



## 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  
SYDNEY REGISTRY**

**BETWEEN:**

**NZYQ**  
Plaintiff

and

**MINISTER FOR IMMIGRATION, CITIZENSHIP AND  
MULTICULTURAL AFFAIRS**

First Defendant

**COMMONWEALTH OF AUSTRALIA**

Second Defendant

**OUTLINE OF ORAL SUBMISSIONS OF THE PLAINTIFF**

## PART I INTERNET PUBLICATION

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

## PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

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### The facts

1 The matters in the Further Amended Special Case at [45] (**BFM v1, 15**) are descriptions of factual circumstances corresponding to the circumstances in which Mr Al-Kateb found himself, as variously described in the judgments. They are not alterative “tests” to be implied into the Act or which answer the constitutional question. In both instances, what is relevant is whether removal of the Plaintiff is “capable of fulfilment” or “reasonably capable of being achieved”. That was the position in *Al-Kateb* and *Al Khafaji*. The Plaintiff’s case is relevantly indistinguishable: **PS [4]-[5]; Reply [2]**.

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- *Al-Kateb* (2004) 219 CLR 562 at [1], [3], [13], [18] (Gleeson CJ) [105], [122] (Gummow J), [145] (Kirby J) (**JBA v 3, Tab 14**);
- *SHDB v Goodwin* [2003] FCA 300 at [9] (von Doussa J) (**PAA Tab 6**);
- *Al Khafaji* (2004) 219 CLR 664 at [2] (Gleeson CJ), [16], [22] (Gummow J), [25] (Kirby J) (**JBA v 4, Tab 26**).

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2 As at 30 May 2023, there was no real likelihood or prospect of the Plaintiff being removed from Australia in the reasonably foreseeable future. The parties agree that nothing that has occurred since affects the correctness of that fact as at that date: **BFM v1, 16 [45E]**. The Plaintiff’s submission is that, at present, the position is the same. That is to be assessed based on current information, not based on information that may come to light in the future.

- Stephens Affidavit (**BFM, 85-89, 95, 99-100, 134, 137, 139, 143, 151, 154, 164, 167, 177-178, 187, 400**);
- Title 8 of *United States Code*, §§ 1157(c)(3), 1182(a)(2)(A) (**BFM 289, 300-301**).

### Freedom from executive detention, without judicial warrant or statutory authority

3 Aliens in Australia — whether lawfully or unlawfully — have a “freedom” from being detained by mere administrative decision or action. The Commonwealth Executive cannot take away that freedom, without judicial mandate, except to the extent authorised by valid statutory provision: **PS [30], [50]; Reply [6]**.

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- *Re Bolton* (1987) 162 CLR 514 at 517 (Mason CJ, Wilson and Dawson JJ), 520-521 (Brennan J), 528-529 (Deane J), 547 (Gaudron J) (**JBA v 6, Tab 36**);
- *Lim* (1992) 176 CLR 1 at 19 (Brennan, Deane and Dawson JJ), 62-63 (McHugh J) (**JBA v 3, Tab 16**);

- *Plaintiff M68* (2016) 257 CLR 42 at [146]-[163] (Gageler J), [372] (Gordon J) (**JBA v 5, Tab 31**);
- *Al-Kateb* at [219], [254] (Hayne J).

#### The construction issue (Special Case Questions 1 and 3)

4 The construction of ss 189 and 196 adopted by Gleeson CJ in *Al-Kateb* is one that is “reasonably open” and should be preferred: **PS [6]-[23]; Reply [9]-[10]**.

- *Lim* (1992) 176 CLR 1 at 20 (Brennan, Deane and Dawson JJ);
- *Plaintiff S4* (2014) 253 CLR 219 at [26] (**JBA v 6, Tab 34**);
- *Al-Kateb* at [1], [3], [14]-[29] (Gleeson CJ), [219], [224]-[237] (Hayne J), [292]-[299] (Callinan J);
- *AJL20* (2021) 273 CLR 43 at [44]-[45] (Kiefel CJ, Keane, Gageler and Steward JJ), (**JBA Vol 3, Tab 17**).

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5 *Al-Kateb* should be re-opened and overruled on the construction issue: **PS [21]-[23]; Reply [4]**.

#### The constitutional issue (Special Case Questions 2 and 4)

6 The “default characterisation” of detention is “punitive”. There are exceptional cases where detention will “escape” that characterisation. The categories of such cases are not closed, but they remain exceptions. To be within an exceptional case, the detention must: (a) be imposed for a purpose that is both “legitimate” and “non-punitive”; and (b) properly be characterised as having that non-punitive purpose: **PS [28]-[29]**.

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- *Jones* [2023] HCA 34 at [40], [43] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [149] (Edelman J) (**PAA Tab 3**);
- *Benbrika [No 2]* [2023] HCA 33 at [36]-[39], [44] (Kiefel CJ, Gageler, Gleeson and Jagot JJ) [51], [59], [62] (Gordon J), [86]-[88] (Edelman J) (**PAA Tab 2**);
- *Garlett* (2022) 96 ALJR 888 at [125], [133], [140], [144] (Gageler J), [174], [180] (Gordon J) (**JBA Vol 8, Tab 45**);
- *Benbrika [No 1]* (2021) 272 CLR 68 at [71], [73], [78], [85] (Gageler J) (**JBA Vol 4, Tab 24**).

7 **Identification of purpose:** Detention for the purpose of removal — in the sense of effectuating or facilitating removal — is both legitimate and a non-punitive purpose:

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**Reply [11]**.

- *Lim* at 27-28, 30-31 (Brennan, Deane and Dawson JJ);
- *Robtelmes v Brennan* (1906) CLR 395 at 400 (Griffith CJ) (**JBA Vol 6, Tab 39**);
- *Plaintiff S4* at [25]-[27] (the Court);

- *Falzon* (2018) 262 CLR 333 at [29], [39] (Kiefel CJ, Bell, Keane and Edelman JJ) (**JBA v 4, Tab 20**).

8 The purposes identified by the Commonwealth (**CS [46]**) are not legitimate non-punitive purposes: **PS [49]; Reply [11]-[13]**.

- *Re Woolley* (2004) 225 CLR 1 at [135]-[138] (Gummow J), [222]-[223] (Hayne J) (**JBA Vol 6, Tab 38**);
- *AJL20* (2021) 273 CLR 43 at [20], [27], [44], [61] (Kiefel CJ, Keane, Gageler and Steward JJ), [134] (Edelman J).

9 **Characterisation:** For detention to properly be characterised as being for the purpose of  
10 removal (and thereby displace the default characterisation of the detention as punitive:  
**PS [36]-[37]**):

9.1. the removal of the person detained must be capable of fulfilment or be reasonably capable of being achieved (**first condition**) (**PS [34]**);

- *CPCF* (2015) 255 CLR 514 at [374] (Gageler J) (**JBA Vol 3, Tab 18**);
- *Plaintiff M68* at [184]-[185] (Gageler J), [392] (Gordon J);
- *Jones* at [52] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [70] (Gordon J), [183] (Edelman J) and [203] (Steward J).

9.2. be limited to such period of time as is reasonably capable of being seen as appropriate and adapted to the removal of the person (**second condition**) (**PS [35]**);

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- *Plaintiff M76* (2013) 251 CLR 322 at [139]-[140] (Crennan, Bell and Gageler JJ) (**JBA Vol 6, Tab 32**)
  - *Jones* at [43] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [77]-[78] (Gordon J), [148]-[149] (Edelman J), [188] (Steward J).

9.3. the duration of the detention must be capable of being determined by a court from time to time (**third condition**) (**PS [38]-[39]**).

- *Plaintiff M96A* (2017) 261 CLR 582 at [29], [33] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ) (**JBA Vol 6, Tab 33**);
- *NAAJA* (2015) 256 CLR 569 at [98]-[101] (Gageler J) (**JBA Vol 5, Tab 27**).

10 The detention of the Plaintiff is not properly characterised as being for the purpose of  
30 removal, because none of those conditions is satisfied: **PS [41]-[43]**.

11 *Al-Kateb* should be re-opened and overruled on the constitutional issue: **PS [45]-[52]**.

**Dated:** 7 November 2023



**Craig Lenehan**

**Frances Gordon**

**James Stellios**

**Thomas Wood**