IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M47 OF 2012

BETWEEN

PLAINTIFF M47/2012

Plaintiff

and

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 PLAINTIFF

(REVISED)

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Part I: Publication of Submissions

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

Part II: Issues Arising in the Proceedings

2. The Plaintiff, a national of Sri Lanka, with no present right to enter or reman in any other country, has been found to be a refugee who, faces a real chance of abduction, torture or death should he be sent to Sri Lanka. He was refused a visa because the Minister was not satisfied that he met public interest criterion 4002 (**PIC 4002**), due to an adverse security assessment issued by ASIO. He remains in detention. Although the Defendants do not propose or intend to remove him to Sri Lanka, he is said by them to be detained for the purpose of his removal under s 198(2) of the *Migration Act* 1958 (the **Act**). No country has agreed to take him.

3. The Plaintiff contends for the following propositions:

4. First, s 198(2) does not apply to a person to whom Australia owes protection obligations under the Act. Section 198(2) is to be read down to facilitate and reflect Australia's obligations under the *Convention relating to the Status of Refugees*[1] (**Convention**) and the *Protocol Relating to the Status of Refugees*[2] (**Protocol**) as embodied in the Act.

5. Secondly, the Plaintiff is owed protection obligations, both under the Act and the Convention. Neither articles 32(1) or 33(2) of the Convention apply to the Plaintiff to permit either his expulsion or refoulement. Criterion 4002 does not reflect those articles, as they are embodied in the Act.

6. Thirdly, the Plaintiff is being detained for the purpose of removal. Because there is no power to remove him, his continued detention is not for a statutory purpose and is unlawful.

7. Fourthly, if s 198(2) does apply in its terms to the Plaintiff, removal is not reasonably practicable and his detention is unlimited. It is unlawful. The construction of the Act reflected in the holding of this Court in *Al-Kateb v Godwin* (2004) 219 CLR 562 ***(Al-Kateb)*** is incorrect and the Plaintiff seeks leave to challenge that holding.

8. Finally, the decision of ASIO to issue the assessment is attended by a failure to accord procedural fairness, because of a failure to put to the Plaintiff critical issues on which the decision turned, and is therefore invalid.

Part III: Notices under Section 78B of the *Judiciary Act* 1903 (Cth)

9. The plaintiff has served notices under s. 78B of the *Judiciary Act* 1903 (Cth).

Part IV: Material Facts

10. The material facts are set out in the Amended Special Case dated 7 June 2012 and the attachments thereto.

Part V: Plaintiff's Argument

A General propositions concerning construction to be drawn from the text and objects of the Act

11. As in *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 (***M61***) and *Plaintiff M70/2011 v The Commonwealth v Minister for Immigration and Citizenship* (2011) 244 CLR 144 (***M70***), this matter raises a number of issues of construction of the Act, which are to be resolved having regard to the fact that the Act proceeds, in important respects, from the

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[1] Signed at Geneva on 28 July 1951.
[2] Done at New York on 31 January 1967.

assumption that Australia has "protection obligations" to individuals.[3] The Act identifies those obligations by reference to the Convention.[4] The Act has been said to contain an "elaborated and interconnected" set of statutory provisions directed to the purpose of responding to those international obligations.

12. More specifically, it was also said in *M61* (and reiterated in *M70*) that the text and structure of the Act proceed on the footing that the Act provides power to respond to Australia's international obligations under those instruments by granting a protection visa in an appropriate case and (more importantly for present purposes) by not returning that person, directly or indirectly,[5] to a country where he or she has a well-founded fear of persecution for a Convention reason.[6] The Act should be construed in a way that, to the extent the text and context permits, facilitates Australia's compliance with its obligations under the Convention and the Protocol.[7]

13. A further and related general consideration in issue here, that should inform the construction of the provisions of the Act, was identified by Gummow, Hayne, Crennan and Bell JJ in *M70*: the ambit and operation of a statutory power to remove an unlawful non-citizen from Australia must be understood in light of relevant principles of international law concerning the movement of persons from state to state[8] and the practical operation of those powers.

14. As to the latter, while it is true that the terms of the Act speak of "removal from" Australia rather than "removal to" any particular place or any place at all,[9] it is evident that the exercise of any power of removal conferred by the Act is limited by the practical necessity to find a state that will receive the person to be removed. That matter of practicality is, as was said in *M70*, ordinarily addressed by looking to a person's country of nationality – drawing on the principle of international law that a national has a right to re-enter the territory of that country (and that that country has a corresponding duty to admit its national).[10]

15. That general expectation is qualified by the principle of international law, that, in the case of a person found to have a well founded fear of persecution for a reason specified in article 1A of the Convention, removal of that person under the Act may infringe Australia's obligations under the Convention and the Protocol. In that regard, Gummow, Hayne, Crennan and Bell JJ in *M70* made reference to the obligation of non-refoulement in article 33(1). A further relevant obligation which arises in the present case is that in article 32 – which prohibits a State party to the Convention expelling a refugee lawfully in their territory save on grounds of national security or public order.[11] It may also be qualified by practical considerations (such as the possibility that, as was the case in *Al-Kateb*, the person is stateless and/or matters concerning international relations which may be beyond Australia's control or influence[12]).

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[3] *M61* at [27]; M70 at [44] per French CJ and [90] per Gummow, Hayne, Crennan and Bell JJ.
[4] See s36(2) and the definition of the terms "Refugees Convention" and "Refugees Protocol" in s5.
[5] For example, by sending a refugee to a country that might then refoule them.
[6] *M61* at [27]; *M70* at [44] per French CJ and at [90] per Gummow, Hayne, Crennan and Bell JJ.
[7] *M70* at [98] per Gummow, Hayne, Crennan and Bell JJ.
[8] *M70* at [91]-[94] per Gummow, Hayne, Crennan and Bell JJ.
[9] *Al Kateb* at [227] per Hayne J; *M70* at [89] per Gummow, Hayne, Crennan and Bell JJ.
[10] See the texts and instruments referred to in *M70* at [92], footnotes [91] and [92].
[11] It is unclear whether the Commonwealth contends that the plaintiff was not "lawfully in [its] territory" within the meaning of that article. To the extent it does, that is dealt with in attachment A to these submissions.
[12] *Al-Kateb* at [228] per Hayne J.

B The plaintiff is owed "protection obligations" under the Act

16. The plaintiff arrived in Australia in the circumstances described in paras [5]-[9] of the Amended Special Case (**SC**) and was found by the Minister's delegate to be a person in respect of whom Australia had "protection obligations".[13]

17. Something more should be said about the nature of that finding. The concept of "a non-citizen...to whom the Minister is satisfied Australia has protection obligations" as that term is used in s36(2) of the Act, fastens upon the definition of the term "refugee" in article 1 of the Convention (read in light of article 1(2) of the Protocol).[14] That state of satisfaction is a jurisdictional fact,[15] that requires attention as to whether:

10 (a) the criterion in subparagraph A(2) of the Convention (as expanded by the Protocol) is engaged; and

(b) the exceptions or disentitling provisions in subparagraphs C-F of the Convention are not.

18. The "protection obligations" in s36(2) are best understood as a general expression of the precept to which the Convention gives effect – that is, that States parties are to offer surrogate protection in place of the protection of the country of nationality of which the applicant is unwilling to avail herself or himself. Quite apart from article 33, it encapsulates a range of other obligations imposed by the Convention, including articles 3, 4, 16(1), 17(1), 26 and 32 (each of which may also fairly be characterised as "protection obligations").[16]

20 19. The Minister's delegate also determined that the plaintiff was not a "person to whom the provisions of [the Refugees Convention]" do not apply within the meaning of article 1F[17] and that the adverse security assessment furnished by the First Defendant (the **Director**) was not in itself sufficient to engage article 33(2) of the Convention.[18] The Refugee Review Tribunal (**Tribunal**) proceeded on the basis of each of those findings and those matters did not arise in the review.[19]

20. The relationship between "protection obligations" and articles 1F, 32 and 33(2) is not yet settled but does not directly arise in the proceeding. The better view may be that consideration of article 1F arises at the point of satisfaction of the s 36 criterion whereas articles 32 and 33(2) arises as a basis of cancellation of a protection visa.[20] On the other

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[13] See page 4, paras [14]-[16] of the Special Case Book.

[14] *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 (***NAGV***) at [32]-[33]. See also *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* and Another (2006) 231 CLR 1 at 19 [48].

[15] *Minister for Immigration and Ethnic Affairs v Eshetu* (1999) 197 CLR 611 at 651 per Gummow J.

[16] *NAGV* at [31] and *M70* at [117]-[119] per Gummow, Hayne, Crennan and Bell JJ.

[17] See page 59-60 of the Special Case Book.

[18] See page 60, para [3] of the Special Case Book.

[19] See page 71, para [23] of the Special Case Book; *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [35].

[20] That is, the references in the Act to those articles are shorthand for the power of cancellation conferred by 116(1)(e) ("risk to the...safety or good order of the Australian community") and the power to refuse or cancel a visa on character grounds conferred by 501 (see particularly (d)(v) of the character test). That would perhaps better reflect the notion that article 1F is an aspect of the enlivening conditions for the obligations under the Refugees Convention (to be considered at an anterior stage as an element of the state of satisfaction required by s36(2)(a)), whereas articles 32 and 33(2) do not annul refugee status, but rather simply authorise the host government to divest itself of certain particularised protective responsibilities: see, discussing the difference between article 1F and article 33(2), J Hathaway *The Rights of Refugees Under International Law* CUB (2005) at 342-344. However, that approach may not adequately explain the fact that Parliament has made separate and specific provision as to the effect of the term "particularly serious crime" as it appears in article 33(2): see s91U of the Act.

hand, as was noted in *NAGV*, the Act contains a number of provisions relating to the refusal or cancellation of visas "relying on one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2)": see ss 500(1)(c), 500(4)(c), 502(1)(a)(iii), 503(1)(c). In *NAGV* it was suggested (although the issue was not resolved) that those references may have been included in the Act:

> ...for more abundant caution or as epexegetical of article 1F in its adoption by the Act, with operation both at the time of grant and later cancellation of protection visas.[21]

21. Whatever be the correct construction, the Act plainly manifests a legislative intention to deal with cancellation or refusal decisions founded upon articles 1F, 32 or 33(2) in a specific fashion. First, it makes them subject to the satisfaction of the Minister[22] and, given the particular nature of the issues presented, provides for review rights which are substantially different from those that would otherwise apply in respect of a refusal or cancellation decision founded upon, say, one or more of the matters in article 1 other than paragraph F or for failure (as in this case) to satisfy another criterion specified in reg 866 of the Regulations. The combined operation of ss500(1) and (4) empowers the Administrative Appeals Tribunal to review decisions "relying upon" Article 1F, 32 or 33(2), while denying that power to the Tribunal.[23] The rationale for that approach is likely that discerned by a Full Court of the Federal Court in *Daher v Minister for Immigration & Ethnic Affairs* (1997) 77 FCR 107 at 110 (per Davies, Hill and Heerey JJ). That is:

> The Administrative Appeals Tribunal is a high ranking review tribunal, the President of which is a judge of this Court. It is a body which is well suited to dealing with the issues which arise under [articles 1F, 32 and/or 33(2)]....High quality decision making is sought.[24]

22. None of those specific statutory procedures were here engaged. The plaintiff's application for a protection visa was determined and refused solely on the basis that the plaintiff failed to satisfy PIC 4002 and therefore failed to meet the criterion specified in 866.225(a) of the Regulations: SC [14] and [17]. The terms of PIC 4002 do not reflect articles 1F, 32 and 33(2) and are not relevant to satisfaction by the Minister of the statutory criterion, imposed by s 36, that Australia owes "protection obligations".[25] In that regard, it is no different from any other criterion that the Executive, via Regulation, may impose,[26] non satisfaction of which disentitles a visa applicant to be granted the visa but without intersecting with the protection obligations that the Act jealously guards. As noted above, the primary decision maker (in a finding the Tribunal adopted) expressly found that articles 1F and 33(2) had no application. The consequence of the plaintiff having failed to meet PIC 4002 is that the plaintiff is denied a visa, continues to hold the status of an "unlawful non-citizen" and remains in detention (SC, [11]-[12]). As developed below the lawfulness of his detention

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[21] Per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ at [57].

[22] Either through s 65 or s 501 of the Act

[23] Save if the Minister, acting personally, makes a decision to issue a certificate under s502, declaring the person to be an excluded person.

[24] Note that, under the first enacted form of s500, such applications were required to be heard by the Tribunal constituted by a presidential member alone (see s500(5) as in force at the time of *Daher*). Note also that a similar review mechanism has been applied to the equivalent aspects of the so-called complementary protection provisions in s36(2)(aa): see ss36(2C)(a) and (b) and 500(1)(c)(ii) and 4(c)(ii).

[25] See eg, as regards art 33(2), *Kaddari* [2000] FCA 659 per Tamberlin J at [23]-[25], to which the Minister's delegate referred.

[26] Ss40(1), 504 of the Act permits the imposition of criteria for visas by Regulation

depends on it being for the purpose of removal. In turn, that depends on whether removal is authorised by s 198(2).

23. The factual context in which that issue arises is set out in the SC. The Commonwealth accepts that should the plaintiff be returned to Sri Lanka, there is a real chance that he will be persecuted by way of abduction, torture or death because of a Convention reason. In those circumstances and by reason of the fact that:

(a) the Commonwealth does not propose or intend to remove the plaintiff to Sri Lanka (SC [31]);

(b) the plaintiff has no right to enter and remain in any other country (SC [18]);

(c) there is at present no other country to which the plaintiff can be sent (SC [32])

the plaintiff is currently detained for an apparently unlimited period of time.

24. Even assuming that his removal were permissible under s 198(2) (which it is not, for reasons developed below) the length of his further detention depends entirely upon the willingness of the Executive to enter into, and its ability to successfully conclude, diplomatic negotiations between Australia and other nation states. Those processes have been ongoing since at least May 2010 and have to date been entirely fruitless. UNHCR has declined to provide assistance, and has advised that presenting the plaintiff (and others) for acceptance by another resettlement country was not something it would be party to (SC [33.1A]). Seven of the eleven countries Australia has approached to consider resettlement of the plaintiff have either refused to do so or, in the opinion of the Department of Foreign Affairs and Trade, will not do so. Such life as remains in those processes rests upon "outstanding" responses to four requests to consider resettlement (three of which have been "outstanding" for more than six months – SC [33.4]) and the outcome of a meeting that a DIAC representative proposes to attend in Geneva in July 2012 (SC [33.5]), where he proposes to "approach" unnamed states and seek to persuade those states to consider resettlement of a group of refugees.

C Removal of the plaintiff is not permissible under s198 and the plaintiff's detention is, in those circumstances, unauthorised

25. As M70 demonstrates, it is not possible to construe the text of s 198 of the Act and, in turn, the power to detain conferred by combined operation of ss189, 196 of the Act unconstrained by its context and the general propositions outlined in Part A above.

26. That approach to the construction of the Act bears out the observation (identified above) that the Act should be understood as an "elaborated and interconnected" set of statutory provisions directed to the object of responding to those international obligations. Thus it has been held that:

(a) an offshore entry person, claiming to be a refugee and detained under s189(3), cannot be taken or removed from Australia other than pursuant to s198A, unless that person's claim for protection is assessed within Australia: see *M70* at [54] (per French CJ) and [99] per Gummow, Hayne, Crennan and Bell JJ. That ensures that such a person may only be taken to a country providing the "access" and "protections" identified in s198A(3);

(b) where they apply, the safe third country provisions in sub-divisions AI and AK of Division 3 of Part 2 and the associated removal provisions in ss198(7) and 198(9) ensure assessment under the Act of whether a non-citizen can avail herself or himself of protection in a third country: see *M70* at [47]-[48] (per French CJ) and [121]-[122] per Gummow, Hayne, Crennan and Bell JJ;

(c) the duty to remove "as soon as practicable" imposed by s198(2) (and the powers of detention conferred by the Act) should be construed so as to accommodate the possible exercise of the powers conferred by ss46A and 195A, pursuant to a decision made by the Minister under the Act to consider whether to exercise those powers in respect of any person making a claim that Australia owes them protection obligations.

27. It follows, from the scheme of the Act and the general principles of construction identified above, that if (as is the case here) a person is found to be:

(a) a person to whom Australia owes protection obligations within the meaning of s36(2); or

(b) a "refugee" within the meaning of article 1 of the Convention,

section 198(2) does not permit their removal unless conditions specified in articles 32 and/or 33(2), and implemented in the relevant sections of the Act, are met.

28. Here, neither articles 32 or 33(2) are applicable. As to article 32, if it is in fact in dispute that the plaintiff is "lawfully" within the territory , then for the reasons given in annexure A the plaintiff submits that he is, and that the obligation is engaged.[27] As such, unless he is refused a visa (or subject to a cancellation decision) upon the grounds specified in that article, the scheme of the Act does not contemplate his removal under s198(2).

29. As to article 33(2), it is plain that the operation of that article cannot be engaged by a side wind, through non satisfaction of a regulation imposed criterion, in circumstances where it is addressed directly in the Act, including through a specific review process. The provisions of the Act identified above (particularly 500(1)(c) and 500(4)(c)) envisage a particular process for determining whether a protection visa may be refused or cancelled in reliance upon those Convention grounds. The fact that the Act specifically makes reference to the provisions of the Convention dealing with the circumstances in which a "refugee" within the meaning of article 1 may be refouled or (if lawfully within territory) expelled strongly suggests that the power or duty of removal in s198(2) should be construed such it is only enlivened if it is determined in accordance with that statutory process that those conditions are met.

30. In any event, s 198(2) does not apply to a person owed protection obligations for the following reasons.

31. First, it is not possible to construe s 198(2) as imposing no constraint as to the place of removal and, at the same time reconcile Australia's Convention obligations as embodied in the Act. In M70, this Court rejected the proposition that s198(2) supplied a further power to remove before there has been an assessment of whether those protection obligations are in fact engaged, for that would mean that a person to whom Australia owed protection obligations could be removed to *any* country willing to receive them, potentially putting Australia in breach of those obligations: M70 at [54] (per French CJ) and [95], [98] per Gummow, Hayne, Crennan and Bell JJ.

32. Indeed, in a case such as the present where the plaintiff has no right to enter and remain in any other country apart from Sri Lanka, the consequence of s198(2) having application to the plaintiff (without any constraint as to the receiving country) is that there is a duty to refoule which must be effected "as soon as reasonably practicable". Even if it were otherwise and there were other available receiving countries in a particular case, unless further constraints are applied to the power, the words of s198(2) do not require removal *to*

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[27] To the extent that is put in issue by the defendants, that will be further addressed in reply.

any particular place. An applicant's fate is entirely in the hands of the relevant "officer" (a term of wide import, not necessarily confined to senior officials – see s5), whose duty is defined solely by reference to a temporal imperative.

33. Compounding the inherent improbability of such a construction is the position of those asylum seekers in respect of whom there has been no assessment of whether Australia's protection obligations are in fact engaged. That leads to the following odd result: as was held in *M70*, consideration of Australia's potential protection obligations leads to a conclusion that s198(2) is not engaged in respect of that class of persons; nevertheless, that provision does apply (in a manner which, as submitted above, may impose a "duty of refoulement") to a person to whom Australia actually owes such obligations. That anomalous outcome would result in discord in the otherwise harmonious "interconnected" statutory scheme and suggests that such a construction is untenable.

34. The process of reconciliation between the broad language of s 198(2) and the architecture of protection that the Act erects, cannot be undertaken solely by reference to the pursuit of non refoulement. The Act does not simply identify non refoulement as an organising principle but contains a complex web of provisions designed to identify how the status is to be assessed, how decisions are to be reviewed, what level of scrutiny (either merits review or parliamentary oversight) is to be imposed and how protection obligations are to be defined.

35. The difficulty is that s198(2) is very arid textual ground for any such exercise – one cannot fasten upon the words "reasonably practicable" as providing the means by which these complex and difficult decision making processes are to occur.

36. Take for example the provisions for removal to certain safe third countries in sub-divisions AI and AK of Division 3 of Part 2 and s198(7), which apply to persons who would otherwise be eligible to apply for protection visas. Those processes are limited to countries to which the applicant has a defined connection and are subject to strict oversight requirements, including:

    (a) Parliamentary scrutiny of the matters to be addressed in the Minister's statement required by s91D(3) -dealing with various matters including compliance by the country with relevant international law concerning the protection of persons seeking asylum (see para (a)) and the willingness of that country to allow the person to remain until their asylum claim is determined and if determined to be a refugee to remain until a durable solution relating to their permanent settlement is found); and

    (b) the declaration required by s91O(3) (which is in substantially similar terms to s198A, considered in *M70*).

37. Self evidently, that may be seen to reflect a concern on the part of Parliament to avoid the possibility of refoulement, including (in particular) indirect refoulement of potential refugees. Those provisions are also only engaged where it is determined that the non-citizen has a particular connection to that country: ss91D(1) and 91N(1) and (2). Similar safeguards are, of course, contained in s198A.

38. There is nothing in the text of s198(2) (or which is readily derived from the scope and object of the Act) that might assist the "officer" as to how (if at all) such matters are to be taken into consideration in removing a person to whom Australia does owe protection obligations.

39. Such perplexities apart, s 198(2) provides no criteria, or even guidance for the "officer" in resolving claims by the person to be removed:

    (a) to have a well founded fear of being subjected to persecution on Convention grounds in the proposed receiving country identified by the officer (however that country might be so identified); or

(b) that the receiving country would subject them to refoulement.

40. Again, it is notable that the Act makes careful provision for that possibility as an aspect of the decision making process concerning protection visas: see ss36(4) and (5) which qualify the deeming provision in s36(3).

41. The Court cannot re-write the Act to assist the officer to address that complex range of considerations – to do so would far exceed the judicial function.[28] The anomalous situation which thus arises (compare again the position of potential asylum seekers under sub-divisions AI and AK and 198A) suggests that even such an attenuated construction of s198(2) faces insuperable difficulties. The better view is that that provision simply has no application to a person in the position of the plaintiff. Question 2 should be answered "no".

The plaintiff's detention is unlawful

42. If that be correct, it then also follows that this case is distinguishable from *Al-Kateb* – there being no duty under s198(2) to be fulfilled and no current consideration of a grant of a visa to the plaintiff, his detention is not for a purpose authorised by the Act and is unlawful.[29] In those circumstances, the plaintiff is not being detained for a purpose under the Act. It follows that question 3 should also be answered "no".

No obstacle to the plaintiff's release arises from the fact the plaintiff does not hold a visa

43. It is true that the consequence of that argument, if accepted, is that the plaintiff is entitled to be released from immigration detention without having been granted a visa (although, the Minister could of course choose to grant him one – see ss195A and 417). However, the Act is in a distinctly different form to that which it took at the time *Al-Kateb* was decided and it is no longer true to say (even on the face of the legislation) that the Act evinces the "imperative" that an unlawful non-citizen be detained until removed, deported or granted a visa.[30] For those characterisations have now been overtaken by subsequent legislative action. In particular, after the amendments made by the *Migration Legislation Amendment (Detention Arrangements) Act 2005* (Cth) a person may be the subject of a residence determination under Part 2, Division 7, sub-division B, specifying that they are to reside at a specified place instead of being detained at a place covered by the definition of "immigration detention" in s5(1). While the determination is in force, the Act applies to that person "as if" they were being kept in immigration detention at that place in accordance with s 189. The terms of that deeming provision and the disconformity between the effect of a residence determination and the definition of "immigration detention" point to the fact that the person is not, while such a determination is in force, in fact "kept in immigration detention" within the meaning of s196.[31] It is therefore no longer correct (to the extent it ever was) to regard detention under the Act as a hermetically sealed system, terminable only upon the one of the three specified events in s196.[32]

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[28] *Pidoto v Victoria* (1943) 68 CLR 87 at 109 per Latham CJ, citing *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 676 per Evatt and McTiernan JJ. See also, e.g., *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at [251] per Gummow, Crennan and Bell JJ; *Momcilovic v R* (2011) 85 ALJR 957 (***Momcilovic***) at [398]-[399] per Heydon J (dissenting in result).

[29] See eg *Al-Kateb* at [226]-[227] per Hayne J (with whom McHugh and Heydon JJ relevantly agreed) and *M61* at [21].

[30] See eg *Al-Kateb* Gleeson CJ at [17] and Hayne J at [226].

[31] It is true that s197AC(4) deals with the position where a person is required by a provision of the Act to be "released from immigration detention" or the "Act no longer requires or permits the person to be detained", but those provisions may be seen to have been included for more abundant caution to ensure that the determination (and any conditions imposed pursuant to s197AB(2)(b)) cease to have effect at that time.

[32] Indeed, that was true even at the time of *Al-Kateb* in respect of "offshore entry persons" - by reason of the amendments effected by the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act* 2001 (Cth)

44. Further, given that the plaintiff seeks the remedy of habeas corpus under s33(1)(f) of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) (a broad and flexible remedy), it would be open to the Court to impose terms and conditions which relate directly to the circumstances affecting his right to be released from detention, and to reflect temporal and other qualifications on that right. Should question 3 be answered favourably to him, the plaintiff accepts that the power conferred by s32 of the *Judiciary Act* would extend to the imposition of such conditions at the time relief is crafted.[33] That might include requirements to notify any change of address and reporting requirements. Although a "more difficult question", it might also extend to the imposition of conditions or restraints in the case of a person "shown to be a danger to the community" [34] (although, the plaintiff denies that any such danger has been "shown" to arise in this case and that would be a matter for the defendants to raise after the questions reserved in the special case have been given).

D Alternative Argument: *Al-Kateb* was wrongly decided

45. Alternatively, if the Court answers question 2 "yes" (that is that s198(2) does permit the plaintiff's removal to countries other than those where he has a well founded fear of persecution for a Convention ground), the plaintiff would accept that his case (so far as it concerns his detention) is governed by the result in *Al-Kateb*. The factual circumstances are relevantly indistinguishable. If that is so, the plaintiff contends that that *Al-Kateb* was wrongly decided and should not now be followed. That is principally put as a matter of construction, although the limits imposed by Chapter III of the Constitution bear upon that construction (for reasons developed further below).

46. The plaintiff relies upon the principle of construction identified by Gleeson CJ in *Al-Kateb* at [19]-[21], 577 – that is, the so-called "principle of legality" - that Courts do not impute to the legislature an intention to abrogate or curtail certain rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in issue, and consciously decided upon their abrogation or curtailment.[35] The underlying rationale is that, absent clear words, the full implications of a proposed law upon fundamental rights and freedoms recognised by the general law may pass unnoticed. The presumption is a "powerful one" – a statute, which on one construction would encroach upon the relevant right or freedom, is to be construed, if an alternative construction be available, so as avoid or mitigate that encroachment.[36]

(which did not apply to Mr Al-Kateb) an "offshore entry person" may be detained under s189(3) and then dealt with under s198A. A person being dealt with under that section is taken not to be in immigration detention.

[33] See, referring to s22 of the *Federal Court of Australia Act 1976* (Cth), Gleeson CJ in *Al-Kateb* at [28], with whom Gummow J agreed at [142] (and note, agreeing with the orders proposed by Gummow J, which seemingly contemplated that such conditions might be sought, Kirby J at [142]) – see also *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664 (***Al Khafaji***) at [24] per Gummow J, at [25] per Kirby J. While, in *Al-Kateb* Hayne J (with whom McHugh JJ relevantly agreed) expressed the view that the Federal Court had no power to impose such conditions (at [242]-[244], a view which his Honour reiterated in *Al-Khafaji* at [37]), those views were obiter. Callinan J expressed no view on the issue. Moreover, Heydon J (in *Al Kateb* at [304] and *Al-Khafaji* at [52]) expressly declined to decide that point. It is perhaps fair to say, in those circumstances, that while no clear view on that issue emerges from existing authority, there is equally no clear decision of the Court to the effect that such conditions may not be imposed.

[34] Gleeson CJ in *Al-Kateb* at [29] and see also Gummow J in *Al-Kateb* at [142].

[35] *Momcilovic* at [42]-[45] per French CJ and the authorities there collected. In the United Kingdom, the application of an identical or substantially similar principle has been said to require that Parliament squarely confront what it is doing and accept the political cost *R v Secretary of State for Home Department; Ex parte Simms* [2000] 2 AC 115 at 131 per Lord Hoffmann.

[36] *Momcilovic* at [43]-[44] per French CJ.

47. In Australia, it has been said that there is a constitutional dimension to that principle.[37] That arises, at least in part, from the notion that the common law is the "ultimate constitutional foundation in Australia".[38] That understanding may also be seen to reflect the fact that the grants of legislative power in s51 and elsewhere envisage that the laws made by the Commonwealth Parliament will be construed by Courts exercising the judicial power of the Commonwealth and applying orthodox judicial techniques to that end – including through the application of common law principles.[39]

48. A similar or related principle of construction (albeit not one that operates by reference to the presumed intention of Parliament) may be seen in the reasons of Gummow J at in *Al-Kateb* at [117] – that is, in a manner similar to the approach undertaken in *Koon Wing Lau v Calwell*,[40] one should eschew a construction of a power to detain which would result in detention for an unlimited time (if a construction doing so is reasonably open). To similar effect, in *M61/2010* this Court said that "it is not readily to be supposed that a statutory power to detain a person permits continuation of that detention at the unconstrained discretion of the Executive",[41] that being a matter which informed its construction of the Act in that case (see further below).

49. Significantly, as Hayne J observed in *Al-Kateb* (at 643, [241]) the requirement imposed by either the principle of legality or some related principle for an "unmistakably clear" manifestation of Parliamentary intention to override fundamental rights is not satisfied by "general words". Hayne J went on to conclude that that principle was not engaged as regards the powers conferred by operation of s189, 196 and 198, because of the language of those provisions, which his Honour described as "intractable" (at [232], [241]). One could not, his Honour held, apply the principle to "transform" what he considered to be the only temporal limitation imposed by the scheme – that is, the requirement imposed by s198 that removal be as "soon as reasonably practicable" (detention otherwise being mandatory and required to continue until the happening of one of the three events specified in s196). McHugh and Heydon JJ agreed with Hayne J on that issue (at [33] and [303]) and Callinan J adopted a substantially similar approach (at [292]).

50. For the following reasons, the plaintiff submits that that decision should be re-visited and the dissenting reasons of Gleeson CJ, Gummow and Kirby JJ preferred.

51. The plaintiff contends that (consistent with those reasons) ss189, 196 and 198 should be construed as follows: those provisions do not authorise indefinite detention; the period of detention under s196 is limited to that period during which removal under s198 is reasonably practicable; where such removal is not reasonably practicable, detention is unauthorised and the power to detain is suspended.

52. For the reasons given by Gummow J in *Al-Kateb* (at [121]-[122]), that construction has a firm foothold in the text of the Act. The relevant provisions contain both temporal elements (the

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[37] *Momcilovic* at [45] per French CJ; *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414 at [113] per Black CJ, French and Weinberg JJ and *Evans v New South Wales* (2008) 168 FCR 576 (Evans) at [70] per French, Branson and Stone JJ. See also, writing in an extra-curial capacity, Chief Justice Robert French "*Liberty and Law in Australia*", paper delivered to the Washington University in St Louis School of Law, 14 January 2011.

[38] *Momcilovic* at [42] and *Evans* at [71], each referring to *Wik Peoples v Queensland* (1996) 187 CLR 1 at 182 per Gummow J.

[39] *Momcilovic* at [42]; *Zheng v Cai* (2009) 239 CLR 446 at [27] (per curiam) – see also *APLA* per Hayne J at [423] and *Theophanous v Herald and Weekly Times* (1994) 182 CLR 104 at 196 per McHugh J. It is also (perhaps) an aspect of the somewhat Delphic notion that the Constitution is framed in accordance with an assumption of the conception of the rule of law: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 262-3.

[40] (1949) 80 CLR 533.

[41] At [64], 348 per curiam.

requirement in s196 to detain "until...removed...under section 198" in s196 and the term "as soon as" in s198) and elements dealing with the process or outcome (the reference, in s196, to removal "under" section 198 and the notion of what is "practicable" in the sense of being able to effected or accomplished). Connecting those elements, the term "reasonably" in s198 requires a judgment to be made as to the period which is appropriate or suitable to the legislative "purpose" (in the objective sense, referred to by the plurality in the *IRA Case*[42] and by Hayne J in *APLA Limited v Legal Services Commissioner for NSW*[43]). His Honour identified that purpose as being to provide for detention of the person to facilitate her or his removal from Australia, but not with such delay that the detention has the appearance of being for an unlimited time.[44]

53. That points to the operative constraint arising here. In a situation such as the present one, where the plaintiff is unable to be removed and unlikely as a matter of reasonable practicability to be removed, s 198 no longer retains a present purpose of facilitating removal from Australia which is reasonably in prospect. To that extent, its operation is spent. That, in turn, means that a "necessary assumption" (*Al-Kateb* at [122]) for the continued operation of the temporal imperative which flows from the word "until" in s196(1) is falsified – the assumption being that s198 continues to operate to provide for removal "under" that provision. In those circumstances, ss189, 196 and 198 no longer authorise the detention.

54. That is also a construction required by the "powerful" principle identified above. Far from "transforming" the temporal limitations in s198, it flows from a choice between an unexpressed exception and an (equally) unexpressed outcome. In particular, as Gleeson CJ observed at [22], as regards that class of case where the purpose of removal under s198 cannot be fulfilled (that being the matter his Honour identified as the primary purpose of detention after assessment of the claim for a visa), an interpretive choice arises under which one can either treat the detention as indefinite or, alternatively, as suspended, neither possibility having clearly been addressed by Parliament. So understood, the latter choice (reflected in the construction proposed by the Plaintiff) does not transmogrify any aspect of the statutory scheme – it merely finds in its interstices a set of circumstances to which it appears, from the general language of the Act, Parliament did not direct its attention (at [21]). Once it appears that that interpretative choice is available, the plaintiff's proposed construction is necessarily to be preferred over one that would allow for indefinite detention at the unconstrained discretion of the Executive, being a possibility upon which the Act is similarly silent.

55. The construction preferred by Hayne J in *Al-Kateb* rests upon the notion that the words "reasonably practicable" are (contrary to the views expressed by Gleeson CJ, Gummow and Kirby JJ) incapable of giving rise to a premise underlying the Act which is falsified, even where there is a long history of unsuccessful attempts to effect removal. In his Honour's view, the most that could be said of such a situation is that it has "not yet been practicable" to perform that duty. However, that highly elastic conception of the duty imposed by s198 means that cessation of a person's detention may, for all practical purposes, become a "possibility ... wholly within the control of the Commonwealth Executive"[45] and its

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[42] *Victoria v Commonwealth* (1996) 187 CLR 416 at 487.

[43] (2005) 224 CLR 322 (***APLA***) at [423]-[424].

[44] Contrary to the views expressed by Rose (8(3) *Constitutional Law and Policy Review* (2005) 58 at 61) one does not conclude from the use of the word "or" at the end of paragraph (b) of s196 that Parliament intended that detention would continue indefinitely, regardless of whether the time for performance of the duty of removal imposed by s198 has expired. Indeed, Hayne J expressly held otherwise: *Al-Kateb* 638-9, [226]-[227].

[45] See *M61* at [65].

arrangements with other nation States. As noted above, such considerations led this Court in *M61* to reject a proposed construction of the Act which would have conferred a power of that nature.

56. Further, and in any event, it is no longer the case that the Act contemplates a closed system, limited to detention, release upon the grant of a visa or removal/deportation. As submitted above, there is now the possibility of the making of a residence determination under Part 2, Division 7, sub-division B.[46] Those alterations to the legislative landscape are a further reason for concluding that the Act does not contemplate detention on an indefinite basis, pending fulfilment of a temporally elastic duty.

10 57. Importantly, the plaintiff's proposed construction does no violence whatsoever to the temporal limitation in s198 upon which Hayne J focussed – for, as Gleeson CJ observed at [23] the obligation imposed by s198 is not forever displaced (hence the use of the word "suspended" in the plaintiff's proposed construction). As such, the constraint imposed by s198 continues to mark the outer limits of the person's potential detention if the obligation to detain again arises.

58. The circumstances of the plaintiff's detention are addressed at [23]-[24] above. Having regard to those circumstances, the Court can infer that the plaintiff's removal is unlikely as a matter of reasonable practicability (the drawing of such inferences being provided for by clause 28.08.5 of the Rules).

20 59. It is, of course, true that that limitation may depend upon the course of ongoing international negotiations and that it may, in some circumstances, be difficult to discern whether a person's removal is unlikely as a matter of reasonable practicability. However, such difficulties are not unknown to Australian law – for example, an equally difficult question might be said to arise when discerning the point at which the Senate "fails to pass" a law for the purposes of s57.[47] The formulation of legal tests by reference to flexible notions of "reasonableness" (upon which minds may well differ) is commonplace and, so expressed, may frequently involve similar difficulties. Nor does any insuperable obstacle arise from the fact that such matters may require consideration of international relations – where legal constraints apply by reference to such matters, it is the duty of the Court to determine them
30 (there is no doctrine of deference applied in such a case).[48]

60. It follows, for those further or alternative reasons, that the plaintiff's detention is unauthorised and question 3 should be answered "no".

The plaintiff's proposed construction is required to avoid infringing constitutional limitations

61. Further to the above, the construction of ss189, 196 and 198 of the Act for which the plaintiff contends is mandated by the proposition that those powers to detain must be construed so as to confine their exercise within relevant constitutional limits.[49]

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[46] Further, there is (and was at the time of *Al-Kateb*) the possibility that an offshore person would be dealt with under s198A.

[47] *Victoria v Commonwealth* (1975) 134 CLR 81 at 187 per Mason J.

[48] "[I]f a criterion of constitutional validity consists in matter of fact, the fact must be ascertained by the court as best it can" *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280 at 292 per Dixon CJ (by reference, inter alia, to *Sloan v Pollard* (1947) 75 CLR 445 at 468, 469 in which "facts were shown about arrangements between this country and the United Kingdom"). See also *Attorney-General (Cth) v Tse Chu-Fai & anor* (1998) 193 CLR 128 at [52]-[57] per Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ and *M70* at [106]-[109], [135] per Gummow, Hayne, Crennan and Bell JJ.

[49] See eg *K-Generation v Liquor Licensing Court* (2009) 237 CLR 501 at [46] per French CJ and the authorities there cited.

62. While a law infringing upon the liberty of an alien will be a law with respect to s51(xix) (and perhaps also 51(xxvii)),[50] it will only be valid if it survives its subjection by the opening words of s51 to the other provisions of the Constitution, particularly Chapter III.[51] In that regard, it is well established that Chapter III of the Constitution (and the separation of the judicial function from the political branches of government thereby effected) achieves the constitutional object described by five members of this Court as "the guarantee of liberty".[52] Put another way, it gives "practical effect to the assumption of the rule of law upon which the Constitution depends for its efficacy".[53]

63. It is an aspect of that guarantee of liberty that ("exceptional" cases aside) the involuntary detention of a person in custody by the State is permissible only as a consequential step in the adjudication of criminal guilt of that person for past acts.[54] The use of the term "exceptional" reflects the fact that the exceptions are "limited",[55] albeit that the class of case that may constitute such an exception is not closed.[56] As with other constitutional constraints, the identification of those exceptions is to be approached by reference to historical antecedents, from which analogies may be developed using ordinary processes of legal reasoning.[57] The engagement of those exceptions depends, critically, upon the identification of the legislative purpose for which a person is detained – again, in the sense of the purpose objectively ascertained and not the subjective intention of the legislators.[58] Although sometimes said to involve a consideration of whether that purpose is "punitive" as opposed to "non-punitive",[59] such a taxonomy is apt to mislead.[60] The central concern is rather with deprivation of liberty without adjudication of guilt and whether the detention is properly characterised as being for the purpose of one or more of the limited exceptions to that principle.

64. A further matter arising from the authorities (equally apt to mislead) is that the beneficiaries of that principle have sometimes been described by reference to the criterion of "citizenship".[61] That may be seen to reflect the fact that, unlike a citizen, an alien is subject to detention for the purposes of "deportation or expulsion" and as an incident to the executive powers to "receive, investigate and determine an application by that alien for an entry

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[50] Cf Gaudron J in *Lim* at 57 and in *Kruger v Commonwealth* (1997) 190 CLR 1 at 109-11.

[51] *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 (***Woolley***) at [149] per Gummow J.

[52] *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11 per Brennan CJ, Dawson, Toohey, McHugh & Gummow JJ. See also, referring to *Wilson, State of South Australia v Totani* (2010) 242 CLR 1 at 156 [423] per Crennan and Bell JJ and the other authorities there collected at footnote 598.

[53] *Thomas v Mowbray* (2007) 233 CLR 307 at 342,[61]; *APLA* at 351-2 [30].

[54] *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 (***Fardon***) per Gummow J at [77], [80] and [83] – see also *Lim* at 27-8 per Brennan, Deane and Dawson JJ and at 70-1 per McHugh J; *Woolley* at 12 [17] per Gleeson CJ and at 35 [82] per McHugh J (although, cf his Honour's reasons at 24 [57]) – note also the doubts expressed by Hayne J at [258]. The references in those passages to "citizens" being the beneficiaries of the principle should be understood in accordance with Gummow J's reasons in *Fardon* at [78].

[55] *Woolley* at 12[17], per Gleeson CJ – although note that his Honour was there referring to "citizens".

[56] See eg *Vasilkjovic* at 648, [108] per Gummow and Hayne JJ.

[57] See, apparently adopting such an approach, *Vasilkjovic* per Gummow and Hayne JJ at [108], [109] and [113] and see Zines "A judicially created bill of rights?" (1994) 16 *SLR* 166 at 174. See also eg (in the context of 51(xxxi)), *Smithers* at 487; and *Theophanous* at [60]-[64] and (in the context of ss55 and 90) *Air Caledonie v Commonwealth* (1988) 165 CLR 462 at 467. See also, in a different context, *Lumbers v W Cook Pty Limited* (2008) 232 CLR 635 at [85].

[58] *Zheng v Cai* (2009) 239 CLR 446 at [27]-[28] (per curiam).

[59] *Lim* at 27-8 per Brennan, Deane and Dawson JJ and at 71 per McHugh J; *Al Kateb* at 584, [44] per McHugh J.

[60] *Al Kateb* at [135]-[139] per Gummow J; *Fardon* at [81] and at [196] per Hayne J.

[61] See *Lim* at 27 per Brennan, Deane and Dawson JJ and *Woolley* at 12 [17] per Gleeson CJ.

permit".[62] However, the principle identified above applies equally to aliens, save in the "particular area" of detention for those purposes.[63] That "particular area" is properly regarded as no more than an example of an exception to that overarching principle[64] (or a legitimate "category of deprivation of liberty"), albeit one which applies only to a subset of the people entitled to the protection afforded by the Constitution and the laws of Australia.[65] That explains the references in *Lim* to there being "limited" authority to detain an alien for certain purposes.[66] In other words, the fact a person is an alien does not mean that legislation may authorise her or his detention at any time and for any purpose without contravening Chapter III of the Constitution.

65. The outer limits of that permissible category of deprivation of liberty were stated by Brennan, Deane and Dawson JJ in *Lim* in these terms: such detention must be restricted to what is "reasonably capable of being seen as necessary" for the purposes of deportation or to enable an application for an entry permit to be made and considered.[67]

66. Contrary to the suggestions made in some of the authorities, that formulation does not suggest that the principle in issue here rests upon a requirement for a sufficient connection with a relevant head of power[68] – indeed, aside from the special case of purposive powers, it is to be doubted that that is now the correct approach to characterisation, even in the area of the so called implied incidental power.[69] The starting point of the plaintiff's argument (see above) is that a law providing for the detention of an alien will be a law with respect to, at least, the subject matter in s51(xix).

67. The test for validity proposed in *Lim* is rather correctly understood as arising from the nature of the constraint imposed by Chapter III. The existence of exceptions to the general principle identified above (even in the case of citizens) indicates that that constraint is not absolute and that some test of what constitutes a legitimate type or level of restriction or incursion must be developed.[70] So understood, the inquiry becomes a familiar one, applied to other express and implied constitutional constraints, and involving consideration of the relationship between the "legitimate" end to be served by the impugned law and the means by which it does so (which must be limited to what is "appropriate and adapted", "reasonably necessary", "reasonably capable of being seen as necessary" or "proportionate"

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[62] *Lim* at 32.

[63] *Fardon* at [78] per Gummow J; *Vasilkjovic v Commonwealth* (2006) 227 CLR 614 (***Vasilkjovic***)at 643 [84] per Gummow and Hayne JJ and [189] per Kirby J.

[64] See, apparently adopting such an analysis, *Vasilkjovic* at 648, [108]-[109] and Kirby at 183 [668].

[65] Indeed, the same may be said of other "exceptions" – for example, the detention of a person suffering from a mental illness or infectious disease.

[66] Per Mason CJ at 10 and Brennan, Deane and Dawson JJ at 32 and 33.

[67] *Lim* at 33 per Brennan, Deane and Dawson JJ. See, to somewhat similar effect (albeit resting upon a dichotomy between punitive and non-punitive objects) McHugh J at 71. See also, seemingly endorsing that test: *Al-Kateb* per Callinan J (at 660 [294]); *Woolley* per Gleeson CJ at 14 [21]-[22], [25], Gummow J at 51-52 [133]-[134] and 60 [163]-[165], Callinan J at 84 [260]; *Fardon* per Callinan J and Heydon J at 653-654 [215] (in regards to detention generally); *Behrooz* per Kirby J at 527 [118]-[119] and Callinan J at 559 [218]; *Kruger* per Gummow J at 162 (in regards to detention generally). However, compare *Al-Kateb* per Hayne J at 647-648, [252]-[256] (Heydon J concurring) and per McHugh J at 584 [45]; *Woolley* per McHugh J at 33 [78] and Hayne J at 77 [227]-[228] (Heydon J concurring) and *Behrooz* per Hayne J, who expresses doubt about the "line" drawn in *Lim* 541-542, [171].

[68] Cf Hayne J in *Al Kateb* at 647 [253].

[69] *Theophanous v Commonwealth* (2006) 225 CLR 101 at 128 [70].

[70] *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at [444] per Kiefel J.

to that end).[71] Indeed there is authority for the proposition that such an inquiry is to be applied to all cases where an impugned law invokes the support of a legislative power that is qualified by an express or an implied limitation.[72]

68. Those matters are, of course, not at large and cannot be conclusively determined by any but the judicial branch of government – the Constitution does not contemplate that a member of the Executive may be given power with a quality of complete freedom from legal control.[73] As such, the continued viability of the purpose of deportation or expulsion cannot be treated by the legislature as a matter purely for the opinion of the Executive.[74] Further, while the legislature may confer a power of detention upon the Executive, that power is necessarily constrained by any applicable constitutional restrictions upon the legislative power, with the result that the Executive will act *ultra vires* if it exceeds those constraints[75] (that is so, even though the power is conferred in "wide general words" imposing few if any express constraints or if the legislature specifies that the exercise of the power of detention is mandatory[76]).

69. Those matters support the conclusion that the Act should be construed such that it imposes the statutory constraints for which the plaintiff contends (the engagement of which can be determined by a Court). The power may well not otherwise be susceptible of exercise in accordance with the constitutional restrictions identified above.[77] Notably, in that regard, Gummow J observed in *Woolley* that, had he not construed the Act in the manner identified above, "serious questions respecting validity could have arisen": at 52, [135]. His Honour also expressed his disagreement (in obiter) with the proposition that the Act may validly authorise the indefinite detention of a person in the position of Mr Al-Kateb, provided that in the view of the Executive government (which may be contrary to fact) removal remains a matter of reasonable practicability: *Al-Kateb* at [126], [127]. It is unnecessary to go further and conclude that those "serious questions" would in fact result in invalidity if the Act were not construed in the manner for which the plaintiff contends: this Court has had regard to constitutional limits in rejecting a construction of a statutory provision which "would put it in peril" of being invalid.[78] That is at least the case here.

70. Those considerations have particular cogency in the context of the legislative provisions in issue in these proceedings. For it may well be the case that a person the subject of an adverse security assessment does not know the substance of the allegations against them or the grounds of concern - as appears to be the position of Plaintiff S138, seeking leave to intervene.[79] If the removal of such a person is unlikely as a matter of reasonable practicability then (absent the limits for which the plaintiff contends) their ongoing detention is entirely in the hands of the Executive. That situation may also require consideration of the somewhat differently formulated constraints proposed by Plaintiff S138.

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[71] See eg *Hogan v Hinch* (2011) 243 CLR 506 at [47], [50] per French CJ and [97]-[98] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ and *Betfair v WA* (2008) 234 CLR 418 (Betfair) at [101]-[105].

[72] *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 322-4 per Brennan J.

[73] *Shrimpton v Commonwealth* (1945) 69 CLR 613 at 629-30.

[74] *Al Kateb* at [140] per Gummow J.

[75] *Wotton* v *Queensland* (2012) 86 ALJR 246 at [21]; *Miller v TCN Channel Nine Pty Limited* (1986) 161 CLR 556 at 613-4 per Brennan J.

[76] Cf Hayne J in *Al Kateb* at [254].

[77] Cf *Wotton* at [23].

[78] *New South Wales v The Commonwealth* (*Work Choices Case*) (2006) 229 CLR 1 at 161-162 [355] – it was also there said that one should prefer a construction which "would avoid" rather than lead to a conclusion of constitutional invalidity (see also *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553 [11]).

[79] See s36 of the *Australian Security Intelligence Organisation Act 1979* (Cth).

71. Some members of this Court have suggested that, in addition to the purposes identified above, the legitimate category of deprivation of liberty that applies in connection with the status of alienage extends to such detention as is necessary for their segregation from the community.[80] That is not, in the plaintiff's submission, a matter which has been authoritatively determined[81] and for the following reasons is incorrect.

72. First, that view seemingly has its origins in McHugh J's reasons in *Lim* at 71. As is clear from the authorities upon which his Honour there relied (see footnote 56), his Honour was significantly influenced by the decisions of the United States Supreme Court in *Jean v Nelson*, 472 US 846 (1985) and *Shaughnessy v United States; Ex rel Mezei* 345 US 206 (1953). Those cases proceed on the basis of the so called "entry fiction" – that is that aliens stopped at the border and made the subject of an "exclusion determination" are, even if then permitted physically to enter the United States on a form of "parole", and deemed never to have entered.[82] That artificial approach has been the subject of extensive criticism[83] and is inapposite in the context of Chapter III.[84]

73. Secondly, as developed by some members of the Court in *Al Kateb* and in *Woolley*, that view seems to rest upon the notion that s51(xix) confers power upon the Commonwealth Parliament to make laws with respect to the "exclusion" of aliens.[85] However, "exclusion", as that concept has been understood in the context of s51(xix),[86] comparative jurisprudence[87] and international law,[88] is merely the "complement" of the power to expel or deport. As an aspect of sovereignty, a State may legitimately turn back aliens at the border (and so "exclude the entry of non citizens or a particular class of non-citizens"—: *Lim* at 26) or remove aliens after they have entered the territory (the power of expulsion or

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[80] See *Al Kateb* at [45] and [49] per McHugh J and at [255]-[256] per Hayne J (with whom Heydon J agreed at 662-3 [303] and *Woolley* at 26 [61] and 46-7, [115] per McHugh J and at [222]-[223] per Hayne J (with whom Heydon J agreed at 87,[270]). Gleeson CJ's comments in *Wooley* at [26]-[28] do not extend that far – while his Honour explained *Lim* on the basis that the "power of exclusion" supported detention, his Honour characterised that power as one to keep those persons separate from the community "while their visa applications were being investigated and considered" (at [27]).

[81] While Callinan J in *Al-Kateb* said that it "may be the case" that detention for such purposes is constitutionally permissible (and identified a number of practical considerations that might favour that view) he expressly refrained from deciding that issue: at 658, [289]. Moreover, Hayne J's reasons in *Al Kateb* may suggest that that purpose is not sufficient in itself and may require (in addition) an ongoing purpose of removal: see the words "in the meantime" at 648 [255] but cf the seemingly broader formulation at 651, [267].

[82] See *Al-Kateb* at [96] per Gummow J.

[83] See eg Professors Nowak and Rotunda, *Constitutional Law* (8th ed, 2010) at 937 saying of *Mezei* "This decision may now be constitutionally infirm, even though it has never been overruled".

[84] Nor does *Ex Parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 (to which his Honour also referred) take matters further – the references in that case to membership of the Australian community arose in the distinctly different context of s51(xxvii) – for the reasons given by Gummow J in *Al Kateb* at [91]-[94] and in *Woolley* at [147]-[148], those matters have no part to play in the conceptually and textually distinct head of power conferred by s51(xix).

[85] See eg *Al Kateb* at 584 [45] per McHugh J and at 648 [255] per Hayne J; *Wooley* 31[72] per McHugh J (seemingly endorsing Hayne J's reasoning in *Al-Kateb*) and at 75, [222] per Hayne J.

[86] *Robtelmes v Brenan* (1906) 4 CLR 395, at pp 400-404 (per Griffith CJ), 415 (per Barton J), 420-422 (per O'Connor J); *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR, at pp 132-133 per Starke J; *O'Keefe v. Calwell* (1949) 77 CLR 261 at pp 277-278 (per Latham CJ - dealing with 51(xxvii); *Koon Wing Lau v Calwell* (1949) 80 CLR 533, at pp 555-556 (per Latham CJ); *Lim* at 26 per Brennan, Deane and Dawson JJ – see also *Musgrove v Chun Teeong Toy* (1891) AC 272at 282 and *Chung Teong Toy v Musgrove* (1888) 14 VLR 349 at p878.

[87] *Cain v Canada* (1906) AC 542 at 546-547 – see also the United States authorities referred to in *Robtelmes*.

[88] Exclusion' is not recognized as a distinct concept in international law. To the extent that the term is used, it is generally used as a synonym for non-admission: see eg "Colonial Expulsion of Aliens", *American Law Review*, No. 33 (1899), pp. 90-91 and Maurice Kamto, Special Rapporteur, *Second report on the expulsion of aliens*, International Law Commission, Fifty-eighth session, 20 July 2006, A/CN.4/573 at 54, para 170. See also the decision of the Permanent Court of International Justice in *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* P.C.I .J. Reports, Series A/B, No. 44 at page 41.

deportation). So understood, the power of expulsion (and not the power of exclusion) is traditionally understood to be the applicable power as regards aliens within territory. The assumption that the power to exclude should be understood more broadly as some form of all encompassing power of segregation would be to erase the differences between those conceptually distinct notions. Indeed, given the apparent breadth of the notion of the "exclusion/segregation" power, that would mean that the principle identified above has no application to non-citizens.[89]

74. Thirdly, even if the notion of exclusion carried with it some broader power of segregation, that would not answer the question of whether Chapter III is infringed. As with other constitutional guarantees or constraints, the question of whether a law is within a head of s51 power is distinct from the question of whether the relevant constraint is contravened.[90]

75. Fourthly, for the reasons given by Gummow J in *Woolley* at [135]-[148], the notion of exclusion from the Australian community is an indeterminate concept, reflecting the equally indeterminate nature of the concept of membership of that community (applied in the context of the so called absorption doctrine in determining whether a person is beyond the reach of the immigrants power).[91] That "very vague" conception has no part to play in the construction of the content or outer limits of the aliens power or the constraints applied to that power by Chapter III.[92]

***Al-Kateb* should be re-opened and overruled**

76. Having regard to the above matters, the plaintiff submits that this Court should re-open and overrule *Al-Kateb*. As to the discretionary factors identified in *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [65]-[72] per French CJ (and the authorities there referred to) the plaintiff submits that while *Al-Kateb* has been referred to in a succession of cases, it does not rest upon a principle which has been "carefully worked out" in that stream of authority. Nor has that decision been independently acted upon in a manner which militates against its reconsideration – rather, as the reasoning in *Fardon* and *Woolley* illustrates, there are ongoing controversies about aspects of the reasoning in *Al Kateb*, upon which there is yet to emerge a decisive view of the Court. Further, the correctness of the reasoning of the majority has been doubted by members of this Court, both at the time of its original formulation and more recently. Those doubts are, for the reasons given above, well founded.

E Denial of procedural fairness

77. It is well settled that the exercise of a statutory power that affects a person's rights, interests or legitimate expectations will be regulated by the rules of procedural fairness, unless excluded by plain words.[93] As this Court has recently explained, that presumption also derives from the principle of legality governing the relationship between the three branches of government.[94]

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[89] See, again, expressing a contrary view Gummow and Hayne JJ in *Vasilkjovic* at 643 [84].

[90] See, in the context of s51(xxxi), *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [187] per Gummow and Hayne JJ and *Airservices Australia v Canadian Airlines Ltd* (1999) 202 CLR 133 at 250 [339] per McHugh J.

[91] Which, in so far as it is reflected in the so called "absorption doctrine" applicable to s 51(xxvii), has been described as a "very vague conception" *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at [160].

[92] *Woolley* at [147]-[148] per Gummow J.

[93] *Annetts v McCann* (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh J; *Kioa v West* (1985) 159 CLR 550 at 584 per Mason J and at 628 per Brennan J. In *Potter v Minahan* (1908) 7 CLR 277, O'Connor J used the phrase "irresistible clearness" (at 304).

[94] *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 259 [15] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ.

78. Given the dramatic affect of the 2012 assessment on the plaintiff's liberty,[95] it is unsurprising that the first defendant has conceded that the exercise of powers in connection with the making of the 2012 assessment[96] was conditioned by an obligation to afford procedural fairness.[97] That concession accords with the first defendant's conduct in other cases.[98]

79. The question then turns upon the content of the obligation in the circumstances, which relevantly include considerations of national security, considerations of the plaintiff's right to liberty and the schemes erected by the ASIO Act and the Migration Act.

80. For the reasons elaborated below, the plaintiff contends that the first defendant was required to (and did not) disclose to the plaintiff the following allegations and give the applicant the opportunity to respond to them:

(a) that the plaintiff maintained further involvement with LTTE Intelligence activities from 1999-2006;

(b) that the plaintiff remains supportive of the LTTE's use of violence to achieve political objectives; and

(c) that the plaintiff is likely to continue to support the LTTE activities of security concern in and from Australia.

81. It is clear as a result of the affidavit of the Director-General of Security that the 2012 assessment was not based on any information obtained from non-citizens (including other detainees). Further, the first defendant does not point to other material, or other reasons, which ASIO was prevented from putting to the plaintiff on the ground of national security.[99] For those reasons, the facts in the present case are materially different to those in other cases that have considered adverse security assessments in the context of procedural fairness.[100]

82. It is contended that, on the facts set out in the special case, the requirements of procedural fairness were not met in four relevant respects.

83. *First*, it is apparent from the transcript of interview that the 2011 interview was conducted on the basis that the plaintiff had an evidentiary onus to discharge in order to satisfy ASIO that he was not a direct or indirect threat to national security. So much can be seen from statements of one of the interviewing agents that "... it's not our responsibility to ask you every single question to elicit your contact with the LTT. This is your opportunity and you asked to speak to us, in order for you to have an opportunity to tell us everything ..."[101] and other statements to a like effect.[102]

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[95] The performance of the statutory function authorized by s 37 of the *Australian Security Intelligence Organisation Act 1979* (Cth) had the effect of precluding the plaintiff from meeting public interest criterion 4002 under Schedule 3 of the Regulations.

[96] As to which see s 37 of the ASIO Act.

[97] Defendants' submissions on show case application at [9].

[98] *Leghaei v Director-General of Security & Anor* (2007) 241 ALR 141 at 145 [43] per Tamberlin, Stone and Jacobson JJ; *Sagar & Anor v O'Sullivan* (2011) 193 FCR 311 at 318 [40].

[99] Cf *Salemi v MacKellar (No 2)* (1997) 137 CLR 396 at 421 per Gibbs J.

[100] For example, *Sagar & Anor v O'Sullivan* (2011) 193 FCR 311 at 318 [40]; *Leghaei v Director-General of Security & Anor* (2007) 241 ALR 141 at 145 [43] per Tamberlin, Stone and Jacobson JJ; *Leghaei v Director-General of Security* [2005] FCA 1576 per Madgwick J.

[101] Transcript (Confidential attachment 5) at page 20.

[102] Transcript (Confidential attachment 5) at page 2 and transcript page 49 ("we have put all the issues that we wish to put to your client to him").

84. ASIO, in fulfillment of the statutory function authorized by s 37, is called upon to furnish other Commonwealth agencies with security assessments. One such "agency" is the Department of Immigration and Citizenship. A proper reading of s 37 and the ASIO Act as a whole does not reveal any onus laying upon those subject to assessment. To the extent ASIO has "adverse information that is credible, relevant and significant"[103] and that is not required to be withheld on national security grounds, the information, or its substance, must be disclosed to the subject of the assessment in order for procedural fairness to be afforded. The misconceived understanding of the requirements of procedural fairness then infected the interview as explained in the second, third and fourth points below.

85. *Secondly*, the adverse security assessment issued as a direct result of a finding that the plaintiff continued to support the LTTE and would likely continue that support in and from Australia. The opinion was arrived at in the absence of direct questioning on those topics.

86. As Lord Diplock explained in *Mahon v Air New Zealand Ltd*,[104] procedural fairness requires that the person whose interests are affected "not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material or probative value". The concern that underlies his Lordship's statement was reflected in the reasons of Brennan J in *Kioa*, where emphasis was placed on the importance of the need to bring to the attention of a person affected by a decision the critical issue or factor on which the administrative decision is likely to turn, so that the person may have an opportunity to deal with that issue.[105] In that regard, it has been held by the Full Court of the Federal Court that a "general and unfocused invitation to make submissions"[106] will not suffice; specificity is required.

87. At no stage were the propositions set out in 80(a)-80(c) above squarely put to the plaintiff, notwithstanding (as the first defendant's affidavit makes clear), that they were integers of the decision.

88. This Court has clearly explained the requirement that affected parties have an opportunity to give evidence or make submissions about the "determinative issues" to an exercise of power.[107] Review of the transcript makes clear the plaintiff was not afforded any such opportunity.

89. The *third* point is that if the first defendant had information in his possession that tended to the view that the plaintiff was once, and remained, supportive of the LTTE, that information plainly did not come from the 2011 interview. Consequently, in coming to the decision to issue the 2012 assessment, he must have relied on information garnered from other sources that he regarded as credible, relevant and significant to the 2011 assessment.

90. It is submitted that because national security did not preclude the first respondent from disclosing that information to the plaintiff, it was necessary for the information – or at least the substance of it – to be disclosed and an opportunity to respond provided.

91. As was recognised in *Applicant VEAL*, there is an important public interest in the proper administration of the Migration Act and "[i]t is in aid of that important public interest that, so far as possible, there should be no impediment to the giving of information to authorities

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[103] *Kioa v West* (1985) 159 CLR 550 (***Kioa***) at 629 per Brennan J; *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 (***Applicant VEAL***) at 95-97 [16]-[18] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ.
[104] [1984] AC 808 at 821, cited in *Re Refugee Review Tribunal & Anor; Ex Parte Aala* (2000) 204 CLR 82 at 116 per Gaudron and Gummow JJ.
[105] *Kioa* at 629.
[106] *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 223.
[107] *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 165 per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ.

about claims that are made for visas. That public interest, and the need to accord procedural fairness to the appellant, could be accommodated."[108]

92. *Fourthly*, in contradistinction to the position above, statements that in the light of the first defendant's affidavit are false, or at least misleading, were put to the plaintiff. Most particularly, it was insinuated that another detainee had passed on information adverse to his cause. [109]

93. Accordingly, the sum effect was that:

(a) the 2011 interview proceeded on the basis that it was for the plaintiff to disprove that he was a person in relation to whom an adverse security assessment should issue;

(b) he was not provided with any opportunity to respond to allegations central to the decision;

(c) he was not provided with information, or its substance, critical to the decision; and

(d) he was misled as to the nature of information in fact in the possession of the decision maker.

94. It is submitted that each of 93(a) to 93(d) above constitutes a denial of procedural fairness and, further, that taken together the process cannot be said to be one that was fair to the plaintiff. Accordingly, question 1 should be answered "yes".

Part VI: Applicable Constitutional Provisions etc

95. See Annexure B.

Part VII: Orders

96. The plaintiff submits that the questions reserved should be answered as follows:

(a) Question one: Yes.

(b) Question two: No.

(c) Question three: No.

(d) Question four: the defendants.

DATED: 8 June 2012

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[108] *VEAL* at 100 [28] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ.

[109] "is there any reason that you know of as to why another detainee would tell us lies about you?": transcript (Confidential attachment 5) at page 45.

IN THE HIGH COURT OF AUSTRALIA No M47 OF 2012
MELBOURNE REGISTRY

BETWEEN

PLAINTIFF M47/2012
Plaintiff

and

DIRECTOR GENERAL OF SECURITY
First Defendant

10 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

20 COMMONWEALTH OF AUSTRALIA
Fifth Defendant

ANNEXURE A

Meaning of the term "lawfully present in their territory" in the Refugees Convention

Annexure A – meaning of the term "lawfully present in their territory" in the Refugees Convention

1. The term "lawfully present in their territory" must be interpreted in accordance with the principles set out in Article 31(1) of the VCLT.

2. While the word "lawfully" manifestly encompasses domestic laws, it would be contrary to a good faith interpretation of the Convention to treat "lawfully" as coterminous with domestic laws, as such an approach permits absurd or unreasonable outcomes. For example, domestic laws could define all refugees as "unlawful", which "could result in refugees never being in a position to secure" rights such as those protected in Article 32 (Hathaway, ibid, at 177) and thus States parties avoiding any need to comply with Article 32.

3. For this reason, the plaintiff submits that the Court should not adopt the reasoning in *R (on the application of ST (Eritrea)) (FC) (Appellant) v Secretary of State for the Home Department* [2012] UKSC 12, in which s 11(1) of the *Immigration Act 1971* (UK) "deemed" the appellant to have not lawfully entered the UK, although she was – as a matter of fact – permitted by law to remain there.

4. Interpreting the Convention in good faith in light of its object and purpose, it is necessary to delimit "a state's general right to define lawful presence" by preventing states from "deeming presence to be unlawful in circumstances when the Refugee Convention … deem[s] presence to be lawful. … [This] is important to ensuring the workability of a treaty intended to set a common international standard." (Hathaway, ibid at 177).

5. Such an approach is also consistent with the travaux preparatoire, which indicate that negotiating countries viewed the concept of "lawful presence" to be "a very wide term applicable to any refugee, whatever his origin or situation." (Statement of Mr Juvigny of France, UN Doc. E/AC.32/SR.42, 24 August 1950 at 12) including, for instance, individuals who have entered irregularly but are awaiting a determination of their refugee status assessment (see Statement of Mr Rain of France, UN Doc E.AC.32/SR.15, 27 January 1950 at 15, Statement of Mr Henkin of the United States, ibid, at 20).

6. It is also notable that Art 32 only applies to "refugees", and thus does not prevent a country from expelling a person found not to be a refugee. The high level of protection for refugees against expulsion is justified on the basis that "a refugee, unlike an ordinary alien, does not have a home country to which he can return, his expulsion may have particularly severe consequences." (UN High Commissioner for Refugees, Note on Expulsion of Refugees, 24 August 1977, EC/SCP/3).

7. The plaintiff entered Australia lawfully, with a special purpose visa: SC para [8]-[9]. He has remained in Australia while waiting for determination of his protection visa application and while seeking review in respect of the decision on that application (including now in this Court in so far as the Plaintiff challenges the lawfulness of the 2012 Assessment, which formed the basis for the decisions to refuse him a visa). He remains a person "lawfully present in [Australia's] territory" for the purposes of article 32(1) in those circumstances. As Hathaway observed (at 175):

> ...the stage between "irregular" presence and the recognition or denial of refugee status, including the time required for exhaustion of any appeals or reviews is also a form of 'lawful presence' (cf *Rajendran v Minister for Immigration and Multicultural* Affairs (1998) 86 FCR 526 at 530-1).

A fortiori here, where the plaintiff's presence was "regular" at the time of entry and the plaintiff has been found to be a person to whom Australia owes protection obligations.

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M47 OF 2012

BETWEEN

PLAINTIFF M47/2012

Plaintiff

and

DIRECTOR GENERAL OF SECURITY

First Defendant

10 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

20 COMMONWEALTH OF AUSTRALIA

Fifth Defendant

ANNEXURE B

Legislation and Regulations

Annexure "B"

Applicable Provisions of the Commonwealth Constitution

The applicable provisions are still in force at the date of making the plaintiff's submissions.

Applicable Provisions of the *Migration Act* 1958 (Cth)

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

(aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) to whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; 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; or

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

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

(ii) holds a protection visa.

(2A) A non-citizen will suffer *significant harm* if:

(a) the non-citizen will be arbitrarily deprived of his or her life; or

(b) the death penalty will be carried out on the non-citizen; or

(c) the non-citizen will be subjected to torture; or

(d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or

(e) the non-citizen will be subjected to degrading treatment or punishment.

(2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:

(a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or

(b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or

(c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

Ineligibility for grant of a protection visa

(2C) A non-citizen is taken not to satisfy the criterion mentioned in paragraph (2)(aa) if:

(a) the Minister has serious reasons for considering that:

(i) the non-citizen has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or

(ii) the non-citizen committed a serious non-political crime before entering Australia; or

(iii) the non-citizen has been guilty of acts contrary to the purposes and principles of the United Nations; or

(b) the Minister considers, on reasonable grounds, that:

(i) the non-citizen is a danger to Australia's security; or

(ii) the non-citizen, having been convicted by a final judgment of a particularly serious crime (including a crime that consists of the commission of a serious Australian offence or serious foreign offence), is a danger to the Australian community.

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, subsection (3) does not apply in relation to a country in respect of which:

(a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or

(b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.

(5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:

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

(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.

(5A) Also, subsection (3) does not apply in relation to a country if:

(a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and

(b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other 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.

189 Detention of unlawful non-citizens

(1) If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person.

(2) If an officer reasonably suspects that a person in Australia but outside the migration zone:

(a) is seeking to enter the migration zone (other than an excised offshore place); and

(b) would, if in the migration zone, be an unlawful non-citizen;

the officer must detain the person.

(3) If an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer may detain the person.

(4) If an officer reasonably suspects that a person in Australia but outside the migration zone:

(a) is seeking to enter an excised offshore place; and

(b) would, if in the migration zone, be an unlawful non-citizen;

the officer may detain the person.

(5) In subsections (3) and (4) and any other provisions of this Act that relate to those subsections, *officer* means an officer within the meaning of section 5, and includes a member of the Australian Defence Force.

Note: See Subdivision B for the Minister's power to determine that people who are required or permitted by this section to be detained may reside at places not covered by the definition of *immigration detention* in subsection 5(1).

196 Duration of detention

(1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:

(a) removed from Australia under section 198 or 199; or

(b) deported under section 200; or

(c) granted a visa.

(2) To avoid doubt, subsection (1) does not prevent the release from immigration detention of a citizen or a lawful non-citizen.

(3) To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa.

(4) Subject to paragraphs (1)(a), (b) and (c), if the person is detained as a result of the cancellation of his or her visa under section 501, the detention is to continue unless a court finally determines that the detention is unlawful, or that the person detained is not an unlawful non-citizen.

(4A) Subject to paragraphs (1)(a), (b) and (c), if the person is detained pending his or her deportation under section 200, the detention is to continue unless a court finally determines that the detention is unlawful.

(5) To avoid doubt, subsection (4) or (4A) applies:

(a) whether or not there is a real likelihood of the person detained being removed from Australia under section 198 or 199, or deported under section 200, in the reasonably foreseeable future; and

(b) whether or not a visa decision relating to the person detained is, or may be, unlawful.

(5A) Subsections (4) and (4A) do not affect by implication the continuation of the detention of a person to whom those subsections do not apply.

(6) This section has effect despite any other law.

(7) In this section:

visa decision means a decision relating to a visa (including a decision not to grant the visa, to cancel the visa or not to reinstate the visa).

198 Removal from Australia of unlawful non-citizens

(1) An officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed.

(1A) In the case of an unlawful non-citizen who has been brought to Australia under section 198B for a temporary purpose, an officer must remove the person as soon as reasonably practicable after the person no longer needs to be in Australia for that purpose (whether or not the purpose has been achieved).

(2) An officer must remove as soon as reasonably practicable an unlawful non-citizen:

(a) who is covered by subparagraph 193(1)(a)(i), (ii) or (iii) or paragraph 193(1)(b), (c) or

(d); and

(b) who has not subsequently been immigration cleared; and

(c) who either:

(i) has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; or

(ii) has made a valid application for a substantive visa, that can be granted when the applicant is in the migration zone, that has been finally determined.

(2A) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is covered by subparagraph 193(1)(a)(iv); and

(b) since the Minister's decision (the *original decision*) referred to in subparagraph 193(1)(a)(iv), the non-citizen has not made a valid application for a substantive visa that can be granted when the non-citizen is in the migration zone; and

(c) in a case where the non-citizen has been invited, in accordance with section 501C, to make representations to the Minister about revocation of the original decision—either:

(i) the non-citizen has not made representations in accordance with the invitation and the period for making representations has ended; or

(ii) the non-citizen has made representations in accordance with the invitation and the Minister has decided not to revoke the original decision.

Note: The only visa that the non-citizen could apply for is a protection visa or a visa specified in regulations under section 501E.

(3) The fact that an unlawful non-citizen is eligible to apply for a substantive visa that can be granted when the applicant is in the migration zone but has not done so does not prevent the application of subsection (2) or (2A) to him or her.

(5) An officer must remove as soon as reasonably practicable an unlawful non-citizen if the non-citizen:

(a) is a detainee; and

(b) was entitled to apply for a visa in accordance with section 195, to apply under section 137K for revocation of the cancellation of a visa, or both, but did neither.

(6) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) the non-citizen made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and

(c) one of the following applies:

(i) the grant of the visa has been refused and the application has been finally determined;

(iii) the visa cannot be granted; and

(d) the non-citizen has not made another valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(7) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) Subdivision AI of Division 3 of this Part applies to the non-citizen; and

(c) either:

(i) the non-citizen has not been immigration cleared; or

(ii) the non-citizen has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and

(d) either:

(i) the Minister has not given a notice under paragraph 91F(1)(a) to the non-citizen; or

(ii) the Minister has given such a notice but the period mentioned in that paragraph has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(8) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) Subdivision AJ of Division 3 of this Part applies to the non-citizen; and

(c) either:

(i) the Minister has not given a notice under subsection 91L(1) to the non-citizen; or

(ii) the Minister has given such a notice but the period mentioned in that subsection has ended and the non-citizen has not, during that period, made a valid

application for a substantive visa that can be granted when the applicant is in the migration zone.

(9) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) Subdivision AK of Division 3 of this Part applies to the non-citizen; and

(c) either:

(i) the non-citizen has not been immigration cleared; or

(ii) the non-citizen has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and

(d) either:

(i) the Minister has not given a notice under subsection 91Q(1) to the non-citizen; or

(ii) the Minister has given such a notice but the period mentioned in that subsection has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(10) For the purposes of subsections (6) to (9), a valid application under section 137K for revocation of the cancellation of a visa is treated as though it were a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

Applicable Provisions of the *Migration Regulations* 1994 (Cth)

Schedule 4 Public interest criteria and related provisions

Part 1 Public Interest Criteria

4002 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 *Australian Security Intelligence Organisation Act 1979*.

Schedule 2 Subclass 866- Protection

866.1 Interpretation

866.111 In this Part:

Refugees Convention means the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees.

866.112 For the purposes of this Part, a person (***A***) is a member of the same family unit as another person (***B***) if:

(a) A is a member of B's family unit; or

(b) B is a member of A's family unit; or

(c) A and B are members of the family unit of a third person.

866.2 Primary criteria

Note All applicants must satisfy the primary criteria.

866.21 Criteria to be satisfied at time of application

866.211 (1) One of subclauses (2) to (5) is satisfied.

(2) The applicant:

(a) claims to be a person to whom Australia has protection obligations under the Refugees Convention; and

(b) makes specific claims under the Refugees Convention.

(3) The applicant claims to be a member of the same family unit as a person who is:

(a) mentioned in subclause (2); and

(b) an applicant for a Protection (Class XA) visa.

(4) The applicant claims to be a person to whom Australia has protection obligations because the applicant claims that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm.

(5) The applicant claims to be a member of the same family unit as a person who is:

(a) mentioned in subclause (4); and

(b) an applicant for a Protection (Class XA) visa.

866.22 Criteria to be satisfied at time of decision

866.221 (1) One of subclauses (2) to (5) is satisfied.

(2) The Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

Note See paragraph 36 (2) (a) of the Act.

(3) The Minister is satisfied that:

(a) the applicant is a person who is a member of the same family unit as an applicant who is mentioned in subclause (2); and

(b) the applicant mentioned in subclause (2) has been granted a Protection (Class XA) visa.

Note See paragraph 36 (2) (b) of the Act.

(4) The Minister is satisfied that the applicant:

(a) is not a person to whom Australia has protection obligations under the Refugees Convention; and

(b) is a person to whom Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

Note See paragraph 36 (2) (aa) of the Act.

(5) The Minister is satisfied that:

(a) the applicant is a person who is a member of the same family unit as an applicant mentioned in subclause (4); and

(b) the applicant mentioned in subclause (4) has been granted a Protection (Class XA) visa.

Note See paragraph 36 (2) (c) of the Act.

866.223 The applicant has undergone a medical examination carried out by any of the following (a ***relevant medical practitioner***):

(a) a Medical Officer of the Commonwealth;

(b) a medical practitioner approved by the Minister for the purposes of this paragraph;

(c) a medical practitioner employed by an organisation approved by the Minister for the purposes of this paragraph.

866.224 The applicant:

(a) has undergone a chest x-ray examination conducted by a medical practitioner who is qualified as a radiologist in Australia; or

(b) is under 11 years of age and is not a person in respect of whom a relevant medical practitioner has requested such an examination; or

(c) is a person:

(i) who is confirmed by a relevant medical practitioner to be pregnant; and

(ii) who has been examined for tuberculosis by a chest clinic officer employed by a health authority of a State or Territory; and

(iii) who has signed an undertaking to place herself under the professional supervision of a health authority in a State or Territory and to undergo any necessary treatment; and

(iv) who the Minister is satisfied should not be required to undergo a chest x-ray examination at this time.

866.224A A relevant medical practitioner:

(a) has considered:

(i) the results of any tests carried out for the purposes of the medical examination required under clause 866.223; and

(ii) the radiological report (if any) required under clause 866.224 in respect of the applicant; and

(b) if he or she is not a Medical Officer of the Commonwealth and considers that the applicant has a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community, has referred any relevant results and reports to a Medical Officer of the Commonwealth.

866.224B If a Medical Officer of the Commonwealth considers that the applicant has a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community, arrangements have been made, on the advice of the Medical Officer of the Commonwealth, to place the applicant under the professional supervision of a health authority in a State or Territory to undergo any necessary treatment.

866.225 The applicant:

(a) satisfies public interest criteria 4001, 4002 and 4003A; and

(b) if the applicant had turned 18 at the time of application -- satisfies public interest criterion 4019.

866.226 The Minister is satisfied that the grant of the visa is in the national interest.

866.227 (1) The applicant meets the requirements of subclause (2) or (3).

(2) The applicant meets the requirements of this subclause if the applicant, or a member of the family unit of the applicant, is not a person who has been offered a temporary stay in Australia by the Australian Government for the purpose of an application for a Temporary Safe Haven (Class UJ) visa as provided for in regulation 2.07AC.

(3) The applicant meets the requirements of this subclause if section 91K of the Act does not apply to the applicant's application because of a determination made by the Minister under subsection 91L (1) of the Act.

866.230 (1) If the applicant is a child mentioned in paragraph 2.08 (1) (b), subclause (2) or (3) is satisfied.

(2) Both of the following apply:

(a) the applicant is a member of the same family unit as an applicant mentioned in subclause 866.221 (2);

(b) the applicant mentioned in subclause 866.221 (2) has been granted a Subclass 866 (Protection) visa.

(3) Both of the following apply:

(a) the applicant is a member of the same family unit as an applicant mentioned in subclause 866.221 (4);

(b) the applicant mentioned in subclause 866.221 (4) has been granted a Subclass 866 (Protection) visa.

866.231 The applicant has not been made an offer of a permanent stay in Australia as described in item 3 or 4 of the table in subregulation 2.07AQ (3).

866.232 The applicant does not hold a Resolution of Status (Class CD) visa.

866.3 Secondary criteria

Note All applicants must satisfy the primary criteria.

866.4 Circumstances applicable to grant

866.411 The applicant must be in Australia.

866.5 When visa is in effect

866.511 Permanent visa permitting the holder to travel to and enter Australia for a period of 5 years from the date of grant.

866.6 Conditions: Nil.

866.7 Way of giving evidence

866.711 No evidence need be given.

866.712 If evidence is given, to be given by a label affixed to a valid passport, valid Convention travel document or an approved form.

Applicable Provisions of the *Australian Security and Intelligence Organisation Act* 1979 (Cth)

37 Security assessments

(1) 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.

(2) An adverse or qualified security assessment shall be accompanied by a statement of the grounds for the assessment, and that statement:

(a) shall contain all information that has been relied on by the Organisation in making the assessment, other than information the inclusion of which would, in the opinion of the Director-General, be contrary to the requirements of security; and

(b) shall, for the purposes of this Part, be deemed to be part of the assessment.

(3) The regulations may prescribe matters that are to be taken into account, the manner in which those matters are to be taken into account, and matters that are not to be taken into account, in the making of assessments, or of assessments of a particular class, and any such regulations are binding on the Organisation and on the Tribunal.

(4) Subject to any regulations made in accordance with subsection (3), the Director-General shall, in consultation with the Minister, determine matters of a kind referred to in subsection (3), but nothing in this subsection affects the powers of the Tribunal.

(5) No proceedings, other than an application to the Tribunal under section 54, shall be brought in any court or tribunal in respect of the making of an assessment or anything done in respect of an assessment in accordance with this Act.