IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN:

No S138 of 2012

PLAINTIFF S138/2012

Plaintiff

DIRECTOR GENERAL OF SECURITY

First Defendant

MINISTER FOR IMMIGRATION AND CITIZENSHIP

Second Defendant

COMMONWEALTH OF AUSTRALIA

Third Defendant

DIRECTOR, DETENTION OPERATIONS, NSW/ACT

Fourth Defendant

SECRETARY, DEPARTMENT OF IMMIGRATION AND CITIZENSHIP

Fifth Defendant

DEFENDANTS' SUBMISSIONS

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I. PUBLISHABLE ON THE INTERNET

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

II. STATEMENT OF THE ISSUES

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

2.1. Did Australian Security Intelligence Organisation (**ASIO**) comply with the requirements of procedural fairness when issuing an adverse security assessment (**ASA**) in respect of the Plaintiff (**Question 1**)?

2.2. Did the Secretary make an error of law by:

(a) failing to comply with the requirements if procedural fairness; or

(b) relying on public interest criterion (**PIC**) 4002,

in not referring the Plaintiff's case to the Minister for consideration of the exercise of the Minister's power under s 46A(2) of the Act?

And, if the answer is "yes', what relief should follow (**Questions 2 and 3**)?

2.3. Do ss 189 and 196 of the *Migration Act 1958* (Cth) (**the Act**), properly construed, require the Commonwealth to detain the Plaintiff, being an unlawful non-citizen who has been assessed by ASIO to be a risk to Australia's national security (**Question 4**)?

2.4. If so, are ss 189 and 196 of the Act invalid to that extent, with the result that the Plaintiff is required to be released into the Australian community (**Question 5**)?

III. SECTION 78B NOTICES

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

IV. MATERIAL FACTS

4. The facts and documents necessary to enable the Court to decide the questions reserved for the opinion of the Full Court are contained in the Special Case filed 15 February 2013 (**the Special Case**), together with such supplement as may be sought on motion by way of updating of events since 15 February 2013.

V. APPLICABLE LEGISLATION

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

VI. ARGUMENT

(A) INTRODUCTION

6. For reasons that are further developed below, the issues raised in this case differ in various important respects from the issues that were considered by the Court in *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 (***Plaintiff M47***) and in *Al-Kateb v Godwin* (2004) 219 CLR 562 (***Al-Kateb***).

7. What distinguishes this case from *Plaintiff M47* is that the present Plaintiff is an "offshore entry person" (now called an "unauthorised maritime arrival"[1]) who, absent a decision by the Minister to exercise his broad discretionary power under s 46A(2) to "lift the bar", is unable to make a valid application for a visa. Accordingly, PIC 4002, which in *Plaintiff M47* this Court held to be invalidly prescribed as a criterion for a protection visa, has no direct application to the Plaintiff's case. Unlike Plaintiff M47, this Plaintiff has no right to be granted a visa if he meets the criteria, because he has no right to apply for a visa at all. Even if (which is denied) the Secretary erred at some time in the past by not referring the Plaintiff's case to the Minister for consideration under s 46A(2) by reason of a false presumption as to the validity of PIC 4002, it would be pointless to grant relief in respect of such an error in circumstances where the Minister has clearly indicated (in a policy pre-dating *Plaintiff M47*) that he does not wish to consider exercising his power under s 46A(2) in any case where a person has received an ASA.

8. What distinguishes this case from *Al-Kateb* is: first, the Plaintiff has been refused admission into the Australian community on the basis that he has been assessed to be a risk to security; second, it is not the case that there is no real likelihood or prospect of the Plaintiff's removal.

(B) QUESTION 1 – PROCEDURAL FAIRNESS

9. While the Plaintiff seeks certiorari to quash the ASA [SCB7], and the first question in the Special Case concerns the validity of the ASA, in his written submissions the Plaintiff treats the question of whether the Director-General of Security provided procedural fairness to him in connection with the ASA as "subsumed into"[2] the second question in the Special Case, concerning whether the Department of Immigration and Citizenship (**the Department**) denied him procedural fairness in making its recommendation to the Minister for the purposes of s 46A(2) of the Act.

10. That approach invites error. It treats the validity of two separate administrative decisions under separate legislation as if they were interchangeable, when plainly they are not. For the reasons developed below, the question whether the ASA is invalid because of a denial of procedural fairness must be answered

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1 The *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth) amended the Act with effect from 1 June 2013 such that the Plaintiff's status is now described as "unauthorised maritime arrival" rather than "offshore entry person". The same bar in s 46A(1) applies to prevent the Plaintiff, as an unauthorised maritime arrival, from making a valid application for a visa. Given that the Special Case and the Plaintiff's submissions refer to the Plaintiff as an "offshore entry person", the Defendants maintain that description for the purpose of these submissions.

2 Plaintiff's submissions at [2(a)]. See also at [30].

having regard to the terms of the *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**) and the actions of the officers who prepared the ASA. It cannot be affected by the actions (or omissions) of persons who are not officers of ASIO, being actions or omissions at a time after the ASA has been made, in the exercise (or non-exercise) of a power under a different Act.

11. The Defendants accept that ASIO was required to afford the Plaintiff procedural fairness in issuing an ASA in respect of him to the Department. The issues in this case are the content of that obligation, and whether ASIO satisfied it.

12. There are no universal rules as to the content of the duty to afford procedural fairness.[3] For that reason, general statements as to what procedural fairness "ordinarily" requires are of limited assistance in this case. While procedural fairness may "ordinarily" require the Plaintiff to be given the opportunity to know, and be put in a position to answer, the allegations and information which it is proposed will be relied on in making a decision that will affect his rights,[4] the direct application of such statements to ASIO's function in furnishing security assessments will lead to error. The content of ASIO's procedural fairness obligations must be determined:

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

12.2. *secondly*, by considering the "nature of the inquiry, the subject matter, and the rules under which the decision-maker is acting ... [The procedure must be fair considered] in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect".[6]

The statutory framework

13. Section 17(1)(c) of the ASIO Act provides that the functions of ASIO include "to advise Ministers and authorities of the Commonwealth in respect of matters relating to security". Section 37(1) then provides:

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

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

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

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3 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 260 [18]; *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 (***VEAL***) at 99 [25]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 228 CLR 152 at 16 [48] (McHugh and Gummow JJ).

4 Plaintiff's submissions at [26].

5 *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 at 504 (Kitto J). See also *Plaintiff M47/2012* at 1472 [498] (Bell J).

6 *Kioa v West* (1985) 159 CLR 550 at 584-585.

15. The word "security" is defined in s 4 of the ASIO Act. Many of the terms used in that definition are themselves further defined in s 4.[7]

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

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

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

18. The Minister's function of granting and refusing visas under s 65 of the Act therefore constitutes "prescribed administrative action", as does the Minister's function of considering whether to exercise any one or more of his various "dispensing" powers (including his power in s 46A to "lift the bar" and enable an offshore entry person to make a valid application for a visa).[8] A recommendation by ASIO that a visa not be granted, or that these powers not be exercised, is an "adverse security assessment".

19. Thus, while the ASIO Act does not exclude the rules of procedural fairness in relation to security assessments,[9] close attention to the terms of that Act remains necessary in order to determine the content of those rules in a given case.

20. The Plaintiff's submissions do not address the ASIO Act explicitly. Several provisions in that Act strongly suggest that the content of procedural fairness is limited in relation to ASAs concerning the exercise of powers in relation to non-citizens who do not hold permanent visas. Of most relevance:

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

20.2. Section 38(1) of the ASIO Act has the effect that, generally, the agency or authority that receives an adverse or qualified security assessment is required to give the subject of that assessment a copy of the statement provided under s 37(2). However, a copy of that statement is not required to be given to the subject of the assessment if the Attorney-General has certified that he or she is satisfied that the disclosure of that statement or part of that statement "would be prejudicial to the interests of security" (s 38(2)(b)).

20.3. Section 38(2)(a) provides that the Attorney-General may certify that the withholding of notice to a person of the making of a security assessment in respect of the person is essential to the security of the nation. If such a certificate is issued, s 38(4) lifts the requirement to give notice of a security assessment under s 38(1). These provisions assume that a security assessment can

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7 See the definitions of the terms "politically motivated violence", "promotion of communal violence" and "acts of foreign interference".

8 Cf. *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 86 ALJR 1019 (***Plaintiff S10***) at 1026-1027 [28] and [30] (French CJ and Kiefel J) and 1032 [54] and [57] and 1037 [86] (Gummow, Hayne, Crennan and Bell JJ) and 1040-1042 [108]-[118].

9 *Leghaei v Director-General of Security* (2007) 241 ALR 141 (***Leghaei***) at 145 [43]. (Special leave refused in *Leghaei v Director-General of Security* [2007] HCA Trans 655.)

properly be undertaken without the subject of the assessment being notified of that fact (let alone being notified of the issues in the assessment). If procedural fairness required (or, at least, invariably required) such notice to be given, that would render nugatory the power in s 38(2)(a), because in order to comply with the requirements of procedural fairness, ASIO would need to have informed the subject of the assessment that the assessment was undertaken, even in a case where s 38(1) did not impose any such requirement because the Attorney-General had certified that he or she was satisfied that the withholding of notice was essential to national security.

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

20.5. The terms of s 36(b), which reflect recommendations made by the Hope Royal Commission,[10] reveal a deliberate decision by Parliament that non-citizens in the position of the Plaintiff should not be given information as to the grounds for the assessment or the information relied upon in making that assessment, even when the provision of that information would not be prejudicial to the requirements of security. That decision necessarily informs the content of the obligation to afford procedural fairness when ASIO exercises its power to issue a security assessment with respect to such persons,[11] for it would be inconsistent with the statutory scheme if procedural fairness required information to be disclosed to non-citizens in the position of the Plaintiff of a kind that Parliament has provided need not be disclosed.

The function and effect of furnishing a security assessment

21. Security assessments are issued for a wide range of different purposes, and the consequences of such assessments are variable. In the present case, at the time that ASIO issued the ASA, the Plaintiff was an offshore entry person held in detention.[12] He was precluded by s 46A(1) from making a valid application for a visa. However, the Minister had broad discretionary powers in s 46A(2) and 195A to permit the Plaintiff to apply for a visa, or to grant the Plaintiff a visa.[13] And the Plaintiff had, by seeking a refugee status assessment, effectively requested that such a dispensing power be exercised in his favour.[14]

22. It should be inferred from directions that the Minister had previously given to the Department that he wished a security assessment to be undertaken before he considered whether to exercise his power in s 46A(2) in respect of a person in the position of the Plaintiff, and that he did not wish any cases to be

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10 See *Plaintiff M47* at 1425 [250] fn 229 (Heydon J). The Second Reading speech for the *Australian Security Intelligence Organization Bill 1979* referred to Mr Justice Hope's recommendations, and said that the legislation based on them was "the first attempt, at least in a common law country, to provide a comprehensive statutory framework regulating the making of security assessments": Hansard (House of Representatives) 22 May 1979, p 215. See also Hope Royal Commission, Second Report at [134], stating "The understandable desire of individuals to have all the rules of natural justice applied to security appeals must be denied to some extent, unfortunate though that may be". The class of persons excluded by s 36(b) was narrowed somewhat by the *Australian Security Intelligence Organization Amendment Bill 1986* (Cth).

11 *Leghaei* at 144 [19].

12 Special Case Book (**SCB**) at 13 [11]-[12].

13 *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 (***Plaintiff M61***).

14 SCB at 13 [13]. See also *Plaintiff S10* at 1027 [31].

referred to him for consideration of the possible exercise of such a power where the security assessment was adverse.[15]

23. It may be accepted that a consequence of ASIO issuing an ASA was that the Plaintiff would, subject to any reconsideration by ASIO or to a decision by the Minister to lift the bar or grant a visa despite the ASA, *remain* an unlawful non-citizen liable to detention and removal as soon as reasonably practicable. (The period for which the Plaintiff might remain in detention – or uncertainty as to what such period might be – cannot fairly be imputed to ASIO.) The impact of the ASA on liberty is a factor that tends to increase the content of ASIO's duty of procedural fairness to the Plaintiff.[16] But it does not result in some rule that disclosure is required.[17] Any such rule would be contrary to the scheme of the ASIO Act.

24. Further, there are four factors that tend to reduce the content of procedural fairness in relation to ASAs. Even having regard to the effect of the security assessment process on the Plaintiff's detention, these factors have an important bearing on the content of the obligation to afford procedural fairness.

25. First, and most importantly, ASIO's functions under s 17 of the ASIO Act revolve around the definition of "security" (s 4). The terms of that definition reveal that much of ASIO's work is necessarily secret. As Brennan J accepted in *Church of Scientology v Woodward*,[18] "[t]he secrecy of the work of an intelligence organization which is to counter espionage, sabotage, etc. is essential to national security". More recently, in *Thomas v Mowbray*,[19] Hayne J said "The desirability of keeping intelligence material secret is self-evident. Often it will be essential."

26. Accordingly, the starting point in determining ASIO's obligations to disclose information should be that intelligence information is ordinarily kept secret. Any unqualified proposition to the effect that procedural fairness requires ASIO to inform the person who is subject to an ASA of the "substance of the allegations against the person, and the grounds of concern, such that the person has a meaningful opportunity to answer the case against him or her"[20] – even if that proposition is confined to cases where liberty is at stake – would require ASIO to expose its assessments of Australia's national security vulnerabilities (including gaps in ASIO's knowledge, or information from which inferences could be drawn as to its sources or methodology) to the very people (and the groups with whom they are associated) who are most likely to exploit that information to damage Australia's national security.[21] As Sundberg J said in *Parkin v O'Sullivan*[22] in the context of a public interest immunity claim:

> [S]ecurity assessments are the key mechanism by which ASIO advises government that particular individuals pose a threat to national security. If documents falling within this class were required to be produced, ASIO would be giving information about its knowledge, assessments and methodology to the very people to whom it is most important that national security information is not disclosed: cf *Alister* 154 CLR at 454-455 per Brennan J...[T]he relevant class is "one of the classes of documents held by ASIO that require the greatest level of protection" first, because of the inherent sensitivity of the information that is routinely contained in such documents, and second, because of the detrimental consequences in terms

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15 SCB at 13 [10], 129.
16 *Plaintiff M47* at [497] (Bell J). See also *Suresh v Canada* [2002] 1 SCR 3 (***Suresh***) at [118]; *Charkaoui v Canada* (2007) 1 SCR 350 at [60].
17 Cf. Plaintiff's submissions at [29].
18 *Church of Scientology v Woodward* (1980) 154 CLR 25 at 76-77, quoted with approval in *Leghaei* at 147 [52]-[53].
19 (2007) 233 CLR 307 at 477 [510].
20 Cf. Plaintiff's submissions at [29].
21 *Alister v R* (1984) 154 CLR 404 at 454-455 (Brennan J).
22 (2009) 260 ALR 503 at 511 [33]. See also *Sagar v O'Sullivan* (2011) 193 FCR 311 (***Sagar v O'Sullivan***) at 320 [46]-[47].

of the quality of decision-making that would be likely to follow if ASIO officers were forced to omit particular kinds of information from Final Appreciations and related briefing notes due to the risk that those documents will become available to persons the subject of security assessments.

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

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

29. The second matter that tends to reduce the content of procedural fairness in relation to ASAs is that the "issues" involved in such assessment are fluid, and they evolve as information is obtained and evaluated against other intelligence holdings or material obtained through further investigations. Except at a high level of generality, the "issues" involved in a security assessment cannot meaningfully be separated from the mental processes involved in evaluating and forming provisional views on the information obtained during the assessment process. Yet procedural fairness does not require a decision-maker to inform the affected person of his or her thought processes or preliminary conclusions, or of his or her assessment or evaluation of any material supplied by the affected person.[28]

30. Consistently with that submission, in *Plaintiff M47* Kiefel J (with whom Crennan J agreed on this point), in rejecting an argument that ASIO denied procedural fairness to the subject of an ASA by failing to put specific allegations to him concerning his involvement with and support of the Liberation Tigers of Tamil Ealam (**the LTTE**), said that "these matters were largely in the nature of opinions formed by the officers and as such were not required to be put before the plaintiff for comment".[29]

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23 See, e.g., *Leghaei* at 146 [48]; *Sagar v O'Sullivan* at 324-325 [72]; *Amer v Minister for Immigration, Local Government and Ethnic Affairs* (FCA, Lockhart J, 19 December 1989, unreported) at 1, 9-10.

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

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

26 (1994) 49 FCR 576 (***Alphaone***).

27 *Alphaone* at 592.

28 *Alphaone* at 591, endorsed in *Re Minister for Immigration and Multicultural Affairs and Indigenous; Ex parte Palme* (2003) 216 CLR 212 at 219 [22] (Gleeson CJ, Gummow and Heydon JJ).

29 *Plaintiff M47* at [413] (Kiefel J, with Crennan J agreeing at [380]).

31. Third, "by its very nature, intelligence material will often require evaluative judgments to be made about the weight to be given to diffuse, fragmentary and even conflicting pieces of intelligence".[30] Those judgments involve a synthesis that may make it impossible to isolate for comment a set of discrete "issues" upon which the decision to issue the assessment turns.[31] Indeed, to require the identification of "issues" to the subject of the assessment would inappropriately compartmentalise and limit the decision-making process. This is another factor that suggests that, to the extent that any "issues" can be isolated, that can usefully be done only at a broad level of generality.

32. Finally, the security assessment process is an investigatory process. It follows that ASIO is never "obliged to put, as an adversary in adversarial proceedings might be bound to do, in respect of each and every key matter, an assertion of apparent falsity or unreliability."[32]

The content of procedural fairness

33. If not for the impact of the ASA on the Plaintiff's liberty, then the limiting factors outlined above would suggest that procedural fairness required little, if any, disclosure to the Plaintiff of the basis for an ASA. However, as noted above, the Defendants accept that ASIO's obligation to afford procedural fairness has some content.

34. In light of all of these factors, it is submitted that ASIO will exceed the minimum requirements of procedural fairness in relation to persons in the position of the Plaintiff if it conducts an interview with the person during which it:

34.1. informs the person that he or she is being assessed for security purposes in connection with his or her request for admission to Australia; and

34.2. except insofar as security requires otherwise:

(a) directs the person's attention to the general issue of concern to ASIO, and gives the subject an opportunity to advance whatever evidence or material he or she thinks is relevant to that issue; and

(b) gives the person an opportunity to address any adverse information, personal to the subject, that is credible, relevant and significant.

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

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30 *Thomas v Mowbray* (2007) 233 CLR 307 at 477 [510]. See also *Suresh* at [31] and [85].

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

32 *Plaintiff M47* at 1407 [139] (Gummow J); *Abebe v Commonwealth* (1999) 197 CLR 510 at 576 [187] (Gummow and Hayne JJ, with whom Gaudron J at 546 [90] and Kirby J (584 [212]) agreed) and 608 [295] (Callinan J); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 115 [76] (Gaudron and Gummow JJ).

No denial of procedural fairness occurred

36. It is clear that ASIO informed the Plaintiff that he was being assessed for the purpose of assessing his risk to Australia's national security (including specifically whether the Plaintiff might promote violence in Australia, or engage in terrorism).[33] Moreover, ASIO informed the Plaintiff that his past conduct and associations, and his truthfulness about these matters during the interview process, might be relevant to that assessment.[34]

37. The general issue of concern to ASIO related to the extent and level of the Plaintiff's involvement with the LTTE, including in particular:[35]

37.1. whether the Plaintiff was a member of the LTTE;

37.2. whether the Plaintiff was untruthful, withheld information or misrepresented components of his past in order to avoid revealing activities of security concern;

37.3. whether the Plaintiff remains ideologically supportive of the LTTE and its use of violence to achieve political goals, and whether he would continue to support the LTTE if admitted to Australia; and

37.4. whether the Plaintiff would engage in acts prejudicial to Australia's security if admitted to Australia.

38. ASIO conducted two lengthy interviews with the Plaintiff, during which the Plaintiff was given ample opportunity to discuss his association with, and attitude toward, the LTTE.[36] In particular, the Plaintiff was specifically questioned about – and given specific opportunity to provide further information in relation to – the following matters:

38.1. whether he supports the LTTE and their objectives, or is associated with or otherwise "important to" the LTTE;[37]

38.2. whether (and, if so, why) Sri Lankan authorities were interested in him around the time that the war ended;[38] and

38.3. whether, during the interview process, he deliberately withheld information regarding his activities of security concern, and provided mendacious information.[39]

39. The Plaintiff was afforded a break in the second interview.[40] He was given an opportunity to clarify inconsistent or unclear statements, and otherwise to explain statements about which the ASIO officers expressed some doubt.[41] He was invited to ask questions about the assessment process.[42] Thus, the

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33 SCB 193-194, 266.
34 SCB 266-269, 271.
35 SCB 275 [4], 279 [4].
36 Cf. *Plaintiff M47* at [1407 [142] (Gummow J), 1424 [248] (Heydon J), 1458 [415] (Kiefel J, with whom Crennan J agreed at 1452 [280]), 1473 [501] (Bell J).
37 SCB 210-216, 229-232, 255, 260-269.
38 SCB 224, 227-233, 243-244, 256, 267-269.
39 SCB 232, 267-269.
40 SCB 240-241. Cf. *Plaintiff M47* at 1407 [142] (Gummow J), 1425 [252] (Heydon J), 1458 [415] (Kiefel J, with whom Crennan J agreed at 1452 [280])
41 SCB 213, 217, 218, 220-221, 224, 228-231, 236-239, 241, 244, 248, 256, 267. Cf. *Plaintiff M47* at 1407-1408 [143] (Gummow J), 1425 [252] (Heydon J).

Plaintiff was given the opportunity to deal with "matters with which he can reasonably be expected to deal, and which might assist his or her case", consistently with the guiding principle of fairness in all the circumstances.[43] The Plaintiff has not identified what additional material he might have adduced had ASIO put the bases for its adverse assessment to him in the terms as disclosed in the Director-General's affidavit of 6 February 2013.[44]

40. Procedural fairness does not require the disclosure of information if that disclosure would harm national security.[45] In this case, the Director-General has sworn that:[46]

40.1. the Plaintiff's attention was directed to the issues of concern to ASIO, and the Plaintiff was given an opportunity to respond to those issues, to the extent that this was possible consistently with the requirements of security; and

40.2. to the extent that ASIO relied on adverse information that was not disclosed to the Plaintiff during the interview, ASIO could not have revealed that information to the Plaintiff without causing significant damage to security.

41. The authorities establish that great weight should be given to such an affidavit.[47] Contrary to those authorities, the Plaintiff asks that the Court give the Director-General's evidence no weight.[48] There is no basis for that submission: the Director-General's evidence in his first affidavit set out at paragraph 40 above is not inconsistent with his later affidavit; the Director-General did not in his later affidavit resile from that evidence; and it is wrong to characterise the second affidavit as revealing a "very different view" as to what can be disclosed consistently with security. Further, the Plaintiff agreed to the two affidavits being placed before the Court as part of the Special Case without making any application to cross-examine the Director-General on those affidavits. His evidence is therefore uncontradicted.

42. Notwithstanding the above, the Plaintiff asserts that he was denied procedural fairness because ASIO did not inform him "in any meaningful way about the allegations against him ... or the information which ASIO proposed to rely upon".[49] However, the facts in the Special Case show that the Plaintiff's attention was directed to the general issues upon which the adverse assessment turned and that, to the extent that ASIO relied on undisclosed adverse information, it was not possible to provide that information without causing significant damage to security.

43. There was no denial of procedural fairness in this case. Question 1 should be answered "No".

(C) QUESTIONS 2 AND 3 – NON-REFERRAL OF CASE TO MINISTER

44. On or about 6 April 2010, the Department notified the Plaintiff by letter that:[50]

44.1. ASIO had assessed him to be directly (or indirectly) a risk to security, within the meaning of s 4 of the ASIO Act;

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42 SCB 193-194, 270-271.
43 *Kioa* at 613-614 (Brennan J).
44 Cf. *Plaintiff M47* at 1473 [502] (Bell J), and likewise at [251] (Heydon J). Cf. Plaintiff's submissions at [31].
45 *Plaintiff M47* at [250] (Heydon J); *Leghaei* at 146 [48]; *Sagar v O'Sullivan* at 324-325 [72].
46 SCB 275-276 [5].
47 The relevant authorities are collected in *Leghaei* at [56]-[58], [62].
48 Plaintiff's submission at [32]-[33].
49 Plaintiff's submissions at [27].
50 SCB 298-299.

44.2. a criterion that must be satisfied by an applicant for a permanent visa is PIC 4002, which states that "[t]he applicant is not assessed by [ASIO] to be directly or indirectly a risk to security, within the meaning of section 4 of the [ASIO Act]"; and

44.3. as a result of the ASA, he was "not eligible" for the grant of a permanent visa to remain in Australia.

45. The Department's letter reflects, at least in part, a presumption as to the validity of the prescription of PIC 4002 as a criterion for a protection visa, being a presumption subsequently proved to be incorrect by this Court's decision in *Plaintiff M47*.[51]

46. Of course, at the time, the Department *ought* to have presumed that PIC 4002 was valid. Accordingly, the Department's assertion in its letter to the Plaintiff that he would not satisfy PIC 4002 is unsurprising.

47. More importantly, however, the fact that that presumption was made, and that it subsequently proved to be incorrect, turns out to be immaterial to the question before the Court. That follows because the answer to the question whether the Secretary "erred" by not referring the Plaintiff's case to the Minister for consideration of the exercise of one of the Minister's dispensing powers depends upon what direction the Minister had given his Department as to the cases that ought to be referred to him.[52]

48. The Defendants contend, and the Plaintiff apparently accepts,[53] that the Minister's comments in his decision record regarding the exercise of his power under s 46A(2) dated 10 March 2009 are properly to be characterised as a direction to the Department that cases where a person had received an ASA were not to be referred for consideration of the exercise of one of his dispensing powers (the **2009 direction**).[54] That conclusion is reinforced by the fact that on 24 March 2012, many months before this Court delivered judgment in *Plaintiff M47*, the Minister gave a formal direction (which remains in force) as to which cases should, or should not, be referred to him for consideration of whether to exercise his power under s 46A(2) (the **2012 direction**). The 2012 direction makes clear that one category of cases that the Minister does *not* wish to be referred to him is cases involving offshore entry persons who have received an ASA.[55] (A *separate* category of cases that the Minister does not wish to have referred to him is cases involving offshore entry persons who do not appear to satisfy the relevant public interest criteria for the grant of a protection visa.[56])

49. Given that the Plaintiff had received an ASA, there can be no error in the Department's non-referral of his case to the Minister for the possible exercise of a dispensing power. That non-referral was in accordance with the direction that the Minister had given in March 2009.

50. In any event, it is clear from the 2012 direction that the Minister does not from that date, or since, want cases involving an offshore entry person who has received an ASA to be referred to him. In those circumstances, a declaration concerning any past error would not produce any foreseeable consequence, and for that reason declaratory relief would be inappropriate.[57]

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51 SCB 16 [22].
52 Cf. *Plaintiff M61* at 348 [62] and 349 [66].
53 Plaintiff's submissions at [6], stating that in March 2009 "the Minister directed the Department that...".
54 SCB 129.
55 SCB 308.2.
56 SCB 307.8.
57 *Gardner v Dairy Industry Authority (NSW)* (1977) 52 ALJR 180 at 188 per Mason J, 189 per Aickin J; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 580-581, 595; cf *Plaintiff M61* at [103]. Contrary to the Plaintiff's suggestion at [24], there is no basis to conclude that the Minister's clear position in

51. The Plaintiff has foreshadowed making a submission in reply to the effect that the Minister's direction on 24 March 2012 is somehow "inconsistent with the statutory scheme", and that it therefore "suffers from much the same defects as those which led the majority of the Court to conclude in *M47* that PIC 4002 was invalid".[58] While that submission has not yet been developed by the Plaintiff, it is already apparent that it is misconceived. The Court's decision in *Plaintiff M47* that PIC 4002 had been invalidly prescribed as a criterion for a protection visa was premised on an inconsistency between that prescription and the special review processes established in the Act for decisions to refuse or cancel *visas* "relying on" one or more of Arts 1F, 32 and 33(2) of the Refugees Convention.[59] No such inconsistency can arise in relation to the Minister's exercise of power to give directions for the purpose of the possible exercise of his power under s 46A(2), because that power is exercisable in relation to persons who cannot apply for visas, plainly is not subject to merits review under s 500 of the Act, and is conditioned only by the requirement that the Minister considers it is in the "public interest" to exercise that power.[60] To suggest that the Minister is precluded from identifying a class of persons that he does not wish to be referred to him for possible consideration of his power under s 46A entails the proposition that the Minister is *required* to consider certain cases. But that proposition is expressly negated by s 46A(7).[61]

52. The Plaintiff's separate argument that the Secretary breached an obligation to afford procedural fairness in connection with the non-referral of the Plaintiff's case to the Minister is misconceived.[62] For the reasons explained above, the Secretary was *obliged* by the Minister's direction under s 46A(2) not to refer cases such as the Plaintiff's to the Minister once an ASA was issued. The direction did not permit the Secretary to go behind the ASA. Whether the ASA was valid, and thus capable of engaging the Minister's direction, is the subject of Question 1. But if it was, the Secretary cannot have been under an obligation to put to the Plaintiff the matters underpinning the ASA. That is so both because there is no basis to conclude that the Department was even aware of the basis of ASIO's assessment, and because it was the fact of the ASA, not the reasons underlying the ASA, that obliged the Department not to refer the Plaintiff's case to the Minister.

53. Question 2 should be answered "No", and Question 3 is unnecessary to answer. Alternatively, if the answer to Question 2 is "Yes", the answer to Question 3 is "None".

(D) QUESTIONS 4 AND 5 - DETENTION OF THE PLAINTIFF IS VALIDLY AUTHORISED BY THE ACT

54. The Defendants submit that this case is distinguishable from *Al-Kateb*, and that no occasion therefore arises to revisit the constructional and constitutional issues considered in that case.

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the 2012 Direction would be affected by a declaration that the Secretary erred by not referring the Plaintiff's case to him in the past (on the assumption, contrary to the Defendants' submissions, that the Minister's position was relevantly different at that time).

58 Plaintiff's submissions at [25].

59 According to French CJ (at [38], [42]), Hayne (at [193]) and Crennan J (at [389]), such a decision may be made under s 501 of the Act, relying on the character test in s 501(6)(d)(v). According to Kiefel J (at [427]-[428]), such a decision may be made relying on a criterion arising by implication from s 500(1)(c) of the Act.

60 As this Court has stated on numerous occasions, consideration of the "public interest" involves "a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view'": *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216 (Mason CJ, Brennan, Dawson and Gaudron JJ), cited with approval most recently in *Plaintiff M79/2012 v Minister for Immigration and Citizenship* [2013] HCA 24 at [39] (French CJ, Crennan and Bell JJ).

61 *Plaintiff M61* at 350 [70], 353 [77] and 358 [99]-[100]. See also *SZQDZ v Minister for Immigration and Citizenship* (2012) 200 FCR 207 at 217 [36] and 219 [44]; *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33 at [200].

62 See Plaintiff's submissions at [26]-[33].

55. In the alternative, the Defendants submit that:

55.1. Leave to re-open the decision in *Al-Kateb*[63] should be refused.

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

55.3. The operation of ss 189 and 196 of the Act in relation to the Plaintiff has not transgressed any limit imposed by Ch III of the Constitution.

Al-Kateb *is distinguishable*

56. In *Al-Kateb*, a majority of this Court held that ss 189 and 196 validly authorised the detention of the appellant, a stateless person, in circumstances where: the appellant had asked to be removed from Australia; he was being detained for the purpose of removal; but there was no real likelihood or prospect of removal in the reasonably foreseeable future.[64] The appellant's detention was authorised for as long as was necessary to give effect to the purpose of removal, the effect of that detention being to segregate the appellant from the Australian community pending his removal.

57. It may be accepted that the termination date for the present Plaintiff's detention is presently unknown. However, the factual premise that was of "critical importance" for the minority's conclusion in *Al-Kateb* was not that a termination date for detention was unknown, but that there was "no real likelihood or prospect" of the fulfilment of the purpose for that detention in the reasonably foreseeable future.[65]

58. In the present case, s 196 requires that the Plaintiff be released from detention if and when any one of the following three events occurs:

58.1. *First*, the Plaintiff is granted a visa (for example, following completion of the independent review of his ASA, and following a favourable exercise by the Minister of one of his dispensing powers).

58.2. *Second*, it becomes reasonably practicable to remove the Plaintiff to a third country and he is so removed.

58.3. *Third*, the Plaintiff ceases to be a refugee and therefore can be removed to Sri Lanka and he is so removed.

59. In relation to each of these possible events, at the date of these submissions (and subject to any amendment to the Special Case which may be made to update events prior to the hearing):

59.1. *First*, at the Plaintiff's request the Independent Reviewer (**the Reviewer**) is presently reviewing the ASA,[66] and will provide her opinion and any recommendations to the Director-General, the Minister and the Attorney-General.[67] This process may result in the Minister deciding to exercise one of his dispensing powers in the Plaintiff's favour. Even if the present review is

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63 (2004) 219 CLR 562.
64 *Al-Kateb v Godwin* (2004) 219 CLR 562 (***Al-Kateb***) at 640 [231] (Hayne J, McHugh and Heydon JJ relevantly agreeing); 658 [290] (Callinan J).
65 *Al-Kateb* at 572 [2] (Gleeson CJ), [104]-[105] (Gummow J).
66 SCB 18 [33], [35].
67 SCB 332-333.

unfavourable, the terms of reference of the Reviewer require the ASA to be reviewed every 12 months.

59.2. *Second*, while (despite considerable efforts) there is presently no country to which the Plaintiff can be sent at this moment,[68] it is agreed that a wide range of circumstances affect a country's capacity or willingness to resettle a person, and these circumstances (including political exigencies and developments in international relations) may change over time with the result that even countries that have to date declined to resettle the Plaintiff may change their position.[69] It cannot presently be said that there is no real likelihood or prospect of removal of the Plaintiff in the reasonably foreseeable future.[70]

59.3. *Third*, the Department is presently reviewing, and plans to continue to review in the future, the assessment of the Plaintiff's refugee status.[71]

60. Accordingly, based on the facts in the Special Case, the Court should not find that there is no real likelihood or prospect of the fulfilment in the reasonably foreseeable future of the present purposes of the Plaintiff's detention. At least while the Independent Review process is ongoing, a favourable exercise of a dispensing power remains a realistic possibility. Further, there is no basis to conclude that the Department's continuing engagement with third countries is so unlikely to succeed that the prospect of removing the Plaintiff is "so remote that continued detention cannot be for the purposes of removal".[72] The present case, thus, does not present as one where the Plaintiff has elected to pursue no further rights to remain in Australia (as in *Al-Kateb)* or where such rights have been "finally determined" adversely to him (as Bell J approached the matter in *M47)*[73]. In those circumstances, the facts of this case do not give rise to the question of construction that divided the Court in *Al-Kateb*, because on either view the detention of the Plaintiff is authorised and required by ss 189 and 196. Accordingly, the Court should not embark on a reconsideration of the correctness of *Al-Kateb*, because it would be unnecessary to do so to answer the questions posed by the Special Case.[74]

Al-Kateb *should not be re-opened*

61. Alternatively, the question arises whether the Court ought to give leave to re-open *Al-Kateb* or, if leave is given, whether it should depart from the principle established in *Al-Kateb*.[75]

62. While the Court has power to review and depart from its previous decisions, such a course should not be lightly undertaken.[76] The "power to disturb settled authority is ... one to be exercised with restraint, and only after careful scrutiny of the earlier course of decisions and full consideration of the consequences".[77] It is not enough that members of the later Court believe that the earlier decision is

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68 SCB at 19 [39].
69 SCB at 24 [44].
70 Cf. *Al-Kateb* at 572 [2] and 603 [105].
71 SCB 19-20 [40]-[41].
72 Cf. *Al-Kateb* at 601 [98] (Gummow J).
73 Plaintiff *M47* at 1474 [509] (Bell J).
74 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at [253] (Gummow and Hayne JJ).
75 See *Evda Nominees v Victoria* (1984) 154 CLR 311 at 313, 316; *Allders International v Commissioner of State Revenue* (1996) 186 CLR 630 at 646, 655, 661 and 673; *British American Tobacco Australia v Western Australia* (2003) 217 CLR 30 at [74]. Cf. *Plaintiff M47* at 1447 [350] (Heydon J).
76 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439; see also *Second Territory Senators Case* (1977) 139 CLR 585 at 630 (Aickin J); *Wurridjal v Commonwealth* (2009) 237 CLR 309 (***Wurridjal***) at [70] (French CJ).
77 *Esso Australia Resources Ltd v FCT* (1999) 201 CLR 49 at 71 [55] (Gleeson CJ, Gaudron and Gummow JJ).

wrong.[78] When considering whether to depart from a previous decision, the Court often refers to the factors identified in *John v Federal Commissioner of Taxation.*[79] The evaluation of these factors should be "informed by a strongly conservative cautionary principle".[80]

62.1. *First*, the constructional issue in *Al-Kateb* that divided the Court had been thoroughly ventilated and analysed over a succession of cases before it reached this Court.[81] The ultimate decision was reached after "a very full examination of the question", and no compelling consideration or important authority was overlooked.[82] In particular, the majority in *Al-Kateb* did not overlook the principle of legality.[83] Arguments based on the principle of legality were at the heart of both the appellant's and the intervener's submissions in that case.[84] The principle of legality was
10 expressly addressed by Hayne J,[85] whose reasons were adopted by two other members of the majority.[86] Indeed, the very conclusion of the majority that the language of the Act was "intractable"[87] was expressed in terms that recognise that a statute ought not to be construed as limiting fundamental rights and freedoms unless it so provides expressly or by clear implication. Moreover, the two members of the majority who did not expressly refer to the principle of legality dealt with foreign cases that were decided on the basis of essentially the same interpretive principle in a closely analogous context.[88]

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

79 (1989) 166 CLR 417 at 438-439, referring to *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 at 56-58. See also *Momcilovic v R* (2011) 245 CLR 1 at 192 [483] (Heydon J); *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at [38]-[39] (Gleeson CJ, Gummow and Hayne JJ); *Esso Australia Resources Ltd v FCT* (1999) 201 CLR 49 at 71 [55]; *Plaintiff M47* at 1404 [120] fn [152] (Gummow J), 1447 [350] (Heydon J), 1477 [525] ff (Bell J).

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

81 Cf. *Plaintiff M47* at 1477 [526] (Bell J). The cases in which the issues had been examined were *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54. The first instance decision of Merkel J in *Al Masri v Minister for Immigration and Multicultural Affairs* (2002) 192 ALR 609; 69 ALD 296 had been followed in *Al Khafaji v Minister for Immigration and Multicultural Affairs* [2002] FCA 1369 (Mansfield J); *NAKG of 2002 v Minister for Immigration and Multicultural Affairs* [2002] FCA 1600 (Jacobsen J) and *Applicant WAIW v Minister for Immigration and Multicultural Affairs* [2002] FCA 2002 (Finkelstein J); but had not been followed in *WAIS v Minister for Immigration and Multicultural Affairs* [2002] FCA 1625 (***WAIS***) (French J); *NAES v Minister for Immigration and Multicultural Affairs* [2003] FCA 2 (Beaumont J); *Daniel v Minister for Immigration and Multicultural Affairs* (2003) 196 ALR 52 (Whitlam J); *SHFB v Minister for Immigration and Multicultural Affairs* [2002] FCA 29; *SHDB v Minister for Immigration and Multicultural Affairs* [2002] FCA 30 (Selway J); *SHFB v Goodwin* [2002] FCA 294 (von Doussa J); and *NAGA v Minister for Immigration and Multicultural Affairs* [2003] FCA 224 (Emmett J).

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

83 (2004) 219 CLR 562 at 643 [241] (Hayne J, with whom Heydon J agreed at 662-663 [303]). See also at 586-588 [51]-[54] (McHugh J) and 661 [296] (Callinan J). The absence of express reference to the principle of legality in the reasons of McHugh and Callinan JJ does not reveal that those members of the Court did not give due weight to the principle: cf. *Plaintiff M47* at 1404 [119] (Gummow J), 1479 [532] (Bell J).

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

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

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

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

88 See *Al-Kateb* at 587 [53]-[54] (McHugh J) and 661 [296] (Callinan J), where their Honours discuss *R v Governor of Durham Prison; Ex parte Hardial Singh* [1984] 1 WLR 704 and *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97. In *Tan Te Lam*, the Privy Council, articulating the "*Hardial Singh* principles" stated at 111 in relation to the scope of a statutory power to detain pending removal: "[I]n their Lordships view the courts should construe strictly any statutory provision purporting to allow the deprivation

62.2. *Secondly*, there was no material difference between the reasons of the justices who formed the majority in *Al-Kateb* and *Minister for Immigration and Multicultural and Indigenous Affairs v Al-Khafaji*.[89]

62.3. *Thirdly*, the question whether *Al-Kateb* has achieved a "useful result" or whether it has instead led to "considerable inconvenience" is not directed to the merits of the operation of the Act as construed by the Court in a general or policy sense.[90] Rather, the question is directed to whether there are unacceptable difficulties or uncertainties about the content or application of the construction adopted by the Court.[91] The construction of the Act adopted by the majority in *Al-Kateb* is clear, and gives rise to no such difficulties or uncertainties.

10 62.4. *Fourthly*, the Department has been entitled to administer the Act consistently with the Court's decision since it was handed down in 2004.[92] Moreover, it is relevant that *Al-Kateb* has been a well-known decision since it was handed down in 2004, and yet Parliament has not amended the relevant provisions of the Act since then.[93]

The majority's construction is correct

63. If the Court grants leave to re-open *Al-Kateb*, the construction adopted by the majority should be affirmed as correct. That construction draws considerable force not just from the language of ss 189, 196 and 198, but from the scheme of the Act in which those sections take their place. This point was emphasised by Hayne J, who explained that since the commencement of the "radical change" made by the *Migration Reform Act 1992*, the three principal features of the scheme of the Act are:[94]

20 63.1. First, non-citizens may enter Australia only if they have permission (in the form of a visa) to do so; they may remain in Australia only for so long as they have permission (again in the form of a visa) to do so.

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

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

64. These features of the scheme of the Act are critical in assessing whether the construction of s 196(1) favoured by the minority in *Al-Kateb* is available, because the consequence of the minority's construction is that there would be a category of non-citizen who can lawfully reside in the Australian community even
30 though they do not have permission to do so (in the form of a visa). That is the very outcome that the

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of individual liberty by administrative detention and should be slow to hold that statutory provisions authorise administrative detention for unreasonable periods or in unreasonable circumstances". See also the Plaintiff's submissions at fn 45.

89 (2004) 219 CLR 664.

90 Cf. *Plaintiff M47* at [526] (Bell J).

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

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

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

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

reforms made by the *Migration Reform Act 1992* expressly sought to avoid. The minority's construction therefore does violence to the fundamental scheme of the Act.

65. Particularly when understood in their wider statutory context, ss 189 and 196(1) are clear and unambiguous.[95] Section 189(1) requires the detention of a person where "an officer knows or reasonably suspects that [the] person [is] in the migration zone (other than an excised offshore place) [and] is an unlawful non-citizen". Section 196(1) requires detention under s 189 to continue "until" one of three specified events occurs – the person is removed from Australia under ss 198 or 199, the person is deported under s 200, or the person is granted a visa.[96] Thus, "the relevant operation of s 196(1) is that each plaintiff must be kept in detention until he is either removed from Australia or granted a visa".[97] As Hayne J has explained:[98]

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

66. The power and duty to "remove" – which is defined in s 5 of the Act to mean "remove from Australia" – necessarily incorporates the notion of moving a person not only "from Australia", but also *to* another country. That follows because, as a practical matter, the duty to remove from Australia can be performed only by removal to another country.[99]

67. The time for the performance of the duty to remove under s 198 does not arise until removal is "reasonably practicable".[100] However, "[t]he event described as being 'removed from Australia under section 198' is an event the occurrence of which is affected by the imposition of a duty, by s 198, to bring about that event 'as soon as reasonably practicable'."[101] The Plaintiff's submissions that no removal power under s 198 is available are not to the point.[102] Indeed, if such a power were available, detention would end and removal would occur. But "until" removal is possible, detention under ss 189 and 196 must continue.

68. The words "reasonably practicable" "direct attention to the extent of the duty" and acknowledge that the duty does not require the officer to take "every possible step that could be taken" to effect removal.[103] So long as the removal of an unlawful non-citizen is not yet "reasonably practicable", the time for performance of the duty to remove has not arrived and s 196 requires the non-citizen to be kept in detention.[104] As Hayne J (with whom McHugh and Heydon JJ relevantly agreed) observed in *Al-Kateb*:[105]

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95 (2004) 219 CLR 562 at 640 [232] and 643 [241] (Hayne J, with whom Heydon J agreed), [33] (McHugh J), [298] (Callinan J).
96 (2004) 219 CLR 562 at [226], [241] (Hayne J).
97 *Plaintiff M61* at 337 [19]. See also *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 (***Woolley***) at 8 [4] (Gleeson CJ), 17 [36] (McHugh J), 49 [127] (Gummow J), 64 [178] (Kirby J), 76 [224] (Hayne J, with whom Heydon J agreed).
98 *Woolley* at 76 [224] Hayne J (with whom Heydon J agreed).
99 *Znaty v Minister for Immigration* (1972) 126 CLR 1 at 9 (Walsh J); *WAIS* at [58] (French J); *M38/2002 v Minister for Immigration & Multicultural and Indigenous Affairs* (2003) 131 FCR 146 at [68].
100 (2004) 219 CLR 562 at [227] (Hayne J).
101 *Al-Kateb* at 638 [226] (Hayne J).
102 Plaintiff's submissions at [38]-[42].
103 *Baiada Poultry Pty Ltd v The Queen* [2012] 86 ALJR 459 at [15].
104 (2004) 219 CLR 562 at [34] (McHugh J), [226], [231] (Hayne J).
105 (2004) 219 CLR 562 at [218].

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

69. One consequence of the above scheme is that the period of detention under s 196 may be lengthy or uncertain.[106] Removal arrangements might involve complex and sensitive discussions between governments, and the circumstances are often unpredictable and may change or develop within a short period.[107] Even if there is currently no recipient country to which the non-citizen may be removed, it remains possible that such a recipient country will be identified, at which time it will become reasonably practicable to remove the non-citizen to that country.[108] But this does not have the consequence that the power to detain rests on the will or opinion of the executive government.[109] There is a continuing statutory duty to remove the non-citizen from Australia, and to do so as soon as reasonably practicable.

70. The construction adopted by the minority justices in *Al-Kateb*, and by Gummow and Bell JJ in *Plaintiff M47*,[110] should not be adopted.

70.1. The construction identifies an implied temporal limitation in s 196 which would suspend the power to detain if there was no prospect of removal in the reasonably foreseeable future. Such an implication conflates the temporal element that enlivens the duty to remove "as soon as reasonably practicable" under s 198 with an additional temporal limit on the power to detain until such removal. The operation of s 198 is treated as spent (or suspended) when "the stage has been reached that the [non-citizen] cannot be removed from Australia and as a matter of reasonable practicability is unlikely to be removed", at which time the power to detain in s 196(1) "loses a necessary assumption for its continued operation".[111] As Hayne J pointed out,[112] this effectively transfers and transforms the temporal element in s 198 into a different temporal limitation on the operation of s 196.

70.2. In addition, the implied temporal limitation would involve difficulties in its application.[113] Determination of the prospects of a non-citizen's removal may involve consideration of issues concerning international relations that are not suited to judicial determination. Further, as the limitation contemplates that the power and duty to detain will revive if and when there is a real prospect of removal, this gives rise to uncertainty as to the operation of ss 189 and 196 from time to time.

71. Even if, contrary to the submissions above, the Act does admit of a constructional choice, the principle of legality does not dictate the precise choice to be made. While important common law rights and privileges are not to be lightly abrogated, the construction of the Act must give due weight to the character and purpose of the Act. The Act represents, relevantly, an exercise of Australia's sovereign right to identify who may and may not come into its territory and become a member of the Australian

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106 (2004) 219 CLR 562 at [217]-[218] (Hayne J), [292] (Callinan J).
107 For example, the removal of Mr Al Masri took place approximately 4 weeks after the Merkel J had held that there was no real likelihood or his removal in the reasonably foreseeable future: see *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54 at 61 [18].
108 (2004) 219 CLR 562 at [229]-[231] (Hayne J).
109 Cf. *Al-Kateb* at [88], [140] (Gummow J), [146] (Kirby J).
110 Bell J adopted Gleeson CJ's construction in *Al-Kateb*: see 1479 [533].
111 (2004) 219 CLR 562 at [122] (Gummow J), compare Gleeson CJ at [12].
112 (2004) 219 CLR 562 at [237].
113 (2004) 219 CLR 562 at [235]-[237] (Hayne J).

community.[114] In *Pochi v Macphee*, Gibbs CJ (with whom Mason and Wilson JJ agreed), described those sovereign powers as being "essential to national security".[115] Thus, while general words in most legislative contexts would be insufficient to justify a construction that constrains liberty,[116] it is sufficiently clear from the language, character and evident purpose of the Act (including, in particular, ss 189, 196 and 198) that Parliament has directed its attention to liberty, and has decided that non-citizens must be detained until such time as they are granted a visa or removal. In that regard, it should not be overlooked that the liberty interest of a non-citizen is different to that of a citizen. As Hayne J (with whom McHugh and Heydon JJ relevantly agreed) said in *Al-Kateb*, "The questions which arise about mandatory detention do not arise as a choice between detention and freedom. The detention to be examined is not the detention of someone who, but for the fact of detention, would have been, and been entitled to be, free in the Australian community".[117]

72. Thus, even if there is some ambiguity in the use of the word "until" in s 196(1), the Court should not apply the principle of legality such as to construe the Act as allowing the Plaintiff, being an offshore entry person who is incapable of making a valid application for a visa without the Minister exercising a dispensing power in his favour, to live in the Australian community.[118] Rather, the Court ought to conclude that the Act evinces a sufficiently clear intention that a non-citizen in the Plaintiff's position must not be admitted into the Australian community without the permission of the Executive, and that if such permission is not granted the non-citizen must remain segregated from the Australian community until removal can occur, even where removal is not practicable in the reasonably foreseeable future.

No constitutional limit is exceeded

73. Sections 189, 196 and 198 are laws with respect to aliens. Subject to any limitation arising from Ch III those sections are plainly supported by s 51(xix) of the Constitution, for it is well settled that s 51(xix) supports laws authorising the Executive to detain non-citizens[119] pending their removal from Australia.[120] That does not deny that the operation of ss 189, 196 and 198 in the present case may also be supported by other heads of power (such as the defence or external affairs power).[121] However, it is unnecessary to consider that issue.

74. The question that arises is whether any limit arising from Ch III of the Constitution precludes the detention of the Plaintiff, in the following circumstances: the Plaintiff is an alien (within s 51(xix)); the Plaintiff entered Australia without permission, and at a place, that had the consequence that the Plaintiff was to have no rights under the Act to apply for or be granted a visa, save only if there was an executive decision in the national interest to relax such barrier; there has been no such executive decision, in part due to a separate executive assessment not found to be subject to legal error that the Plaintiff is a threat

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

115 (1982) 151 CLR 101 at 106.

116 Cf. *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 341 (Mason ACJ, Wilson and Dawson JJ); *Coco v The Queen* (1994) 179 CLR 427 at 438; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [30].

117 *Al-Kateb v Godwin* (2004) 219 CLR 562 at [219]. See also Callinan J at [299].

118 Cf. *Al-Kateb* at 576 [18] (Gleeson CJ).

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

120 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 (***Lim***) at 10 (Mason CJ), 25-26, 32-33 (Brennan, Deane and Dawson JJ), 58 (Gaudron J), 71 (McHugh J); *Al-Kateb* at 582 [39] (McHugh J), 636 [216] and 644 [245] (Hayne J).

121 Cf. *Plaintiff M47* at 1398-1399 [83]-[84] (Gummow J).

to the security of Australia; Parliament has validly required that in such circumstances the Plaintiff be removed from Australia and be held in detention pending such removal; the Executive has made and continues to make appropriate efforts to effect such removal; a long period has passed without those efforts coming to fruition.

75. It is appropriate to consider the constitutional question at that level of specificity, because s 3A of the Act effectively requires ss 189, 196 and 198 of the Act to be given effect to the extent they may have a "valid application".[122]

76. French J's observations in 2001 as to the manner in which Australia's undoubted sovereign rights to admit or exclude persons from the Australian community is reflected in the Constitution remain apposite:[123]

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

77. The suggested limit on Parliament's power to enact ss 189, 196 and 198, in the exercise of the sovereign authority identified above, is based on a statement made in *Chu Kheng Lim* by Brennan, Deane and Dawson JJ. Their Honours said:[124]

> Putting to one side the exceptional cases to which reference is made below, the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt. (the ***Chu Kheng Lim* doctrine**)

78. The exceptions to the suggested principle are so numerous and diverse that the better view is that Ch III does not in fact create any such rule. As Gaudron J pointed out in *Kruger*,[125] in comments that have been cited with approval many times:[126]

> [I]t cannot be said that the power to authorise detention in custody is exclusively judicial except for clear exceptions ... The exceptions recognised in *Lim* are neither clear nor within precise and confined categories. For example, the exceptions with respect to mental illness and infectious disease point in favour of broader exceptions relating, respectively, to the detention of people in custody for their own welfare and for the safety or welfare of the community. Similarly,

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122 Compare, e.g., *Coleman v Power* (2004) 220 CLR 1 at 54-57 [107]-[110] (McHugh J); *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 340 (Brennan J), 348-349 (Dawson J), 355 (Toohey J), 373 (McHugh J).

123 *Ruddock v Vardarlis* (2001) 110 FCR 491 at 542-543 [192] (emphasis added). See also *Al-Kateb* at 632 [203] (Hayne J, with Heydon J agreeing).

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

125 *Kruger v The Commonwealth* (1997) 190 CLR 1 (***Kruger***) at 110 (emphasis added).

126 *Al-Kateb* at 648 [258] (Hayne J, Heydon J agreeing); *Woolley* at 24-27 [57]-[62] (McHugh J); *Thomas v Mowbray* (2007) 233 CLR 307 at 330 (Gleeson CJ) and 431 (Kirby J); *South Australia v Totani* (2010) 242 CLR 1 at 146-147 [382]-[383] (Heydon J).

> it would seem that, if there is an exception in war time, it, too, is an exception which relates to the safety or welfare of the community.
>
> Once exceptions are expressed in terms involving the welfare of the individual or that of the community ... it is not possible to say that, subject to clear exceptions, the power to authorise detention in custody is necessarily and exclusively judicial power. Accordingly, I adhere to the view that I tentatively expressed in *Lim*, namely, that a law authorising detention in custody is not, of itself, offensive to Ch III.

79. It may be accepted that a constitutional limitation is usually infringed where a person is detained for a *punitive* purpose otherwise than as an incident of an exercise of judicial power.[127] However, contrary to the suggestion apparently made by the Plaintiff,[128] Gummow J's opinion in *Fardon v Attorney-General (Qld)* that the constitutional limit derived from Ch III is concerned with detention generally has not commanded support from a majority of the Court.[129]

80. The practical difficulties of finding in the foreseeable future a country to take the Plaintiff to implement the removal required by Parliament arise through a combination of factors[130]: (a) the Plaintiff has chosen not to bring his detention to an end by exercise of his right under s 198(1) to seek removal to his country of origin Sri Lanka, due to his fears of persecution[131]; (b) Parliament has chosen through s 198(2), and the limitations found to be attached to it in implementation of international obligations, to take the humane course of not seeking to remove the Plaintiff to his country of origin, Sri Lanka against his will; and (c) removal requires the consent and cooperation of some other country (and intermediate countries) which is proving difficult to obtain.

81. Those practical difficulties do not sever the connection between the detention and its lawful and intended purpose. It remains purposefully directed to achieving the valid legislative goals of achieving the removal of the alien from Australia and, as McHugh J pointed out in *Al-Kateb*[132], ensuring that in the meantime the alien does not enter the community into which he has no right to enter.

82. The Plaintiff's detention is thus non-punitive; it is an incident of the exercise of the sovereign right to determine "who may not and who shall be admitted into the Australian community"; it is not detention of a kind that can validly be imposed only as an incident of the exercise of judicial power.[133]

83. Further, even if the *Chu Kheng Lim* doctrine is correct, that case itself establishes that one of the "exceptional cases" where Chapter III permits detention to be imposed without an exercise of judicial power is detention for the purpose of deciding whether to admit or exclude a non-citizen from Australia.[134] The plurality accepted that this exception would permit "a measure to prevent entry into the

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127 *Al-Kateb* at 584 [44] (McHugh J), 649-650 [263] (Hayne J, with whom Heydon J agreed), and 657 [287] and 659-660 [291] and [294] (Callinan J).

128 Plaintiff's submissions at [56].

129 See *Vasiljkovic v The Commonwealth* (2006) 227 CLR 614 at 629 [34] (Gleeson CJ); cf. Kirby J at 669-670 (Kirby J); *Thomas v Mowbray* (2007) 233 CLR 307 at 356 [115] (Gummow and Crennan JJ) and 430 [353] (Kirby J).

130 cf *Al-Kateb* at 649 [261] per Hayne J.

131 The relevance of this factor was pointed to in *Lim* at 34,72.

132 *Al-Kateb* at 584-586 [45]-[49].

133 *Al-Kateb* at 584 [45] (McHugh J), 650 [264]-652 [269] (Hayne J, with whom Heydon J agreed), 659 [291] (Callinan J). Unlike the other members of the majority, Callinan J did not expressly refer to detention for the purpose of segregation pending removal, as opposed to simply detention for the purpose of removal. However, the effect of Callinan J's analysis is the same, where his Honour says: "[i]t would only be if the respondents formally and unequivocally abandoned that purpose [detention for removal] that the detention could be regarded as being no longer for that purpose".

134 *Lim* at 10 and 32.

community of a person whom the State does not wish to accept as a member of the community".[135] That proposition has been accepted on several occasions since. For example Hayne J (with whom Heydon J agreed) expressed the same idea in both *Al Kateb* and *Woolley*. In the later case, Hayne J said: [136]

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

84. The Defendants submit that those statements are correct, and that they are sufficient to demonstrate that ss 189, 196 and 198, and their combined operation to require the detention of unlawful non-citizens until they are granted a visa or removed from Australia (thereby segregating the non-citizen until visa grant or removal), is consistent with Ch III.

85. On that approach, it is irrelevant whether or not the removal of a non-citizen from Australia is reasonably practicable in the foreseeable future. Detention pending removal serves the constitutionally permissible non-punitive purpose of segregating a non-citizen pending removal, irrespective of the practicability of removal. The majority in *Al-Kateb* were correct to so conclude.

86. In *Plaintiff M47*, in what may provide an alternative path to the same result, Heydon J held that it was sufficient to conclude that, since the exceptions to the *Chu Kheng Lim* doctrine are not closed:

> another should be added: the detention of unlawful non-citizens who threaten the safety or welfare of the community because of the risks they pose to Australia's security. If it is possible to detain a diseased person because that person is a threat to the public health, why is it not possible to detain a person assessed to be a risk to Australia's security because that person is a threat to public health in a different way?

87. The Plaintiff separately contends that the Act, insofar as it mandates the detention of the Plaintiff, offends against Ch III because "a condition precedent to detention is in substance unreviewable (namely the ASA)" and "indefinite detention is the result". The argument seeks to apply the principles in the *Communist Party* Case,[137] and is substantially similar to the argument he made as an intervener in *Plaintiff M47*. The argument is misconceived, and should be rejected, as it was by Heydon J in *Plaintiff M47*.[138]

88. The principle established in the *Communist Party Case* is that "no law can give power to any person (other than a court) to determine conclusively any issue on which the constitutional validity of the law depends".[139] The Plaintiff's attempt to invoke that principle so as to impugn the application of ss 189, 196 and 198 of the Act to him is premised on two propositions: that the ASA is the "condition precedent to detention";[140] and that, while the ASA is "not unreviewable in a strict or jurisdictional sense" the ASA is nevertheless "in substance unreviewable".[141] Both of those propositions are wrong.

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135 In *Woolley* at 13 [19], Gleeson CJ pointed out that the key passage in *Lim* at 32 cites cases that endorse that proposition.

136 *Woolley* at 77 [227]. See also at 75 [222]; *Al-Kateb* at 584 [45], 586 [49] (McHugh J), 648 [255]-[256] (Hayne J, with whom Heydon J agreed) and 658 [289] (Callinan J).

137 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 (the ***Communist Party Case***). See Plaintiff's submissions at [59]-[79], especially at [71] ff.

138 *Plaintiff M47* at 1449-1450 [357]-[362].

139 Leslie Zines, *The High Court and the Constitution* (5th edn, 2008) 300.

140 Plaintiff's submissions at [59], [61].

141 Plaintiff's submissions at [59], [63], [73].

89. *First*, the condition precedent to the Plaintiff's detention is that an officer "knows or reasonably suspects that a person ... is an unlawful non-citizen". No law purports to make the Executive's judgment that the Plaintiff is an unlawful non-citizen conclusive; there is no question of the Executive "reciting itself into power".[142] As Hayne J said in *Al-Kateb*, the "only disputable question is whether the person is an unlawful non-citizen. And the courts can readily adjudicate any dispute about that."[143] Further, unless and until the Minister exercises a dispensing power and grants a visa to the Plaintiff, he will remain an unlawful non-citizen. It is therefore incorrect to describe an ASA as a "condition precedent to detention". An ASA is no more a condition precedent to detention than any other fact or circumstance that the Minister has decided means he should not exercise the dispensing power. The point is illustrated by the fact that, even if the validity of the ASA were successfully challenged, the Plaintiff would not be entitled to be released from detention. He would remain lawfully detained unless and until the Minister decided to grant him a visa or he is removed.

90. *Secondly*, it is not the case that the Plaintiff's ASA is "unreviewable". Indeed, the Plaintiff's submission that it is unreviewable is undermined by the fact that he has invoked the jurisdiction of this Court to seek an order quashing the ASA on the ground of breach of procedural fairness. While the Plaintiff did not apply for pre-trial processes (such as discovery) that may have enabled him to bring different or better challenges to the ASA,[144] that was his own tactical choice. The factual foundation for the Plaintiff's argument is therefore absent.[145]

91. In any event, it is instructive to consider *why* any attempt to compel production to the Plaintiff of the documents underlying the ASA might have failed. The Plaintiff points to the fact that any such attempt "would be met by a comprehensive public interest immunity claim that would frustrate the exercise".[146] But the Court would only uphold such a claim if it formed the view that the public interest in national security outweighs the public interest in the disclosure of information to the Plaintiff. That such an outcome is possible – or even likely – does not mean that ASIO's decision to issue an ASA is "conclusive" in the sense discussed in the *Communist Party Case*. On the contrary, the difficulties that the Plaintiff would confront arise not from any law purporting to make the ASA conclusive, but from the "self-imposed restraints which courts have adopted when undertaking the judicial review of security assessments".[147] As Mason J explained in *Church of Scientology v Woodward*:[148]

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

92. The "conclusive" nature of the ASA upon which the Plaintiff bases his argument arises entirely from the manner in which a court may apply general law principles to resolve a challenge to an ASA. For that reason, the Plaintiff's characterisation of an ASA as "unreviewable" should not be accepted. It is

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142 See *Plaintiff M47* at 1450 [361] (Heydon J).
143 *Al-Kateb* at 647 [254].
144 *O'Sullivan v Parkin* (2008) 169 FCR 283. See also *Plaintiff M47* at 1450 [361].
145 See *Plaintiff M47* at 1449-1450 [360] (Heydon J).
146 Plaintiff's submissions at [63].
147 *Sagar v O'Sullivan* at 325 [82].
148 (1980) 154 CLR 25 at 61. That passage quoted with approval by the plurality in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (WA)* (2008) 234 CLR 532 (***Gypsy Jokers***) at 556. *Hughes and Vale Pty Ltd v New South Wales [No 2]* (1955) 93 CLR 127, and the other cases mentioned in the Plaintiff's submissions at [74], do not assist him. The observations in those cases relate to a fundamentally different issue: there, the difficultly in seeking judicial review of a decision in the exercise of a particular power arose not from the application of the application by the courts of a self-imposed restraint but from the terms of the Act that empowered the decision.

unreviewable only if, and to the extent that, a court decides that it would be contrary to the public interest for particular information to be disclosed. The fact that it is a court that decides that question demonstrates that there is no infringement of Ch III of the Constitution.[149]

93. Further, the allegedly "conclusive" nature of the ASA plainly is not a result of the legislation the validity of which he challenges. Any difficulties in challenging an ASA do not derive in any way from ss 189 and 196. The validity of those sections in their application to the Plaintiff cannot depend on the manner in which courts may apply general law doctrines to deciding a challenge to an administrative decision the validity of which is not even a precondition of his detention. The Plaintiff's attempt to link the practical impediments to an effective challenge to a security assessment to the validity of ss 189 and 196 via the "reading down" that he proposes[150] would require the Court to redraft those sections in a manner that would far exceed the proper judicial function.[151] The task would be manifestly of a legislative, not judicial, nature.[152]

94. Moreover, there is no logical reason to limit the Plaintiff's argument to the case of indefinite detention. Leaving aside the conceptual and practical difficulties caused by the fact that detention will only be able to be characterised as indefinite at some time after detention begins,[153] if the argument is valid then it would apply to any detention after an ASA has issued.

95. Finally, it is noted that the Plaintiff's argument has a perverse consequence, which serves to underline its weakness. The Plaintiff contends that if the Executive "wishes to use ... material which would be covered by public interest immunity" then:

> that use comes with a condition – disclosure of the substance of the allegations and grounds for that concern. If that price is too high for the Executive, then the person cannot be detained indefinitely based upon it.

96. There will be cases where Australia wishes to refuse to admit a non-citizen into the community for reasons that it would be contrary to the public interest to disclose. The very reason that Australia refuses to admit the non-citizen may likewise mean that other nations are unwilling to receive the person, meaning that it may be difficult to remove the person from Australia.[154] The Plaintiff's argument would require Australia either to disclose information upon which it relies to refuse admission (thus damaging its sovereign interests), or to admit the non-citizen and accept the associated risks to the Australian community (again contrary to its sovereign interests). Ch III should not be held to have that consequence.

97. In conclusion, the practical difficulties identified in [80] above, leave Parliament with probably four main options in this type of case, none of them ideal: (a) release the alien into the community without restraint against the assessed security risk; (b) release the alien with constraints on freedom of movement and

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149 See, e.g., *Gypsy Jokers* at 556 [24], 559 [36] (Gummow, Hayne, Heydon and Kiefel JJ), 595-596 [182]-[183], 597 [189] (Crennan J, with Gleeson CJ agreeing on this point); *K-Generation v Liquor Licensing Court* (2009) 237 CLR 501 at 542-543 [144]-[149]; *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 at [46], [68]-[70], [86] (French CJ), [188]-[120], [149]-[157] (Hayne, Crennan, Kiefel and Bell JJ), [192]-[195] (Gageler J).

150 Plaintiff's submissions at [77].

151 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 164 (Latham CJ) and 372 (Dixon J); *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 349; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 513 [102] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). See also *Plaintiff M47* at 1450 [362].

152 Cf. *Momcilovic v R* (2011) 245 CLR 1 at 159 [399] (Heydon J).

153 Plaintiff's submissions at [78].

154 *Al-Kateb* at 649 [261] (Hayne J).

association; (c) reverse the humane judgment reflected in s 198 that it will not send the alien against his will to the place of feared persecution; or (d) authorise the continued detention for the purposes identified above.

98. Parliament has to make what it considers to be the least worst choice between those four non-ideal outcomes. Various considerations pull in different directions: protecting the community; giving effect to valid legislative and executive judgments over what aliens are regarded as suitable to enter the community; minimising restrictions on liberty; avoiding harsh outcomes to persons even if they be aliens; giving effect to international obligations; ensuring removal can easily be effected once practical; and costs and effectiveness of monitoring assessed security threats if aliens are allowed into the community.

99. Nothing in Ch III mandates that Parliament's ample power to make laws with respect to aliens is fettered such that it must confine its choice to the first three and not the fourth of these possible means to address a very difficult problem.

Relief

100. Question 4 should be answered "Yes", and Question 5 should be answered "No".

101. In the event that the Court finds that the detention of the Plaintiff is not authorised by ss 189 and 196 of the Act, plainly he must be released. However, the Defendants submit that if the Court makes this finding, it ought to hear further from the parties on the question of what conditions might properly attach to an order for the Plaintiff's release[155], or as to what (short) period of time should be permitted to enable a consideration of possible administrative actions, in light of the Court's judgment, before the order takes effect.

VIII. ESTIMATE OF TIME FOR ORAL ARGUMENT

102. The Defendants estimate that presentation of their oral argument will take 4.5 hours.

Dated: 4 June 2013

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[155] Plaintiff *M47* [148] (Gummow J), [534] (Bell J).

ANNEXURE A

Further applicable provisions of the *Australian Security Intelligence Organisation Act 1979* (as in force as at 18 December 2009)

4 Definitions

In this Act, unless the contrary intention appears:

...

acts of foreign interference means activities relating to Australia that are carried on by or on behalf of, are directed or subsidised by or are undertaken in active collaboration with, a foreign power, being activities that:

(a) are clandestine or deceptive and:

(i) are carried on for intelligence purposes;

(ii) are carried on for the purpose of affecting political or governmental processes; or

(iii) are otherwise detrimental to the interests of Australia; or

(b) involve a threat to any person.

...

politically motivated violence means:

(a) acts or threats of violence or unlawful harm that are intended or likely to achieve a political objective, whether in Australia or elsewhere, including acts or threats carried on for the purpose of influencing the policy or acts of a government, whether in Australia or elsewhere; or

(b) acts that:

(i) involve violence or are intended or are likely to involve or lead to violence (whether by the persons who carry on those acts or by other persons); and

(ii) are directed to overthrowing or destroying, or assisting in the overthrow or destruction of, the government or the constitutional system of government of the Commonwealth or of a State or Territory; or

(ba) acts that are terrorism offences; or

(c) acts that are offences punishable under the *Crimes (Foreign Incursions and Recruitment) Act 1978*, the *Crimes (Hostages) Act 1989* or Division 1 of Part 2, or Part

3, of the *Crimes (Ships and Fixed Platforms) Act 1992* or under Division 1 or 4 of Part 2 of the *Crimes (Aviation) Act 1991*; or

(d) acts that:

(i) are offences punishable under the *Crimes (Internationally Protected Persons) Act 1976*; or

(ii) threaten or endanger any person or class of persons specified by the Minister for the purposes of this subparagraph by notice in writing given to the Director-General.

...

promotion of communal violence means activities that are directed to promoting violence between different groups of persons in the Australian community so as to endanger the peace, order or good government of the Commonwealth.

17 Functions of Organisation

(1) The functions of the Organisation are:

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

(b) for purposes relevant to security and not otherwise, to communicate any such intelligence to such persons, and in such manner, as are appropriate to those purposes;

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

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

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

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

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

35 Interpretation

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

adverse security assessment means a security assessment in respect of a person that contains:

(a) any opinion or advice, or any qualification of any opinion or advice, or any information, that is or could be prejudicial to the interests of the person; and

(b) a recommendation that prescribed administrative action be taken or not be taken in respect of the person, being a recommendation the implementation of which would be prejudicial to the interests of the person.

...

prescribed administrative action means:

(a) action that relates to or affects:

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

(ii) a person's ability to perform an activity in relation to, or involving, a thing (other than information or a place), if that ability is controlled or limited on security grounds; position under the Commonwealth or an authority of the Commonwealth or under a State or an authority of a State, or in the service of a Commonwealth contractor, the occupant of which has or may have any such access or ability;

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

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

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

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

...

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

person or the question whether the requirements of security make it necessary or desirable for prescribed administrative action to be taken in respect of a person, and includes any qualification or comment expressed in connection with any such recommendation, opinion or advice, being a qualification or comment that relates or that could relate to that question.

38 Person to be notified of assessment

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

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

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

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

(b) the disclosure to a person of the statement of grounds contained in a security assessment in respect of the person, or

of a particular part of that statement, would be prejudicial to the interests of security.

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

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

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

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

Relevant provisions of the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* follow

Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013

No. 35, 2013

An Act to amend the *Migration Act 1958*, and for other purposes

[*Assented to 20 May 2013*]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013*.

2 Commencement

(1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information

Column 1	Column 2	Column 3
Provision(s)	**Commencement**	**Date/Details**
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	20 May 2013
2. Schedule 1, items 1 to 14	A single day to be fixed by Proclamation. However, if the provision(s) do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	
3. Schedule 1, items 15 and 16	The day after this Act receives the Royal Assent.	21 May 2013
4. Schedule 1, items 17 to 62	At the same time as the provision(s) covered by table item 2.	
5. Schedule 2	The later of: (a) immediately after the commencement of the provision(s) covered by table item 2; and (b) immediately after the commencement of section 69 of the *Maritime Powers Act 2013*. However, the provision(s) do not commence at all if the event mentioned in paragraph (b) does not occur.	

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

(2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Main amendments

Part 1—Amendments

Migration Act 1958

1 Subsection 4(5)

Omit "offshore entry persons", substitute "unauthorised maritime arrivals".

2 Subsection 5(1) (note at the end of the definition of *excised offshore place*)

Repeal the note.

3 Subsection 5(1) (definition of *offshore entry person*)

Repeal the definition.

4 Subsection 5(1) (paragraphs (a) and (aa) of the definition of *transitory person*)

Omit "an offshore entry person", substitute "a person".

5 Subsection 5(1) (subparagraph (c)(iii) of the definition of *transitory person*)

Omit "country;", substitute "country.".

6 Subsection 5(1) (definition of *transitory person*)

Omit all the words after subparagraph (c)(iii) of the definition.

7 Subsection 5(1)

Insert:

> ***unauthorised maritime arrival*** has the meaning given by section 5AA.

8 After section 5

Insert:

5AA Meaning of *unauthorised maritime arrival*

(1) For the purposes of this Act, a person is an ***unauthorised maritime arrival*** if:

(a) the person entered Australia by sea:

(i) at an excised offshore place at any time after the excision time for that place; or

(ii) at any other place at any time on or after the commencement of this section; and

(b) the person became an unlawful non-citizen because of that entry; and

(c) the person is not an excluded maritime arrival.

Entered Australia by sea

(2) A person ***entered Australia by sea*** if:

(a) the person entered the migration zone except on an aircraft that landed in the migration zone; or

(b) the person entered the migration zone as a result of being found on a ship detained under section 245F and being dealt with under paragraph 245F(9)(a); or

(c) the person entered the migration zone after being rescued at sea.

Excluded maritime arrival

(3) A person is an ***excluded maritime arrival*** if the person:

(a) is a New Zealand citizen who holds and produces a New Zealand passport that is in force; or

(b) is a non-citizen who holds and produces a passport that is in force and is endorsed with an authority to reside indefinitely on Norfolk Island; or

(c) is included in a prescribed class of persons.

Definitions

(4) In this section:

aircraft has the same meaning as in section 245A.

ship has the meaning given by section 245A.

9 Subparagraphs 5A(3)(j)(ii) and (iii)

Omit "offshore entry person", substitute "unauthorised maritime arrival".

10 Section 46A (heading)

Repeal the heading, substitute:

46A Visa applications by unauthorised maritime arrivals

11 Subsections 46A(1) and (2)

Omit "offshore entry person", substitute "unauthorised maritime arrival".

12 Subsection 46A(2)

Omit "the person", substitute "the unauthorised maritime arrival".

13 Paragraphs 46A(5)(a) and (b)

Omit "offshore entry person", substitute "unauthorised maritime arrival".

14 Subsection 46A(7)

Omit "offshore entry person" (wherever occurring), substitute "unauthorised maritime arrival".

15 Subsection 189(2)

Omit "must detain", substitute "may detain".

16 Paragraph 189(3A)(a)

Repeal the paragraph, substitute:

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

17 Subsection 198(11)

Omit "offshore entry person", substitute "unauthorised maritime arrival".

18 Paragraph 198AA(b)

Omit "offshore entry persons" (wherever occurring), substitute "unauthorised maritime arrivals".