**IN THE HIGH COURT OF AUSTRALIA**

**MELBOURNE REGISTRY** **No M76 of 2013**

**BETWEEN:**

**PLAINTIFF M76/2013**

Plaintiff

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

First Defendant

**THE OFFICER IN CHARGE, SYDNEY IMMIGRATION RESIDENTIAL HOUSING**

Second Defendant

**SECRETARY, DEPARTMENT OF IMMIGRATION AND CITIZENSHIP**

Third Defendant



**COMMONWEALTH OF AUSTRALIA**

Fourth Defendant

# DEFENDANTS' SUBMISSIONS

Filed on behalf of the Defendants by:

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## I. PUBLISHABLE ON THE INTERNET

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

## II. STATEMENT OF THE ISSUES

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

   2.1. Do ss 189 and 196 of the *Migration Act 1958* (Cth) (**the Act**), properly construed, presently authorise the Second Defendant to detain the Plaintiff, being an unlawful non-citizen who is unable to apply for a visa and who has been assessed by ASIO to be a risk to Australia's national security, for the purpose of segregating her from the Australian community until such time as it becomes reasonably practicable to remove her from Australia? (**Question 1**)

   2.2. If so, are ss 189 and 196 of the Act to that extent contrary to Chapter III of the Constitution, with the result that the Plaintiff is required to be released into the Australian community? (**Question 2**)

   2.3. Does the fact that the Plaintiff's case was not referred to the Minister for him to consider whether to exercise his power under s 46A(2) of the Act reveal an error of law? (**Question 3**)

   2.4. If the Plaintiff is successful, what form of relief should be granted? (**Question 4**)

## III. SECTION 78B NOTICES

3. The Plaintiff gave notice under s 78B of the *Judiciary Act 1903* (Cth) on 26 February 2013. No further notice is required.

## IV. MATERIAL FACTS

4. The facts and documents necessary to enable the Court to decide the questions reserved for the opinion of the Full Court are contained in the Amended Special Case filed 9 August 2013 (**the Special Case**).

## V. APPLICABLE LEGISLATION

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

## VI. ARGUMENT

### (A) INTRODUCTION

6. The Plaintiff is a non-citizen with no legal right to enter or remain in Australia, or to apply for a visa that would permit her to do so.[1] The reason that she has not been permitted to apply for a visa is that the Minister has issued guidelines indicating that he does not wish to consider exercising his dispensing power under s 46A(2) of the Act with respect to certain persons, including persons such as the Plaintiff who have received adverse security assessments from ASIO.[2] The Plaintiff has been assessed by ASIO to be likely to

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1 Special Case at [9].
2 Special Case at [19] and SC-9.

engage in acts prejudicial to Australia's security if she is granted a protection visa (the **ASA**).[3] The ASA was upheld following an independent review by the Hon Margaret Stone (the **Independent Review**).[4] The Plaintiff has not sought to challenge either the ASA or the Independent Review.

7. A central aspect of Australia's sovereignty is that it has the right to determine who is to be admitted into the Australian community and who is to be refused admission.[5] This Court has described that right as being "essential to security".[6] In order to be effective, that right must exist whether or not any difficulties attend the removal of a non-citizen from Australia. It is common sense that such difficulties are particularly likely to attend the removal of persons who are assessed to constitute a security risk, for the existence of such an assessment constitutes a "significant obstacle" to resettlement.[7] However, if Australia must release into the community a non-citizen who entered its territory without permission and who it is presently difficult to remove, it would follow that Australia cannot deny admission to the very people that it may be most important to Australia's sovereign interests to exclude.

8. Chapter III of the Constitution does not prevent the detention of a non-citizen who has been refused admission to Australia, and who is detained in order to segregate him or her from the Australian community until such time as his or her removal becomes reasonably practicable. The detention of such a non-citizen does not involve the purported exercise of judicial power by the legislature or executive, nor does it otherwise impair or interfere with any role of the courts. On the contrary, the capacity to detain a non-citizen until he or she is removed is a necessary incident of the power to decide who to admit and who to exclude, that being a matter for Parliament and the Executive. As French J explained in *Ruddock v Vardarlis*:[8]

> Australia's status as a sovereign nation is reflected in its power to determine who may come into its territory and who may not and who shall be admitted into the Australian community and who shall not. That power may also be linked to the foundation of the Constitution in popular sovereignty implied in the agreement of the "people" of pre-federation colonies "to unite in one indissoluble federal Commonwealth". It may be said that the people, through the structures of representative democracy for which the Constitution provides, including an Executive responsible to the Parliament, may determine who will or will not enter Australia. These powers may be exercised for good reasons or bad. That debate, however, is not one for this Court to enter.

9. Yet if the Plaintiff's arguments in this case were to be accepted, the consequences would include that no arm of government – not the Parliament, Executive or Judiciary – has power to prevent non-citizens who have come to Australia without permission, but who it is not reasonably practicable to remove, from entering the Australian community.[9] The Court should not conclude that Chapter III of the Constitution operates to deny a central aspect of Australia's status as a sovereign nation. The Plaintiff takes a constitutional precept that is concerned with the division of sovereign power among the branches of government, and translates it into a guarantee of liberty that creates a lacuna in sovereign power. The argument has no textual or contextual basis in the Constitution. It should be rejected.

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3 Special Case at [20] and [51].
4 Special Case at [56] and SC-20.
5 *Ruddock v Vardarlis* (2001) 110 FCR 491 at 542-543 [192]-[193]. See also *Al-Kateb v Godwin* (2004) 219 CLR 562 at 632 [203] (Hayne J, Heydon J agreeing) (***Al-Kateb***); *Robtelmes v Brenan* (1906) 4 CLR 395 at 406.
6 *Pochi v Macphee* (1982) 151 CLR 101 at 106 (Gibbs CJ, with whom Mason and Wilson JJ agreed).
7 Special Case at [69].
8 *Ruddock v Vardarlis* (2001) 110 FCR 491 at 542-543 [192] (emphasis added).
9 Save perhaps for the possibility of Parliament enacting criminal law as a device to achieve a similar result: *Al-Kateb* at 584-585 [46] (McHugh J) and 632-633 [201]-[203], 635 [213]-[215] (Hayne J).

10. By way of summary, the answers to the substantive questions in this case ought to be determined favourably to the Defendants for the following reasons:

10.1. The detention of the Plaintiff for the purpose of her segregation from the Australian community pending removal conforms to the construction of ss 189, 196 and 198 of the Act preferred by a majority of the Court in *Al-Kateb v Godwin* (2004) 219 CLR 562 (***Al-Kateb***), and infringes no limit arising from Chapter III of the Constitution. There is no good reason to re-open *Al-Kateb* (either the construction or constitutional limb), let alone to overturn that decision.

10.2. The non-referral of the Plaintiff's case to the Minister, and the consequent cessation of Ministerial consideration of whether to lift the bar under s 46A(2), conforms with the principles of law established by the Court in *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 (***Plaintiff M61***).

11. Notwithstanding the Plaintiff's reliance on it, *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 (***Plaintiff M47***) has little relevance to the issues to be determined in this case. That case concerned the interaction of provisions in the Act concerning protection visas. The legislative provisions that were determinative in *Plaintiff M47*, including in particular s 500(1)(c), have no operation in relation to persons who are not permitted to make a valid application for a visa. It invites error to take statements made in judgments concerned with the principles that apply to a person who has made an application for a protection visa, and to apply those statements in the context of the entirely different legal regime that governs persons who are prevented by s 46A(1) from lodging such an application. The Plaintiff's attempt to equate those regimes seeks to undermine the very differences that Parliament has legislated to create.

## (B) QUESTIONS 1 AND 2 - DETENTION OF THE PLAINTIFF

12. The Plaintiff is being detained for the purpose of removing her from Australia as soon as it is reasonably practicable to do so, and segregating her from the Australian community pending removal.[10] The Minister does not presently propose to remove the Plaintiff to Sri Lanka against her will, and the Plaintiff has not asked the Minister in writing to remove her to Sri Lanka.[11] Despite the Department's endeavours to identify a third country to which it might be practicable to remove the Plaintiff, at present no such country has been found.[12]

13. It would be open to the Court to conclude, on the facts presently known, that there is "no real likelihood or prospect of removal in the reasonably foreseeable future" (as the Federal Court held in *Al-Kateb*[13]). But there is no basis for the Plaintiff's contention[14] that there is "[no] reasonable future prospect of resettlement", let alone that the purpose of detention has become "incapable of fulfilment".[15] That last proposition involves a leap from the fact that it cannot presently be predicted when the Plaintiff's removal may become practicable to the conclusion that removal will never be practicable,[16] and it ignores that there is but one purpose of detention which has two inextricably linked aspects: to segregate her from the Australian community until she can be removed. While it is not presently known when it might become practicable to remove the Plaintiff from Australia, the assessment of prospects of removal is not a static process.

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10 See Special Case at [61].
11 Special Case at [64].
12 Special Case at [62]-[63].
13 *SHDB v Goodwin* [2003] FCA 300 at [9]. See also, for instance, *Al-Kateb* at 572 [2] (Gleeson CJ).
14 cf Plaintiff's submissions at [29].
15 cf *Al-Kateb* at 572 [3] (Gleeson CJ), referring to *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54.
16 See *Al-Kateb* at 639-640 [229] (Hayne J).

Circumstances change, and new information becomes available.[17] It is conceivable that a resettlement country might change its policies such that it is willing to accommodate the Plaintiff, or that there might be a change in the conditions in Sri Lanka such that the Plaintiff would no longer have a well-founded fear of persecution there. The Department intends to keep the Plaintiff's case under review so as to identify any relevant change in circumstances.[18]

14. Further, it is open to the Plaintiff at any time to bring her detention to an end by requesting that she be removed to Sri Lanka.[19] In making that submission, the Defendants do not suggest that this is an attractive choice, having regard to the Plaintiff's well-founded fear of persecution in Sri Lanka. It is, however, a choice that has previously (and correctly) been regarded as relevant.[20] And it is a choice that means that the Plaintiff is wrong to say that the length of her detention in Australia "depends entirely" on the whim of the Executive, or on the Executive's ability successfully to negotiate with third countries.[21] Rather, the length of the Plaintiff's detention will depend on a complex matrix of factors, including her own choices, her activities and beliefs that have justified the conclusion that she is a risk to security, the circumstances in Sri Lanka, and the attitudes of other countries.[22]

15. Should the Court find that there is no real likelihood or prospect of removal of the Plaintiff in the reasonably foreseeable future, *Al-Kateb* nevertheless establishes that ss 189 and 196 of the Act validly authorise and require her detention for the sovereign purpose of segregating her from the Australian community until such time as her removal becomes reasonably practicable. The Plaintiff seeks to distinguish *Al-Kateb* or, in the alternative, invites the Court to re-open and overturn it. In response, the Defendants submit:

15.1. *Al-Kateb* is not distinguishable.

15.2. Leave to re-open *Al-Kateb* should be refused.

15.3. If the Court does re-open *Al-Kateb*, it should:

(a). affirm the construction of ss 189 and 196 that was preferred by the majority; and

(b). affirm that ss 189, 196 and 198 do not contravene Ch III of the Constitution in the circumstances of the Plaintiff's case.

**_Al-Kateb_ is not distinguishable**

16. The Plaintiff seeks to distinguish *Al-Kateb* on the basis that she is covered by s 198(2) (rather than s 198(1) as was the appellant in *Al-Kateb*), and that the Court should construe that subsection as subject to an implied limit precluding removal of "a person to whom Australia may or does owe protection obligations (absent a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on one [of] Arts 1F, 32 or

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17 A point recognised in *Zadvydas v Davis* 533 US 678 at 708-709 (2001), cited in *Al-Kateb* at 658-660 [290]-[295] (Callinan J); *Plaintiff M47* at 1448 [355] (Heydon J).

18 Special Case at [72]. It is a misleading gloss on the agreed facts to contend, as the Plaintiff does in its submissions at [29], that "[n]o life remains in any of the Department's initiatives".

19 Section 198(1). Cf *Al-Kateb*, where the appellant did not have the option of bringing his detention to an end that way because he had, in fact, signed a form addressed to the Minister advising that he "wish[ed] to voluntarily depart Australia, and ask the Minister to remove me from Australia as soon as reasonably practicable".

20 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 (***Lim***) at 34 (Brennan, Deane and Dawson JJ), 72 (McHugh J). See also *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 (***Woolley***) at 16 [30] (Gleeson CJ), 38 [95] (McHugh J).

21 Plaintiff's submissions at [27].

22 *Al-Kateb* at 649 [261] and 651 [268] (Hayne J).

33(2)".[23] She then contends that, because no such decision has been made (which will be the position for any person who is subject to the bar imposed by s 46A(1)), s 198(2) cannot require her removal. It is said to follow that her present detention cannot be for the purpose of removal under s 198(2), and is therefore unlawful.

17. In support of that argument, the Plaintiff points to the following features of the statutory scheme:

17.1. the power and duty to remove a person to a place under s 198(2) is not engaged where removal to that place would contravene Australia's non-*refoulement* obligations;

17.2. the availability of rights to apply to the Administrative Appeals Tribunal for review of decisions to refuse to grant a protection visa, or to cancel a protection visa, relying on Arts 1F, 32 or 33(2) of the Refugees Convention; and

17.3. other powers by which certain non-citizens may be expelled from Australia.[24]

The existence of each of those features of the statutory scheme may be accepted. But none of them lead to the conclusion for which the Plaintiff contends.

18. With respect to the first feature, the Court identified this limit on s 198(2) in *Plaintiff M70*.[25] It is a limit that gives effect to a legislative intention, evident from the Act as a whole, to facilitate compliance with Australia's obligations under the Refugees Convention by avoiding an outcome whereby the Commonwealth is obliged to return refugees to a place where they fear persecution, in contravention of its non-*refoulement* obligation.[26] Thus, as Gummow J explained in *Plaintiff M47*, s 198 impliedly excludes from the Commonwealth's "power [to] select" the country to which an unlawful non-citizen may be removed any country where that person's life or freedom would be threatened on a Convention ground.[27]

19. But in *Plaintiff M47* several Justices acknowledged that it would <u>not</u> contravene Australia's international obligations to remove a non-citizen to a place where Australia has concluded that the non-citizen does not have a well-founded fear of persecution.[28] By arguing that s 198(2) does not authorise removal to such a place, the Plaintiff contends for a limit on s 198(2) that goes considerably further than the limit recognised in *Plaintiff M70*, because she suggests that removal under s 198(2) is not possible even if such removal is entirely consistent with Australia's non-*refoulement* obligations. To support that contention, the Plaintiff relies on a statement by Kiefel J in *Plaintiff M70* that "removal under s 198(2) is not an option, unless each plaintiff's status as a refugee is considered and rejected".[29] However, the context for Kiefel J's statement was her Honour's conclusion that "[i]t could not have been intended that s 198(2) was to be a source of power to effect removal of asylum seekers to a country without any assessment of the

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23 Plaintiff's submissions at [23].

24 Including Pt 2 Div 8 Subdiv B of the Act (the regional processing provisions) and Pt 2 Div 3 Subdivs AI or AK, read with ss 198(7) and (9).

25 See *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 (***Plaintiff M70***) at 178 [54] (French CJ) and 191-192 [95]-[98] (Gummow, Hayne, Crennan and Bell JJ), 223-232 [212]-[239] (Kiefel J).

26 *Plaintiff M70* at 192 [98]. See also French CJ at 178 [54] and Kiefel J at 223-226 [212]-[218].

27 (2012) 86 ALJR 1372 at 1401 [100]. See also Bell J at 1474 [509]. The Defendants accept that s 198(2) is likewise impliedly limited by Australia's non-refoulement obligations under the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

28 *Plaintiff M47* at 1400 [94] (Gummow J), 1434-1436 [285]-[293] (Heydon J) and 1474-1475 [511]-[514] (Bell J).

29 *Plaintiff M70* at 231 [239]. See Plaintiff's submissions at [15].

protections that would be provided to such persons by that country" (emphasis added).[30] Her Honour's concern, which was shared in the other judgments, was to explain why s 198(2) did not authorise removal to a third country where a person may be persecuted. It was not to suggest that refugees could not be removed to any country at all.

20. The Plaintiff's argument that s 198(2) does not authorise the removal of a non-citizen who has been found to be a refugee would have the consequence of conferring on refugees a de facto right to permanent residence in Australia. That de facto right would exist even for refugees who are barred by s 46A from applying for a protection visa, or for refugees who do not meet criteria for a protection visa additional to the criteria in s 36(2). That follows because, if s 198(2) does not authorise the removal of a person who has been found to be a refugee to any country at all, then once a person is found to be a refugee the person would have to be released into the Australian community. That result would be contrary to the evident scheme of the Act, which contemplates that a person who is owed protection obligations may nevertheless be refused a visa.[31] It is also contrary to existing authority,[32] and goes far beyond what is required by the Refugees Convention.[33] Those members of the Court who considered much the same argument in *Plaintiff M47* rejected it.[34]

21. Not only are the words of limitation that the Plaintiff invites the Court to read into s 198(2) unnecessary to ensure Australia complies with its obligations under the Refugees Convention, they would do violence to the statutory scheme. That is because reading in those words would have the effect that for persons in the Plaintiff's position, the Minister would be obliged to lift the bar under s 46A(2), release the person into the community on an innominate basis, or (if the person was an "unauthorised maritime arrival") to take them to a regional processing country. But that does violence to the statutory scheme. The notion of an obligation to lift the bar is contrary to the express words of s 46A(7). The notion of an obligation to release a person into the community on an innominate basis is contrary to the fundamental scheme of the Act introduced by the *Migration Reform Act 1992* (for reasons outlined at paragraphs 27 to 35 below). And there is no obligation to take a person who has already been assessed to be a refugee to a regional processing country: even assuming that the person is an unauthorised maritime arrival (s 198AD), that a regional processing country has been designated (ss 198AB and 198AF) and that it would accept the person (s 198AG), the Minister is clearly entitled to exercise his discretion in such a case so as to avoid what would otherwise be a duty to take the person there (s 198AE).

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30 *Plaintiff M70* at 231 [237]. The Plaintiff's suggestion in her submissions at [16] that statements made by the Full Court in *Minister for Immigration and Citizenship v SZQRB* at 549 [228] 554 [269] and [272] in applying *Plaintiff M70* support her argument are incorrect. It is one thing to say, as Lander and Gordon JJ said in *SZQRB*, that a person may not be removed under s 198 *before* their claims to fear persecution in that country have been assessed. It is an entirely different thing to say, as the Plaintiff says, that a person may not be removed *after* their protection claims have been assessed to a country where they have not claimed to fear persecution.

31 Section 31(3) expressly contemplates that there can be criteria in addition to that created by s 36(2). If those other criteria are not satisfied, s 65 of the Act requires a protection visa to be refused. If a person who is owed protection obligations fails to satisfy any one of the other criteria for a protection visa, that visa must be refused and, unless that person is granted a different visa, he or she will be an unlawful non-citizen under s 14 of the Act. Such a person is subject to mandatory detention under ss 189 and 196. See *Plaintiff M47* at 1399-1400 [89]-[92] and 1406 [136] (Gummow J).

32 Many of the relevant authorities are discussed in *Plaintiff M47* at 1429-1433 [271]-[280] (Heydon J).

33 Mathew, "Sovereignty and the Right to Seek Asylum: The Case of Cambodian Asylum-Seekers in Australia" (1994) 15 *Australian Year Book of International Law* 35 at 54-55, quoted in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 274 (Gummow J); *SZ v Minister for Immigration and Multicultural Affairs* (2000) 101 FCR 342 at 345-346 [14].

34 *Plaintiff M47* at 1427 [260]-[261] (Heydon J) and 1473-1474 [506]-[509] (Bell J, with whom it appears Gummow J relevantly agreed: see at 1407 [138] and answer to Question 2).

22. The Act clearly distinguishes between the legal rights of those who are entitled to make an application for a visa (who are entitled to a visa if they meet the criteria, and who have merits review rights in relation to visa decisions) and those who are not. In its terms, s 198(2) obviously applies to non-citizens who have never applied for a visa, and who therefore do not have access to the "special review rights" conferred by s 500(1)(c). No principle of statutory interpretation (whether that found in s 15AA of the *Acts Interpretation Act 1901* (Cth) (**AI Act**) or otherwise) permits the ordinary meaning of the statutory language in s 198(2) to be limited in the way the Plaintiff suggests.

23. For those reasons, s 198(2) is not subject to the limitation for which the Plaintiff contends. *Al-Kateb* therefore cannot be distinguished on the basis that there is no removal power that presently applies to the Plaintiff.

**_Al-Kateb_ should not be re-opened**

24. The Court ought not give leave to re-open *Al-Kateb*.[35] While the Court has power to review and depart from its previous decisions, such a course should not be lightly undertaken.[36] The "power to disturb settled authority is ... one to be exercised with restraint, and only after careful scrutiny of the earlier course of decisions and full consideration of the consequences".[37] It is not enough that members of the later Court believe that the earlier decision is wrong.[38]

25. When considering whether to depart from a previous decision, the Court often refers to the factors identified in *John v Federal Commissioner of Taxation*.[39] The evaluation of these factors should be "informed by a strongly conservative cautionary principle".[40]

    25.1. *First*, the constructional issue in *Al-Kateb* that divided the Court had been thoroughly ventilated and analysed over a succession of cases before it reached the Court.[41] The ultimate decision was reached after "a very full examination of the question", and no compelling consideration or important authority was overlooked.[42] In particular, the majority in *Al-Kateb* did not overlook the principle of

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35 See *Evda Nominees v Victoria* (1984) 154 CLR 311 at 313 and 316; *Allders International v Commissioner of State Revenue* (1996) 186 CLR 630 at 646, 655, 661 and 673; *British American Tobacco Australia v Western Australia* (2003) 217 CLR 30 at 62-63 [74].

36 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439; see also *Second Territory Senators Case* (1977) 139 CLR 585 at 630 (Aickin J); *Wurridjal v Commonwealth* (2009) 237 CLR 309 (***Wurridjal***) at 352 [70] (French CJ).

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

38 *Plaintiff M47* at 1447 [350] (Heydon J).

39 (1989) 166 CLR 417 at 438-439, referring to *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 at 56-58. See also *Momcilovic v R* (2011) 245 CLR 1 at 192 [483] (Heydon J); *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 45 [38]-[39] (Gleeson CJ, Gummow and Hayne JJ); *Esso Australia Resources Ltd v FCT* (1999) 201 CLR 49 at 71 [55]; *Plaintiff M47* at 1404 [120] fn [152] (Gummow J), 1447 [350] (Heydon J), 1477 [525] ff (Bell J).

40 *Wurridjal* at [70] (French CJ), cited with approval in *Plaintiff M47* at 1477 [527] (Bell J).

41 cf *Plaintiff M47* at 1477 [526] (Bell J). The cases in which the issues had been examined were *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54. The first instance decision of Merkel J in *Al Masri v Minister for Immigration and Multicultural Affairs* (2002) 192 ALR 609 had been followed in *Al Khafaji v Minister for Immigration and Multicultural Affairs* [2002] FCA 1369 (Mansfield J); *NAKG of 2002 v Minister for Immigration and Multicultural Affairs* [2002] FCA 1600 (Jacobsen J, although his Honour expressed reservations about the correctness of Merkel J's decision in *Al Masri* at [59]) and *Applicant WAIW v Minister for Immigration and Multicultural Affairs* [2002] FCA 2002 (Finkelstein J), but had not been followed in *WAIS v Minister for Immigration and Multicultural Affairs* [2002] FCA 1625 (***WAIS***) (French J); *NAES v Minister for Immigration and Multicultural Affairs* [2003] FCA 2 (Beaumont J); *Daniel v Minister for Immigration and Multicultural Affairs* (2003) 196 ALR 52 (Whitlam J); *SHFB v Minister for Immigration and Multicultural Affairs* [2002] FCA 29; *SHDB v Minister for Immigration and Multicultural Affairs* [2002] FCA 30 (Selway J); *SHFB v Goodwin* [2002] FCA 294 (von Doussa J); and *NAGA v Minister for Immigration and Multicultural Affairs* [2003] FCA 224 (Emmett J).

42 *Attorney-General (NSW) v Perpetual Trustee Company Ltd* (1952) 85 CLR 237 at 243-244 (Dixon J). See also *Wurridjal* at 350-353 [65]-[71] (French CJ).

legality.[43] Arguments based on the principle of legality were at the heart of both the appellant's and the intervener's submissions in that case.[44] The principle of legality was expressly addressed by Hayne J,[45] whose reasons were adopted by two other members of the majority.[46] Indeed, the very conclusion of the majority that the language of the Act was "intractable"[47] was expressed in terms that recognise that a statute ought not to be construed as limiting fundamental rights and freedoms unless it so provides expressly or by clear implication. Moreover, Callinan J expressly rejected the reasoning in *Al-Masri*, which squarely addressed the principle of legality,[48] and McHugh and Callinan JJ also examined foreign cases that were decided on the basis of essentially the same interpretive principle in a closely analogous context.[49]

25.2. *Secondly*, there was no material difference between the reasons of the justices who formed the majority in *Al-Kateb*.

25.3. *Thirdly*, the question whether *Al-Kateb* has achieved a "useful result" or whether it has instead led to "considerable inconvenience" is not directed to the merits of the operation of the Act as construed by the Court in a general or policy sense.[50] Rather, the question is directed to whether there are unacceptable difficulties or uncertainties about the content or application of the construction adopted by the Court.[51] The construction of the Act adopted by the majority in *Al-Kateb* is clear, and gives rise to no such difficulties or uncertainties. By contrast, the construction preferred by the minority would give rise to considerable difficulties of application.[52]

25.4. *Fourthly*, the Department has been required to administer the Act consistently with the Court's decision since it was handed down in 2004.[53] If *Al-Kateb* is overruled, that would alter – with retrospective effect – the understanding of the Act upon which unlawful non-citizens have been detained since 2004.

26. There are also particular considerations relevant to whether the Court should overrule a prior decision on a constitutional question.[54] Those considerations include: (a) whether

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43 (2004) 219 CLR 562 at 643 [241] (Hayne J, with whom Heydon J agreed at 662-663 [303]). See also at 586-588 [51]-[54] (McHugh J) and 661 [296] (Callinan J). The absence of express reference to the principle of legality in the reasons of McHugh and Callinan JJ does not reveal that those members of the Court did not give due weight to the principle: cf. *Plaintiff M47* at 1404 [119] (Gummow J), 1479 [532] (Bell J).

44 *Al-Kateb* at 564-565 and 569. See also the respondents' arguments in response recorded at 567.

45 *Al-Kateb* at 643 [241].

46 See McHugh J at 581 [33] and Heydon J at 662 [303]. While McHugh J did not expressly mention the principle of legality in his own reasons, by expressly adopting Hayne J's reasons in relation to construction he necessarily adopted Hayne J's remarks at 643 [241] addressing the principle of legality. McHugh J also said at 581 [33] that the words of ss 189, 196 and 198 were "too clear to read them as being subject to a purposive limitation or an intention not to affect fundamental rights". That can only be a reference to the line of authority now often referred to as the "principle of legality". Similarly, while Callinan J did not expressly mention the principle of legality, his Honour's reasons at 661 [297]-[298] demonstrate that he did not consider that the language of the Act left any room for the operation of interpretative principles of that kind.

47 *Al-Kateb* at 643 [241].

48 *Al-Kateb* at [300], rejecting *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54 at [48], [82]-[86].

49 See *Al-Kateb* at 587 [53]-[54] (McHugh J) and 661 [296] (Callinan J), where their Honours discuss *R v Governor of Durham Prison; Ex parte Hardial Singh* [1984] 1 WLR 704 and *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97. See also the Plaintiff's submissions at fn 45.

50 cf *Plaintiff M47* at [526] (Bell J).

51 See *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [114] (Gaudron, McHugh and Gummow JJ).

52 See paragraph 35.4 below.

53 *Plaintiff M47* at 1443 [334] (Heydon J).

54 *Wurridjal* at 351 [68] (French CJ), referring to *Queensland v The Commonwealth* (*Second Territory Senators Case*) (1977) 139 CLR 585 at 630 (Aickin J). See also *Second Territory Senators Case* at 593-594 (Barwick

the asserted error affecting the prior decision had been made manifest by later cases that had not directly overruled it; (b) whether the prior decision went with "a definite stream of authority" and did not conflict with established principle; (c) whether the prior decision could be confined to a precise question or whether it had wider consequences; (d) whether the prior decision was isolated and received no support from other decisions; and (e) whether the prior decision concerned a fundamental provision of the Constitution or involved a question of vital constitutional importance. On balance, these considerations point against overruling *Al-Kateb*.

**The majority's construction is correct**

27. If the Court grants leave to re-open *Al-Kateb*, the construction adopted by the majority should be affirmed as correct. That construction draws considerable force not just from the language of ss 189, 196 and 198, but from the scheme of the Act in which those sections take their place. This point was emphasised by Hayne J, who explained that since the commencement of the "radical change" made by the *Migration Reform Act 1992*, the three principal features of the scheme of the Act are as follows:[55]

27.1. First, non-citizens may enter Australia only if they have permission (in the form of a visa) to do so; they may remain in Australia only for so long as they have permission (again in the form of a visa) to do so.

27.2. Secondly, if a non-citizen has entered Australia without permission, or no longer has permission to remain here, that non-citizen must be detained.

27.3. Thirdly, the detention of a non-citizen is to end only upon that person's removal or deportation from Australia or upon the person obtaining a visa permitting him or her to remain in the country.

28. The scheme of the Act is simply stated in the objects provision. Section 4 provides that, to advance the Act's object of regulating in the national interest the coming into and presence in Australia of non-citizens, the Act (being the "only source" of the right of non-citizens to enter or remain in Australia) provides for visas permitting non-citizens to enter or remain in Australia, and provides for the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted. The Court is required by s 15AA of the AI Act to prefer an interpretation that "best achieves" the object of the Act to "each other interpretation".

29. An appreciation of the nature of that scheme of the Act is critical in assessing whether the construction of s 196(1) favoured by the minority in *Al-Kateb* is available, because the consequence of that construction is that there would be a category of non-citizen who can lawfully reside in the Australian community even though they do <u>not</u> have permission to do so (in the form of a visa). That is the very outcome that the reforms made by the *Migration Reform Act 1992* sought to avoid.[56] The minority's construction therefore does violence to the fundamental scheme of the Act. It is one thing to say that this result is mandated by Chapter III (which is denied, for the reasons addressed below). It is quite

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CJ) and 599-601 (Gibbs J); *Ha v New South Wales* (1997) 189 CLR 465 at 491 and 499 (Brennan CJ, McHugh, Gummow and Kirby JJ).

55 *Al-Kateb* at 634 [210] and 637-638 [223]. See also *Plaintiff M47* at 1442-1443 [333]-[336], where Heydon J rejected the plaintiff's argument that amendments to the Act meant that the Act no longer treated the visa or detention scheme as "hermetically sealed".

56 It is for that reason that certain persons already in Australia without visas were deemed to have been granted visas on the commencement of that Act: see, for example, s 34 (absorbed persons visas) and the *Migration Reform (Transitional Provisions) Regulations 1994*, the purpose of which was analysed in *Nystrom v Minister for Immigration and Multicultural Affairs* (2006) 228 CLR 556 at 575-579 [15]-[27] (Gummow and Hayne JJ) and 601 [106]- 603 [112] (Crennan and Heydon JJ).

another to say that it reflects the proper construction of the Act, given its inconsistency with the scheme that the Act creates.

30. Particularly when understood in that wider statutory context, ss 189 and 196(1) are clear and unambiguous.[57] Section 189(1) requires the detention of a person where "an officer knows or reasonably suspects that [the] person [is] in the migration zone (other than an excised offshore place) [and] is an unlawful non-citizen". Detention under s 189 is required to continue "until" one of the events specified in s 196(1) occurs – the person is removed from Australia under ss 198 or 199, an officer begins to deal with the non-citizen under s 198AD(3),[58] the person is deported under s 200, or the person is granted a visa.[59] The whole Court said in *Plaintiff M61* that "the relevant operation of s 196(1) is that each plaintiff must be kept in detention until he is either removed from Australia or granted a visa".[60] Further, as Hayne J has explained:[61]

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

31. The power and duty to "remove" – which is defined in s 5 of the Act to mean "remove from Australia" – necessarily incorporates the notion of moving a person not only "from Australia", but also *to* another country. That follows because, as a practical matter, the duty to remove from Australia can be performed only by removal to another country.[62]

32. The time for the performance of the duty to remove under s 198 does not arise until removal is "reasonably practicable".[63] However, "[t]he event described as being 'removed from Australia under section 198' is an event the occurrence of which is affected by the imposition of a duty, by s 198, to bring about that event 'as soon as reasonably practicable'."[64] The Plaintiff's submissions to the effect that the removal power under s 198(2) is not presently available are not to the point.[65] Indeed, if that power were available, detention would be required to be brought to an end by removal. The word "until" embraces the whole of the period of time up to the moment when the event occurs. The statute commands that, "until" removal is possible, detention under ss 189 and 196 must continue. There is no time limit on the period of detention that may be required by ss 189 and 196. The fact that ss 189 and 196 were enacted without the 273 day time limit on detention that was previously found in the Act (in the provisions considered in *Lim*) can only reflect a distinct legislative choice.

33. The words "reasonably practicable" "direct attention to the extent of the duty" and acknowledge that the duty does not require the officer to take "every possible step that could be taken" to effect removal.[66] So long as the removal of an unlawful non-citizen is not yet "reasonably practicable", the time for performance of the duty to remove has not

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57 (2004) 219 CLR 562 at 640 [232] and 643 [241] (Hayne J, with whom Heydon J agreed), 581 [33] (McHugh J), 661 [298] (Callinan J).

58 This event became relevant subsequent to the decision in *Al-Kateb*, on the commencement of s 196(1)(aa), which was inserted by the *Migration Legislation (Regional Processing and Other Measures) Act 2012* (Cth).

59 (2004) 219 CLR 562 at 638 [226] and 643 [241] (Hayne J).

60 *Plaintiff M61* at 337 [19]. See also *Woolley* at 8 [4] (Gleeson CJ), 17 [36] (McHugh J), 49 [127] (Gummow J), 64 [178] (Kirby J), 76 [224] (Hayne J, with whom Heydon J agreed).

61 *Woolley* at 76 [224] Hayne J (with whom Heydon J agreed).

62 *Znaty v Minister for Immigration* (1972) 126 CLR 1 at 9 (Walsh J); *WAIS* at [58] (French J); *M38/2002 v Minister for Immigration & Multicultural and Indigenous Affairs* (2003) 131 FCR 146 at 166 [68]; *Al-Kateb* at 574 [7] (Gleeson CJ) and 636 [218] (Hayne J).

63 (2004) 219 CLR 562 at 639 [227] (Hayne J).

64 *Al-Kateb* at 638 [226] (Hayne J).

65 Plaintiff's submissions at [26]-[34].

66 cf *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at 100 [15].

arrived and s 196 requires the non-citizen to be kept in detention.[67] As Hayne J (with whom McHugh and Heydon JJ relevantly agreed) observed in *Al-Kateb*:[68]

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

34. A consequence of the above scheme, and the complex matrix of factors upon which effecting removal depends, is that the period of detention under s 196 in a given case may be lengthy or uncertain.[69] That complex matrix of factors includes the highly dynamic factor of the attitudes of third countries, being attitudes which are affected by sensitive discussions between governments, are difficult to predict and may change within a short period.[70] While there is currently no recipient third country identified to which the Plaintiff can be removed, it is conceivable that such a recipient country might be identified, at which time it might become reasonably practicable to remove her to that country.[71] In any event, the fact of present difficulties in removing the Plaintiff does not mean that the power to detain rests on the will or opinion, or the "whim", of the Executive.[72] There is a continuing statutory duty to remove the Plaintiff from Australia as soon as reasonably practicable.

35. There are five reasons why the construction favoured by the minority justices in *Al-Kateb*, and by Gummow and Bell JJ in *Plaintiff M47*,[73] should not be adopted.

35.1. The minority construction gives insufficient weight to the broader scheme introduced by the *Migration Reform Act 1992*, with which it is fundamentally inconsistent.[74] Accordingly, it is not an interpretation favoured by s 15AA of the AI Act.

35.2. In *Al-Kateb*, the minority construction was also heavily influenced by the view that the "primary" purpose of detention was to facilitate removal. But that failed to appreciate that there was but one purpose of detention – segregation from the Australian community pending removal.[75] The "segregation" aspect of that purpose is not properly understood as secondary, but rather is on an equal footing to, and is inextricably linked with, the "removal" aspect of the purpose.[76]

35.3. The construction identifies an implied temporal limitation in s 196 which would suspend the power to detain if there is no prospect of removal in the reasonably foreseeable future. The operation of s 198 is treated as spent (or suspended) when "the stage has been reached that the [non-citizen] cannot be removed from Australia and as a matter of reasonable practicability is unlikely to be removed", at which time the power to detain in s 196(1) "loses a necessary assumption for its

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67 (2004) 219 CLR 562 at 581 [34] (McHugh J), 638 [226] and 640 [231] (Hayne J).
68 (2004) 219 CLR 562 at 636 [218].
69 (2004) 219 CLR 562 at 636 [217]-[218] (Hayne J), 659 [292] (Callinan J).
70 For example, the removal of Mr Al Masri took place approximately 4 weeks after Merkel J had held that there was no real likelihood or his removal in the reasonably foreseeable future: see *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54 at 61 [18].
71 (2004) 219 CLR 562 at 639-640 [229]-[231] (Hayne J).
72 *Al-Kateb* at 585-586 [48], [50] (McHugh J); cf. at 599 [88], 613 [140] (Gummow J) and 615 [146] (Kirby J).
73 Bell J adopted Gleeson CJ's construction in *Al-Kateb*: see 1479 [533].
74 None of the minority judgments in *Al-Kateb* referred to s 15AA of the AI Act (which at that time took a slightly different form).
75 *Al-Kateb* at 576 [17] (Gleeson CJ).
76 *Woolley* at 77 [227] (Hayne J); *Al-Kateb* at 584 [45] (McHugh J) and 648 [255] (Hayne J).

continued operation".[77] As Hayne J pointed out in *Al-Kateb*,[78] this effectively transfers and transforms the temporal element in s 198 into a different temporal limitation on the operation of s 196.

35.4. The construction would involve substantial difficulties in its application.[79] Determination of the prospects of a non-citizen's removal may involve consideration of issues concerning international relations that are not suited to judicial determination.[80] Perhaps more importantly, as this construction involves the power and duty to detain reviving if and when there is a real prospect of removal, the operation of ss 189 and 196 from time to time will involve considerable uncertainty. The officers who are obliged by s 189(1) to detain all unlawful non-citizens may have no way of determining whether or not that section does, in fact, require them to detain any particular non-citizen, because often they would not be in a position to make any (or any accurate) assessment of the prospects of removal. These difficulties point against this being the correct construction.

35.5. Parliament has amended the Act regularly since *Al-Kateb* was handed down, including by making amendments to both s 189 and 196(1),[81] but it has chosen not to amend the Act to alter the construction adopted by the majority in *Al-Kateb*.[82] Instead, Parliament enacted the *Migration Amendment (Detention Arrangements) Act 2005*, which recognised that the Act may in certain cases require non-citizens to be detained for uncertain and perhaps lengthy periods, and which conferred new powers on the Minister to alleviate the resultant burden if the Minister thought it appropriate to do so. Thus, that Act enabled the Minister to make a residence determination that would enable an unlawful non-citizen to live in the community while retaining the status of being in "immigration detention". That Act also introduced Part 8C, which gives the Commonwealth Ombudsman a role in reviewing the cases of persons who have been in immigration detention for a period totalling at least two years. That role included provision for the Ombudsman to make recommendations to the Minister addressing the situation of non-citizens in long-term detention, including by making recommendations concerning the continued detention of the person, recommending that another form of detention is more appropriate to the person (such as residing at a place in accordance with a residence determination), or recommending the release of the person into the community on a visa (see s 486O). The Ombudsman's reports are required to be tabled in Parliament (s 486P). The Explanatory Memorandum to the Bill that became that Act also refers in several places to the capacity to use s 195A to grant a "Removal Pending Bridging Visa where the detainee has no right to remain in Australia but removal is not practicable in the foreseeable future".[83]

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77 (2004) 219 CLR 562 at 608 [122] (Gummow J), compare Gleeson CJ at 574 [12].

78 (2004) 219 CLR 562 at 641 [237].

79 (2004) 219 CLR 562 at 641 [235]-[237] (Hayne J).

80 *Al-Kateb* at 658-661 [290]-[295] (Callinan J); *Plaintiff M47* at 1448 [355] (Heydon J).

81 Including the *Migration Legislation (Regional Processing and Other Measures) Act 2012* (Cth) (which inserted s 196(1)(aa)), and the *Migration Amendment (Detention Arrangements) Act 2005* (Cth) (which inserted the note to s 189).

82 *Plaintiff M47* at 1443 [334] (Heydon J); *Platz v Osborne* (1943) 68 CLR 133 at 141 (Rich J), 145-146 (McTiernan J), 146-147 (Williams J). See also *Bennion on Statutory Interpretation* (5th ed., 2008) at pp 171 and 711, and the cases there cited, including *Denman v Essex Area Health Authority* [1984] QB 735 at 746 (Peter Pain J); *Phillips v Mobil Oil Co Ltd* [1989] 1 WLR 888.

83 Explanatory Memorandum, *Migration Amendment (Detention Arrangements) Bill 2005*, at [10], [21]. This legislation complemented the creation of the Removal Pending Bridging Visa by the *Migration Amendment*

35.6. The suite of amendments introduced after *Al-Kateb* was decided, which were evidently enacted having regard to the consequences of that decision, confirms Parliament's acceptance of the construction placed on ss 189 and 196 by the majority in *Al-Kateb*. Gleeson CJ accepted in *Al-Kateb* that the existence of powers of this kind would make it easier "to discern a legislation intention to confer a power of indefinite administrative detention".[84] The amendments recognise that the length of detention, and the prospects of removal, are matters that properly bear upon the Executive judgment whether a visa should be granted, or a less restrictive form of detention should be adopted. They also subject the Executive to new and particular forms of scrutiny, including parliamentary scrutiny, as the length of detention increases without a visa being granted. But they acknowledge that the ultimate responsibility for determining whether a non-citizen should be permitted to enter and reside in the Australian community remains with the Executive. That is the legislative scheme.

**The principle of legality**

36. If, contrary to the submissions above, a "constructional choice" arises in this case, it could only be because the word "until" in s 196(1) of the Act is thought to be ambiguous. In seeking to resolve any ambiguity in that word, the principle of legality ought not be applied rigidly and reflexively such that Parliament is taken to have intended to confer on a non-citizen who cannot be removed in the reasonably foreseeable future a right to be free in the Australian community, irrespective of the choice that the Parliament has authorised the Executive to make not to permit the Plaintiff to join the Australian community, and despite Parliament's evident concern to protect Australia's security by empowering the Executive to decide who it is in Australia's national interest to allow to enter Australia.

37. The principle of legality is but one of a range of interpretive techniques of more or less weight in any given case. It rests on the presumption that it is "in the last degree improbable" that the legislature would overthrow fundamental principles, infringe rights or depart from the general system of law without clearly expressing its intention to do so.[85] Satisfying that standard has been said to require, first, that it be manifest from the terms of the statute that the legislature has "directed its attention" to the question whether or not to abrogate or restrict such a right and, secondly, that it has determined to do so.[86]

38. For the reasons set out in paragraph 25.1 above, the majority in *Al-Kateb* did not overlook the relevance of the principle of legality to the constructional question that divided the Court. That principle was expressly considered by Hayne J (with whom McHugh and Heydon JJ relevantly agreed), and closely analogous principles were discussed in foreign judgments analysed by McHugh and Callinan JJ.

39. If anything, the Defendants submit that the minority overstated the assistance provided by the principle of legality in resolving the constructional issue. Parliament has clearly "directed its attention" to whether or not to abrogate or restrict liberty in the Act. The only issue is whether, having directed its attention to that issue, it indicated sufficiently clearly

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*Regulations 2005 (No. 2)*, which can be granted where, amongst other things, the non-citizen is in immigration detention; the Minister is satisfied that the non-citizen's removal from Australia is not reasonably practicable at that time; and the Minister is satisfied that the non-citizen has done everything possible to facilitate the non-citizen's removal from Australia.

84 *Al-Kateb* at 578 [22] (Gleeson CJ)

85 *Potter v Minahan* (1908) 7 CLR 277 at 304, quoting *Maxwell's On the Interpretation of Statutes* (1905, 4th ed), p 122. Various verbal formulae have been expressed to describe the clarity of language needed to interfere with such rights: see *Durham Holdings Pty Ltd v New South Wales* (1999) 47 NSWLR 340 at 354-355 [44] for a convenient compilation.

86 See, e.g., *Coco v The Queen* (1994) 179 CLR 427 at 437, cited with approval in *X7 v Australian Crime Commission* (2013) 87 ALJR 858 at 892 [158] (Kiefel J).

whether persons in the position of the Plaintiff are to be segregated from the Australian community in immigration detention pending removal, or whether they are to be released into the Australian community on an innominate basis. The principle of legality does not dictate the answer to that question. That is to say, the principle of legality does not require the Court to adopt the construction that results in the minimum possible restriction of liberty.[87] Whether Parliament has sufficiently clearly indicated its intention to restrict liberty in this context is a matter to be resolved utilising all of the conventional tools of statutory construction, including inquiry into matters of legislative history, and the context provided by the scheme of an Act of which the relevant provisions form part.[88]

40. In analysing the extent of the restriction of liberty that Parliament has authorised, the Court ought be mindful that Parliament will often seek to strike a balance between competing common law rights, or between such rights and other significant public interests. Thus, Gleeson CJ's remark in *Carr v Western Australia* that "[f]or a court to construe ... legislation as though it pursued [one] purpose to the fullest extent possible may be contrary to the manifest intention of the legislation" is also salutary in relation to the manner in which the principle of legality ought to be applied.[89] It is overly simplistic in cases where Parliament has clearly directed its attention to limiting fundamental rights, and has decided to do so in order to protect a countervailing significant public interest, to make an a priori assumption that Parliament is "taken to have intended"[90] the least possible restriction of rights. To adopt that approach would be to elevate one interpretive principle over all others, with distorting effect on the balance Parliament may seek to strike between competing human rights or between rights and other competing public interests.

41. A further consideration is that, while the similarity between the principle of legality and interpretive provisions in human rights legislation has been recognised,[91] a rigid and reflexive application of the principle of legality would leave no room for consideration of whether the putative restriction of a right is a reasonable or justifiable limitation, that inquiry ordinarily being a necessary one in jurisdictions that have express guarantees of human rights (in recognition of the fact that Parliament must be able to limit human rights in a justifiable way in pursuit of countervailing public interests).[92]

42. Parliament has squarely addressed the liberty of unlawful non-citizens, and by enacting ss 189 and 196 it has chosen to severely restrict their liberty in pursuit of a countervailing public interest in maintaining control of the membership of the Australian community. The only question is the extent of that restriction. The better view is that, even if the word "until" in s 196 is ambiguous, the weight of other textual and contextual indicators clearly reveals that Parliament has determined to restrict the liberty of persons in the Plaintiff's position. The key consideration in identifying the extent of any restriction on liberty that Parliament has authorised is the fact that the unlawful non-citizens to whom ss 189 and 196 apply are persons the Executive has decided, in the exercise its undoubted sovereign

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87 cf Plaintiff's submissions at [44].

88 *CTM v The Queen* (2008) 236 CLR 440 at 498 [203]-[205] (Heydon J); *Griffin v Pantzer* (2004) 137 FCR 209 at 231 [56] (Allsop J, Ryan and Heerey JJ agreeing).

89 (2007) 232 CLR 138 at 142-143 [5] (Gleeson CJ).

90 See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 455 at 384 [78], cited with approval in *Momcilovic v The Queen* (2011) 245 CLR 1 (***Momcilovic***) at 45 [38] (French CJ), 92 [170] (Gummow J).

91 See, e.g., *Momcilovic* at 50 [51] (French CJ).

92 See, e.g., *R v Lambert* [2002] 2 AC 545 at 567 [26]; *R v Oakes* [1986] 1 SCR 103 at 114; *HKSAR v Wai* (2006) 9 HKCFAR 574 at 595 [29]; *Hansen v The Queen* [2007] 3 NZLR 1 at [92]; *Momcilovic* at 92 [168] (Gummow J, Hayne J agreeing), 247 [677], 249 [683] (Bell J), cf 44 [35]-[36] (French CJ), 219-220 [571], [575] (Crennan and Kiefel JJ).

right,[93] not to admit. As such, the persons who are affected by ss 189 and 196 are, by definition, persons who do not possess any right to enter the Australian community. The absence of that right is critical because, as Hayne J (with whom McHugh and Heydon JJ relevantly agreed) observed in *Al-Kateb*:[94]

> The questions which arise about mandatory detention do not arise as a choice between detention and freedom. The detention to be examined is not the detention of someone who, but for the fact of detention, would have been, and been entitled to be, free in the Australian community. (emphasis added)

43. While unlawful non-citizens are, of course, entitled to the protection of Australian law, the extent to which Australian law protects their liberty is limited by the fact that they have no right to live in the Australian community that a court can vindicate. The Plaintiff's argument is circular, because it starts from the counter-factual assumption that unlawful non-citizens have a right to liberty in Australia, and then uses the assumed right as the foundation for reading down legislative provisions enacted pursuant to the aliens power for the very purpose of denying that aliens have a right to liberty in Australia, and through that reading down creates a right to be released into the Australian community that did not previously exist.

44. Parliament having directed its attention to the liberty of non-citizens by enacting a scheme that requires their mandatory detention, any presumption to the contrary is rebutted, and effect should be given to that scheme in accordance with the ordinary meaning of the statutory language. Reading that scheme as a whole, and having regard to the public interests set out in s 4 that the Act seeks to promote, it is not "in the last degree improbable" that Parliament intended that a person in the position of the Plaintiff, being a person who the Executive has refused the right to apply for a visa because she has been assessed to be a threat to security, should not be allowed to enter the Australian community. For those reasons, provided they are constitutionally valid, ss 189 and 196 authorise and require the Plaintiff's detention.

***No constitutional limit is exceeded***

45. Subject to any limitation arising from Chapter III, ss 189, 196 and 198 are plainly supported by s 51(xix) of the Constitution.[95] The Plaintiff correctly does not deny that the power of Parliament to make laws under s 51(xix) with respect to aliens[96] extends to laws that, either directly or through authorisation of executive action, determine:

45.1. which aliens will be permitted to enter the country; and

45.2. whether aliens seeking entry may be detained against their will for the purpose of considering their claim for a right of entry, and if such claim is denied, in order to remove them from Australia.[97]

46. The Plaintiff likewise correctly accepts that where detention is properly characterised by such purposes, its character under the Constitution is executive and not judicial, and

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93 See, e.g., *Ruhani v Director of Police (No. 2)* (2005) 222 CLR 580 at 588 [26]; *Ruddock v Vardarlis* (2001) 110 FCR 491 at 542-543 [192]-[193]; *Woolley* at 12-13 [18], 14 [28] (Gleeson CJ); *O'Keefe v Calwell* (1949) 77 CLR 261 at 275 (Latham CJ) and 288 (Dixon J); *Robtelmes v Brenan* (1906) 4 CLR 395 at 406.

94 *Al-Kateb* at 637 [219] (emphasis added). See also Callinan J at 662 [299].

95 Of course, the operation of ss 189, 196 and 198 in this case may also be supported by other heads of power (such as the defence or external affairs power): *Plaintiff M47* at 1398-1399 [83]-[84] (Gummow J).

96 The terms "non-citizen" and "alien" are co-extensive, having regard to the definition of non-citizen in s 5 of the Act and the decision in *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178. See also *Singh v Commonwealth* (2004) 222 CLR 322.

97 *Lim* at 10 (Mason CJ), 25-26, 32-33 (Brennan, Deane and Dawson JJ), 58 (Gaudron J), 71 (McHugh J); *Al-Kateb* at 582 [39] (McHugh J), 636 [216], 644 [245] and 648 [255] (Hayne J); *Woolley* at 77 [227] (Hayne J).

therefore does not transgress on a function reserved exclusively to the courts. It follows that some period of detention pending removal is constitutional, because it is an inescapable fact that the ability of the Executive to effect the removal of an alien who is denied entry, and the timing of this removal, may vary from case to case, and may depend on circumstances outside Australia's control. Common sense, and the agreed facts of this case,[98] demonstrate that a non-citizen assessed by the Executive to be a threat to the security of Australia may be harder to resettle in another country than other non-citizens, and that the return of such a person to their country of origin may contravene non-*refoulement* obligations.

47. However, the Plaintiff contends for a constitutional rule that, where the practical ability of the Executive at any point in time to remove a given non-citizen becomes so restricted that there is no real likelihood of removal in the reasonably foreseeable future, there is a strict constitutional barrier to the Executive continuing the detention which up until that time had been constitutionally lawful. Two points should be noted about the constitutional rule urged by the Plaintiff:

47.1. *First*, the suggested rule is one of strict preclusion. Once a point in time is reached at which the assessment of the practical prospects of removal triggers the rule, then irrespective of any other circumstances, the Constitution requires the detention to cease. There is no room for examination of the reasons why it was thought fit to preclude the person from lawful entry into the Australian community (including any consideration of the nature of the threat they may pose).[99]

47.2. *Secondly*, the suggested constitutional rule carries with it as an inescapable consequence that the Executive is bound to take a *positive* action with respect to a non-citizen – action in contradiction of the will of Parliament expressed in the Act, that the non-citizen not be admitted into the Australian community. The Executive becomes bound either to grant the non-citizen a visa to enter and remain in the community, or to release the non-citizen into the community on an innominate basis where the non-citizen is present in defiance of the apparent requirements of the Act.

48. These two consequences of the Plaintiff's suggested constitutional rule point to its incompatibility with accepted techniques whereby the Court has discerned implications from Chapter III. The second of the above consequences is perhaps the more fundamental. The suggested rule produces not just a restriction upon legislative and executive action, but imports a positive requirement or directs particular legislative or executive action to be taken, notwithstanding that the judgment of the legislature was to take action to the contrary. Such implications have not previously been recognised in Chapter III.

*Chu Kheng Lim*

49. The initial source invoked by the Plaintiff for the suggested constitutional rule is the judgment in *Lim*.[100] In that case, Brennan, Deane and Dawson JJ noted that Chapter III constitutes "an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested", and that the grants of legislative power in s 51 (including the aliens power) do not permit the conferral upon any organ of the Executive of any part of the judicial power of the Commonwealth.[101] Their Honours stated that there are some functions that, by reason of their nature or because of historical associations, are "essentially and exclusively judicial in character" and identified within that class the function of adjudging and punishing criminal guilt under a law of the Commonwealth.[102] In

98 Special Case at [69].
99 The Plaintiff expressly advances that proposition: Plaintiff's submissions at [81].

the course of explaining that the concern of the Constitution in this regard is with "substance and not mere form", their Honours stated as follows:[103]

> It would, for example, be beyond the legislative power of the Parliament to invest the Executive with such an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt. The reason why that is so is that, putting to one side the exceptional cases to which reference is made below, the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt. (emphasis added)

50. It is strongly arguable that the "exceptions" to the rule identified in that passage are so numerous and diverse as to deny the existence of the "rule". As Gaudron J pointed out in *Kruger*,[104] in comments that have been cited with approval many times:[105]

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

51. The Plaintiff purports to rely on the rule identified in *Lim*, whilst simultaneously seeking to excise one of the critical foundations upon which it rests.[106] In the key passages in *Lim* (at pp 27-28), the Court explains that the reason why Parliament cannot invest the Executive with an arbitrary power to detain citizens in custody is that such a power would be penal or punitive in character, and the separation of powers doctrine requires that such power be exercised only as "an incident of the exclusively judicial function of adjudging and punishing criminal guilt". Likewise, when the Court deals with the so-called "exceptions", it does so through a framework where the "punitive v non-punitive" distinction plays a central role in the analysis. Thus, the exceptions for committal to custody awaiting trial, and involuntary detention in the case of mental illness or infectious disease, are explained as being "non-punitive" in character, and for that reason to cause no offence to the separation of powers. The exceptions are not closed, and the reasoning that supports the above exceptions may likewise support the recognition of a new exception permitting the detention of non-citizens who are a risk to security.[107] However, the Court may find it unnecessary to decide that question, as the constitutionality of the detention of the Plaintiff is readily justified on the basis of existing authority.

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100 (1992) 176 CLR 1. See Plaintiff's submissions at [61]-[62].
101 (1992) 176 CLR 1 at 26-27.
102 (1992) 176 CLR 1 at 27.
103 (1992) 176 CLR 1 at 28.
104 *Kruger v The Commonwealth* (1997) 190 CLR 1 (***Kruger***) at 110 (emphasis added).
105 See, e.g., *Al-Kateb* at 648 [258] (Hayne J, Heydon J agreeing); *Woolley* at 24-27 [57]-[62] (McHugh J); *Thomas v Mowbray* (2007) 233 CLR 307 at 330 (Gleeson CJ) and 431 (Kirby J); *South Australia v Totani* (2010) 242 CLR 1 at 146-147 [382]-[383] (Heydon J).
106 This emerges, in particular, from Plaintiff's submissions at [66].
107 *Plaintiff M47* at 1446 [346] (Heydon J).

52. There are some other "exceptional cases" which stand outside of the implied limits deriving from Chapter III of the Constitution (e.g., military justice[108] and contempt of Parliament[109]) without it being necessary to inquire whether detention is punitive. Those exceptions are not explained by reference to some "proportionality" analysis.[110] And the existence of those exceptional cases does not deny that the "punitive v non-punitive" distinction is an absolutely central plank within the analysis that *Lim* requires.

53. It is the "punitive v non-punitive" distinction that was applied in reaching the actual result in *Lim* that executive detention of non-citizens in custody does not offend Chapter III. The plurality noted that one of the rights possessed by the "supreme power" of every State as an incident of sovereignty is the right to refuse permission to an alien to be present in the State, and the right to expel an alien not permitted to be present,[111] and that "the power to deport ... is the complement of the power to exclude".[112] The authority to detain non-citizens in custody for the above purposes "is neither punitive in nature nor part of the judicial power of the Commonwealth."[113] As Gleeson CJ pointed out in *Woolley*, the plurality in *Lim* cited a number of cases in which it was said that exclusion and deportation of an unwanted alien is not imposed as punishment for an offence but as a measure to prevent entry into the community of a person whom the State does not wish to accept as a member.[114] Hayne J (with whom Heydon J agreed) expressed the same idea in both *Al-Kateb* and *Woolley,* stating in the latter case:[115]

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

54. The Court should reject the Plaintiff's attempt to advance a general proposition from *Lim* that is divorced from what the Court understood by the structural separation of powers mandated by Chapter III of the Constitution which underpins it. None of the reasons to abandon the central relevance of the distinction between punitive and non-punitive laws offered by the Plaintiff[116] have any real strength. Since the *Lim* proposition rests on separation of powers and the concern for substance over form, it is only a conclusion that the Executive is imposing detention for a punitive purpose that provides the *prima facie* foundation for the conclusion that it is doing something properly reserved to the courts and the criminal law.

55. In applying *Lim*, and evaluating whether an impugned law falls within an "exceptional case", it is the purpose of the law, rather than its operation or effect in a particular case,[117] that must be identified. That is because what is in issue is whether the law infringes the structural separation of powers by exercising judicial power or by conferring judicial power

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108 See *Lane v Morrison* (2009) 239 CLR 230 at 237 [10] (French CJ and Gummow J).
109 See *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 166-167.
110 cf Plaintiff's submissions at [66(b)].
111 *Lim* at 29.
112 *Lim* at 31.
113 *Lim* at 32. Mason CJ agreed with Brennan, Deane and Dawson JJ at 10.
114 (2004) 225 CLR 1 at [19], referring to *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 60-61, 96; *O'Keefe v Calwell* (1949) 77 CLR 261 at 278; *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 555. See also *Behrooz v Secretary, Department of Immigration and Multicultural Affairs and Citizenship* (2004) 219 CLR 486 at 498 [20] (Gleeson CJ), where his Honour expressly accepted that "exclusion" includes preventing aliens who come to Australia without permission from entering the community.
115 *Woolley* at 77 [227]. See also at 75 [222]; *Al-Kateb* at 584 [45], 586 [49] (McHugh J), 648 [255]-[256] (Hayne J, with whom Heydon J agreed) and 658 [289] (Callinan J).
116 Plaintiff's submissions at [66].
117 The Plaintiff appears to recognise this at paragraph 66(a) of her submissions. Yet it is by reference to the burdensome *effect* of the operation of those provisions in her particular case – i.e., what she describes as "indefinite detention" – that she seeks to persuade the Court that the provisions are invalid.

on the executive, rather than the operation of a guarantee of individual rights.[118] That requires attention primarily to the terms of the relevant law, although it is also informed by context and the mischief at which the law is aimed.[119] In some cases (as in the case of the aliens power, and the defence power, to give two clear examples) a critical part of that context will be the nature of the head of power on which Parliament has relied. It would be incongruous to treat a law made under the aliens power that is directed to the segregation and removal of aliens as punitive, and contrary to Chapter III, in circumstances where the making of such laws is at the very core of that head of power.

56. When consideration is given to the character of ss 189, 196 and 198 of the Act, it is readily apparent that those provisions are not punitive. Those provisions are directed only to unlawful non-citizens, being persons who require, but do not possess, permission to enter or remain in Australia. The evident purpose of the provisions is to give effect to Parliament's judgment that, unless and until non-citizens obtain the permission of the Executive (in the form of a visa) to enter or remain in Australia, those non-citizens must be detained so that they are segregated from the Australian community pending either the grant of a visa or removal. Such detention does not involve the performance by the Executive of any exclusively judicial power, nor does it impair or interfere with the role of the courts in the structure created by the Constitution.

57. The Plaintiff apparently[120] seeks to escape the above conclusion by inviting the Court to adopt the dissenting analysis of Gummow J in *Al-Kateb*.[121] His Honour subsequently developed his analysis further in *Fardon*, where he proposed a reformulation of the *Lim* principle as follows: [122]

> I would prefer a formulation of the principle derived from Ch III in terms that, the "exceptional cases" aside, the involuntary detention of a citizen in custody by the State is permissible only as a consequential step in the adjudication of criminal guilt of that citizen for past acts ... That formulation ... eschews the phrase "is penal or punitive in character". In doing so, the formulation emphasises that the concern is with the deprivation of liberty without adjudication of guilt rather than with the further question whether the deprivation is for a punitive purpose.

58. That proposed reformulation has not commanded the support of a majority of the Court.[123] The fact that a court can impose a penalty such as imprisonment for both punitive and non-punitive purposes may be accepted. That, however, does not remove the fundamental insight of *Lim* that the determination of criminal guilt and consequent punishment, including imprisonment, is exclusively reserved to the judiciary. Where in substance executive detention has the character of imprisonment as punishment for

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118 *R v Davison* (1954) 90 CLR 353 at 380-382 (Kitto J); *Kruger* at 61, 68 (Dawson J, with whom McHugh J agreed at 141-142); *Thomas v Mowbray* (2007) 233 CLR 307 at 355 [11] (Gummow and Crennan JJ).

119 See *Al-Kateb* at 651 [267] (Hayne J); *Woolley* at 15 [28], [30] (Gleeson CJ); 26 [60], 27 [62] (McHugh J). See also *Kruger* at 62 (Dawson J, with whom McHugh J agreed at 141-142), and 85 (Toohey J) for a discussion of the characterisation of the purpose of a law in a different context.

120 See Plaintiff's submissions at [66] and footnote 64.

121 See *Al-Kateb* at [137], where Gummow J said that "it is primarily with the deprivation of liberty that the law is concerned, not with whether that depravation is for a punitive purpose". That statement is too broad as a statement of the relevant Chapter III implication.

122 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 612.

123 Gleeson CJ referred to the punitive v non-punitive distinction in *Vasiljkovic v The Commonwealth* (2006) 227 CLR 614 at 629 [34]. Gummow and Hayne JJ (Heydon J agreeing at 676 [222]) referred to both *Lim*, and Gummow J in *Fardon*, in *Vasiljkovic* at 648 [108] without expressing a preference for either approach. Hayne J also referred to both formulations in *South Australia v Totani* (2010) 242 CLR 1 at 81 [202] and 83 [209]-[211], again without expressing a preference, while Heydon J applied the punitive v non-punitive test in *Totani* at 146-147 [382]-[383]. Heydon J also referred to the *Lim* formulation in *Plaintiff M47* at [345], although, citing Gaudron J's view in *Kruger*, he appeared to question whether any such principle existed. But cf *Fardon* at 669-670 [193] (Kirby J); *Thomas v Mowbray* (2007) 233 CLR 307 at 356 [114]-[115] and 358 [126] (Gummow and Crennan JJ) and 430 [353] (Kirby J).

wrongdoing, then the separation of powers principle is invoked, but not otherwise. In any event, Gummow J's proposed reformulation of the principle remains subject to the "exceptional cases", of which detention for the purpose of segregating from the community pending removal is clearly one.

59. It might be added that the conclusion of Gummow J in *Al-Kateb* at [140] does not capture this case. The Executive is not reserving purely for its opinion the boundary line between deprivation of liberty permissible under Chapter III and that prohibited under Chapter III. The purpose for the detention remains the exercise of the sovereign right to segregate from the Australian community a non-citizen who has not been given permission to enter until removal becomes possible. Contrary to the suggestion of Gummow J, the segregation aspect of the purpose is inextricably linked with the removal aspect of the purpose.[124] While the achievement of the purpose of removal has become much harder than is ordinarily the case, and the point at which removal may be achieved cannot presently be identified, the objective of the endeavour has not changed.

60. The correct view on the above questions was stated by the majority of the Court in *Al-Kateb*.[125] The Plaintiff has not made out any adequate case to reopen the constitutional ruling in *Lim* nor to challenge its correctness.

*Proportionality*

61. As the Court explained in *Lim*, Chapter III of the Constitution demands that neither the Parliament nor the Executive usurp or interfere with a function that is "essentially and exclusively judicial in nature". No question about "proportionality" between the means and ends of a law arises in that context. Either a law usurps or interferes with the exclusive functions of the judiciary (in which case it is invalid) or it does not. A law that interferes with the exclusive functions of the judiciary cannot somehow be "saved" from invalidity if it pursues some legitimate countervailing objective by means that impose no "undue burden" [126] on the separation of powers (i.e., that it impairs an exclusive judicial function no more than is necessary to achieve that objective[127]). None of the recognised "exceptions" to the *Lim* principle are properly explained on this basis.[128]

62. Although the Plaintiff's submissions in various places invoke a test of proportionality as justifying its suggested constitutional rule,[129] the argument that she advances does not engage in an adequate proportionality analysis. Such an analysis would have regard to the following questions:[130]

62.1. Does the challenged law seek to advance an end which is permissible?

62.2. Is there a rational connection between the law and the end sought to be advanced?

62.3. Is there any means alternatively available which is less restrictive of the relevant right sought to be protected?

62.4. In a balancing exercise, do the benefits sought to be obtained by the measure outweigh the detriment through restricting the right?

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124 *Al-Kateb* at 613 [140].

125 *Al-Kateb* at 584-586 [44]-[49] (McHugh J), 650-651 [265]-[269] (Hayne J, with Heydon J agreeing) and 661 [298] (Callinan J).

126 cf Plaintiff's submissions at [68].

127 cf *Monis v The Queen* (2013) 87 ALJR 340 at 408 [347]. The Plaintiff cites *Monis* in her submissions at [75] and fn [60], along with *Roach v Electoral Commissioner* (2007) 233 CLR 162 and *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

128 cf Plaintiff's submissions at [64], [66]-[68], [83].

129 Plaintiff's submission at [68], [80].

130 See Barak, *Proportionality: Constitutional Rights and Their Limitations* (2012), p. 180

63. The Plaintiff's approach eschews any such analysis because, as was noted above, one consequence of her argument is to create a rule of strict preclusion such that, once a point in time is reached at which the assessment of the practical prospects of removal triggers the rule, then irrespective of any other circumstances the Constitution requires the detention to cease. The Plaintiff treats Chapter III as creating a "constitutional imperative" that no person (whether citizen or alien) can be deprived of his or her liberty otherwise than as a consequential step in the adjudication of criminal guilt.[131] From that false premise, the Plaintiff then draws on supposedly "analogous areas of constitutional discourse" to submit that assessing the existence of "exceptions" to the *Lim* principle "requires consideration of whether they can be regarded as 'compatible' with the relevant constitutional imperative",[132] and invokes principles of proportionality in aid of that task.[133]

64. Even if, contrary to the submissions above, a proportionality analysis is required in assessing whether the Plaintiff's detention falls within an exception to the *Lim* principle, the Plaintiff fails to properly identify or adequately analyse the purpose of detention. That purpose, as this Court has previously recognised,[134] is to segregate her from the community pending removal.[135] The Plaintiff dismisses the segregation aspect as "seemingly incidental to removal" and on this basis concludes that as an "additional purpose" it "fails too".[136] But that analysis is obviously flawed, because it is the present inability to remove the Plaintiff that provides the occasion for her segregation pending removal (as opposed to showing that that purpose "fails"). As segregation pending removal is the purpose of detention, any proportionality analysis would necessarily involve an analysis of the relationship between the means (detention for an uncertain period until removal becomes practicable) and that purpose. Detention is obviously a proportionate means to achieve that purpose, as it is the best (if not the only) means to do so.[137] Accordingly, even if a proportionality analysis is required, it would not support an argument for invalidity.

65. In conclusion on the constitutional issue, Parliament has probably four main options in this type of case, none of them ideal: (a) authorise the Executive to release a non-citizen into the community without restraint against the assessed security risk; (b) authorise the Executive to release the non-citizen with constraints on freedom of movement and association; (c) reverse the humane judgment reflected in s 198 that it will not send the non-citizen against his will to the place of feared persecution; or (d) authorise the continued detention for the purposes identified above. Parliament has made what it considers to be the appropriate choice between the options, none of which is ideal. Various considerations pull in different directions: protecting the community; giving effect to valid legislative and executive judgments over which non-citizens are regarded as suitable to enter the community; minimising restrictions on liberty; avoiding harsh outcomes to persons even if they be non-citizens; giving effect to international obligations; ensuring removal can easily be effected once practical; and costs and effectiveness of monitoring assessed security threats if non-citizens are allowed into the community. Nothing in Chapter III mandates that Parliament's ample power to make laws with respect to aliens is fettered such that it must confine its choice to the first three and not the fourth of these possible means to address a very difficult problem.

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131 Plaintiff's submissions at [61].
132 Plaintiff's submissions at [64].
133 Plaintiff's submissions at [68], [71]-[75], [79]-[80].
134 *Woolley* at [19], [222] and [227]. *Al-Kateb* at 584 [45], 586 [49] (McHugh J), 648 [255]-[256] (Hayne J, with whom Heydon J agreed) and 658 [289] (Callinan J).
135 Special Case at [61].
136 Plaintiff's submissions at [84].
137 *Al-Kateb* at 585 [48] (McHugh J).

66. Question 1 should be answered "Yes", and Question 2 should be answered "No".

## (B) QUESTION 3 – NON-REFERRAL OF PLAINTIFF'S CASE TO THE MINISTER

67. The Court held in *Plaintiff M61* that the exercise of the power conferred on the Minister by s 46A(2) of the Act is constituted by two distinct steps: first, a decision to consider whether to exercise the power to lift the bar; and secondly, a decision whether to lift the bar.[138] Where the Minister makes a decision at the first step, and directs that his Department conduct inquiries for the purpose of informing him of matters that he may consider in making a possible decision at the second step, those inquiries have a statutory foundation,[139] as they are done "in consequence" of that decision at the first step,[140] and as a "step towards the exercise of [the] statutory power" at the second step.[141]

68. It was acknowledged in *Plaintiff M61* that the undertaking of inquiries at the first step prolonged the detention of the plaintiff. This had the consequence that the Department's inquiries "must be procedurally fair and must address the relevant ... questions".[142] But despite the effect of the inquiries on the duration of the detention of the plaintiff, the Court acknowledged that:

68.1. the Minister may elect to "stop" considering exercising his power to lift the bar at any time;[143]

68.2. the Minister is not bound to make a decision at the second step "no matter what" the result of any inquiries undertaken by the Department;[144]

68.3. an unauthorised maritime arrival has "no right" to have the Minister make a decision at the second step, let alone have the Minister lift the bar, if the results of such inquiries are favourable to him or her,[145] even if "the process of inquiry miscarried";[146] and

68.4. if the Minister does make a decision at the second step, the Minister is not required to take into account the results of any inquiries at the first step.[147]

69. The Full Court of the Federal Court has twice applied *Plaintiff M61* consistently with the propositions identified above.[148] Most recently, a Full Court summarised the position by stating that "The Minister is not bound to exercise the power under s 46A ... whatever be the outcome of the [Department's inquiries]".[149]

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138 (2010) 243 CLR 319 at 350-351 [70].
139 (2010) 243 CLR 319 at 349 [65]-[66], 350 [69], 351 [73].
140 (2010) 243 CLR 319 at 348 [62], 349 [66], 350 [69].
141 (2010) 243 CLR 319 at 353-354 [78].
142 (2010) 243 CLR 319 at 353 [76]-[77].
143 (2010) 243 CLR 319 at 353-354 [78].
144 (2010) 243 CLR 319 at 353 [77], 358-359 [100].
145 (2010) 243 CLR 319 at 353 [77].
146 (2010) 243 CLR 319 at 358 [99].
147 (2010) 243 CLR 319 at 358-359 [100].
148 See *SZQDZ v Minister for Immigration and Citizenship* (2012) 200 FCR 207 (***SZQDZ***) at 210 [10], 215 [29], 216 [34], 217 [36], 218 [39], 219 [44] (Keane CJ, Rares and Perram JJ); *Minister for Immigration and Citizenship v SZQRB* (2013) 210 FCR 505 (***SZQRB***) at 533-537 [139]-[164], 544-545 [200], 546-547 [202]-[208] (Lander and Gordon JJ), 561-564 [319]-[331] (Besanko and Jagot JJ). In *SZQRB* the Full Court expressly rejected a contrary interpretation of *Plaintiff M61* and refused to find that *SZQDZ* had been wrongly decided, with Lander and Gordon JJ stating (at 546 [203]) that the decision in *SZQDZ* was "an orthodox application of the reasons and decision of the High Court in *Plaintiff M61*".
149 *SZQRB* at 544 [200.11] (Lander and Gordon JJ). The Minister has applied for special leave to appeal from the Full Court's decision in *SZQRB*, but not on any ground that the Full Court erred in its understanding of *Plaintiff M61*.

70. Having regard to the above, the following submission of the Plaintiff's must be rejected: that "it is not open for the Minister, having directed that inquiries be undertaken so he can decide whether to exercise the s 46A power, then to fail to decide whether [to] exercise the power in light of the outcome of the inquiries".[150] That submission is contrary to *Plaintiff M61*.

71. The only condition on the Minister making a decision (at the second step) to lift the bar is that he thinks it is in the "public interest" to do so. The Minister's consideration of that matter involves "a discretionary value judgment to be made by reference to undefined factual matters, confined 'only in so far as the subject matter and scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any object the legislature could have had in view".[151] The breadth and flexibility of the "public interest" is reinforced by ss 46A(4) to (6), which are "a particular manifestation of that aspect of responsible government which renders individual Ministers responsible to the Parliament for the administration of their departments".[152]

72. The object of the Act, as stated in s 4(1), is "to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens". It is fully consistent with that object for the Minister to decline to consider whether to allow a person who poses a threat to Australia's security to reside here.[153] If the Minister reaches that view, while it would be open to him to go on to consider other matters in reaching his judgment as to the public interest, he is not obliged as a matter of law to do so.

73. The Plaintiff's submission[154] that the Minister is bound to have regard to the criteria for a protection visa in deciding whether or not he thinks it in the public interest to exercise his power under s 46A(2) must be rejected. The Minister may consider whether a person would satisfy particular visa criteria if he chooses to do so, but the Act imposes no obligation to consider those matters, for the question of what is relevant to the public interest is left to the Minister (who is politically responsible for the judgment that is reached). As the Court accepted in *Plaintiff M79 v Minister for Immigration and Citizenship*,[155] the judgment as to the content of the "public interest" is principally a matter for the Minister, and it is open to the Minister to reach a judgment as to the public interest irrespective of the substantive or procedural requirements for any particular visa.[156]

74. The same reasoning applies to the Plaintiff's submission that an error of law occurs if, when determining whether to refer a matter to the Minister under s 46A, officers of the Department fail to consider whether the Minister's discretionary power under s 501 to refuse to grant a visa to a person would not be exercised.[157] The assertion that officers are required to consider that topic is subject to the obvious objection that it would be unworkable to require officers to try to predict how the Minister would exercise his personal discretionary power under s 501. But more fundamentally, the submission depends on reading the words "public interest" in s 46A as if they require consideration of all the matters that would be relevant in deciding an application for a protection visa. So to

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150 Plaintiff's submissions at [88].

151 See, e.g., *Plaintiff M79 v Minister for Immigration and Citizenship* (2013) 87 ALJR 682 (***Plaintiff M79***) at 692 [39] (French CJ, Crennan and Bell JJ), 706 [127] (Gageler J); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 (***Plaintiff S10***) at 648 [30] (French CJ and Kiefel J), citing with approval *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216; *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505.

152 *Plaintiff S10* at 656 [55] (Gummow, Hayne, Crennan and Bell JJ). See also at 648-649 [30] (French CJ and Kiefel J); *Plaintiff M79* at 692 [40] (French CJ, Crennan and Bell JJ) and 706 [131] (Gageler J).

153 See, e.g., *Pochi v Macphee* (1982) 151 CLR 101 at 106 (Gibbs CJ, with whom Mason and Wilson JJ agreed).

154 Plaintiff's submissions at [94]-[96].

155 (2013) 87 ALJR 682 at 690 [32].

156 *Plaintiff M79* at 692 [42] (French CJ, Crennan and Bell JJ).

157 Plaintiff's submissions at [95].

read the provision would be contrary to this Court's clear judgments concerning the meaning of the words "public interest".

75. As the Minister is not obliged to exercise his s 46A(2) power in any circumstances, it is open to the Minister to make a decision to consider whether to exercise the power to lift the bar in relation to a wide class of persons, but to direct his Department to refer a case to him for a possible decision at the second step only if a person meets certain qualifying criteria, and does not meet certain disqualifying criteria. That is the very approach that the Minister had adopted on the facts and circumstances in issue in *Plaintiff M61*.[158] If the Minister adopts that approach, then the Minister's consideration of the exercise of his s 46A(2) power will stop if and when the Department determines that the case meets one or more disqualifying criteria. In such a case, the matter will never be referred to the Minister. Further, from the time the Department concludes that disqualifying criteria apply, it is no longer necessary for s 198 to "accommodate" the consideration of the possible exercise of a personal non-compellable power.[159] Accordingly, from that time the non-citizen must be removed from Australia as soon as reasonably practicable.

76. Having regard to the chronology filed with these submissions and to the principles stated above:

76.1. The Department's non-referral of the Plaintiff's case to the Minister for a possible decision at the second step before 24 March 2012 accorded with the applicable direction as then in force (being the 2009 direction), and involved no error, because no "security checks" had been completed at that time.

76.2. The Department's non-referral of the Plaintiff's case to the Minister for a possible decision at the second step on and after 24 March 2012 likewise accorded with the applicable direction (being the 2012 direction), and involved no error. While the Department assumed that PIC 4002 had been validly prescribed as a criterion for a protection visa, that is immaterial because an additional and independent disqualifying criterion existed (being the fact that the Plaintiff had received an ASA). It is an agreed fact that the Plaintiff's case was not referred to the Minister because of this disqualifying criterion,[160] being a criterion that was not affected by the judgment in *Plaintiff M47*. Further, at a time after the judgment in *Plaintiff M47* was handed down, the Department confirmed that the Plaintiff's case would not be referred to the Minister because of the ASA.[161] It is therefore clear that the non-referral of the matter to the Minister for consideration of the possible exercise of his power under s 46A(2) does not depend on any assumption that compliance with PIC 4002 is a criterion for a protection visa. That confirms both that, at present, the fact that the Plaintiff's case has not been referred to the Minister is unrelated to PIC 4002, and also that there would be no utility in any relief directed to any past reliance on PIC 4002 (as such relief would not have any foreseeable consequence).[162]

77. Question 3 should be answered "No".

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158 See *Plaintiff M61* at 342 [39], 343 [44], 344 [49], which make it clear that while all persons were to be considered at the first step, there were cases where the process of inquiry would stop and the non-citizen would be removed without the matter ever being referred to the Minister for possible consideration at the second step. This was accepted by the Court at 349 [67]. See also *Plaintiff S10*.

159 *Plaintiff M61* at 351 [71].

160 Special Case at [21(b)].

161 Special Case at [24] and SC11.

162 Cf *Plaintiff M61* (2010) 243 CLR 319 at 359 [103].

### (C) QUESTION 4 – RELIEF

78. Questions 1 and 2 of the Special Case are concerned with whether the detention of the Plaintiff is or is not authorised at the time of judgment, and not with whether the detention of the Plaintiff was or was not authorised at some time in the past. That is reinforced by the relief that the Plaintiff seeks in this matter, being a writ of *habeas corpus* and a declaration that the Plaintiff's detention is not authorised by ss 189 and 196 of the Act. Had the Special Case raised an issue as the lawfulness of past detention, the Defendants would not have agreed to the special case in its present form.[163]

79. It is an agreed fact that, in the event that the Court declares that there has been an error of the kind described in paragraphs 2A or 2B of the Amended Application, consideration would be given by the Department to whether the Plaintiff's case should be referred to the Minister for the possible exercise of his power under s 46A(2). In other words, if the Court finds that the cessation of consideration of s 46A(2) was affected by legal error, that consideration will immediately resume having regard to the decision and reasons for judgment of the Court.

80. It follows that, in the event that the Court answers Question 3 favourably to the Plaintiff, and also decides in answering Question 4 that it would be appropriate to make one or both of the declarations sought by the Plaintiff in paragraphs 2A and 2B of the Amended Application, the Court should answer Questions 1 and 2 favourably to the Defendants. That is because, in that event, the Plaintiff would be detained for the purpose of enabling further consideration of the exercise of the Minister's power under s 46A(2). The constructional and constitutional arguments advanced by the Plaintiff in relation to Questions 1 and 2 respectively would no longer be relevant, as her detention would not be for the purpose of segregation pending removal as soon as it becomes reasonably practicable.

81. In the event that the Court answers Questions 1 or 2 favourably to the Plaintiff, the Court ought to hear further from the parties on the question of what conditions might properly attach to an order for the Plaintiff's release from immigration detention, or as to what (short) period of time should be permitted to enable consideration of possible administrative actions that might obviate the need for such an order.

## VIII. ESTIMATE OF TIME FOR ORAL ARGUMENT

82. The Defendants estimate that presentation of their oral argument will take 3 hours.

Dated: 23 August 2013

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163 At a minimum, additional facts relating to the state of mind of the detaining officers at relevant times, and the prospects of removal at particular times, would have been relevant.

**CHRONOLOGY REFERRED TO AT PARAGRAPH 76 OF THE DEFENDANT'S SUBMISSIONS**

In this case, the relevant chronology is as follows:

a On 10 March 2009, the Minister issued a direction to the Department that a case should not be referred to him for a possible decision at the second step unless "security checks" had been completed or "extenuating or special circumstances" applied (the **2009 direction**).[1]

b On 8 May 2010, the Plaintiff entered Australia.[2]

c On 27 July 2010, the Plaintiff submitted a request for protection as a refugee under the Australian Government's then current "Refugee Status Assessment" process.[3]

d On 12 September 2011, the Department completed its inquiries into whether the Plaintiff was a refugee.[4]

e On 8 December 2011, ASIO interviewed the Plaintiff for the purpose of conducting a security assessment.[5]

f On 24 March 2012, the Minister issued a further direction to the Department as to the cases that should, and should not, be referred to him for a possible decision at the second step (the **2012 direction**). Relevantly, the 2012 direction specified two independent disqualifying criteria: (a) that the person "does not appear to satisfy … the relevant Public Interest Criteria for the grant of a protection visa"; and (b) the person "has received an adverse security assessment".[6]

g On 24 April 2012, the Plaintiff received an adverse security assessment.[7]

h On 5 October 2012, the High Court handed down its judgment in *Plaintiff M47*, holding that PIC 4002 had been invalidly prescribed as a criterion for a protection visa.[8]

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1 Special Case at [16].

2 Special Case at [8].

3 Special Case at [12].

4 Special Case at [15].

5 Special Case at [17].

6 Special Case at [19].

7 Special Case at [20].

8 (2012) 86 ALJR 1372.

## Annexure: Additional Statutory Provisions

*Acts Interpretation Act 1901 (Cth)*

**Part 5—General interpretation rules**

**15AA Interpretation best achieving Act's purpose or object**

In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

*Migration Act 1958 (Cth)*

**4 Object of Act**

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

(2) To advance its object, this Act provides for visas permitting non-citizens to enter or remain in Australia and the Parliament intends that this Act be the only source of the right of non-citizens to so enter or remain.

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

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

(5) To advance its object, this Act provides for the taking of unauthorised maritime arrivals from Australia to a regional processing country.

**5 Interpretation**

(1) In this Act, unless the contrary intention appears:

*immigration detention* means:

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

(i) an officer; or

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

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

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

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

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

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

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

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

Note 1:Subsection 198AD(11) provides that being dealt with under subsection 198AD(3) does not amount to immigration detention.

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

*non-citizen* means a person who is not an Australian citizen.

*remove* means remove from Australia.

*unlawful non-citizen* has the meaning given by section 14.

**13 Lawful *non-citizens***

(1) A non-citizen in the migration zone who holds a visa that is in effect is a lawful non-citizen.

(2) An allowed inhabitant of the Protected Zone who is in a protected area in connection with the performance of traditional activities is a lawful non-citizen.

**14 Unlawful *non-citizens***

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

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

**31 Classes of visas**

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

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

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

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

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

**65 Decision to grant or refuse to grant visa**

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

(a) if satisfied that:

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

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

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

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

is to grant the visa; or

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

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

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

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

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

(a) detained under subsection 189(1):

(i) on being refused immigration clearance; or

(ii) after bypassing immigration clearance; or

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

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

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

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

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

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

(d) detained under section 189 who:

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

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

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

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

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

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

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

(3) If:

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

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

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

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

*Persons to whom section applies*

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

*Minister may grant visa*

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

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

*Minister not under duty to consider whether to exercise power*

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

*Minister to exercise power personally*

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

*Tabling of information relating to the granting of visas*

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

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

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

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

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

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

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

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

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

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

## Division 9—Deportation

### 200 Deportation of certain non-citizens

The Minister may order the deportation of a non-citizen to whom this Division applies.

### 201 Deportation of non-citizens in Australia for less than 10 years who are convicted of crimes

Where:

(a) a person who is a non-citizen has, either before or after the commencement of this section, been convicted in Australia of an offence;

(b) when the offence was committed the person was a non-citizen who:

(i) had been in Australia as a permanent resident:

(A) for a period of less than 10 years; or

(B) for periods that, when added together, total less than 10 years; or

(ii) was a citizen of New Zealand who had been in Australia as an exempt non-citizen or a special category visa holder:

(A) for a period of less than 10 years as an exempt non-citizen or a special category visa holder; or

(B) for periods that, when added together, total less than 10 years, as an exempt non-citizen or a special category visa holder or in any combination of those capacities; and

(c) the offence is an offence for which the person was sentenced to death or to imprisonment for life or for a period of not less than one year;

section 200 applies to the person.

**202 Deportation of non-citizens upon security grounds**

(1) Where:

(a) it appears to the Minister that the conduct (whether in Australia or elsewhere and either before or after the commencement of this subsection) of a non-citizen referred to in paragraph 201(b) constitutes, or has constituted, a threat to security; and

(b) the Minister has been furnished with an adverse security assessment in respect of the non-citizen by the Organisation, being an assessment made for the purposes of this subsection;

then, subject to this section, section 200 applies to the non-citizen.

(2) Where:

(a) subsection (1) applies in relation to a non-citizen;

(b) the adverse security assessment made in respect of the non-citizen is not an assessment to which a certificate given in accordance with paragraph 38(2)(a) of the Australian Security Intelligence Organisation Act 1979 applies; and

(c) the non-citizen applies to the Tribunal for a review of the security assessment before the end of 30 days after the receipt by the non-citizen of notice of the assessment and the Tribunal, after reviewing the assessment, finds that the security assessment should not have been an adverse security assessment;

section 200 does not apply to the non-citizen.

(3) Where:

(a) subsection (1) applies in relation to a non-citizen;

(b) the adverse security assessment made in respect of the non-citizen is an assessment to which a certificate given in accordance with paragraph 38(2)(a) of the Australian Security Intelligence Organisation Act 1979 applies; and

(c) the Attorney-General has, in accordance with section 65 of that Act, required the Tribunal to review the assessment;

section 200 does not apply to the non-citizen unless, following the receipt by the Attorney-General of the findings of the Tribunal, the Attorney-General advises the Minister that the Tribunal has confirmed the assessment.

(4) A notice given by the Minister pursuant to subsection 38(1) of the Australian Security Intelligence Organisation Act 1979 informing a person of the making of an adverse security assessment, being an assessment made for the purposes of subsection (1) of this section, shall contain a statement to the effect that the assessment was made for the purposes of subsection (1) of this section and that the person may be deported under section 200 because of section 202.

(5) Despite subsection 29(7) of the Administrative Appeals Tribunal Act 1975, the Tribunal must not extend beyond the period of 28 days referred to in subsection 29(2) of that Act the time within which a person may apply to the Tribunal for a review of an adverse security assessment made for the purposes of subsection (1) of this section.

(6) In this section:

adverse security assessment, security assessment and Tribunal have the same meanings as they have in Part IV of the Australian Security Intelligence Organisation Act 1979.

Organisation means the Australian Security Intelligence Organisation.

security has the meaning given by section 4 of the Australian Security Intelligence Organisation Act 1979.

**203 Deportation of non-citizens who are convicted of certain serious offences**

(1) Where:

(a) a person who is a non-citizen has, either before or after the commencement of this subsection, been convicted in Australia of an offence;

(b) at the time of the commission of the offence the person was not an Australian citizen; and

(c) the offence is:

(i) an offence against section 24AA, 24AB, 25 or 26 of the Crimes Act 1914; or

(ia) an offence against Division 80 of the Criminal Code; or

(ii) an offence against section 6 of the Crimes Act 1914 that relates to an offence mentioned in subparagraph (i) or (ia) of this paragraph; or

(iia) an offence against section 11.1 or 11.5 of the Criminal Code that relates to an offence mentioned in subparagraph (i) or (ia) of this paragraph; or

(iii) an offence against a law of a State or of any internal or external Territory that is a prescribed offence for the purposes of this subparagraph;

then, subject to this section, section 200 applies to the non-citizen.

(2) Section 200 does not apply to a non-citizen because of this section unless the Minister has first served on the non-citizen a notice informing the non-citizen that he or she proposes to order the deportation of the non-citizen, on the ground specified in the notice, unless the non-citizen requests, by notice in writing to the Minister, within 30 days after receipt by him or her of the Minister's notice, that his or her case be considered by a Commissioner appointed for the purposes of this section.

(3) If a non-citizen on whom a notice is served by the Minister under subsection (2) duly requests, in accordance with the notice, that his or her case be considered by a Commissioner appointed for the purposes of this section, the Minister may, by notice in writing, summon the non-citizen to appear before a Commissioner specified in the notice at the time and place specified in the notice.

(4) A Commissioner for the purposes of this section shall be appointed by the Governor-General and shall be a person who is or has been a Judge of a Federal Court or of the Supreme Court of a State or Territory, or a barrister or solicitor of the High Court or of the Supreme Court of a State or Territory of not less than 5 years' standing.

(5) The Commissioner shall, after investigation in accordance with subsection (6), report to the Minister whether he or she considers that the ground specified in the notice under subsection (2) has been established.

(6) The Commissioner shall make a thorough investigation of the matter with respect to which he or she is required to report, without regard to legal forms, and shall not be bound by

any rules of evidence but may inform himself or herself on any relevant matter in such manner as he or she thinks fit.

(7) Where a notice has been served on a non-citizen under subsection (2), section 200 does not apply to the non-citizen because of this section unless:

(a) the non-citizen does not request, in accordance with the notice, that his or her case be considered by a Commissioner;

(b) the non-citizen, having been summoned under this section to appear before a Commissioner, fails so to appear at the time and place specified in the summons; or

(c) a Commissioner reports under this section in relation to the non-citizen that he or she considers that the ground specified in the notice has been established.

**204 Determination of time for sections 201 and 202**

(1) Where a person has been convicted of any offence (other than an offence the conviction in respect of which was subsequently quashed) the period (if any) for which the person was confined in a prison for that offence shall be disregarded in determining, for the purposes of section 201 and subsection 202(1), the length of time that that person has been present in Australia as a permanent resident or as an exempt non-citizen or a special category visa holder.

(2) In section 201 and subsection 202(1):

permanent resident means a person (including an Australian citizen) whose continued presence in Australia is not subject to any limitation as to time imposed by law, but does not include:

(a) in relation to any period before 2 April 1984—a person who was, during that period, a prohibited immigrant within the meaning of this Act as in force at that time; or

(b) in relation to any period starting on or after 2 April 1984 and ending on or before 19 December 1989—the person who was, during that period, a prohibited non-citizen within the meaning of this Act as in force in that period; or

(c) in relation to any period starting on or after 20 December 1989 and ending before the commencement of section 7 of the Migration Reform Act 1992—the person who was, during that period, an illegal entrant within the meaning of this Act as in force in that period; or

(d) in relation to any later period—the person who is, during that later period, an unlawful non-citizen.

(3) For the purposes of this section:

(a) a reference to a prison includes a reference to any custodial institution at which a person convicted of an offence may be required to serve the whole or a part of any sentence imposed upon him or her by reason of that conviction; and

(b) a reference to a period during which a person was confined in a prison includes a reference to a period:

(i) during which the person was an escapee from a prison; or

(ii) during which the person was undergoing a sentence of periodic detention in a prison.

**205 Dependants of deportee**

(1) Where the Minister makes or has made an order for the deportation of a person who has a spouse or de facto partner, the Minister may, at the request of the spouse or de facto partner of that person, remove:

(a) the spouse or de facto partner; or

(b) the spouse or de facto partner and a dependent child or children;

of that person.

(2) Where the Minister makes or has made an order for the deportation of a person who does not have a spouse or de facto partner but who does have a dependent child or children, the Minister may, at the person's request, remove a dependent child or children of the person.

**206 Deportation order to be executed**

(1) Where the Minister has made an order for the deportation of a person, that person shall, unless the Minister revokes the order, be deported accordingly.

(2) The validity of an order for the deportation of a person shall not be affected by any delay in the execution of that order.

**486L What is the *detention reporting start time* for a person?**

For the purposes of this Part, the ***detention reporting start time*** for a person is whichever of the following times (if any) applies to the person:

(a) if the person is in immigration detention on the commencement of this Part and has been in immigration detention before then for a period of at least 2 years, or for periods that total at least 2 years—the time when this Part commences; or

(b) otherwise—the time after the commencement of this Part when the person has been in immigration detention for a period of 2 years, or for periods that total at least 2 years (some of which detention may have occurred before the commencement of this Part).

**486M What is a *detention reporting time* for a person?**

For the purposes of this Part, ***a detention reporting time*** for a person is:

(a) the detention reporting start time for the person; or

(b) the end of each successive period of 6 months after that time at the end of which the person is in immigration detention.

**486N Secretary's obligation to report to Commonwealth Ombudsman**

(1) The Secretary must give the Commonwealth Ombudsman a report relating to the circumstances of the person's detention. The report must be given:

(a) if the detention reporting time is the time when this Part commences—as soon as practicable, and in any event within 6 months, after that commencement; or

(b) otherwise—within 21 days after the detention reporting time.

(2) Without limiting subsection (1), the report must include any matters specified in regulations made for the purposes of this subsection.

(3) The Secretary must give the report to the Commonwealth Ombudsman even if the person has, since the detention reporting time, ceased to be in immigration detention.

**486O Commonwealth Ombudsman to give Minister assessment of detention arrangements**

*Commonwealth Ombudsman to give Minister assessment of appropriateness of detention arrangements*

(1) As soon as practicable after the Commonwealth Ombudsman receives a report under section 486N, he or she is to give the Minister an assessment of the appropriateness of the arrangements for the person's detention.

*Assessment may include recommendations*

(2) The assessment may include any recommendations the Commonwealth Ombudsman considers appropriate.

(3) Without limiting subsection (2), the kinds of recommendations the Ombudsman may make include the following:

(a) a recommendation for the continued detention of a person;

(b) a recommendation that another form of detention would be more appropriate for a person (for example, residing at a place in accordance with a residence determination);

(c) a recommendation that a person be released into the community on a visa;

(d) general recommendations relating to the Department's handling of its detainee caseload.

(4) The Minister is not bound by any recommendations the Commonwealth Ombudsman makes.

*Assessment to include statement for tabling in Parliament*

(5) The assessment must also include a statement, for the purpose of tabling in Parliament, that sets out or paraphrases so much of the content of the assessment as the Commonwealth Ombudsman considers can be tabled without adversely affecting the privacy of any person.

*Assessment to be given even if person no longer in detention*

(6) The Commonwealth Ombudsman must give the assessment to the Minister even if the person has, since the detention reporting time, ceased to be in immigration detention.

**486P Minister to table statement from Commonwealth Ombudsman**

The Minister must cause the statement included in an assessment as mentioned in subsection 486O(5) to be laid before each House of the Parliament within 15 sitting days of that House after the Minister receives the assessment.

**486Q Application of *Ombudsman Act 1976***

(1) Subject to this Part, the Ombudsman Act 1976 applies in relation to the Commonwealth Ombudsman's preparation of an assessment under section 486O (including his or her consideration of the report under section 486N to which the assessment relates), as if the preparation of the assessment were an investigation under that Act.

(2) The Commonwealth Ombudsman's functions include the functions conferred on the Commonwealth Ombudsman by this Part.

**2.03 Criteria applicable to classes of visas**

(1) For the purposes of subsection 31 (3) of the Act (which

deals with criteria for the grant of a visa) and subject to regulation 2.03A, the prescribed criteria for the grant to a person of a visa of a particular class are:

(a) the primary criteria set out in a relevant Part of Schedule 2; or

(b) if a relevant Part of Schedule 2 sets out secondary criteria, those secondary criteria.

(2) If a criterion in Schedule 2 refers to a criterion in Schedule 3, 4 or 5 by number, a criterion so referred to must be satisfied by an applicant as if it were set out at length in the first-mentioned criterion.

(3) If a criterion in Schedule 2 specifies that a person is to be the holder of, or have held, a visa of a particular class or subclass, that criterion is taken to be satisfied:

(a) if:

(i) before 1 September 1994, the person held a visa

or entry permit that was granted under the

Migration (1993) Regulations, the Migration

(1989) Regulations or the Act as in force before 19 December 1989; and

(ii) the criteria that were applicable to, or the grounds for the grant of, that visa or entry permit are the same in effect as the criteria applicable to the new visa; and

(iii) the visa or entry permit was continued in force

as a transitional visa on 1 September 1994 by

the Migration Reform (Transitional Provisions) Regulations; or

(b) if:

(i) before 1 September 1994, the person applied for a visa or entry permit under the Migration (1993) Regulations, the Migration (1989) Regulations or the Act as in force before 19 December 1989; and

(ii) the criteria that were applicable to, or the grounds for the grant of, that visa or entry permit are the same in effect as the criteria applicable to the new visa; and

(iii) either:

(A) in the case of an application made before 19 December 1989 — the Minister had not made a decision on the application; or

(B) in any other case — the application had not been finally determined;

before 1 September 1994; and

(iv) on or after 1 September 1994 the person was granted a transitional visa under the Migration Reform (Transitional Provisions) Regulations on the basis that he or she had satisfied the criteria, or the grounds, applicable to the visa or entry permit referred to in subparagraph (i).

**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.

## SCHEDULE 4 PUBLIC INTEREST CRITERIA AND RELATED PROVISIONS

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.