IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M76 of 2013

BETWEEN

PLAINTIFF M76/2013
Plaintiff

and

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

PLAINTIFF'S SUBMISSIONS

Date of document: 9 August 2013
Filed on behalf of: the Plaintiff

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Part I: Publication of Submissions

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

Part II: Issues Arising in the Proceedings

2. The plaintiff, a national of Sri Lanka, has been found to be a refugee who faces a real chance of subjection to violence (including sexual violence), imprisonment, torture and death if returned to Sri Lanka.[1] As an "unauthorised maritime arrival" she is unable to make a valid application for a visa. The first defendant, the Minister, has declined to exercise his power to lift that bar. The plaintiff is currently in detention. Although the Minister does not propose to remove her to Sri Lanka,[2] she is said by the defendants to be detained for the purpose of her removal under ss189(1) and 196(1) of the *Migration Act* 1958 (Cth) (**Act**) and for the purpose of segregating her from the community pending removal.[3] She has no right to enter or reside in any other country, and no country has agreed to take her.[4]

3. The issues arising on the Special Case (**SC**), and the questions stated for the opinion of the Full Court, are as follows:

   (1) Do ss189, 196 and 198 of the Act authorise the detention of the Plaintiff?

   (2) If the answer to question 1 is "yes", are these provisions beyond the legislative power of the Commonwealth insofar as they apply to the Plaintiff?

   (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) reveal an error of law?

   (4) What relief, if any, should issue?

   (5) Who should pay the costs of and incidental to this Special Case?

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

4. The plaintiff has served notices under s 78B of the *Judiciary Act* 1903 (Cth). The plaintiff considers that no further notice is necessary.

Part IV: Decision Below/Jurisdiction

5. This matter is brought in the Court's original jurisdiction under s 75(iii) and (v) of the *Constitution*.

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[1] Special Case (**SC**) **[15]**, p27 of attachment SC6.
[2] SC [64].
[3] SC [61].
[4] SC [63]-[64].

Part V: Material Facts

6. The material facts are set out in the Special Case and attachments filed on 1 August 2013 and the attachments thereto.

Part VI: Plaintiff's Argument

7. The plaintiff says that:

    1. In answer to question 1: her current detention is not authorised by ss189, 196 and 198 of the Act, on their proper construction; or,
    2. In answer to question 2: if those sections do authorise her detention, then they are invalid as they are beyond the legislative power of the Commonwealth.
    3. In answer to question 3: the Minister and/or officers of the Commonwealth made errors of law in relation to the failure of the Minister to decide whether to exercise the s 46A power.

Question 1: Do ss 189, 196 and 198 of the Act authorise the detention of the Plaintiff?

8. The plaintiff contends that:

    1. *Al-Kateb v Godwin* (2004) 219 CLR 562 (***Al-Kateb***) is distinguishable and the plaintiff's detention is not authorised by the Act;
    2. Alternatively, to the extent that it is binding authority for the proposition that the plaintiff's detention is authorised, *Al-Kateb* should be re-opened and overruled. For the reasons identified by Gleeson CJ, Gummow J and Kirby J in *Al-Kateb* and by Gummow J and Bell J in *Plaintiff M47 of 2012 v Director General of Security &Ors* (2012) ALJR 1372 (***M47***), ss189, 196 and 198 do not authorise the detention of the plaintiff in these circumstances.

Al Kateb is distinguishable and the plaintiff is unlawfully detained

9. The plaintiff was detained under s 189(1) of the Act, which imposes a "duty" upon an officer to detain a person whom the officer reasonably suspects is an "unlawful non-citizen". By reason of s 196 of the Act, an unlawful non-citizen must be kept in immigration detention until one of the three possibilities there mentioned eventuates: removal from Australia under s 198 or 199; deportation under s 200; or grant of a visa.

10. As to the latter two possibilities:

    1. no consideration is presently being given to the exercise of the Minister's powers under s 46A(2) or to otherwise granting a visa to the Plaintiff (**SC [23] and [60]**); and
    2. none of the conditions in Part 2, Division 9 have been met so as to enliven the Minister's deportation power in s200 of the Act.

11. The defendants rather assert that the plaintiff's detention is authorised by s189(1) and 196(1) of the Act for the purpose of her removal under s198 of the

Act and for the purpose of segregating her from the community pending removal.[5]

12. First, as a preliminary observation, it is only s198(2) which could authorise the plaintiff's removal. The obligations and associated powers to remove a non-citizen in sub-ss 198(1)[6] (which was engaged in *Al Kateb*), (1A),[7] (2A),[8] (5),[9] (6),[10] (7),[11] (8)[12] and (9)[13] have no application to the plaintiff.

13. As to s198(2), it is tolerably clear that it is subject to certain constraints where it concerns removal of a person to whom Australia owes protection obligations.

14. The first constraint is that s198 does not authorise removal of such a person to their country of origin or to any other territory where her or his life or freedom would be threatened on a convention ground or would suffer significant harm of a type contemplated by s 36(2A) of the Act. That is, removal under s198(2) involving a contravention of Australia's non-refoulement obligations would involve an improper exercise of the power: *M47* at [99]-[100] per Gummow J and see also at [509] per Bell J and *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 (***M70***) at 178, [54] per French CJ; 190-191 [91], [95] per Gummow, Hayne, Crennan and Bell JJ and 231 [239] per Kiefel J. The same holds true for complementary protection[14].

15. However, the plaintiff submits that that is an aspect of a broader constraint upon the power, which Kiefel J identified when her Honour observed in *M70* at 231 [239]:

> It follows that removal under s198(2) is not an option, unless each plaintiff's status as a refugee has been considered *and rejected* (emphasis added).

16. Similar observations were made by Lander and Gordon JJ in *Minister for Immigration and Citizenship v SZQRB*.[15] That suggests that if (as here) a person's status as a refugee, both as to Art 1A and 1F, *has been accepted*, the power in s198(2) is not engaged, unless otherwise authorised by the Act.

17. As regards the last mentioned possibility, attention is required to the reasoning of a majority of this Court in *M47*, holding that PIC 4002 was inconsistent with the statutory scheme. It follows from that reasoning that the Act recognises that there *are* circumstances in which a person who is found to occupy the status of a refugee under the Convention may nevertheless be removed from Australia under s198(2) – that is, if a decision is made to refuse or cancel a visa invoking

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[5] SC [61].
[6] The plaintiff has not requested removal and so the enlivening condition is not met.
[7] The plaintiff was not brought to Australia under s198B for a temporary purpose.
[8] The plaintiff is not a non-citizen covered by s193(1)(a)(iv).
[9] The plaintiff was not entitled to apply for a visa under s195 or the revocation or cancellation of a visa under s137(K): see s198(5).
[10] The Plaintiff did not make a valid application for a substantive visa that could be granted when in the migration zone.
[11] Subdivision AI of Division 3 does not apply to the plaintiff.
[12] Subdivision AK of Division 3 does not apply to the plaintiff.
[13] Subdivision AJ of Division 3 does not apply to the plaintiff.
[14] The complementary protection provisions were considered by a special Full Federal Court of five in *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33 (**SZQRB**). Special leave has been sought from that decision.
[15] *SZQRB* at [228], [269] and [272] per Lander and Gordon JJ.

sub-ss 501(1) or (2) and (6)(d)(v) or one or more of the provisions identified by Crennan J at 1453-4 [389] (501(3) or 116(1)(e) of the Act.

18. But, each of those decisions must fall within the statutory description of a "decision to refuse to grant a protection visa, or to cancel a protection visa, relying on one or more of the following Articles of [the Convention], namely, Article 1F, 32 or 33(2)": see s500(1)(c). That in turn carries with it particular procedural protections, in the form of review rights in the Administrative Appeals Tribunal, the nature of which was influential in the reasoning of the majority in *M47*.[16]

19. Importantly, those elements are part of the broader statutory scheme, the purpose of which is to give effect to Australia's obligations under the Refugees Convention and to provide for cases in which those obligations are limited or qualified: *M47* at 1395 [65] per French CJ. The "[m]arking off" of that class of decisions for a special class of review reflects a legislative recognition of important aspects of the international obligations Australia has undertaken – leading as it does to the expulsion from Australia of a person who has found to be a refugee within the meaning of Art 1 of the Convention: *M47* at 1416 [194] per Hayne J.

20. The Act also provides, with some specificity, for other mechanisms by which a person to whom Australia does or may owe protection obligations may be removed from Australia. That now includes Pt 2, Div 8, subdiv B (dealing with regional processing). As recorded in s198AA, that subdivision was enacted because Parliament considered (amongst other things) that "unauthorised maritime arrivals, including unauthorised maritime arrivals in respect of whom Australia *has or may have* protection obligations under the [Refugees Convention] should be able to be taken to any country designated to be a regional processing country" (emphasis added). The operative provision authorising an officer to remove a person to a regional processing country is drafted using the word "taking" rather than "removal", but that does not indicate a power of a different kind: see, as regards the similarly worded former s198A(1), *M70* at 230 [235] per Kiefel J.

21. Those statutory mechanisms also include the safe third country provisions in subdivsAI and AK of Div 3 of Pt 2, which enliven, respectively, the removal powers in ss198(7) and 198(9). Again, Parliament recorded the reasons for enacting those subdivisions in terms that indicate that the people to whom they apply include those to whom Australia might otherwise be found to owe protection obligations (were they to have their claims for asylum assessed here): see ss91A and 91M.

22. In each case, the relevant provisions put in place demanding safeguards involving Parliamentary scrutiny and evince a concern that those arrangements will not result in refoulement so as to place Australia in contravention of its international obligations: see ss91D(3), 91N(3) and (5) and 198AB and 198AC. Indeed, in the case of the safe third country provisions, an assessment is

[16] See at 1396, [66] per French CJ, 1418 [205] per Hayne J, 1454 per Crennan J and 1463-4 [447]-[448] per Kiefel J.

required under the Act of whether the non-citizen can avail herself or himself of protection in the particular third country.[17]

23. Neither those safeguards, nor merit review rights akin to those conferred by s500(1)(c), apply in respect of an exercise of the removal power under s198(2). As such, a construction of s198(2) that permitted 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 Arts1F, 32 or 33(2)) would undermine those specific features of the statutory scheme.[18] Section 198(2) should not be so construed.

24. If that submission be accepted, it follows that the current matter is distinguishable from *Al-Kateb*. There has been no decision reflecting the statutory description in s500(1)(c) in respect of the plaintiff and there is seemingly no intention to make one. Indeed, Art1F and Art 33(2) have been found not to apply. There being no duty under s198(2) to be fulfilled and none of the matters in s196 being otherwise applicable, the detention of the plaintiff is not authorised by the Act and is unlawful.[19] It follows that question 1 should be answered "no".

25. It is necessary to note that a related submission was rejected by three members of the Court in *M47*: see Gummow J at 1400 [94], Heydon J at 1436 [294] and Bell J at 1475 [514]. However, their Honours' reasons for doing so rested (at least in large part) upon the proposition that Art 32 had no application to the plaintiff in that case because he was not "lawfully" within Australia. But, for the reasons given by the majority, it is not to the point that a person is or is not "lawfully" within Australia. The reference to Art 32 in s500(1)(c) rather directs attention to the matters which form the basis for the non-operation of the Refugees Convention or the disentitlement of a person to the benefit of its provisions.[20]

The plaintiff is indefinitely detained

26. If it cannot be distinguished in the manner submitted above, this case directly raises the question of the correctness of the result in *Al-Kateb*. In that event, the plaintiff contends that that *Al-Kateb* was wrongly decided and should not be followed. That is principally put as a matter of construction, although the limits imposed by Chapter III of the Constitution bear upon that construction. The first step in that argument is the proposition that the plaintiff is currently detained for

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[17] *M70* at 176 [48] per French CJ; 198 [122] per Gummow, Hayne, Crennan and Bell JJ and at 227 [223] per Kiefel J.

[18] For example, rather than requiring something akin to the processes concerning the identification of the receiving country specified in ss91D, 91N or s198AB, s198(2) (if it applies in respect of a refugee) seemingly permits the "officer" to remove a refugee to "any place willing to receive them" (*Al-Kateb* at 639 [227] per Hayne J), except perhaps if that amounts to refoulement—assuming the constraint identified above does apply in respect of s198(2). Indeed, even if one makes the last mentioned assumption, how the "officer" is to assess that matter is entirely unclear from the Act.

[19] Cf *M61* at 337-338, [21] and 348, [62] and see also *SZQRB* at [269] per Lander and Gordon JJ.

[20] Kiefel J at 1464 [451] (with whom Crennan J agreed at 1454 [391]) and see also Hayne J at 1430-1, [216]-[220]. Note in addition that Hayne J criticized the plaintiff's argument in that case as 'not engag[ing], as it must, with the text of the Act. But his Honour did not suggest that there was no textual basis for that argument and submissions developed herein seek to address that deficiency.

an apparently unlimited period of time. That follows principally by reason of the following matters:[21]

(a) If the plaintiff is returned to Sri Lanka, there is a real chance that she will face violence, imprisonment, torture or death for a Convention reason;

(b) the Commonwealth does not propose or intend to remove the plaintiff to Sri Lanka;

(c) the plaintiff has no right to enter and remain in any other country;

(d) there is at present no other country to which the plaintiff can be sent.

27. The length of her further detention depends entirely upon the willingness of the Executive to enter into, and its ability to successfully conclude, diplomatic negotiations between Australia and other nation states to which Australia could remove the plaintiff without infringing Art 33(1) of the Refugees Convention.

28. Those processes have been ongoing since at least May 2010—both before and after the ASA—and have been fruitless.[22] The Department has sought to resettle the plaintiff and other persons to whom Australia owes protection obligations, but who have received ASAs, in 12 other nations. Ten of the 12 have expressly declined these requests. While the requests to the last two countries were made in May 2010 and remain outstanding, as long ago as March 2011 DFAT expressed the view that neither country will provide a positive response.

29. No life remains in any of the Department's initiatives detailed in **SC [66]-[70]** to resettle the plaintiff. Nor is there any reasonable future prospect of resettlement: the Department concedes that further approaches to foreign countries are unlikely to succeed[23]. The only possibility for resettlement to which the Defendants point is the possibility of some unspecified "change in circumstances" which "*may include changes in those countries' resettlement policies, a change in the plaintiff's personal circumstances or further information being obtained regarding the plaintiff's relatives in resettlement countries.*" As to the first two possibilities:

1. a change in a foreign sovereign nation's resettlement policy is substantively beyond the control of the Australian Government. The possibility rises no higher than abstract speculation.

2. As to a change in the plaintiff's "personal circumstances", what such a change might be, or how it may lead to resettlement, has not even been articulated, let alone meaningfully explored.

30. As to the reference to the plaintiff's relatives in resettlement countries, this is equally unpromising, for three reasons.

31. First, at her Entry Interview with a departmental officer on 6 June 2010, the plaintiff in fact provided substantial information about her relatives, including parents' and siblings' names, dates of birth and then current locations.[24] That information was not taken up, and evidently did not assist the defendants with any resettlement attempts between 2010-2012.

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[21] SC [62]-[68].
[22] SC [66(b)].
[23] SC [70]-[71].
[24] SC [74].

32. Secondly, between 6 June 2010 and 23 July 2013, the material before the Court indicates that the Department placed scant weight on the possibility of the plaintiff's resettlement with relatives. Apart from requesting information that the plaintiff had already provided in her Entry Interview[25] the Department showed no interest in gathering further information about the plaintiff's overseas relatives until after these proceedings had been commenced. Only on 23 July 2013 the Department wrote to the plaintiff's legal advisers seeking further information about the plaintiff's parents and siblings. That information was provided on 25 July 2013.[26]

33. Thirdly, as is evident from the information known about the plaintiff's relatives,[27] when read together with **SC [66]-[69]**, there is little prospect of resettlement in the plaintiff's relatives' countries of residence in any event. The plaintiff's parents in India have no right to sponsor her migration; they must themselves continue to reapply to remain there. Finally, it is clear that Country J has already refused to resettle the plaintiff.

34. In the circumstances, the Court can be satisfied that the removal of the plaintiff from Australia is not likely to be practicable in the foreseeable future (the drawing of such inferences being provided for by clause 27.08.5 of the Rules).

Al-Kateb was wrongly decided

35. The next step involves the submission that this Court should reconsider what was held in *Al-Kateb* regarding the construction of ss189, 196 and 198. Should leave be required to do so,[28] the plaintiff seeks that leave. As to the factors relevant to that grant of leave, the plaintiff relies upon the matters identified in *M47* by Gummow and Bell JJ.[29]

36. The plaintiff contends that those provisions should be construed as follows: they do not authorise indefinite detention; the period of detention under s196 is limited to that period during which removal under s198 is reasonably practicable; where such removal is not reasonably practicable, detention is unauthorised and the power to detain is suspended. That is, the reasons of Gummow J and Bell J in *M47*[30] and the dissenting reasons of Gleeson CJ and Gummow J and Kirby J in *Al-Kateb* should be preferred to those of the majority in *Al-Kateb*.

Textual considerations

37. The plaintiff's construction has a firm foothold in the text of the Act, for the reasons given by Gummow J in *Al-Kateb* (at 608, [121]-[122]). The relevant provisions contain both temporal elements (the requirement in s196 to detain "until...removed...under section 198" in s196 and the term "as soon as" in s198) and elements dealing with the process or outcome (the reference, in s196, to removal "under" s198 and the notion of what is "practicable" in the sense of being able to be effected or accomplished).

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[25]SC [75], attachment SC22.
[26]SC [78], attachment SC23.
[27]SC [78], attachment SC23.
[28]See the division of authority on that question identified in *M47* at 1447 [350] per Heydon J and per Bell J at 1479, [533].
[29]At 1404, [120] and 1477, [525]-[527], 1479, [532].
[30]At [110]–[121], [145]–[149] and at [515]–[534].

38. Connecting those elements, the term "reasonably" in s198 requires a judgment to be made as to the period which is appropriate or suitable to the legislative "purpose" (in the objective sense, referred to by the plurality in the *IRA* Case[31] and by Hayne J in *APLA Limited v Legal Services Commissioner for NSW*[32]). Gummow J identified that purpose as being to provide for detention of the person to facilitate her or his removal from Australia, but not with such delay that the detention has the appearance of being for an unlimited time.[33]

39. That, and the legislative context, points to the operative constraint arising here. In a situation such as this, where the plaintiff is unable to be removed and unlikely as a matter of reasonable practicability to be removed, s198 no longer retains a present purpose of facilitating removal from Australia that is reasonably in prospect. That follows from the fact that Australia's power to remove non-citizens from its territory is built on an assumption that a person will be sent to a country of attachment or be confined by the practical necessity to find a state that will receive the person who is to be removed. And yet, in the case of a person to whom Australia owes protection obligations, the most obvious state to which a person might be removed (the person's country of nationality, which, as a principle of international law, they have a right to re-enter) is unavailable.[34] The executive's assessment as to security renders it exceedingly improbable that another country will accept such a person absent any obligation to do so.

40. The presently insurmountable difficulties that attend those matters of practical necessity mean that a "necessary assumption" (*Al-Kateb* at [122]) for the continued operation of the temporal imperative which flows from the word "until" in s196(1) is falsified – the assumption being that s198 continues to operate to provide for removal "under" that provision. In those circumstances, ss189, 196 and 198 no longer authorise the detention. Understood in that way, the construction for which the plaintiff contends is an orthodox one, supported by the text of the Act and proper regard to the context, including the relevant principles of international law concerning the movement of persons from state to state identified above: see *M70* at 190 [91].

The Principle of Legality

41. The "strongest guidance" on the issue of construction presented by the interaction of ss189, 196 and 198 is provided by the so called "principle of legality" being the principle of statutory construction identified by Gleeson CJ in *Al-Kateb* at [19]-[21], 577-8[35] and see also Gummow J at [117]. Yet, as Bell J and Gummow J observed in *M47*,[36] two members of the majority in *Al-Kateb* (McHugh J and Callinan J) did not discuss that principle and appear not to have considered its import for the issues of construction presented in that case. As

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[31] *Victoria v Commonwealth* (1996) 187 CLR 416 at 487.
[32] (2005) 224 CLR 322 (***APLA***) at [423]-[424]
[33] Contrary to the views expressed by Rose (8(3) *Constitutional Law and Policy Review* (2005) 58 at 61) one does not conclude from the use of the word "or" at the end of paragraph (b) of s196 that Parliament intended that detention would continue indefinitely, regardless of whether the time for performance of the duty of removal imposed by s198 has expired. Indeed, Hayne J expressly held otherwise: *Al-Kateb* at 638-9 [226]-[227].
[34] Quite different considerations apply to the position of a stateless person in the position of Mr Al-Kateb (which may provide a further basis for distinguishing that case) - – although cf Heydon J in *M47* at 1442 [332]..
[35] See *M47* at 1404 [119], per Gummow J
[36] At 1403-1404 [118]-[119] and 1372 [532].

Bell J pointed out in *M47*, their Honours' reasoning is weakened in those circumstances.

42. Under that principle of construction, the Courts do not impute to the legislature an intention to abrogate or curtail certain rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in issue, and consciously decided upon their abrogation or curtailment.[37] The presumption is a "powerful one".[38] In particular, a contrary statutory intention must be expressed with "irresistible clearness".[39] That is not a low standard and will usually require that it be manifest from the statute that the legislature has directed its attention "to the question whether to so abrogate and restrict and determined to do so".[40]

43. In Australia, it has been said that there is a constitutional dimension to that principle.[41] That arises, at least in part, from the notion that the common law is the "ultimate constitutional foundation in Australia".[42] That understanding may also be seen to reflect the fact that the grants of legislative power in s51 and elsewhere envisage that the laws made by the Commonwealth Parliament will be construed by Courts exercising the judicial power of the Commonwealth and applying orthodox judicial techniques to that end – including through the application of common law principles.[43] As such, the fact that the principle is expressed by reference to the "intention" of Parliament is to be understood as an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws.[44] As Gummow J observed in *M47,* those concepts are now better understood than they were when McHugh J used the term "intention" and cognate expressions in *Al-Kateb* at 581 [33] and [35] (see also, Callinan J at 661, [296]-[298]).

44. The principle is not exhausted when legislation expresses, with the requisite irresistible clearness, an intention to encroach *to some degree* upon the relevant right or freedom. It is for that reason that the principle has been formulated such that it requires that statutes be construed, where constructional choices are open, so as to "avoid *or minimise"* their encroachment upon the relevant right or freedom: *Momcilovic* at 46 [43] per French CJ. The paradigm example illustrating that point is the application of the principle to restrictions upon speech – the fact that a law curtails to some degree the common law freedom of

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[37] See eg *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 523; *Coco v The Queen* (1994) 179 CLR 427 at 437; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [11] and *Momcilovic* at [42]-[45] per French CJ and the authorities there collected.

[38] *Momcilovic* at [43]-[44] per French CJ

[39] *Potter v Minahan*(1908) 7 CLR 277 at 304 per O'Connor J.

[40] *X7 v Australian Crime Commission* (2013) 87 ALJR 858 at 892 [158] per Kiefel J.

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

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

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

[44] *M47* at [118] per Gummow J, referring to *Cai* at 1403-4 [118].

expression will nevertheless inevitably leave to the Court constructional choices involving comparatively greater or lesser encroachments: see eg *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 87 ALJR 289 (***Corneloup***) at 305-6, [45] per French CJ.

45. That applies equally to the common law right to liberty. In *Al-Kateb* at [14] Gleeson CJ identified the constructional choices as being between that identified above (if removal ceases to be a practical possibility, detention must cease, at least for as long as that situation prevails); or, alternatively, that if it never becomes practicable to remove the detainee, the detainee must spend the remainder of her or his life in detention. Plainly, the first possible construction "minimises" the encroachment on liberty, in that the period of detention under the second possible construction is potentially unbounded, and subject only to the possible exercise of the Minister's non-compellable and non-reviewable powers to lift the bar or grant a visa. As this Court said in *M61* "it is not readily to be supposed that a statutory power to detain a person permits continuation of that detention at the unconstrained discretion of the Executive".[45]

46. That leaves the question of whether Parliament has, with the requisite "irresistible clearness" expressed itself so as to authorise detention for an unlimited period of time, potentially for the detainee's lifetime. The plaintiff submits that it has not. Rather, there exists a choice between an unexpressed exception and an (equally) unexpressed outcome. For, as submitted above, the term "until" in s196 assumes the possibility of compliance with s198 of removal as soon as practicable, but no express provision is made for the case where that assumption is falsified. As Gummow J observed in *M47* at 1403, [114], the position would be different if the word "until" in s196 were required to be construed as meaning "unless". But in the absence of such language, Parliament has simply failed squarely to confront the issue of statutory construction that arises here and that the legislation is susceptible of the two competing interpretations identified above. Indeed, Parliament's failure to confront that issue appears confirmed in some measure from the paragraphs (4)-(5A) added to s196 in 2003 (mentioned by Gummow J in *Al-Kateb* at [115]).

47. If that is correct, then the principle of legality becomes decisive and the plaintiff's proposed construction is necessarily to be preferred over one that would allow for indefinite detention, potentially for life, at the unconstrained discretion of the Executive.

48. So understood, and contrary to the what was held by the majority in *Al-Kateb*, the construction proposed by the Plaintiff does not transmogrify any aspect of the statutory scheme – it merely finds in its interstices a set of circumstances to which it appears, from the general language of the Act, Parliament did not direct its attention (at [21]). Those "gaps" in the statutory scheme delineate the areas occupied by the "negative" common law rights, upon which the principle of legality operates: *Corneloup* at 324, [145] per Heydon J.

49. The construction preferred by Hayne J in *Al-Kateb* rests upon the notion that the words "reasonably practicable" are (contrary to the views expressed by Gleeson CJ, Gummow and Kirby JJ) incapable of giving rise to a premise underlying the

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

Act which is falsified, even where there is a long history of unsuccessful attempts to effect removal or powerful evidence suggesting that removal cannot be achieved. In his Honour's view, the most that could be said of such a situation is that it has "not yet been practicable" to perform that duty. However, that highly elastic conception of the duty imposed by s198 means that cessation of a person's detention may, for all practical purposes, become a "possibility ... wholly within the control of the Commonwealth Executive"[46] and its arrangements with other nation States. Such considerations led this Court in *M61* to reject a proposed construction of the Act which would have conferred a power of that nature.

50. Importantly, the plaintiff's proposed construction does no violence to the temporal limitation in s 98 upon which Hayne J focussed – for, as Gleeson CJ observed at [23] the obligation imposed by s198 is not forever displaced (hence the use of the word "suspended" in the plaintiff's proposed construction). As such, the constraint imposed by s198 continues to mark the outer limits of the person's potential detention if the obligation to detain again arises.

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

52. In any event, in the present case, the circumstances of the plaintiff's detention are addressed at [26]-[34] above. They disclose that there is little or no prospect of the plaintiff's removal from Australia in the foreseeable future.

53. The construction of ss189, 196 and 198 of the Act for which the plaintiff contends is also mandated by the proposition that those powers to detain must be construed so as to confine their exercise within relevant constitutional limits.[49] These limits are addressed in the next section.

54. It follows that the plaintiff's detention is unauthorised and Question 1 should be answered "no".

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

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

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

[49] See *Monis v The Queen* (2013) 87 ALJR 340 at [327], [328] and [332] per Crennan, Kiefel and Bell JJ and the authorities there referred to and note *M47* at 1403 [115] per Gummow J

Question 2: If ss 189, 196 and 198 authorise the detention of the plaintiff, are they beyond the legislative power of the Commonwealth in their application to the Plaintiff?

55. If, contrary to the answer proposed to Question 1, ss189, 196 and 198 authorise the (continued) detention of the plaintiff, she submits that they are beyond the legislative power of the Commonwealth. They are inconsistent with the exclusive vesting of the judicial power of the Commonwealth in the courts designated by Chapter III of the Constitution. The following submissions inform the approach to construction of those provisions of the Act put in the preceding section, as well as the approach to their validity.

56. The issue is not whether ss189, 196 and 198 are supported by a head of power. A law encroaching upon the liberty of an alien can be a law with respect to s51(xix) (and perhaps also s51(xxvii)).[50] However, such a law is subject, by the opening words of s51, to the other provisions of the Constitution — particularly Chapter III.[51]

57. Contrary to the suggestions made in some of the authorities, that formulation does not suggest that the principle in issue here rests upon a requirement for a sufficient connection with a relevant head of power[52] – indeed, aside from the special case of purposive powers, it is to be doubted that that is now the correct approach to characterisation, even in the area of the so called implied incidental power.[53] The starting point of the argument is that a law providing for the detention of an alien will be a law with respect to, at least, the subject matter in s 51(xix).

Separation of judicial power

58. Chapter III of the Constitution, and the separation of the judicial function from the political branches of government thereby effected, achieves the constitutional object described by five members of this Court as "the guarantee of liberty".[54]

59. It may be that the constraint identified in *Chu Kheng Lim v Minister for Immigration*[55] that flows from those structural features of the Constitution is not properly regarded as an individual "immunity" or "guarantee". The better view may be that what is protected is not the rights of individuals, but rather the constitutionally prescribed scheme that vests the judicial power of the Commonwealth exclusively and exhaustively in Chapter III courts.[56]

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[50]Cf Gaudron J in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 57 and in *Kruger v Commonwealth* (1997) 190 CLR 1 at 109-11.
[51]*Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1at 55 [149] per Gummow J.
[52]Cf Hayne J in *Al-Kateb* at 647 [253].
[53]*Theophanous v Commonwealth* (2006) 225 CLR 101 at 128 [70].
[54] *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11 per Brennan CJ, Dawson, Toohey, McHugh& Gummow JJ. See also, referring to *Wilson*, *State of South Australia v Totani* (2010) 242 CLR 1 at 156 [423] per Crennan and Bell JJ and the other authorities there collected at footnote 598.
[55](1992) 176 CLR 1 at 28-9 per Brennan, Deane and Dawson JJ (Mason CJ agreeing at 10).
[56] See, by way of analogy with the implied freedom cases, *Monis v The Queen* (2013) 87 ALJR 340 at 360 [62]; 295 ALR 259 at 279 per French CJ; *Wotton v Queensland* (2012) 246 CLR 1 at 13 [20] and 15 [25]; and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561. See also, in the context of Chapter III, *Assistant Commissioner Michael James Condon v Pompano Pty Limited* (2013) 87 ALJR 458 at 497-8 [180]-[183]; 295 ALR 638 at 686-7 per Gageler J.

60. On either analysis, judicial power cannot be exercised otherwise than by the judicial branch of government, thereby giving "practical effect to the assumption of the rule of law upon which the Constitution depends for its efficacy".[57]

Central conception of judicial power

61. The power to deprive a person of their liberty, conditioned upon the adjudication of guilt, lies at the heart of judicial power and is exclusively judicial.[58]It is an aspect of the guarantee of liberty (or the structural imperative) that, "exceptional" cases aside, the involuntary detention of a person in custody by the State is permissible only as a consequential step in the adjudication of criminal guilt of that person for past acts. This is an implied constraint on executive and legislative power, derived from the constitutional landscape.

62. So far as the structural imperative is concerned, it is no answer to say that the exclusive domain of judicial power remains unsullied by executive detention because the executive branch has deprived a person of their liberty *without* the adjudication of criminal guilt. To use this as a general criterion is impermissibly to decouple the result or consequence — deprivation of liberty — from its essential precondition — judicial determination of criminal guilt.[59]

Exceptions and compatibility with the constitutionally prescribed scheme

63. Question (2) of the special case concerns the exercise of legislative power. In that context, the so called "exceptions" to the constraint identified above identify certain permissible statutory objects. If, as a matter of objective intention, a legislative measure can be said to be directed to such an object, it will not necessarily exceed that constitutional constraint, subject to the further requirements identified below.

64. As in analogous areas of constitutional discourse, the identification of such exceptions (and associated permissible objects) requires consideration of whether they can be regarded as "compatible" with the relevant constitutional imperative.[60] In that regard, certain of the recognised exceptions are readily understood as being compatible with the constitutional scheme:

    (a) Detention on remand is ancillary to and facilitative of the process of adjudication of guilt (and is also subject to judicial supervision). It therefore facilitates the constitutionally prescribed scheme by ensuring that accused persons are available to be dealt with by the exercise of judicial power and is unlikely to objectionable.

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[57] *Thomas v Mowbray* (2007) 233 CLR 307 at 342 [61]; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 351-2 [30].

[58] *M47* per Gummow J at [101]-[105]; *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 per Gummow J at 611 [76], 611 [77], 612 [80] and 613 [83] – see also *Lim* at 27-8 per Brennan, Deane and Dawson JJ and at 70-1 per McHugh J; *Woolley* at 12 [17] per Gleeson CJ and at 35 [82] per McHugh J (although, cf his Honour's reasons at 24 [57]) – note also the doubts expressed by Hayne J in *Al-Kateb v Godwin* (2004) 219 CLR 562 at 648 [258]. The references in those passages to "citizens" being the beneficiaries of the principle should be understood in accordance with Gummow J's reasons in *Fardon* at 611-2 [78].

[59] See *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 497 per Gaudron J.

[60] See eg *Monisv The Queen* (2013) 87 ALJR 340 at 396; 396 [277], [278]; 295 ALR 259 at 329 per Crennan, Kiefel and Bell JJ; *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 199 [85] per Gummow, Kirby and Crennan JJ; *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 59 [161] per Gummow and Bell JJ.

(b) Military justice (in its traditional form) is unobjectionable because it does not involve the exercise of Chapter III judicial power: see *Lane v Morrison* (2009) 239 CLR 230.

(c) Detention for contempt of Parliament has a clear textual basis in s 49 of the Constitution: *R v Richards; Ex Parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 167.

(d) Quarantine and mental health reflect traditional forms of executive detention that the law has long recognised[61] as a matter of pragmatic necessity – see eg Lord Eldon LC in *Crowley's Case*[62] referring to the "most serious mischiefs" that might result from habeas corpus issued in respect of a quarantined ship if there were no requirement for probable cause verified by affidavit. But, being born of necessity to address mischief of that nature, those exceptions are limited to the extent of the need.[63]

65. The constitutionally mandated separation of powers is not threatened by such exceptions, at least in their traditional forms.

66. It is clear that it is not the dichotomy between punitive and non-punitive that differentiates these categories from judicial power (cf *Lim*). Nor should it. Such language may be a convenient shorthand; however, as a taxonomy it is apt to mislead:[64]

(a) One difficulty with the "punitive vs non punitive" criterion is that it suggests that the constraint upon power is animated by matters that are subjective to the person detained; rather than a functional concern to guard the exclusivity of the otherwise purely judicial power to deprive of liberty.

(b) In addition, the criterion of 'punitive' detention does not explain, for example, why military justice (which undoubtedly involves punitive detention) is an exception. On the other side, there are potentially limitless examples of detention that might be said to serve some form of 'non-punitive' purpose, and so the adoption of that criterion might see the exceptions swallow the rule. That strongly suggests that the question of whether detention is "punitive" is not the organising or animating principle in this area.

(c) A further difficulty is that it proceeds from the unstated assumption that non-punitive detention is as a matter of principle a lesser intrusion upon the detainee's liberty than punitive detention. But that assumption is not a sound basis upon which to determine matters of general constitutional principle.

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[61] Their history is traced in Gordon, "Imprisonment and the Separation of Judicial Power: A Defence of a Categorical Immunity from Non-Criminal Detention" (2012) 36 *Melbourne University Law Review* 41 at 77-84.

[62] (1818) 36 ER 514 at 531.

[63] See, by way of analogy, *APLA Ltd v Legal Services Commissioner (NSW)* 224 CLR 322 at 361 [66] per McHugh J.

[64] *Al-Kateb* at 611-3 [135]-[138] per Gummow J; *Fardon* at 162 [81] per Gummow J and at 647-8 [196] per Hayne J. Alternatively, to the extent that the principle rests upon such a distinction, it is best understood as follows: Involuntary detention that is punitive will *never* be permissible other than as an exercise of judicial power. Involuntary detention that is non punitive *may* be permissible if it falls within one of the "exceptional" cases.

(d) No normative assumption can or should be made about the quality or severity of conditions of 'punitive' compared to 'non-punitive' detention. The 'non-punitive' label will offer little comfort to the detainee who has been neither charged with nor convicted of any crime, but remains detained indefinitely.

(e) Thus it is not to the point that the facility in which the plaintiff is detained has a "colourbond fence" or that the area surrounding the facility is "extensively landscaped" etc: **SC [34]-[46]**. She is still in administrative detention.

67. It can also be accepted that the classes of case that may constitute such an exception are not closed.[65] The development of new cases is to be approached by reference to historical antecedents, from which analogies may be developed using ordinary processes of legal reasoning[66] and the overriding requirement that their accommodation be compatible with the maintenance of the constitutionally prescribed separation of powers.

68. The engagement of those exceptions depends, as a critical starting point, upon the identification of the legislative purpose for which the authority to detain is conferred. However, as submitted above, the fact that that purpose may be a permissible one in the sense identified above is a necessary, but not sufficient, condition for validity. For reasons developed below, it is also necessary that the legislative means adopted be proportionate to the permissible purpose and not impose an undue burden upon the constitutionally prescribed scheme.

The exception concerning the power to expel or deport aliens

69. *Lim* establishes that, in addition to the exceptions discussed above, there is an exception concerning laws conferring on the executive power to expel or deport a particular alien and the associated power to "restrain an alien in custody to the extent necessary" to make expulsion or deportation "effective" or for the purposes of considering entry.[67] The terms in which that exception is formulated and the discussion in *Lim* suggest that it is to be explained by reference to matters of necessity and history (like the categories of quarantine and mental health) – see also *Koon Wing Lau v Calwell.*[68] If within that exception, the detention does not violate the constraint identified above because it is incidental to (and takes its character from) the executive powers of expulsion, deportation or admission: *Lim* at 32.

70. That being the case, the content of this category is what is in dispute. In circumstances where removal of the detainee is not reasonably practicable, the question arises whether that power to detain may validly continue to exist, even in circumstances where the principal power to expel or deport cannot be exercised effectively.

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[65] Eg *Vasiljkovic v Commonwealth* (2006) 227 CLR 614 at 648 [108] per Gummow and Hayne JJ.

[66] See, apparently adopting such an approach, *Vasiljkovic* per Gummow and Hayne JJ at 648 [108]-[109] and 649 [113] and see Zines, "A Judicially Created Bill of Rights?" (1994) 16 *Sydney Law Review* 166 at 174. See also eg (in the context of 51(xxxi)), *The Queen v Smithers; Ex parte McMillan* (1982) 152 CLR 477 at 487; *Theophanous v Commonwealth* (2006) 225 CLR 101 at 126-7 [60]-[64]; and (in the context of s 55) *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 467. See also, in a different context, *Lumbers v W Cook Builders Pty Ltd* (2008) 232 CLR 635 at 665 [85].

[67] *Lim* at 30-1 per Brennan, Deane and Dawson JJ.

[68] (1949) 80 CLR 533 at at 555-556 per Latham CJ.

71. The outer limits of that permissible category of deprivation of liberty were stated by Brennan, Deane and Dawson JJ in *Lim* in these terms: the detention authorised by the enactment must be restricted to what is "reasonably capable of being seen as necessary" for the purposes of deportation or to enable an application for an entry permit to be made and considered.[69]

72. The exception provides that administrative detention is permissible as a point of transition between either "entry" or removal but not an end in itself. The ability to achieve either outcome, as a matter of legal and practical effect, conditions any legislative power to detain. The reference in *Lim* to an application for an entry permit does not entrench a right to make such an application, nor calibrate the principle to a particular legislative setting, and care needs to be exercised in this context about the term "entry". The plaintiff does not argue for a right of entry to the extent that the term connotes any entitlement to physically enter the territory or to participate in civic life once here. She is already within the country and the only claim of right is to liberty.

73. The test for validity proposed in *Lim* arises from the nature of the constraint imposed by Chapter III. The existence of exceptions to the general principle identified above (even in the case of citizens) indicates that that constraint is not absolute and that some test of what constitutes a legitimate type or level of restriction or incursion must be developed.[70] The test must explain the relationship between the deprivation of liberty and the effective exercise of the power (in this case) to remove.

74. So understood, the inquiry in *Lim* becomes a familiar one, applied to other express and implied constitutional constraints, and involving consideration of the relationship between the "permissible" end to be served by the impugned law (supplied by the exceptions) and the means by which it does so (which must be limited to what is "appropriate and adapted", "reasonably necessary", "reasonably capable of being seen as necessary" or "proportionate" to that end).[71] However, what is regarded as "necessary" or "proportionate" is more demanding in the context of deprivation of liberty than in other contexts.

75. The reasons of Crennan, Kiefel and Bell JJ in *Monis v The Queen* may suggest that it is necessary to ask, in addition, whether the legislative means adopted imposes an unreasonable burden or strain upon the prescribed constitutional scheme (or, put another way, whether it is proportionate to the object of

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[69] *Lim* at 33 per Brennan, Deane and Dawson JJ. See, to somewhat similar effect (albeit resting upon a dichotomy between punitive and non-punitive objects), McHugh J at 71. See also, seemingly endorsing that test: *Al-Kateb* per Callinan J at 660 [294]; *Woolley* per Gleeson CJ at 13-14 [21]-[22], 14 [25], Gummow J at 51-52 [133]-[134] and 60 [163]-[165], Callinan J at 84 [260]; *Fardon* per Callinan and Heydon JJ at 653-654 [215] (in regard to detention generally); *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 per Kirby J at 527 [118]-[119] and per Callinan J at 559 [218]; *Kruger* per Gummow J at 162 (in regard to detention generally). However, compare *Al-Kateb* per Hayne J at 647-648 [252]-[256] (Heydon J concurring) and per McHugh J at 584 [45]; *Woolley* per McHugh J at 33 [78] and Hayne J at 77 [227]-[228] (Heydon J concurring) and *Behrooz* per Hayne J who, at 541-2 [171], expresses doubt about the "line" drawn in *Lim*.

[70] *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 136 [444] per Kiefel J. Indeed, such an inquiry is particularly apposite when regard is had to the origins of the exception, including judicial statements that have consistently emphasised its limited nature and the importance of the existence of a relationship with the object of making effective particular aspects of sovereign power: see eg *Calwell* at 595.

[71] See eg *Monis v The Queen* (2013) 87 ALJR 340 at 408 [345]; 295 ALR 259 at 345; *Hogan v Hinch* (2011) 243 CLR 506 at 542-3 [47], 544 [50] per French CJ and 556 [97]-[98] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; and *Betfair v WA* (2008) 234 CLR 418 at 476-8 [101]-[105].

maintaining that scheme, that being the object that underlies the principle in *Lim*).[72]

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

77. Does that exceptional category apply to a case where it is not reasonably foreseeable that the object of deportation could be achieved? The answer must be no: once it is recognised that that object, for the foreseeable future, will not realistically be achieved, the justification for detention to facilitate that object necessarily falls away. There is no other permissible object. For reasons developed below, segregation of aliens generally from the community is not such an object. Accordingly, detention cannot be validly authorised in those circumstances. The further questions regarding proportionality do not arise.

78. Of course if deportation were to become a realistic possibility at some future point, then grounds for such detention may again exist and further detention may be warranted. But in the intervening period, detention serves no permissible purpose in the sense identified above. As an alien, she will always be amenable to expulsion where there is legislative authority for that to occur. She will lack the legislative protections of a visa: to that extent she will not have "entered" the community with the rights that a visa holder enjoys. Liberty is not conditioned on a statutory permission to "enter" and the two cannot be conflated. The constitutional concept of liberty is a freedom from the executive's power to detain rather than a consequence of a statutory decision to allow the person to enter.

79. Alternatively, it follows from the requirement that the legislative means must be proportionate to a permissible end (and perhaps also to the object of maintaining the constitutionally prescribed scheme) that it is not sufficient for the Commonwealth to assert that the Act validly authorises detention provided that the object of removal (at some unspecified date in the future) remains on foot.

80. Where the relevant end — expulsion or deportation of an alien — is not reasonably practicable (ie impossible to achieve, consistently with Australia's

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[72] (2013) 87 ALJR 340 at 396 [277]-[278], 396-7 [282]; 295 ALR 259 at 329, 330.
[73] *Shrimpton v Commonwealth* (1945) 69 CLR 613 at 629-30.
[74] *Al-Kateb* at 613 [140] per Gummow J.
[75] *Wotton* at 13-14 [21]-[22]; *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 613-4 per Brennan J.
[76] See *Al-Kateb* at 609 [126]-[127] per Gummow J; cf Hayne J at 647 [254].

international obligations, in the foreseeable future), it does not follow that what is authorised by the exceptional case grows correspondingly more extreme. If that were so, then in the most extreme cases what is authorised is unlimited and indefinite executive detention at the unconstrained discretion of the executive: cf *M61*.[77] Rather, it must follow that the only available means (ie indefinite detention) ceases to be proportionate to the permissible object.[78] That is so while it remains a fact that expulsion or deportation cannot be achieved.

81. Importantly, once removal of a person who is not to be granted a visa is impracticable, it is not permissible to rely on the limited executive power to detain aliens for the purpose of removal in order to perform a different function of preventative detention — that is, detention at the control of the executive for the purpose of protection of the community against a threat or risk posed by a particular individual (as perceived by the executive, but untested in a court). It is irrelevant to the content of that detention whether the threat is posed by an alien or a citizen. Preventative executive detention is not within the *Lim* exceptions. If preventative steps are thought to be necessary in relation to certain individuals, those individuals must be dealt with under the general law conformably with Chapter III,[79] including the law relating to control orders.[80]

Principles concerning executive detention not limited by reference to citizenship

82. The constitutional separation of judicial power is not to be limited by reference to a criterion of citizenship. Care is required in that regard because the beneficiaries of that principle have sometimes been described by reference to that criterion.[81] That may be seen to reflect the fact that, unlike a citizen, an alien is subject to detention for the purposes of "deportation or expulsion" and as an incident to the executive powers to "receive, investigate and determine an application by that alien for an entry permit".[82]

83. The principle identified above applies equally to aliens, save in the "particular area" of detention for the purposes of considering permission to enter or removal.[83] That "particular area" is properly regarded as no more than an example of an exception to that overarching principle[84] (or a legitimate "category of deprivation of liberty"), albeit one which applies only to a subset of the people entitled to the protection afforded by the Constitution and the laws of Australia.[85] That explains the references in *Lim* to there being "limited" authority to detain an alien for certain purposes.[86] In other words, the fact that a person is an alien does not mean that legislation may authorise her or his detention by the

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[77](2010) 243 CLR 319 at 348 [64].
[78]See, in that regard, *M47* at 1402-2 [103]-[106] and 1403 [115] per Gummow J (noting, but not deciding, the issue).
[79]See, eg, the discussion in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [68]-[84] (Gummow J).
[80]As considered by this Court in *Thomas v Mowbray*(2007) 233 CLR 307.
[81]See *Lim* at 27 per Brennan, Deane and Dawson JJ and *Woolley* at 12 [17] per Gleeson CJ.
[82]*Lim* at 32.
[83]*Fardon* at 611-2 [78] per Gummow J; *Vasiljkovic* at 643 [84] per Gummow and Hayne JJ and 669 [189] per Kirby J.
[84]See, apparently adopting such an analysis, *Vasiljkovic* at 648 [108]-[109] per Gummow and Hayne JJ and at 668 [183] per Kirby J.
[85]Indeed, the same may be said of other "exceptions" – for example, the detention of a person suffering from a mental illness or infectious disease.
[86]*Lim*, per Mason CJ at 10 and Brennan, Deane and Dawson JJ at 32 and 33.

executive at any time and for any purpose without contravening Chapter III of the Constitution.

The exception is not a general power to detain for the purpose of segregation from the community pending removal

84. In addition to detention for the purpose of removal, the Defendants rely upon a power to segregate aliens from the community pending that removal: **SC [61]**. This purpose is seemingly incidental to removal; thus if the Plaintiff is correct in her arguments concerning removal, this additional purpose fails too.

Question 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) reveal an error of law?

85. The Plaintiff contends that, the Minister's consideration of whether to exercise the s 46A power having commenced, and he having directed that inquiries be made and the RSA process be carried out,[87] and the Plaintiff's detention having lawful justification whilst those inquiries and processes were carried out: [88]

(a) the Minister erred in failing to decide whether to exercise the s 46A power; and

(b) an officer of the Commonwealth erred in not referring the Plaintiff's case to the Minister for decision; and

(c) further and alternatively, the officer and the Minister erred in not considering whether the Plaintiff, having been found to be a person to whom Australia owes protection obligations, would nonetheless be refused a visa under ss 500 and 501 of the Act.

Minister erred in not deciding whether to exercise s 46A power

86. The Plaintiff's detention was lawful for the period between her arrival and on or about 24 April 2012 because — and only because — the Minister had decided to consider exercising his power under s 46A of the Migration Act.[89]

87. The relevant inquiries were completed on 24 April 2012 when the Department became aware that the Plaintiff had an adverse security assessment and did not satisfy PIC 4002 (as it then stood): **SC [22]**. On or about that date it was in effect determined that the Plaintiff's case would not be referred to the Minister for consideration of whether to exercise his s 46A power. It is on or shortly after this date that the Plaintiff's detention ceased to be for the purpose of inquiries directed to the exercise of the s 46A power; and is now said by the Commonwealth to be for the purpose of her removal from Australia (**SC [60]-[61]**).

88. The Plaintiff's detention pending inquiries directed to the potential exercise of the s 46A power was valid because those inquiries were directed to consideration of whether she may be permitted to apply for a visa and thus given permission to remain in Australia. A necessary predicate of the validity

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[87] *M61* at [66],[70]
[88] *M61* at [21]-[26], [35], [70]-[71].
[89] *M61* at [65]-[71].

of the Plaintiff's detention is that the outcome of the inquiries might lead to the exercise of the s 46A power; if it were not for that purpose, the prolongation of the Plaintiff's detention pending the inquiries would be unlawful.[90] Thus 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 exercise the power in light of the outcome of the inquiries. The effect of the argument that the Minister can terminate the process in this way is that the inquiries and their outcome were irrelevant to the Minister's decision under s 46A and he need not even be informed of them; yet the validity of the Plaintiff's detention depended precisely on the opposite proposition — that the inquiries were relevant to a decision to be made by the Minister personally.

Minister/officer erred in applying PIC 4002 and in not considering ss 500 and 501

89. Further and alternatively, the Minister and/or an officer of the Department erred in applying PIC 4002, which was invalid,[91] and in not considering the operation of ss 500 and 501 of the Act.

90. The processes taken to determine whether the Minister would exercise the s 46A power in respect of the Plaintiff were steps taken under and for the purposes of the Act. Those processes prolonged the plaintiffs' detention; thus the right of the Plaintiff to freedom from detention at the behest of the Australian Executive was directly affected, and those who carried out the processes were bound to act according to law.

91. The Minister having embarked upon a consideration of whether to exercise his s 46A power, termination of that consideration involved an error of law if the processes that were to inform that consideration were not undertaken according to law. [92]

92. Although the power is to be exercised by the Minister when he thinks it is in the public interest to do so, such a power is not ipso facto unconstrained; nor is the Minister's consideration of whether to exercise his power beyond the supervisory jurisdiction of this Court. *Plaintiff S10* did not hold to the contrary.[93]

93. Constraints on the s 46A power are to be discerned from the place of s 46A in the scheme of the Act and, in particular, of its role in ensuring that Australia adheres to its international obligations. Those obligations are relevantly found in the Refugees Convention and Protocol. One such obligation is that of non-refoulement. However, as has been noted above, that obligation may not arise in relation to some persons who fall within the definition of "refugee" in Art 1A of the Convention. This is the effect of Arts 32 and 33 of the Convention.

94. As submitted above, Arts 32 and 33 of the Convention are dealt with by s 500 (and, implicitly, s 501) of the Act. They are, to that extent, brought into and made relevant to Australian domestic law. The Act thus contemplates that

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[90] *M61* at [66], [70].
[91] *M47* at [71], [221], [399], [458].
[92] *M61* at [76]-[79], [101].
[93] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636. Further, the persons seeking relief in that case were not offshore entry persons detained for the purpose of consideration of exercise of power under s 46A; they were detainees who had validly applied for a protection visa and been refused: see *Plaintiff S10* at [80].

where a person satisfies the definition of "refugee" within Art 1A, he or she might be refused a protection visa utilising ss 500 and/or 501 of the Act.[94] Section 501 also contains a discretion to grant a visa, notwithstanding that the person does not satisfy the "character test" set out in that section. These sections, understood in light of Arts 32 and 33 of the Convention, are directed at a different — and more stringent — question that a security assessment undertaken by ASIO under the ASIO Act.

95. Once the Minister has decided to consider whether to exercise his power under s 46A(2) (as here), it is necessary for him not only to consider whether the plaintiff satisfies the Art 1A definition of refugee (the inquiry which was considered in *Plaintiff M61*), but also whether a visa might be refused on the basis of Arts 32 or 33 as applied by ss 500 and 501; and whether not he may exercise his discretion to grant a visa in any event.

96. That is, ss 500 and 501 of the Act are relevant considerations once the consideration under s 46A has commenced. Section 46A(2) is to be understood in light of other provisions of the Act and the purpose of the Act as a whole. A consideration of those other provisions is required once the Minister has embarked upon a consideration of whether to exercise the power.

97. These matters cannot be sidestepped by the Minister determining to ignore those sections and rely simply on the existence of an adverse security assessment by ASIO — an inquiry directed to a different question. For him to do so involves giving ASIO a determinative role regarding the exercise of the s 46A power.[95] That is not contemplated by the Act; and "impermissibly cuts across the process intended by the Migration Act".[96]The fact that the s 46A power is non-compellable and to be exercised in the public interest does not affect that conclusion. It is a power to be exercised by the Minister personally; not by ASIO.

98. The error is compounded in this case by the fact that the RSA decision had concluded that Art 33(2) did not apply to the Plaintiff. That finding would have been significant (albeit not determinative) in an assessment of whether the Plaintiff might or might not be refused a visa under ss 500 and 501. But because neither any officers of the Department nor the Minister considered ss 500 and 501, this aspect of the Plaintiff's case was not considered.

Question 4: Relief

99. If the Court determines that vitiating error has been demonstrated, then the plaintiff is entitled to the declaratory relief in paragraphs 2A and 2B of the application. However, it would not follow that it would in those circumstances be unnecessary to answer questions 1 and 2 by reason of the following matters:

(a) as this Court held in *M61* at 358 [99], the Minister has no duty to consider whether to exercise his powers under s 46A of the Act;

(b) nor is mandamus available to compel the exercise of those powers;

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[94] *M47*, Hayne J at [2-4]; French CJ at [65]-[66]; Crennan J at [387]-389]; Kiefel J at [457]-459].
[95] *M47* at [458] (Kiefel J); and see [396] (Crennan J); Hayne J at [206]; French CJ at [71].
[96] *M47* at [459] (Kiefel J).

(c) nor will the effect of any declaration be to "retrospectively re-characterise" the plaintiff's detention as being for the purposes of considering whether to exercise the power under s 46A(2). That is because, as a matter of fact, since approximately May 2012 the purpose of her detention has *not* been to consider the grant of a visa; quite the opposite (**SC [23], [24], [60]** and **[61]**);[97]

(d) while it may follow from the Department's stated intention in **SC [23A]** that the plaintiff's detention *may at some point in the future* come to be authorised by reason of the "accommodation" identified in *M61* at 351 **[71]**, it is to be noticed that no decision to consider the exercise of the power conferred by s46A has yet been made by the Minister (cf *M61* at **[73]**). The Act does not authorise the detention of an unlawful non-citizen for the purposes of an assessment under those powers if that assessment process has been abandoned: *SZQRB* at 572 [269]. As such, the plaintiff's detention cannot be said to be authorised by reason of those matters.

100. Accordingly, even if Question 3 is answered favourably to the plaintiff, questions 1 and 2 arise.

Part VII: Applicable Constitutional and Statutory Provisions etc

101. The applicable constitutional provisions, statutes and regulations as they existed at the relevant time, are set out verbatim in the Annexure.

Part VIII: Orders

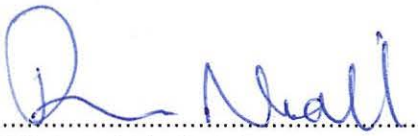
102. The plaintiff seeks orders that the Questions (1)-(3) posed in the Special Case be answered in the manner set out at paragraph [7] above. In answer to Question 4, relief should issue in terms set out in the Further Amended Application [1]-[3]. In answer to Question 5, the Defendants should pay the costs of and incidental to this Special Case.

Part IX: Time Estimate

103. It is estimated the Plaintiff will require 2.5 hours for oral argument.

Dated: 9 August 2013

[97] In that regard, her position may vary from that of the plaintiff in *M47*, where it may have been the case that the plaintiff was at all times a person who had made a valid application for a protection visa that had not been finally determined within the meaning of s 198(2)(c)(ii) (there having been no valid decision in that case on the plaintiff's application for a protection visa).



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ANNEXURE: Applicable Constitutional and Statutory Provisions

The applicable constitutional and statutory provisions are in force as at the date of filing of these submissions.

Constitution

Chapter I—The Parliament

...

Part V—Powers of the Parliament

51 Legislative powers of the Parliament

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

...(xix) naturalization and aliens;

...

Chapter III—The Judicature

71 Judicial power and Courts

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

72 Judges' appointment, tenure, and remuneration

The Justices of the High Court and of the other courts created by the Parliament:

(i) shall be appointed by the Governor-General in Council;

(ii) shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity;

(iii) shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

...

73 Appellate jurisdiction of High Court

The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences:

(i) of any Justice or Justices exercising the original jurisdiction of the High Court;

(ii) of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council;

(iii) of the Inter-State Commission, but as to questions of law only;

and the judgment of the High Court in all such cases shall be final and conclusive.

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

75 Original jurisdiction of High Court

In all matters:

(i) arising under any treaty;

(ii) affecting consuls or other representatives of other countries;

(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;

(iv) between States, or between residents of different States, or between a State and a resident of another State;

(v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;

the High Court shall have original jurisdiction.

76 Additional original jurisdiction

The Parliament may make laws conferring original jurisdiction on the High Court in any matter:

(i) arising under this Constitution, or involving its interpretation;

(ii) arising under any laws made by the Parliament;

(iii) of Admiralty and maritime jurisdiction;

(iv) relating to the same subject-matter claimed under the laws of different States.

77 Power to define jurisdiction

With respect to any of the matters mentioned in the last two sections the Parliament may make laws:

(i) defining the jurisdiction of any federal court other than the High Court;

(ii) defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States;

(iii) investing any court of a State with federal jurisdiction.

Migration Act 1958 (Cth)

36 Protection visas

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

Note: See also Subdivision AL.

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

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

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

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

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

(ii) holds a protection visa; or

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

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

(ii) holds a protection visa.

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

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

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

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

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

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

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

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

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

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

Ineligibility for grant of a protection visa

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

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

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

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

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

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

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

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

Protection obligations

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

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

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

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

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

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

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

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

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

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

Determining nationality

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

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

...

46A Visa applications by unauthorised maritime arrivals

(1) An application for a visa is not a valid application if it is made by an unauthorised maritime arrival who:

(a) is in Australia; and

(b) is an unlawful non-citizen.

(2) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to an unauthorised maritime arrival, determine that subsection (1) does not apply to an application by the unauthorised maritime arrival for a visa of a class specified in the determination.

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

(4) If the Minister makes a determination under subsection (2), the Minister must cause to be laid before each House of the Parliament a statement that:

(a) sets out the determination; and

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

(5) A statement under subsection (4) must not include:

(a) the name of the unauthorised maritime arrival; or

(b) any information that may identify the unauthorised maritime arrival; 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 matter concerned—the name of that other person or any information that may identify that other person.

(6) A statement under subsection (4) must be laid before each House of the Parliament within 15 sitting days of that House after:

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

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

(7) The Minister does not have a duty to consider whether to exercise the power under subsection (2) in respect of any unauthorised maritime arrival whether the Minister is requested to do so by the unauthorised maritime arrival or by any other person, or in any other circumstances.

...

Subdivision AI—Safe third countries

91A Reason for Subdivision

This Subdivision is enacted because the Parliament considers that certain non-citizens who are covered by the CPA, or in relation to whom there is a safe third country, should not be allowed to apply for a protection visa or, in some cases, any other visa. Any such non-citizen who is an unlawful non-citizen will be subject to removal under Division 8.

91B Interpretation

(1) In this Subdivision:

agreement includes a written arrangement or understanding, whether or not binding.

CPA means the Comprehensive Plan of Action approved by the International Conference on Indo-Chinese Refugees, held at Geneva, Switzerland, from 13 to 14 June 1989.

(2) For the purposes of this Subdivision, if, apart from this section:

(a) a colony, overseas territory or protectorate of a foreign country; or

(b) an overseas territory for the international relations of which a foreign country is responsible;

is not a country in its own right, the colony, territory or protectorate is taken to be a country in its own right.

91C Non-citizens covered by Subdivision

(1) This Subdivision applies to a non-citizen at a particular time if:

(a) the non-citizen is in Australia at that time; and

(b) at that time, the non-citizen is covered by:

(i) the CPA; or

(ii) an agreement, relating to persons seeking asylum, between Australia and a country that is, or countries that include a country that is, at that time, a safe third country in relation to the non-citizen (see section 91D); and

(c) the non-citizen is not excluded by the regulations from the application of this Subdivision.

(2) To avoid doubt, a country does not need to be prescribed as a safe third country at the time that the agreement referred to in subparagraph (1)(b)(ii) is made.

91D Safe third countries

(1) A country is a *safe third country* in relation to a non-citizen if:

(a) the country is prescribed as a safe third country in relation to the non-citizen, or in relation to a class of persons of which the non-citizen is a member; and

(b) the non-citizen has a prescribed connection with the country.

(2) Without limiting paragraph (1)(b), the regulations may provide that a person has a prescribed connection with a country if:

(a) the person is or was present in the country at a particular time or at any time during a particular period; or

(b) the person has a right to enter and reside in the country (however that right arose or is expressed).

(3) The Minister must, within 2 sitting days after a regulation under paragraph (1)(a) is laid before a House of the Parliament, cause to be laid before that House a statement, covering the country, or each of the countries, prescribed as a safe third country by the regulation, about:

(a) the compliance by the country, or each of the countries, with relevant international law concerning the protection of persons seeking asylum; and

(b) the meeting by the country, or each of the countries, of relevant human rights standards for the persons in relation to whom the country is prescribed as a safe third country; and

(c) the willingness of the country, or each of the countries, to allow any person in relation to whom the country is prescribed as a safe third country:

(i) to go to the country; and

(ii) to remain in the country during the period in which any claim by the person for asylum is determined; and

(iii) if the person is determined to be a refugee while in the country—to remain in the country until a durable solution relating to the permanent settlement of the person is found.

(4) A regulation made for the purposes of paragraph (1)(a) ceases to be in force at the end of 2 years after the regulation commences.

91E Non-citizens to which this Subdivision applies unable to make valid applications for certain visas

Despite any other provision of this Act, if this Subdivision applies to a non-citizen at a particular time and, at that time, the non-citizen applies, or purports to apply, for a protection visa then, subject to section 91F:

(a) if the non-citizen has not been immigration cleared at that time—neither that application nor any other application made by the non-citizen for a visa is a valid application; or

(b) if the non-citizen has been immigration cleared at that time—neither that application nor any other application made by the non-citizen for a protection visa is a valid application.

91F Minister may determine that section 91E does not apply to non-citizen

(1) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to a particular non-citizen, determine:

(a) that section 91E does not apply to an application for a visa made by the non-citizen in the period starting when the notice is given and ending at the end of the seventh working day after the day that the notice is given; or

(b) that section 91G does not apply to an application for a visa made by the non-citizen during the transitional period referred to in that section.

(2) The power under subsection (1) may only be exercised by the Minister personally.

(3) If the Minister makes a determination under subsection (1), he or she is to cause to be laid before each House of the Parliament a statement that:

(a) sets out the determination; and

(b) sets out the reasons for the determination, referring in particular to the Minister's reasons for thinking that his or her actions are in the public interest.

(4) A statement under subsection (3) is not to include:

(a) the name of the non-citizen; or

(b) any information that may identify the non-citizen; 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 matter concerned—the name of that other person or any information that may identify that other person.

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

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

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

(6) The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any non-citizen, whether he or she is requested to do so by the non-citizen or by any other person, or in any other circumstances.

91G Applications made before regulations take effect

(1) Subject to section 91F and subsection (3), if:

(a) this Subdivision applies to a non-citizen immediately after a regulation prescribing a country as a safe third country takes effect and did not apply to the non-citizen immediately before that time; and

(b) the regulation prescribes a day as the cut off day; and

(c) during the period (the *transitional period*) from the beginning of the cut off day until immediately before that regulation takes effect, the non-citizen made an application for a protection visa;

then:

(d) if the non-citizen had not been immigration cleared at the time of making the application—that application, and any other application made by the non-citizen for a visa made during the transitional period, ceases to be a valid application when the regulation takes effect; and

(e) if the non-citizen had been immigration cleared at the time of making the application—that application, and any other application made by the non-citizen for a protection visa made during the transitional period, ceases to be a valid application when the regulation takes effect; and

(f) on and after the regulation takes effect, this Act applies as if the non-citizen had applied for a protection visa immediately after the regulation takes effect.

(2) To avoid doubt:

(a) paragraphs (1)(d) and (e) apply even if an application referred to in the paragraph concerned, or a decision in relation to such an application, is the subject of a review by, or an appeal or application to, the Migration Review Tribunal, the Refugee Review Tribunal, the Administrative Appeals Tribunal, a Federal Court or any other body or court; and

(b) no visa may be granted to the non-citizen as a direct, or indirect, result of such an application.

(3) Subsection (1) does not apply in relation to a non-citizen who, before the regulation referred to in that subsection takes effect, has:

(a) been granted a substantive visa as a result of an application referred to in that subsection; or

(b) been determined under this Act to be a non-citizen who satisfies the criterion mentioned in subsection 36(2).

(4) The cut off day specified in the regulation must not be:

(a) before a day on which the Minister, by notice in the *Gazette*, announces that he or she intends that such a regulation will be made; or

(b) more than 6 months before the regulation takes effect.

...

Subdivision AK—Non-citizens with access to protection from third countries

91M Reason for this Subdivision

This Subdivision is enacted because the Parliament considers that a non-citizen who can avail himself or herself of protection from a third country, because of nationality or some other right to re-enter and reside in the third country, should seek protection from the third country instead of applying in Australia for a protection visa, or, in some cases, any other visa. Any such non-citizen who is an unlawful non-citizen will be subject to removal under Division 8.

Note: For protection visas, see section 36.

91N Non-citizens to whom this Subdivision applies

(1) This Subdivision applies to a non-citizen at a particular time if, at that time, the non-citizen is a national of 2 or more countries.

(2) This Subdivision also applies to a non-citizen at a particular time if, at that time:

(a) the non-citizen has a right to re-enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country (the ***available country***) apart from:

(i) Australia; or

(ii) a country of which the non-citizen is a national; or

(iii) if the non-citizen has no country of nationality—the country of which the non-citizen is an habitual resident; and

(b) the non-citizen has ever resided in the available country for a continuous period of at least 7 days or, if the regulations prescribe a longer continuous period, for at least that longer period; and

(c) a declaration by the Minister is in effect under subsection (3) in relation to the available country.

(3) The Minister may, after considering any advice received from the Office of the United Nations High Commissioner for Refugees:

(a) declare in writing that a specified country:

(i) provides access, for persons seeking protection, to effective procedures for assessing their need for protection; and

(ii) provides protection to persons to whom that country has protection obligations; and

(iii) meets relevant human rights standards for persons to whom that country has protection obligations; or

(b) in writing, revoke a declaration made under paragraph (a).

(4) A declaration made under paragraph (3)(a):

(a) takes effect when it is made by the Minister; and

(b) ceases to be in effect if and when it is revoked by the Minister under paragraph (3)(b).

(5) The Minister must cause a copy of a declaration, or of a revocation of a declaration, to be laid before each House of the Parliament within 2 sitting days of that House after the Minister makes the declaration or revokes the declaration.

Determining nationality

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

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

91P Non-citizens to whom this Subdivision applies are unable to make valid applications for certain visas

(1) Despite any other provision of this Act but subject to section 91Q, if:

(a) this Subdivision applies to a non-citizen at a particular time; and

(b) at that time, the non-citizen applies, or purports to apply, for a visa; and

(c) the non-citizen is in the migration zone and has not been immigration cleared at that time;

neither that application, nor any other application the non-citizen makes for a visa while he or she remains in the migration zone, is a valid application.

(2) Despite any other provision of this Act but subject to section 91Q, if:

(a) this Subdivision applies to a non-citizen at a particular time; and

(b) at that time, the non-citizen applies, or purports to apply, for a protection visa; and

(c) the non-citizen is in the migration zone and has been immigration cleared at that time;

neither that application, nor any other application made by the non-citizen for a protection visa while he or she remains in the migration zone, is a valid application.

91Q Minister may determine that section 91P does not apply to a non-citizen

(1) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to a particular non-citizen, determine that section 91P does not apply to an application for a visa made by the non-citizen in the period starting when the notice is given and ending at the end of the seventh working day after the day that the notice is given.

(2) For the purposes of subsection (1), the matters that the Minister may consider include information that raises the possibility that, although the non-citizen satisfies the description set out in subsection 91N(1) or

(2), the non-citizen might not be able to avail himself or herself of protection from the country, or any of the countries, by reference to which the non-citizen satisfies that description.

(3) The power under subsection (1) may only be exercised by the Minister personally.

(4) If the Minister makes a determination under subsection (1), he or she is to cause to be laid before each House of the Parliament a statement that:

(a) sets out the determination; and

(b) sets out the reasons for the determination, referring in particular to the Minister's reasons for thinking that his or her actions are in the public interest.

(5) A statement under subsection (4) is not to include:

(a) the name of the non-citizen; or

(b) any information that may identify the non-citizen; 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 matter concerned—the name of that other person or any information that may identify that other person.

(6) A statement under subsection (4) is to be laid before each House of the Parliament within 15 sitting days of that House after:

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

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

(7) The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any non-citizen, whether he or she is requested to do so by the non-citizen or by any other person, or in any other circumstances.

...

189 Detention of unlawful non-citizens

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

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

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

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

the officer may detain the person.

(3) If an officer knows or reasonably suspects that a person (other than a person referred to in subsection (3A)) in an excised offshore place is an unlawful non-citizen, the officer must detain the person.

(3A) If an officer knows or reasonably suspects that a person in a protected area:

(a) is a citizen of Papua New Guinea; and

(b) is an unlawful non-citizen;

the officer may detain the person.

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

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

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

the officer may detain the person.

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

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

...

196 Duration of detention

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

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

(aa) an officer begins to deal with the non-citizen under subsection 198AD(3); or

(b) he or she is deported under section 200; or

(c) he or she is granted a visa.

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

(3) To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than as referred to in paragraph (1)(a), (aa) or (b)) unless the non-citizen has been granted a visa.

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

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

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

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

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

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

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

(7) In this section:

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

...

Subdivision B—Residence determinations

197AA Persons to whom Subdivision applies

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

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

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

(2) A residence determination must:

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

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

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

197AC Effect of residence determination

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

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

(2) If:

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

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

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

Certain provisions do not apply to people covered by residence determinations

(3) Subsection (1):

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

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

What constitutes release from immigration detention?

(4) If:

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

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

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

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

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

Secretary must ensure section 256 complied with

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

197AD Revocation or variation of residence determination

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

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

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

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

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

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

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

197AF Minister to exercise powers personally

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

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

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

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

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

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

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

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

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

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

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

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

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

...

Subdivision A—Removal

198 Removal from Australia of unlawful non-citizens

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

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

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

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

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

(c) who either:

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

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

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

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

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

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

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

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

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

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

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

(a) is a detainee; and

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

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

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

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

(c) one of the following applies:

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

(iii) the visa cannot be granted; and

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

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

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

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

(c) either:

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

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

(d) either:

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

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

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

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

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

(c) either:

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

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

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

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

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

(c) either:

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

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

(d) either:

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

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

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

(11) This section does not apply to an unauthorised maritime arrival to whom section 198AD applies.

Subdivision B—Regional processing

198AA Reason for Subdivision

This Subdivision is enacted because the Parliament considers that:

(a) people smuggling, and its undesirable consequences including the resulting loss of life at sea, are major regional problems that need to be addressed; and

(b) unauthorised maritime arrivals, including unauthorised maritime arrivals in respect of whom Australia has or may have protection obligations under the Refugees Convention as amended by the Refugees Protocol, should be able to be taken to any country designated to be a regional processing country; and

(c) it is a matter for the Minister and Parliament to decide which countries should be designated as regional processing countries; and

(d) the designation of a country to be a regional processing country need not be determined by reference to the international obligations or domestic law of that country.

198AB Regional processing country

(1) The Minister may, by legislative instrument, designate that a country is a *regional processing country*.

(1A) A legislative instrument under subsection (1):

(a) may designate only one country; and

(b) must not provide that the designation ceases to have effect.

(1B) Despite subsection 12(1) of the *Legislative Instruments Act 2003*, a legislative instrument under subsection (1) of this section commences at the earlier of the following times:

(a) immediately after both Houses of the Parliament have passed a resolution approving the designation;

(b) immediately after both of the following apply:

(i) a copy of the designation has been laid before each House of the Parliament under section 198AC;

(ii) 5 sitting days of each House have passed since the copy was laid before that House without it passing a resolution disapproving the designation.

(2) The only condition for the exercise of the power under subsection (1) is that the Minister thinks that it is in the national interest to designate the country to be a regional processing country.

(3) In considering the national interest for the purposes of subsection (2), the Minister:

(a) must have regard to whether or not the country has given Australia any assurances to the effect that:

(i) the country will not expel or return a person taken to the country under section 198AD to another country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion; and

(ii) the country will make an assessment, or permit an assessment to be made, of whether or not a person taken to the country under that section is covered by the definition of *refugee* in Article 1A of the Refugees Convention as amended by the Refugees Protocol; and

(b) may have regard to any other matter which, in the opinion of the Minister, relates to the national interest.

(4) The assurances referred to in paragraph (3)(a) need not be legally binding.

(5) The power under subsection (1) may only be exercised by the Minister personally.

(6) If the Minister designates a country under subsection (1), the Minister may, by legislative instrument, revoke the designation.

(7) The rules of natural justice do not apply to the exercise of the power under subsection (1) or (6).

(9) In this section, *country* includes:

(a) a colony, overseas territory or protectorate of a foreign country; and

(b) an overseas territory for the international relations of which a foreign country is responsible.

198AC Documents to be laid before Parliament

(1) This section applies if the Minister designates a country to be a regional processing country under subsection 198AB(1).

(2) The Minister must cause to be laid before each House of the Parliament:

(a) a copy of the designation; and

(b) a statement of the Minister's reasons for thinking it is in the national interest to designate the country to be a regional processing country, referring in particular to any assurances of a kind referred to in paragraph 198AB(3)(a) that have been given by the country; and

(c) a copy of any written agreement between Australia and the country relating to the taking of persons to the country; and

(d) a statement about the Minister's consultations with the Office of the United Nations High Commissioner for Refugees in relation to the designation, including the nature of those consultations; and

(e) a summary of any advice received from that Office in relation to the designation; and

(f) a statement about any arrangements that are in place, or are to be put in place, in the country for the treatment of persons taken to the country.

(3) The Minister must comply with subsection (2) within 2 sitting days of each House of the Parliament after the day on which the designation is made.

(4) The sole purpose of laying the documents referred to in subsection (2) before the Parliament is to inform the Parliament of the matters referred to in the documents and nothing in the documents affects the validity of the designation. Similarly, the fact that some or all of those documents do not exist does not affect the validity of the designation.

(5) A failure to comply with this section does not affect the validity of the designation.

(6) In this section, *agreement* includes an agreement, arrangement or understanding:

(a) whether or not it is legally binding; and

(b) whether it is made before, on or after the commencement of this section.

198AD Taking unauthorised maritime arrivals to a regional processing country

(1) Subject to sections 198AE, 198AF and 198AG, this section applies to an unauthorised maritime arrival who is detained under section 189.

Note: For when this section applies to a transitory person, see section 198AH.

(2) An officer must, as soon as reasonably practicable, take an unauthorised maritime arrival to whom this section applies from Australia to a regional processing country.

Powers of an officer

(3) For the purposes of subsection (2) and without limiting that subsection, an officer may do any or all of the following things within or outside Australia:

(a) place the unauthorised maritime arrival on a vehicle or vessel;

(b) restrain the unauthorised maritime arrival on a vehicle or vessel;

(c) remove the unauthorised maritime arrival from:

(i) the place at which the unauthorised maritime arrival is detained; or

(ii) a vehicle or vessel;

(d) use such force as is necessary and reasonable.

(4) If, in the course of taking an unauthorised maritime arrival to a regional processing country, an officer considers that it is necessary to return the unauthorised maritime arrival to Australia:

(a) subsection (3) applies until the unauthorised maritime arrival is returned to Australia; and

(b) section 42 does not apply in relation to the unauthorised maritime arrival's return to Australia.

Ministerial direction

(5) If there are 2 or more regional processing countries, the Minister must, in writing, direct an officer to take an unauthorised maritime arrival, or a class of unauthorised maritime arrivals, under subsection (2) to the regional processing country specified by the Minister in the direction.

(6) If the Minister gives an officer a direction under subsection (5), the officer must comply with the direction.

(7) The duty under subsection (5) may only be performed by the Minister personally.

(8) The only condition for the performance of the duty under subsection (5) is that the Minister thinks that it is in the public interest to direct the officer to take an unauthorised maritime arrival, or a class of unauthorised maritime arrivals, under subsection (2) to the regional processing country specified by the Minister in the direction.

(9) The rules of natural justice do not apply to the performance of the duty under subsection (5).

(10) A direction under subsection (5) is not a legislative instrument.

Not in immigration detention

(11) An unauthorised maritime arrival who is being dealt with under subsection (3) is taken not to be in *immigration detention* (as defined in subsection 5(1)).

Meaning of officer

(12) In this section, *officer* means an officer within the meaning of section 5, and includes a member of the Australian Defence Force.

198AE Ministerial determination that section 198AD does not apply

(1) If the Minister thinks that it is in the public interest to do so, the Minister may, in writing, determine that section 198AD does not apply to an unauthorised maritime arrival.

Note: For specification by class, see the *Acts Interpretation Act 1901*.

(1A) The Minister may, in writing, vary or revoke a determination made under subsection (1) if the Minister thinks that it is in the public interest to do so.

(2) The power under subsection (1) or (1A) may only be exercised by the Minister personally.

(3) The rules of natural justice do not apply to an exercise of the power under subsection (1) or (1A).

(4) If the Minister makes a determination under subsection (1) or varies or revokes a determination under subsection (1A), the Minister must cause to be laid before each House of the Parliament a statement that:

(a) sets out the determination, the determination as varied or the instrument of revocation; and

(b) sets out the reasons for the determination, variation or revocation, referring in particular to the Minister's reasons for thinking that the Minister's actions are in the public interest.

(5) A statement under subsection (4) must not include:

(a) the name of the unauthorised maritime arrival; or

(b) any information that may identify the unauthorised maritime arrival; 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 matter concerned—the name of that other person or any information that may identify that other person.

(6) A statement under subsection (4) must be laid before each House of the Parliament within 15 sitting days of that House after:

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

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

(7) The Minister does not have a duty to consider whether to exercise the power under subsection (1) or (1A) in respect of any unauthorised maritime arrival, whether the Minister is requested to do so by the unauthorised maritime arrival or by any other person, or in any other circumstances.

(8) An instrument under subsection (1) or (1A) is not a legislative instrument.

198AF No regional processing country

Section 198AD does not apply to an unauthorised maritime arrival if there is no regional processing country.

198AG Non-acceptance by regional processing country

Section 198AD does not apply to an unauthorised maritime arrival if the regional processing country, or each regional processing country (if there is more than one such country), has advised an officer, in writing, that the country will not accept the unauthorised maritime arrival.

Note: For specification by class, see the *Acts Interpretation Act 1901*.

198AH Application of section 198AD to certain transitory persons

(1) Section 198AD applies, subject to sections 198AE, 198AF and 198AG, to a transitory person if, and only if:

(a) the person is an unauthorised maritime arrival who is brought to Australia from a regional processing country under section 198B for a temporary purpose; and

(b) the person is detained under section 189; and

(c) the person no longer needs to be in Australia for the temporary purpose (whether or not the purpose has been achieved).

(2) Subsection (1) of this section applies whether or not the transitory person has been assessed to be covered by the definition of *refugee* in Article 1A of the Refugees Convention as amended by the Refugees Protocol.

198AI Ministerial report

The Minister must, as soon as practicable after 30 June in each year, cause to be laid before each House of Parliament a report setting out:

(a) the activities conducted under the Bali Process during the year ending on 30 June; and

(b) the steps taken in relation to people smuggling, trafficking in persons and related transnational crime to support the Regional Cooperation Framework during the year ending on 30 June; and

(c) the progress made in relation to people smuggling, trafficking in persons and related transnational crime under the Regional Cooperation Framework during the year ending on 30 June.

198AJ Reports about unauthorised maritime arrivals

(1) The Minister must cause to be laid before each House of the Parliament, within 15 sitting days of that House after the end of a financial year, a report on the following:

(a) arrangements made by regional processing countries during the financial year for unauthorised maritime arrivals who make claims for protection under the Refugees Convention as amended by the Refugees Protocol, including arrangements for:

(i) assessing those claims in those countries; and

(ii) the accommodation, health care and education of those unauthorised maritime arrivals in those countries;

(b) the number of those claims assessed in those countries in the financial year;

(c) the number of unauthorised maritime arrivals determined in those countries in the financial year to be covered by the definition of *refugee* in Article 1A of the Refugees Convention as amended by the Refugees Protocol.

(2) However, a report under this section need deal with a particular regional processing country in accordance with subsection (1) only so far as information provided by the country makes it reasonably practicable for the report to do so.

(3) A report under this section must not include:

(a) the name of a person who is or was an unauthorised maritime arrival; or

(b) any information that may identify such a person; or

(c) the name of any other person connected in any way with any person covered by paragraph (a); or

(d) any information that may identify that other person.

...

199 Dependants of removed non-citizens

(1) If:

(a) an officer removes, or is about to remove, an unlawful non-citizen; and

(b) the spouse or de facto partner of that non-citizen requests an officer to also be removed from Australia;

an officer may remove the spouse or de facto partner as soon as reasonably practicable.

(2) If:

(a) an officer removes, or is about to remove an unlawful non-citizen; and

(b) the spouse or de facto partner of that non-citizen requests an officer to also be removed from Australia with a dependent child or children of that non-citizen;

an officer may remove the spouse or de facto partner and dependent child or children as soon as reasonably practicable.

(3) If:

(a) an officer removes, or is about to remove, an unlawful non-citizen; and

(b) that non-citizen requests an officer to remove a dependent child or children of the non-citizen from Australia;

an officer may remove the dependent child or children as soon as reasonably practicable.

(4) In paragraphs (1)(a), (2)(a) and (3)(a), a reference to remove includes a reference to take to a regional processing country.

200 Deportation of certain non-citizens

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

...

500 Review of decision

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

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

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

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

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

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

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

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

(a) the person is an Australian citizen; or

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

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

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

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

(b) a decision under section 501;

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

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

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

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

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

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

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

(d) if:

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

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

the seriousness of that offence; and

(e) if:

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

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

the seriousness of that offence;

and must not have regard to any other matters.

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

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

(a) the Tribunal; or

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

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

(d) the Federal Circuit Court of Australia or a Judge of that Court under section 44A of that Act.

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

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

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

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

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

(6D) If:

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

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

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

(6E) If:

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

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

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

(6F) If:

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

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

then:

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

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

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

(iii) contains non-disclosable information; and

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

(6G) If:

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

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

the Tribunal must not:

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

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

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

(6H) If:

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

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

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

(6J) If:

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

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

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

(6K) If:

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

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

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

then:

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

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

(6L) If:

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

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

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

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

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

(8) In this section:

business day means a day that is not:

(a) a Saturday; or

(b) a Sunday; or

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

(d) a public holiday in the place concerned.

...

501 Refusal or cancellation of visa on character grounds

Decision of Minister or delegate—natural justice applies

(1) The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.

Note: *Character test* is defined by subsection (6).

(2) The Minister may cancel a visa that has been granted to a person if:

(a) the Minister reasonably suspects that the person does not pass the character test; and

(b) the person does not satisfy the Minister that the person passes the character test.

Decision of Minister—natural justice does not apply

(3) The Minister may:

(a) refuse to grant a visa to a person; or

(b) cancel a visa that has been granted to a person;

if:

(c) the Minister reasonably suspects that the person does not pass the character test; and

(d) the Minister is satisfied that the refusal or cancellation is in the national interest.

(4) The power under subsection (3) may only be exercised by the Minister personally.

(5) The rules of natural justice, and the code of procedure set out in Subdivision AB of Division 3 of Part 2, do not apply to a decision under subsection (3).

Character test

(6) For the purposes of this section, a person does not pass the *character test* if:

(a) the person has a substantial criminal record (as defined by subsection (7)); or

(aa) the person has been convicted of an offence that was committed:

(i) while the person was in immigration detention; or

(ii) during an escape by the person from immigration detention; or

(iii) after the person escaped from immigration detention but before the person was taken into immigration detention again; or

(ab) the person has been convicted of an offence against section 197A; or

(b) the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct; or

(c) having regard to either or both of the following:

(i) the person's past and present criminal conduct;

(ii) the person's past and present general conduct;

the person is not of good character; or

(d) in the event the person were allowed to enter or to remain in Australia, there is a significant risk that the person would:

(i) engage in criminal conduct in Australia; or

(ii) harass, molest, intimidate or stalk another person in Australia; or

(iii) vilify a segment of the Australian community; or

(iv) incite discord in the Australian community or in a segment of that community; or

(v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way.

Otherwise, the person passes the *character test*.

Substantial criminal record

(7) For the purposes of the character test, a person has a *substantial criminal record* if:

(a) the person has been sentenced to death; or

(b) the person has been sentenced to imprisonment for life; or

(c) the person has been sentenced to a term of imprisonment of 12 months or more; or

(d) the person has been sentenced to 2 or more terms of imprisonment (whether on one or more occasions), where the total of those terms is 2 years or more; or

(e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution.

Periodic detention

(8) For the purposes of the character test, if a person has been sentenced to periodic detention, the person's term of imprisonment is taken to be equal to the number of days the person is required under that sentence to spend in detention.

Residential schemes or programs

(9) For the purposes of the character test, if a person has been convicted of an offence and the court orders the person to participate in:

(a) a residential drug rehabilitation scheme; or

(b) a residential program for the mentally ill;

the person is taken to have been sentenced to a term of imprisonment equal to the number of days the person is required to participate in the scheme or program.

Pardons etc.

(10) For the purposes of the character test, a sentence imposed on a person, or the conviction of a person for an offence, is to be disregarded if:

(a) the conviction concerned has been quashed or otherwise nullified; or

(b) the person has been pardoned in relation to the conviction concerned.

Conduct amounting to harassment or molestation

(11) For the purposes of the character test, conduct may amount to harassment or molestation of a person even though:

(a) it does not involve violence, or threatened violence, to the person; or

(b) it consists only of damage, or threatened damage, to property belonging to, in the possession of, or used by, the person.

Definitions

(12) In this section:

court includes a court martial or similar military tribunal.

imprisonment includes any form of punitive detention in a facility or institution.

sentence includes any form of determination of the punishment for an offence.

Note 1: *Visa* is defined by section 5 and includes, but is not limited to, a protection visa.

Note 2: For notification of decisions under subsection (1) or (2), see section 501G.

Note 3: For notification of decisions under subsection (3), see section 501C.

Australian Security Intelligence Organisation Act 1979 (Cth)

4 Definitions

In this Act, unless the contrary intention appears:

security means:

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

(i) espionage;

(ii) sabotage;

(iii) politically motivated violence;

(iv) promotion of communal violence;

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

(vi) acts of foreign interference;

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

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

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