



HIGH COURT OF AUSTRALIA

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**IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY**

NO C 16 OF 2020

BETWEEN: **COMMONWEALTH OF AUSTRALIA**
Appellant

AND: **AJL20**
Respondent

NO C 17 OF 2020

BETWEEN: **COMMONWEALTH OF AUSTRALIA**
Appellant

AND: **AJL20**
Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE APPELLANT

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

The correct analytical approach: is s 196 valid across the range of its operations?

2. Where legislation is said to contravene a constitutional limit, it is necessary first to construe it, and then to consider whether so construed the law complies with that limit in all of its operations (**AR [2]**). If it does, then no further constitutional issue arises; the law should be given effect according to its terms, and any Executive action taken under it may be reviewed only on administrative law grounds.

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- *Palmer v WA* [2021] HCA 5 at [63]-[68] (Kiefel CJ and Keane J), [118]-[127] (Gageler J), [201]-[202] (Gordon J), [224]-[227] (Edelman J) (**JBA 5, Tab 18**)
 - Contra **CAB 37 [17], 46-48 [40]-[45]; RS [73]**

Construction of the Act

3. The *Migration Act 1958* (Cth) establishes a regime pursuant to which Parliament intends that visas be the “only source” of the right of non-citizens to enter or remain in the Australian community: **ss 4, 13-14**.

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4. **Section 189(1)** imposes a duty to detain unlawful non-citizens. It leaves no room for Executive discretion, and the existence of the duty does not depend upon any assessment of the purpose of the detaining officer (**AS [17]**).

- *Al-Kateb* (2004) 219 CLR 562 at [254] (Hayne J) (**JBA 3, tab 5**)

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5. **Section 196(1)** provides that a person detained under s 189 “must be kept in detention until”, relevantly, “he or she is removed from Australia under s 198”. The text contemplates an ongoing or continuous state of affairs that is to be maintained until one of the specified events actually occurs. **Section 196(3)** reinforces s 196(1): an unlawful non-citizen may be “released” from detention only in the ways provided for in s 196(1) (**AS [19]**). It is not open to read s 196(1) as authorising detention only until removal should have occurred, or until such stage as the Court identifies a “departure” from the purpose of removal because officers have failed to “undertake” sufficient “steps in pursuance of removal” (cf **CAB 59 [89]**). Such a construction would create uncertainty

and undermine the object in s 4(1) (AS [14], [21]). It would also be in tension with the duty imposed by s 189(1).

- *Al-Kateb* (2004) 219 CLR 562 at [33]-[35] (McHugh J), [210], [218]-[219], [226], [241] (Hayne J), [298] (Callinan J) (**JBA 3, tab 5**)
- *Plaintiff M76* (2013) 251 CLR 322 at [117]-[118], [126]-[127] (Hayne J), [181]-[187] (Kiefel and Keane JJ) (**JBA 4, tab 9**)

Section 196 is valid across the range of its operations

6. *Lim* held that s 51(xix) supports laws that empower the Executive to detain aliens if the detention which they require and authorise is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or to enable an application for any entry permit to be made and considered. Section 54L, which required detention unless and until removal or grant of an entry permit, was upheld in all its operations.
- *Lim* (1992) 176 CLR 1 at 17, 29, 32-34, 36, 38 (Brennan, Deane and Dawson JJ) (**JBA 3, Tab 6**)
7. The majority in *Al-Kateb* upheld the validity of ss 189 and 196 and clarified that it is an aspect of the purpose of removing a non-citizen that the non-citizen be prevented from entering into the Australian community until removal occurs (AS [22]; AR [10]).
- *Al-Kateb* (2004) 219 CLR 562 at [45]-[48] (McHugh J). See also at [254]-[255], [266]-[267] (Hayne J; Heydon J agreeing), [289], [295] (Callinan J) (**JBA 3, Tab 5**)
 - *Re Woolley* (2004) 225 CLR 1 at [19] (Gleeson CJ), [72]-[73] (McHugh J), [222]-[228] (Hayne J; Heydon J agreeing), [264] (Callinan J) (**JBA 4, Tab 13**)
 - *Plaintiff M76* (2013) 251 CLR 322 at [130] (Hayne J), [205], [207] (Kiefel and Keane JJ), [140] (Crennan, Bell and Gageler JJ) (**JBA 4, Tab 9**)
 - *Plaintiff M96A* (2017) 261 CLR 582 at [33] fn 26 (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ) (**JBA 4, Tab 10**)
8. The respondent offers no principled reason why Ch III denies to Parliament the power to authorise the detention of non-citizens, who have no right to enter Australia, until they are actually removed. There is nothing in the nature of judicial power about excluding from the community people who have no right to enter it.

- *Al-Kateb* (2004) 219 CLR 562 at [47] (McHugh J), [254] (Hayne J; Heydon J agreeing) (**JBA 3, Tab 5**)

Consequences of s 196(1) being valid across the range of its operations

9. In any particular case where ss 189 and 196 are applied to a particular unlawful non-citizen, the only question is whether officers have complied with the duties those sections impose, or the related duties to bring about the detention-terminating events (cf **CAB 56 [75], 69 [128], 80 [171]**).

10. The Commonwealth's construction does not result in unbounded, unconstrained or discretionary Executive detention. The authority to detain is specifically constrained by the enforceable duties to bring about a terminating event either within a reasonable time or as soon as reasonably practicable. Failure to comply with those duties may attract mandamus, but it does not render detention unlawful.

- *Plaintiff M96A* (2017) 261 CLR 582 at [18]-[19], [21], [29]-[32] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ), [43]-[45] (Gageler J) (**JBA 4, Tab 10**)
- *NAES* [2003] FCA 2 at [2], [11]-[13], [15] (Beaumont J)
- *WAIS* [2002] FCA 1625 at [47], [49], [56] (French J) (**JBA 5, Tab 19**)

Plaintiff S4 (2014) 253 CLR 219

11. While it was central to the primary judge's reasoning (eg **CAB 35-36 [11], 40 [22], 41-44 [25]-[34], 46-48 [40]-[46], 58 [87], 59 [89]**), the issue decided in *Plaintiff S4* was very different to that now before the Court, and the present question was not the subject of any argument in that case. To the extent this judgment is relevant, it is consistent with the Commonwealth's submissions (**AS [42]-[43]**).

- *Plaintiff S4* (2014) 253 CLR 219 at [29]-[30], [32], [34] (**JBA 4, Tab 12**)



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