran (both by requesting removal and seeking mandamus to compel that result in two different matters).[52] The Commonwealth could elect, as it did in *NZYQ*,[53] to explore removing AZC20 to various other countries. Yet, since July 2021, "all efforts (such as they have been) have focused on Iran".[54]

49 *NZYQ* (2023) 97 ALJR 1005 at [57] (the Court).

50 Assuming that they have a nationality at all. That is not necessarily the case, as *NZYQ* illustrates: see [1] ("stateless"), [5] ("he does not have any right of entry to or residence in Myanmar"); see also *David v Secretary of Department of Home Affairs* [2024] FedCFamC2G 178 at [109]-[125].

51 ***Plaintiff M76**/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at [119] (Hayne J).

52 *AZC20* [2023] FCA 1497 at [65(b)] (Kennett J) and *AZC20 v Minister for Home Affairs* [2021] FCA 1234 (Rangiah J). As to the Appellant, see **AS [64]**; cf **J[126(6)]**.

53 (2023) 97 ALJR 1005 at [65] (the Court).

54 *AZC20* [2023] FCA 1497 at [49] (Kennett J). See further paragraphs 49 to 52 below.

C THE ELEMENTS RELEVANT TO THE FACT-FINDING EXERCISE HERE

C.1 First element: No consent

37 Where a person's removal to a country of which they are a citizen is practically contingent on their consent to being removed to that country, the question of whether or not that person will consent is relevant to the prospect of them being removed.

38 If the person consents, and there are no other obstacles to removal, then it may readily be concluded that there is a real prospect of their removal to the particular country becoming practicable in the reasonably foreseeable future. On the other hand, if the person does not consent, it will be relevant to determine *why* the person has refused consent. In particular, it will be relevant to inquire as to whether the person has a "good reason" for not consenting to their removal to the particular country.[55]

39 The wisdom of that approach is illustrated by the experience in other jurisdictions where the duration of immigration detention is similarly constrained (albeit under different standards and legislative provisions).[56] Nonetheless, various authorities recognise the dangers of expounding any blanket rule against a detained person who the executive determines to be "uncooperative". By way of illustration, of the position in the United Kingdom,[57] Lord Dyson has observed:[58]

> the fact that the detained person has refused voluntary return should not be regarded as a "trump card" which enables the Secretary of State to continue to detain until deportation can be effected, whenever that may be. That is because otherwise … "the refusal of an offer of voluntary repatriation would justify as reasonable any period of detention, no matter how long, provided that the Secretary of State was doing his best to effect the deportation." If the refusal of voluntary return has any relevance in such cases … it must be limited.

[55] *Plaintiff M47* (2019) 265 CLR 285 at [30] (Kiefel CJ, Keane, Nettle and Edelman JJ). See also *David v Secretary of Department of Home Affairs* [2024] FedCFamC2G 178 at [7], [74] and Anstis and Joeck, "Detaining the Uncooperative Migrant" (2020) 33 *Journal of Law and Social Policy* 38 at 60-61.

[56] See *R (on the application of Nouazli) v Secretary of State for the Home Department* [2016] UKSC 16 at [64]-[67] (Lord Clarke, with whom Lord Neuberger, Lady Hale, Lord Carnwath and Lord Toulson agreed), discussing *R v Governor of Durham Prison, Ex p Hardial Singh* [1984] 1 WLR 704 (United Kingdom); ***Brown*** *v Canada* [2021] 1 FCR 53 at [89]-[102] (Rennie JA) (Canada); *Chief Executive of the Department of Labour v* ***Yadegary*** [2009] 2 NZLR 495 (New Zealand); *Zadvydas v Davis* (2001) 533 US 678 (US).

[57] In Canada, see *Brown* [2021] 1 FCR 53 at [99] (Rennie JA): ("Detention cannot be ordered on the basis of non-cooperation alone"). In New Zealand, see *Yadegary* [2009] 2 NZLR 495 at [100] (Baragwanath J), [164], [194], [200] (O'Regan J), [254], [257] (William Young P). In Hong Kong, see *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97 at 114-115 (Privy Council).

[58] *R (**Lumba**) v Secretary of State for the Home Department* [2012] 1 AC 245 at [128], see further [122]-[127]; *R (ex parte A) v Secretary of State for the Home Department* [2007] EWCA Civ 804 at [79] (Keene LJ), see also [54] (Toulson LJ); *R (I) v Home Secretary* [2003] INLR 196 at [51]-[52] (Dyson LJ);

40 The absence of a "good reason" for the person's refusal may support an inference that the person is refusing to consent in an attempt "to procure release in Australia"[59] or "to engineer their own release into the community by frustrating the efforts of officers to carry out their duty under s 198 of the Act".[60] In other words, it may be inferred that the "posture"[61] adopted by the person in refusing consent is opportunistic. In those circumstances, the Court may draw the further inference that there is a prospect that the person will abandon that posture if the possibility of their release into the community has dissipated: cf **AS [46]**. That is how the factual question comes to be answered against the interests of that person in such a case. It is the principled answer to the issue Kennett J raised about the basis for the approach in *Plaintiff M47* and whether it had a normative aspect.[62]

41 Conversely, where a person has a "good reason" — such that it cannot be inferred that they are acting opportunistically — the Court can be satisfied that the person's position as to consent will not change in the reasonably foreseeable future. Accordingly, absent any other avenues, the Court in those circumstances may conclude that there is reason to suppose that there is no real prospect that the person's removal to that country will become practicable in the reasonably foreseeable future.

42 As a matter of onus, that approach is sound, because it is (at least prima facie) within the control of the detained person to cease any "frustrating" conduct and the explanation for such conduct will be within their knowledge. Accordingly, evidence bearing on those features of the factual context will be within their power to produce.[63] Moreover, the approach guards against a detained person turning any frustration to his or her "advantage".[64] That approach is consistent with the approach taken in analogous contexts.

59 See *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCATrans 154 (8 November 2023) at line 7978 (Solicitor-General).
60 *AZC20* [2023] FCA 1497 at [64] (Kennett J).
61 *Plaintiff M47* (2019) 265 CLR 285 at [30] (Kiefel CJ, Keane, Nettle and Edelman JJ).
62 See *AZC20* [2023] FCA 1497 at [64].
63 See *Plaintiff M47* (2019) 265 CLR 285 at [40] (Kiefel CJ, Keane, Nettle and Edelman JJ).
64 See *Plaintiff M47* (2019) 265 CLR 285 at [34] (Kiefel CJ, Keane, Nettle and Edelman JJ). See also *AZC20* [2023] FCA 1497 at [64] (Kennett J).

42.1 Where a court is called upon to assess loss or damage suffered by a plaintiff, but the quantification of that loss or damage is made "difficult" because of the plaintiff's "wrong", a court may draw an inference in favour of the defendant.[65]

42.2 In a similar vein, "when a party lies, or destroys or conceals evidence, or attempts to destroy or conceal evidence, or suborns witnesses, or calls testimony known to be false, or fails to comply with court orders for the production of evidence (like subpoenas or orders to answer interrogatories), or misleads persons in authority about who the party is, or flees, the conduct can be variously described as an implied admission or circumstantial evidence permitting an adverse inference".[66]

10 42.3 In the criminal context, lies told by an accused are recognised to be capable of supporting an inference that the person engaged in the offences alleged by the prosecution. However, that inference will only be available where the lie is "deliberate" and is told by the accused "because he perceives that the truth is inconsistent with his innocence".[67]

43 Nonetheless, in the present context, and particularly given a person is not obliged to cooperate in their removal, care should be taken before drawing any inference against that person on the implicit basis that they are a "wrongdoer". That may, however, be the appropriate description for a person who engages in a calculated attempt to engineer their own release into the community with "deliberate obfuscation and falsehood".[68] No such
20 conduct was evident for either the Appellant or AZC20.

What constitutes a "good reason"?

44 The incapacity of a person to provide their consent will constitute a "good reason".[69] The Commonwealth appears to have accepted the relevance of that point to the resolution of the factual question: **J[10]**. That is AZC20's position. Kennett J's finding that AZC20

65 See *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388 at [74] (the Court), citing *Armory v Delamirie* (1722) 1 Stra 505 [93 ER 664]; *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* (1990) 24 NSWLR 499 at 508 (Hodgson J); *Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46 at 59 (Handley JA). See also *McCartney v Orica Investments Pty Ltd* [2011] NSWCA 337 at [149]-[154] (Giles JA); cf *Berry v CCL Secure Pty Ltd* (2020) 271 CLR 151 at [34]-[36] (Bell, Keane and Nettle JJ), [74] (Gageler and Edelman JJ).

66 *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 at [64] (Heydon, Crennan and Bell JJ). See also *Plaintiff M47* (2019) 265 CLR 285 at [35] (Kiefel CJ, Keane, Nettle and Edelman JJ).

67 *Edwards v The Queen* (1993) 178 CLR 193 at 209 (Deane, Dawson and Gaudron JJ).

68 *Plaintiff M47/2018* (2019) 265 CLR 285 at [30], [34]-[35] (Kiefel CJ, Keane, Nettle and Edelman JJ), [47] (Bell, Gageler and Gordon JJ).

69 *Plaintiff M47* (2019) 265 CLR 285 at [32] (Kiefel CJ, Keane, Nettle and Edelman JJ), [47] (Bell, Gageler and Gordon JJ),

"has had mental health problems over a lengthy period, as a result of which [his Honour was] not persuaded that it is realistically within his power to change his approach to one of cooperation with removal to Iran"[70] falls within the notion of "incapacity" in this context.[71]

45 There will be other "good reasons" for a person to refuse consent to be removed to the country of which they are a citizen: cf **J[56]**, **[60]**. It is not necessary, nor would it be appropriate, for the Court to attempt to draw the metes and bounds of the concept of "good reason" in this proceeding. It is an elastic but qualitatively clear concept. Consistent with paragraph 21 above, it is a concept that reflects the real world context and the content of which will be developed over time on a "case by case" basis.[72]

46 There is no reason in principle why a person's subjective fear about persecution if they were to be returned to the country of which they are a citizen may not constitute a "good reason" for refusing to consent to that removal. The *Migration Act* recognises,[73] as does Australia through its treaty obligations, that the subjective fear of persecution is what drives asylum seekers from their country of citizenship. The Act is built upon an understanding of the valid reasons why a person would not wish to expose themselves to particular harms.[74] In those circumstances, it would fit uncomfortably with the Act to suggest that a person's subjective fear of serious or significant harm is not a "good reason" for them to refuse to consent to their return to a country from which they have fled.

47 Contrary to the suggestion made by Colvin J at **J[61]**, the statutory relevance of those matters does not simply evaporate at the point any protection visa application is finally refused. That flies in the face of the terms of s 197C (which removes consideration of the most obvious destination for removal — the person's country of citizenship — from the duties imposed by s 198, by reference to "protection findings" made with respect to that country) and the provision made for the exercise of the Minister's non-compellable dispensing powers, which are an aspect of the legislative design for responding to those

70 *AZC20* [2023] FCA 1497 at [65(d)] (Kennett J) and *AZC20 v Minister for Home Affairs* [2021] FCA 1234 at [158]-[160] (Rangiah J)
71 Colvin J adopted that understanding of Kennett J's finding: **J[39]**.
72 See also *Prince Alfred College Inc v ADC* (2016) 258 CLR 134 at [127]-[131] (Gageler and Gordon JJ).
73 See, in particular, s 5J(1)(a), (4) and (5).
74 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at [27] (the Court).

treaty obligations.[75] As Kenny and Mortimer JJ observed in respect of those powers in *WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*, the term "as soon as reasonably practicable" in s 198 is to be understood as allowing for the duties in s 198 to remove a person to be performed in a way which accommodates those other aspects of the statutory scheme of the *Migration Act* and, indeed, other relevant exercises of executive power, such as inquiries about whether there is a third country which may be willing to accept a person removed from Australia.[76] The latter point is particularly relevant to the position of AZC20, for the reasons identified at paragraph 36 above.

48 At the very least, even if a person's subjective fear is not independently capable of providing a "good reason", it may provide additional "real world" context that assists in explaining why a person has refused to provide consent to be returned to a particular country. Thus, Kennett J considered it relevant that AZC20's "opposition to being removed to Iran has its basis in a strong belief that he would suffer persecution if he were to return there".[77] There was no error in his Honour doing so.[78]

C.2 Second element: Iran's non-compliance with international law

49 "Australia's power to remove non-citizens from its territory is confined by the practical necessity to find a state that will receive the person who is to be removed".[79] It is the "difficulties which attend that practical necessity" that have caused the long-term detention of Iranian nationals.[80]

50 An essential part of that difficulty stems from Iran's "policy of not issuing travel documents to people for the purpose of returning to that country if their return was not voluntary".[81] That policy is contrary to customary international law, under which

75 See, eg, *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at [27] and (referring to s195A) [40] (the Court) and *WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 285 FCR 463 at [121] (Kenny and Mortimer JJ).

76 (2021) 285 FCR 463 at [115] and see also [151].

77 *AZC20* [2023] FCA 1497 at [65(c)].

78 Cf Commonwealth's Notice of Appeal in *AZC20*, Ground 2.

79 ***Plaintiff M70****/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at [92] (Gummow, Hayne, Crennan and Bell JJ).

80 See *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at [146] (Gummow J).

81 *AZC20* [2023] FCA 1497 at [50].

Australia has a right to deport an Iranian national to Iran, and Iran owes a "correlative duty" to Australia to "receive the individual on deportation".[82]

51 Thus, ultimately, it is Iran's policy that presents the "roadblock" to the removal to Iran of persons such as the Appellant and AZC20: see also **AS [66]**.[83] The clearing of that roadblock is a matter for the Commonwealth to resolve through the tools available to it, "whether through escalating levels of diplomatic and political pressure, negotiated bilateral return agreements or placing visa or other entry requirements on nationals from the delinquent country".[84]

52 For that reason, in resolving the factual question, it will be relevant to assess whether the Commonwealth has sought to overcome the roadblock. There was no evidence about that issue adduced by the Commonwealth before Kennett J or Colvin J.[85] That, of course, is evidence within the power of the Commonwealth to have produced, yet it elected not to do so. That will be relevant to an assessment of whether the Commonwealth has discharged its legal burden. Attention to those further "real world" factual complexities illustrates why it is that labels like "uncooperative" and "involuntary" cannot be regarded as a trump card in the way contended for by the Commonwealth.

PART V: ESTIMATED TIME

53 In the event that the Court grants leave for AZC20 to appear at the hearing of the appeal, it is estimated that 20 minutes would be required for the presentation of his oral argument.

Dated: 21 March 2024

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82 *Nottebohm (Liechtenstein v Guatemala) Case*, (1955) ICJ Reports 4 at 47 (Judge Read), see also at 48. Judge Read dissented but his explanation of principle on this point is uncontroversial: see *Plaintiff M70* (2011) 244 CLR 144 at [92] (Gummow, Hayne, Crennan and Bell JJ); *Plaintiff M76* (2013) 251 CLR 322 at [119] (Hayne J).

83 *Brown* [2021] 1 FCR 53 at [101] (Rennie JA).

84 *Brown* [2021] 1 FCR 53 at [102] (Rennie JA).

85 Cf *Yadegary* [2009] 2 NZLR 495 at [10], where it appears there was evidence that New Zealand was negotiating with Iran to alter its policy of its policy of refusing entry to its citizens if they do not hold a passport, albeit there was a lack of any evidence of likelihood of any change in the foreseeable future.

IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN: **ASF17**
Appellant

and

COMMONWEALTH OF AUSTRALIA
Respondent

ANNEXURE TO SUBMISSIONS OF AZC20
(SEEKING LEAVE TO INTERVENE OR BE HEARD AS *AMICUS CURIAE*)

Pursuant to Practice Direction No. 1 of 2019, AZC20 sets out below a list of the statutes referred to in his submissions.

No.	Description	Version	Provisions
1.	*Migration Act 1958* (Cth)	Current (Compilation No 158)	ss 5J, 196, 197C, 198

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