IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY

No M47 of 2012

BETWEEN:

PLAINTIFF M47/2012

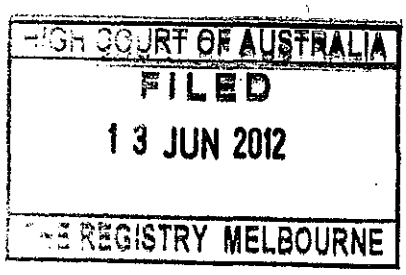
Plaintiff

DIRECTOR-GENERAL OF SECURITY

First Defendant

THE OFFICER IN CHARGE, MELBOURNE IMMIGRATION TRANSIT ACCOMMODATION

Second Defendant



SECRETARY, DEPARTMENT OF IMMIGRATION AND CITIZENSHIP

Third Defendant

MINISTER FOR IMMIGRATION AND CITIZENSHIP

Fourth Defendant

COMMONWEALTH OF AUSTRALIA

Fifth Defendant

SUBMISSIONS OF THE DEFENDANTS

Filed on behalf of the Defendants by:

Australian Government Solicitor
Level 21, 200 Queen Street Melbourne VIC 3000
DX50 Melbourne

Date of this document: 13 June 2012
Contacts: Evan Evagorou and Emily Nance

File ref: 12035788
Telephone:03 9242 1316
Facsimile: 03 9242 1265
E-mail: evan.evagorou@ags.gov.au; emily.nance@ags.gov.au

I. PUBLISHABLE ON THE INTERNET

1. The Defendants certify that these submissions are in a form suitable for publication on the Internet.

II. STATEMENT OF THE ISSUES

2. The Defendants submit that the main questions for determination are:

   2.1. Did the First Respondent (**the Director-General**) comply with the requirements of procedural fairness when issuing an adverse security assessment in respect of the Plaintiff?

   2.2. Does the *Migration Act 1958* (Cth) (**the Act**) purport to empower the Commonwealth to refuse to admit into the Australian community (and therefore to detain until removed) a non-citizen who has been assessed by ASIO as a direct or indirect risk to Australia's national security, but who has also been assessed to be a refugee?

   2.3. If so, are ss 189 and 196 of the Act invalid to that extent, with the result that such a non-citizen is required to be released into the Australian community?

III. SECTION 78B NOTICES

3. The Plaintiff gave notice under s 78B of the *Judiciary Act 1903* (Cth) on 1 June 2012. No further notice is required.

IV. MATERIAL FACTS

4. The facts and documents necessary to enable the Court to decide the questions reserved for the opinion of the Full Court are contained in the Amended Special Case dated 7 June 2012 (**the Special Case**).

V. APPLICABLE LEGISLATION

5. The Defendants accept the accuracy of the Plaintiff's statement of applicable constitutional provisions, statutes and regulations, but add the further provisions set out in Annexure A to these submissions.

VI. ARGUMENT

6. In summary, the Defendants submit that:

   6.1. Having regard to the statutory framework and the nature of the function that Australian Security Intelligence Organisation (**ASIO**) performs when issuing security assessments, ASIO complied with the requirements of procedural fairness. It did so by conducting an interview with the Plaintiff which focused on his association with, and support for, the Liberation Tigers of Tamil Eelam (**LTTE**), and gave him ample opportunity to advance evidence or material relevant to that topic.

6.2. As a matter of statutory construction, the Act does not ascribe any consequence to the fact that a person is owed "protection obligations" within s 36(2) of the Act unless that person also satisfies the other criteria for a protection visa.

6.3. Section 198 of the Act does not authorise or require the removal of a non-citizen from Australia in breach of the *Convention relating to the Status of Refugees* done at Geneva on 28 July 1951 as amended by the *Protocol relating to the Status of Refugees* done at New York on 31 January 1967 (together, the **Convention**). However, the removal of the Plaintiff to a country where he does not have a well-founded fear of persecution would not breach the Convention.

10 6.4. The detention of the Plaintiff is authorised and required by ss 189 and 196 of the Act. It cannot be said that there is no real likelihood or prospect of the Plaintiff's removal from Australia in the reasonably foreseeable future, so the issue that divided the Court in *Al-Kateb v Godwin* (***Al-Kateb***)[1] does not arise. Even if it does arise, leave should not be given to reopen that decision. If leave to re-open is granted, *Al-Kateb* should not be overruled. The construction of ss 189 and 196 that was adopted by the majority in that case is correct, and does not cause ss 189 or 196 to exceed any constitutional limit.

(A) QUESTION 1 – PROCEDURAL FAIRNESS

7. The Defendants accept that ASIO was required to afford the Plaintiff procedural
20 fairness in furnishing the adverse security assessment concerning the Plaintiff to the Department of Immigration and Citizenship (**DIAC**). The issue in this case concerns the content of that obligation, and whether ASIO satisfied it.

8. There are no universal rules as to the content of the duty to accord procedural fairness.[2] For that reason, general statements as to what procedural fairness "ordinarily requires" are of limited assistance. While procedural fairness may "ordinarily" require "the party affected to be given the opportunity of ascertaining the relevant issues",[3] and the decision-maker "to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made",[4] the direct application of such statements to ASIO's function
30 in issuing security assessments will lead to error. The content of ASIO's procedural fairness obligations must be determined:

8.1. first, by having regard to the relevant statutory framework, being "the express and implied provisions of the relevant Act and the inferences of legislative intention to be drawn from the circumstances to which the Act was directed and from its subject matter";[5]

8.2. second, by considering the "nature of the inquiry, the subject matter, and the rules under which the decision-maker is acting ... [The procedure must be fair to the individual considered] in the light of the statutory requirements, the interests

---

1 (2004) 219 CLR 562.
2 *SAEED v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 260 [18]; *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at 99 [25].
3 *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 590-591 (Northrop, Miles and French JJ).
4 *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 592 (Northrop, Miles and French JJ); *Kioa v West* (1985) 159 CLR 550 at 507 (Mason J).
5 *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 at 504 (Kitto J).

of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect".[6]

The statutory framework

9. Section 17(1)(c) of the *Australian Security Intelligence Organisation Act 1979* (**the ASIO Act**) provides that the functions of ASIO include "to advise Ministers and authorities of the Commonwealth in respect of matters relating to security". Section 37(1) then provides:

> The functions of the Organisation referred to in paragraph 17(1)(c) include the furnishing to Commonwealth agencies of security assessments relevant to their functions and responsibilities.

10. A "security assessment" is defined in s 35 of the ASIO Act as:

> a statement in writing furnished by the Organisation to a Commonwealth agency expressing any recommendation, opinion or advice on, or otherwise referring to, the question whether it would be consistent with the requirements of security for prescribed administrative action to be taken in respect of a person or the question whether the requirements of security make it necessary or desirable for prescribed administrative action to be taken in respect of a person ...

11. The word "security" is defined in s 4 of the ASIO Act. Many of the terms used in that definition are themselves further defined in s 4.

12. An "adverse security assessment" is defined in s 35 to include a security assessment that contains a recommendation that prescribed administrative action not be taken in respect of a person, being a recommendation the implementation of which would be prejudicial to the interests of the person.

13. The term "prescribed administrative action" is defined in s 35. It relevantly includes:

> (b) the exercise of any power, or the performance of any function, in relation to a person under the *Migration Act 1958* or the regulations under that Act ...

14. The function of granting and refusing visas under s 65 of the *Migration Act 1958* (Cth) therefore constitutes "prescribed administrative action", and a security assessment that recommends that a visa not be granted is an "adverse security assessment".

15. In *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs*, this Court said:[7]

> It has long been established that the statutory framework within which a decision-maker exercises statutory power is of critical importance when considering what procedural fairness requires.

16. Thus, while the ASIO Act does not exclude the rules of procedural fairness in relation to security assessments,[8] close attention to the terms of that Act remains necessary in order to determine the content of those rules.

17. Several provisions in the ASIO Act strongly suggest that the content of procedural fairness is limited in relation to adverse security assessments concerning the exercise

---

6 *Kioa v West* (1985) 159 CLR 550 at 584-585 (Mason J).
7 (2006) 228 CLR 152 at 160 [26] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ).
8 *Leghaei v Director-General of Security* (2007) 241 ALR 141 at 145 [43].

of powers under the Act in relation to non-citizens who do not hold permanent visas. Of most relevance:

17.1. Section 37(2) of the ASIO Act has the effect that, generally, an adverse or qualified security assessment must be accompanied by a statement of the grounds for the assessment, which must "contain all information that has been relied on by [ASIO] in making the assessment". However, it is not necessary for that statement to include information the inclusion of which "would, in the opinion of the Director-General, be contrary to the requirements of security".

17.2. Section 38 of the ASIO Act has the effect that, generally, the agency or authority that receives an adverse or qualified security assessment is required to give the subject of that assessment a copy of the statement provided under s 37(2). However, a copy of that statement is not required to be given to the subject of the assessment if the Attorney-General has certified that she is satisfied that the disclosure of that statement or part of that statement "would be prejudicial to the interests of security" (s 38(2)(b)).

17.3. Even these limited duties to provide information to subjects of adverse or qualified security assessments – being duties that do not apply to information the disclosure of which would be contrary to the requirements of security – are excluded when ASIO issues an adverse or qualified security assessment that concerns the exercise of powers under the Act in relation to a non-citizen who does not hold a permanent or special purpose visa (s 36(b)).

18. The terms of s 36(b), which reflect recommendations made by the Hope Royal Commission,[9] reveal a deliberate decision by Parliament that non-citizens in the position of the Plaintiff should not be given information as to the grounds for the assessment or the information relied upon in making that assessment, even when the provision of that information would not be prejudicial to the requirements of security. That decision necessarily informs the content of the obligation to afford procedural fairness when ASIO exercises its power to furnish a security assessment in relation to such persons,[10] for it would be inconsistent with the statutory scheme if procedural fairness required information to be disclosed to non-citizens in the position of the Plaintiff of a kind that Parliament has provided need not be disclosed. The statutory scheme suggests that procedural fairness can, at its highest, require less by way of the disclosure of the grounds for an assessment than would be required by s 37(2) in relation to citizens and permanent residents.

19. Contrary to the Australian Human Rights Commission's (**AHRC**) submissions, s 17A of the ASIO Act provides no support for the notion that a subject must always be given specific "opportunity to be heard as to what they propose to do in Australia".[11] That section suggests that security assessments should not be based on activities of

---

9 The Second Reading speech for the *Australian Security Intelligence Organization Bill 1979* referred to Mr Justice Hope's recommendations, and said that the legislation based on them was "the first attempt, at least in a common law country, to provide a comprehensive statutory framework regulating the making of security assessments": Hansard (House of Representatives) 22 May 1979, p 215. See also Hope Royal Commission, Second Report at [134], stating "The understandable desire of individuals to have all the rules of natural justice applied to security appeals must be denied to some extent, unfortunate though that may be". The class of persons excluded by s 36(b) was narrowed somewhat by the *Australian Security Intelligence Organization Amendment Bill 1986* (Cth).

10 *Leghaei v Director-General of Security* (2007) 241 ALR 141 at 144 [19].

11 Cf. AHRC's submissions at [55].

the kinds that it identifies. It says nothing about ASIO's obligations as a matter of procedural fairness when conducting security assessments.

The nature of the function of furnishing security assessments

20. Security assessments are issued for a wide range of different purposes, and the consequences of such assessments are variable.[12] Where a security assessment is issued in terms that reflect Public Interest Criterion 4002 (**PIC 4002**)[13] in relation to an applicant for a protection visa, s 65 of the Act has the result that the protection visa must be refused. If the applicant is in Australia, then unless some other visa is issued,[14] he or she must be detained until removed from Australia. The length of that detention will vary depending on the difficulty of removal. It should not be assumed that any such detention will be lengthy or indefinite.

21. In light of the above, while detention is not a necessary legal consequence of an adverse security assessment, the Defendants accept that as a practical matter an adverse security assessment in relation to an applicant for a protection visa will often have the consequence that the subject of the assessment is thereafter detained pending removal. This is a factor that tends to increase the content of the duty of procedural fairness in carrying out a security assessment.[15] It is not, however, the only relevant factor.[16]

22. There are three matters that tend to reduce the content of procedural fairness in relation to adverse security assessments. Even having regard to the practical effect of an adverse security assessment on liberty in some cases (including the Plaintiff in this case), these factors have an important bearing on the content of the requirements of procedural fairness.

23. First, and most importantly, ASIO's functions under s 17 of the ASIO Act revolve around the definition of "security" (s 4). The terms of that definition reveal that much of ASIO's work is necessarily secret. As Brennan J accepted in *Church of Scientology v Woodward*,[17] "[t]he secrecy of the work of an intelligence organization which is to counter espionage, sabotage, etc. is essential to national security". More recently, in *Thomas v Mowbray*,[18] Hayne J said that "The desirability of keeping intelligence material secret is self-evident. Often it will be essential."

24. Accordingly, the starting point in determining ASIO's obligations to disclose information should be that intelligence information is ordinarily kept secret. Any unqualified proposition to the effect that procedural fairness requires ASIO to inform the person who is subject to an adverse security assessment of the grounds of that assessment would require ASIO to expose its assessments of Australia's national security vulnerabilities (including gaps in ASIO's knowledge, or information from which inferences could be drawn as to its sources or methodology) to the very people

---

12 For example, it is unnecessary for the Court to consider the content of the duty of procedural fairness in respect of security assessments of persons outside Australia.

13 See paragraph 51.3 below.

14 As can occur, for example, under ss 195A or 417 of the Act.

15 Cf. *Suresh v Canada* [2002] 1 SCR 3 at [118]; *Charkaoui v Canada* (2007) 1 SCR 350 at 44 [60]; AHRC's submissions at [47].

16 Plaintiff's submissions at [78]; AHRC's submissions at [41]-[46].

17 *Church of Scientology v Woodward* (1980) 154 CLR 25 at 76-77, quoted with approval in *Leghaei v Director-General of Security* (2007) 241 ALR 141 at 147 [52]-[53] (special leave refused in *Leghaei v Director-General of Security* [2007] HCA Trans 655).

18 (2007) 233 CLR 307 at 477 [510].

(and the groups with whom they are associated) who are most likely to exploit that information to damage Australia's national security.[19] As Sundberg J said in *Parkin v O'Sullivan*:[20]

> [S]ecurity assessments are the key mechanism by which ASIO advises government that particular individuals pose a threat to national security. If documents falling within this class were required to be produced, ASIO would be giving information about its knowledge, assessments and methodology to the very people to whom it is most important that national security information is not disclosed: cf *Alister* 154 CLR at 454-455 per Brennan J...[T]he relevant class is "one of the classes of documents held by ASIO that require the greatest level of protection" first, because of the inherent sensitivity of the information that is routinely contained in such documents, and second, because of the detrimental consequences in terms of the quality of decision-making that would be likely to follow if ASIO officers were forced to omit particular kinds of information from Final Appreciations and related briefing notes due to the risk that those documents will become available to persons the subject of security assessments.

25. While the above remarks were made in upholding a public interest immunity claim over the reasons for an adverse security assessment, it would be surprising if procedural fairness required, as a condition of the valid exercise of power under s 37 of the ASIO Act, that information be disclosed in circumstances where that same information could be protected by a claim of public interest immunity from compulsory disclosure in a court.

26. That is not to equate the requirements of procedural fairness with the boundaries of public interest immunity.[21] Any such equation would mean that, in order to comply with the rules of procedural fairness, ASIO officers would be required accurately to predict the way in which a court would determine a public interest immunity claim. That would impose an impossible burden on the officers concerned (who ordinarily would not be legally trained). It would also create a "hazard" to the effective exercise of ASIO's national security functions, because the level of disclosure procedural fairness would require in order to make a valid security assessment would depend upon a legal judgment that the officers concerned would not be qualified to make.[22]

27. Accordingly, the content of ASIO's obligations as a matter of procedural fairness must accommodate the fact that information that is relevant to an adverse security assessment frequently will not be able to be disclosed on national security grounds.[23] The greater the level of particularity at which ASIO is required to disclose the "issues" relevant to a security assessment, the greater the danger that information about ASIO's knowledge (and sources, methods, capabilities or foreign liaison relationships) or lack thereof would be revealed, and the more likely it is the information will be required to be withheld on national security grounds. For that reason, the nature of ASIO's function suggests that any requirement as a matter of procedural fairness to identify the "issues" the subject of an adverse security assessment should be held to require the disclosure of those issues only at a high level of generality.

---

19 *Alister v R* (1984) 154 CLR 404 at 454-455 (Brennan J).

20 (2009) 260 ALR 503 at 511 [33]. See also *Sagar v O'Sullivan* (2011) 193 FCR 311 at 320 [46]-[47].

21 See *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at 98 [24], cautioning against any such equation in a somewhat analogous context.

22 See *Leghaei v Director General of Security* [2005] FCA 1576 at [82].

23 See, e.g., *Leghaei v Director-General of Security* (2007) 241 ALR 141 at 146 [48]; *Sagar v O'Sullivan* (2011) 193 FCR 311 at 324-325 [72]; *Amer v Minister for Immigration, Local Government and Ethnic Affairs* (FCA, Lockhart J, 19 December 1989, unreported) at 1, 9-10

28. The above submission is a particular application, in the national security context, of the proposition that it will often be sufficient if the "gravamen or substance of the issue" is brought to the attention of the affected person so that the person "is on notice of its 'essential features'".[24] It is not necessary to disclose "the precise details of all matters upon which he [the decision-maker] intends to rely".[25] For example, in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd*,[26] it was sufficient that the applicant was aware of the need to demonstrate that it was a fit and proper person to hold the licence at issue in that case, without having also to be informed of the specific basis upon which the decision-maker proposed to conclude that it was not fit and proper.[27]

29. The AHRC submits that, if information cannot be disclosed "consistently with the requirements of national security, national security must give way to the interests of procedural fairness".[28] That submission is contrary to a substantial body of Australian authority, and to the scheme of ss 37 and 38 of the ASIO Act, and it should be rejected.[29] The contrary conclusion would undermine the strong public interest in information being available to be taken into account by the Executive even if that information cannot be disclosed.[30] That public interest is particularly acute in relation to decisions concerning national security or foreign relations, where decisions must frequently be made on the basis of information that cannot be publicly revealed without damaging the national interest.

30. The AHRC's submission relies heavily on a decision of the European Court of Human Rights in *A v United Kingdom*, and on subsequent cases applying that decision. *A v United Kingdom* concerned the compatibility with the *European Convention of Human Rights* of provisions of United Kingdom law enabling the review by a court of control orders made by the Home Secretary on the basis of evidence not disclosed to the subject of the control order.[31] The decision is of limited assistance, as it concerned the minimum requirements for the accessibility of evidence in the conduct of a judicial process. It says nothing about the duty of procedural fairness of an intelligence agency in making an administrative decision.

31. The second matter that tends to reduce the content of procedural fairness in relation to adverse security assessments is that the "issues" involved in such assessment are fluid. Those issues evolve as information is obtained and evaluated against other intelligence holdings or material obtained through further investigations. Except at a high level of generality, the "issues" involved in a security assessment cannot

---

24 *Minister for Immigration and Citizenship v Maman* (2012) 200 FCR 30 at 42 [37] (Flick and Foster JJ); *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at 100 [29]; *Pilbara Aboriginal Land Council Aboriginal Corporation Inc v Minister for Aboriginal and Torres Strait Islander Affairs* (2000) 103 FCR 539 at 557 [70] (Merkel J).

25 *McVeigh v Willarra Pty Ltd* (1984) 6 FCR 587 at 600 (Toohey, Wilcox and Spender JJ); *Telstra Corporation Limited v Kendall* (1995) 55 FCR 221 at 230 (Black CJ, Ryan and Hill JJ).

26 (1994) 49 FCR 576.

27 *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 592 (Northrop, Miles and French JJ).

28 AHRC's submissions at [41].

29 See, e.g., *Leghaei v Director-General of Security* (2007) 241 ALR 141 at 146 [48]; *Salemi v Mackellar (No 2)* (1997) 137 CLR 396 at 421; *Alister v R* (1984) 154 CLR 404 at 435 and 455; *Sagar v O'Sullivan* (2011) 193 FCR 311 at 324-325 [72]; *Amer v Minister for Immigration, Local Government and Ethnic Affairs* (FCA, Lockhart J, 19 December 1989, unreported) at 1, 9-10.

30 *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at 98 [24] and 100 [29].

31 (2009) 49 EHRR 29; [2009] ECHR 301 at [200]-[224].

meaningfully be separated from the mental processes involved in evaluating and forming provisional views on the information obtained during the assessment process. Yet it is often said that procedural fairness does not require a decision-maker to inform the affected person of his or her thought processes or preliminary conclusions, or of his or her assessment or evaluation of any material supplied by the affected person.[32] As Hayne J (with whom Gummow J agreed on this point) said in *Muin v Refugee Review Tribunal*,[33] a decision-maker is "not obliged to tell [the applicant] that it was minded to reach a view about that question, which was contrary to the view he sought to have it form, and then ask him whether he wished to contradict that view."

10 32. The third matter is that, "by its very nature, intelligence material will often require evaluative judgments to be made about the weight to be given to diffuse, fragmentary and even conflicting pieces of intelligence".[34] Those judgments involve a synthesis that may make it impossible to isolate for comment a set of discrete "issues" upon which the decision to issue the assessment turns.[35] Indeed, to require the identification of particular "issues" to the subject of the assessment would inappropriately compartmentalise and limit the decision-making process. This is another factor that suggests that, to the extent that any "issues" can be isolated, that can be done only at a high level of generality.

The content of procedural fairness

20 33. If not for the practical implications of an adverse security assessment for the liberty of a non-citizen who is physically within Australia, the above factors, taken together with the scheme of the ASIO Act, would suggest that procedural fairness requires little, if any, disclosure by ASIO of the basis for an adverse security assessment. However, as is noted above, the Defendants accept that procedural fairness will have greater content where an adverse security assessment is likely to have the practical result that the subject of the security assessment is detained. Indeed, in recognition of that fact, ASIO ordinarily conducts a security assessment interview in such circumstances. Such an interview occurred in this case.

34. In light of the various matters identified above, it is submitted that ASIO will exceed
30 the minimum requirements of procedural fairness if, in undertaking a security assessment of a person who is likely to be detained if an adverse security assessment is issued, it conducts an interview with the subject of the assessment during which it:

34.1. informs the person that he or she is being assessed for security purposes in connection with his or her application for a visa;

34.2. directs the attention of the person to the general issue of concern to ASIO – in this case, the Plaintiff's role as an intelligence officer with the LTTE – and gives the subject an opportunity to advance whatever evidence or material he

---

32 *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591, endorsed in *Re Minister for Immigration and Multicultural Affairs and Indigenous; ex parte Palme* (2003) 216 CLR 212 at 219 [22] (per Gleeson CJ, Gummow and Heydon JJ); *Telstra Corp Ltd v Kendall* (1995) 55 FCR 221 at 230-231 (Black CJ, Ryan and Hill JJ).

33 (2002) 76 ALJR 966 at [265].

34 *Thomas v Mowbray* (2007) 233 CLR 307 at 477 [510]. See also *Suresh v Canada* [2002] 1 SCR 3 at [31] and [85].

35 See *Kaddari v Minister for Immigration and Multicultural Affairs* (2000) 98 FCR 597 at [25], recognising that "The grounds on which assessments of national security risks are made are frequently not capable of being clearly formulated or evidenced".

or she thinks is relevant to that issue, unless national security requires that that not occur; and

34.3. gives the person an opportunity to address any adverse information, personal to the subject, that is credible, relevant and significant, unless national security requires that such information not be disclosed.

35. To require anything further would be to give insufficient weight to Parliament's clear intention that non-citizens without permanent or special purpose visas not be provided with the "grounds" of an assessment or the information on which it is based; would create an undue risk of the disclosure of information that would adversely affect ASIO's functions in protecting national security; would risk rendering security assessments invalid by reference to a procedural standard the content of which ASIO officers could not reasonably determine; and would require ASIO officers to disclose the thought processes by which they reach their evaluative judgments about risks to security.

No denial of procedural fairness occurred

36. The approach adopted by ASIO in this case did not merely give the Plaintiff a "general and unfocussed invitation to make submissions";[36] it did not leave him "in the dark" as to the risk of an adverse security assessment being made.[37] The Plaintiff's submission to the contrary,[38] which is based on *Kurtovic*,[39] is misplaced. In that case, Gummow J's observation that a "general unfocused invitation to make submissions" was insufficient was directed to a decision-maker's failure to invite submissions about adverse information from another source. His Honour in fact rejected an argument that there had been a denial of procedural fairness on wider grounds, because the fact that a general invitation had been extended to Mr Kurtovic to make written submissions opposing deportation was "fatal" to that submission as "plainly ... [he] was given an opportunity to be heard".[40]

37. In this case, ASIO conducted a lengthy interview at which the Plaintiff (who was accompanied by his legal adviser) was given an extensive opportunity to discuss his association with, and attitude toward, the LTTE. Notwithstanding that interview, the Plaintiff asserts that he was denied procedural fairness because of the "absence of direct questioning" on whether he continued to support the LTTE,[41] or because each of the conclusions identified in the Director-General's affidavit (Special Case, Attachment 6) were not "squarely put" to him.[42] Those submissions should be rejected.

38. The security assessment process is an investigatory process. ASIO "is not obliged to put, as an adversary in adversarial proceedings might be bound to do, in respect of

---

36 *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 223. Cf. Plaintiff's submissions at [86].
37 *Mahon v Air New Zealand Ltd* [1984] AC 808 at 821. Cf Plaintiff's submissions at [86].
38 Plaintiff's submissions at [86].
39 (1990) 21 FCR 193 at 223.
40 (1990) 21 FCR 193 at 222. See also at 204.
41 Plaintiff's submissions at [85].
42 Plaintiff's submissions at [87].

each and every key matter, an assertion of apparent falsity or unreliability."[43] As Gaudron and Gummow JJ said in *Re Refugee Review Tribunal; ex parte Aala*:[44]

> There is no universal proposition that before the Tribunal ever makes a finding adverse to an applicant, it is necessary for the Tribunal to put to the applicant the concerns which are inclining the Tribunal towards such an adverse finding. The procedure is inquisitorial and not adversarial. The requirement of procedural fairness did not require the Tribunal when ... it gave the prosecutor the opportunity to appear before it to give evidence, to treat what transpired 'as though it were a trial in a court of law'.

39. Further, in respect of the Plaintiff's complaint that ASIO's assessment of his future conduct was not put to him, not only was ASIO not obliged to disclose its thought processes, but it is clear from the terms of the ASIO Act,[45] and it is in any event obvious, that a security assessment is concerned with the existence of a present or future risk from which "protection" is required. For that reason, the fact that ASIO would consider whether the Plaintiff was likely in the future to act in a way that creates such a risk was "apparent from [the] nature [of the decision] or the terms of the statute under which it is made".[46]

40. During the interview the Plaintiff had ample opportunity to address the question whether, in light of his prior involvement as an intelligence officer with the LTTE, he posed a direct or indirect risk to national security. There were numerous breaks in which he could consult with his legal adviser.[47] He was given an opportunity to clarify inconsistencies with previous statements,[48] and to deal with "matters with which he can reasonably be expected to deal, and which might assist his or her case", consistently with the guiding principle of fairness in all the circumstances.[49] The transcript of the interview (Special Case, Attachment 5) demonstrates that ASIO informed the Plaintiff of the purpose of the interview,[50] and provided him with an opportunity to provide any information that he wished in relation to each of the following topics:

40.1. whether he was a voluntary and active member of the LTTE Intelligence Wing from 1996-1999;[51]

40.2. whether his responsibilities included identifying Sri Lankan Army collaborators;[52]

40.3. whether he was aware that his identifying of Sri Lankan Army collaborators likely led to extra judicial killings;[53]

---

43 *Abebe v Commonwealth* (1999) 197 CLR 510 at 608 [295] (Callinan J). See also 576 [187] (Gummow and Hayne JJ), with whom Gaudron J (at 546 [90]) and Kirby J (584 [212]) agreed.

44 (2000) 204 CLR 82 at 115 [76], citing *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296 at 315.

45 See, in particular, the definition of "security" in s 4 of the ASIO Act.

46 *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 592 (Northrop, Miles and French JJ); *Kioa v West* (1985) 159 CLR 550 at 507 (Mason J).

47 Transcript at 17, 28, 38.

48 Transcript at 2-3, 12, 15, 21-22, 40-43, 46-48.

49 *Kioa v West* (1985) 159 CLR 550 at 613-614 (Brennan J).

50 Transcript at1-3.

51 Transcript at 11-13, 15, 18, 39-40.

52 Transcript at 18-28, 39.

53 Transcript at18-28, 44-45.

40.4. whether he maintained further involvement in intelligence activities on behalf of the LTTE from 1999 to 2006;[54]

40.5. whether, during the interview, he deliberately withheld information regarding his activities of security concern, and provided mendacious information;[55] and

40.6. whether his purpose in withholding information and providing mendacious information was to conceal his activities with the LTTE.[56]

41. The focus of the interview was upon the Plaintiff's membership and role with the LTTE in Sri Lanka. A particular focus was whether he joined the LTTE voluntarily, and then performed his roles with the LTTE voluntarily, which had obvious ramifications for the existence and degree of his support for the LTTE.[57] The Plaintiff repeatedly insisted that he was forced to join LTTE.[58] Consequently, it was futile for ASIO to explore with the Plaintiff whether his past voluntary association with the LTTE meant that he remains supportive of, or would continue to support, the LTTE. His denial of the premise for any such questioning had the consequence that any questions about whether he remained supportive, or was likely to continue to support, the LTTE, could only have been asked on the premise that his denials were false. Such questioning would have been pointless. Procedural fairness did not require it to occur.

42. The Plaintiff's submission that the transcript shows that ASIO approached the interview as if the Plaintiff had an onus to discharge is without foundation.[59] The statements upon which the Plaintiff relies in support of this argument show no more than that the ASIO officers sought to ensure that the Plaintiff provided any information that he thought was relevant even if he was not asked directly about it. The asking of open-ended questions of that kind is incapable of demonstrating a denial of procedural fairness. Indeed, they show that the Plaintiff's submission that he was not afforded an opportunity to make submissions on the determinative issues is unsustainable.[60]

43. The Plaintiff's submission that ASIO must have relied on information garnered from other sources in coming to the conclusion that the Plaintiff was once supportive of the LTTE is likewise unsustainable.[61] He had told the UNHCR that he joined the LTTE voluntarily, and he was specifically questioned about that statement.[62] Further, the Plaintiff chose not to pursue his application for orders requiring the Defendants to produce the reasons for the adverse security assessment. In the absence of those reasons, there is no basis upon which the Court could find that ASIO relied upon any adverse information obtained from other sources.

44. Finally, the Plaintiff's submission that he was denied procedural fairness because "false, or at least misleading" statements were put to him should be rejected.[63] That submission is not supported by reference to any authority, or even by any argument that the questioning prevented the Plaintiff from providing relevant information, or

---

54 Transcript at 20, 22-23, 34, 39.
55 Transcript at 1, 3, 11-12, 17-18, 20-22, 27, 40-43, 46-48.
56 Transcript at 43.
57 Transcript at 11-13, 39-40.
58 Transcript at 11-13, 15, 18, 27-28, 30-33.
59 Plaintiff's submissions at [83].
60 Plaintiff's submissions at [88].
61 Plaintiff's submissions at [89]-[90].
62 Transcript at 11-13, 15, 18, 27-28, 30-33.
63 Plaintiff's submissions at [92].

otherwise resulted in unfairness. Care should be exercised before imposing any restrictions on the questioning techniques that can be used in a security assessment context, particularly in the absence of any evidence as to the rationale for the use of those techniques either in this case, or more generally.

45. Accordingly, there was no denial of procedural fairness in this case. Question 1 should be answered "No".

(B) QUESTION 2 – REMOVAL TO A SAFE THIRD COUNTRY

46. In relation to question 2, the Defendants submit, in summary:

46.1. The Act does not ascribe any consequence to the fact that a person is owed "protection obligations" within the meaning of s 36(2) unless that person also satisfies the other criteria for the grant of a protection visa.

46.2. The power to remove an unlawful non-citizen under s 198 of the Act should be construed so as not to authorise or require the removal of a refugee in breach of Australia's obligations under the Convention, but otherwise applies to refugees in the same way as other non-citizens.

46.3. The removal of the Plaintiff to a country where he does not have a well-founded fear of persecution would not breach the Convention.

Protection obligations and protection visas

47. Historically, Australian refugee law embodied a two-step process. The first step involved a determination of refugee status, and the second the grant of a visa or entry permit.[64] This Court traced the relevant legislative history in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*[65] (***NAGV***). While those two separate steps existed, it was plainly possible for a person who was found to be a refugee not to be granted an entry permit or visa.

48. The *Migration Reform Act 1992* (the **Reform Act**) introduced the concept of a protection visa,[66] which was "intended to be the mechanism by which Australia offers protection to persons who fall under [the Convention]".[67] As the Explanatory Memorandum explained (in a passage quoted in *NAGV*):[68]

> In the future persons seeking the protection of the Australian Government on the basis that they are refugees will not apply initially, as now, for recognition as a refugee, but directly for the protection visa. This change is consistent with the general principle contained in the Reform Act that the visa should be the basis of a non-citizen's right to remain in Australia lawfully. The change will end the present duplication of processing whereby separate applications are required for recognition of refugee status and grant of formal authority to remain (presently an entry permit). (emphasis added)

49. "A criterion for a protection visa" is that the applicant for the visa is "a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention" (s 36(2)). In *NAGV*, this Court held that this criterion "describes no more than a person who is a refugee within the meaning of Art 1 of the

---

64 See *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290.
65 (2005) 222 CLR 161 at 174 [35] – 176 [40].
66 By introducing s 26B, which subsequently became s 36 of the Act.
67 See *NAGV* (2005) 222 CLR 161 at 176 [40]; *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 226 [217].
68 See *NAGV* (2005) 222 CLR 161 at 176 [40].

Convention".[69] However, since the commencement of the *Border Protection Legislation Amendment Act 1999*, s 36 has been narrowed to exclude persons who have not taken all possible steps to avail themselves of the right to enter and live in "any country apart from Australia" where they would not have a well-founded fear of persecution.[70] Accordingly, s 36 itself recognises that some refugees may not be eligible to obtain protection visas.

50. The Plaintiff submits that the term "protection obligations" is "best understood as a general expression of the precept to which the Convention gives effect – that is, that State parties are to offer surrogate protection".[71] That submission implies that States that are bound by the Convention are obliged to provide asylum to refugees. But the Convention "does not guarantee asylum in the sense of permanent residence or full membership of the community, nor does it guarantee admission to potential countries of asylum".[72] "Refugee status is ... far from being an international passport which entitles the bearer to demand entry ... into the territory of any contracting state".[73]

51. The Act has never provided that a person who is owed "protection obligations" is entitled to be granted a protection visa. The Full Federal Court has held that "the Act does not give to a person who falls within the definition of 'refugee' in the Refugees Convention any right to enter or remain in Australia",[74] and that the assumption that s 36 "gives an unqualified right to remain in Australia to every person to whom Australia has protection obligations under the Refugees Convention is unsustainable".[75] There have always been other criteria that must be satisfied before a protection visa may be granted (as the reference to "a" criterion in s 36(2) anticipates). If those other criteria are not satisfied, s 65 of the Act requires a protection visa to be refused. Thus, since the commencement of the Reform Act:

    51.1. s 31(3) of the Act has provided that the regulations may prescribe criteria for various classes of visa (expressly including protection visas);

    51.2. the regulations have prescribed "public interest criteria" for the grant of a protection visa, including (at different times) criteria concerning whether the person is of good character; whether the person's presence in Australia would be contrary to Australia's foreign policy interests; whether the person's presence in Australia may be directly or indirectly associated with the proliferation of weapons of mass destruction; and whether the person has signed a certain "values statement";[76]

    51.3. the regulations have prescribed PIC 4002 as a criterion for the grant of a protection visa, being a criterion concerning whether the person has been

---

69 *NAGV* (2005) 222 CLR 161 at 176 [42].
70 Section 36(3) to (5) of the Act.
71 Plaintiff's submissions at [18].
72 Mathew, "Sovereignty and the Right to Seek Asylum: The Case of Cambodian Asylum-Seekers in Australia" (1994) 15 *Australian Year Book of International Law* 35 at 54-55, quoted in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 274 (Gummow J); *SZ v Minister for Immigration and Multicultural Affairs* (2000) 101 FCR 342 at 345-346 [14].
73 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 274, quoting *Nguyen Tuan Cuong v Director of Immigration* [1997] 1 WLR 68 at 79.
74 *SZ v Minister for Immigration and Multicultural Affairs* (2000) 101 FCR 342 at 346 [15].
75 *SZ v Minister for Immigration and Multicultural Affairs* (2000) 101 FCR 342 at 348-349 [29]-[32].
76 See the *Migration Regulations 1994* (Cth), as amended by the *Migration Regulations (Amendment) 1995*; *Migration Amendment Regulations 1999 (No. 6)*; *Migration Amendment Regulations 2006 (No. 1)*; *Migration Amendment Regulations 2007 (No. 12)*.

assessed to be directly or indirectly a risk to Australia's national security.[77]

52. It follows that the Act has always acknowledged that there is no necessary correlation between the fact that a person is assessed to be a refugee (and thus to be owed protection obligations for the purposes of the criterion in s 36(2)(a)) and the grant of a protection visa. If a person who is owed protection obligations fails to satisfy any one of the other criteria for a protection visa, that visa must be refused and, unless that person is granted a different visa, he or she will be an unlawful non-citizen under s 14 of the Act. Likewise, a non-citizen who arrives in Australia without a visa and whose application for a protection visa has not yet been assessed will be an unlawful non-citizen, even if the person objectively satisfies the definition in Article 1 of the Convention. Persons in both categories are subject to mandatory detention under ss 189 and 196. As a matter of domestic law, such a person is not "lawfully in" or "lawfully staying" in Australia. It is only once a refugee is granted a visa – in the exercise of the undoubted sovereign right of a State to choose who shall be permitted to enter the State[78] – that the refugee becomes lawfully entitled to be in Australia.

53. The Plaintiff submits that PIC 4002 does not "reflect" Arts 32 or 33 of the Convention, and that his failure to satisfy PIC 4002 disentitles him to be granted a visa "without intersecting with the protection obligations that the Act jealously guards".[79] That submission is correct in so far as it recognises that failure to satisfy PIC 4002 disentitled the Plaintiff to a protection visa, and that this resulted from s 65 when read with the criterion specified in Schedule 2, clause 866.225(a), rather than on the basis of his failure to satisfy s 36(2) of the Act.[80] But it is incorrect in suggesting that the Act "jealously guards" the concept of "protection obligations", because that suggests that the Act uses the concept of "protection obligations" to do something more than specify <u>one</u> of the criteria for a protection visa. It does not. While, as is explained below, the fact that a person is a refugee (and therefore is owed protection obligations) is relevant to the operation of s 198 of the Act, that relevance arises from the interaction between the Act and the Convention. It does not result from the Act giving statutory significance as a matter of domestic law to the fact that a person is owed "protection obligations".

54. The Plaintiff and AHRC contend that, as a matter of statutory construction, s 198 has no application to a person owed protection obligations under the Convention (i.e. to a refugee).[81] If that submission is correct, it would follow that ss 189 and 196 could not authorise the detention of a refugee, whether or not the refugee has been granted a visa. Both the Plaintiff and the AHRC acknowledge that consequence of their

---

77 PIC 4002 was introduced in the *Migration Regulations 1994*. Until 30 November 2005, it stated: "The applicant is not assessed by the competent Australian authorities to be directly or indirectly a risk to Australian national security". By the *Migration Amendment Regulations 2005 (No. 10)*, with effect from 1 December 2005, PIC 4002 was repealed and restated as follows: "The applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security, within the meaning of section 4 of the [ASIO Act]".

78 See *Ruddock v Vadarlis* (2001) 110 FCR 491 at 542-543 [192]-[193], where French J said "Australia's status as a sovereign nation is reflected in its power to determine who may come into its territory and who may not and who shall be admitted into the Australian community and who shall not .... The power to determine who may come into Australia is so central to its sovereignty that it is not to be supposed that the Government of the nation would lack under the power conferred upon it directly by the *Constitution*, the ability to prevent people not part of the Australia community, from entering". See also *Robtlemes v Brenan* (1906) 4 CLR 395 at 406.

79 Plaintiff's submissions at [22].

80 See, e.g., *Director-General of Security v Sultan* (1998) 90 FCR 334.

81 Plaintiff's submissions at [30], [41]; AHRC's submissions at [20].

respective submissions.[82] The submission would mean that there is "a gap in the legislation in its application to an obvious and important group of non-citizens" which would place such non-citizens in "a kind of legal limbo".[83] It would mean that any refugee would stand outside the Act, and would be entitled to live and work in the Australian community whether or not granted a visa. The submission elevates one of the criteria for a protection visa ("protection obligations") and gives it a consequence that removes any need to be granted a protection visa or a visa of any other kind. Further, the submission renders irrelevant the criteria for the grant of a protection visa contemplated by s 31(3) and set out in the regulations. It would also defeat the provisions concerned with the cancellation of visas on character or other grounds[84] because, even if a visa was cancelled, the person who formerly held that visa could not be taken into detention or removed from Australia.

55. The proposition that those consequences reflect the proper construction of the Act must be rejected. Such a construction would be directly contrary to the object set out in s 4(2) of the Act, which states that "this 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".

56. The Plaintiff seeks to downplay the significance of the above consequences by submitting that the statutory imperative recognised by the Court in *Al-Kateb* that a non-citizen in the migration zone who does not hold a visa must be detained until he or she is granted a visa, deported or removed, has been nullified by subsequent amendments to the Act. He refers in that regard to the amendments in 2005 that introduced provisions concerning "residence determinations".[85] Those amendments conferred on the Minister a personal, non-compellable, discretionary power to allow a person to reside at a specified place.[86] The conferral of this power confirms that Parliament recognised the possibility that the Act may require the long term detention of some non-citizens, and took steps to empower the Minister to alleviate the burden of that detention while preserving the integrity of the mandatory detention regime.[87] The statutory imperative remains; the capacity to make residence determinations simply increases the range of detention options by *deeming* a person the subject of such a determination to be in immigration detention.[88] Further, in the absence of a decision by the Minister to exercise his personal non-compellable powers under either ss 197AB or 195A, the position confronting an unlawful non-citizen is exactly the same now as it was at the time *Al-Kateb* was decided. The fundamental principle underlying the Act since 1992 remains exactly as it was: a non-citizen in the migration zone (other than an excised offshore place) who does not hold a visa must be detained.

Section 198 does not authorise or require removal contrary to the Convention

57. Section 198 obliges an officer to remove from Australia a number of different categories of non-citizen. The Plaintiff falls within both ss 198(2) and 198(6), and he

---

82 Plaintiff's submissions at [43]; AHRC's submissions at [40].
83 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 9 [8] (Gleeson CJ).
84 These provisions authorise the cancellation of protection visas: see *Akpata v Minister for Immigration and Multicultural Affairs* [2004] FCAFC 65 at [115] and *SZLDG v Minister for Immigration* [2008] FCA 11.
85 *Migration Legislation Amendment (Detention Arrangements) Act 2005*, introducing Part 2 Div 7 Subdiv B.
86 Sections 197AA, 197AB, 197AE and 197AF.
87 Second Reading Speech, *Migration Amendments (Detention) Arrangements Bill 2005, Hansard* (House of Representatives) 21 June 2005 p 55.
88 Section 197AC.

therefore must be removed from Australia as soon as reasonably practicable.

58. In *Plaintiff M70/2011 v Minister for Immigration and Citizenship*[89] (the ***Malaysia Declaration Case***), Gummow, Hayne, Crennan and Bell JJ said that an important consideration that bears upon the proper construction of s 198 the Act is that "the ambit and operation of a statutory power to remove an unlawful non-citizen from Australia must be understood in the context of relevant principles of international law concerning the movement of persons from state to state".[90] That strongly implies that s 198 does not authorise or require the removal of a refugee contrary to Australia's obligations under the Convention. French CJ and Kiefel J each expressly endorsed that proposition,[91] French CJ stating that "If the person is found to be a refugee, then removal under s 198(2) will necessarily have to accord with Australia's non-refoulement obligation".

59. Having regard to the above, the Defendants accept that s 198 of the Act does not authorise or require the removal of a refugee in circumstances where removal would be contrary to Australia's obligations under the Convention.[92] It follows that, before an officer can remove a non-citizen to a third country, the officer must consider whether removal to that third country would be compatible with Australia's obligations under the Convention.

60. Contrary to the submissions of the Plaintiff and AHRC,[93] there is no difficulty accommodating such consideration within the statutory regime governing removal. While as a matter of practice the officer charged with the removal of the non-citizen would take advice from the trained officers within DIAC who are specifically tasked with assessing whether the removal of non-citizens is consistent with Australia's international obligations, the power and duty to effect removal as soon as reasonably practicable rests with the officer charged with removal. If that officer errs in determining whether removal to a particular third country would be consistent with the Convention, that would be an error as to the scope of the officer's power under s 198, and it would be subject to judicial review in the ordinary way. The law that determines the limits of the power to remove to a safe third country under s 198 is not "unspecified or uncertain" – it is the Convention itself. There is no impediment to a Chapter III court interpreting or applying the Convention, which happens as a matter of routine. Nor is the length of the non-citizen's detention "wholly in the control of the executive" – on the contrary, if removal to a third country is consistent with the Convention, the officer must remove a non-citizen to that country as soon as is reasonably practicable. The officer would only have a choice to make if multiple third countries are simultaneously willing to accept the non-citizen.

61. For the above reasons, it is necessary to determine whether the removal of the Plaintiff from Australia to a third country where he would not have a well-founded fear of persecution would be consistent with the Convention because, if it is, his removal to such a country is authorised and required by s 198 of the Act.

---

89 (2011) 244 CLR 144.

90 (2011) 244 CLR 144 at 190 [91]; *Plaintiff M61/2010Ev Commonwealth* (2010) 243 CLR 319 at 339 [27].

91 (2011) 244 CLR 144 at [54] and [239].

92 It follows that they accept that aspects of the reasoning in some earlier Federal Court authorities has now been overtaken: see, e.g., *NATB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 506 at 515 [53].

93 Plaintiff's submissions at [35]-[41]; AHRC's submissions at [12]-[13] and [20].

The Convention

General principles regarding the interpretation of the Convention

62. The Convention is an agreement negotiated and agreed between, and binding upon, the relevant Contracting States.[94] It represented a compromise between the need to ensure humane treatment of victims of oppression and the wish of sovereign states to maintain control over those seeking entry to their territory.[95]

63. In ascertaining the scope of Australia's obligations under the Convention, primacy must be given to the ordinary meanings of the words in the text, although the context, objects and purpose must also be considered.[96] Subsequent practice in the application of the Convention by Contracting States should also be taken into account.[97] In order to avoid a multitude of divergent approaches in the territories of the Contracting States on the same subject matter, the Court should strive to interpret the Convention in a way that conforms to the interpretations which have attracted general support in the decisions of the courts of other Contracting States.[98] Further, as the Supreme Court of the United Kingdom has recently emphasised, in interpreting the Convention, the "court's task remains one of interpreting the document to which the contracting parties have committed themselves by their agreement"; there is "no warrant to give effect to what they might, or in an ideal world would, have agreed".[99]

A hierarchy of obligations

64. The Convention does not impose upon Contracting States uniform obligations with respect to all refugees. Instead, it requires Contracting States to provide progressively more rights to refugees as their connection or attachment to their host country increases. As one commentator has explained:[100]

> [T]he drafters of the 1951 Convention had ... a distinct vision of how refugees would eventually integrate into their host societies. The path of integration might start after the individuals seeking refuge from persecution had entered the country clandestinely and illegally ... In due course, the asylum seekers were expected to register with the authorities. The authorities would then process their claims and, after reaching a determination, proceed with the regularization of their stay, normally involving the issuance of a temporary residence permit and a work permit. These permits might be extended continually, depending on the situation in the country of origin, the perspectives of resettlement in another country and individual preferences ... Eventually, the refugees would opt for naturalization in their country of refuge, thus changing their status from refugees to nationals and citizens.

---

94 *NAGV* (2005) 222 CLR 161 at 169-170 [16].

95 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 247-248, 274 (Gummow J); *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2005] 2 AC 1 at [15]; *Rodriguez v US* (1987) 480 US 522 at 525-526.

96 *Morrison v Peacock* (2002) 210 CLR 274 at 279 [16]; *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at 45 [136] (Gummow J, with whom Hayne J agreed). Both cases cite *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 251-256 (McHugh J).

97 *Vienna Convention on the Law of Treaties* done at Vienna on 23 May 1969, Art 31(3)(b). See also *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 231 (Brennan CJ), 240 (Dawson J), 252 (McHugh J), 277 (Gummow J) and 294 (Kirby J); *Morrison v Peacock* (2002) 210 CLR 274 at 279 [16]; *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 16 [45].

98 See, e.g., *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at 14-16 [34] (Gummow ACJ, Callinan, Heydon and Crennan JJ), and the cases there cited.

99 *R (ST) v Secretary of State for the Home Department* [2012] 2 WLR 748 at 747 [31]. See also *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2005] 2 AC 1 at [18].

100 Davy, "Article 32: Expulsion" in Zimmerman (ed), *The 1951 Convention relating to the Status of Refugees and its Protocol* (2011) 1277 at 1281. See also at 1294.

65. Consistently with the above, the text of the Convention draws a distinction between the obligations of Contracting States with respect to refugees depending upon the extent of the connection or attachment between the refugee and the Contracting State. Those obligations fall into five groups. Although there is some disagreement as to the precise boundaries of some of these groups,[101] the existence of the groups themselves is clear (as the AHRC's submissions acknowledge[102]). The United Kingdom Supreme Court recently recognised the following groupings:[103]

65.1. the core obligation in Art 33,[104] as well as the basic obligations in Arts 3, 5, 7(1), (3) and (4), 9, 12, 16(1) and (3), 17(3), 20, 22, 24(3) and (4), 29, 30 and 34, are owed with respect to all refugees who are subject to a State's jurisdiction;

65.2. when a refugee is physically present in a State, the additional obligations in Arts 4, 27 and 28(1) apply;

65.3. when a refugee is "lawfully in" a State, the additional obligations in Arts 18, 26 and 32 apply;

65.4. when a refugee is "lawfully staying" in a State, the additional obligations in Arts 7(2), 10, 15, 17, 19, 21, 23, 24(1)-(3), 25 and 28 apply;

65.5. when a refugee is "habitually resident" in a State, the additional obligations in Arts 14 and 16(2) apply.

66. Thus, while signatories to the Convention "are bound to accord to those who have been determined to be refugees the rights that are specified in those instruments",[105] those rights in their terms do not apply to <u>all</u> refugees simply because they have been assessed to be refugees. In particular, the careful distinctions in the language of the different articles of the Convention reveal that the Convention was deliberately framed so as to distinguish between the rights that States agreed to provide to refugees because they were physically present within a State, and those that would be accorded to refugees who were "lawfully in" a State.

67. For that reason, a refugee who is physically present within Australia (such as the Plaintiff) is not entitled to all of the "rights" in the Convention unless a decision has been made under Australian domestic law to admit that person to Australia, and thus to grant them "lawful" status. Importantly, however, a refugee has no right to be granted "lawful" status. On the contrary, it is clear that the Convention does not detract "from the right of a Contracting State to determine who should be allowed to enter its territory".[106] As Lord Mustill stated in *T v Home Secretary*,[107] in a passage

---

101 Compare, for instance, Davy, "Article 32: Expulsion" in Zimmerman (ed), *The 1951 Convention relating to the Status of Refugees and its Protocol* (2011) 1277 at 1281 and Hathaway, *The Rights of Refugees under International Law* (2005) at 160, regarding the proper classification of Art 34.

102 AHRC's submission at fn4.

103 See Hathaway, *The Rights of Refugees under International Law* (2005) at 154-160. This analysis was adopted by the Supreme Court of the United Kingdom in *R (ST) v Secretary of State for the Home Department* [2012] 2 WLR 735 at 744 [21]. See also Davy, "Article 32: Expulsion" in Zimmerman (ed), *The 1951 Convention relating to the Status of Refugees and its Protocol* (2011) 1304.

104 See, e.g., *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 182 [66] (French CJ); *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at 41 [120] (Kirby J).

105 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 196 [117].

106 *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 169-170 [16], citing *T v Home Secretary (UK)* [1996] AC 742 at 753-754 and *Sale v Haitian*

approved by Gummow J in *Applicant A v Minister for Immigration and Ethnic Affairs*:[108]

> Neither under international nor English municipal law does a fugitive have any direct right to insist on being received by a country of refuge. Subject only to qualifications created by statute *this country is* entirely free to decide, as a matter of *executive discretion, what foreigners it allows to remain* within its boundaries.

The removal of the Plaintiff would be compatible with the Convention

68. While the Defendants accept that s 198 of the Act does not authorise the removal of the Plaintiff from Australia in breach of its obligations under the Convention, the removal of the Plaintiff to a country where he does not have a well-founded fear of persecution would not breach any such obligation. That follows because the Convention permits a State to remove a refugee from its territory provided that it does not contravene the articles dealing with the expulsion or removal, being Articles 32 and 33.

Article 32

69. Article 32(1) of the Convention obliges Contracting States not to "expel" a refugee who is "lawfully in" its territory, save on grounds of national security or public order.

70. For the reasons that follow, the Plaintiff is not "lawfully in" Australia within the meaning of the Convention. Article 32 therefore does not impose any obligations on Australia with respect to his expulsion. For that reason, it is unnecessary for the Court to consider whether the removal of the Plaintiff from Australia would accord with Article 32(2).

71. There is a high level of international consensus that a refugee is "lawfully in" a Contracting State only if the refugee has been granted the right to live in that State under the domestic law of that State. The position was recently and authoritatively analysed in *R (ST) v Secretary of State for the Home Department* (the ***Eritrea case***), where the Supreme Court of the United Kingdom unanimously held that the words "lawfully in" refer to what is lawful according to the domestic law of the Contracting State.[109] In reaching that conclusion, the Supreme Court affirmed the unanimous decision of the Court of Appeal below,[110] and approved the House of Lords' earlier decision in *R v Secretary of State for the Home Department; Ex parte Bugdaycay*.[111]

72. In the *Eritrea case*, the plaintiff had been temporarily admitted to the United Kingdom according to United Kingdom law, and had been assessed to be a refugee (due to her well-founded fear of persecution in Eritrea). The United Kingdom refused her permission to remain in the United Kingdom on the basis that she could be safely removed to Ethiopia. She had been living in the community in the United Kingdom on a series of temporary permits for 13 years while her claims were assessed and appeals were pursued. The plaintiff unsuccessfully contended that her expulsion from the United Kingdom would be contrary to Art 32 of the Convention. The

---

Centers Council (1993) 509 US 155 at 179-183. See also *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 272-275 (Gummow J).

107 [1996] AC 742 at 754, approved by the Supreme Court of the United Kingdom in *R (ST) v Secretary of State for the Home Department* [2012] 2 WLR 735 at 748 [33].

108 (1997) 190 CLR 225 at 273-274.

109 [2012] 2 WLR 735; [2012] UKSC 12.

110 [2010] 1 WLR 2858.

111 [1987] AC 514 at 526.

Supreme Court rejected that argument, holding that "the purpose of article 32 is to give security of residence to a refugee who has been given the right to live in the contracting state in question".[112] The Court held:[113]

72.1. The ordinary meaning of the words "lawfully in", and the context in which they appear, contemplates that a refugee is not merely present in the territory of the Contracting State, and not merely that his presence is being "tolerated", but that his presence is lawful by reference to the state's domestic law.[114]

72.2. The "lawfully in" degree of attachment is also the condition for the conferral of certain rights on refugees by Arts 18 and 26 with respect to self-employment and freedom of movement. "It seems unlikely that the contracting states would have agreed to grant to refugees the freedom to choose their place of residence and to move freely within their territory before they themselves had decided, according to their own domestic laws, whether or not to admit them to the territory in the first place".[115]

72.3. There is no indication in the *travaux préparatoires* that any of the states that framed the Convention were minded to surrender control over those seeking entry to their territory.[116]

72.4. There is no consensus among academic commentators as to the meaning of "lawfully in" in Art 32.[117] In rejecting an argument that "lawful" presence had an autonomous meaning independent from the domestic law of Contracting States, the Court expressly warned that "[o]ne should bear in mind ... that there may be a profound gap between what commentators, however respected, would like the article to mean and what it has actually been taken to mean in practice".[118] That echoes Hayne J's remark in *Minister for Immigration v Haji Ibrahim*[119] that commentaries upon the Convention must not be accorded a status which denies the primacy of the text of the Convention itself.

73. Courts in the United States have likewise interpreted Art 32 as applying only to refugees who are "lawfully in" the United States according to its domestic law. In *Chim Ming v Marks*, the United States Court of Appeals for the 2nd Circuit held that "the only rational interpretation" of the expression "lawfully in their territory" in Art 32 is one consistent with the definition of unlawfulness in Art 31 as involving the status of being in a nation "without authorization", and that "[s]ince a nation's immigration laws

---

112 [2012] 2 WLR 735 at 741.

113 Baroness Hale and Lords Brown, Mance, Kerr and Clarke agreed with Lord Hope. Lord Dyson delivered a concurring judgment.

114 [2012] 2 WLR 735 at 747-748 [31]-[32]. That is also the view expressed in Davy, "Article 32: Expulsion" in Zimmerman (ed), *The 1951 Convention relating to the Status of Refugees and its Protocol* (2011) 1277 at 1299, 1304; Goodwin-Gill & McAdam, *The Refugee in International Law* (3rd ed, 2007) at 524-525.

115 [2012] 2 WLR 735 at 749-750 [36]-[37].

116 [2012] 2 WLR 735 at 748 [22], citing Robinson, *Convention relating to the Status of Refugees, its History, Contents and Interpretation* (1953), at 110-111 in support of the contrary conclusion.

117 [2012] 2 WLR 735 at 749 [34], citing conflicting interpretations offered by Hathaway, *Rights of Refugees under International Law* (2005), at 177-179, on the one hand, and Goodwin-Gill & McAdam, *The Refugee in International Law* (3rd ed, 2007), at 524-525, on the other. Lord Dyson made the same observation in his concurring judgment at 758 [63].

118 [2012] 2 WLR 735 at 751 [41].

119 (2000) 204 CLR 1 at 72 [204].

provide authorization, one unlawfully in the country is in violation of those laws".[120] The Court of Appeals for the 3rd Circuit had come to the same conclusion in *Kan Kam Lin v Rinaldi*, stating that the correctness of this interpretation was "abundantly clear".[121]

74. The UNHCR likewise accepts that the "lawfulness" of a refugee's stay in a Contracting State is to be judged by reference to that State's domestic law.[122] The same interpretation is supported by the drafting history of the Convention,[123] and by commentators in relation to the cognate obligations in Art 31 of the *Convention relating to the Status of Stateless Persons*[124] and Art 13 of the *International Covenant on Civil and Political Rights.*[125]

75. While the matter has not been examined in detail in Australia, several decisions concerning Art 32 support the position outlined above:

75.1. In *Simsek v Macphee*, Stephen J concluded that a person who had become a "prohibited immigrant" under Australian law following a period of three months during which his stay had been lawful could not rely on Art 32.[126] In forming that conclusion, Stephen J indirectly referred with approval to the approach taken in the United States decisions noted above.[127]

75.2. In *NAGV*, this Court cited academic commentary emphasising the distinction between Arts 32 and 33, noting that Art 32 "assumes the prior *admission* of the refugee to a status of lawful residence" (emphasis added).[128]

75.3. In *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004*,[129] this Court contemplated that Art 32 would not assist even a refugee who had previously been granted a temporary protection visa, on the basis that removal following the failure to grant a further visa would not be to "expel" the person.

75.4. In *Rajendran v Minister for Immigration and Multicultural Affairs*,[130] the Full Federal Court held that a refugee who had arrived lawfully in Australia on a

---

120 (1974) 505 F 2d 1170 at 1172.
121 (1973) 361 F Supp 177 at 185-186.
122 "Lawfully Staying – A Note on Interpretation" (1988), referred to by the Supreme Court in *R (ST) v Secretary of State for the Home Department* [2012] 2 WLR 748 at 748 [33]. Due weight ought to be given to the UNHCR's view: see, e.g., *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 ALR 340 at 361 [76] (Kirby J); *NBGM v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52 at 61 [28]
123 Davy, "Article 32: Expulsion" in Zimmerman (ed), *The 1951 Convention relating to the Status of Refugees and its Protocol* (2011) 1277 at 1286.
124 Done at New York on 28 September 1954. See, e.g., Robinson, *Convention relating to the Status of Stateless Persons: Its History and Interpretation* (1955); Frank, "Effect of the 1967 United Nations Protocol on the Status of Refugees in the United States" (1977) 11 *International Lawyer* 291 at 298. See also *Al-Kateb v Godwin* (2004) 219 CLR 562 at 603 [106], where Gummow J said that the Stateless Persons Convention was of no assistance to the appellant in that case as "Article 31 obliges the Contracting States not to 'expel a stateless person *lawfully* in their territory save on grounds of national security or public order".
125 Done at New York on 16 December 1966. See, e.g., Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed, 2005) at 263-264, 292-293.
126 (1982) 148 CLR 636 at 644-645.
127 Stephen J stated that "[c]ourts in the United States have regarded Art 32 in the same light", citing Frank, "Effect of the 1967 United Nations Protocol on the Status of Refugees in the United States" (1977) 11 *International Lawyer* 291 at 302-304, where the author discussed *Kan Kam Lim v Rinaldi* and *Ming v Marks.*
128 (2005) 222 CLR 161 at 171 [21], citing Shearer, "Extradition and Asylum", in Ryan (ed), *International Law in Australia* (2nd ed, 1984) 179 at 205.
129 (2006) 231 CLR 1 at 19 [49].
130 (1998) 86 FCR 526 at 530-531.

visitor's visa, and who held a bridging visa at the time of the hearing, would cease to be lawfully in Australia, and would thereafter not fall within Art 32, once his bridging visa expired.

75.5. Similarly, in *Minister for Immigration and Multicultural Affairs v Thiyagarajah*, the Full Federal Court concluded that Art 32 could have no application to a person whose entry permit had expired and who was not permitted by Australian law to reside in Australia.[131]

76. Accordingly, Art 32 of the Convention applies only to a refugee whose presence within the territory of a Contracting State is lawful by reference to the domestic law of that State. It does not apply simply because there has been some short period of lawful presence before presence becomes unlawful.

77. The Plaintiff entered Australia at 11.10 pm on 29 December 2009 as the holder of a special purpose visa.[132] That visa expired 50 minutes later, at which time the Plaintiff became, and has since remained, an unlawful non-citizen under s 14 of the Act.[133] While the Plaintiff made a valid application for a protection visa,[134] that application was refused. In the absence of a visa, he is an "unlawful non-citizen" liable to mandatory detention and removal from Australia. He is not a person who is "lawfully in" Australia, and he therefore does not benefit from Australia's obligations under Art 32 of the Convention.

Article 33

78. Article 33(1) obliges Contracting States not to "expel or return ('refouler')" a refugee to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. That obligation is the core obligation in the Convention. It is owed to all refugees over whom Contracting States have jurisdiction.

79. The Defendants do not propose or intend to remove the Plaintiff to Sri Lanka.[135] His removal to a country where he would not have a well-founded fear of persecution would not contravene Art 33(1). There are many decisions of Australian courts that hold or accept that a Contracting State may remove a refugee to a safe third country (assuming that such a country may be found) without contravening that article.[136] There is likewise considerable State practice that supports that interpretation of Art 33 of the Convention.[137]

---

131 (1997) 80 FCR 543 at 557 (von Doussa J, with whom Moore and Sackville J agreed). The Full Federal Court's judgment was overturned on appeal to this Court, but this aspect of its judgment was not criticised: see *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (2000) 199 CLR 343.

132 Special case at [9].

133 Special case at [10].

134 Special case at [13].

135 Special case at [31].

136 See, e.g., *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 172-173 [25], [28] and [29] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ); *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 158 [4] and 178 [54] (French CJ) and 190-191 [94] (Gummow, Hayne, Crennan and Bell JJ); *Minister for Immigration and Multicultural Affairs v Al Sallal* (1994) 94 FCR 549 at 559 [43]-[46]; *Patto v Minister for Immigration and Multicultural Affairs*(2000) 106 FCR 119 at 129-131 [30]-[37] (French J); *SZ v MIMA* (2000) 101 FCR 342 at 345 [14]-[15].

137 See, e.g., Hathaway *The Rights of Refugees under International Law* (2005) at 323-324; Goodwin-Gill & McAdam, *The Refugee in International Law* (3rd ed, 2007) at 391.

80. At present, the country to which the Plaintiff will be removed has not been identified. For that reason, it is not yet possible to consider whether the Plaintiff would have a well-founded fear of persecution in that country. Such consideration would be required before removal to that country under s 198 would be possible. However, question 2 to the Special Case asks only whether s 198 of the Act authorises the removal of the Plaintiff to a place where he does not have a well-founded fear of persecution for the purposes of Article 1A of the Convention. The answer to that question is "yes".

81. The Plaintiff and AHRC make reference to the operation and scope of Art 33(2) of the Convention, although both accept that that Article does not apply.[138] That article contains an exception to the obligation imposed by Art 33(1) which applies in circumstances including where there are "reasonable grounds for regarding [a refugee] as a danger to the security of the country in which he is". As the Defendants to not propose to remove the Plaintiff to a place of a kind that would attract the operation of Art 33(1), it is unnecessary to consider whether removal to that place would be permitted by Art 33(2).

82. For the avoidance of doubt, the Defendants do not contend that Art 33(2) applies to the Plaintiff. Indeed, they accept that the facts before the Court do not support the conclusion that the removal of the Plaintiff to Sri Lanka would be permitted by Art 33(2). It is implicit in that acceptance that the fact that an adverse security assessment has been issued with respect to the Plaintiff is not itself sufficient to demonstrate that the exception in Article 33(2) applies. The question whether a person is a "direct or indirect risk to security" for the purposes of PIC 4002 overlaps with, but is distinct from, the question whether the exception in Art 33(2) is satisfied.[139]

83. Article 33(2) sets a higher hurdle than PIC 4002. As Lauterpacht and Bethlehem explained, in a passage approved by Glazebrook J of the New Zealand Court of Appeal in *Zaoui v Attorney-General (No 2)*:[140]

> [T]he fundamental character of the prohibition of refoulement and the humanitarian character of the 1951 Convention more generally, must be taken as establishing a high threshold for the operation of exceptions to the Convention. This is particularly so given the serious consequences for the individual of refoulement. The danger to the security of the country in contemplation in Art 33(2) must therefore be taken to be a very serious danger rather than danger of some lesser order.

Thus, as her Honour concluded, the exception in Art 33(2) must be interpreted "restrictively"; the danger must be "serious enough to justify frustrating the whole purpose of the Refugee Convention by sending a person back to persecution".[141]

---

138 Plaintiff's submissions at [28] and [32]; AHRC' submissions at [19]

139 See *Kaddari v Minister for Immigration and Multicultural Affairs* (2000) 98 FCR 597 at [23]-[25]; *Director-General of Security v Sultan* (1998) 90 FCR 334.

140 (2005) 1 NZLR 690 at 726 [134].

141 (2005) 1 NZLR 690 at 726 [136] and further at [137]-[142], citing Grahl-Madsen, *Commentary on the Refugee Convention 1951*, comments [5] and [7] on Art 33, Stenberg, *Non-Expulsion and Non-Refoulement* (1989), at 219-221, Lauterpacht & Bethlehem, "The scope and content of the principle of non-refoulement: Opinion" in Feller, Türk & Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003), at 107 [51], "Summary Conclusions: the principle of non-refoulement, expert roundtable, Cambridge, July 2001", in Feller, Türk & Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003), at 179. See also the judgments of Anderson P (at 698 [25]) and William Young J (739-740 [196]-[199]).

84. On appeal, the New Zealand Supreme Court accepted a test for satisfaction of the exception in Art 33(2) formulated by the Supreme Court of Canada in *Suresh v Canada*: that the person must be thought on reasonable grounds to pose a serious threat to the security of the host state; the threat must be based on objectively reasonable grounds and the threatened harm must be substantial.[142] This test set a "high threshold" that was justified by the "gravity, indicated by para 1 of Art 33, of the consequences of deportation or removal".[143]

85. Finally, it should also be noted that the standard for satisfying Art 33(2) is different to, and higher than, than the standard for satisfying the exception in Art 32 for the non-expulsion obligation for refugees lawfully in a state's territory "on grounds of national security".[144]

(C) QUESTION 3 - THE DETENTION OF THE PLAINTIFF IS AUTHORISED BY SECTIONS 189 AND 196

86. In summary, the Defendants submit as follows.

86.1. Leave to re-open the decision in *Al-Kateb*[145] should be refused.

86.2. If *Al-Kateb* is reconsidered, the construction of ss 189 and 196 adopted by the majority is correct.

86.3. Even on the construction of ss 189 and 196 adopted by the minority in *Al-Kateb*, the Plaintiff's detention is lawful.

86.4. The construction of ss 189 and 196 adopted by the majority in *Al-Kateb* does not transgress any constitutional limit.

Al-Kateb should not be re-opened

87. In *Al-Kateb*, a majority of this Court held that ss 189 and 196 validly authorise the detention of an unlawful non-citizen during the period until removal to another country becomes reasonably practicable, even in circumstances where there is no real likelihood or prospect of removal in the reasonably foreseeable future.[146]

88. While the Court has power to review and depart from its previous decisions, such a course should not be lightly undertaken.[147] The "power to disturb settled authority is ... one to be exercised with restraint, and only after careful scrutiny of the earlier course of decisions and full consideration of the consequences".[148]

89. In this case, for the reasons developed below, on the facts agreed in the Special Case it is not open to the Court to find that there is no real likelihood or prospect that

---

142 *Zaoui v Attorney-General (No 2)* (2006) 1 NZLR 289 at 310 [45]; and see *Suresh v Canada* [2002] 1 SCR 3.

143 *Zaoui v Attorney-General (No 2)* (2006) 1 NZLR 289 at 301 [20] and 310 [45].

144 See, e.g., Stenberg, *Non-Expulsion and Non-Refoulement* (1989), at 219-221; Lauterpacht & Bethlehem, "The scope and content of the principle of non-refoulement: Opinion" in Feller, Türk & Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003), at 134-136 [162]-[172]; Goodwin-Gill & McAdam, *The Refugee in International Law* (3rd ed, 2007) 234-237.

145 (2004) 219 CLR 562.

146 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 640 [231] (Hayne J, McHugh and Heydon JJ relevantly agreeing); 658 [290] (Callinan J).

147 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439. See also *Second Territory Senators Case* (1977) 139 CLR 585 at 630 (Aickin J); *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [70] (French CJ).

148 *Esso Australia Resources Ltd v FCT* (1999) 201 CLR 49 at 71 [55] (Gleeson CJ, Gaudron and Gummow JJ).

the Plaintiff will be removed in the reasonably foreseeable future. In the absence of such a finding, the premise for the issue that divided the Court in *Al-Kateb* is absent. For that reason, the Defendants' primary submission is the question whether the decision in *Al-Kateb* should be re-opened does not arise, because the Court "should not embark upon the reconsideration of an earlier decision where, for the resolution of the instant case, it is not necessary to do so".[149]

90. Even if the issue does arise, the Court should not give leave to re-open *Al-Kateb.* The Court has adopted a practice of requiring leave to re-open its previous decisions.[150] In considering whether leave to re-open should be given, and whether departure from an earlier decision is justified, the Court has regard to the matters identified in *John v Federal Commissioner of Taxation*.[151] In this case:

90.1. It cannot be said that the decision in *Al-Kateb* did not rest upon a principle carefully worked out in a succession of cases. Prior to *Al-Kateb*, the construction of ss 189, 196 and 198 in circumstances where removal was not reasonably practicable had been the subject of extensive consideration in a line of Federal Court decisions, culminating in the decision of the Full Court of the Federal Court in *Al-Masri*.[152] At single judge level in the Federal Court, judicial opinion had been divided.[153] In this manner, the questions concerning the construction of the relevant statutory provisions had been ventilated and analysed prior to the hearing and determination of the appeals in *Al-Kateb* and *Al-Khafaji*.

90.2. There was no material difference between the reasons of the justices who formed the majority in *Al-Kateb* and *Al-Khafaji*. McHugh J[154] and Heydon J[155] expressed agreement with the reasons of Hayne J, and the reasons for judgment of Callinan J were consistent with those of Hayne J.

90.3. The decision in *Al-Kateb* has not led to "considerable inconvenience".

90.4. Since 2004, the Act has been administered on the basis of the decision in *Al-Kateb*.

91. The decision in *Al-Kateb* is a recent and considered determination of the proper construction of ss 189, 196 and 198 of the Act. The decision was reached after "a

---

149 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at [253] (Gummow and Hayne JJ).

150 See *Evda Nominees v Victoria* (1984) 154 CLR 311 at 313, 316; *Allders International v Commissioner of State Revenue* (1996) 186 CLR 630 at 646, 655, 661 and 673; *British American Tobacco Australia v Western Australia* (2003) 217 CLR 30 at [74].

151 (1989) 166 CLR 417 at 438-439, referring to *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 at 56-58. See also *Momcilovic v R* (2011) 85 ALJR 957 at 1074-1075 [483] (Heydon J); *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at [38]-[39] (Gleeson CJ, Gummow and Hayne JJ); *Esso Australia Resources Ltd v FCT* (1999) 201 CLR 49 at 71 [55].

152 (2003) 126 FCR 54.

153 The first instance decision of Merkel J in *Al Masri v Minister for Immigration and Multicultural Affairs* (2002) 192 ALR 609; 69 ALD 296 had been followed in *Al Khafaji v Minister for Immigration and Multicultural Affairs* [2002] FCA 1369 (Mansfield J); *NAKG of 2002 v Minister for Immigration and Multicultural Affairs* [2002] FCA 1600 (Jacobsen J) and *Applicant WAIW v Minister for Immigration and Multicultural Affairs* [2002] FCA 2002 (Finkelstein J); but had not been followed in *WAIS v Minister for Immigration and Multicultural Affairs* [2002] FCA 1625 (French J); *NAES v Minister for Immigration and Multicultural Affairs* [2003] FCA 2 (Beaumont J); *Daniel v Minister for Immigration and Multicultural Affairs* (2003) 196 ALR 52 (Whitlam J); *SHFB v Minister for Immigration and Multicultural Affairs* [2002] FCA 29; *SHDB v Minister for Immigration and Multicultural Affairs* [2002] FCA 30 (Selway J); *SHFB v Goodwin* [2002] FCA 294 (von Doussa J); and *NAGA v Minister for Immigration and Multicultural Affairs* [2003] FCA 224 (Emmett J).

154 (2004) 219 CLR 562 at [33].

155 (2004) 219 CLR 562 at [303].

very full examination of the question", no compelling consideration or important authority was overlooked, the decision did not conflict with established principle or a definite stream of authority, and the decision does not affect any wider field of law or have an importance beyond the construction of the relevant provisions of the Act.[156]

92. It is of particular note that, in reaching their conclusion, the majority in *Al-Kateb* considered the principle of legality, and the principle of interpretation that statutes should if possible be construed so as to accord with Australia's international obligations.[157] The reliance of the Plaintiff and AHRC on those principles therefore does not provide any reason to reconsider the decision of the majority, for the majority decided that those principles were of no assistance having regard to the "intractable" statutory language.

***Al-Kateb* is correct**

93. If the Court grants leave to re-open the decision in *Al-Kateb*, the construction adopted by the majority should be affirmed as correct.

94. The language of ss 189 and 196 is clear and unambiguous.[158] Section 189(1) requires the detention of a person where "an 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(1) requires detention under s 189 to continue "until" one of three specified events occurs – the person is removed from Australia under ss 198 or 199, the person is deported under s 200, or the person is granted a visa.[159] Thus, "the relevant operation of s 196(1) is that each plaintiff must be kept in detention until he is either removed from Australia or granted a visa".[160] As Hayne J has explained:[161]

> [c]ontinued detention under s 196 is predicated upon the person being an unlawful non-citizen. It ... does not depend on the formation of any opinion of the Executive about whether detention is necessary or desirable whether for purposes of investigation or any other purpose. That judgment has been made by the legislature.

95. The power and duty to "remove" – which is defined in s 5 of the Act to mean "remove from Australia" – necessarily incorporates the notion of moving a person not only "from Australia", but also to another country. That follows because, as a practical matter, the duty to remove from Australia can be performed only by removal to another country.[162] As Gleeson CJ said in *Al-Kateb*,[163] "[r]emoval is not necessarily limited to removal to an unlawful non-citizen's country of nationality. However, it does not include simply ejecting a person physically from Australian territory".

---

156 *Attorney-General (NSW) v Perpetual Trustee Company Ltd* (1952) 85 CLR 237 at 243-244 (Dixon J). See also *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [65]-[71] (French CJ).

157 (2004) 219 CLR 562 at 643 [241] (Hayne J, with whom Heydon J agreed). See also at 586-588 [51]-[54] (McHugh J) and 661 [296] (Callinan J).

158 (2004) 219 CLR 562 at [33] (McHugh J), [298] (Callinan J).

159 (2004) 219 CLR 562 at [226], [241] (Hayne J).

160 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at 337 [19]. See also *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 8 [4] (Gleeson CJ), 17 [36] (McHugh J), 49 [127] (Gummow J), 64 [178] (Kirby J), 76 [224] (Hayne J, with whom Heydon J agreed).

161 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 76 [224] Hayne J (with whom Heydon J agreed).

162 *WAIS v Minister for Immigration & Multicultural and Indigenous Affairs* [2002] FCA 1625 at [58] (French J); *M38/2002 v Minister for Immigration & Multicultural and Indigenous Affairs* (2003) 131 FCR 146 at [68].

163 (2004) 219 CLR 562 at [9].

96. The time for the performance of the duty to remove under s 198 does not arise until removal is "reasonably practicable".[164] However, "[t]he event described as being 'removed from Australia under section 198' is an event the occurrence of which is affected by the imposition of a duty, by s 198, to bring about that event 'as soon as reasonably practicable'."[165]

97. The words "reasonably practicable" "direct attention to the extent of the duty" and acknowledge that the duty does not require the officer to take "every possible step that could be taken" to effect removal.[166] So long as the removal of an unlawful non-citizen is not yet "reasonably practicable", the time for performance of the duty to remove has not arrived and s 196 requires the non-citizen to be kept in detention.[167] As Hayne J (with whom McHugh and Heydon JJ relevantly agreed) observed in *Al-Kateb*:[168]

> Detention comes to an end upon removal ... But ... removal *to* a country requires the co-operation of the receiving country, and of any countries through which the person concerned must pass to arrive at that destination. That co-operation is not always freely made available ... Australia can seek that co-operation; it cannot demand it. Detention will continue until that co-operation is provided.

98. One consequence of the above scheme is that the period of detention under s 196 may be lengthy or uncertain, particularly given that the removal of an unlawful non-citizen from Australia requires the co-operation of a recipient country.[169] Removal arrangements might involve complex and sensitive discussions between governments, and the circumstances are often unpredictable and may change or develop within a short period.[170] Even if there is currently no recipient country to which the non-citizen may be removed, it remains possible that such a recipient country will be identified, at which time it will become reasonably practicable to remove the non-citizen to that country.[171] But this does not have the consequence that the power to detain rests on the will or opinion of the executive government.[172] There is a continuing statutory duty to remove the non-citizen from Australia, and to do so as soon as reasonably practicable.

99. The construction adopted by the minority justices in *Al-Kateb* should not be adopted.

99.1. Each of the minority justices implied a temporal limitation into s 196 which would suspend the power to detain if there was no prospect of removal in the reasonably foreseeable future. Such an implication conflates the temporal element which enlivens the duty to remove "as soon as reasonably practicable" under s 198 with an additional temporal limit on the power to detain until such removal. The operation of s 198 is treated as spent when

---

164 (2004) 219 CLR 562 at [227] (Hayne J).

165 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 638 [226] (Hayne J). The Plaintiff is therefore not correct to say at [24] of his submissions that the length of his detention "depends entirely on the willingness of the Executive to enter into ... diplomatic negotiations [with] other states". See also AHRC submissions at [20].

166 *Baiada Poultry Pty Ltd v The Queen* [2012] 86 ALJR 459 at [15].

167 (2004) 219 CLR 562 at [34] (McHugh J), [226], [231] (Hayne J).

168 (2004) 219 CLR 562 at [218].

169 (2004) 219 CLR 562 at [217]-[218] (Hayne J), [292] (Callinan J).

170 For example, the removal of Mr Al Masri took place approximately 4 weeks after the Merkel J had held that there was no real likelihood or his removal in the reasonably foreseeable future: see *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54 at 61 [18].

171 (2004) 219 CLR 562 at [229]-[231] (Hayne J).

172 Cf *Al-Kateb* (2004) 219 CLR 562 at [88], [140] (Gummow J), [146] (Kirby J); cf Plaintiff's submission at [24]; AHRC's submissions at [20].

"the stage has been reached that the [non-citizen] cannot be removed from Australia and as a matter of reasonable practicability is unlikely to be removed", at which time the power to detain in s 196(1) "loses a necessary assumption for its continued operation".[173] As Hayne J pointed out,[174] this effectively transfers and transforms the temporal element in s 198 into a different temporal limitation on the operation of s 196.

99.2. In addition, the temporal limitation implied by the minority justices would involve difficulties in its application.[175] Determination of the prospects of a non-citizen's removal may involve consideration of issues concerning international relations that are not ideally suited to judicial determination. Further, as the limitation contemplates that the power and duty to detain will revive if and when there is a real prospect of removal, this gives rise to uncertainty as to the operation of ss 189 and 196 from time to time.

99.3. The minority justices drew support to a varying extent from several decisions of foreign courts in different statutory and constitutional contexts, in which a power to detain a non-citizen pending removal was held to be subject to implied temporal limits.[176] However, those decisions are of no direct assistance in the construction of ss 189, 196 and 198 of the Act, because none of them concern the interpretation of a mandatory detention regime.

No constitutional limit is exceeded

100. The construction of ss 189, 196 and 198 adopted by the majority in *Al Kateb* does not exceed any constitutional limit on the legislative power of the Parliament.

101. Sections 189, 196 and 198 are laws with respect to aliens, and they are therefore supported by s 51(xix) of the Constitution. That paragraph supports laws authorising the Executive to detain non-citizens[177] pending their removal from Australia.[178] The power to exclude non-citizens is an aspect of territorial sovereignty,[179] and the power to remove is "but the complement of the power of exclusion".[180]

102. The Plaintiff's argument would have the consequence that a non-citizen who is a refugee must be admitted into the Australian community, even where that person has been assessed to pose a risk to Australia's security, if for some reason it is not reasonably practicable to remove the person from Australia. He asserts that, to the extent that they provide otherwise, ss 189 and 196 contravene Chapter III of the

---

173 (2004) 219 CLR 562 at [122] (Gummow J), compare Gleeson CJ at [12].
174 (2004) 219 CLR 562 at [237].
175 (2004) 219 CLR 562 at [235]-[237] (Hayne J).
176 *R v Governor of Durham Prison; ex parte Hardial Singh* [1984] 1 WLR 704; [1984] 1 All ER 983; *Tan Te Lam v Superintendant of Tai A Chau Detention Centre* [1997] AC 97; *Zadvydas v Davis*, 533 US 678 (2001).
177 The terms "non-citizen" and "alien" are co-extensive, having regard to the definition of non-citizen in s 5 of the Act and the decision in *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178. See also *Singh v Commonwealth* (2004) 222 CLR 322.
178 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 10 (Mason CJ), 25-26, 32-33 (Brennan, Deane and Dawson JJ), 58 (Gaudron J), 71 (McHugh J); *Al-Kateb v Godwin* (2004) 219 CLR 562 at 582 [39] (McHugh J), 636 [216] and 644 [245] (Hayne J).
179 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 12-13 [18], 14 [28] (Gleeson CJ); *Robtelmes v Brenan* (1906) 4 CLR 395.
180 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 639 [227] (Hayne J); *Robtelmes v Brenan* (1906) 4 CLR 395 at 400. See also 417.

Constitution. The premise for this argument is that: [181]

> ... putting to one side the exceptional cases to which reference is made below, the involuntary detention of a citizen 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 adjudging and punishing criminal guilt. (**the Chu Kheng Lim doctrine)**

103. The Defendants submit that, contrary to the above passage, Chapter III of the Constitution does not create any rule that, exceptional cases aside, detention may lawfully be imposed "only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt". As Gaudron J said in *Kruger v Commonwealth*,[182] in comments which have been cited with approval in subsequent cases:[183]

> [I]t cannot be said that the power to authorise detention in custody is exclusively judicial except for clear exceptions....The exceptions recognised in *Lim* are neither clear nor within precise and confined categories. For example, the exceptions with respect to mental illness and infectious disease point in favour of broader exceptions relating, respectively, to the detention of people in custody for their own welfare and for the safety or welfare of the community. Similarly, it would seem that, if there is an exception in war time, it, too, is an exception which relates to the safety or welfare of the community.
>
> Once exceptions are expressed in terms involving the welfare of the individual or that of the community ... it is not possible to say that, subject to clear exceptions, the power to authorise detention in custody is necessarily and exclusively judicial power. Accordingly, I adhere to the view that I tentatively expressed in *Lim*, namely, that a law authorising detention in custody is not, of itself, offensive to Ch III.

104. In addition to the issues identified by Gaudron J, the concept of "criminal guilt" is indeterminate.[184] It therefore provides an unsatisfactory foundation for any constitutional immunity from detention otherwise than in accordance with a judicial determination of criminal guilt.

105. Even if the Chu Kheng Lim doctrine exists, in its terms it is subject to exceptions. One of those exceptions permits the detention of non-citizens to enable the executive to receive, investigate and determine application for entry permits and, after determination, to admit or remove those non-citizens.[185]

106. In this case, the Plaintiff is detained for the purpose of removal. His detention therefore falls squarely within the exception recognised in *Chu Kheng Lim*. But even if his removal was not likely in the foreseeable future, his detention would nevertheless be valid because the exception extends to detention for the purpose of

---

181 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ). Gummow J has suggested a reformulation of that rule, stating that save for "exceptional cases", "the involuntary detention of a citizen in custody by the state is permissible only as a consequential step in the adjudication of the criminal guilt of that citizen for past acts": *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 612 [80].

182 (1997) 190 CLR 1 at 110 (emphasis added).

183 See *Kruger v Commonwealth* (1997) 190 CLR 1 at 84 (Toohey J); *Al-Kateb v Godwin* (2004) 219 CLR 562 at 648 [258] (Hayne J, Heydon J agreeing); *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 24-27 [57]-[62] (McHugh J); *Thomas v Mowbray* (2007) 233 CLR 307 at 330 (Gleeson CJ) and 431 (Kirby J); *South Australia v Totani* (2010) 242 CLR 1 at 146-147 [382]-[383] (Heydon J).

184 See *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 612 [79] (Gummow J); *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 at 198 [114] and 206-207 [139] (Hayne J, with whom Gleeson CJ and McHugh J agreed).

185 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 10 and 32.

segregating non-citizens from the Australian community pending their removal.[186] Indeed, in *Chu Kheng Lim*, the plurality accepted that the exception would permit "a measure to prevent entry into the community of a person whom the State does not wish to accept as a member of the community".[187] Hayne J (with whom Heydon J agreed) expressed the same idea in both *Al Kateb* and *Re Woolley*. In the later case, Hayne J said: [188]

> Once it is accepted ... that the aliens and immigration powers support a law directed to excluding a non-citizen from the Australian community (by segregating that person from the community) the effluxion of time ... will not itself demonstrate that the purpose of detention has passed from exclusion by segregation to punishment.

107. None of the cases in this Court that have applied the exception to the Chu Kheng Lim doctrine support the submissions of the Plaintiff or AHRC that the operation of that exception depends on whether the detention of a non-citizen is "appropriate and adapted" or "proportionate" to the present prospect of removal.[189] There is no warrant for applying any such test. Sections 189 and 196 of the Act are laws with respect to aliens, and they are therefore readily seen to be supported by s 51(xix) of the Constitution without any need to ask whether they are "appropriate or adapted", or "reasonably necessary", to any particular end.[190] Nor do those questions assist in determining whether ss 189 and 196 contravene Chapter III, because Chapter III is not infringed if detention is for the purpose of the exercise of the executive power to refuse to admit a non-citizen into the Australian community. If that purpose exists as a matter of fact, there is no room for any proportionality analysis.

108. Alternatively, even if a proportionality inquiry is required, that inquiry could only concern the proportionality between detention and the purpose of that detention (i.e. segregation pending removal, or denial of entry to the Australian community), rather than proportionality between detention and the present viability of removal. There is no lack of proportionality between detention and the purpose of segregation pending removal, because detention is the best mechanism to achieve that purpose.[191]

The purpose of the Plaintiff's detention

109. The Plaintiff, as a national of Sri Lanka,[192] is a non-citizen with no right to enter or remain in Australia.[193] On the face of ss 189 and 196, those provisions require his detention until he is granted a visa or removed from Australia.

110. Active efforts are presently underway to remove the Plaintiff from Australia.[194] His detention is plainly for the purpose of removal, as indeed the Plaintiff concedes.[195] The Plaintiff's argument that his detention is unlawful is based on the proposition that

---

186 Cf Plaintiff's submissions at [71]-[75].

187 In *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 13 [19], Gleeson CJ pointed out that the key passage in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 32 cites cases that endorse that proposition.

188 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 77 [227]. See also at 75 [222]; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 584 [45], 586 [49] (McHugh J), 648 [255]-[256] (Hayne J, with whom Heydon J agreed) and 658 [289] (Callinan J).

189 Cf Plaintiff's submissions at [67]; AHRC submissions at [34].

190 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 583-584 [40]-[46] (McHugh J) and 648 [256] (Hayne J).

191 Hayne and Heydon JJ recognised this in the passage from *Woolley* quoted above. See also *Al-Kateb v Godwin* (2004) 219 CLR 562 at 585-586 [48] (McHugh J).

192 Special Case at [2].

193 Special Case at [18].

194 Special Case at [33].

195 Plaintiff's submissions at [6].

his removal is not viable, not on the proposition that he is detained for some purpose other than removal.

111. To the extent that the Plaintiff's arguments depend on the "indefinite" nature of his detention, they assume that his detention was at one time validly authorised by ss 189 and 196, but that his detention at some point ceased to be authorised because it ceased to be for the purpose of removal. The argument depends on an assertion that the fact that the Plaintiff cannot presently be removed[196] in some way negates the purpose of removal.[197]

112. That argument should be rejected at a number of levels. First, at a factual level, the special case does not permit a finding that there is no real likelihood or prospect that the Plaintiff will be removed in the reasonably foreseeable future. In contrast to the factual position in *Al Kateb*,[198] no finding of fact has been or could be made to that effect. While there is presently no country to which the Plaintiff can be sent,[199] active steps are being taken to identify a recipient country and there are current requests pending with the governments of several countries for resettlement assistance in relation to persons including the Plaintiff.[200] The nature of international negotiations is such that judicial assessment of their prospects is problematic, but there is nothing to suggest that those negotiations are so unlikely to succeed that the Plaintiff's prospects of removal could be found to be "so remote that continued detention cannot be for the purposes of removal".[201] For that reason, even on the approach of the minority in *Al-Kateb* or the Full Federal Court in *Al Masri*,[202] there would be no basis to find that the Plaintiff cannot validly be detained.[203]

113. Second, it is not possible to infer that the Executive is not detaining the Plaintiff for the purpose of removal simply because his removal is not currently practicable. The argument that detention ceases to be lawful if removal is not viable contradicts the scheme of the Act, because ss 196 and 198 authorise and require detention only when removal is not yet "reasonably practicable" (leaving to one side detention while considering an application for admission). Once removal becomes "reasonably practicable", the end point of lawful detention under s 196 is reached.[204] For that reason, the present impracticability of removal cannot set the period of time within which detention is authorised or required.[205] The fact that removal is not currently practicable means that the time for the performance of the duty to remove under s 198 has not yet arisen. It is therefore impossible to infer from the fact that removal has not occurred that the Plaintiff's detention is no longer for the purpose of removal.[206] As Callinan J put it in *Al Kateb*, "It would only be if the respondents

---

196 Plaintiff's submissions at [24].
197 Plaintiff's submissions at [68].
198 In *Al-Kateb v Godwin* (2004) 219 CLR 562, a finding of fact, regarded by Gummow J as being of "critical importance", had been made by the Federal Court that there was no real likelihood or prospect that the appellant would be removed in the reasonably foreseeable future: see at [2] (Gleeson CJ) and [104]-[105], [123] (Gummow J).
199 Special Case at [32].
200 Special Case at [33].
201 Cf *Al-Kateb v Godwin* (2004) 219 CLR 562 at 601 [98] (Gummow J).
202 (2003) 126 FCR 54.
203 See *WAIS v Minister for Immigration and Multicultural Affairs* [2002] FCA 1625 at [59] (French J).
204 *Plaintiff M61v Commonwealth* (2010) 243 CLR 319 at 338 [21].
205 See *Al-Kateb v Godwin* (2004) 219 CLR 562 at 641 [237] (Hayne J).
206 See, eg, *Al-Kateb v Godwin* (2004) 219 CLR 562 at 640 [231] (Hayne J).

formally and unequivocally abandoned that purpose [removal] that the detention could be regarded as being no longer for that purpose."[207]

The principle in the Communist Party case

114. Plaintiff S138 advances a separate constitutional issue, contending that ss 189 and 196 are invalid because they infringe the principle established in *Australian Communist Party v Commonwealth*[208] that "no law can give power to any person (other than a court) to determine conclusively any issue on which the constitutional validity of the law depends".[209]

115. Plaintiff S138 contends that the exception to the Chu Kheng Lim doctrine that permits non-citizens to be detained for the purpose of removal does not apply where "a condition precedent to detention is in substance unreviewable" and where "indefinite detention is the result".[210] This argument should be rejected. It conflates the decision as to whether a non-citizen should be admitted into the Australian community with the separate question whether a non-citizen who has not been so admitted may be detained. Five points may be made.

116. First, at a factual level, the argument does not arise. It is premised on the proposition that a non-citizen may be unable effectively to challenge an adverse security assessment because national security reasons have justified a reduction in the content of the requirements of procedural fairness to such a level that the non-citizen does not know enough about the adverse security assessment to challenge that assessment.[211] However, neither the Plaintiff nor Plaintiff S138 submits that the security assessment in relation to the Plaintiff is "in substance unreviewable".[212] The foundation for the argument is therefore absent.

117. Second, the validity of ss 189 and 196 does not depend upon any fact that needs to be determined by any person or court. There is no question of the Executive reciting itself into power, whether conclusively or otherwise. The validity of ss 189 and 196 is established by the terms of the sections when read with s 51(xix) of the Constitution.

118. Even in respect of their operation in relation to any particular non-citizen, the "condition precedent" to the operation of ss 189 and 196 is that an officer "knows or reasonably suspects that a person ... is an unlawful non-citizen". No law purports to make the Executive's judgment that a person is an unlawful non-citizen conclusive. Further, while a person's status as an unlawful non-citizen may be a consequence of a decision to refuse to grant that person a visa, unless and until a visa is granted, the non-citizen remains an unlawful non-citizen. It is therefore incorrect to describe an adverse security assessment as a "condition precedent to detention". Such an assessment is no more a condition precedent to detention than any other decision that may result in the refusal of a visa. For the purposes of ss 189 and 196, what is significant is the fact that a non-citizen does not hold a visa, not the reason that the visa was refused.

---

207 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 659 [291]. See also *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 85 [262] (Callinan J).
208 (1951) 83 CLR 1.
209 Leslie Zines, *The High Court and the Constitution* (5th ed, 2008) 300.
210 Plaintiff S138's submissions at [12] and [16].
211 Plaintiff S138's submissions at [12], [16], [22].
212 See Plaintiff's submissions at [70]; Plaintiff S138's submissions at [16].

119. Third, even if the adverse security assessment is properly characterised as a condition precedent to detention, it is wrong to describe it as "in substance unreviewable". Plaintiff S138 concedes that "judicial review is technically available",[213] but submits that any challenge to an adverse security assessment is likely to fail.[214] But it is necessary to explore why such a challenge might be likely to fail. The Plaintiff points to the fact that:

119.1. "where the person in question does not know the substance of the allegations or concerns (and assuming here that this is seen to be consistent with the general law requirements of procedural fairness) then he or she will know little, if anything, of the basis for the decision";[215] and

119.2. "any application for preliminary discovery to establish the basis on which an assessment was made is likely to be met by a comprehensive public interest immunity claim that would frustrate the exercise".[216]

120. If the subject of an adverse security assessment wishes to challenge that assessment, such a challenge can be commenced in the Federal Court pursuant to s 39B of the *Judiciary Act 1903* (Cth).[217] In any such a challenge, discovery is available, and is likely to be ordered.[218] The problem that Plaintiff S138 anticipates is not that such a proceeding cannot be instituted, but that it may fail because ASIO is likely to object on national security grounds to the plaintiff being permitted to inspect any discovered documents, and the Court will uphold that claim if it decides that the public interest in national security outweighs the public interest in the disclosure of information to the plaintiff. But the fact that such a public interest immunity claim may be upheld does not mean that ASIO's decision to issue an adverse security assessment is "conclusive" in the sense discussed in the *Communist Party Case*. On the contrary, the difficulties that the Plaintiff would confront arise from the "self-imposed restraints which courts have adopted when undertaking the judicial review of security assessments".[219] As Mason J explained in *Church of Scientology v Woodward*:[220]

> The fact that a successful claim for privilege [public interest immunity] handicaps one of the parties to litigation is not a reason for saying that the Court cannot or will not exercise its ordinary jurisdiction; it merely means that the Court will arrive at a decision on something less than the entirety of the relevant materials.

121. The "conclusive" nature of the adverse security assessment upon which Plaintiff S138 bases his argument does not result from any legislation the validity of which is challenged. It arises entirely from the manner in which a court may apply general law principles to resolve a challenge to an adverse assessment. For that reason, the characterisation of an adverse security assessment as an "unreviewable" executive decision should not be accepted. Any application for review of such an assessment would be limited only if, and to the extent, that a court decides that it would be contrary to the public interest for particular information to be disclosed. The fact that it

---

213 Plaintiff S138's submissions at [20].
214 Plaintiff S138's submissions at [20]-[21].
215 Plaintiff S138's submissions at [20].
216 Plaintiff S138's submissions at [21].
217 See, e.g., *Leghaei v Director General of Security* [2005] FCA 1576; *Sagar v O'Sullivan* (2011) 193 FCR 311.
218 *O'Sullivan v Parkin* (2008) 169 FCR 283.
219 *Sagar v O'Sullivan* (2011) 193 FCR 311 at 325 [82].
220 (1980) 154 CLR 25 at 61. That passage quoted with approval by the plurality in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (WA)* (2008) 234 CLR 532 at 556.

is a court that decides that question demonstrates that there is no infringement of Chapter III of the Constitution.[221]

122. Fourth, to the extent that a plaintiff will confront practical difficulties in challenging an adverse security assessment, those difficulties do not derive in any way from ss 189 and 196. The validity of those sections cannot depend on the manner in which courts may apply general law doctrines to deciding a challenge to an administrative decision taken at some steps removed from the decision to detain. Plaintiff S138's attempt to link the impediments to an effective challenge to a security assessment to the validity of ss 189 and 196 via the "reading down" that he proposes[222] would require the Court to redraft those sections in a manner that would far exceed the proper judicial function.[223]

123. Finally, there is no logical reason to limit Plaintiff S138's argument to the case of indefinite detention. Leaving aside the conceptual and practical difficulties caused by the fact that detention will only be able to be characterised as indefinite at some time after detention begins,[224] if the argument is valid then it applies to any detention and to removal itself.

Dated: 13 June 2012

Stephen Donaghue
Douglas Menzies Chambers
T: (03) 9225 7919
F: (03) 9225 6058
s.donaghue@vicbar.com.au

Chris Horan
Owen Dixon Chambers
T: (03) 9225 8430
F: (03) 9225 8668
chris.horan@vicbar.com.au

Frances Gordon
Joan Rosanove Chambers
T: (03) 9225 6809
F: (03) 9225 8668
frances.gordon@vicbar.com.au

Nick Wood
Melbourne Chambers
T: (03) 9640 3137
F: (03) 9225 8395
nick.wood@vicbar.com.au

---

221 See, e.g., *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (WA)* (2008) 234 CLR 532 at 556 [24], 559 [36] (Gummow, Hayne, Heydon and Kiefel JJ), 595-596 [182]-[183], 597 [189] (Crennan J, with Gleeson CJ agreeing on this point); *K-Generation v Liquor Licensing Court* (2009) 237 CLR 501 at 542-543 [144]-[149] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

222 Plaintiff S138's submissions at [35].

223 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 164 (Latham CJ) and 372 (Dixon J); *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 349; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 513 [102] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

224 Difficulties acknowledged by Plaintiff S138: see Plaintiff S138's submissions at [36].

IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY

No M47 of 2012

BETWEEN:

PLAINTIFF M47/2012

Plaintiff

DIRECTOR-GENERAL OF SECURITY

First Defendant

THE OFFICER IN CHARGE, MELBOURNE IMMIGRATION TRANSIT ACCOMODATION

Second Defendant

SECRETARY, DEPARTMENT OF IMMIGRATION AND CITIZENSHIP

Third Defendant

MINISTER FOR IMMIGRATION AND CITIZENSHIP

Fourth Defendant

COMMONWEALTH OF AUSTRALIA

Fifth Defendant

ANNEXURE A

Defendants' supplementary constitutional and statutory provisions

Filed on behalf of the Defendants by:

Australian Government Solicitor
Level 21, 200 Queen StreetMelbourne VIC 3000
DX50 Melbourne

Date of this document: 13 June 2012
Contacts: Evan Evagorou and Emily Nance

File ref: 12035788
Telephone:03 9242 1316
Facsimile: 03 9242 1265
E-mail: evan.evagorou@ags.gov.au; emily.nance@ags.gov.au

COMMONWEALTH CONSTITUTION

51 Legislative powers of the Parliament

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

...

(xix) naturalization and aliens;

MIGRATION ACT 1958 (Cth) – provisions applicable at all relevant times

Section 4 Object of Act

(1) The object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non citizens.

(2) To advance its object, this 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.

(3) To advance its object, this Act requires persons, whether citizens or non citizens, entering Australia to identify themselves so that the Commonwealth government can know who are the non citizens so entering.

(4) To advance its object, this Act provides for the removal or deportation from Australia of non citizens whose presence in Australia is not permitted by this Act.

Section 5 Interpretation

...

detain means:

(a) take into immigration detention; or

(b) keep, or cause to be kept, in immigration detention;

and includes taking such action and using such force as are reasonably necessary to do so.

Note: This definition extends to persons covered by residence determinations (see section 197AC).

...

immigration detention means:

(a) being in the company of, and restrained by:

(i) an officer; or

(ii) in relation to a particular detainee—another person directed by the Secretary to accompany and restrain the detainee; or

(b) being held by, or on behalf of, an officer:

(i) in a detention centre established under this Act; or

(ii) in a prison or remand centre of the Commonwealth, a State or a Territory; or

(iii) in a police station or watch house; or

(iv) in relation to a non-citizen who is prevented, under section 249, from leaving a vessel—on that vessel; or

(v) in another place approved by the Minister in writing;

but does not include being restrained as described in subsection 245F(8A), or being dealt with under paragraph 245F(9)(b).

Note 1: See also section 198A, which provides that being dealt with under that section does not amount to immigration detention.

Note 2: This definition extends to persons covered by residence determinations (see section 197AC).

...

officer means:

(a) an officer of the Department, other than an officer specified by the Minister in writing for the purposes of this paragraph; or

(b) a person who is an officer for the purposes of the *Customs Act 1901*, other than such an officer specified by the Minister in writing for the purposes of this paragraph; or

(c) a person who is a protective service officer for the purposes of the *Australian Federal Police Act 1979*, other than such a person specified by the Minister in writing for the purposes of this paragraph; or

(d) a member of the Australian Federal Police or of the police force of a State or an internal Territory; or

(e) a member of the police force of an external Territory; or

(f) a person who is authorised in writing by the Minister to be an officer for the purposes of this Act; or

(g) any person who is included in a class of persons authorised in writing by the Minister to be officers for the purposes of this Act, including a person who becomes a member of the class after the authorisation is given.

...

(9) For the purposes of this Act, an application under this Act is finally determined when either:

(a) a decision that has been made in respect of the application is not, or is no longer, subject to any form of review under Part 5 or 7; or

(b) a decision that has been made in respect of the application was subject to some form of review under Part 5 or 7, but the period within which such a review could be instituted has ended without a review having been instituted as prescribed.

Section 14 Unlawful non citizens

(1) A non citizen in the migration zone who is not a lawful non citizen is an unlawful non citizen.

(2) To avoid doubt, a non citizen in the migration zone who, immediately before 1 September 1994, was an illegal entrant within the meaning of the Migration Act as in force then became, on that date, an unlawful non citizen.

Section 31 Classes of visas

(1) There are to be prescribed classes of visas.

(2) As well as the prescribed classes, there are the classes provided for by sections 32, 33, 34, 35, 36, 37, 37A, 38, 38A and 38B.

(3) The regulations may prescribe criteria for a visa or visas of a specified class (which, without limiting the generality of this subsection, may be a class provided for by section 32, 36, 37, 37A or 38B but not by section 33, 34, 35, 38 or 38A).

(4) The regulations may prescribe whether visas of a class are visas to travel to and enter Australia, or to remain in Australia, or both.

(5) A visa is a visa of a particular class if this Act or the regulations specify that it is a visa of that class.

Section 65 Decision to grant or refuse to grant visa

(1) After considering a valid application for a visa, the Minister:

(a) if satisfied that:

(i) the health criteria for it (if any) have been satisfied; and

(ii) the other criteria for it prescribed by this Act or the regulations have been satisfied; and

(iii) the grant of the visa is not prevented by section 40 (circumstances when granted), 500A (refusal or cancellation of temporary safe haven visas), 501 (special power to refuse or cancel) or any other provision of this Act or of any other law of the Commonwealth; and

(iv) any amount of visa application charge payable in relation to the application has been paid;

is to grant the visa; or

(b) if not so satisfied, is to refuse to grant the visa.

Note: See also section 195A, under which the Minister has a non compellable power to grant a visa to a person in detention under section 189 (whether or not the person has applied for the visa). Subdivision AA, this Subdivision, Subdivision AF and the regulations do not apply to the Minister's power under that section.

(2) To avoid doubt, an application put aside under section 94 is not taken for the purposes of subsection (1) to have been considered until it has been removed from the pool under subsection 95(3).

Section 193 Application of law to certain non-citizens while they remain in immigration detention

(1) Sections 194 and 195 do not apply to a person:

(a) detained under subsection 189(1):

(i) on being refused immigration clearance; or

(ii) after bypassing immigration clearance; or

(iii) after being prevented from leaving a vessel under section 249; or

(iv) because of a decision the Minister has made personally under section 501, 501A or 501B to refuse to grant a visa to the person or to cancel a visa that has been granted to the person; or

(b) detained under subsection 189(1) who:

(i) has entered Australia after 30 August 1994; and

(ii) has not been immigration cleared since last entering; or

(c) detained under subsection 189(2), (3) or (4); or

(d) detained under section 189 who:

(i) held an enforcement visa that has ceased to be in effect; and

(ii) has not been granted a substantive visa since the enforcement visa ceased to be in effect.

(2) Apart from section 256, nothing in this Act or in any other law (whether written or unwritten) requires the Minister or any officer to:

(aa) give a person covered by subsection (1) an application form for a visa; or

(a) advise a person covered by subsection (1) as to whether the person may apply for a visa; or

(b) give a person covered by subsection (1) any opportunity to apply for a visa; or

(c) allow a person covered by subsection (1) access to advice (whether legal or otherwise) in connection with applications for visas.

(3) If:

(a) a person covered by subsection (1) has not made a complaint in writing to the Australian Human Rights Commission, paragraph 20(6)(b) of the Australian Human Rights Commission Act 1986 does not apply to the person; and

(c) a person covered by subsection (1) has not made a complaint to the Postal Industry Ombudsman, paragraph 7(3)(b) of the Ombudsman Act 1976 (as that paragraph applies because of section 19R of that Act) does not apply to the person.

(4) This section applies to a person covered by subsection (1) for as long as the person remains in immigration detention.

Section 195A Minister may grant detainee visa (whether or not on application)

Persons to whom section applies

(1) This section applies to a person who is in detention under section 189.

Minister may grant visa

(2) If the Minister thinks that it is in the public interest to do so, the Minister may grant a person to whom this section applies a visa of a particular class (whether or not the person has applied for the visa).

(3) In exercising the power under subsection (2), the Minister is not bound by Subdivision AA, AC or AF of Division 3 of this Part or by the regulations, but is bound by all other provisions of this Act.

Minister not under duty to consider whether to exercise power

(4) The Minister does not have a duty to consider whether to exercise the power under subsection (2), whether he or she is requested to do so by any person, or in any other circumstances.

Minister to exercise power personally

(5) The power under subsection (2) may only be exercised by the Minister personally.

Tabling of information relating to the granting of visas

(6) If the Minister grants a visa under subsection (2), he or she must cause to be laid before each House of the Parliament a statement that (subject to subsection (7)):

(a) states that the Minister has granted a visa under this section; and

(b) sets out the Minister's reasons for granting the visa, referring in particular to the Minister's reasons for thinking that the grant is in the public interest.

(7) A statement under subsection (6) in relation to a decision to grant a visa is not to include:

(a) the name of the person to whom the visa is granted; or

(b) any information that may identify the person to whom the visa is granted; or

(c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the grant of the visa—the name of that other person or any information that may identify that other person.

(8) A statement under subsection (6) is to be laid before each House of the Parliament within 15 sitting days of that House after:

(a) if the decision to grant the visa is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or

(b) if the decision to grant the visa is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.

Subdivision B—Residence determinations

Section 197AA Persons to whom Subdivision applies

This Subdivision applies to a person who is required or permitted by section 189 to be detained, or who is in detention under that section.

Section 197AB Minister may determine that person is to reside at a specified place rather than being held in detention centre etc.

(1) If the Minister thinks that it is in the public interest to do so, the Minister may make a determination (a residence determination) to the effect that one or more specified persons to whom this Subdivision applies are to reside at a specified place, instead of being detained at a place covered by the definition of immigration detention in subsection 5(1).

(2) A residence determination must:

(a) specify the person or persons covered by the determination by name, not by description of a class of persons; and

(b) specify the conditions to be complied with by the person or persons covered by the determination.

(3) A residence determination must be made by notice in writing to the person or persons covered by the determination.

Section 197AC Effect of residence determination

Act and regulations apply as if person were in detention in accordance with section 189

(1) While a residence determination is in force, this Act and the regulations apply (subject to subsection (3)) to a person who is covered by the determination and who is residing at the place specified in the determination as if the person were being kept in immigration detention at that place in accordance with section 189.

(2) If:

(a) a person covered by a residence determination is temporarily staying at a place other than the place specified in the determination; and

(b) the person is not breaching any condition specified in the determination by staying there;

then, for the purposes of subsection (1), the person is taken still to be residing at the place specified in the determination.

Certain provisions do not apply to people covered by residence determinations

(3) Subsection (1):

(a) does not apply for the purposes of section 197 or 197A, or any of sections 252AA to 252E; and

(b) does not apply for the purposes of any other provisions of this Act or the regulations that are specified in regulations made for the purposes of this paragraph.

What constitutes release from immigration detention?

(4) If:

(a) a residence determination is in force in relation to a person; and

(b) a provision of this Act requires the person to be released from immigration detention, or this Act no longer requires or permits the person to be detained;

then, at the time when paragraph (b) becomes satisfied, the residence determination, so far as it covers the person, is revoked by force of this subsection and the person is, by that revocation, released from immigration detention.

Note: Because the residence determination is revoked, the person is no longer subject to the conditions specified in the determination.

(5) If a person is released from immigration detention by operation of subsection (4), the Secretary must, as soon as possible, notify the person that he or she has been so released.

Secretary must ensure section 256 complied with

(6) The Secretary must ensure that a person covered by a residence determination is given forms and facilities as and when required by section 256.

Section 197AD Revocation or variation of residence determination

(1) If the Minister thinks that it is in the public interest to do so, the Minister may, at any time, revoke or vary a residence determination in any respect (subject to subsection (2)).

Note 1: If a person covered by a residence determination does not comply with a condition specified in the determination, the Minister may (subject to the public interest test) decide to revoke the determination, or to vary the determination by altering the conditions, whether by omitting or amending one or more existing conditions or by adding one or more additional conditions.

Note 2: If the Minister revokes a residence determination (without making a replacement determination) and a person covered by the determination is a person whom section 189 requires to be detained, the person will then have to be taken into detention at a place that is covered by the definition of immigration detention in subsection 5(1).

(2) Any variation of a residence determination must be such that the determination, as varied, will comply with subsections 197AB(1) and (2).

(3) A revocation or variation of a residence determination must be made by notice in writing to the person or persons covered by the determination.

Section 197AE Minister not under duty to consider whether to exercise powers

The Minister does not have a duty to consider whether to exercise the power to make, vary or revoke a residence determination, whether he or she is requested to do so by any person, or in any other circumstances.

Section 197AF Minister to exercise powers personally

The power to make, vary or revoke a residence determination may only be exercised by the Minister personally.

Section 197AG Tabling of information relating to the making of residence determinations

(1) If the Minister makes a residence determination, he or she must cause to be laid before each House of the Parliament a statement that (subject to subsection (2)):

(a) states that the Minister has made a determination under this section; and

(b) sets out the Minister's reasons for making the determination, referring in particular to the Minister's reasons for thinking that the determination is in the public interest.

(2) A statement under subsection (1) in relation to a residence determination is not to include:

(a) the name of any person covered by the determination; or

(b) any information that may identify any person covered by the determination; or

(c) the address, name or location of the place specified in the determination; or

(d) any information that may identify the address, name or location of the place specified in the determination; or

(e) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the determination—the name of that other person or any information that may identify that other person.

(3) A statement under subsection (1) is to be laid before each House of the Parliament within 15 sitting days of that House after:

(a) if the residence determination is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or

(b) if the residence determination is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.

Section 504 Regulations

(1) The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act and, without limiting the generality of the foregoing, may make regulations:

(a) making provision for and in relation to:

(i) the charging and recovery of fees in respect of any matter under this Act or the regulations, including the fees payable in connection with the review of decisions made under this Act or the regulations, whether or not such review is provided for by or under this Act; or

(ii) the charging and recovery of fees in respect of English language tests conducted by or on behalf of the Department;

(iii) the way, including the currency, in which fees are to be paid; or

(iv) the persons who may be paid fees on behalf of the Commonwealth;

(b) making provision for the remission, refund or waiver of fees of a kind referred to in paragraph (a) or for exempting persons from the payment of such fees;

(c) making provision for or in relation to the furnishing or obtaining of information with respect to:

(i) persons on board a vessel arriving at a port in Australia in the course of, or at the conclusion of, a voyage or flight that commenced at, or during which the vessel called at, a place outside Australia; and

(ii) persons on board a vessel leaving a port in Australia and bound for, or calling at, a place outside Australia; and

(iii) persons on board an aircraft arriving at or departing from an airport in Australia, being an aircraft operated by an international air carrier;

(d) making provision for and in relation to the use that may be made by persons or bodies other than officers of the Department of information collected pursuant to regulations made under paragraph (c);

(e) making provision for and in relation to:

(i) the giving of documents to;

(ii) the lodging of documents with; or

(iii) the service of documents on;

the Minister, the Secretary or any other person or body, for the purposes of this Act;

(f) prescribing the practice and procedure in relation to proceedings before a Commissioner or a prescribed authority under this Act, including the summoning of witnesses, the production of documents, the taking of evidence on oath or affirmation, the administering of oaths or affirmations and the payment of expenses of witnesses;

(g) requiring assurances of support to be given, in such circumstances as are prescribed or as the Minister thinks fit, in relation to persons seeking to enter, or remain in, Australia and providing for the enforcement of assurances of support and the imposition on persons who give assurances of support of liabilities in respect of the maintenance of, and other expenditure in connexion with, the persons in respect of whom the assurances of support are given;

(h) making provision for the remission, refund or waiver of charges under the Migration (Health Services) Charge Act 1991;

(i) enabling a person who is alleged to have contravened section 137 to pay to the Commonwealth, as an alternative to prosecution, a prescribed penalty, not exceeding $1,000;

(j) enabling a person who is alleged to have contravened section 229 or 230 to pay to the Commonwealth, as an alternative to prosecution, a prescribed penalty, not exceeding:

(i) in the case of a natural person—30 penalty units; and

(ii) in the case of a body corporate—100 penalty units; and

(jaa) enabling a person who is alleged to have committed an offence against subsection 245N(2) to pay to the Commonwealth, as an alternative to prosecution, a prescribed penalty, not exceeding 10 penalty units; and

(ja) enabling a person who is alleged to have committed an offence against subsection 280(1) to pay to the Commonwealth, as an alternative to prosecution, a penalty of 12 penalty units; and

(k) prescribing penalties not exceeding a fine of $1,000 or imprisonment for 6 months in respect of offences against the regulations; and

(l) making provision for matters that, under the Education Services for Overseas Students Act 2000, are required or permitted to be prescribed in regulations made under this Act.

(2) Section 14 of the Legislative Instruments Act 2003 does not prevent, and has not prevented, regulations whose operation depends on a country or other matter being specified or certified by the Minister in an instrument in writing made under the regulations after the taking effect of the regulations.

(3) The regulations that may be made under paragraph (1)(e) include, but are not limited to, regulations providing that a document given to, or served on, a person in a specified way shall be taken for all purposes of this Act and the regulations to have been received by the person at a specified or ascertainable time.

(3A) The Evidence Act 1995 does not affect the operation of regulations made for the purposes of paragraph (1)(e).

(4) Regulations in respect of a matter referred to in paragraph (1)(g) may apply in relation to maintenance guarantees given before the commencement of this Part in accordance with the regulations that were in force under any of the Acts repealed by this Act.

(5) An assurance of support given, after the commencement of this subsection, in accordance with regulations under paragraph (1)(g) continues to have effect, and may be enforced, in accordance with such regulations in spite of any change in circumstances whatsoever.

(5A) The following have effect only in relation to assurances of support that were given before 1 July 2004 and are not assurances of support in relation to which Chapter 2C of the Social Security Act 1991 applies or applied:

(a) subsection (5) of this section;

(b) regulations made under paragraph (1)(g) (whether before, on or after the commencement of this subsection) providing for:

(i) the enforcement of assurances of support; or

(ii) the imposition on persons who give assurances of support of liabilities in respect of the maintenance of, and other expenditure in connection with, the persons in respect of whom the assurances of support are given.

(6) In this section:

international air carrier means an air transport enterprise that operates an air service between Australia and a place outside Australia.

Section 505 Regulations about visa criteria

To avoid doubt, regulations for the purpose of prescribing a criterion for visas of a class may provide that the Minister, when required to decide whether an applicant for a visa of the class satisfies the criterion:

(a) is to get a specified person or organisation, or a person or organisation in a specified class, to:

(i) give an opinion on a specified matter; or

(ii) make an assessment of a specified matter; or

(iii) make a finding about a specified matter; or

(iv) make a decision about a specified matter; and

(b) is:

(i) to have regard to that opinion, assessment, finding or decision in; or

(ii) to take that opinion, assessment, finding or decision to be correct for the purposes of;

deciding whether the applicant satisfies the criterion.

MIGRATION ACT 1958 (Cth) - before 24 March 2012 and as at 18 February 2011

Section 36 Protection visas

(1) There is a class of visas to be known as protection visas.

Note: See also Subdivision AL.

(2) A criterion for a protection visa is that the applicant for the visa is:

(a) a non citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or

(b) a non citizen in Australia who is a member of the same family unit as a non citizen who:

(i) is mentioned in paragraph (a); and

(ii) holds a protection visa.

Protection obligations

(3) Australia is taken not to have protection obligations to a non citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non citizen is a national.

(4) However, if the non citizen has a well founded fear of being persecuted in a country for reasons of race, religion, nationality, membership of a particular social group or political opinion, subsection (3) does not apply in relation to that country.

(5) Also, if the non citizen has a well founded fear that:

(a) a country will return the non citizen to another country; and

(b) the non citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion;

subsection (3) does not apply in relation to the first mentioned country.

Determining nationality

(6) For the purposes of subsection (3), the question of whether a non citizen is a national of a particular country must be determined solely by reference to the law of that country.

(7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.

MIGRATION ACT 1958 (Cth) - from 24 March 2012

Section 500 Review of decision

(1) Applications may be made to the Administrative Appeals Tribunal for review of:

(a) decisions of the Minister under section 200 because of circumstances specified in section 201; or

(b) decisions of a delegate of the Minister under section 501; or

(c) a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on:

(i) one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2); or

(ii) paragraph 36(2C)(a) or (b) of this Act;

other than decisions to which a certificate under section 502 applies.

(2) A person is not entitled to make an application under paragraph (1)(a) unless:

(a) the person is an Australian citizen; or

(b) the person is a lawful non-citizen whose continued presence in Australia is not subject to any limitation as to time imposed by law.

(3) A person is not entitled to make an application under subsection (1) for review of a decision referred to in paragraph (1)(b) or (c) unless the person would be entitled to seek review of the decision under Part 5 or 7 if the decision had been made on another ground.

(4) The following decisions are not reviewable under Part 5 or 7:

(a) a decision under section 200 because of circumstances specified in section 201;

(b) a decision under section 501;

(c) a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on:

(i) one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2); or

(ii) paragraph 36(2C)(a) or (b) of this Act.

(5) In giving a direction under the *Administrative Appeals Tribunal Act 1975* as to the persons who are to constitute the Tribunal for the purposes of a proceeding for review of a decision referred to in subsection (1), the President must have regard to:

(a) the degree of public importance or complexity of the matters to which that proceeding relates; and

(b) the status of the position or office held by the person who made the decision that is to be reviewed by the Tribunal; and

(c) the degree to which the matters to which that proceeding relates concern the security, defence or international relations of Australia; and

(d) if:

(i) the person to whom the decision relates has been convicted of, or sentenced for, an offence; and

(ii) that conviction or sentence is relevant to the matters to which that proceeding relates;

the seriousness of that offence; and

(e) if:

(i) the person to whom the decision relates has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution; and

(ii) that acquittal is relevant to the matters to which that proceeding relates;

the seriousness of that offence;

and must not have regard to any other matters.

(5A) Section 23B of the *Administrative Appeals Tribunal Act 1975* does not apply in relation to a proceeding for review of a decision referred to in subsection (1) of this section.

(6) Where an application has been made to the Tribunal for the review of a decision under section 200 ordering the deportation of a person, the order for the deportation of the person shall not be taken for the purposes of section 253 to have ceased or to cease to be in force by reason only of any order that has been made by:

(a) the Tribunal; or

(b) a presidential member under section 41 of the Administrative Appeals Tribunal Act 1975; or

(c) the Federal Court of Australia or a Judge of that Court under section 44A of that Act; or

(d) the Federal Magistrates Court or a Federal Magistrate under section 44A of that Act.

(6A) If a decision under section 501 of this Act relates to a person in the migration zone, section 28 of the *Administrative Appeals Tribunal Act 1975* does not apply to the decision.

(6B) If a decision under section 501 of this Act relates to a person in the migration zone, an application to the Tribunal for a review of the decision must be lodged with the Tribunal within 9 days after the day on which the person was notified of the decision in accordance with subsection 501G(1). Accordingly, paragraph 29(1)(d) and subsections 29(7), (8), (9) and (10) of the *Administrative Appeals Tribunal Act 1975* do not apply to the application.

(6C) If a decision under section 501 relates to a person in the migration zone, an application to the Tribunal for a review of the decision must be accompanied by, or by a copy of:

(a) the document notifying the person of the decision in accordance with subsection 501G(1); and

(b) one of the sets of documents given to the person under subsection 501G(2) at the time of the notification of the decision.

(6D) If:

(a) an application is made to the Tribunal for a review of a decision under section 501 of this Act; and

(b) the decision relates to a person in the migration zone;

section 37 of the *Administrative Appeals Tribunal Act 1975* does not apply in relation to the decision.

(6E) If:

(a) an application is made to the Tribunal for a review of a decision under section 501 of this Act; and

(b) the decision relates to a person in the migration zone;

the Registrar, a District Registrar or a Deputy Registrar of the Tribunal must notify the Minister, within the period and in the manner specified in the regulations, that the application has been made. Accordingly, subsection 29(11) of the *Administrative Appeals Tribunal Act 1975* does not apply in relation to the application.

(6F) If:

(a) an application is made to the Tribunal for a review of a decision under section 501 of this Act; and

(b) the decision relates to a person in the migration zone;

then:

(c) the Minister must lodge with the Tribunal, within 14 days after the day on which the Minister was notified that the application had been made, 2 copies of every document, or part of a document, that:

(i) is in the Minister's possession or under the Minister's control; and

(ii) was relevant to the making of the decision; and

(iii) contains non-disclosable information; and

(d) the Tribunal may have regard to that non-disclosable information for the purpose of reviewing the decision, but must not disclose that non-disclosable information to the person making the application.

(6G) If:

(a) an application is made to the Tribunal for a review of a decision under section 501 of this Act; and

(b) the decision relates to a person in the migration zone;

the Tribunal must not:

(c) hold a hearing (other than a directions hearing); or

(d) make a decision under section 43 of the *Administrative Appeals Tribunal Act 1975*;

in relation to the decision under review until at least 14 days after the day on which the Minister was notified that the application had been made.

(6H) If:

(a) an application is made to the Tribunal for a review of a decision under section 501; and

(b) the decision relates to a person in the migration zone;

the Tribunal must not have regard to any information presented orally in support of the person's case unless the information was set out in a written statement given to the Minister at least 2 business days before the Tribunal holds a hearing (other than a directions hearing) in relation to the decision under review.

(6J) If:

(a) an application is made to the Tribunal for a review of a decision under section 501; and

(b) the decision relates to a person in the migration zone;

the Tribunal must not have regard to any document submitted in support of the person's case unless a copy of the document was given to the Minister at least 2 business days before the Tribunal holds a hearing (other than a directions hearing) in relation to the decision under review. However, this does not apply to documents given to the person or Tribunal under subsection 501G(2) or subsection (6F) of this section.

(6K) If:

(a) an application is made to the Tribunal for a review of a decision under section 501 of this Act; and

(b) the decision relates to a person in the migration zone; and

(c) the Tribunal is of the opinion that particular documents, or documents included in a particular class of documents, may be relevant in relation to the decision under review;

then:

(d) the Tribunal may cause to be served on the Minister a notice in writing stating that the Tribunal is of that opinion and requiring the Minister to lodge with the Tribunal, within a time specified in the notice, 2 copies of each of those documents that is in the Minister's possession or under the Minister's control; and

(e) the Minister must comply with any such notice.

(6L) If:

(a) an application is made to the Tribunal for a review of a decision under section 501 of this Act; and

(b) the decision relates to a person in the migration zone; and

(c) the Tribunal has not made a decision under section 42A, 42B, 42C or 43 of the *Administrative Appeals Tribunal Act 1975* in relation to the decision under review within the period of 84 days after the day on which the person was notified of the decision under review in accordance with subsection 501G(1);

the Tribunal is taken, at the end of that period, to have made a decision under section 43 of the *Administrative Appeals Tribunal Act 1975* to affirm the decision under review.

(7) In this section, decision has the same meaning as in the *Administrative Appeals Tribunal Act 1975*.

(8) In this section:

business day means a day that is not:

(a) a Saturday; or

(b) a Sunday; or

(c) a public holiday in the Australian Capital Territory; or

(d) a public holiday in the place concerned.

AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION ACT 1979 (Cth) – provisions applicable at all relevant times

Section 4 [Definition of "security"]

security means:

(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:

(i) espionage;

(ii) sabotage;

(iii) politically motivated violence;

(iv) promotion of communal violence;

(v) attacks on Australia's defence system; or

(vi) acts of foreign interference;

whether directed from, or committed within, Australia or not; and

(aa) the protection of Australia's territorial and border integrity from serious threats; and

(b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).

Section 17 Functions of Organisation

(1) The functions of the Organisation are:

(a) to obtain, correlate and evaluate intelligence relevant to security;

(b) for purposes relevant to security, to communicate any such intelligence to such persons, and in such manner, as are appropriate to those purposes;

(c) to advise Ministers and authorities of the Commonwealth in respect of matters relating to security, in so far as those matters are relevant to their functions and responsibilities.

(ca) to furnish security assessments to a State or an authority of a State in accordance with paragraph 40(1)(b);

(d) to advise Ministers, authorities of the Commonwealth and such other persons as the Minister, by notice in writing given to the Director General, determines on matters relating to protective security; and

(e) to obtain within Australia foreign intelligence pursuant to section 27A or 27B of this Act or section 11A, 11B or 11C of the Telecommunications (Interception and Access) Act 1979, and to communicate any such intelligence in accordance with this Act or the *Telecommunications (Interception and Access) Act 1979*; and

(f) to co operate with and assist bodies referred to in section 19A in accordance with that section.

(2) It is not a function of the Organisation to carry out or enforce measures for security within an authority of the Commonwealth.

Section 17A Act not concerned with lawful dissent etc.

This Act shall not limit the right of persons to engage in lawful advocacy, protest or dissent and the exercise of that right shall not, by itself, be regarded as prejudicial to security, and the functions of the Organisation shall be construed accordingly.

Section 31 Classes of visas

(1) There are to be prescribed classes of visas.

(2) As well as the prescribed classes, there are the classes provided for by sections 32, 33, 34, 35, 36, 37, 37A, 38, 38A and 38B.

(3) The regulations may prescribe criteria for a visa or visas of a specified class (which, without limiting the generality of this subsection, may be a class provided for by section 32, 36, 37, 37A or 38B but not by section 33, 34, 35, 38 or 38A).

(4) The regulations may prescribe whether visas of a class are visas to travel to and enter Australia, or to remain in Australia, or both.

(5) A visa is a visa of a particular class if this Act or the regulations specify that it is a visa of that class.

Section 35 [definitions of "security assessment" and "prescribed administrative action"]

prescribed administrative action means:

(a) action that relates to or affects:

(i) access by a person to any information or place access to which is controlled or limited on security grounds; or

(ii) a person's ability to perform an activity in relation to, or involving, a thing (other than information or a place), if that ability is controlled or limited on security grounds;

including action affecting the occupancy of any office or position under the Commonwealth or an authority of the Commonwealth or under a State or an authority of a State, or in the service of a Commonwealth contractor, the occupant of which has or may have any such access or ability;

(b) the exercise of any power, or the performance of any function, in relation to a person under the *Migration Act 1958* or the regulations under that Act; or

(c) the exercise of any power, or the performance of any function, in relation to a person under the *Australian Citizenship Act 2007*, the *Australian Passports Act 2005* or the regulations under either of those Acts; or

(d) the exercise of a power under section 58A, or subsection 581(3), of the *Telecommunications Act 1997*.

Note: An obligation, prohibition or restriction imposed by a control order is not prescribed administrative action (see subsection (2)).

security assessment or ***assessment*** means a statement in writing furnished by the Organisation to a Commonwealth agency expressing any recommendation, opinion or advice on, or otherwise referring to, the question whether it would be consistent with the requirements of security for prescribed administrative action to be taken in respect of a person or the question whether the requirements of security make it necessary or desirable for prescribed administrative action to be taken in respect of a person, and includes any qualification or comment expressed in connection with any such recommendation, opinion or advice, being a qualification or comment that relates or that could relate to that question.

Section 36 Part not to apply to certain assessments

This Part (other than subsections 37(1), (3) and (4)) does not apply to or in relation to:

(a) a security assessment in relation to the employment, by engagement outside Australia for duties outside Australia, of a person who is not an Australian citizen or is not normally resident in Australia; or

(b) a security assessment in relation to action of a kind referred to in paragraph (b) of the definition of prescribed administrative action in section 35 (other than an assessment made for the purposes of subsection 202(1) of the *Migration Act 1958*) in respect of a person who is not:

(i) an Australian citizen;

(ii) a person who is, within the meaning of the *Migration Act 1958*, the holder of a valid permanent visa; or

(iii) a person who holds a special category visa or is taken by subsection 33(2) of the Migration Act 1958 to have been granted a special purpose visa; or

(c) a security assessment in relation to the engagement, or proposed engagement, of a person by or in the Organisation, or an intelligence or security agency, as a staff member of the Organisation or agency.

Section 38 Person to be notified of assessment

(1) Subject to this section, where, after the commencement of this Act, an adverse or qualified security assessment in respect of a person is furnished by the Organisation to a Commonwealth agency or a State or an authority of a State, the Commonwealth agency, the State or the authority of the State shall, within 14 days after the day on which the assessment is so furnished, give to that person a notice in writing, to which a copy of the assessment is attached, informing him or her of the making of the assessment and containing information, in the prescribed form, concerning his or her right to apply to the Tribunal under this Part.

(1A) This section does not apply to a security assessment if section 38A applies to the assessment.

(2) The Attorney General may, by writing signed by the Attorney General delivered to the Director General, certify that the Attorney General is satisfied that:

(a) the withholding of notice to a person of the making of a security assessment in respect of the person is essential to the security of the nation; or

(b) the disclosure to a person of the statement of grounds contained in a security assessment in respect of the person, or of a particular part of that statement, would be prejudicial to the interests of security.

(3) Where the Attorney General issues a certificate under subsection (2), he or she shall cause a copy of the certificate to be delivered to the Commonwealth agency to which the assessment was furnished.

(4) Subsection (1) does not require a notice to be given in relation to a security assessment to which a certificate in accordance with paragraph (2)(a) applies.

(5) In the case of a security assessment in relation to which a certificate certifying in accordance with paragraph (2)(b) has been given, the copy of the assessment to be attached to a notice under subsection (1) shall not contain any matter to which the certificate applies.

(6) A notice under subsection (1) may be given to a person by delivering it to him or her personally or by sending it to the person by registered post at his or her address last known to the Commonwealth agency.