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 THE RESPONDENT

PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

AZC20 should not be granted leave to intervene or be heard as amicus curiae

2. AZC20 presently resides in the community as the holder of a bridging visa. His legal rights are not substantially affected by this appeal, which has less significance for his rights than for the rights of many un-cooperative non-citizens presently in immigration detention. At most, this appeal will be a relevant (albeit, he will contend, distinguishable) precedent in future litigation that he may never commence. An interest of that kind does not satisfy the precondition for intervention. Nor is there any reason to allow him to appear as an *amicus*, as he has no special expertise, and the appellant is represented by experienced counsel: *Levy v Victoria* (1997) 189 CLR 579 at 603-604 **(Vol 3, Tab 11)**.

The central issue

3. This appeal directly raises a question which was not necessary to decide in *NZYQ* (2023) 97 ALJR 1005: whether Ch III of the *Constitution* prevents ss 189 and 196 of the *Migration Act 1958* (Cth) from validly authorising the detention of non-citizens who it would be practicable to remove from Australia if they cooperated with that removal, and who are capable of cooperating, but who refuse to provide that cooperation.

4. That question arises because the primary judge made an (unchallenged) factual finding that the only barrier to the appellant's removal is his non-cooperation in that removal: **CAB 11 [12], 14 [31], 42 [131]**; **ABFM 147.36-148.13**; cf AR [10]-[12].

5. *Lim* (1992) 176 CLR 1 held that the detention required by the predecessors to ss 189 and 196 was consistent with Ch III. *NZYQ* qualified that holding in only one narrow and specific respect, by establishing that those provisions do not validly apply to a non-citizen who is cooperating in their removal if, notwithstanding that cooperation, there is "no real prospect of removal becoming practicable in the reasonably foreseeable future": at [39], [55] **(Vol 5, Tab 22)**. That qualification is the result, in a particular factual context, of the "single question of characterisation (whether the power is properly characterised as punitive)" arising from *Lim*. That test does not displace the question of characterisation in other factual circumstances. As a result, the question arising on this appeal is not solely a factual question: *NZYQ* at [44]; cf AS [54], IS [17], [23]-[26].

6. If the only impediment to removal is that the non-citizen will not cooperate in that removal, detention pending that removal is not punitive. The contrary view would

"uncouple the limitation from its underlying constitutional justification", by going "beyond merely ensuring that the non-punitive purpose of detention remains a purpose capable of being achieved in fact": *NZYQ* at [58]. That conclusion is consistent with this Court's longstanding recognition that the power of non-citizens to bring their detention to an end by requesting removal prevents the characterisation of detention as punitive: *Lim* at 33-34, 72 **(Vol 3, Tab 8)**; *Re Woolley* (2004) 225 CLR 1 at [95], [97], [152]-[153], also [30] **(Vol 4, Tab 15)**.

7. The treatment of *Plaintiff M47* (2019) 265 CLR 285 **(Vol 4, Tab 13)** in *NZYQ* confirms that the constitutional limit arising from Ch III is not reached in the case of a non-citizen whose failure to cooperate has frustrated removal (either as a matter of characterisation, or because an un-cooperative non-citizen cannot discharge the evidential burden of establishing a reason to suppose that their detention has ceased to be lawful): *Plaintiff M47* at [15], [30]-[34], [39]-[43], [47]-[49]; *NZYQ* at [62] **(Vol 5, Tab 22)**; **CAB 13 [24]-[25]**.

8. In the case of non-citizens who refuse to cooperate with removal, the constitutional limit in *NZYQ* is reached only if the Court is satisfied that – even if cooperation was forthcoming – there would be no real prospect of removal becoming practicable in the reasonably foreseeable future: **CAB 23 [64]-[65]**.

9. There is a consistent body of Federal Court authority (concerning what was thought to be an analogous statutory limit on the power to detain) holding that detention remains lawful if removal would be possible with a non-citizen's cooperation: *WAIS* [2002] FCA 1625 at [59]-[61] **(Vol 5, Tab 27)**; *Al Masri* (2003) 126 FCR 54 at [136]-[137], [176] **(Vol 5, Tab 21)**; *SPKB* (2003) 133 FCR 532 at [5]-[7], [16]-[17] **(Vol 5, Tab 26)**. *AZC20* [2023] FCA 1497 at [63]-[65] **(Vol 5, Tab 16)**, in so far as it held that *Plaintiff M47* is confined to cases of a non-citizen embarking on a "deliberate strategy" of preventing their removal (at [65(a)]), wrongly introduces elements of subjective fault into Ch III reasoning.

Refusal to cooperate with removal due to a genuine subjective fear of harm does not engage the *NZYQ* limit

10. Parliament has chosen to create a detailed scheme that reflects a deliberate and careful choice about the way in which, and the extent to which, Australia's international *non-refoulement* obligations are given effect in domestic law: Act, ss 5H, 5J, 36, 197C **(Vol 1, Tab 4)**; *Plaintiff M1* (2022) 275 CLR 582 at [17]-[20], [32], [34] **(Vol 4, Tab 12)**.

11. Where a non-citizen has applied for a protection visa claiming to fear persecution on particular grounds, and that claim has been rejected, the fact that the non-citizen continues to hold a genuine subjective fear of harm is irrelevant to the obligation to remove the non-

citizen under s 198: *Ex parte E* (1998) 73 ALJR 123 at [16], [19] **(Vol 5, Tab 24)**; *WAIS* at [60] **(Vol 5, Tab 27)**; *DMH20* [2022] FCA 1054 at [75] **(Vol 5, Tab 17)**. A non-citizen can be in no better position if they have chosen not even to advance a particular claim in support of an application for a protection visa: Act ss 48B, 197C.

12. The primary judge accepted that the appellant's "present and recent sexual orientation is bisexual": **CAB 40 [126]**; **ABFM 120 [15]**. However, there was no evidence about how the appellant would act if he returned to Iran, or about why he would act in that way, those being matters relevant to an assessment of any *non-refoulment* obligations that may be enlivened on account of his bisexuality: *Appellant S395* (2003) 216 CLR 473 at [34]-[35], [84], [88] **(Vol 3, Tab 7)**.

13. By reason of s 197C(1) and (2), no protection finding having been made under the Act concerning the appellant's bisexuality, it is irrelevant to the duty under s 198 to remove him to Iran. The appellant has not asked the Minister to intercept that removal by making a decision under ss 48B or 195A. Chapter III does not, by implication, provide a parallel mechanism outside the Act by which the appellant can obtain a judicial decision on the merits of a protection claim that he chose not to advance under the Act, for the purpose of a court then releasing him into the Australian community because he had a "good reason" for refusing to cooperate with removal. In that regard, it may be noted that the primary judge did not accept the appellant's explanations as to why he did not previously claim to fear persecution on account of his bisexuality: **CAB 36 [109], [111]**.

The appellant's refusal to cooperate was not due to a genuine subjective fear of harm

14. The appellant's challenge to factual findings rejecting his claim that his non-cooperation with removal efforts was caused by a genuine subjective fear of harm requires him to overcome well-established principles of appellate restraint with respect to factual findings turning on the credibility of witnesses: e.g., **CAB 36 [109]-[111], 42 [130]**.

15. The appellant makes no attempt to show that the findings he challenges were "glaringly improbable", "contrary to compelling inferences", or shown to be wrong by "incontrovertible facts or uncontested testimony": *Lee v Lee* (2019) 266 CLR 129 at [55]. Instead, he refers to evidence that was either not admitted at all, or subject to limitations under s 136 of the *Evidence Act 1995* (Cth): **RBFM 29**; RS, Annexure B.

Dated: 17 April 2024

Stephen Donaghue Bora Kaplan Naomi Wootton