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

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SUBMISSIONS OF THE PLAINTIFF

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PART I: CERTIFICATION

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

PART II: ISSUES

2 The Plaintiff advances two propositions: *first*, on their proper construction, ss 189 and 196 of the *Migration Act 1958* (Cth) (the **Act**) do not authorise his detention by the Commonwealth Executive, because there is no real likelihood or prospect of him being removed from Australia in the reasonably foreseeable future; and *second*, if ss 189 and 196 purport to authorise his detention, they infringe Ch III of the Constitution to that extent. The Plaintiff accepts that both propositions are contrary to *Al-Kateb v Godwin*.[1] To the extent necessary, that decision should be overruled.

PART III: SECTION 78B NOTICE

3 The Plaintiff has given notice under s 78B of the *Judiciary Act 1903* (Cth): **SCB 29**.

PART IV: FACTS

4 The Plaintiff is a stateless Rohingya refugee from Myanmar: **SCB 33-35 [1], [3]-[7], [21(a)]**. He arrived in Australia as a child and is now approximately 28 to 30 years old: **SCB 33 [2]**. He has been detained under ss 189 and 196 of the Act for over 5 years: **SCB 35 [17]-[18]**. The duty imposed on the Executive to remove the Plaintiff from Australia, as soon as reasonably practicable, first arose more than 3 years ago, under s 198(6), when his application for a protection visa was refused and therefore "finally determined": see **SCB 35 [20]-[21]**.[2] That same duty also arose more than 15 months ago, under s 198(1), when he requested that he be removed from Australia: **SCB 36-37 [27]**. However, s 197C(3) prohibits the Executive from removing him to Myanmar because he is the subject of a "protection finding": **SCB 37-38 [34]-[35]**.[3] The Department has not to date identified any viable options to remove him to any "third country": see **SCB 37 [31]**.

5 It is in that context, as detailed in the Special Case, that the parties agreed that, as at 20 May 2023, there was no real prospect or likelihood of the Plaintiff being removed from Australia in the reasonably foreseeable future: **SCB 39 [45(b)]**.[4] The facts are therefore

1 (2004) 219 CLR 562.

2 Because of the basis on which his application was refused, the decision was not subject to review under Pt 5 or Pt 7 of the Act: see ss 5(9)(a), 500(1)(c), (4)(c).

3 In 2020, a delegate of the Minister found that the Plaintiff is a refugee because he has a well-founded fear of persecution in Myanmar; and that there were substantial grounds for believing that, as a necessary and foreseeable consequence of him being removed from Australia to Myanmar, there was a real risk that he would suffer significant harm: see **SCB 35 [21(b), (d)]**.

4 They have also agreed that, as a matter of reasonable practicability, the Plaintiff is unlikely to be removed in the foreseeable future (**SCB 39 [45(c)]**): see *Al-Kateb* (2004) 219 CLR 562 at [122] (Gummow J).

indistinguishable from those in *Al-Kateb*.[5] In that case, Gleeson CJ treated the factual finding as equivalent to a finding that the purpose of removal had become "incapable of fulfilment".[6] To the same effect, in *Commonwealth v AJL20*, Gordon and Gleeson JJ treated the factual finding as meaning the Executive "*could not*" effect removal or, in other words, there was an "inability to remove".[7] Those observations apply here.

PART V: ARGUMENT

A THE CONSTRUCTION ISSUE (QUESTION 1)

6 In general terms, under the Act, an unlawful non-citizen must be detained by an officer of the Executive (s 189(1)) until the person is removed from Australia (s 196(1)). Relevantly for the Plaintiff, the Executive is obliged to remove the person "as soon as reasonably practicable" once the person makes a written request for removal (s 198(1)) or once an application for a substantive visa has been refused and finally determined (s 198(6)).

7 As Gleeson CJ said in *Al-Kateb*, the obligation to remove "assumes the possibility of removal".[8] The Act is drafted upon the correctness of that assumption (or "presupposition").[9] But, in some circumstances, the assumption may turn out to be wrong. As here, a situation may arise where there is no "practical possibility" of a person being removed.[10] How is the Act to be interpreted to meet that situation? The express terms provide no immediate answer: they do not say what is to happen to a person "if, through no fault of his [or her] own or of the authorities, he [or she] cannot be removed".[11]

8 Rather, the Act is susceptible of two interpretations to deal with that situation: (i) "if it never becomes practicable to remove the detainee, the detainee must spend the remainder of his or her life in detention" (the **indefinite detention construction**); or (ii) "if removal ceases to be a practical possibility, the detention must cease, at least for as long as that situation continues" (the **temporary detention construction**).[12] That being so, the Court must make a "constructional choice".

5 See also *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664 at [2] (McHugh J), [16] (Gummow J), [35] (Hayne J), [43] (Callinan J).

6 See *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at [143] (Crennan, Bell and Gageler JJ); *Commonwealth v AJL20* (2021) 273 CLR 43 at [133] (Edelman J).

7 (2021) 273 CLR 43 at [91] (Gordon and Gleeson JJ) (emphasis in original).

8 (2004) 219 CLR 562 at [17], see also [12], [18], [22]-[23] (Gleeson CJ), [122] (Gummow J), [193] (Kirby J).

9 See *Vunilagi v The Queen* [2023] HCA 24 at [142]-[145] (Edelman J).

10 *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at [116], see also at [146] (Gummow J), [530] (Bell J). See also *Al-Kateb* (2004) 219 CLR 562 at [109] (Gummow J).

11 *Al-Kateb* (2004) 219 CLR 562 at [21] (Gleeson CJ).

12 See *Plaintiff M47* (2012) 251 CLR 1 at [116]-[117] (Gummow J).

9 A similar choice arose in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*.[13] The primary issue in *Lim* was the validity of the (then) Div 4B of the Act, which was enacted while the plaintiffs were detained. But, for the period before its enactment, the Commonwealth relied upon (then) s 88 of the Act as authorising the detention of the plaintiffs. If a person arrived at an Australian port on a vessel, and was seeking unlawfully to enter Australia or was refused permission to enter Australia, s 88 authorised an officer to direct that the person be detained "until" that particular vessel departed Australia (or until the officer otherwise directed). In other words, s 88 was drafted on the assumption that the particular vessel would depart Australia.[14]

10 10 In *Lim*, the relevant vessels had been destroyed. The Commonwealth's argument that — despite the destruction of the vessels — s 88 authorised detention to continue indefinitely, was rejected by Brennan, Deane and Dawson JJ. Their Honours explained that once the "relevant vessel no longer existed (or, for that matter, once it became apparent that the relevant vessel would never depart), the temporary period pending departure, in which a person could lawfully be held in custody pursuant to s 88, came to an end".[15] The emphasised words indicate their Honours were of the view that s 88 would cease to authorise detention in circumstances where it became apparent that there was no real practical possibility of the vessel departing (for it could always be said that, as a theoretical possibility, a vessel may depart Australia unless it has been destroyed). That reasoning
20 applies equally to ss 189 and 196 of the Act.

11 However, in *Al-Kateb*, a majority of the Court adopted a radically different approach to the construction of ss 189 and 196 (and did not consider the applicability of the reasoning in *Lim* as regards s 88). Hayne J (with whom McHugh J and Heydon J relevantly agreed) and Callinan J adopted the indefinite detention construction. In dissent, Gleeson CJ, Gummow J and Kirby J preferred the temporary detention construction. In the Plaintiff's submission, the temporary detention construction is an available constructional choice for the reasons explained by Gleeson CJ. That being so, there are three principles of construction that strongly favour that construction: (i) the principle of legality; (ii) legislation is to be construed conformably with Australia's international obligations;
30 and (iii) legislation is to be construed to be valid.

[13] (1992) 176 CLR 1.
[14] Cf *Koon Wing Lau v Calwell* (1949) 80 CLR 533, where the detention was relevantly "until" the person was placed on board any vessel for deportation from Australia.
[15] (1992) 176 CLR 1 at 21-22 (emphasis added), see also at 43-44 (Toohey J), 63 (McHugh J).

The temporary detention construction

12 The process of construction must begin with the text of s 189(1). Although its terms are "open-textured",[16] the detention it authorises is not "without limit of time or with an absence of purpose".[17] As was emphasised recently by the majority in *AJL20*, the detention authorised by s 189(1) is necessarily temporary and purposive: it is detention that "must end" upon the fulfilment of the purpose for which it is imposed.[18] Those limits are supplied by s 196(1), which relevantly requires that a person detained under s 189 must be kept in immigration detention "until" he or she is, relevantly, "removed from Australia under section 198". In that way, the Act operates "upon the combined effect of two imperatives":
10 *first*, as required by s 198, the person must be removed from Australia "as soon as reasonably practicable"; and *second*, as required by ss 189 and 196, the person must be detained until removed.[19] As Gleeson CJ explained:[20]

> The first imperative is compound in its nature. It assumes the possibility of removal. It requires, not merely removal, but removal as soon as reasonably practicable. The second imperative, which builds upon the first, is, in terms, unqualified. As a matter of ordinary language, it is open to the construction that, because of its textual relationship to the first imperative, it is subject to a cognate qualification. This is supported by the purposive nature of the power (and duty) of administrative detention.

13 In other words, ss 189, 196 and 198 are all drafted on the same assumption: that the removal
20 of the person will be possible. That is evident from the text of s 196, in which the period of detention under s 189 is "defined by reference to the fulfilment of the purpose of removal under s 198".[21] The effect of the textual link between the three sections is that the purpose of the detention under ss 189 and 196 takes its character from the obligation to remove imposed under s 198.[22] Where removal of a person is possible, the purpose of detention is to facilitate that removal.[23] However, where the duty to remove under s 198 is incapable of fulfilment, the assumption underlying that section is falsified. It follows that the assumption underlying ss 189 and 196 is also falsified.

16 See *AJL20* (2021) 273 CLR 43 at [109], [125] (Edelman J).
17 (2004) 219 CLR 562 at [112], see also at [117] (Gummow J). See also Act, s 4(1), (4).
18 See *AJL20* (2021) 273 CLR 43 at [45] (Kiefel CJ, Gageler, Keane and Steward JJ).
19 (2004) 219 CLR 562 at [17] (Gleeson CJ).
20 (2004) 219 CLR 562 at [17] (Gleeson CJ) (emphasis added). See also *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54 at [120], [126]-[127] (Black CJ, Sundberg and Weinberg JJ).
21 (2004) 219 CLR 562 at [22] (Gleeson CJ), see also at [117], [121] (Gummow J).
22 *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at [26]-[29], [34] (the Court).
23 See *Al-Kateb* (2004) 219 CLR 562 at [17] (Gleeson CJ), [121]-[122] (Gummow J).

14 In those circumstances, on their proper construction, the provisions do not have any application in relation to the person. The obligation to detain the person is suspended, but "not forever displace[d]".[24] The person is subject to "further liability to renewed detention to facilitate that removal if the prospects of removal arrangements revive as a matter of real likelihood".[25] The provisions otherwise continue to apply "according to their tenor"; there is no "transformation" of the text.[26]

15 The temporary detention construction is supported by ss 196(4) and 196(5)(a), the express effect of which is that a person detained as a result of the cancellation of his or her visa under s 501 must continue to be detained unless a court finally determines that the detention is unlawful, or that the person is not an unlawful non-citizen, "whether or not there is a real likelihood of the person detained being removed from Australia under section 198 … in the reasonably foreseeable future". Those provisions are significant contextual indicators that, where Parliament intends to authorise detention in circumstances where there is no "real likelihood of the person detained being removed from Australia … in the reasonably foreseeable future", it has adopted a particular drafting technique to achieve that end. That the Parliament has not adopted that approach beyond the circumstances identified in s 196(4) was another matter to which the majority in *Al-Kateb* did not refer.[27]

16 For those reasons, the temporary detention construction is, at least, reasonably open. A significant error of the majority in *Al-Kateb* was to fail to recognise that point, and to conclude instead that the text was "clear".[28] But even "apparently clear" words "may be ascribed a different legal meaning after the process of construction is complete"[29] because "principles of construction may lead a court to adopt a construction that departs from the literal meaning of the words of a provision".[30] Here, completion of the process of construction requires the application of the three principles discussed below.

17 ***Principle of legality:*** The first principle is that "courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is

[24] (2004) 219 CLR 562 at [23] (Gleeson CJ). See also *Plaintiff M47* (2012) 251 CLR 1 at [148] (Gummow J), [534] (Bell J); *Al Masri* (2003) 126 FCR 54 at [128] (the Court).
[25] Cf *Al-Kateb* (2004) 219 CLR 562 at [124] (Gummow J).
[26] See Rose, "The High Court decisions in *Al-Kateb* and *Al Khafaji* – a different perspective" (2005) 8 *Constitutional Law and Policy Review* 58 at 60. Cf *Al-Kateb* (2004) 219 CLR 562 at [237], [241] (Hayne J).
[27] See *Al-Kateb* (2004) 219 CLR 562 at [115] (Gummow J).
[28] See *Al-Kateb* (2004) 219 CLR 562 at [33] (McHugh J), [241] (Hayne J), [298] (Callinan J).
[29] *R v A2* (2019) 269 CLR 507 at [32] (Kiefel CJ and Keane J), see also at [124] (Gageler and Bell JJ).
[30] *ENT19 v Minister for Home Affairs* (2023) 97 ALJR 509 at [87] (Gordon, Edelman, Steward and Gleeson JJ).

clearly manifested by unmistakable and unambiguous language".[31] "General words will rarely be sufficient" to manifest the requisite intention.[32] Instead, it must manifest by express words or necessary implication.[33] Two further points must be emphasised. *First*, the extent of the encroachment must be considered because "the greater the intrusion into a person's rights the more clarity of expression" will be required.[34] *Second*, liberty is the "most elementary and important of all common law rights"[35] and is possessed by all persons, not only citizens.[36] Thus, in this case, the principle is at its strongest.[37] Reflecting those two points, even where the purpose of the relevant statute involves an interference with liberty, the principle is "properly applied" to the "choice of that construction, if one be reasonably open, which involves the least interference with that liberty".[38]

18 On any view, ss 189 and 196 authorise a significant interference with liberty. But the indefinite detention construction involves a greater interference, for it supposes that a person in the Plaintiff's position may potentially be detained for life. The temporary detention construction does not; it therefore "better accommodates the basic right of personal liberty".[39] It should be preferred, unless it is "plain" that the Parliament has addressed the "consequence [of mandatory administrative detention for an indefinite period that may extend to the balance of the detainee's life] and that it is the intended consequence".[40] The Act does not expressly address that possibility; nor does it do so by necessary implication.[41] The principle of legality therefore favours the temporary detention construction.[42]

31 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [30] (Gleeson CJ).
32 *Coco v The Queen* (1994) 179 CLR 427 at 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).
33 *X7* (2013) 248 CLR 92 at [125] (Hayne and Bell JJ), [157] (Kiefel J).
34 *Roy v O'Neil* (2020) 272 CLR 291 at [83] (Keane and Edelman J). See also *Al Masri* (2003) 126 FCR 54 at [92] (the Court).
35 *Trobridge v Hardy* (1955) 94 CLR 147 at 15 (Fullagar J).
36 *Lim* (1992) 176 CLR 1 at 19 (Brennan, Deane and Dawson JJ). See also *Plaintiff M47* (2012) 251 CLR 1 at [532] (Bell J); *Al Masri* (2003) 126 FCR 54 at [89]-[91], [114] (the Court)
37 See *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at [159] (Nettle, Gordon, Edelman JJ); *Deputy Commissioner of Taxation v Shi* (2021) 273 CLR 235 at [98] (Edelman J).
38 *NAAJA v Northern Territory* (2015) 256 CLR 569 at [11] (French CJ, Kiefel and Bell JJ) (emphasis added); cf at [81] (Gageler J), where his Honour considered the principle of little assistance, but only because the purpose of the law was to authorise detention and the statutory language was "squarely addressed" to the duration of that detention.
39 *Plaintiff M47* (2012) 251 CLR 1 at [120] (Gummow J).
40 *Plaintiff M47* (2012) 251 CLR 1 at [529] (Bell J).
41 See *Al-Kateb* (2004) 219 CLR 562 at [21] (Gleeson CJ).
42 See *Plaintiff M47* (2012) 251 CLR 1 at [117] (Gummow J), [530] (Bell J); *Al Masri* (2003) 126 FCR 54 at [119], [132] (the Court); *Al-Kateb* (2004) 219 CLR 562 at [117] (Gummow J), [145], [193] (Kirby J).

19 ***International obligations:*** The second principle is that, where a constructional choice exists, "the courts should favour a construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party".[43] In discussing this principle in *Al-Kateb*, Hayne J overlooked the prohibition in Art 9(1) of the *International Covenant on Civil and Political Rights* that detention not be "arbitrary", referring only to the distinct requirement that the detention be on grounds and procedures that are authorised by law.[44] For the purpose of Art 9(1), detention will be arbitrary if it "is capricious, or has resulted from conduct which is unpredictable, unjust or unreasonable in the sense of not being proportionate to the legitimate aim sought".[45] That description is apt
10 where, as here, detention is imposed for the purpose of removal, but there is no real prospect of removal occurring in the reasonably foreseeable future.[46] Thus, this principle also favours the temporary detention construction.[47]

20 ***Chapter III:*** The third principle is that, if there is a constructional choice to be made "between reading a statutory provision in a way that will invalidate it and reading it in a way that will not, a court must always choose the latter course when it is reasonably open".[48] The indefinite construction is invalid: see Part C below. The temporary detention construction is not and, therefore, the principle requires that it be chosen by this Court.

Re-opening and overruling *Al-Kateb*: the construction issue

21 The majority in *Al-Kateb* "erred in a significant respect in the applicable principles of
20 statutory construction".[49] In particular, their Honours failed to recognise that the temporary detention construction was reasonably open, and therefore failed properly to apply each of the three principles identified above, resulting in the adoption of a construction of the Act which exceeds constitutional limits: see further Part C below. In the circumstances, the construction adopted by their Honours "should not be regarded as a precedent which in the present case forecloses further consideration of the matter".[50] That is particularly so where their Honours also did not address the reasoning in *Lim* as regards s 88 or the significance of s 196(5)(a) (see paragraphs 4 to 5 and 15 above). Further, the introduction of a new

43 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 (Mason CJ and Deane J).
44 (2004) 219 CLR 562 at [238]. An interference with liberty may be arbitrary even if it is lawful: see *Al Masri* (2003) 126 FCR 54 at [143]-[152] (the Court); *DPP (Vic) v Kaba* (2014) 44 VR 526 at [149]-[156] (Bell J).
45 See *Thompson v Minogue* (2021) 67 VR 301 at [50], [55] (Kyrou, McLeish and Niall JJA).
46 See *Al Masri* (2003) 126 FCR 54 at [153] (the Court).
47 See *Al-Kateb* (2004) 219 CLR 562 at [150], [193] (Kirby J); *Al Masri* (2003) 126 FCR 54 at [155] (the Court).
48 *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at [28] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
49 (2012) 251 CLR 1 at [120] (Gummow J).
50 *Plaintiff M47* (2012) 251 CLR 1 at [120] (Gummow J).

s 197C[51] means that, in a case such as the Plaintiff's where a "protection finding" has been made, the Executive cannot remove the person from Australia unless a "third country option" can be identified: see paragraph 4 above.[52] Thus, the legislative scheme is different to the one that operated when *Al-Kateb* was decided.[53]

22 However, if leave to re-open *Al-Kateb* on the construction issue is required, the Plaintiff seeks that leave. "[T]here are special considerations applicable to the doctrine of *stare decisis* in cases of statutory construction" because the "fundamental responsibility of a court when it interprets a statute is to give effect to the legislative intention as it is expressed in the statute".[54] Those special considerations are highlighted here, because the Court is
10 "called upon to consider an earlier decision in which there was a division of opinion among the justices of the Court constituting the majority and there was a persuasive dissent".[55] The four *John* factors must be viewed through that prism.

22.1 As to the first factor, the issue was not worked out by this Court in a significant succession of cases.[56] Since *Al-Kateb*, it has not been given further consideration by a majority of this Court.[57]

22.2 As to the second factor, there is an important difference between the reasons of the Justices constituting the majority. Callinan J alone considered that the purpose of detention was to be assessed by reference to the purpose being pursued by the Executive.[58] Since *AJL20*, that view is no longer open.[59]

20 22.3 As to the third factor, as Bell J said in *Plaintiff M47*, it is "glib" to say that *Al-Kateb* has not produced inconvenience.[60] For example, *Al-Kateb* has generated a scenario in which there is a real prospect that the Plaintiff, who is not yet 30 years old, may

51 *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth).
52 Cf *NATB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 506 at [53]-[55], [60]-[67] (Heerey, Finn and Conti JJ).
53 See *BNGP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 878 at [57]-[59] (Jagot J).
54 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).
55 *John* (1989) 166 CLR 417 at 440 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ). The dissents in *Al-Kateb* have "obvious force": see *Plaintiff M47* (2012) 251 CLR 1 at [351] (Heydon J).
56 *Plaintiff M47* (2012) 251 CLR 1 at [526] (Bell J).
57 Cf *Plaintiff M47* (2012) 251 CLR 1 at [351] (Heydon J); *Plaintiff M76* (2013) 251 CLR 322 at [123]-[127] (Hayne J), [179]-[190], [193], [199] (Kiefel and Keane JJ).
58 See *Al-Kateb* (2004) 219 CLR 562 at [291], [295], [298]-[299], [301]. See also *Re Woolley; Ex parte Applicants 276/2003* (2004) 225 CLR 1 at [262] (Callinan J).
59 (2021) 273 CLR 43 at [70]-[71] (Kiefel CJ, Gageler, Keane and Steward JJ).
60 (2012) 251 CLR 1 at [526]. See also, as to the systemic implications of the prevailing construction of the Act, *Sami v Minister for Home Affairs* [2022] FCA 1513 at [53]-[54], [56], [101], [107], [110] (Mortimer J).

be detained by the Executive for the rest of his life.

22.4 As to the fourth factor, "[t]o observe that the decision has been acted upon is not to identify some aspect of those circumstances that militates against reconsideration".[61]

23 For those reasons, to the extent necessary, leave to re-open *Al-Kateb* on the construction issue should be granted and the decision on that issue should be overruled.

B CONSTITUTIONAL ISSUE (QUESTION 2)

24 The constitutional holding of *Al-Kateb* is that "ss 189, 196 and 198 are valid insofar as they authorise and require detention of an unlawful non-citizen even where removal is not reasonably practicable in the foreseeable future".[62] The Plaintiff challenges that holding on the basis that it conflicts with Ch III of the Constitution. If that challenge is successful, ss 189 and 196, in their application to the Plaintiff, will be invalid.

Chapter III: separation of judicial power of the Commonwealth

25 "The Constitution is structured upon, and incorporates, the doctrine of the separation of judicial from executive and legislative powers".[63] The doctrine is no "mere theoretical construct":[64] it ensures the continued existence of "an independent and impartial judicial branch of government to enforce lawful limits on the exercise of public power".[65] Under our system of government, that "checking" role has historically included the determination of the rights of individuals — including the right to liberty — free from the influence of the Parliament and the Executive.[66] The doctrine thereby serves (at least) two constitutional objectives: "the guarantee of liberty and, to that end, the independence of Ch III judges".[67]

26 Chapter III gives effect to the doctrine, and advances those two objectives, by constituting "an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested".[68] One consequence is that only a "court" is able to exercise the judicial power of the Commonwealth. As a corollary, the Parliament is prohibited from conferring

61 *Plaintiff M47* (2012) 251 CLR 1 at [526], see also at [533] (Bell J).
62 *AJL20* (2021) 273 CLR 43 at [26] (Kiefel CJ, Gageler, Keane and Steward JJ).
63 *Lim* (1992) 176 CLR 1 at 26 (Brennan, Deane and Dawson JJ).
64 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 12 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).
65 *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at [104] (Hayne, Crennan, Kiefel and Bell JJ)
66 *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at [140] (Gageler J).
67 *Wilson* (1996) 189 CLR 1 at 11-12 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ). See also *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at [20] (Kiefel CJ, Bell, Keane and Steward JJ), [67] (Gageler J), [136]-[141] (Gordon J); *Garlett v Western Australia* (2022) 96 ALJR 888 at [163], [169]-[174], [199] (Gordon J).
68 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

upon the Executive any part of the judicial power of the Commonwealth.[69] That prohibition directs attention to the content of the judicial power of the Commonwealth. It cannot be exhaustively defined. But there are "some functions which, by reason of their nature or because of historical considerations, have become established as essentially and exclusively judicial in character".[70]

The authority of *Lim*

27 Within that constitutional context, *Lim* establishes that "the power to order that a citizen be involuntary confined in custody is … part of the judicial power of the Commonwealth entrusted exclusively to Ch III courts".[71] That "general proposition"[72] is the product of two more specific propositions: (i) the "adjudgment and punishment of criminal guilt under a law of the Commonwealth" is an exclusively judicial function;[73] and (ii) the "involuntary detention of a [person] in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudgment and punishing criminal guilt".[74]

28 That last proposition — the *Lim* "principle" or "observation" — is now "well accepted".[75] The principle recognises that it is the "involuntary deprivation of liberty by itself that ordinarily constitutes punishment".[76] As such, one consequence of the principle is that the "***default characterisation***" of detention is punitive.[77] In that way, the principle operates as a "safeguard on liberty".[78]

29 There are, however, exceptions to the *Lim* principle (and therefore to the general proposition). There are few such exceptions because the Court has been "vigilant in ensuring that the occasions for non-punitive detention are not abused or extended for illegitimate purposes".[79] One established exception, recognised and applied in *Lim* itself,

[69] *Lim* (1992) 176 CLR 1 at 26-27 (Brennan, Deane and Dawson JJ).
[70] *Lim* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ).
[71] *Lim* (1992) 176 CLR 1 at 28 (Brennan, Deane and Dawson JJ).
[72] *Benbrika* (2021) 272 CLR 68 at [18] (Kiefel CJ, Bell, Keane and Steward JJ).
[73] *Lim* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ).
[74] *Lim* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ).
[75] *Garlett* (2022) 96 ALJR 888 at [292] (Gleeson J), and see fn 102 below.
[76] *Garlett* (2022) 96 ALJR 888 at [176] (Gordon J), see also at [124]-[135] (Gageler J); *Benbrika* (2021) 272 CLR 68 at [84] (Gageler J).
[77] *NAAJA* (2015) 256 CLR 569 at [98] (Gageler J). See also *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at [23]-[24] (Kiefel CJ, Bell, Keane and Edelman JJ); *Benbrika* (2021) 272 CLR 68 at [40] (Kiefel CJ, Bell, Keane and Steward JJ), [73] (Gageler J), [140] (Gordon J), [201] (Edelman J).
[78] *Benbrika* (2021) 272 CLR 68 at [36], see also at [19] (Kiefel CJ, Bell, Keane and Steward JJ), [71]-[73] (Gageler J), [136]-[140], [150] (Gordon J).
[79] *Fardon v A-G (Qld)* (2004) 223 CLR 575 at [217] (Callinan and Heydon JJ).

concerns the detention of "aliens" in a "narrow range"[80] of circumstances — namely, in "the context and for the purposes of" executive powers to "exclude, admit and deport".[81]

The *Lim* exception: an incident of the power to exclude, admit and deport

30 In *Lim*, Brennan, Deane and Dawson JJ (with whom Mason CJ relevantly agreed) carefully explained why that exception is "fully justifiable for reasons of history".[82] The starting point for that explanation is that "[t]he common law does not recognise any executive warrant authorising arbitrary detention".[83] Therefore, absent legislative authority, the Executive does not, and has never had, power to detain an alien.[84] However, the Executive historically has had powers to exclude, admit and deport an alien.[85] Those historical powers
10 derived from the recognition by international law that the power to exclude or expel an alien is an incident of "sovereignty over territory".[86] It is the "vulnerability" of aliens to the exercise of those powers that is the "most important" difference between the common law rights and immunities of citizens and aliens.[87]

31 It is against that historical background that s 51(xix) of the Constitution empowers the Parliament to enact laws that confer upon the Executive powers to exclude, admit and deport an alien.[88] Reflecting the historical vulnerability of aliens to the exercise of those powers, when those powers are conferred by statute, they are not punitive in character.[89] And it is that same historical vulnerability that has the effect of significantly "diminish[ing] the protection which Ch III of the Constitution provides".[90] However, that does not mean
20 that aliens are afforded no protection by Ch III: the "beneficiaries" of the *Lim* principle

80 *AJL20* (2021) 273 CLR 43 at [128] (Edelman J).
81 *Lim* (1992) 176 CLR 1 at 32 (Brennan, Deane and Dawson JJ).
82 See *Fardon* (2004) 223 CLR 575 at [155] (Kirby J), approved in *Garlett* (2022) 96 ALJR 888 at [140], see also at [154] (Gageler J), [179]-[180] (Gordon J); *Benbrika* (2021) 272 CLR 68 at [36] (Kiefel CJ, Bell, Keane and Steward JJ), [209], [213] (Edelman J).
83 *Plaintiff M76* (2013) 251 CLR 322 at [139] (Crennan, Bell and Gageler JJ).
84 *Lim* (1992) 176 CLR 1 at 19, 22 (Brennan, Deane and Dawson JJ). See also *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at [148]-[149] (Hayne and Bell JJ); *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at [147]-[159] (Gageler J); *AJL20* (2021) 273 CLR 43 at [80] (Gordon and Gleeson JJ).
85 At least with statutory authority: see *Lim* (1992) 176 CLR 1 at 29 (Brennan, Deane and Dawson JJ); *CPCF* (2015) 255 CLR 514 at [275] (Kiefel J).
86 *Lim* (1992) 176 CLR 1 at 29 (Brennan, Deane and Dawson JJ). See also *CPCF* (2015) 255 CLR 514 at [182] (Crennan J), [259]-[279] (Kiefel J), [479]-[484] (Keane J).
87 *Lim* (1992) 176 CLR 1 at 29 (Brennan, Deane and Dawson JJ).
88 See *Lim* (1992) 176 CLR 1 at 30-31 (Brennan, Deane and Dawson JJ).
89 See *Falzon* (2018) 262 CLR 333 at [29] (Kiefel CJ, Bell, Keane and Edelman JJ).
90 *Lim* (1992) 176 CLR 1 at 29 (Brennan, Deane and Dawson JJ).

include both aliens and citizens.[91] Rather, it is to recognise that it is the historical vulnerability of aliens to the exercise of executive powers to exclude, admit and deport that marks out the boundary of the *Lim* exception.[92]

32 That being so, the effect of that exception is that — under s 51(xix) and without infringing Ch III — the Parliament may enact a law that authorises the detention of an alien by the Executive, but it may only do so "in the context and for the purposes of" an executive power to exclude, admit or deport.[93] When so conferred, the authority to detain an alien "constitutes" an incident of the executive power.[94] In those circumstances, the authority to detain "takes its character from the executive powers to exclude, admit and deport of which it is an incident".[95]And because those powers are non-punitive, the authority to detain bears that same character.[96]

The *Lim* exception: conditions on validity

33 It follows that, where the Parliament enacts a law that is said to confer upon the Executive authority to detain a person for the purpose of "removal" from Australia, it is necessary for the scope of that authority to be confined so that it does not authorise detention that does not have that purpose.[97] The Plaintiff submits that a law will be so confined, and therefore not infringe Ch III, if it meets two conditions.

34 The **first condition** is that the law must only authorise detention in circumstances where the identified purpose of the detention — removal of the person from Australia — is "reasonably capable of being achieved" or "capable of fulfilment".[98] That involves an assessment of whether the "achievement" of that purpose is a "practical possibility".[99] If there is no practical possibility of removal, and detention is nonetheless purportedly authorised for that purpose, it cannot be said that there exists a rational "connection" between "the detention and … removal".[100]

91 See *Vasiljkovic v Commonwealth* (2006) 227 CLR 614 at [84] (Gummow and Hayne JJ); *Falzon* (2018) 262 CLR 333 at [33] (Kiefel CJ, Bell, Keane and Edelman JJ); *Benbrika* (2021) 272 CLR 68 at [71] (Gageler J); *SDCV v Director-General of Security* (2022) 96 ALJR 1002 at [174] (Gordon J), [222] (Edelman J).
92 See *Re Woolley* (2004) 225 CLR 1 at [24], [28] (Gleeson CJ).
93 *Lim* (1992) 176 CLR 1 at 32 (Brennan, Deane and Dawson JJ).
94 *Lim* (1992) 176 CLR 1 at 32 (Brennan, Deane and Dawson JJ).
95 *Lim* (1992) 176 CLR 1 at 32 (Brennan, Deane and Dawson JJ).
96 *Lim* (1992) 176 CLR 1 at 32 (Brennan, Deane and Dawson JJ).
97 *Falzon* (2018) 262 CLR 333 at [31] (Kiefel CJ, Bell, Keane and Edelman JJ).
98 *NAAJA* (2015) 256 CLR 569 at [99] (Gageler J); *CPCF* (2015) 255 CLR 514 at [374] (Gageler J); *Plaintiff M68* (2016) 257 CLR 42 at [184]-[185] (Gageler J), [386] (Gordon J). S
99 *CPCF* (2015) 255 CLR 514 at [218] (Crennan J).
100 Cf *AJL20* (2021) 273 CLR 43 at [25] (Kiefel CJ, Gageler, Keane and Steward JJ).

35 The **second condition** is that the law must only authorise detention that is "limited to what is reasonably capable of being seen as necessary" for the purpose of removing the person from Australia.[101] That condition reflects the "constitutional holding" in *Lim*.[102] It is a specific manifestation of the general requirement that, for detention imposed otherwise than as a result of adjudgment and punishment of criminal guilt, the detention must be "reasonably capable of being seen as necessary for a legitimate non-punitive objective".[103]

36 If both of those conditions are met, it can be inferred that, in truth, the law confers upon the Executive authority to detain for the purpose of removal.[104] That being so, the authority to detain "constitutes an incident of that executive power".[105] Taking its character from the statutory power to which it is incidental, the detention so authorised will properly be characterised as non-punitive.[106] The "default characterisation" of the detention as punitive will therefore be "displaced".[107]

37 However, if either condition is not satisfied, it cannot be said that the true purpose of the law authorising detention is that of removal. Alternatively, it might be concluded that the law pursues that purpose in a manner that is incompatible with Ch III.[108] Either way, the authority to detain will not properly be seen as an incident of the power to remove.[109] The connection between detention and the purpose of removal, required by Ch III, will be

[101] *Lim* (1992) 176 CLR 1 at 33 (Brennan, Deane and Dawson JJ).

[102] See *Re Woolley* (2004) 225 CLR 1 at [23], [25], [28] (Gleeson CJ), [164]-[165] (Gummow J); *Plaintiff M76* (2013) 251 CLR 322 at [138]-[140] (Crennan, Bell and Gageler JJ); *Plaintiff S4* (2014) 253 CLR 219 at [26] (the Court); *Plaintiff M68* (2016) 257 CLR 42 at [97]-[98] (Bell J), [149] (Gageler J), [386] (Gordon J); *Falzon* (2018) 262 CLR 333 at [27] (Kiefel CJ, Bell, Keane and Edelman JJ), [82] (Gageler and Gordon JJ), *Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582 at [21] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).

[103] *Kruger v Commonwealth* (1997) 190 CLR 1 at 162 (Gummow J). See also *Benbrika* (2021) 272 CLR 68 at [78] (Gageler J) and *Garlett* (2022) 96 ALJR 888 at [143]-[144] (Gageler J).

[104] See *Falzon* (2018) 262 CLR 333 at [29], [31] (Kiefel CJ, Bell, Keane and Edelman JJ). See also *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 472-473 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at [117] (Gageler J); Chordia, *Proportionality in Australian Constitutional Law* (2020) at 121-124.

[105] *Lim* (1992) 176 CLR 1 at 32 (Brennan, Deane and Dawson JJ). See also *Spence v Queensland* (2019) 269 CLR 355 at [60]-[63] (Kiefel CJ, Bell, Gageler and Keane JJ).

[106] *Lim* (1992) 176 CLR 1 at 32-33 (Brennan, Deane and Dawson JJ). See also *Citta Hobart Pty Ltd v Cawthorn* (2022) 96 ALJR 476 at [22], [26] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

[107] *Benbrika* (2021) 272 CLR 68 at [40] (Kiefel CJ, Bell, Keane and Steward JJ).

[108] See *Benbrika* (2021) 272 CLR 68 at [77]-[79] (Gageler J); *Alexander* (2022) 96 ALJR 560 at [101], [106] (Gageler J); *Garlett* (2022) 96 ALJR 888 at [144]-[152] (Gageler J); *SDCV* (2022) 96 ALJR 1002 at [138] (Gageler J), [176]-[179] (Gordon J), [231], [238]-[241] (Edelman J).

[109] *Lim* (1992) 176 CLR 1 at 33 (Brennan, Deane and Dawson JJ).

"broken".[110] The detention will not "escape" its default punitive character and the law purportedly authorising that detention will infringe Ch III.[111]

38 In addition, to avoid infringing Ch III, the law authorising detention must also meet a **third condition**. That is that the "duration of any form of detention, and thus its lawfulness, must be capable of being determined" by a court, and ultimately this Court, "at any time and from time to time".[112] The condition exists because Chapter III requires that any executive detention be subject to "judicial scrutiny".[113] The requirement has two aspects, directed to distinct questions.[114] *First*, the lawfulness of the detention must be able to be "determined" by a court.[115] As emphasised in *Plaintiff M96A*, that requires that there "be objectively determinable criteria for detention".[116] *Second*, the lawfulness of the detention must be able to be "enforced" by a court.[117] That requires a court to be able to issue a remedy that compels the Executive to release a person from unlawful detention (by *habeas corpus*),[118] or, as emphasised by the majority in *AJL20*, issue a remedy that compels the Executive to comply with any statutory limit on the detention (such as mandamus).[119]

39 It is necessary to say something more about *AJL20*. In that case, the majority explained that ss 189 and 196 of the Act satisfy the second and third conditions identified above because the authority to detain an unlawful non-citizen under those provisions is "hedged about by enforceable duties" (including those imposed by ss 198(1) and 198(6)), which duties give effect to "legitimate non-punitive purposes" (including the purpose of "removal").[120] As their Honours observed, the existence of those duties means that detention "must end", relevantly upon the removal of the non-citizen from Australia.[121] However, unlike both *Al-Kateb* and this case, *AJL20* was not a case "where the Executive *could not*" remove a

[110] See *Plaintiff M68* (2016) 257 CLR 42 at [185] (Gageler J), [392] (Gordon J).
[111] *NAAJA* (2015) 256 CLR 569 at [99] (Gageler J). See also *Plaintiff M68* (2016) 257 CLR 42 at [98] (Bell J).
[112] *Plaintiff S4* (2014) 253 CLR 219 at [29] (the Court).
[113] See *Plaintiff M96A* (2017) 261 CLR 582 at [31] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ); *AJL20* (2021) 273 CLR 43 at [80] (Gordon and Gleeson JJ).
[114] See *Plaintiff M68* (2016) 257 CLR 42 at [165] (Gageler J).
[115] *Plaintiff S4* (2014) 253 CLR 219 at [29] (the Court).
[116] (2017) 261 CLR 582 at [31] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ), see also at [45] (Gageler J).
[117] See *Plaintiff S4* (2014) 253 CLR 219 at [29] (the Court).
[118] *Lim* (1992) 176 CLR 1 at 28 (Brennan, Deane and Dawson JJ); *Plaintiff M68* (2016) 257 CLR 42 at [161] (Gageler J); *AJL20* (2021) 273 CLR 43 at [92], [94], [96]-[97] (Gordon and Gleeson JJ), [130], [143], [155] (Edelman J).
[119] *AJL20* (2021) 273 CLR 43 at [44]-[45]. [52]-[53], [73] (Kiefel CJ, Gageler, Keane and Steward JJ).
[120] *AJL20* (2021) 273 CLR 43 at [44] (Kiefel CJ, Gageler, Keane and Steward JJ).
[121] *AJL20* (2021) 273 CLR 43 at [45] (Kiefel CJ, Gageler, Keane and Steward JJ).

person.[122] For that reason, no challenge was made to the "constitutional holding" in *Al-Kateb*, and the correctness of that decision did not otherwise arise for consideration.[123] Accordingly, there was no occasion for the majority to consider whether ss 189 and 196 satisfy the second and third conditions in circumstances where there is no real prospect of removal in the reasonably foreseeable future. Nor was there any occasion for the majority to consider the existence of the first condition identified above, or whether ss 189 and 196 comply with that condition. The majority reasoning — including the statement that ss 189 and 196 are "valid in all their potential applications"[124] — must be read in that context. Having earlier expressly observed that they were not called upon to decide whether those provisions are valid in their application to a person in the Plaintiff's position, their decision could not stand as authority against the Plaintiff's arguments in this case or otherwise provide the answer to Question 2 in the Special Case.[125] It is to that question we now turn.

Sections 189 and 196 in their application to the Plaintiff

Do ss 189 and 196, in their application to the Plaintiff, infringe Ch III of the Constitution? The answer is "yes". That is because, in the Plaintiff's circumstances, none of the three conditions identified above would be satisfied.

As to the **first condition**, as identified at the outset (see paragraph 5 above), because there is no real prospect of the Plaintiff being removed in the reasonably foreseeable future, this is a case where removal has "become incapable of fulfilment".[126] That being so, it is not "possible to discern" how the detention can "further the purpose" of removal.[127] Put another way, and to use Gummow J's words from *Al-Kateb*, "the prospects of removal to another country are so remote that continued detention cannot be for the purpose of removal".[128]

As to the **second condition**, because there is no real prospect of the Plaintiff being removed in the reasonably foreseeable future, it cannot be said that any further period of detention

[122] *AJL20* (2021) 273 CLR 43 at [91] (Gordon and Gleeson JJ) (emphasis in original).
[123] See *AJL20* (2021) 273 CLR 43 at [26] (Kiefel CJ, Gageler, Keane and Steward JJ), [106] (Edelman J).
[124] *AJL20* (2021) 273 CLR 43 at [45], see also at [43] (Kiefel CJ, Gageler, Keane and Steward JJ).
[125] See *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 214 at [42] (Kiefel CJ, Gageler and Gleeson JJ), [182] (Edelman J), [320] (Jagot J).
[126] See *Plaintiff M68* (2016) 257 CLR 42 at [185] (Gageler J), [392] (Gordon J).
[127] *McCloy v New South Wales* (2015) 257 CLR 178 at [55] (French CJ, Kiefel, Bell and Keane JJ). See, by analogy, *Unions NSW v New South Wales* (2013) 252 CLR 530 at [51]-[60] French CJ, Hayne, Crennan, Kiefel and Bell JJ). The same logic underlies McHugh J's observation in *Al-Kateb* at [42] that "[i]f the power to detain aliens for the purpose of deportation was merely an incidental power, it would be impossible to justify the detention of an alien once it appeared that deportation could not be effected or could not be effected in the foreseeable future", albeit that observation was misdirected to the question of whether the provisions are within the incidental aspect of the aliens power.
[128] *Al-Kateb* (2004) 219 CLR 562 at [98]. See also *Al Masri* (2003) 126 FCR 54 at [74] (the Court); *Re Woolley* (2004) 225 CLR 1 at [88] (McHugh J); *AJL20* (2021) 273 CLR 43 at [103] (Gordon and Gleeson JJ).

is "reasonably capable of being seen to be necessary" to facilitate that removal. The contrast with the position in *Lim* on this point is stark. There, Brennan, Deane and Dawson JJ (with whom Mason CJ relevantly agreed) reached the conclusion that the relevant provisions of the Act complied with the second condition only because it was "always" within the power of a detained person to bring his or her detention "to an end by requesting to be removed from Australia" (under the equivalent of present s 198(1)), taken together with the express time limitations otherwise imposed by the Act (which have no equivalent in the present Act).[129] Here, the Plaintiff has made a request to be removed but, despite that request, there is no real prospect of his detention ending in the reasonably foreseeable future. That reinforces the point that, in their application to the Plaintiff, ss 189 and 196 do not comply with the second condition.

43 As to the **third condition**, in circumstances where there is no real prospect of the Plaintiff being removed in the reasonably foreseeable future, it is not possible for this Court to conclude, by reference to any meaningful criteria, when the Plaintiff's detention will come to an end.[130] Further, if a court issued mandamus to compel the Executive to perform its duty to remove the Plaintiff as soon as reasonably practicable, that would not alter the prospect of the Plaintiff being removed.[131] The duty to remove the Plaintiff is therefore "effectively unenforceable".[132] As a result, the period of the Plaintiff's current detention is at the unconstrained discretion of the Executive.[133]

44 For those reasons, ss 189 and 196, in their application to the Plaintiff, are invalid for infringing Ch III. It is the Parliament's intention that ss 189 and 196 are "not to have that invalid application", but to have "every valid application".[134] Accordingly, the provisions must be severed (in the sense of "partially disapplied") so that they have no application to the Plaintiff.[135] Question 2 must be answered "yes".

Re-opening and overruling *Al-Kateb*: the constitutional issue

45 The analysis above is broadly consistent with the analysis of Gummow J in *Al-Kateb*, but

[129] *Lim* (1992) 176 CLR 1 at 34. See also *Al-Kateb* (2004) 219 CLR 562 at [109] (Gummow J).
[130] Cf *Plaintiff M68* (2016) 257 CLR 42 at [185] (Gageler J); *Al-Kateb* (2004) 219 CLR 562 at [140] (Gummow J).
[131] Cf *AJL20* (2021) 273 CLR 43 at [52]-[53] (Kiefel CJ, Gageler, Keane and Steward JJ).
[132] See *BHL19 v Commonwealth (No 2)* [2022] FCA 313 at [197], see also at [164], [170], [194] (Wigney J).
[133] See *AJL20* (2021) 273 CLR 43 at [97], [99] (Gordon and Gleeson JJ); *Al-Kateb* (2004) 219 CLR 562 at [140] (Gummow J), [155] (Kirby J).
[134] Act, s 3A(1). See also *Acts Interpretation Act 1901* (Cth), s 15A.
[135] *Clubb v Edwards* (2019) 267 CLR 171 at [141] (Gageler J), [338]-[340] (Gordon J), [429] (Edelman J); *Farm Transparency International Ltd v New South Wales* (2022) 96 ALJR 655 at [122], [191] (Gordon J), [217] (Edelman J), [269] (Steward J); *Vunilagi* [2023] HCA 24 at [144] (Edelman J). Alternatively, as noted at paragraph 20 above, those same matters require the adoption of the temporary detention construction.

conflicts with the analysis of Hayne J (with whom Heydon J relevantly agreed), McHugh J and Callinan J. That conflict reflects the "division of opinion" in *Al-Kateb* "as to the effect to be given to *Lim*".[136] But, whatever the position at the time *Al-Kateb* was decided, there can now be no doubt as to the effect to be given to *Lim*. As noted at paragraph 28 above, the *Lim* principle is now "well accepted". That is the correct position: the principle emerges from the reasoning of Brennan, Deane and Dawson JJ in *Lim*, with which Mason CJ relevantly agreed. That reasoning reflects "the principles for which the case stands as authority".[137] Gummow J was therefore correct to endorse it in *Al-Kateb*. That reasoning is squarely founded on Ch III of the Constitution.

10 46 By contrast, members of the majority in *Al-Kateb* appear to have been influenced by Gaudron J's judgment in *Kruger v Commonwealth*, where her Honour expressed reservations about the reasoning of Brennan, Deane and Dawson JJ in *Lim* and, in particular, its foundation in Ch III. That "early criticism" received support from Hayne J in *Al-Kateb* and very shortly thereafter from McHugh J in *Re Woolley*.[138] Gaudron J's influence can be seen most clearly in Hayne J's statements in *Al-Kateb* that the "reasonably capable of being seen as necessary" test is "more apposite to the identification of whether the law is a law with respect to" a head of power, and that the relevant "Ch III question" cannot be answered by applying that test.[139] Those statements reflect Gaudron J's articulation of the "true constitutional position", namely "subject to certain exceptions, a
20 law authorising detention in custody, divorced from any breach of the law, is not a law on a topic with respect to which s 51 confers legislative power".[140] But that position has never been accepted by a majority of this Court, and it is inconsistent with *Lim*. To focus on the scope of the heads of power is to "obscure" the limits imposed by Ch III.[141]

47 The majority in *Al-Kateb* may also have been influenced by what Gummow J observed to have been the focus of submissions in that matter, namely the question whether the detention authorised by the statute was punitive or non-punitive in character.[142] Thus, Hayne J said that, if that is the correct focus, then it is important that it was "not inflicted

[136] *Vasiljkovic* (2006) 227 CLR 614 at [108] n 103 (Gummow and Hayne JJ).
[137] *Re Woolley* (2004) 225 CLR 1 at [14] (Gleeson CJ). See also *Plaintiff M76* (2013) 251 CLR 322 at [138] (Crennan, Bell and Gageler JJ).
[138] See *Garlett* (2022) 96 ALJR 888 at [292] (Gleeson J), citing *Re Woolley* (2004) 225 CLR 1 at [57] (McHugh J); *Al-Kateb* (2004) 219 CLR 562 at [258] (Hayne J).
[139] (2004) 219 CLR 562 at [252], [256]; see also at [251], [258]-[259]; *Re Woolley* (2004) 225 CLR 1 at [59] (McHugh J).
[140] *Kruger* (1997) 190 CLR 1 at 111.
[141] *Plaintiff M68* (2016) 257 CLR 42 at [384] (Gordon J).
[142] See *Al-Kateb* (2004) 219 CLR 562 at [135].

… as punishment for any actual or assumed wrongdoing".[143] To similar effect, his Honour thought it important that the detention was not imposed in consequence of the commission of an offence.[144] However, the difficulty with both of those observations is that they place too much emphasis on the form of the provisions, and pay insufficient attention to Brennan, Deane and Dawson JJ's warning in *Lim* that it would "be beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt".[145] The focus of the submissions in *Al-Kateb* may also explain Hayne J's observation that, because the detention authorised is "mandatory", there is "nothing about the decision making that must precede detention which bespeaks an exercise of the judicial power".[146] However, it is not necessary to search for an exercise of discretion that "bespeaks" judicial power in view of the default characterisation approach adopted in *Lim.*

48 In any event, whatever the explanation, the result was that the majority did not in fact apply the principles in *Lim*.[147] McHugh J acknowledged in *Re Woolley* that "[n]one of the Justices in the majority applied the 'reasonably capable of being seen as necessary' test as the determinative test for ascertaining whether the purpose of the detention was punitive".[148] In other words, his Honour acknowledged that none of the majority judges — including his Honour — applied the constitutional holding in *Lim*. Indeed, his Honour went as far as to say nothing in the reasoning or the decision in *Lim* assisted Mr Al-Kateb.[149]

49 In reaching that conclusion, McHugh J appears to have adopted the view that a law can authorise detention for the purpose of simply segregating an alien from the community, as an end in itself.[150] Parts of Hayne J's reasoning suggest his Honour shared that view.[151] But that view cannot be reconciled with *Lim*. The premise underlying the *Lim* exception is that

[143] (2004) 219 CLR 562 at [261].
[144] (2004) 219 CLR 562 at [266]. And see the persuasive critique of this reasoning in Gordon, "Imprisonment and the Separation of Judicial Power: A Defence of a Categorical Immunity from Non-Criminal Detention" (2012) 36 *Melbourne University Law Review* 41 at 65-66.
[145] *Lim* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ). See also *Benbrika* (2021) 272 CLR 68 at [27] (Kiefel CJ, Bell, Keane and Steward JJ).
[146] (2004) 219 CLR 562 at [254]. See also *Re Woolley* (2004) 225 CLR 1 at [224] (Hayne J).
[147] See *Al-Kateb* (2004) 219 CLR 562 at [45] (McHugh J), [252], [256] (Hayne J), [298] (Callinan J).
[148] *Re Woolley* (2004) 225 CLR 1 at [71], see also at [72]-[78].
[149] *Al-Kateb* (2004) 219 CLR 562 at [49].
[150] See (2004) 219 CLR 562 at [46], [48], [74] (McHugh J).
[151] See *Al-Kateb* (2004) 219 CLR 562 [267] (Hayne J). Callinan J did not decide the issue: at [289]. See further *Re Woolley* (2004) 225 CLR 1 at [227] (Hayne J). In *Plaintiff M47* (2012) 251 CLR 1 at [346], Heydon J did not reaffirm support for this view but asserted a new exception to the *Lim* principle.

"the power of the Parliament to authorise the administrative detention of aliens is not at large and that the power does not extend to authorise detention for any purpose selected by the Parliament".[152] For historical reasons, the *Lim* exception permits detention of an alien as an incident of the executive power to exclude, admit and deport.[153] That carefully crafted exception would be rendered meaningless if the Parliament had power to enact "sustained laws for the segregation by incarceration of aliens without their commission of any offence requiring adjudication and for a purpose unconnected with the entry, investigation, admission or deportation of aliens".[154]

50 Finally, and relatedly, Hayne J emphasised that the "premise for the debate is that the non-citizen does not have permission to be at liberty in the community".[155] However, the correct premise, as established by *Lim*, is that "[a]n alien within Australia, whether lawfully or not, cannot be detained except under and in accordance with law".[156] The Ch III question is whether the statute authorising the detention is valid. If the statute is invalid then the alien will be "at liberty" in the community but will remain "vulnerable" to removal (and to lawful detention to facilitate that removal) by reason of their status as an alien.

51 The above demonstrates that "essential parts" of the majority reasoning in *Al-Kateb* are "erroneous"[157] and, indeed, are "manifestly wrong" in light of *Lim*.[158] With *Lim* having been affirmed more recently, it is also now evident that the majority reasoning is against the "definite stream of authority" and "has proven to be incompatible with the ongoing development of constitutional jurisprudence".[159] Further, the constitutional analysis of one member of the majority (Callinan J) was founded on a construction of the Act that is no longer open: see paragraph 22.2 above. That ongoing development of the law may mean that this case is not "governed" by *Al-Kateb*.[160]

[152] *Al-Kateb* (2004) 219 CLR 562 at [131], see also at [139]-[140] (Gummow J); *AJL20* (2021) 273 CLR 43 at [127] (Edelman J).
[153] *Falzon* (2018) 262 CLR 333 at [39] (Kiefel CJ, Bell, Keane and Edelman JJ).
[154] *Al-Kateb* (2004) 219 CLR 562 at [140]. See also *Re Woolley* (2004) 225 CLR 1 at [150]-[151] (Gummow J). That is not to deny it is possible that, in an appropriate case, a further exception might be developed. But any new exception would need to be crafted to cohere with the *Lim* exception and be developed by reference to history or by analogy: see *Plaintiff M68* (2016) 257 CLR 42 at [389], [395], [401] (Gordon J).
[155] (2004) 219 CLR 562 at [254].
[156] See *Plaintiff S4* (2014) 253 CLR 219 at [24] (the Court).
[157] *Street v Queensland Bar Association* (1989) 168 CLR 461 at 588 (McHugh J).
[158] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 554 (the Court).
[159] *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [68], [71] (French CJ), see also at [189] (Gummow and Hayne JJ).
[160] See *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182 at 201 (the Court).

52 But, if leave is required, those same factors point powerfully in favour of re-opening the constitutional holding of *Al-Kateb*. So too does the fact that "the interpretation of the Constitution is involved and, whilst precedent has a part to play, ultimately it is the Constitution itself, and not authority, which must provide the answer".[161] That is especially important where, as here, the constitutional question is of "vital" importance.[162] We otherwise refer to the discussion of the *John* factors at paragraph 22 above, emphasising that the Court "may more readily reconsider constitutional issues than it should reconsider questions of statutory construction".[163] For those reasons, to the extent necessary, leave to re-open the constitutional holding in *Al-Kateb* should be granted and it should be overruled. "The Court has a responsibility to set the matter right".[164]

C RELIEF (QUESTION 3)

53 Sections 189 and 196 do not authorise the Plaintiff's detention, based only on "the hope of the Minister, triumphing over present experience, that at some future time some other State may be prepared to receive" him.[165] To the extent that they purport to do so, they infringe Ch III and are invalid in their application to the Plaintiff. Either way, there being no other statutory authority for the Plaintiff's detention since 20 May 2023 at the latest (see paragraph 5 above), his detention has been unlawful since at least that date, and he is entitled to *habeas corpus* and declaratory relief.

PART VI: ORDERS SOUGHT

54 The questions in the Special Case (**SCB 39-40 [46]**) should be answered: (1) No, and they have not done so since 30 May 2023 at the latest; (2) Yes; (3) The relief at paras (4) to (9) of Pt 1 of the Application for a Constitution or Other Writ (**SCB 6**);[166] (4) The Defendants.

PART VII: ESTIMATE OF TIME

55 It is estimated that up to 3 hours will be required for the Plaintiff's oral argument.

Dated: 1 September 2023

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[161] *Street* (1989) 168 CLR 461 at 549 (Dawson J).
[162] *Lange* (1997) 189 CLR 520 at 554 (the Court).
[163] *Plaintiff M76* (2013) 251 CLR 322 at [128] (Hayne J). See also *Vunilagi* [2023] HCA 24 at [162] (Edelman J), placing greater weight on the first two factors, which are both strongly in favour of re-opening here.
[164] *Street* (1989) 168 CLR 461 at 489 (Mason CJ).
[165] *Al-Kateb* (2004) 219 CLR 562 at [125] (Gummow J).
[166] Subject to the insertion of the following words at the end of the declaration sought at (7): "and has been since 30 May 2023 at the latest".

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 PLAINTIFF

Pursuant to Practice Direction No.1 of 2019, the Plaintiff sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
	Constitutional provisions		
1.	*Commonwealth Constitution*	Current	Ch III
	Statutory provisions		
2.	*Migration Act 1958* (Cth)	Compilation No 129 (24 June 2023 to present)	ss 3A, 5, 88, 189, 196, 198, 500
3.	*Acts Interpretation Act 1901* (Cth)	Compilation No 37 (12 August 2023 to present)	s 15A

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