HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 12 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 27D - Respondent's submissions
Filing party:	Defendant
Date filed:	12 Mar 2021

Important Information

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IN THE HIGH COURT OF AUSTRALIA

CANBERRA REGISTRY

No. C16 of 2020

BETWEEN: **COMMONWEALTH OF AUSTRALIA**

Appellant

AND

AJL20

Respondent

No. C17 of 2020

BETWEEN: **COMMONWEALTH OF AUSTRALIA**

Appellant

AND

AJL20

Respondent

RESPONDENT'S OUTLINE OF SUBMISSIONS

Filed on behalf of the Respondent by:
Human Rights for All
PO Box 391, Lindfield, NSW, 2070

Date of this document: 12 March 2021
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Part I. Form of submissions

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

Part II. Issues presented by the appeal

2. The issue presented by this appeal is this: do (and can, consistently with Ch III of the Constitution) ss 189, 196, and 198 of the *Migration Act 1958* authorise (*i.e.*, render lawful) detention of an unlawful non-citizen while the Commonwealth is not pursuing any lawful purpose of detention? AJL20 answers this question thus: "no" (and nor could they). The Commonwealth answers, "yes" (and that the provisions are saved from invalidity by the ability of the unlawful non-citizen to seek *mandamus* in relation to the s 198 duty).

3. **AS [2]** mis-states Bromberg J's conclusions. His Honour did hold that the Commonwealth had failed to comply with its duty to remove AJL20 from Australia as soon as reasonably practicable (**J [127], [171]; CAB 69, 80**). That is not contested on appeal (**AS [2]**). The Commonwealth says (**AS [2]**) that that led his Honour to reach four conclusions. The *first* conclusion attributed to Bromberg J is more or less what his Honour held, but it is better to use his Honour's language: that the failure to carry the purpose of removal into effect as soon as reasonably practicable showed that the Commonwealth had departed from the only relevant lawful purpose (being removal) (**J [128], [171] CAB 69, 80**). The *second* conclusion—the Act did not, properly construed, authorise AJL20's detention—is one that his Honour reached. So too did his Honour reach the *third*—AJL20 should be released.

4. But the *fourth* purported conclusion identified at **AS [2]** (see also **AS [13]**) is not one that Bromberg J reached. His Honour did find that relief would be utile, but not because there could never be re-detention. His Honour held that, "in the prevailing circumstances" AJL20 could not be detained (**J [175], CAB 81**). If the prevailing circumstances change—*i.e.*, if the Commonwealth abandons its unlawful policy of acting as though s 197C "does not exist" (**J [123], CAB 68**), and resolves to take steps to remove AJL20 from Australia as soon as reasonably practicable—AJL20 could be detained for that purpose.[1]

5. The Commonwealth's submissions fail to recognise or address the fact that Bromberg J found AJL20's unlawful detention, as well as justifying discharge on *habeas*, constituted the tort of false imprisonment, with damages yet to be assessed.

Part III. Section 78B notice

6. Notice has already been given under s 78B of the *Judiciary Act 1903* (Cth).

Part IV. Contested material facts set out in Appellant's narrative or chronology

7. AJL20 agrees with the procedural history at **AS [6]–[9]**.

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[1] This is consistent with *Wiest v DPP* (1988) 81 ALR 129 at 135–136 (Davies J), discussed in Aronson *et al*, *Judicial Review of Administrative Action and Government Liability* (6th ed., 2017) at [14.40], and AJL20's case as presented below. Aronson *et al* summarise the position thus: "[t]he fact that one detention was invalid does not necessarily prevent the official again detaining the person, in a way which does not repeat the previous error."

A. Facts and Bromberg J's decision at first instance

8. AJL20 would add a point to **AS [10]–[11]**. AJL20 pleaded that his detention would only be lawful if it were for one of three, or possibly four, purposes: (a) removing him; (b) receiving, investigating and determining an application for a visa by him; (c) determining whether to permit him to make a valid application for a visa; or (d) possibly, determining whether to grant him a visa without application (*i.e.*, under s 195A).[2] The Commonwealth admitted that AJL20's detention had not been for purposes (b)–(d), and said that it "has been for the purpose of removing him from Australia." Thus, it was common ground that if (as AJL20 contended) detention was lawful only if it were for one of these purposes, the only relevant purpose was the purpose of removal from Australia as soon as reasonably practicable.

9. **AS [12]** mischaracterises Bromberg J's judgment. It is inaccurate to say that his Honour's reasoning "depended on a particular reading" of *Plaintiff S4* (*cf.* **AS [12]**). As is apparent from **J [11]–[94] CAB 35–60**, his Honour's interpretation of ss 189, 196, and 198 was based on consideration (in addition to *Plaintiff S4*) of *Lim*,[3] *Koon Wing Lau*,[4] *Al-Kateb*,[5] *Plaintiff M76*,[6] and *Plaintiff M96A*.[7] *Lim*, particularly, was important due to its "seminal holding" (**J [23], [29], [36(b)], [37]–[38], CAB 40, 42, 44–45**). The scantness of the Commonwealth's submissions about *Lim* is telling. *Lim* is addressed in detail below. **AS [13]** also misunderstands the reasoning of Kiefel and Keane JJ in *Plaintiff M76*; also addressed below.

Part V. Argument on appeal

A. Statutory scheme

10. Section 4(2) of the Act provides, relevantly, that the Act provides for visas permitting non-citizens to remain in Australia, and that Parliament intends the Act to be the only source of the right for non-citizens so to remain.

11. Section 189(1) provides that if an officer knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, the officer must detain that person. Section 196(1)(a) provides that an unlawful non-citizen detained under s 189 must be kept in detention until removed from Australia under (relevantly) s 198. Section 198 requires removal in a variety of circumstances, including (relevantly) those provided for in s 198(6). It was common ground that AJL20 has at all material times been an unlawful non-citizen, and that s 198(6) was engaged by 26 July 2019 (**J [5], CAB 34**).

12. It may be accepted in this light (*cf.* **AS [15]**) that the Act has (non-exhaustively) three features, as identified by Hayne J in *Al-Kateb* at [210]. It contemplates: (1) that a visa is necessary to

2 *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at [26] identifies three purposes; it is not necessary to decide whether there is a fourth.
3 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.
4 *Koon Wing Lau v Caldwell* (1949) 80 CLR 533.
5 *Al-Kateb v Godwin* (2004) 219 CLR 562.
6 *Plaintiff M76/2013 v Minister for Immigration and Border Protection* (2013) 251 CLR 322.
7 *Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582.

enter and remain in Australia—though a notable exception to the proposition in **AS [15(a)]**, that non-citizens can only be in the community with a visa, is the residence determination scheme in Pt 2, Div 7, Subdiv B of the Act, inserted after *Al-Kateb*; (2) absent a visa a person must be detained; (3) detention is to continue until (relevantly) removal. But a fourth and critical feature, which Hayne J identified in *Al-Kateb* at [210] but which the Commonwealth omits from **AS [15]**, is that "[r]emoval or deportation must occur 'as soon as reasonably practicable'," after one of the triggers for removal in s 198 (here, s 198(6)) occurs.

13. Identifying this fourth feature reveals a flaw in the Commonwealth's argument: for as long as the Commonwealth acts consistently with this fourth feature (the duty to remove as soon as reasonably practicable), all other features of the scheme are maintained. The question posed by this appeal is different: what happens when the Commonwealth fails to discharge its duty? *Ex hypothesi*, the Commonwealth is, in that scenario, itself acting "contrary to the objects and principal features of the Act" (**AS [16]**).

14. The Commonwealth's approach thus involves identifying consequences of a particular construction on the hypothesis that it has failed to comply with its duty under s 198. This is a wrong approach. Rather, the proper construction of ss 189, 196, and 198 should be "framed on the assumption" that the Executive will comply with its s 198 duty—"[t]hat is what the law requires and it is to be expected that the requirements of the law will be observed."[8] So, Bromberg J's construction does not undermine any of the features of the Act: for as long as the Commonwealth discharges its duties, the binary structure (visa-holders in the community; non-visa-holders purposively detained) is maintained.

15. This is why **AS [16]** is wrong. Assuming that the limitations on the Executive's power to detain are not transgressed (these limitations being, as outlined below, purposive), then an unlawful non-citizen in AJL20's position will be detained until removal "actually occurs". The Act does not, of course, expressly provide for release of unlawful non-citizens in the event of transgression by the Executive of the limitations on its power to detain, but it need not do so for two reasons: *first*, the Act requires pursuit of a purpose and expects that that will be observed; *second*, it is fundamental that the remedy for unlawful detention is *habeas*—this need not be stated expressly. There is no gap in the Act.

16. A useful way to address the constructional issue, then, is to answer two questions. Does the Act authorise the Commonwealth to detain a person while it fails to do what is required by s 198 (read with s 197C) (which must be the Commonwealth's argument)? If so, can it do so, consistently with Ch III? This Court has already (correctly) answered those questions "no", in judgments which the Commonwealth does not seek to re-open. That proposition is the central focus of these submissions. First, however, it is useful to discuss s 197C.

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8 *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at [45] (Gageler, Keane and Nettle JJ).

B. Section 197C of the *Migration Act 1958* (Cth)

17. Section 197C of the Act was inserted by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth). It provides that, for the purposes of s 198, it is irrelevant whether Australia has *non-refoulement* obligations in respect of an unlawful non-citizen (s 197C(1)), and that the duty to remove as soon as reasonably practicable an unlawful non-citizen under s 198 arises irrespective of whether there has been an assessment, according to law, of *non-refoulement* obligations in respect of the non-citizen (s 197C(2)). (*Non-refoulement* obligations are also irrelevant to assessment of the "practicability" of removal.[9])

18. The Explanatory Memorandum made expressly clear (at [1128]–[1146]) that the purpose of inserting s 197C was to reverse jurisprudence of this Court[10] and the Federal Court[11] that the removal power in s 198 was to be read in light of, and subject to, international obligations. It went on to say that Australia would continue to meet *non-refoulement* obligations through "other mechanisms", including "the protection visa application process or the use of the Minister's personal powers ([1142]).[12] The effect of inserting s 197C, as the Commonwealth accepted (**J [95], CAB 61**), is that it cannot lawfully defer removing a person from Australia because the person was or may be owed *non-refoulement* obligations.[13] By extension, the Commonwealth cannot lawfully elect only to pursue (fruitlessly) the prospect of persuading a third country, of which the person is not a national, to take him or her while taking no steps to remove to the country of nationality (**J [152], [169]–[171], CAB 75, 79–80**).[14]

19. Before s 197C, the Commonwealth may have argued that the Act did not authorise the removal of someone in AJL20's position to a country in breach of Australia's *non-refoulement* obligations and that, so long as it was pursuing the possibility of removal to a third country, detention was lawful (governed by the construction of the Act explained in *Al-Kateb*). In the light of s 197C, that way is now closed. The Commonwealth cannot lawfully decline, by reason of its desire not to breach international law, to seek to remove an unlawful non-citizen to their home country and thereby (by its unlawful policy) render detention indefinite. The Commonwealth must seek to remove, or ensure compliance with its *non-refoulement* obligations by "other mechanisms" (*e.g.*, the grant of a visa). There is no "third way."

20. Bromberg J records these findings, which are unchallenged: officers of the Commonwealth

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9 *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 146 at [65] (Full Court); *NATB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 506 at [47], [52] (Full Court). "Practicable", in this context, simply means "capable of being carried out in action; feasible".

10 *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 241 CLR 539; *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144.

11 *Minister for Immigration and Citizenship v SZQRB* (2013) 210 FCR 505.

12 See also the Second Reading Speech, Commonwealth, *Parliamentary Debates*, House of Representatives, 25 September 2014, 10548–10549 (Scott Morrison, Minister for Immigration and Border Protection).

13 See also *DMH16 v Minister for Immigration and Border Protection* (2017) 253 FCR 576.

14 See also *Al-Kateb* at [227] (Hayne J): "[U]nless some other provision of the Act restricts the place to which a non-citizen may be removed (and none was said to be relevant here), the duty imposed by s 198 requires an officer to seek to remove the non-citizen to any place that will receive the non-citizen" (emphasis added).

repeatedly recorded as the reason for failing to pursue removal the fact that AJL20 was owed *non-refoulement* obligations in relation to Syria (**J [105], [112], [129]–[131], CAB 63, 65, 69–70**); the Commonwealth did not seek to justify inaction in the first period by reference to obstacles beyond its control (**J [118], CAB 66**); it was *non-refoulement* obligations that explains inactivity in regard to removal (**J [120], [157], CAB 67, 76**); but this was not based on misunderstanding s 197C and 198 (**J [122], CAB 68**); rather, inactivity was based on Departmental officers following a policy of non-removal that could not, in light of s 197C, be legally justified (**J [123], CAB 68**). In short, the Commonwealth self-imposed a legally unjustifiable obstacle to removal (**J [123], CAB 68**). Removal was not undertaken or carried into effect as soon as reasonably practicable (**J [128], CAB 69**). In any event, the Commonwealth had not discharged its burden of proof (**J [160], [171], CAB 77, 80**).

C. Judgments of this Court addressing the constructional question

Chu Kheng Lim

21. The provisions at issue in *Lim* "were not substantially different" from the provisions at issue in this case: s 54J (corresponds to s 4); s 54N (s 189), s 54L (s 196(1)); s 54R (s 196(3)); and s 54P (s 198).[15] The plaintiffs were Cambodian nationals who were detained in custody. Their applications for refugee status were rejected, but in 1992 those decisions were set aside by the Federal Court, which also ordered that applications made in April 1992 for release from custody be heard starting on 7 May 1992. On 5 May 1992, Div 4B (including ss 54N, 54L and 54P) was inserted into the Act by the *Migration Amendment Act 1992*.

22. The central question in *Lim* was whether those sections were invalid in respect of the applications for release from custody. The leading judgment was that of Brennan, Deane and Dawson JJ (Gaudron J agreeing at 58), from which the following propositions emerge.

23. A public official cannot lawfully detain an individual without "positive authority" conferred by some valid statutory provision (at 19). The requirement for such positive authorisation is, of course, a manifestation of ancient and fundamental law.[16] So, authorisation and lawfulness are truly one and the same thing. Relevantly, here, therefore: Parliament either positively authorises the Commonwealth to detain a person in AJL20's circumstances while taking no steps to fulfil a purpose such as removal, or it does not. There is no "middle ground" where such purposeless detention is not "positively authorised" but is "lawful."

24. Exceptional cases aside, involuntary detention by the State is penal or punitive in character and so exists as an incident of the exclusively judicial function of adjudging and punishing criminal guilt (at 27). Parliament's power to make laws with respect to aliens extends to authorising restraint in custody, but only "to the extent necessary to make the deportation effective" (at 30–31, citing *Koon Wing Lau*, addressed below). The conferral of "such limited

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15 *Al-Kateb* at 645 [248] (Hayne J).

16 See, e.g., *Lim* at 19 (Brennan, Deane and Dawson JJ), citing generally *Kioa v West* (1985) 159 CLR 550, at 631; *Ex parte Lo Pak* (1888) 9 LR (NSW) 221 at 244–245; *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 79–80; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 528–529.

authority to detain", "in [that] context and for that purpose" does not infringe Ch III (at 32).

25. Accordingly—and this is the "seminal holding" in *Lim* (at 33, emphasis added):

> *"… the [relevant] sections will be valid laws if the detention which they require and authorize is limited to what is reasonably capable of being seen as necessary for the purposes of deportation … . On the other hand, if the detention which those sections require and authorize is not so limited, the authority which they purportedly confer upon the Executive cannot properly be seen as an incident of the executive powers to exclude, admit and deport an alien. In that event, they will be of a punitive nature and contravene Ch. III's insistence that the judicial power of the Commonwealth be vested exclusively in the courts which it designates."*

26. What saved ss 54L and 54N from invalidity was the presence of limitations on the authority to continue to detain an alien. Importantly, s 54P(1)—which "set[] the context in which the other provisions of Div 4B operate[d]" (at 33)—required removal as soon as practicable after the alien requested removal (at 33–34). Once such a request was made, "further detention in custody [was] authorized by Div 4B only for the limited period involved, in the circumstances of a particular case, in complying with the statutory requirement of removal 'as soon as practicable'" (at 34, emphasis added).

27. The plurality went on to consider whether s 54R was invalid. It purported to prevent a court ordering the release from custody of a designated person. Their Honours held that it was invalid (at 36), because it purported to prevent the release of a person even where the person was being held unlawfully, "by a person purportedly acting in pursuance of Div 4B (at 35). For example, relevantly to the present case, if a person "continued to be held in custody in disregard of a request for removal duly made under s 54P(1) … the person concerned would remain a designated person … but could no longer be lawfully held in involuntary custody" (at 36). The section could not be read down to bring it within power (at 37). Notably, however, if the Commonwealth's submissions in this case were correct (and they are not), their Honours would not have found s 54R to be invalid; they would have said that the limits on permissible detention were to be enforced solely by *mandamus* and never by *habeas*.

28. Four propositions follow. *First*, ss 54N, 54L, and 54P (or, now, ss 189, 196(1), and 198) do not infringe Ch III because (and if and only if) the detention that they authorise is limited to what is reasonably capable of being seen as necessary for the purposes of detention. *Second*, they are so limited including because they require removal "as soon as reasonably practicable" upon the happening of particular events (including, *e.g.*, a request for removal). *Third*, if, in the "circumstances of a particular case", removal is not effected as soon as possible, detention is no longer "authorized." *Fourth*, to the extent that the Act is construed as prohibiting discharge on *habeas* even where that limitation has been contravened, it is invalid. Why is it invalid? Because continued detention after the occasion for removal has arisen is not (and could not be) authorised by the Act; the affected person "could no longer be lawfully held in involuntary custody" (at 36), and it is not within the legislative power of the Commonwealth to prevent the release of such a person (at 36).

29. That reasoning is enough to decide this case. It is not in contest that the occasion for AJL20's removal had arisen (here, by operation of s 198(6); it would not matter if it was by operation of s 198(1) instead). The result is that continued custody was only authorised "for the limited period involved … in complying with the statutory requirement of removal as soon as practicable" (at 34). It is undisputed that the Commonwealth did not comply with the statutory requirement of removal as soon as practicable. If ss 189, 196, and 198 were construed as authorising detention despite this, they would be beyond power. Or, if s 196 were construed as precluding discharge on *habeas* despite excess of power, it would be invalid.

30. The reasoning of the minority judges in *Lim* leads to the same conclusion. Mason CJ agreed with the plurality that the legislative power conferred by s 51(xix) extends to conferring authority to detain an alien for the purposes of deportation (at 10). When conferred in that context and for that purpose, such limited authority can be conferred without inconsistency with Ch III (at 10). The logical endpoint of Mason CJ's reasoning (which is not different from the plurality's) is at 11–12, and directly applies here:

> *"What initially begins as lawful custody under Div 4B may cease to be lawful by reason of the failure of the Executive to take steps to remove a designated person in Australia in conformity with Div 4B. Thus, a failure to remove a designated person from Australia 'as soon as practicable' pursuant to s 54P(1), after that person has asked the Minister in writing to be removed, would, in my view, deprive the Executive of legal authority to retain that person in custody. So also would a failure to remove a designated person from Australia pursuant to the terms of s 54P(2) and (3)."*

31. Section 54P(3) (set out at CLR 18) operates no differently from s 198(6). So, Mason CJ's reasoning mirrors AJL20's submission, and is directly contrary to the Commonwealth's.

32. The difference between Mason CJ and the plurality was only that Mason CJ considered that s 54R could be read down (at 10), as a direction to courts not to release a person lawfully held in custody (at 10, 13–14). Toohey J said that s 54P, in requiring removal as soon as practicable, ensures that detention would not be for any lengthy period (at 46). His Honour considered, as did Mason CJ, that "there may be circumstances in which a person with the status of a designated person is unlawfully held in custody by a person purportedly acting pursuant to Div 4B" (at 50). Accordingly, s 54R was to be read down so as to prevent the release only of people who were lawfully detained (at 50–51).

33. McHugh J stated a principle in similar terms to the "seminal principle," at 65: "[i]f a law authorizing the detention of an alien went beyond what was reasonably necessary to effect the deportation of that person, the law might be invalid because it infringed the provisions of Ch III of the Constitution." At 71, his Honour said further that if imprisonment itself "goes beyond what is reasonably necessary to achieve the non-punitive object, it will be regarded as punitive in character." And (like the plurality), McHugh J considered that the effect of provisions requiring detention to be brought to an end within a determinable period (including s 54P) meant that Div 4B did not authorise detention in the nature of punishment (at 72). Like Mason CJ and Toohey J, McHugh J held that s 54R was saved from invalidity

by reading it as preventing the release only of lawfully detained persons (at 67–68, 69).

34. This survey reveals that there was no difference in principle between the judgments of the majority and those of the dissentients in *Lim*. The dividing line was whether s 54R could be read down. Inherent in the reasoning of all was that, in particular circumstances (including, relevantly, where the duty to remove had arisen but had not been discharged), detention was not authorised by Div 4B (and it was this limitation on authority that prevented Div 4B from being invalid in entirety). All agreed that, if s 54R was construed as preventing the release of an unlawfully-detained person, it was beyond power. And all agreed in a proposition most-clearly articulated in Mason CJ's judgment: that Div 4B only authorised detention for a limited period (the time necessary to effect removal), that thereafter detention was not authorised, and that detention that started as authorised may become unauthorised including because of a failure by the Executive to do what the statute required: to remove the detainee.

35. The Commonwealth's submissions simply cannot be reconciled with either the majority or the dissenting view. On the majority view, so far as s 196 (s 54R) prevents the release of a person held unlawfully (*e.g.*, detention beyond the "limited period involved … in complying with the statutory requirement of removal 'as soon as practicable'"), it is invalid. There is no suggestion that it is somehow saved because *mandamus* is available instead. On the minority view, s 196 (s 54R) is not invalid, but only because it does not prevent the release of an unlawfully-detained person (where unlawfulness might arise as a result of, *e.g.*, a failure to remove within the time period specified in s 198(6) (s 54P(2)–(3)). *Lim*, therefore, would have to be re-opened and overruled for the Commonwealth to succeed. Yet, as noted above, the Commonwealth has not sought to re-open *Lim*.

Koon Wing Lau

36. It is convenient to detour back to *Koon Wing Lau*. Section 7(1)(a) of the *War-time Refugees Removal Act 1949* (Cth) provided (at 581) that a deportee may be kept in custody, "pending his deportation and until he is placed on board a vessel for deportation from Australia" (emphasis added). Latham CJ held at 556 (McTiernan J agreeing at 583; Webb J agreeing at 595) that "[i]f it were shown that detention was not being used for these purposes the detention would be unauthorized and a writ of habeas corpus would provide an immediate remedy". Similarly, Dixon J held at 581 (Rich J agreeing at 570), that "the words 'pending deportation' imply purpose", that "a deportee may be held in custody for the purpose of fulfilling the obligation to deport him until he is placed on board the vessel," (the emphasis is Hayne J's in *Al-Kateb* at [224]) and that "unless within a reasonable time [the person to be deported] is placed on board a vessel he would be entitled to his discharge on habeas." Thus, *Koon Wing Lau* also contemplates that detention must be purposive, and that failure to pursue a purpose entitled a detainee to discharge on *habeas*.

***Park Oh Ho v Minister of State for Immigration and Ethnic Affairs* (1989) 167 CLR 637**

37. A similar result obtained in *Park Oh Ho*. Section 39(6) of the Act provided that "[a] deportee

may be kept in such custody as the Minister or an officer directs – (a) pending deportation, until he is placed on board a vessel for deportation" (emphasis added). One of the reasons given by all members of the Court as to why the continued detention of the appellants was not justified was that s 39(6) only authorised detention "during such time as is required for the implementation of the deportation order"; "[i]t does not authorize the indefinite detention in custody of a person for some ulterior purpose" (643). So too, here, the Act does not authorise the indefinite detention in custody of a person for a purpose other than removal as soon reasonably practicable—*i.e.*, as soon as is convenient to the Commonwealth in light of a desire to avoid breaching *non-refoulement* obligations.

10 ***Al-Kateb v Godwin***

38. *Al-Kateb* concerned the detention of a stateless person who had not been removed because attempts at international co-operation in service of removal were made but were not successful. The facts and issue for decision in *Al-Kateb* were critically different to the present case. In *Al-Kateb*, there was an impediment to removal (the absence of international co-operation); in the present case, there is no finding of any impediment. In *Al-Kateb*, steps had been taken to remove (*i.e.*, the purpose of removal was being pursued) (see at [197] (Hayne J)); in the present case, it is common ground that the Commonwealth failed to comply with its duty to remove AJL20 as soon as reasonably practicable. In *Al*-Kateb it was argued, in effect, that the provisions do not authorise continued detention where removal
20 could not be affected in the reasonably foreseeable future (which is not AJL20's argument).

39. The leading judgment in *Al-Kateb* is that of Hayne J (Heydon J agreeing).[17] At [224], Hayne J noted that the relevant sections did not differ from those in issue in *Koon Wing Lau* in that neither expressly refers to the purpose of detention. But, as explained above, in *Koon Wing Lau* (and in *Park Oh Ho*), the Court held that the legislation impliedly authorised detention only for a purpose. Having cited the passages from Dixon J's judgment in *Koon Wing Lau* that are quoted above, Hayne J said (at [225]) that the period of detention is governed by the requirement to effect removal as soon as reasonably practicable, and that since the period of detention is prescribed, the relevant sections "may therefore be read as providing for detention for the purposes of processing any visa application and removal."

30 40. His Honour's analysis proceeds on the basis that detention is authorised if it is for a purpose. But his Honour held (at [231]) that "so, it cannot be said that the purpose of detention (the purpose of removal) is shown to be spent by showing that efforts made to achieve removal have not so far been successful." In that case, it was only possible to say that it had not yet been practicable to remove, not that it would never happen. So, it could not be said that the time for performance of the duty had arrived ([231]). And, that did not mean that continued detention was not for the permitted purpose, "the legislature having authorised detention until the first point at which removal [was] reasonably practicable" (at [231]). Again, this

17 See *Plaintiff M76* at [175] (Kiefel and Keane JJ).

reveals the distinguishability of *Al-Kateb* from this case: here, the Commonwealth failed to prove that it had not yet been practicable to remove AJL20 (and indeed now accepts the finding that it failed to discharge its duty in that respect).

41. From [234]–[237], his Honour considered *Al Masri*.[18] In *Al Masri*, the Full Court had held that the power to detain was impliedly limited to detention only in circumstances where there was a real likelihood or prospect of removal from Australia in the reasonably foreseeable future.[19] Hayne J said that this involved "transform[ing]" the temporal limit in s 198—as soon as reasonably practicable—into a different limit—"soon," or "for so long as it appears likely to be possible of proximate performance" ([237]). That was impermissible; but, critically, what could "readily be justified by the need to read [ss 189, 196, and 198] together," however, was "transferr[ing]" the s 198 temporal limit (as soon as reasonably practicable) into ss 189 and 196 ([237]). This reflects AJL20's submission, not the Commonwealth's.

42. Starting at [248], Hayne J considered *Lim*. At [251]–[252], having quoted the plurality's "seminal holding," his Honour said that the provisions there (and in substantially the same form here) in issue were valid for the same reasons as in *Lim*. That is, they did not authorise detention beyond the point at which the purpose of detention was spent. That purpose would be spent when it became reasonably practicable to remove the non-citizen (at [251]). Inherent in this is that if the provisions did purport to authorise detention beyond that point, then they would be invalid for the same reason that s 54R was invalid in *Lim*. And, nothing in his Honour's reasons can be taken as suggesting that once the purpose was spent (and hence unauthorised), somehow the detainee was limited to seeking *mandamus*.[20]

43. In the same way, McHugh J agreed with Hayne J (at [33]) and also held as follows (at [34]):

> *"Detention under s 196 for the purpose of removal under s 198 will cease to be detention for that purpose only when the detention extends beyond the time when the removal of the non-citizen has become 'reasonably practicable'."*

44. This is directly inconsistent with the Commonwealth's submission to the effect that "purpose" is to be adjudged wholly by reference to the purpose that is mandated by the statute, rather than the purpose in fact held by the Commonwealth.

45. Callinan J approved Dixon J in *Koon Wing Lau* (at [288]), accepted that detention must be purposive in fact to be lawful (at [290]–[291], [294]–[295]) and approved *Lim* by stating that

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18 *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54.

19 *Al Masri* at [136].

20 Hayne J referred to the point at which "it had become reasonably practicable to remove the non-citizen concerned" ([251], see also [226]). In *Plaintiff S4* it was said that departure from the requirement to carry the purpose of detention into effect as soon as reasonably practicable would amount to departure from the purpose of detention ([34]). Bromberg J preferred the latter (**J [87]–[88], CAB 58–59**); his Honour was right for the reasons that his Honour gave. The Commonwealth appears to contemplate the same answer no matter the analysis (**AS [20]**). AJL20 agrees, and says that the answer in either case is the detention was unlawful. If the Court prefers the Hayne J view, what is relevant is that the Commonwealth accepted that it carried the onus of showing legality of detention (see **J [91], CAB 60**; *Ruddock v Taylor* (2003) 58 NSWLR 269 at [3]–[4] (Spigelman CJ); *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 223 at [5] and [53]–[60] (Allsop CJ), [90]–[92] (Besanko J), [265]–[272] (Mortimer J). The Commonwealth made no attempt to establish that it had not yet been reasonably practicable to remove (**J [88], CAB 59**).

"[t]he yardstick, and with respect rightly so, was 'purpose', the existence, that is the continuing existence of the relevant purpose of deportation".[21]

46. Nothing in the reasons of the minority undermines the strength of the majority reasons of, which amply support AJL20's case. Notably, Gummow J stated (at [117]) that "temporal limits are linked to the purposive nature of the detention requirement in the legislation."

Plaintiff M76

47. *Plaintiff M76* concerned a person who was precluded by s 46A(1) of the Act from making a visa application. The question was whether there was error in the process of referral under s 46A(2) for the Minister to consider whether to lift the prohibition. A subsidiary question was whether ss 189 and 196 of the Act authorised M76's detention in the meanwhile. M76's submission was that there was no power under s 198 to remove in light of a finding of refugee status, and therefore that *Al-Kateb* was distinguishable (or should be overruled) (CLR 327).

48. Again it is clear that *Plaintiff M76* raised different issues than this case. Here, unlike in *Plaintiff M76*, it is not in contest that s 198 requires removal as soon as reasonably practicable. Here, unlike in *Plaintiff M76*, there is no challenge to *Al-Kateb*. Nevertheless, there are statements in several of the judgments that are consistent with the analysis of *Lim* and *Al-Kateb* set out above, and which assist AJL20's case.

49. French CJ said (at [30]) that, absent the claim for protection under the Refugees Convention and the following process, "[her] continuing detention would only have been lawful while steps were being taken to arrange for her removal as soon as reasonably practicable." And here, assessment of AJL20's claim for protection was complete before the relevant period. Accordingly, by application of French CJ's reasoning, the taking of steps to arrange removal as soon as reasonably practicable was a condition of lawful detention. It is not in issue that those steps were not taken. The Commonwealth's submission cannot accommodate French CJ's reasoning (and does not try to).

50. The plurality (Crennan, Bell and Gageler JJ) started by setting out the "constitutional holding" from *Lim* ([138]). Their Honours went on to say that the necessity in that holding is not that detention itself be necessary for the purpose; but rather that the period of duration be limited to the time necessarily taken in administrative processes directed to the limited purposes identified ([138]). It follows, of course, that a statute that purported to authorise (in the sense of render lawful) detention going beyond that period would be beyond power. The Commonwealth does not address this aspect of the plurality's reasoning.

51. And, their Honours expressly contemplated (which the Commonwealth's submissions do not) that a non-citizen can seek relief from a court if and when detention becomes unlawful ([139]). Their Honours observed (which the Commonwealth's submissions do not

[21] See also at 659 [291], where his Honour said that "formal and unequivocal abandon[ment] of purpose" would amount to departure from permitted purpose; while no other justice (in any case) favoured this test, it illustrates that departure from purpose is possible.

countenance) that detention that commenced as lawful may become unlawful ([139]). At [140], their Honours continued thus (emphasis added):

> *"The constitutional holding in Lim was therefore that conferring limited legal authority to detain a non-citizen in custody as an incident of the statutory conferral on the executive of powers to consider and grant permission to remain in Australia, and to deport or remove if permission is not granted, is consistent with Ch III if, but only if, the detention in custody is limited to such period of time as is reasonably capable of being seen as necessary for the completion of administrative processes directed to those purposes."*

52. Their Honours did not say (which is the Commonwealth's case) that the relevant sections would be valid if, despite that they purported to authorise detention beyond the period of time necessary for the completion of administrative processes directed to a permitted purpose, it is open to the detainee to compel (through *mandamus*) compliance with a permitted purpose. And the "if, but only if" part of their Honours' reasoning denies that that is an available reading of their Honours' judgment.

53. Hayne J, at [89], said that M76's detention was lawful because (and only because (emphasis his Honour's)) it was for a permitted purpose. At [93], his Honour said that, the Minister having decided to consider whether to lift the visa application bar, he "should be held to be bound to make that decision and to do so within a reasonable time" (emphasis added). Failing this, there would be detention at the unconstrained discretion of the Executive, which construction should not be adopted ([83], see also [102]–[103]). Nothing in Hayne J's reasoning suggests that that construction could nevertheless be adopted as long as *mandamus* remained available to compel performance of duties.

54. At [99], Hayne J identified the "primary temporal limitation" on the power to detain as being the imposition of the statutory duty to remove as soon as reasonably practicable. Similarly, Hayne J reasoned at [103] that the Minister, by deciding to consider exercising the bar-lift power, fixed not only the means of pursuing the purpose of detention but also the duration thereof. These passages are consistent only with AJL20's case; inherent in the Commonwealth's submission is that there is no limitation on the power to detain or the duration of detention, only an ability to approach a court with a view to requiring the Commonwealth to discharge the purpose of that detention.

55. It is true that at [126], Hayne J denied that the word "until" in s 196 was to be read as fixing the purposes of detention. This is simply a re-iteration of his Honour's reasons in *Al-Kateb* rejecting the *Al-Masri* construction. His Honour is plainly not to be read as denying that detention is only authorised if for a permitted purpose; his Honour expressly said in *Al-Kateb* that the Act authorised detention for the purpose of removal ([225]), and that that purpose would be spent when it became reasonably practicable to remove the non-citizen ([251])—notably, not when the non-citizen was in fact removed. Similarly in *Plaintiff M76* itself, Hayne J said that the plaintiff's continued detention was only justifiable if it was "under and for the purposes of the Act" ([54]), and his Honour's consideration of whether this was so

involved analysis of purposive and temporal limits on detention (see esp. at [99]–[103]).

56. The Commonwealth relies on the judgment of Kiefel and Keane JJ at [182]–[183] as supporting its submission. But those paragraphs do not so support when they are read in their context. Starting at [179], their Honours commenced to deal with M76's submission that *Al-Kateb* was wrongly decided and should not be followed. In dealing with this submission, their Honours "focus[ed] upon the reasoning of Gleeson CJ" in *Al-Kateb* ([179]), his Honour having been in dissent. Their Honours identified that the "nub of the reasoning of Gleeson CJ was that the Act makes no express provision for indefinite detention" ([180]), summarising his Honour's reasoning thus ([180]):

> *"In resolving questions raised by legislative silence, regard should be had to a fundamental principle of interpretation, that of legality. It presumes that the legislature does not intend to abrogate or curtail human rights or freedoms (of which personal liberty is the most basic) unless such an intention is manifested by unambiguous language."*

57. Their Honours identified two points in that reasoning which required attention: *first*, whether the statute was silent on detention where removal was not yet practicable; *second*, whether there was a fundamental right which could be protected by the principle of legality ([181]). At [182]–[183], their Honours reasoned that "there is much to be said in favour of the view that the Act is not relevantly silent," in that ss 189, 196 and 198 are not qualified by any indication that detention depends on reasonable practicability of removal. Rather, s 189 is unqualified and, in its terms, requires detention until a terminating event.

58. Pausing here, what Kiefel and Keane JJ addressed at [182] was whether the minority view in *Al-Kateb* should be preferred to the majority view on the basis of silence in the Act as to indefinite detention. And their Honours, in rejecting that minority approach, prefer the view that the Act is not silent as to the possibility of indefinite detention. Their Honours express their view by reference to the language of the relevant sections. None of that is inconsistent with *Lim*, or indeed with the passages in the majority judgments in *Al-Kateb* upon which AJL20 relies. AJL20 does not seek *Al-Kateb* to be re-opened. He does not put a submission that the Act is silent as to indefinite detention. Rather, he puts the (orthodox, in light of *Lim*) submission that, on its proper construction, the Act does not and cannot authorise detention beyond what is reasonably capable of being seen as necessary for the purposes of deportation. In short, [182] of *Plaintiff M76* does not address the argument in this case.

59. And [183] is in the same vein. Their Honours reject a construction of s 196 as being constrained by the purpose of removal within a reasonable time so that where the purpose is incapable of fulfilment the authority expires. That is not the construction for which AJL20 contends (and if he did, *Al-Kateb* would require re-opening). That construction may have the circularity problem identified later in [183]. AJL20's construction does not for the reason identified by Hayne J in *Al-Kateb* at [237]: s 189 is to be read as having transferred to it the temporal limitation inherent in s 198 (*cf.* the transformation of the limit in s 198 from *Al Masri*). In a word, the sections are to be read in relationship to one another, so that if

(which is the position) s 198 requires the carrying into effect of the permitted purpose of removal as soon as reasonably practicable, the other sections are to be read in the same light.

60. Finally, Kiefel and Keane JJ's approval (at [207]) of a statement of Hayne J (with whom Heydon J agreed) in *Re Woolley* is illuminating.[22] There, Hayne J held that "the effluxion of time … will not itself demonstrate that the purpose of detention has passed from exclusion by segregation to punishment" (emphasis added). Implicitly, that statement acknowledges that actual purpose is relevant to the authority to detain, albeit that mere effluxion of time will not prove that the actual purpose is other than lawful.

Plaintiff S4

61. *Plaintiff S4* is useful not because it develops the law beyond *Lim*, *Al-Kateb*, and *Plaintiff M74*, but because it is a unanimous judgment of the Court that confirms what falls from those cases (especially *Lim*). It does so in a way that unequivocally supports AJL20's construction.

62. It was common ground in *Plaintiff S4* that detention at the Executive's unconstrained discretion was not authorised ([22]). So, it was useful to begin by identifying when it "is authorised" ([22]). At [23], citing *Lim* and *Koon Wing Lau*, the Court said that it is authorised "in the context, and for the purposes, of the Executive's statutory power to remove from Australian alien who is an unlawful non-citizen" (the Court's emphasis). This power is "coupled" with the obligation to effect the removal as soon as reasonably practicable ([23]). Notably, in that paragraph the Court cited *Lim* at 32 (where the majority spoke of the limited power to detain, and the availability of *habeas* if detention is not in fact pursued for the requisite purpose), and *Koon Wing Lau* at 555–556 (where Latham CJ likewise held that if it were shown that detention in fact was not done for a lawful purpose *habeas* would issue).

63. At [24], the Court held that the detention which the Act authorises is detention under "and for the purposes of" the Act. At [26], the Court quoted cited *Lim's* seminal holding and went on to say that "detention under and for the purposes of the Act is limited by the purposes for which the detention is being effected." The concept of "limitation", here, is of course one of limitation on authority to detain, transgression of which results in unlawfulness (not, or at least not only, the availability of *mandamus*). In the same paragraph, the Court identified the permissible purposes of detention, including (relevantly) removal.

64. At [28], the Court said that, "[b]ecause detention under the Act can only be for the purposes identified, the purposes must be pursued and carried into effect as soon as reasonably practicable." Their Honours did not say, "the purpose must be capable of being enforced by *mandamus*," which would be consistent with the Commonwealth's submission. At [29], the Court said this (citations removed):

> *"The duration of any form of detention, and thus its lawfulness, must be capable of being determined at any time and from time to time. Otherwise, the lawfulness of the detention could not be determined and enforced by the courts, and, ultimately, by this Court. And because immigration detention is not discretionary, but is an incident of the execution of particular powers of the*

22 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at [227].

> *Executive, it must serve the purposes of the Act and its duration must be fixed by reference to what is both necessary and incidental to the execution of those powers and the fulfilment of those purposes."*

65. This is inconsistent with the Commonwealth's submission that lawfulness of detention does not turn on whether any, and if so what, purpose is being pursued. Nor is it possible to read the references to enforcement of the lawfulness of detention otherwise than as a reference to discharge on *habeas*, given the citation to *Crowley's Case* at Swans 51 (ER 531),[23] where Lord Eldon LC was addressing precisely the "high prerogative of the crown to issue the writ of *habeas corpus ad subjiciendum*, because absolutely necessary to the liberty of the subject."

66. Having set out the effect of ss 196 and 198, the Court said (at [33]) that "The duration of the plaintiff's lawful detention under the Act was thus ultimately bounded by the Act's requirement to effect his removal as soon as reasonably practicable." This purpose "had to be carried into effect as soon as reasonably practicable" ([34]). Departure from that requirement—*i.e.*, the requirement to effect removal as soon as reasonably practicable—would "entail" departure from the purpose of detention, which the Act is not to be read as authorising ([34]). None of this can be reconciled with the Commonwealth's submission that there is no temporal limit on authority to detain, or that the actual "purpose" of detention is to be identified based on statute alone.

Plaintiff M96A

67. *Plaintiff M96A* also does not develop the jurisprudence, but contains useful distillations of principle at [8] (adhering to *Plaintiff S4*), and [21] (adhering to *Lim*). It was held that *Lim* required the actual purpose of detention to be identified, and consideration to be given to the time necessarily involved to effect that purpose ([21]). Again, this is inconsistent with the Commonwealth's submission, which does not admit of a temporal outer limit to lawful detention (only an ability to seek to hasten the horizon of removal by seeking *mandamus*), or any need to identify the time necessarily involved in pursuing it. The actual purpose of detention is to be assessed objectively by reference to all of the circumstances ([22], see also [31]). This cannot sit with the Commonwealth's submission, which is to the effect that the statute conclusively determines the purpose of detention (so that, even if that purpose is not being pursued, it never becomes unlawful) (see **AS [47]**).

D. What is to be drawn from these authorities

68. AJL20's submission is, in the light of the foregoing analysis, straightforward. Authorities of this Court establish that the scheme enacted by ss 189, 196, and 198 of the Act is consistent with Ch III because the detention that it authorises—*i.e.*, renders lawful—has limits. That is, the scheme is "is limited to what is reasonably capable of being seen as necessary for the purposes of deportation."[24] The limits are as to purpose and as to duration. The

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23 *Crowley's Case* (1818) 2 Swans 1 at 61 [36 ER 514 at 531] per Lord Eldon LC.

24 *Lim* at 33 (Brennan, Deane, and Dawson JJ).

enforcement of those limits is via *habeas corpus*.

69. The Commonwealth's appeal must involve one or both of two propositions. *First*, ss 189, 196, and 198 "authorise" (*i.e.*, render lawful) detention despite that no purpose is held or pursued—they authorise purposeless detention. *Second*, they do not authorise purposeless detention, but even if detention is unlawful (*i.e.*, limits on ss 189, 196, and 198 which cause them to be consistent with Ch III are transgressed), there would be no discharge on *habeas*.

70. The *first* proposition could not be accepted in the light of the authority considered above. It is precisely the fact of limits on the Executive's power to detain that caused the Court in *Lim* (and in subsequent cases) to find that provisions creating that power were consistent with Ch III. If ss 189, 196, and 198 were read as rendering lawful detention otherwise than for a permitted purpose, or for greater than the time reasonably necessary for the effecting of that purpose, then they would not be "limited to what is reasonably capable of being seen as necessary for the purposes of deportation," and they "[could not] properly be seen as an incident of the executive powers to exclude, admit and deport an alien" (*Lim* at 33). Then, they would be punitive in nature and would be inconsistent with Ch III (*ibid.*).

71. As to the *second* proposition, if the Commonwealth submits that, in the case of Executive detention for deportation, *habeas* is doctrinally unavailable, that submission is unsupported by authority and is inconsistent with the cases outlined above. If the Commonwealth relies not on some underlying doctrine but rather on the constructional proposition that the Act evinces the intention that *habeas* may not be granted despite exceeding statutory authority to detain, the submission confronts both the difficulty that there is nothing in the Act that says that,[25] and that if that were the case then the Act would authorise purposeless detention (and be inconsistent with Ch III for reasons give above). If, finally, the Commonwealth submits that on the facts of this case, Bromberg J erred in exercise of his Honour's discretion in discharging AJL20 on *habeas*, then it is necessary for it to show *House v The King* (1936) 55 CLR 499 error. But it has not shown any such error (and there is none).[26]

72. Bromberg J's analysis and application of authority was orthodox. It is the Commonwealth that would need to re-open *Lim* (in particular) to succeed. It has not sought to do so.

E. Particular responses to the Commonwealth's submissions

73. We start with **AS [19]–[21]**. The word "until" in s 196 is to be read relationally with s 198 (and s 189) as Hayne J explained in *Al-Kateb*, and subject to the *Lim* constitutional limitation. The important matter to note about s 196(3) is that which the Commonwealth relegates to a footnote: the section cannot oust jurisdiction to order release from unlawful detention (**AS [19]**, ft 14). Accordingly, to say that s 196(3) supports a particular view of what is lawful

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25 And here the principle of legality would be relevant, as articulated in (*e.g.*) *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [86] (Hayne and Bell JJ) [158] (Kiefel J), *R v Independent Broad-Based Anti-Corruption Commissioner* (2016) 256 CLR 45 at [40] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

26 If (contrary to AJL20's submissions) the Court's decides that Bromberg J was right about construction, but should not, for discretionary reasons, have ordered release then AJL20's claim for damages would remain.

or unlawful is question-begging or circular. **AS [19]–[21]** cannot be accepted because they address ss 189, 196, and 198 as though their interpretation is ungoverned by authority (it is not), and as though there were no intersection with Ch III of the Constitution (there is). The Commonwealth purports to address these matters later, but this is an error in approach: the constitutional intersection compels a particular interpretation.

74. **AS [22]–[23]** is an inadequate treatment of *Lim*. The Commonwealth fails to address the fact that, in *Lim*, the scheme of Div 4B (except s 54R) was saved from Ch III inconsistency because there were limits on detention's duration (ultimately, from the obligation to remove as soon as reasonably practicable).[27] Thus, detention may become unlawful because of failure to comply with the obligation to remove when it arises (11–12 (Mason CJ)).

75. The same answer is given to **AS [25]**. The question is not whether the limits on ss 189, 196, and 198, as established in cases like *Plaintiff M96A*, are consistent with Ch III—this Court has held that they are. And if the Commonwealth had discharged its duty to end AJL20's detention in a permitted way (including by removal as soon as reasonably practicable), this case could not have been brought. But it did not discharge that duty, and in that failing it transgressed a limitation on the power to detain.

76. **AS [26]–[27]** contain a submission the effect of which is that the existence of duties to bring detention to an end (enforced, if necessary, by *mandamus*), ensures constitutional consistency. The Commonwealth cites no authority for this proposition. It is inconsistent with *Lim*. It amounts to saying that, because limits on detention can be enforced by *mandamus*, they cannot be enforced in any other way. That is answered at paragraphs 69–71 above. Further, what happens if *mandamus* is not sought, or is not granted (for discretionary reasons), or if there is a delay before it is sought? Is detention purportedly authorised in the meantime? If yes, then the detention that the Act authorises goes beyond what is reasonably capable of being seen as necessary for the purposes of deportation; if no, then *habeas* should issue.

Federal Court authorities

77. The Federal Court authorities considered at **AS [29]–[32]** do not assist. To the extent that they are inconsistent with *Lim*, *Al-Kateb*, *Plaintiff M76*, *Plaintiff M96A* and *Plaintiff S4*, they are not to be followed. And, the vast majority pre-date *Al-Kateb*, *Plaintiff M76*, *Plaintiff S4* and *Plaintiff M96A*.[28] *Third*, as to *Al Masri*, in that case the Minister had taken all reasonable steps to remove, so the issue in this case (what happens when that is not so) did not arise. Thus, Murphy J was right (in *CMA19* at [224]) that so far as *Al Masri* suggests that the remedy for failure to take reasonably-practicable steps is *mandamus* and not release (at 87–88 [134]), that was *obiter*. In any event, the Court said in *Al Masri*, at 88 [135], that "[i]f the Minister were to hold a person in detention without [the bona fide purpose of removal], then the detention

27 See at 34 (Brennan, Deane and Dawson JJ), 53 and 58 (Gaudron J).

28 Murphy J was right to say, in *CMA19 v Minister for Home Affairs* [2020] FCA 736 at [225], that these judgments are therefore "of limited assistance".

would be unlawful and the person entitled to relief in the nature of habeas corpus."

78. Finally, in *ASP15* (2016) 248 FCR 372, the issue was failure to decide an application for a visa as soon as reasonably practicable. That is distinguishable. Where a visa application is outstanding, there is no obligation to remove (see s 198(6)(c)). It was on this basis that the Full Court (at [35]) distinguished *Plaintiff S4*. "The obligation under s 198(2) was never triggered," there was "no occasion for the terms of s 198(2) to have any effect on s 196(1), let alone dominant effect," and the "reasoning in *Plaintiff S4* [did] not assist" (*ASP15* at [39]).

79. This case is not distinguishable from *Plaintiff S4*. There has at all material times been an extant obligation to remove "as soon as reasonably practicable" (s 198(6)). And as the Court in *ASP15* explained at [38], where *Plaintiff S4-esque* circumstances exist (*i.e.*, as in the present case, there is an extant obligation to remove as soon as reasonably practicable), it is then that detention becomes unlawful if not effected.[29]

Al-Kateb

80. **AS [34]** is answered above at paragraphs 11–14. The analysis of *Al-Kateb* appearing above would be preferred to **AS [35]–[38]**. No weight should be given to statements (from Hayne J or others) which do no more than describe the way that the Act is intended to operate. It is true (*cf.* **AS [36]**) that Hayne J said that the Act provides that detention must continue until removal, which must occur as soon as reasonably practicable.[30] The sections do so provide—and as long as the Commonwealth pursues a permitted purpose of detention, that is how the Act will operate. The question is what happens when the Commonwealth fails to pursue a purpose. Hayne J's analysis in *Al-Kateb* does not support the Commonwealth in this regard; on the contrary it is against the Commonwealth (see paragraphs 40–42 above).

Other relevant decisions of this Court

81. The Commonwealth's approach to *Plaintiff M61*, *Plaintiff M96A*, and *Plaintiff S4* suffers from the same vices: *first*, it cherry-picks only passages that it thinks are supportive of its argument, and ignores those that are more-difficult or impossible to reconcile therewith; *second*, the passages it cherry-picks merely describe the text of the relevant sections, without addressing the constitutional overlay or the result where there is a failure to pursue a permitted purpose.

82. **AS [41]** reverses the true position. AJL20 need not re-open any authorities; they support him. It is the Commonwealth which would have to explain why the Court should depart from *Lim* (in particular but not alone). As to the second part of **AS [41]**, it does considerable injustice to Bromberg J's careful reasons, especially the significance in those reasons of *Lim*, to say that he based his construction "almost exclusively" on *Plaintiff S4* or any other case.

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29 If necessary, AJL20 submits that *ASP15* was wrongly decided. Nothing in *Plaintiff S4* or *Plaintiff M76* distinguishes between purposes. At [28] of *Plaintiff S4*, the Court said, "the purposes must be pursued and carried into effect as soon as reasonably practicable." The plurality in *Plaintiff M76* said (at [139]) that the period of detention must be limited to the time necessarily taken in administrative processes directed to the limited "purposes" identified. This is not inconsistent with *Al-Kateb* (*cf. ASP15* at ([39]–[40]); *Al-Kateb* did not hold that it is lawful to detain a non-citizen despite that no purpose was being pursued.

30 In *Re Woolley; Ex parte M276/2003* (2004) 225 CLR 1 at [224], and in *Plaintiff M76* at [33].

Plaintiff S4

83. The Commonwealth is right that *Plaintiff S4* would be an unlikely place for implicit overruling of *Al-Kateb* or the statement of some new constitutional principle. It does neither of those things. Neither in *Plaintiff S4* nor in the present case was the correctness of *Al-Kateb* in issue. In *Al-Kateb*, removal was being pursued, but without reasonable prospect of success. Here, no purpose was being pursued. *Al-Kateb* is relevant as to construction (in a way that supports AJL20). As for constitutional principle, the Court did not have to establish any new constitutional limitation; that work was done in *Lim*, which the Court applied (at [23]–[26]).

84. **AS [43]** accurately describes the issue in *Plaintiff S4*. But the construction of ss 189, 196, and 198 does not change based on what factual situation is presented. *Plaintiff S4* addresses the construction of the sections in issue in this case. It cannot, therefore, be put to the side on the basis that it is factually distinguishable. In that light the submission at **AS [44]** that Bromberg J was somehow wrong to reason that, "[d]eparture from that requirement [to carry the purpose into effect as soon as reasonably practicable] would entail departure from the purpose for his detention and could be justified only if the Act were construed as permitting detention at the discretion of the Executive," cannot be credited. That is word-for-word what the Court decided in *Plaintiff S4* at [34], after consideration of *Lim*. The balance of **AS [44]** seems to suggest that when the Court said that in *Plaintiff S4*, really what it meant was that any implied temporal limit could be enforced by *mandamus* only. That is inconsistent with *Lim*, is not what was said in *Plaintiff S4*, and is answered at paragraphs 69–71 above.

The grounds of appeal

85. **AS [46]–[49]** are based on the Commonwealth's proposition that detention is (and may be, consistently with Ch III) authorised despite that the Executive is not pursuing a permitted purpose. That should be rejected. As for **AS [47]**, Bromberg J held (as the Commonwealth insists) that ss 189, 196, and 198 are constitutionally valid. What the Commonwealth misses is that his Honour so held because there are limits on the power to detain. The question then became whether those limits had been transgressed, and his Honour held that they had.

86. Bromberg J did not depart from this Court's conclusions about construction or validity of s 196 (*cf.* **AS [48]**). The Commonwealth is right that Ch III does not require assessment of the objective or subjective purpose of officers who detained. Ch III does, however, require a scheme which authorises detention limited to what is reasonably capable of being seen as necessary for the purposes of deportation. The scheme of ss 189, 196, and 198 is so limited because there are limits on authorised detention, including as to purpose. So, the subjective or objective purpose of detention is relevant, not at the constitutional level, but rather in addressing whether limits on authority to detain have been transgressed.[31]

87. The final substantive sentence of **AS [48]** and the quote from *Re Woolley* reveal the same

[31] The Commonwealth's submission—that purpose is derived straightforwardly from what the statute requires purpose to be—fails to explain *Plaintiff M96A* at [22].

confusion of focus. It is right that "the purpose [of detention] has been mandated by Parliament" (**AS [48]**). It does not follow that it is impossible for the Executive to depart from a mandated purpose. Hayne J's point in *Re Woolley* is that the legislature has determined that detention is necessary or desirable for the purposes of (say) removal. So, it is not open to an officer to decide in a particular case that detention is not necessary (*e.g.*, because removal could be effected without it). That says nothing about whether detention is authorised when there is no permitted purpose, or where it is not being pursued.

88. Finally, **AS [52]–[56]**: *habeas* was not inutile (*cf.* **AS [53]**), because as soon as the Commonwealth commenced to have a permitted purpose for detaining AJL20, it could re-detain; in the meantime it could not. The Commonwealth's own submissions provide the answer to **AS [54]**: it recognises that s 196(3) cannot oust the Court's jurisdiction to order a person's release from unlawful detention: *Al-Kateb* at [10] (Gleeson CJ) (**AS [19], ft 14**). That the legislature did not even purport so to oust appears from the Second Reading Speech and Explanatory Memoranda in relation to the relevant Bill.[32]

89. **AS [55]** mischaracterises **J [49], CAB 49**. Bromberg J did not say that s 196(4) and 196(5)(a) evince an intention that unlawful non-citizens should be in the community; his Honour said that they "contemplated that detention can be unlawful prior to the detainee being removed … ." That is what those sections say. Their intention was (and had to be, in light of Ch III) that ss 189, 196, and 198 authorised purposeful detention, which must be pursued.

90. As to **AS [56]**, *Koon Wing Lau* is not distinguishable on the basis suggested. Whether detention is mandatory or discretionary, the analysis is the same: there are implied statutory limits on the power to detain (whether it was exercised of necessity or in exercise of discretion); if they are transgressed, discharge on *habeas* is the remedy. Hayne J said in *Al-Kateb* at [224] of the provisions in issue in *Koon Wing Lau* that they "[did] not differ in any fundamental respect" from ss 189, 196, and 198, and quoted Dixon J with approval.

Part VI. Argument on notice of contention and cross-appeal

91. There is no contention or cross-appeal.

Part VII. Estimate of hours

92. AJL20 estimates that 2.25 hours will be required for his oral argument.

Dated: 12 March 2021

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JUSTIN GLEESON	**NICK WOOD**	**JIM HARTLEY**
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[32] Explanatory Memorandum, Migration Amendment (Duration of Detention) Bill 2003 (Cth), "Outline" [1] and [5], "Notes on Amendments" [11]; Supplementary Explanatory Memorandum, Migration Amendment (Duration of Detention) Bill 2003 (Cth), "Outline" [1], [5], "Notes on Amendments" [2].