HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 26 Mar 2021 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	C16/2020
File Title:	Commonwealth of Australia v. AJL20
Registry:	Canberra
Document filed:	Form 27E - Reply
Filing party:	Applicant
Date filed:	26 Mar 2021

Important Information

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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

REPLY SUBMISSIONS OF THE APPELLANT

Filed on behalf of the Appellant by:

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PART I FORM OF SUBMISSIONS

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

PART II REPLY

2. In cases of this kind, proper legal analysis requires, first, an assessment of whether the impugned law complies with any relevant constitutional limits in all of its operations. If it does, then no further constitutional issue arises, and the only remaining question is whether executive action complies with the relevant statutory limits.[1] Sections 189, 196 and 198 comply with Ch III in all their operations, because they authorise and require the detention of non-citizens only for the purposes upheld in *Lim* and *Al-Kateb* and subject to an enforceable requirement to pursue those purposes in a timely way. Executive action or inaction cannot change those purposes, or the circumstances in which detention is required as a result of the judgment of Parliament (cf **RS [14]**). Where necessary, however, such Executive action or inaction may attract judicial review, that being the means to ensure that the Executive gives effect to the scheme as Parliament intended.

3. It is no part of the Commonwealth's case that the Act authorises "purposeless detention". To the contrary, detention must occur for the purposes and in the circumstances mandated by Parliament (as is conceded at **RS [87]**; cf **RS [23], [69]**). Nor does the Commonwealth contend that habeas cannot issue when detention is unlawful. In contending that the Commonwealth "must" advance one of those propositions (**RS [69]-[71]**), the respondent attacks a straw man. By reason of s 196(1), detention "until" the actual occurrence of one of the events specified in that sub-section is authorised by the Act. While Parliament has linked the occurrence of those events to enforceable duties to bring those events about, it has not linked the lawfulness of detention to compliance with those duties (as opposed to the occurrence of the events that compliance with those duties will bring about). That choice was open to Parliament, it being within its power to authorise detention until the grant of a visa or removal actually occurs because that is the only way to prevent the entry into the community of non-citizens who do not have permission to enter. That is not to deny that officers must comply with the law and discharge their enforceable duties in a timely manner. It is, however, to say that detention remains lawful even if officers fail to

[1] *Palmer v Western Australia* [2021] HCA 5 at [63]-[68] (Kiefel CJ and Keane J), [119], [127] (Gageler J), [201]-[202] (Gordon J), [224] (Edelman J); *Wotton v Queensland* (2012) 246 CLR 1 at [10], [21]-[22].

comply with those duties. That is consistent with Ch III because the courts can at any time and from time to time enforce the legal limits of detention, where necessary by granting mandamus to require performance of the duty to bring about a terminating event.

4. No decision of this Court "answers" the issue presented by this appeal (cf **RS [16]**). By far the most relevant authority is *Al-Kateb*, where the Court was required to decide whether the same provisions that are in issue in this appeal authorised immigration detention in circumstances where the purpose of that detention could not be achieved in the reasonably foreseeable future (as opposed to had not been achieved because the executive had not complied with its statutory duty). Even in the context of that harder case (because mandamus was not available to bring detention to an end), this Court held that immigration detention was validly required by the statute. The two essential reasons for that holding were that ss 189 and 196 could not be construed as permitting non-citizens to enter the Australian community without a visa, and Ch III did not prevent Parliament from requiring the detention of non-citizens so as to deny them entry to the Australian community until such time as they were removed.

5. The same result should follow in this case, for essentially the same reasons. The various passages in the authorities upon which the respondent focuses do not support any different result. Nor can they overcome the respondent's failure to identify any reason why — as a matter of principle — it is beyond the power of Parliament to authorise the detention of non-citizens who have no right to enter the Australian community until they are actually removed, where that authorisation is combined with an enforceable duty to bring such detention to an end in specified circumstances. Such a scheme gives effect to an important aspect of Australia's sovereignty. It is not prevented by Ch III.

Lim

6. In *Lim*, the Court answered a question in a stated case asking whether ss 54L, 54N and 54R, as inserted by the *Migration Amendment Act 1992* (Cth), were valid. No person had been detained after removal should have occurred, and no question was asked (or finding made) concerning whether any individual had been unlawfully detained. Nor was any argument addressed to those topics.[2] The reasons for judgment in *Lim* must be read in

[2] A review of the written and oral submissions in *Lim* confirms that there was no argument concerning the consequences of failing to comply with s 54P for the ongoing authority to detain. As such, it is not an authority on that point: *CSR Ltd v Eddy* (2005) 226 CLR 1 at [13].

that context. Further, the provisions in issue in *Lim* applied only to a small group of "designated persons" (s 54K). While a model for the current provisions, they had yet to be extended to constitute a scheme requiring the detention of all unlawful non-citizens. For that reason, in *Lim* the contextual factors identified at **AS [14]-[16]** were not available to inform the construction of the provisions.

7. The Court unanimously upheld the validity of s 54L (the equivalent to s 196(1)), which clearly required detention until removal or the grant of a visa actually occurred (subject to certain time limits with no equivalent in the current Act). While the plurality (Gaudron J agreeing) held s 54R invalid, that occurred because under the scheme it was possible for the detention of a "designated person" to become unlawful, including because s 54Q provided that the provisions requiring detention and removal ceased to apply to a "designated person" after a specified time.[3] As s 54R purported to prevent a court from ordering release in those circumstances, it was (consistently with the Commonwealth's argument – cf **RS [27]**) clearly inconsistent with Ch III to that extent.

8. The plurality gave two further examples of situations where "detention in custody" would no longer be "authorised" (at 35-36). Both involved the triggering of a duty to remove a designated person from Australia "as soon as practicable" and disregard of that duty. However, it is significant that s 54L referred to removal from Australia as one of the two circumstances where a designated person could be "released from custody". Given that language, s 54R purported to prevent a court from enforcing the duty to remove because that was a form of "release". Unlike s 54R, s 196(3) expressly does not prohibit an order for release of a person by way of removal from Australia.

9. *Lim* predates the line of Federal Court authority discussed in **AS [29]-[30]**. If the respondent truly were advancing an "orthodox" submission in light of *Lim* (cf **RS [58], [72]**), then the many Federal Court judges who decided the cases in that line (including the unanimous Full Court in *Al Masri*) misunderstood *Lim*. In truth, *Lim* does not control the outcome of this case, and it need not be re-opened (cf **RS [16], [35], [82]**).

[3] The importance of the time limit in s 54Q to the reasoning is consistent with the conclusion at the foot of pg 38, which refers to release upon the expiry of the time period in s 54Q (and also a time limit in s 54P(2)) but otherwise only upon removal or grant of a visa. That suggests their Honours did not support Mason CJ's wider reasoning at p 12: cf **RS [34], [74]**.

Al-Kateb

10. The respondent's treatment of the leading judgment of Hayne J in *Al-Kateb* does not engage with the passages quoted or cited in **AS [34]** and **[36]** that make plain that the Act authorises detention until the occurrence of one of the events specified in s 196(1). Hayne J did not hold that detention ceases to be lawful at a time before removal occurs (cf **RS [41]**, **[59]**). In submitting otherwise, the respondent seizes on one sentence at the end of his Honour's summary of *Lim* but ignores the 12 paragraphs that immediately follow (at [252]-[263]) in which Hayne J qualifies aspects of the reasoning in *Lim*, and emphasises Parliament's power to segregate aliens from the community until they are removed because "otherwise [they would] gain entry to the Australian community which the Executive has decided should not be granted" (at [262]; also [255], [261], [266]-[267]). His Honour evidently did not consider that the purpose of removal was "spent" until removal actually occurred (cf **RS [42]**). To treat his analysis as supporting the view that detention ceases to be lawful before the grant of a visa or removal actually occurs is to ignore his Honour's point that the "premise for the debate is that the non-citizen does not have permission to be at liberty in the community" (at [254]).

Plaintiff M76

11. **RS [48]** recognises that *Plaintiff M76* "raised different issues", yet the respondent attaches significance to statements that were not directed to the point now in issue. For example, the statement of French CJ discussed in **RS [49]** is a tangential reference to the position in the ordinary course of events, and says nothing as to the appropriate remedy if removal did not occur when required.[4] **RS [50]-[52]** focus on the joint judgment of Crennan, Bell and Gageler JJ, in which their Honours explained that "the *period* of detention" is to "be limited to the time necessarily taken in administrative processes directed to the limited purposes identified".[5] That is true, for ss 65, 189, 196, 198AD, 198 and 200 together authorise detention until a visa is granted or until a person is taken to a regional processing country, removed or deported. The time taken to <u>complete</u> one of those administrative steps fixes the period of detention under the Act. Until then, "the

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4 (2013) 251 CLR 322 at [31]; cf his Honour's reasoning squarely on point in *WAIS v Minister Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1625 at [56].

5 (2013) 251 CLR 322 at [139].

non-citizen has no legal right to enter the community, and a law providing for detention during the process of decision-making is not punitive in nature".[6] **RS [53]-[54]** focus on paragraphs of Hayne J's reasons in which his Honour held that the Minister, having decided to consider exercising power under s 46A(2) by reference to the outcome of a Refugee Status Assessment process, was bound then to do so. Those paragraphs are not germane to the issues in this appeal.

12. **RS [56]-[60]** advance a distorted reading of Kiefel and Keane JJ's reasons at [182]-[183]. Both as a matter of construction and as a matter of constitutional principle, it would be anomalous if the Act authorised the indefinite segregation of a non-citizen whose removal was not reasonably practicable, yet did not authorise a much shorter period of segregation pending enforcement of the duty to remove an unlawful non-citizen, given that in both cases the non-citizen has no right to be in the community.

Plaintiff S4

13. **RS [83]** concedes the points made in **AS [42]-[43]** as to the issues in *Plaintiff S4*, yet the respondent then quotes extensively from statements in that case that are of no assistance here (**RS [61]-[66]**). The point is not that *Plaintiff S4* is factually distinguishable (cf **RS [84]**). It is that *Plaintiff S4* had nothing to do with immigration detention, such that no argument was directed to any of the relevant authorities or principles. In any case, the statements in *Plaintiff S4* are not inconsistent with the Commonwealth's case, which does not involve "detention at the discretion of the Executive" (cf **RS [84]**). The Court can and should enforce the legal limits of detention by enforcing the duties imposed by the Act, that being the way to ensure that the events that bring an end to detention occur within the timeframes that Parliament intended. To suggest that the Commonwealth's submission "does not admit of a temporal outer limit to lawful detention" (**RS [67]**) is to misstate or misunderstand the Commonwealth's case profoundly.

Dated: 26 March 2021

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[6] *Re Woolley; Ex parte M276/2003* (2004) 225 CLR 1 at [26] (Gleeson CJ), cited in *Plaintiff M76* (2013) 251 CLR 322 at [139] (Crennan, Bell and Gageler JJ).