HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

NZYQ
Plaintiff

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

SUBMISSIONS OF THE DEFENDANTS

PART I: CERTIFICATION

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

PART II: CONCISE STATEMENT OF THE ISSUES

2. The questions before the Court are: (i) whether, properly construed, ss 189(1) and 196(1) of the *Migration Act 1958* (Cth) (the **Act**) authorise the present detention of the Plaintiff; and (ii) if so, whether they are valid in their application to him: **SC [46]**, **SCB 39-40**. As the Plaintiff's Submissions (**PS**) recognise, the answers he seeks are contrary to ***Al-Kateb*** *v Godwin* (2004) 219 CLR 562, which he submits should be overruled: **PS [2]**. Accordingly, the first issue is whether leave should be granted to re-open *Al-Kateb*. If that leave is granted, the second issue is the correctness of the construction of ss 189(1) and 196(1) accepted in *Al-Kateb*, while the third issue is the correctness of the constitutional holding in *Al-Kateb* that those provisions are valid.

3. For the reasons that follow, the Defendants submit that the four questions at **SC [46]** should be answered: (1) Yes; (2) No; (3) None; and (4) the Plaintiff.

PART III: SECTION 78B NOTICES

4. The Plaintiff's notice under s 78B of the *Judiciary Act 1903* (Cth) is adequate: **SCB 29-31**.

PART IV: STATEMENT OF MATERIAL FACTS

5. The facts agreed by the parties are set out in the Special Case. The Defendants do not accept how those facts are characterised at **PS [4]-[5]**.

6. As a non-citizen, the Plaintiff's rights to enter and remain in Australia depend on his holding a visa under the Act, for without a visa he is an "unlawful non-citizen" (s 14). He was granted a (bridging) visa on 18 September 2014: **SC [11]**. That visa was cancelled in January 2015 after he was arrested and charged with sexual intercourse with a person aged between 10 and 14, to which he pleaded guilty (the victim being a boy aged 10): **SC [12]-[14]**, **SCB 34, 58**.

7. On 30 July 2020, the Plaintiff was refused a Safe Haven Enterprise Visa: **SC [20]**. He was refused that visa because the delegate considered him to be a danger to the Australian

community[1] (meaning he did not satisfy the criterion in s 36(1C)): **SC [21](c), SCB 69**. On merits review, the Administrative Appeals Tribunal affirmed that decision: **SC [22], SCB 94 [76]**. There was no equivalent finding in *Al-Kateb*: see [29] (Gleeson CJ). The facts therefore are not "indistinguishable from those in *Al-Kateb*": **PS [5]**.

8. The purpose of removal has not become "incapable of fulfilment": **PS [5]**. The parties agree that, at present, the Plaintiff cannot be removed from Australia, and there is no real prospect or likelihood of removal in the reasonably foreseeable future: **SC [45](a), (b)**. Nevertheless, the Defendants are continuing to take steps directed to the Plaintiff's removal by seeking to identify countries to which he could be removed: **SC [29], [39]-[44]**. The fact that a third country that is willing to receive the Plaintiff has not yet been identified does not render it impossible that it may in future occur. As Gleeson CJ said in *Al-Kateb*, "[i]t cannot be said that it will never be reasonably practicable to remove him."[2] Further, the possibility remains that circumstances may change in Myanmar such that a decision under s 197D would be appropriate, following which his removal to Myanmar may become possible: **SC [37]**.

9. Several possibilities may bring an end to the Plaintiff's held detention. The Minister may exercise the personal, non-compellable power in s 195A to grant him a visa. In February 2023, and again in September 2023, the Minister for Immigration, Citizenship and Multicultural Affairs decided he did *not* wish to consider exercising that power (or that in s 197AB to make a residence determination): **SC [26]**. But that may change if circumstances change, if "Ministers change [or if] Ministers change their minds".[3] If not, officers must continue to attempt to identify a third country to which the Plaintiff can be removed, and if such a country is identified the Plaintiff must be removed to that country as soon as reasonably practicable.

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1 In 2016, the Plaintiff was assessed as being of "moderate to high risk of re-offending"; in both 2019 and 2021, he was assessed as being of "above average" risk of sexual re-offending: **SCB 68**. The Tribunal accepted that the risk of the Plaintiff's re-offending was significant: **SCB 93 [68]**.

2 *Al-Kateb* (2004) 219 CLR 562 at [18] (Gleeson CJ). See also [228]-[230] (Hayne J), [290] (Callinan J).

3 See *BNGP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 878 at [42] (Jagot J), affirmed in *BNGP v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 111 (Perry, Bromwich and Kennett JJ).

PART V: ARGUMENT

A *AL-KATEB* SHOULD NOT BE RE-OPENED

10. The "temporary detention construction" of ss 189(1) and 196(1) that the Plaintiff advances is expressly based on the dissenting reasoning of Gleeson CJ and Gummow J in *Al-Kateb*: **PS [7]-[8], [11]-[14]**. As in previous challenges to *Al-Kateb*, in this proceeding the same arguments that divided the Court in *Al-Kateb* are repeated,[4] apparently in the hope that a differently constituted Court will decide them differently.

11. The Plaintiff does not expressly submit that *Al-Kateb* is distinguishable. While he submits the legislative scheme is "different to the one that operated when *Al-Kateb* was decided" (**PS [21]**), he makes no attempt to explain how the differences to which he refers (enactment of ss 196(5)(a) and 197C, discussed below at [30] and [38]-[39]) undermine the majority's reasoning in *Al-Kateb*. Instead, he correctly concedes that his submissions concerning the construction of ss 189 and 196 are contrary to *Al-Kateb*: **PS [2]**. That being so, leave is required to re-open *Al-Kateb*.[5] That leave should be refused: cf **PS [2], [22]-[23], [45]-[52]**.

12. In the nearly 20 years since *Al-Kateb*, there have been at least three previous attempts to overturn it.[6] A majority of the Court has never needed to decide that issue. But, in *Plaintiff M76*, Kiefel and Keane JJ refused leave to re-open the construction decided in *Al-Kateb*, observing that "[w]hatever the original balance of strengths and weaknesses in the majority and minority views in *Al-Kateb* might have been, the decision should now be regarded as having decisively quelled the controversy as to the interpretation of the Act which arose in that case"[7] and that "there are powerful reasons not to permit the decision in *Al-Kateb* now to be called into question".[8] A decade later, those statements are even more true. The

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4 See, eg, ***Plaintiff M47/2012*** *v Director-General of Security* (2012) 251 CLR 1 at [351] (Heydon J); ***Plaintiff M76****/2013 v Minister for Immigration and Citizenship* (2013) 251 CLR 322 at [179] (Kiefel and Keane JJ); ***Plaintiff M47/2018*** *v Minister for Home Affairs* (2019) 265 CLR 285 at [6] (Kiefel CJ, Keane, Nettle and Edelman JJ).

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

6 *Plaintiff M47/2012* (2012) 251 CLR 1; *Plaintiff M76* (2013) 251 CLR 322; *Plaintiff M47/2018* (2019) 265 CLR 285.

7 *Plaintiff M76* (2013) 251 CLR 322 at [199].

8 *Plaintiff M76* (2013) 251 CLR 322 at [190].

Plaintiff's submissions contain nothing new that would justify re-opening an interpretation that has prevailed for 20 years in a frequently litigated and amended Act. That is so whether or not the Court as presently constituted would have decided *Al-Kateb* the same way.[9]

13. While the Court has power to depart from its previous decisions, that course is not lightly undertaken.[10] When considering this issue, the Court often refers to the factors in *John*. The evaluation of those factors is "informed by a strongly conservative cautionary principle".[11] In this case, each of the four factors points strongly against a grant of leave to re-open.

14. *First*, the constructional issue in *Al-Kateb* had been thoroughly analysed over a succession of cases before it reached the Court: cf **PS [22.1]**.[12] It was determined after "a very full
10 examination of the question" and no compelling consideration or important authority was overlooked.[13] The majority did not fail to properly apply the three principles articulated at **PS [17]-[20]**: *contra* **PS [21]**. As to the first, the principle of legality was at the heart of the submissions of both the appellant and intervener in *Al-Kateb*.[14] It was expressly addressed by Hayne J,[15] with whom McHugh and Heydon JJ agreed. Callinan J rejected the reasoning in *Al-Masri*, which squarely addressed the principle of legality.[16] As to the second, the presumption that legislation should be construed conformably with international obligations

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

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

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

12 The cases were summarised in *Minister for Immigration and Multicultural and Indigenous Affairs v* ***Al Masri*** (2003) 126 FCR 54 at [167]-[173] (the Court).

13 *Attorney-General (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237 at 243-244 (Dixon J). See also *Wurridjal* (2009) 237 CLR 309 at [65]-[71] (French CJ). *Al-Kateb* was heard and determined alongside ***Behrooz*** *v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 and *Minister for Immigration and Multicultural and Indigenous Affairs v* ***Al Khafaji*** (2004) 219 CLR 664. *Behrooz* and *Al Khafaji* were both decided on the basis of the reasoning in *Al-Kateb*, in respect of which the Court had heard argument from three different parties arguing for the temporary detention construction. *Contra* **PS [21]**, it is immaterial that the majority did not address the reasoning in *Chu Kheng* ***Lim*** *v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 as regards s 88: see [34] below.

14 *Al-Kateb* (2004) 219 CLR 562 at 564-565, 567, 569. See, eg, submissions filed by the appellant at [44]-[53]; submissions filed by the Human Rights and Equal Opportunity Commission at [8]-[20]. See also [34]-[35] below.

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

16 *Al-Kateb* (2004) 219 CLR 562 at [300], rejecting *Al Masri* (2003) 126 FCR 54 at [48], [82]-[86].

was likewise addressed.[17] As to the third, the Ch III arguments were correctly rejected, and therefore provided no basis to adopt a different construction so as to preserve validity.

15. *Second*, there was no material difference between the reasons of the majority in *Al-Kateb*.[18] The element of Callinan J's reasoning highlighted at **PS [22.2]** was not material to his conclusion that the text was "clear and unambiguous" and left no room for implications.[19]

16. *Third*, *Al-Kateb* has not resulted in unacceptable difficulties or uncertainties about the content or application of ss 189 and 196. This factor is not directed to the merits or harshness of the results in a general or policy sense: cf **PS [22.3]; HRLC [39]**. It is directed to whether there are unacceptable difficulties or uncertainties about the content or application of the construction of the provisions.[20] The majority's construction is clear and gives rise to no difficulties or uncertainties. By contrast, the Plaintiff's construction would give rise to considerable difficulties of that kind (discussed further at [32] below).

17. *Fourth*, *Al-Kateb* has been consistently and extensively relied upon. If overruled, that would retrospectively alter the understanding of the Act upon which the Commonwealth has relied in detaining unlawful non-citizens since 2004. Departments required to administer the Act consistently with *Al-Kateb* would have the legal basis for their decisions and actions retrospectively altered. The foundation upon which Parliament acted in making amendments to the Act would likewise be removed. As Kiefel and Keane JJ observed in *Plaintiff M76*:[21]

> Given that the principle of legality, on which the minority view in *Al-Kateb* depends, operates "to give effect to the will of Parliament by declaring the meaning of what Parliament has enacted", and given that the decision in *Al-Kateb* has stood for nine years without legislative correction, the suggestion that the majority view did not give effect to the will of Parliament has little practical attraction. It may be accepted that there may be many reasons why the legislature does not move to correct a judicial misinterpretation of its will; but that consideration has little force in relation to legislation where the legislature has been active in making amendments to the legislation in question but has refrained from altering the text the subject of earlier interpretation.

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[17] *Al-Kateb* (2004) 219 CLR 562 at [63] (McHugh J), [238] (Hayne J), [297]-[298] (Callinan J). See also [36] below.

[18] *Plaintiff M76* (2013) 251 CLR 322 at [193] (Kiefel and Keane JJ), stating that "there was no serious divergence between the reasoning adopted by the Justices who constituted the majority in *Al-Kateb*".

[19] *Al-Kateb* (2004) 219 CLR 562 at [297]-[298].

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

[21] *Plaintiff M76* (2013) 251 CLR 322 at [194] (citations omitted).

18. As their Honours went on to observe, the Act has repeatedly been amended in a manner demonstrating that Parliament has acted on the basis of the correctness of *Al-Kateb*. For example, in 2005, s 195A was introduced by the *Migration Amendment (Detention Arrangements) Act 2005* (Cth). The Explanatory Memorandum explained at [10]: "The Minister will have the flexibility to grant any visa that is appropriate to that individual's circumstances, including a Removal Pending Bridging Visa where the detainee has no right to remain in Australia but removal is not practicable in the foreseeable future". Section 195A is readily understood as Parliament's response to the individual hardship that might follow from *Al-Kateb*.[22] The same is true of the introduction of the power to make residence
10 determinations (s 197AB)[23] and reviews by the Ombudsman (Pt 8C), introduced by the same Amendment Act. Further, since *Plaintiff M76* was decided, the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth) inserted s 197C(3), which is a further amendment made on the premise that *Al-Kateb* is correct. As the Statement of Compatibility with Human Rights recognised, "persons affected by the amendments may be subject to ongoing immigration detention under section 189 of the Migration Act" and that this was so even for unlawful non-citizens "whose removal may not be practicable in the reasonably foreseeable future".

B THE CONSTRUCTION ISSUE

19. If the Court grants leave to the Plaintiff to challenge the correctness of *Al-Kateb*, it should
20 confirm the construction of ss 189(1) and 196(1) adopted in that decision.

20. For the reasons developed below, the "temporary detention construction" expounded at **PS [12]-[14]** is not open. It is contrary to the objects of the Act. It is contrary to the binary structure of the Act, which contemplates that only non-citizens who hold a visa may enter or remain in Australia. It is contrary to the plain meaning of the text of ss 189(1) and 196(1), which as this Court recognised in both *Al-Kateb* and *AJL20* require detention to continue

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22 *Plaintiff M76* (2013) 251 CLR 322 at [197] (Kiefel and Keane JJ). *Contra* **AHRC [21].**

23 By reason of s 197AA, a residence determination can be made only with respect to a person who is detained under s 189. In enacting that provision Parliament assumed the correctness of *Al-Kateb*, because if the minority construction were to be adopted, such that s 189 does not apply to unlawful non-citizens whose removal is not practicable in the foreseeable future, then it would follow from s 197AA that a residence determination could not be made in respect of such a person.

until one of the events listed in s 196(1) "actually occurs".[24] Further, it erroneously takes the command in s 198 (to remove as soon as reasonably practicable) and converts it into a different temporal limitation on s 196: instead of being an obligation to detain until removal, it becomes an obligation to detain until it appears removal will not be reasonably practicable in the reasonably foreseeable future.[25] There is no foundation in the text of either s 196 or s 198 to warrant the transformation of the condition expressly imposed on s 198 into an entirely different, and unexpressed, condition on s 196(1).[26]

21. **Scheme of the Act**: The Act is not silent on what must occur when removal of a person is not reasonably practicable in the reasonably foreseeable future: *contra* **PS [7]; AHRC [27]**.[27] That is clear once the unambiguous words of ss 189(1) and 196(1) are read in the context of the scheme of the Act and in light of its objects. Section 4(1) states that the object of the Act is to "regulate, in the national interest, the coming into, and presence in, Australia of non-citizens". Section 4(2) states that, to "advance its object", the Act "provides for visas permitting non-citizens to enter or remain in Australia and the Parliament intends that this Act be the *only source* of the right of non-citizens to so enter or remain" (emphasis added). To further "advance its object", the Act "provides for the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted by this Act": s 4(4).

22. To give effect to these objects, since 1994, the principal features of the scheme have been:[28]

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

(b) *second*, if a non-citizen has entered Australia without permission, or no longer has permission to remain, that non-citizen must be held in immigration detention;[29] and

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[24] *Commonwealth v **AJL20*** (2021) 273 CLR 43 at [49] (Kiefel CJ, Gageler, Keane and Steward JJ).

[25] *Al-Kateb* (2004) 219 CLR 562 at [237], [241] (Hayne J).

[26] "It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do": *Thompson v Goold & Co* [1910] AC 409 at 420 (Lord Mersey), cited in, eg, *Minogue v Victoria* (2018) 264 CLR 252 at [43] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

[27] *Plaintiff M76* (2013) 251 CLR 322 at [182] (Kiefel and Keane JJ).

[28] *Al-Kateb* (2004) 219 CLR 562 at [204]-[210], [223] (Hayne J).

[29] Now subject to a personal, non-compellable power to make a residence determination: Subdiv B of Div 7 of Pt 2.

(c) *third*, the detention of a non-citizen is to end only upon that person's removal or deportation from Australia or upon the person's obtaining a visa.

23. Contrary to these basal features of the Act, the Plaintiff's construction argument is that Parliament *intended* there to be a category of non-citizen who would be entitled to live in the Australian community despite the fact that they do *not* have a visa permitting them to do so. Parliament is said to have intended to allow any non-citizen whose removal is not reasonably practicable in the foreseeable future to live in the Australian community until their removal becomes possible, regardless of their circumstances, including where they have been refused a visa because of the risk they pose to the Australian community. It is impossible to reconcile that construction with the detailed character regime in the Act that requires or authorises the refusal or cancellation of visas to non-citizens who fail the character test.[30] Further, it is a construction requiring the conclusion that Parliament intended there to be an unstated exception to the Act's binary classification of non-citizens as lawful or unlawful non-citizens (ss 13 and 14), that being a classification that depends on the holding of a visa.[31] While that result might be achieved by partial disapplication of the Act where that is required for constitutional reasons,[32] it is not otherwise a tenable construction of the Act because it requires the conclusion that Parliament intended to create a gap in the statutory scheme that would contradict both its objects and its express terms: *contra* **HRLC [16]-[17]**.[33] As the majority recently put it in *AJL20*, "the evident intention of the Act is that an unlawful non-citizen may not, *in any circumstances*, be at liberty in the Australian community".[34]

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30 See, eg, ss 500A, 501, 501A, 501B, 501F.

31 Subject to the presently irrelevant exception in s 13(2). To maintain that binary classification, on the commencement of the *Migration Reform Act 1992* (Cth) certain persons already in Australia without visas were deemed to have been granted visas on the commencement of that Act: see, eg, s 34 (absorbed persons visas) and the *Migration Reform (Transitional Provisions) Regulations 1994* (Cth), analysed in *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at [15]-[27] (Gummow and Hayne JJ), [106]-[112] (Heydon and Crennan JJ). See also *Plaintiff M76* (2013) 251 CLR 322 at [182], [184] (Kiefel and Keane JJ).

32 See ***Love*** *v Commonwealth* (2020) 270 CLR 152, where the particular position of Aboriginal persons who meet the tripartite test is a product of a partial disapplication of the Act to reflect constitutional constraints arising from limitations on the power conferred by s 51(xix) of the Constitution.

33 *Plaintiff M76* (2013) 251 CLR 322 at [189] (Kiefel and Keane JJ); *Plaintiff M47/2012* (2012) 251 CLR 1 at [269] (Heydon J); *Al-Kateb* (2004) 219 CLR 562 at [223]-[224] (Hayne J).

34 *AJL20* (2021) 273 CLR 43 at [61] (Kiefel CJ, Gageler, Keane and Steward JJ) (emphasis added).

24. **The text of ss 189 and 196**: The text of ss 189(1) and 196(1) is clear and unambiguous.[35] The Plaintiff has not identified the words of those provisions which leave open the construction for which he contends. The text is unequivocal. Section 189(1) provides that an officer "must" detain a person where the "officer knows or reasonably suspects that [the] person [is] in the migration zone (other than an excised offshore place) [and] is an unlawful non-citizen". Section 196 establishes the duration of the detention. It provides that the person "must be kept in immigration detention until" one or more of the events in s 196(1) occurs.

25. It is not open to read s 196(1)(a) as providing that the detention required by the Act must cease at some earlier time than that expressly specified. The majority in *Al-Kateb* was correct to hold that there is no express or implied limitation to the obligation imposed by s 196(1) such that detention could not continue unless removal was likely within the reasonably foreseeable future. The word "kept" in s 196(1), used in conjunction with "until", refers to an ongoing state of affairs (detention) that is to be maintained up to the time the event (removal or visa grant) "actually occurs".[36] That is, s 196(1) requires that detention "must continue until removal, or deportation, or the grant of a visa" (or until an unauthorised maritime arrival is taken to a regional processing country).[37] The requirement to detain "until" one of the enumerated events occurs does not use the word "until" in a purposive sense.[38] It fixes the end of detention as being upon the occurrence of one of those events.

26. That s 196(1) was intended to be exhaustive of the circumstances in which a person could be released is confirmed by s 196(3), which provides that: "To avoid doubt, [s 196(1)] prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than as referred to in paragraph (l)(a), (aa) or (b)) unless the non-citizen has been granted a visa".[39] In *AJL20*, the majority rejected a challenge to the validity of s 196(3).[40]

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

[36] *AJL20* (2021) 273 CLR 43 at [49] (Kiefel CJ, Gageler, Keane and Steward JJ).

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

[38] *Plaintiff M76* (2013) 251 CLR 322 at [126] (Hayne J), quoted and endorsed in *AJL20* (2021) 273 CLR 43 at [49] (Kiefel CJ, Gageler, Keane and Steward JJ). *Contra* **HRLC [12]-[13]**.

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

[40] *AJL20* (2021) 273 CLR 43 at [64]-[66] (Kiefel CJ, Gageler, Keane, Steward JJ), cf [155] (Edelman J, dissenting).

27. Section 196 must, of course, be read together with s 198. Contrary to **PS [7]**, the obligation imposed by s 198 is not merely to "remove" but to remove "as soon as reasonably practicable" after the conditions for removal are enlivened. There is no sense in which s 198 assumes the (present) possibility of removal: *contra* **PS [13]; HRLC [15]**. To the contrary, read together, ss 196(1)(a) and 198 recognise that there may be periods of time when removal is *not* possible. It is in that situation that they require unlawful non-citizens to be detained until removal actually occurs.[41] As the Court recently noted, "[t]his view of the relationship between s 196 and s 198 has consistently been accepted and applied in the Federal Court."[42]

28. ***AJL20***: The construction of ss 189(1) and 196(1) adopted by the majority in *Al-Kateb* was confirmed by a majority of this Court in *AJL20*. There, Kiefel CJ, Gageler, Keane and Steward JJ quoted directly from passages in Hayne J's reasons in *Al-Kateb*, including to support the proposition that the duration of the detention required and authorised by s 196(1) is "fixed by reference to the occurrence of any of [the four] specified events. Detention must continue 'until' one of those events occurs."[43] Their Honours then observed:[44]

> The combined effect of ss 189(1) and 196(1) is that a non-citizen can be lawfully within the Australian community only if he or she has been granted a visa. Otherwise, an unlawful non-citizen must be detained until such time as he or she departs Australia by one of the means referred to in s 196(1), relevantly in this case removal under s 198.

29. That construction of the Act was critical to the result in *AJL20*. While the majority in *AJL20* observed that the "correctness of the constitutional holding in *Al-Kateb*"[45] did not arise for consideration in that case, their Honours made no such statement in respect of the holding in that case concerning the *construction* of ss 189(1) and 196(1), which plainly *did* arise. As a result, the Plaintiff's submissions on construction can succeed only if both *Al-Kateb* and *AJL20* are re-opened and overruled, yet no application to re-open *AJL20* has been made.

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41 *AJL20* (2021) 273 CLR 43 at [28], [44], [49], [61] (Kiefel CJ, Gageler, Keane and Steward JJ).

42 *AJL20* (2021) 273 CLR 43 at [35] (Kiefel CJ, Gageler, Keane and Steward JJ).

43 *AJL20* (2021) 273 CLR 43 at [34] (Kiefel CJ, Gageler, Keane and Steward JJ), quoting *Al-Kateb* (2004) 219 CLR 562 at [226] (Hayne J). See also *AJL20* (2021) 273 CLR 43 at [49]-[51].

44 *AJL20* (2021) 273 CLR 43 at [35] (Kiefel CJ, Gageler, Keane and Steward JJ) (citations omitted).

45 *AJL20* (2021) 273 CLR 43 at [26] (Kiefel CJ, Gageler, Keane and Steward JJ).

30. **Legislative changes since *Al-Kateb***: The Act, including ss 189 and 196(1), has been amended multiple times since *Al-Kateb* without altering the majority's construction.[46] It is therefore to be presumed that Parliament has accepted that construction.[47] In particular, as noted at [17]-[18] above, the introduction of ss 195A and 197AB assume and confirm the correctness of the majority's reasoning: cf **AHRC [10]-[21]**. In *Al-Kateb*, Gleeson CJ recognised that a power such as that now contained in s 195A would make it easier "to discern a legislative intention to confer a power of indefinite administrative detention".[48] Further, the *Migration Amendment (Detention Arrangements) Act 2005* (Cth) inserted Pt 8C, which gives the Ombudsman a role in reviewing the cases of persons in detention for a period totalling at least two years. That role includes making recommendations about non-citizens in long-term detention, including recommending another form of detention (such as a residence determination) or release into the community on a visa: see s 486O. This oversight role is part of a legislative response that accepts the construction adopted in *Al-Kateb*.

31. Contrary to **PS [15]** and **AHRC [12]-[16]**, no assistance can be gleaned from ss 196(4) and 196(5)(a). They were inserted by the *Migration Amendment (Duration of Detention) Act 2003* (Cth), which received Royal Assent on 23 September 2003, shortly before the hearing in *Al-Kateb.* They did not apply in that case, and likewise do not apply here, as they concern non-citizens detained as a result of visa cancellations under specified provisions. The Plaintiff's reliance on them is contrary to the express statement in s 196(5A) that "[s]ubsections (4) and (4A) do not affect by implication the continuation of the detention of a person to whom those subsections do not apply". In any event, the Explanatory Memorandum confirmed the amendments were not intended to change the scheme.[49]

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[46] See, eg, *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) (inserting s 196(1)(aa)); *Migration Amendment (Detention Arrangements) Act 2005* (Cth) (inserting note to s 189). See also *DMH20 v Minister for Home Affairs* (2023) 296 FCR 256 at [7] (Charlesworth, Thawley and Kennett JJ).

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

[48] *Al-Kateb* (2004) 219 CLR 562 at [22].

[49] Explanatory Memorandum, Migration Amendment (Duration of Detention) Bill 2003 at [1], [3]. **AHRC [16]** emphasises a note in the Explanatory Memorandum that "[n]ew paragraph 196(4)(a) would cover circumstances where a court finally determines that there is no real likelihood that an unlawful non-citizen will be removed from Australia in the reasonably foreseeable future, and therefore the detention is unlawful". That statement is directed

32. **Consequences of the Plaintiff's construction**: The Plaintiff's construction would give rise to impractical consequences. The words "reasonably practicable" in s 198 recognise that the ability to remove a person is likely dependent upon a complex matrix of factors, including the "cooperation of persons, other than the non-citizen and the officer".[50] This includes cooperation of third countries, which may be affected by changing conditions or attitudes of officials engaged in sensitive negotiations.[51] These matters are difficult to predict and may change rapidly. That point is not theoretical. There are several cases in which non-citizens have been removed from Australia shortly after a judicial finding that there was no real likelihood of removal in the reasonably foreseeable future.[52] Those cases illustrate how the prospects of removal will often be uncertain, and may shift from day to day. If the power and duty of officers to detain unlawful non-citizens varies depending on the answer to a factual question as to whether – at any particular point in time – there is a real prospect of removal in the reasonably foreseeable future, unlawful non-citizens would have to be released from, and then taken back into, immigration detention as prospects of removal fluctuate. That construction would involve enormous difficulties in application,[53] which Parliament is most unlikely to have intended. Such a construction should be avoided.[54]

33. Further difficulties with the Plaintiff's construction arise when a non-citizen has been assessed as a danger to the Australian community (as has occurred with respect to the Plaintiff). In *Al-Kateb*, Gleeson CJ noted that, notwithstanding his Honour's preferred construction, there was an outstanding question as to whether assessment of a person as "a dangerous person" could affect "the detainee's right to be released from administrative

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to the law as it stood following *Al-Masri* (2003) 126 FCR 54, before that decision was overturned in *Al-Kateb*. It cannot properly be treated as a Parliamentary indication that *Al-Masri* was correct.

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

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

52 For example, the removal of Mr Al Masri took place approximately 4 weeks after Merkel J had held that there was no real likelihood of his removal in the reasonably foreseeable future: *Al Masri* (2003) 126 FCR 54 at [18]. The removal of Mr Sami occurred shortly after Mortimer J held that there was no real prospect of his removal in the reasonably foreseeable future: *Sami v Minister for Home Affairs* [2022] FCA 1513 at [144].

53 *Al-Kateb* (2004) 219 CLR 562 at [235]-[237] (Hayne J).

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

detention, or the terms and conditions of release".[55] But, if the Plaintiff's construction is accepted, ss 189(1) and 196(1) do not authorise his detention. If so, he is entitled to be at liberty, and there is no statutory or other basis on which the Court could order that his release be subject to conditions. The Plaintiff makes no submission as to how the legislation can be construed to authorise only conditional release. The fact that Parliament is unlikely to have intended unlawful non-citizens would be released into the Australian community even if they pose a danger to that community points strongly against the Plaintiff's construction.

34. **Principle of legality**: The principle of legality does not assist the Plaintiff: cf **PS [17]-[18]**. That principle applies in circumstances where the Court is faced with a constructional choice.[56] Here, the text is intractable. As McHugh J held in *Al-Kateb*, "[t]he words of the three sections are too clear to read them as being subject to a purposive limitation or an intention not to affect fundamental rights".[57] Further, the principle of legality is intended to ensure that legislation is interpreted in accordance with Parliament's intent, yet the amendments to the Act since *Al-Kateb* contradict the suggestion that the majority's construction did not give effect to the will of Parliament: see [17]-[18] above (cf **PS [18]**).

35. Further, while Australian citizens have a fundamental right to liberty that engages the principle of legality, the same is not true of non-citizens. That was the point made by Kiefel and Keane JJ in *Plaintiff M76*, stating that a non-citizen's "right to be at liberty in Australia is to be approached as a matter of statutory entitlement under the Act rather than as a 'fundamental right'".[58] The same point was made by Hayne J in *Al-Kateb*, in terms recently endorsed by the majority in *AJL20*,[59] when his Honour said: "The detention to be examined is not the detention of someone who, but for the fact of detention, would have been, and been entitled to be, free in the Australian community."[60] Thus, the principle of liberty is not "at its strongest" in the Plaintiff's case: cf **PS [17]; HRLC [21]**. To the contrary, the statutory

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55 *Al-Kateb* (2004) 219 CLR 562 at [29].

56 See, eg, *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 at [40]-[45] (French CJ).

57 *Al-Kateb* (2004) 219 CLR 562 at [33].

58 *Plaintiff M76* (2013) 251 CLR 322 at [184].

59 *AJL20* (2021) 273 CLR 43 at [61] (Kiefel CJ, Gageler, Keane and Steward JJ).

60 *Al-Kateb* (2004) 219 CLR 562 at [219] (Hayne J). See also [254] (Hayne J), stating that "The premise for the debate is that the non-citizen does not have permission to be at liberty in the community".

entitlement of non-citizens to be at liberty in Australia does not attract the principle at all. Parliament has conferred that entitlement only in limited terms that seek to balance it against other rights and interests that might cause a visa to be withheld or cancelled (including the safety of the Australian community). There is no basis for an *a priori* assumption that Parliament intended the least possible restriction of such a right.[61]

36. **International obligations**: The clarity of the text of ss 189(1) and 196(1) leaves no room for their interpretation to be affected by Australia's international obligations.[62] For that reason, an analysis of the content of those obligations cannot affect the answer to the questions in the special case: cf **PS [19]; HLRC [31]-[35]**. Having said that, there "must, at least, be doubt about whether the mandatory detention of those who do not have permission to enter and remain in Australia contravenes Art 9 of the [*International Covenant on Civil and Political Rights*]"[63] when detention occurs pursuant to a duty imposed by legislation, and where the lawfulness of that detention can readily be tested in a court (and is also subject to review by the Ombudsman). It is even more unlikely that detention is "arbitrary" within the meaning of Art 9 in the circumstances of the Plaintiff, who was granted a visa that was cancelled only after he committed a serious sexual offence against a child, and who was refused a further visa because he was assessed as a danger to the Australian community.

37. The jurisprudence of "comparable jurisdictions" is likewise of no assistance: cf **AHRC [42]-[46]; HLRC [22]**. Gleeson CJ was correct in *Al-Kateb* to observe that "in each country the constitutional and statutory context is controlling, and differs".[64]

38. **Section 197C(3)**: The Plaintiff weakly relies on s 197C(3), which provides that s 198 does not "require or authorise" an officer to remove an unlawful non-citizen to a country in respect of which a "protection finding" has been made for the non-citizen: **PS [4], [21]**.[65] The effect

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[61] Cf *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at [314] (Gageler and Keane JJ); *R (Belhaj) v Director of Public Prosecutions (No 1)* [2018] 3 WLR 435 at [14] (Lord Sumption JSC; Baroness Hale PSC agreeing), [41]-[42] (Lord Lloyd-Jones JSC; Lord Wilson JSC agreeing)

[62] *Al-Kateb* (2004) 219 CLR 562 at [239] (Hayne J).

[63] *Al-Kateb* (2004) 219 CLR 562 at [238] (Hayne J).

[64] *Al-Kateb* (2004) 219 CLR 562 at [3]; see also [240] (Hayne J).

[65] A protection finding within the meaning of s 197C(5)(e) has been made in respect of the Plaintiff in relation to Myanmar: **SC [21], [34]**.

of that provision is that the Plaintiff's involuntary removal to Myanmar is not required or authorised by s 198. A limit on the countries to which an unlawful non-citizen may be removed has no effect on the determinative reasoning in *Al-Kateb*, being reasoning premised on there being *no countries* to which removal would be practicable in the foreseeable future. That reasoning emphasised that the Act is concerned not with removal "to" a place, but with the removal "from" Australia of persons who have no right to remain.[66] Section 198(6) continues to require the Plaintiff's removal to *any place* that will accept him other than Myanmar. The exclusion of one country from the list of countries to which the Plaintiff may potentially be removed does not change the purpose of his detention (*a fortiori* where the country in question is one of which the Plaintiff is not a citizen, and where he has no right to reside: **SC [3]**). Further, while s 197C(3) would affect the practical prospects of removal in cases where it displaces the duty to remove a non-citizen to a particular country to which removal would otherwise be possible, it will have that effect only if the non-citizen has not asked to be removed to that country.[67] That is not to imply that a non-citizen should make such a request. It is merely to emphasise that s 197C does not alter the duty to remove under s 198(1), that particular duty being central to the reasoning in *Al-Kateb*.

39. In any case, the effect of s 197C(3) was simply to restore a limitation on s 198 that existed prior to the enactment of s 197C(1). Prior to the enactment of s 197C(1), both this Court[68] and the Full Federal Court[69] had held that s 198 did not authorise removal of unlawful non-citizens contrary to Australia's *non-refoulement* obligations. Section 197C(1) overrode that implied limitation.[70] The subsequent enactment of s 197C(3) substantially re-instated the limitation on s 198 that had previously been implied. It did not alter the purpose of the detention under ss 189(1) and 196(1), or have any effect on the reasoning in *Al-Kateb*.

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

67 By reason of s 197C(3)(c)(iii). While the Plaintiff has requested removal under s 198(1), he has not requested removal to Myanmar: **SC [27]**.

68 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at [54] (French CJ), [94]-[95] (Gummow, Hayne, Crennan and Bell JJ), [233]-[234] (Kiefel J). See also *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at [27] (the Court).

69 *Minister for Immigration and Citizenship v SZQRB* (2013) 210 FCR 505 at [228]-[229], [231] (Lander and Gordon JJ, Flick J concurring at [342]); see also [312]-[313], [332] (Besanko and Jagot JJ).

70 See Explanatory Memorandum to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* at [1133]-[1137].

40. ***Lim* and s 88**: The Plaintiff's criticism of *Al-Kateb* in reliance on the analysis in *Lim* of s 88 of the Act (in its then form) is misplaced: **PS [9]-[10]**, **[21]**. An argument based on that provision was advanced during the hearing in *Al-Kateb*,[71] but was not relied upon by either the majority or the minority. The Plaintiff's submission that the reasoning in *Lim* concerning s 88 "applies equally to ss 189 and 196" (**PS [10]**) cannot be accepted, because the word "until" was used in s 88 in an entirely different context. *First*, it was used in a provision that concerned the departure of a *vessel* rather than the removal of a *person*. The destruction of a vessel, which of course means that it could *never* depart Australia,[72] is not analogous to the removal of an unlawful non-citizen with respect to whom there is "no real likelihood or prospect of departure in the reasonably foreseeable future", because in the latter situation it cannot be said that removal will never occur. *Second*, s 88 conferred a discretionary power to detain, rather than a mandatory duty to detain persons with a specified status until an identified event occurred. For those reasons, *Al-Kateb* is not undermined by the Court's understandable decision not to discuss the argument in *Lim* based on s 88: *contra* **PS [21]**.

C THE CONSTITUTIONAL ISSUE

41. The majority in *Al-Kateb* (only Gummow J dissenting on this point) held that ss 189 and 196 are not contrary to Ch III. The Plaintiff is correct to accept that his argument to the contrary is foreclosed by *Al-Kateb*: **PS [2]**.[73] Leave to re-open should be refused, the Plaintiff not having demonstrated that any of the factors identified in *John* is satisfied: cf **PS [52]**.

42. The Plaintiff's constitutional argument purports to rest on *Lim*, and in particular the proposition that adjudging and punishing criminal guilt under a law of the Commonwealth is "essentially and exclusively judicial in character" (**PS [27]-[28]**).[74] However, in *Lim* this Court rejected a Ch III challenge to the validity of provisions in materially the same terms

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71 [2003] HCATrans 458 (13 Nov 2003) lns 3215–3254.

72 *Lim* (1992) 176 CLR 1 at 21-22 (Brennan, Deane and Dawson JJ).

73 The passing suggestion in **PS [51]** that this case may not be "governed" by *Al-Kateb* because it is against a "definite stream of authority" is untenable (particularly having regard to the discussion of *AJL20* below). There is no analogy with *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182 at 201, as (unlike the position in that case) no decision of this Court has overruled central authorities upon which the impugned judgment relied.

74 *Lim* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ). See also *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at [15] (Kiefel CJ, Bell, Keane and Edelman JJ); ***Alexander** v Minister for Home Affairs* (2022) 96 ALJR 560 at [67] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing).

as ss 189(1) and 196(1), on the ground that the detention they required was an incident of the power to exclude, admit and deport non-citizens and was "neither punitive in nature nor part of the judicial power of the Commonwealth".[75] Further, *Lim* was the focus of the constitutional arguments advanced and decided in *Al-Kateb*. There is thus no substance in the submission at **PS [45]-[51]** that the majority's conclusion in *Al-Kateb* was inconsistent with *Lim*, or "manifestly wrong" in light of it. To the contrary, Hayne J expressly held the impugned provisions would satisfy the "reasonably capable of being seen as necessary" test from *Lim* upon which the Plaintiff relies:[76] cf **PS [46]**.

43. A central aspect of Australia's sovereignty is the right to determine who is to be admitted into the Australian community and who is refused.[77] This Court has described that right as "essential" to security".[78] In its exercise, the Executive may refuse to allow non-citizens to enter or remain in Australia.[79] That is so whether or not difficulties attend their removal. To facilitate the exercise of this aspect of Australia's sovereignty, ss 189(1) and 196(1) require detention of unlawful non-citizens until, relevantly, the grant of a visa or removal, while s 198 imposes an enforceable duty to bring about removal as soon as reasonably practicable.

44. In *AJL20*, Kiefel CJ, Gageler, Keane and Steward JJ explained that it is "because the detention mandated by s 189(1) of the Act is temporally constrained by s 196(1) that the detention is capable of being seen as necessary for execution of *the legitimate non-punitive purposes of segregation pending … removal*".[80] Their Honours went on to hold that:[81]

> The detention authorised by ss 189(1) and 196(1) of the Act is reasonably capable of being seen as necessary for the legitimate non-punitive purposes of segregation pending … removal. This is because the authority and obligation of the Executive to detain unlawful non-citizens is hedged about by enforceable duties, such as that in s 198(6), that give effect to legitimate non-punitive purposes.

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[75] *Lim* (1992) 176 CLR 1 at 32 (Brennan, Deane and Dawson JJ). See also *Alexander* (2022) 96 ALJR 560 at [76] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing).

[76] *Al-Kateb* (2004) 219 CLR 562 at [251]; see also [260] (Hayne J), [49] (McHugh J), [294] (Callinan J).

[77] *Robtelmes v Brenan* (1906) 4 CLR 395 at 406; *Al-Kateb* (2004) 219 CLR 562 at [203] (Hayne J, Heydon J agreeing); *Ruddock v Vadarlis* (2001) 110 FCR 491 at [192]-[193].

[78] *Pochi v Macphee* (1982) 151 CLR 101 at 106 (Gibbs CJ, with whom Mason and Wilson JJ agreed).

[79] Subject to the presently irrelevant sui generis exception recognised in *Love* (2020) 270 CLR 152.

[80] *AJL20* (2021) 273 CLR 43 at [28] (emphasis added).

[81] *AJL20* (2021) 273 CLR 43 at [44] (citations omitted).

The above paragraph expressly holds that ss 189(1) and 196(1) satisfy what the Plaintiff identifies as the "second condition" (the "reasonably capable" test from *Lim*): cf **PS [35], [42]**. That condition relates to the *duration* of detention, not whether the detention itself is necessary to achieve the purpose for which it is imposed.[82] For that reason, it is no part of this test to require the consideration of "alternative measures": cf **AHRC [51]; HLRC [57]**.

45. The majority in *AJL20* went on to hold that the "hedging duties" in ss 189(1) and 196(1) also meant "that the duration, and thus lawfulness, of the detention authorised by the Act is capable of determination from time to time".[83] The fact that these duties are enforceable also meant that "the length of detention [is not] at any time dependent upon the unconstrained, and unascertainable, opinion of the Executive".[84] Those statements expressly hold that ss 189(1) and 196(1) satisfy what the Plaintiff identifies as the "third condition": cf **PS [38], [43]; AHRC [20]**. This reasoning led directly to the conclusion that:[85]

> [Sections] 189(1) and 196(1) are valid. There is no need to read them down to save their validity. *They are valid in all their potential applications*. As has been observed, it is because the duration of the detention of an unlawful non-citizen must end, either upon the grant of a visa or upon the removal of the non-citizen from Australia, that *immigration detention under the Act is not punishment* within the exclusive province of judicial power. That is so because *the terms of the Act circumscribe the purposes of detention of an unlawful non-citizen so that they do not include punishment*.

46. The above reasoning highlights the error in the Plaintiff's proposed "first condition", that detention cannot be for the purpose of removal unless removal is a "practical possibility": **PS [34], [41]**. That submission states the permissible purposes of immigration detention too narrowly. It ignores the fact that they include what the majority in *AJL20* repeatedly described as the "legitimate non-punitive purposes of segregation pending … removal".[86] That same purpose was identified in *Al-Kateb*, where it was held consistent with Ch III.[87]

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[82] See especially *Plaintiff M76* (2013) 251 CLR 322 at [139] (Crennan, Bell and Gageler JJ).

[83] *AJL20* (2021) 273 CLR 43 at [45] (Kiefel CJ, Gageler, Keane and Steward JJ), see also [28]-[32]; ***Plaintiff M96A/2016*** *v Commonwealth* (2017) 261 CLR 582 at [32] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ), [45] (Gageler J); *Plaintiff S4/2014 v Minister for Immigration* (2014) 253 CLR 219 at [29] (the Court).

[84] *AJL20* (2021) 273 CLR 43 at [45] (Kiefel CJ, Gageler, Keane and Steward JJ), see also [28]-[32]; *Plaintiff M96A* (2017) 261 CLR 582 at [31] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).

[85] *AJL20* (2021) 273 CLR 43 at [45] (Kiefel CJ, Gageler, Keane and Steward JJ) (emphasis added).

[86] *AJL20* (2021) 273 CLR 43 at [28], [44] (Kiefel CJ, Gageler, Keane and Steward JJ).

[87] (2004) 219 CLR 562 at [45]-[48] (McHugh J), [255], [262], [266]-[267] (Hayne J, Heydon J agreeing), [289] (Callinan J). See also *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at [227] (Hayne J, Heydon J

Accordingly, the Plaintiff's submission that segregation of non-citizens pending their removal is an illegitimate purpose cannot be accepted: cf **PS [49]**. Further, it overlooks the recognition in *Lim* that the detention of aliens is permissible as an incident of the executive power to "*exclude*, admit and deport",[88] the exclusion in question being exclusion from entry into the Australian community (including to give effect to a decision not to admit pending removal). Once the relevant purpose is correctly identified, that purpose plainly is not "incapable of fulfilment" even if removal is not practicable in the foreseeable future, because detention will serve the purpose of preventing an unlawful non-citizen from entering the Australian community until removal actually occurs: cf **PS [41]**.

10 47. It is true that *AJL20* did not concern a non-citizen in the position of the Plaintiff, and that it did not directly concern the constitutional holding in *Al-Kateb*: **PS [39]**. Nevertheless, the statements referred to above constitute the reasoning of the Court in holding that ss 189(1) and 196(1) did not permit release of a non-citizen from detention until one of the events in s 196(1) *actually occurred*. That was held permissible because the detention that ss 189(1) and 196(1) authorise and require is not punitive, those provisions being reasonably capable of being seen as necessary for the legitimate non-punitive purposes of segregation of non-citizens from the Australian community pending their actual removal from Australia. That legitimate non-punitive purpose, derived from the terms of the Act itself, does not vary depending upon the prospect at any particular time that a non-citizen can be removed in the
20 reasonably foreseeable future. Nor does it vary depending upon which removal obligation in s 198 is engaged: cf **PS [42]**. *AJL20* recognises that the detention of non-citizens under ss 189(1) and 196(1) is *not punitive* because it must end when removal occurs, and there is an enforceable duty to bring about removal as soon as reasonably practicable.[89] That conclusion is fatal to the Plaintiff's constitutional argument.

48. In practical terms, the effect of the above submission is that an unlawful non-citizen who cannot be removed to his or her country of citizenship,[90] or an unlawful non-citizen who

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agreeing); [26] (Gleeson CJ), in a passage cited with approval in *Plaintiff M76* (2013) 251 CLR 322 at [139] (Crennan, Bell and Gageler JJ); *Plaintiff M76* (2013) 251 CLR 322 at [207] (Kiefel and Keane JJ).

88 *Lim* (1992) 176 CLR 1 at 32 (Brennan, Deane and Dawson JJ) (emphasis added); see also 71 (McHugh J).

89 See *AJL20* (2021) 273 CLR 43 at [45], [48], [52] (Kiefel CJ, Gageler, Keane and Steward JJ).

90 Because, for example, that country does not accept the involuntary return of its citizens, or because of a protection finding that engages s 197C(3).

lacks a country of citizenship, is required to be detained until: (a) removal to a safe third country becomes reasonably practicable and then occurs; (b) the circumstances preventing removal to the person's country of citizenship change, such as through a decision under s 197D, meaning that the person can be removed to that country; or (c) the person is granted a visa. Detention of a non-citizen until one of those events occurs is not punitive, irrespective of its length, because it serves the legitimate non-punitive purpose of segregating from the Australian community non-citizens who the Executive has decided not to admit, until their removal becomes practicable and occurs. In the interim, the Executive is obliged to take steps that are reasonably practicable to attempt removal of the non-citizen to a safe third country: cf **AHRC [44]**. There is no suggestion that the Executive has not done this in relation to the Plaintiff, or that the Executive is not continuing to do so.

49. Of course, the preparedness of safe third countries to accept a non-citizen, and conditions in a non-citizen's country of origin, will ordinarily be beyond the control of the Executive. That does not affect the constitutional analysis. As the Court in *Plaintiff M96A* held: "detention does not become an exercise of judicial power merely because the precondition, and hence the period of detention, is determined by matters beyond the control of the Executive. This will frequently be the case where … questions arise as to whether it is reasonably practicable to remove a person from Australia".[91] That observation highlights that detention may be for the non-punitive purpose of removal regardless of whether there is presently a real prospect of removal in the reasonably foreseeable future.

PART VII: ESTIMATE OF TIME

50. The defendants estimate that 3 hours will be required for presentation of their oral argument.

Dated: 3 October 2023

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[91] *Plaintiff M96A* (2017) 261 CLR 582 at [33] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ)

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

NZYQ
Plaintiff

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

ANNEXURE TO THE SUBMISSIONS OF THE DEFENDANTS

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the Defendants set out below a list of the particular constitutional provisions, statutes and statutory instruments referred to in their submissions.

No	Description	Version	Provision(s)
1.	*Commonwealth Constitution*	Current (Compilation No 6, 29 July 1977 – present)	s 51(xix), Ch III
2.	*Migration Act 1958* (Cth)	Current (Compilation No 154, 24 June 2023 – present)	ss 4, 13, 14, 34, 36, 189, 195A, 196, 197AB, 197C, 197D, 198, 486L-486Q, 500, 500A, 501, 501A, 501B, 501F
3.	*Migration Act 1958* (Cth)	As at 31 December 1989 (19 December	s 88

		1989 – 17 February 1991)	
4.	*Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth)	As enacted (25 May 2021)	Sch 1, items 3, 3A
5.	*Migration Amendment (Detention Arrangements) Act 2005* (Cth)	As enacted (29 June 2005)	Sch 1, items 9-10, 19
6.	*Migration Amendment (Duration of Detention) Act 2003* (Cth)	As enacted (23 September 2003)	Sch 1, item 1
7.	*Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth)	As enacted (18 August 2012)	Sch 1, item 18
8.	*Migration Reform Act 1992* (Cth)	As enacted (7 December 1992)	
9.	*Migration Reform (Transitional Provisions) Regulations 1994* (Cth)	As made (1 January 2005)	
10.	*International Covenant on Civil and Political Rights* [1990] ATS 23	Current (entered into force 13 November 1980)	Art 9