IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M47 of 2012

BETWEEN:

PLAINTIFF M47/2012
Plaintiff

and

10 **DIRECTOR GENERAL OF SECURITY**
First Defendant

THE OFFICER IN CHARGE, MELBOURNE IMMIGRATION TRANSIT ACCOMMODATION
Second Defendant

SECRETARY, DEPARTMENT OF IMMIGRATION AND CITIZENSHIP
Third Defendant

20 **MINISTER FOR IMMIGRATION AND CITIZENSHIP**
Fourth Defendant

COMMONWEALTH OF AUSTRALIA
Fifth Defendant

INTERVENER'S SUBMISSIONS – PLAINTIFF S138

30 ### PART I: SUITABILITY FOR PUBLICATION

1. This submission is in a form suitable for publication on the internet.

PART II: BASIS FOR INTERVENTION

2. The plaintiff in High Court proceedings *Plaintiff S138/2012 v Australian Security Intelligence Organisation & Ors* (No S138/2012) ("**Plaintiff S138**") seeks leave to intervene for the purpose of making written and oral submissions in support of the plaintiff. In the alternative, Plaintiff S138 seeks leave to be heard as amicus curiae.

Date of Document: 8 June 2012
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PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. The application is made on the grounds set out in the affidavit of Catherine Mills affirmed on 6 June 2012. Plaintiff S138 is detained in circumstances which are relevantly analogous to the circumstances in which Plaintiff M47 is detained. He has been held in detention since his arrival in July 2009, nearly three years ago. Like Plaintiff M47, Plaintiff S138 has been determined to be a refugee for the purposes of the *Migration Act* 1958 (Cth) (***"Migration Act"***). This was confirmed in November 2010. The Minister's delegate has found that Plaintiff S138, like Plaintiff M47, satisfies all of the criteria for a Subclass 866 Protection Visa under the *Migration Act*, as specified in Schedule 2 of the *Migration Regulations 1994* (***"Migration Regulations"***), except the requirement that he satisfy public interest criterion 4002, as required by item 866.225(a). Public interest criterion 4002[1] is that the applicant is not assessed by the Australian Security Intelligence Organisation (**"ASIO"**)to be directly or indirectly a risk to security, within the meaning of s. 4 of the *Australian Security Intelligence Organisation Act 1979* (***"ASIO Act"***). On 18 December 2009 ASIO advised the Department of Immigration and Citizenship that it had assessed Plaintiff S138 to be a risk to security.

4. Like Plaintiff M47, Plaintiff S138 is from Sri Lanka. There is no apparent prospect of the Commonwealth seeking to return him to Sri Lanka, and any attempts to relocate him to a third country have been unsuccessful to date. So far as Plaintiff S138 is aware, this situation is unlikely to change in the foreseeable future.

5. In proceeding S138/2012 the plaintiff seeks relief similar to that sought by Plaintiff M47. Plaintiff S138 seeks to raise equivalent contentions that his detention depends upon an executive decision made without procedural fairness, and that the Commonwealth lacks the statutory authority and the legislative power to authorise continuing detention where there is no real likelihood of removal in the foreseeable future.

6. The determination of the issues raised in the present proceedings will necessarily affect the determination of the proceedings commenced by Plaintiff S138 and thereby

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[1] In Part 1 of Schedule 4 of the *Migration Regulations.*

substantially affect his legal interests. Plaintiff S138's interest in the determination of the present proceedings is sufficient to satisfy the precondition for intervention.[2]

7. Plaintiff M47 has indicated that his case is primarily one of construction of the *Migration Act*.[3] Plaintiff S138 seeks leave to contend that the proper determination of the issues arising in the present proceeding, including questions of construction, requires a consideration of the constitutional limits of the Commonwealth's legislative power to authorise detention pursuant to an executive decision, submitting as follows:

   a. Procedural fairness requires that people in the position of Plaintiff M47, whose liberty is at risk (perhaps indefinitely), be informed of the substance of the allegations against them and the grounds of concern. But if the duty of procedural fairness is reduced below this level by the public interest in protecting national security, then, at least in cases of indefinite detention, constitutional principles arising from Ch III come into play.

   b. The power to detain is part of the judicial power of the Commonwealth, subject to certain exceptions where the Parliament may authorise executive detention.

   c. The exception to that principle enabling executive detention for the purposes of immigration assessment and removal does not extend to indefinite detention where a condition precedent to detention is, in substance, unreviewable, including where the person has not been provided a substantial and meaningful opportunity to be heard.

   d. Further and in the alternative, the exception does not extend to authorising indefinite detention for the reasons given, in dissent, by Gummow J in *Al-Kateb*,[4] and that decision should be overruled.

8. The main focus of Plaintiff S138 in these submissions is on step (c). The matters sought to be addressed by Plaintiff S138 come within the bounds of the notice issued by

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2 *Levy v Victoria* (1997) 189 CLR 579 at 602; *Roadshow Films Pty Ltd v IINet Limited* [2011] HCA 54 at [2].

3 Transcript of Proceedings, *Plaintiff M47/2012 v Director General of Security & Ors; Plaintiff S138/2012 v Australian Security Intelligence Organisation & Ors* [2012] HCATrans 128 (30 May 2012).

4 *Al Kateb v Godwin* (2004) 219 CLR 562 at [126]-[140].

Plaintiff M47 pursuant to s. 78B of the *Judiciary Act 1903* (Cth).[5] The argument outlined does not appear to form part – or at least a significant part – of the case sought to be advanced by Plaintiff M47. The Court should be addressed on the full range of interrelated issues in this case.[6] The submissions sought to be advanced by Plaintiff S138 will assist the Court in resolving the matter before it.[7] The intervention of Plaintiff S138 will not interfere with the efficient resolution of the proceedings and will not require the parties to incur any significant additional costs.

PART IV: APPLICABLE PROVISIONS

9. Plaintiff S138 understands that the provisions relevant to the determination of the matter will be set out in the plaintiff's submissions.

PART V: SUBMISSIONS

Procedural fairness under the statute

10. In *Applicant VEAL of 2002* the Court indicated that just as courts "mould their procedures" to accommodate public interest immunity so, too, the content of an administrative decision-maker's obligation to give procedural fairness may be informed by the same considerations.[8] The Court recognised the public interest in maintaining the confidentiality of certain information (in that case information submitted to the Tribunal by an informant) while at the same time affording procedural fairness to the applicant. The Court dealt with the "problem of confidentiality" by finding that the conflicting imperatives could and should have been accommodated by the applicant being informed of the substance of the allegations made against him and being given an opportunity to respond.[9]

11. The principles of public interest immunity require that regard be had in the balancing exercise to the importance of the matter before the court and significance of the

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5 See in particular paragraph 3(a)(iv) of the notice.
6 *Roadshow Films Pty Ltd v IINet Limited* (2011) 86 ALJR 205 at [3].
7 *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 313.
8 *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at [24].
9 *Applicant VEAL of 2002* at [29].

material in question to the matter to be determined.[10] These principles are consistent with those which inform the content of procedural fairness at common law. The scope of the obligation to provide an opportunity to be heard depends not only upon the statutory context but also upon the particular circumstances in which the relevant power is exercised.[11] The application of principles of procedural fairness in a particular case must always be moulded to the particular circumstances.[12] Cases such as the present are materially different from *Leghaei v Director-General of Security*,[13] where liberty was not at stake. Where a decision is to be made affecting a matter of such critical importance as a person's liberty – potentially for an extended or indefinite period – the circumstances compel disclosure of the substance of the allegations against the person, and the grounds of concern, such that the person has a meaningful opportunity to answer the case against him or her.

12. However, it is accepted that in some circumstances the general law duty of procedural fairness may contract, perhaps to nothingness,[14] including because of national security concerns.[15] If such a view is taken here, that conclusion cannot end the analysis. Where liberty is at stake the requirements of the Constitution must then be considered.

The constitutional requirement for judicial process to authorise deprivation of liberty

13. The power to detain a person attracts special constitutional considerations bearing on the scope of both legislative and executive power. Other than in the recognised "exceptional cases", the involuntary detention of a person by the state is only permissible as a consequential step in the adjudication of the person's criminal guilt for past acts.[16] In *Fardon*, Gummow J stated that formulating the principle in these terms

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10 *Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 614-619.

11 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [60] per Gaudron and Gummow JJ; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at [129] and [143] per McHugh J.

12 *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at [25].

13 (2007) 241 ALR 141.

14 Cf *Kioa v West* (1985) 159 CLR 550 at 615 per Brennan J.

15 Note *Salemi v MacKellar [No.2]* (1977) 137 CLR 396 at 421 per Gibbs J.

16 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [80] per Gummow J; *Thomas v Mowbray* (2007) 233 CLR 307 at [114]-[115] per Gummow and Crennan JJ; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27-29 per Brennan, Deane and Dawson JJ, also at 10 per Mason CJ, 71 per McHugh J.

emphasises that "the concern is with the deprivation of liberty without adjudication of guilt rather than with the further question of whether the deprivation is for a punitive purpose".[17] The concern about liberty is central to the protective role played by Ch III, which protects certain "basic rights" of persons by "ensuring that those rights are determined by a judiciary independent of the parliament and the executive".[18] In the result, as the plurality stated in *Chu Kheng Lim*, other than in the accepted exceptional cases there is "a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth".[19] Whilst some doubt has been expressed about the primacy to be attached to judicial power in understanding the scope of the Commonwealth's power to detain,[20] the approach adopted in *Chu Kheng Lim* and *Fardon* remains authoritative.[21]

14. Although the plurality in *Lim* earlier spoke of the involuntary detention of *citizens*, the principle is not limited to Australian citizens. The protections of Ch III are not bounded by any such notion, citizenship itself being a statutory creation. So much was implicit in the plurality analysis in *Lim*; the protections were reduced with respect to non-citizens only to the extent of recognising an exception to the principle allowing executive detention for the purposes of receiving, investigating and determining an application for entry, and for the purposes of expulsion or deportation.[22]

15. As the statement by Gummow J in *Fardon* indicates, the critical matter is that detention must be a consequence of a particular process of law. In the ordinary course, where detention is based upon a judicial finding of guilt, the process is attended by the procedural protections inherent in the judicial process, including a requirement that the parties "be given an opportunity to present their evidence and to challenge the evidence led against them".[23] Any Commonwealth law which required a court exercising federal jurisdiction to depart to a significant degree from the methods and standards which are

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17 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [81] per Gummow J.

18 *R v Quinn; Ex parte Consolidated Foods* (1977) 138 CLR 1 at 11 per Jacobs J; *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at [40].

19 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 28-29.

20 See *Al Kateb v Godwin* (2004) 219 CLR 562 at [258] per Hayne J (Heydon J agreeing).

21 See eg *Kable v DPP (NSW)* (1996) 189 CLR 51 at 97-8 per Toohey J, 131-2 per Gummow J.

22 *Lim* at 29-32.

23 *Bass v Permanent Trustees* (1999) 198 CLR 334 at [56] per curiam.

characteristic of the judicial process, including procedural fairness, would be invalid as being repugnant to Ch III of the *Constitution*.[24]

Limits on the exception dealing with immigration assessment and removal

16. The exceptions to the constitutional principle are, necessarily, limited in their scope. The exceptions do not devour the rule. In Plaintiff S138's submission, this case raises a question as to the limits on the exception relating to immigration assessment and removal. It is submitted that the exception to the constitutional immunity does not apply in circumstances where:

    a. a condition precedent to detention is in substance unreviewable, including because the person has not been provided a substantial and meaningful opportunity to be heard; and

    b. indefinite detention is the result, in the sense that there is no reasonably foreseeable prospect of removal.

17. In *Al Kateb* at [44] McHugh J observed that "[e]ven a law whose object is purely protective will infringe Ch III if it prevents the Ch III courts from determining some matter that is a condition precedent to authorising detention". And Hayne J noted at [254] that, there, "[t]he premise for the debate is that the non-citizen does not have permission to be at liberty in the community". By the time *Al Kateb* (and *Al Khafaji*)[25] reached this Court there was no relevant controversy about the process by which the plaintiff came to be held in detention for the purposes of removal.

18. That premise does not apply here. The only thing standing in the way of granting a visa – and thus ending detention – is the adverse security assessment. The correctness and validity of ASIO's determination is not accepted by Plaintiff M47 (or Plaintiff S138). The condition precedent to detention is in dispute.

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24 *Bass* at [56]; *Thomas v Mowbray* (2007) 233 CLR 307 at [111] per Gummow and Crennan JJ. In *Al Rawi v The Security Service* [2011] UKSC 34 at [12] Lord Dyson identified the principle that a party has a right to know the case against him and the evidence on which it is based as one of the features of a common law trial which is fundamental to the English system of justice.

25 *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664.

19. The defendants may seek to argue that this case is indistinguishable from *Al-Kateb*, and that detention falls within the constitutional exception because it is for the purpose of removal. But the substance of the matter cannot be ignored when constitutional principles are at stake. And that substance includes that the only impediment to release is an adverse security assessment. The legal character of the detention cannot be divorced from the process of executive decision-making that has led to the detention of the plaintiff under a combination of powers in the *ASIO Act* and the *Migration Act*. The lawfulness of the detention here depends upon the proposition that the Commonwealth may detain a person based on an adverse security assessment without providing that person with a meaningful opportunity to be heard in respect of the assessment, including by informing the person of the allegations and grounds for concern.

20. The executive decision pursuant to which the plaintiff is detained is not unreviewable in a strict or jurisdictional sense. Judicial review is technically available. However, where the person in question does not know the substance of the allegations or concerns (and assuming here that this is seen to be consistent with the general law requirements of procedural fairness) then he or she will know little, if anything, of the basis for the decision. The regime under Part IV of the *ASIO Act* governing the provision of reasons and merits review in respect of adverse security risk assessments does not apply in respect of a non-citizen in Plaintiff M47's position.[26] Even if reasons were provided they would presumably be as attenuated as the material originally disclosed.

21. If the person subject to such an assessment is not made aware of the basis for the decision, then there is no meaningful possibility of determining whether ASIO has fallen into jurisdictional error, such as to warrant an application for judicial review. A judicial review application cannot be made, properly and ethically, in the speculative hope that a court may compel some further degree of discovery which might turn some error up. Any application for preliminary discovery to establish the basis on which an assessment was made is likely to be met by a comprehensive public interest immunity claim that would frustrate the exercise.

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[26] See ss. 36 and 37 of the *ASIO Act*.

22. It is not suggested that the interests of the plaintiff, the principles of procedural fairness, or Ch III requirements, are such that the conflicting imperatives of national security should be ignored or overridden. Plainly there is a critical public interest in national security and in maintaining the confidentiality of material where necessary in the interests of national security. The relevant constitutional issue is how the conflicting principles are to be reconciled in the exceptional circumstance where the Commonwealth executive is making a decision which has the necessary consequence of subjecting a person to indefinite detention.

23. It is instructive to compare the procedures adopted in respect of ASIO's administrative decision making with the principles governing public interest immunity claims in a judicial context. The principles of public interest immunity apply as a means of reconciling the conflict between, on the one hand, the public interest in the administration of justice which dictates that all relevant material should be available to the parties and the court and, on the other, the public interest in ensuring that harm is not caused by the disclosure of material that ought not, for one reason or another, be disclosed.[27] Importantly, where the latter interest prevails in a particular case, the consequence is that the parties and the court must proceed without the forensic benefit of such material.

24. Where a claim of public interest immunity is upheld, the information the subject of the immunity is not available as evidence to be taken into account in deciding the outcome of the proceedings.[28] The principles of public interest immunity do not contemplate a situation in which the judicial decision-maker and one party to the proceedings, but not the other party, may have access to certain restricted material for the purposes of determining some contested question of rights (apart from the very question of whether material is subject to public interest immunity[29]).

25. There have been limited statutory departures from the principle that rights cannot be determined without mutual access to the material founding the decision, whereby in

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27 *Alister v The Queen* (1983) 154 CLR 404 at 412 per Gibbs CJ; *Sankey v Whitlam* (1978) 142 CLR 1 at 42-43 per Gibbs ACJ; at 95-96 per Mason J; *Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 614-619.

28 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at [5] per Gleeson CJ, at [23]–[24] per Gummow, Hayne, Heydon and Kiefel JJ.

29 As to which see eg *Alister v The Queen* (1983) 154 CLR 404 at 469.

certain proceedings confidential evidence may be received that is not made available to one or more of the parties. But such procedures are exceptional and remain subject to close judicial control.[30] Further, issues of degree must arise taking account of the context and the consequences of the decision. It would be impermissible for a person to be tried, convicted and then detained for a criminal offence based upon information provided to the trier of fact but not made available to the accused or his/her representatives.

26. In the ordinary case where a person is detained pursuant to an adjudication of guilt by a court, the person will have the procedural protections afforded by the judicial process. If an issue were to arise in the course of such proceedings regarding confidential material, the issue would be resolved in accordance with the principles of public interest immunity (or statutory equivalents), according to a judicial process and without any prospect that the decision-maker would determine the matter (and hence the person's liberty) on the basis of material to which the accused was not privy. A Commonwealth law which purported to permit the adjudication of guilt by a court on the basis of evidence that was not available to the accused would be invalid as being repugnant to Ch III of the Constitution and the proper exercise of judicial power.

27. These considerations must also be brought to bear when considering the "exceptional case" in which detention stems not from an exercise of judicial power but from a process of administrative decision-making. The Commonwealth legislature cannot validly confer upon the executive the power to make a decision that has the effect of indefinitely depriving a person of his or her liberty on the basis of material that the person has not had any meaningful opportunity to respond to. To do so impermissibly undermines Ch III's protection of liberty.

28. This requirement exists as a limitation on the exception to the *Lim* principle relating to immigration assessment and removal. That exception could only authorise indefinite detention for the purposes of removal (assuming that can be authorised at all) where the person subject to the detention has had, or is then afforded, a substantial and

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30 See, for example, *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at [10].

meaningful opportunity to challenge the basis of detention, including by being informed of the allegations and grounds for concern.

29. To take the contrary view is to contravene the principle identified in the *Communist Party Case*.[31] On any view, the immigration assessment/removal exception to the *Lim* principle must have limits. In particular, a limit on the removal aspect of the exception is that the person is being detained for the purpose of removal because they do not have a right to enter or remain. If they do have such a right, then the constitutional exception can have no possible application.[32] Thus whether or not they have such a right is a constitutional fact.

10 30. The effect of the scheme as it applies to Plaintiff M47 (and Plaintiff S138) is that that constitutional fact has been determined by the Director-General of Security in a way which is, in practical terms, incapable of review by the courts. The Executive branch has read itself into power.

31. The mere technical ability to seek judicial review may not suffice when it comes to satisfying the *Communist Party Case* principle. As Dixon CJ, McTiernan and Webb JJ said in *Hughes & Vale Pty Ltd v NSW [No.2]*, with respect to a very broad discretion:[33]

> But in any case the grounds for the refusal of a licence would rarely prove to be practically examinable in a court of law. If the unsuccessful applicant for a licence sought a writ of mandamus, it would only be by a chance that he could
20 show that the discretion had been exercised on some ground outside the limits, so difficult of ascertainment, of sub-s (4) of s. 17.

32. In *Miller v TCN Channel Nine Pty Ltd*, Brennan J suggested that the difficulty was answered where there are means available to examine and review the reasons for a decision.[34] Mason CJ, Brennan and Deane JJ each made a similar point in *Cunliffe v Commonwealth* with respect to the freedom of political communication.[35] Here, as in

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31 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, eg at 262 per Fullagar J. Note *Al Kateb* at [140] per Gummow J.

32 See *Lim* at 29.

33 (1955) 93 CLR 127 at 158, see also at 166, 187, 202 and 243.

34 (1986) 161 CLR 556 at 614-615, see also Deane J at 619; note also *Cross v Barnes Towing and Salvage (Qld) Pty Ltd* (2005) 65 NSWLR 331 at [57] per Spigelman CJ, referring to the availability there of merits review. See also discussion by Zines in *The High Court and the Constitution* (5th edn, 2008, Federation Press) at 320-1.

35 (1994) 182 CLR 272 at 303, 331 and 342.

those cases, a type of constitutional guarantee or immunity is at issue. No less stringent approach should be taken here than is required there.

33. To recognise that it is a limitation on the immigration exception to the *Lim* principle that indefinite detention cannot be authorised without a substantial and meaningful opportunity to challenge the basis of detention is not to conclude that the Constitution overrides the important public interests relating to national security. It is not here submitted that a person in the position of Plaintiff M47 (or Plaintiff S138) has some effective constitutional right to access material which would be covered by public interest immunity. Rather, it is to recognise that if the Executive wishes to use such information to detain a person indefinitely, then that use comes with a condition – disclosure of the substance of the allegations and grounds for concern. If that price is too high for the Executive, then the person cannot be detained indefinitely based upon it, just as a person could not be convicted and imprisoned on secret information.

34. That position does not leave the nation unduly exposed to danger. The constitutional principle here is founded on the protection of liberty from detention. Lesser restrictions may be imposed to protect the public interest, whether as conditions on the grant of a writ of habeas corpus, or by imposition of control orders of the kind considered in *Thomas v Mowbray*.[36] It is not necessary here to resolve the extent to which such orders might be made based upon secret information.[37] Nor is it necessary here to resolve the extent to which detention might be authorised in times of total war with only limited rights of judicial review.[38]

35. The constitutional limitation outlined is not infringed if ss. 189 and 196 of the *Migration Act* are read down so as not to permit detention in circumstances where an application for a visa or release has been denied and avenues for challenge practically exhausted, the person is detained, there is no reasonably foreseeable prospect of removal, and the decision to deny the visa was made upon secret information where the person was not informed of the substance of the allegations and grounds which founded the decision.

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36 (2007) 233 CLR 307.

37 Cf *Thomas* at [31] per Gleeson CJ and [122]-[126] per Gummow and Crennan JJ.

38 See similarly *Lim* (1992) 176 CLR at 28 fn 66 per Brennan, Deane and Dawson JJ; see also *Al-Kateb* at [140] per Gummow J. Cf *Little v Commonwealth* (1947) 75 CLR 94 at 103 per Dixon J.

36. What does the limitation articulated here mean in practice, given that it will commonly not be known in advance, at the time a decision is made with respect to their immigration status, that a person may come to be detained indefinitely? It is submitted that the limitation arises at least when the detention assumes the character of being indefinite, that is, there is no reasonably foreseeable prospect of removal. At that stage unless the Minister re-determines the assessment of eligibility for a visa – this time providing the constitutionally necessary degree of disclosure – the detention will exceed the scope of the exception, and will be impermissible.

Consideration of related issues in foreign courts

37. The vexed question of how to reconcile basic principles of liberty, fair process and national security has arisen for consideration in a number of overseas jurisdictions in recent years.[39] Whilst the constitutional and legislative context differs from place to place, the outcome of a number of decisions of superior courts suggests that the principles identified above as constraining the power of detention are recognised as fundamental in a number of similar systems.

38. In *Re Charkaoui* the Canadian Supreme Court held that the detention procedure under the *Immigration and Refugee Protection Act 2001* (***"IRP Act"***) infringed s. 7 of the *Canadian Charter of Rights and Freedoms*.[40] The principles of "fundamental justice" secured by s. 7 of the Charter include a guarantee of procedural fairness.[41] McLachlin CJC, for the Court, cited with approval an earlier statement that "[i]t is an ancient and venerable principle that no person shall lose his or her liberty without due process according to the law, which must involve a meaningful judicial process".[42] Her Honour added, at [28], that this principle "emerged in the era of feudal monarchy, in the form of the right to be brought before a judge on a motion of habeas corpus. It remains as fundamental to our modern conception of liberty as it was in the days of King John."

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39 See eg *Al Rawi v The Security Service* [2011] UKSC 34 at [14] per Lord Dyson.

40 Section 7 of the Charter provides that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

41 *Re Charkaoui* [2007] 1 SCR 350 at [19], [53] per McLachlin CJC (Bastarache, Binni, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ concurring).

42 At [28], citing *United States v Ferrars* [2006] 2 SCR 77 at [19].

39. McLachlin CJC at [61] recognised that it was a "reality of our modern world" that national security concerns could limit the extent of disclosure to an affected individual. Nevertheless, if fundamental justice is to be accorded to a detainee "either the person must be given the necessary information, or a substantial substitute for that information must be found". While the *IRP Act* provided for a system of judicial review of detention, it also denied the detainee the right to know the case against him or her. The Court held that this arrangement constituted a breach of s. 7 of the Charter which was not justified under s. 1 of the Charter.[43] Critical to that conclusion was the potential for alternative procedures to be adopted which could accommodate both the need for procedural fairness and national security concerns.[44]

40. The English courts have also recognised the role of special procedures in circumstances where procedural fairness is subject to constraints arising because of national security concerns. In *Secretary of State for the Home Department v MB* the House of Lords held that the use of a special advocate procedure, to deal with material that was not made available to a person subject to a control order under the *Prevention of Terrorism Act 2005*, could serve as a sufficient means of reconciling procedural fairness and national security concerns. [45] However, it subsequently held that use of a special advocate procedure would lead to the person the subject of a control order being denied a fair hearing[46] if the controlee was not given sufficient information about the allegations against him to understand the essence of the case against him and to enable him to give effective instructions in relation to those allegations.[47] The provision of such information was described as the "bottom line, or the core irreducible minimum".[48] A "denunciation on grounds that are not disclosed is the stuff of nightmares. The rule of law in a democratic society does not tolerate such behaviour."[49]

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43 Section 1 of the Charter provides that "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

44 The availability of less intrusive alternatives was considered by McLachlin CJ at [70]-[84].

45 *Secretary of State for the Home Department v MB* [2008] 1 AC 440.

46 As required by article 6(1) of the Convention scheduled to the *Human Rights Act 1998*.

47 *Secretary of State for the Home Department v AF (No.3)* [2010] 2 AC 269 at [65] and at [81], following the decision of the Grand Chamber of the European Court of Human Rights in *A v United Kingdom* (2009) 49 EHRR 625.

48 *AF* at [81] per Lord Hope of Craighead.

49 *AF* at [83] per Lord Hope, citing an earlier statement by Lord Scott of Foscote.

41. The United State Supreme Court, in considering the availability of procedures to test the classification of persons detained at Guantanamo Bay and elsewhere, has also identified certain irreducible minimum procedural entitlements. In *Hamdi v Rumsfeld*, O'Connor J for the majority held that due process demanded that a detainee seeking to challenge his classification "must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Governments factual assertions before a neutral decisionmaker".[50]

This Court's decision in Al-Kateb

42. The argument outlined above is not inconsistent with the majority decision in *Al-Kateb*. However, further and in the alternative, Plaintiff S138 seeks leave to submit that Ch III does not permit immigration detention for an indefinite period for the reasons outlined by Gummow J in *Al-Kateb* at [126]-[140], and that the majority decision to the contrary in *Al-Kateb* should be overruled. In that respect it is submitted that that part of the majority reasoning did not rest upon a principle carefully worked out in a significant succession of cases.[51] The decision has not been acted upon in a way militating against reconsideration. On the contrary, to the extent that it has been acted upon it has led to indefinite detention of persons contrary to the requirements of the Constitution.

8 June 2012

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50 542 US 507 (2004), 533.

51 Note *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-9 per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ.