HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

M84 and M85 of 2022 M85/2022

BETWEEN:

AZC20
Appellant

and

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs
First Respondent

Commonwealth of Australia
Second Respondent

Secretary, Department of Home Affairs
Third Respondent

APPELLANT'S REPLY

PART I: This reply is in a form suitable for publication on the internet.

PART II: ARGUMENT[1]

A. Ground 1i: There was no 'matter' before the FCAFC

1. Since the parties' earlier submissions were filed, this Court handed down judgment in *Unions NSW v New South Wales* [2023] HCA 4 (***Unions***). That judgment reaffirms key principles and provides a direct response to many of the Respondents' submissions.
2. The Respondents' primary contention can be summarised as 'once a matter, always a matter' (RS [23], [25], [36]). That (seemingly absolute) proposition cannot stand with the reasons given in *Unions*. There this Court held that, within a proceeding, the existence of a matter can come and go. The time to assess whether there remains a matter is 'at the time of' the grant or refusal of relief,[2] not the time of hearing (cf RS [35]–[36]). In *Unions*, a matter ceased to exist,[3] with the result that the Court no longer had jurisdiction. In this case, a matter never arose in the FCAFC or, at best for the Respondents, it 'contracted'[4] to a point of non-existence once the question of costs was resolved by the Respondents' concession before the FCAFC judgment.[5] For this reason, the Respondents' core contention that there is a matter 'even if the orders made on appeal will not alter the rights of the parties' (RS [25]) should not be accepted.
3. The primary judge's orders in this case did not 'determine the rights and obligations of the parties' at the time the Respondent appealed his Honour's orders (RS [23]). What the

[1] The one matter of fact that requires correction is that Ms Hermann's unchallenged evidence was that she and her husband were 'more than happy to have [the Appellant] live with us for as long as required. He would have his own bedroom and bathroom in the house' (CAB 53-54 [157], contra RS [4], see also CAB 56 [168]).
[2] *Unions* [16], [18]–[19] (Kiefel CJ, Gageler, Gordon, Gleeson & Jagot JJ), [44], [52] (Edelman J), [94] (Steward J).
[3] By reason of the repeal of the provision: *Unions* [10], [23]–[24] (Kiefel CJ, Gageler, Gordon, Gleeson & Jagot JJ), [40] (Edelman J).
[4] *Unions* [28] (Kiefel CJ, Gageler, Gordon, Gleeson & Jagot JJ), [44] (Edelman J), [94] (Steward J).
[5] Cf *Commissioner of Taxation v Industrial Equity Ltd* (2000) 98 FCR 573, 576 [13] (the Court).

primary judge determined had no ongoing legal effect such that there was nothing to set aside: his Honour's orders were a vestige — a piece of legal history without consequence. M85/2022

4. The Respondents invite the Court to make 'mootness' a mere discretionary consideration (RS [27]). That is inconsistent with authority, which authority is, in turn, consistent with the principles re-stated in *Unions.* The Federal Court exercising appellate jurisdiction has repeatedly declined to answer questions that are 'presently moot' or 'hypothetical' on the basis that in those circumstances 'there is no controversy … upon which the judicial power can be called in aid to quell' and, accordingly, 'no '"matter"'.[6] This mirrors the approach of the US Supreme Court[7] to appeals which have been rendered moot.[8]

10 5. The suggestion that all appeals within the Federal Court necessarily involve matters sits uneasily with this Court's established approach to its own appellate jurisdiction.[9] If that jurisdiction does not extend to advisory opinions (despite the absence of reference to 'matters' in s 73 (RS [22])), then the Federal Court's appellate jurisdiction cannot so extend.

6. *Mellifont* does not suggest otherwise (cf RS [24]–[25]). That matter involved a *sui generis* procedure by which a State's chief law officer could refer a question of law for determination by a State Court after a person has been acquitted in a criminal trial. This Court's conclusion that there was a matter was based upon the characterisation of the reference procedure as a 'statutory extension' of the trial proceedings and the acknowledgment of contextual considerations unique to the criminal law.[10] It is, as

20 Professor Lane observed, explicable 'only' on 'grounds of practice, history and convenience'.[11] Those considerations are not present here. Moreover, *Mellifont* proceeded on the basis that there *remained* an 'actual controversy between the parties',[12] to which the reference procedure was related. Again, that is not so here — the FCAFC recognised that the appeals were 'in substance largely unrelated to any ongoing effect of the primary judge's orders' (CAB 83 [19]).[13] The observation in *Abebe*[14] (RS [23]) takes matters no further. As is apparent from their Honours' reference to *O'Toole*[15] at the beginning of the sentence

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[6] *Bainbridge v Minister for Immigration and Citizenship* (2010) 181 FCR 569, 573 [11] (Moore & Perram JJ); see also *Commissioner of Taxation v Industrial Equity Ltd* (2000) 98 FCR 573, 576 [13] (the Court).
[7] Cf *Unions* [52] (Edelman J), [94] (Steward J); *Bruce v Commonwealth Trade Marks Label Association* (1907) 4 CLR 1569, 1571.
[8] See eg *United States v Sanchez-Gomez* (2018) 138 S Ct 1532.
[9] *DPP (SA) v B* (1998) 194 CLR 566, 580 [25] (Gaudron, Gummow & Hayne JJ). See also *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595, 612 (Brennan CJ, Dawson, Toohey, Gaudron & Gummow JJ); *A-G (NSW) v Commonwealth Savings Bank of Australia* (1986) 160 CLR 315, 323 (the Court).
[10] *Mellifont v A-G (Qld)* (1991) 173 CLR 289, 304–5 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ).
[11] P H Lane, *Lane's Commentary on the Australian Constitution* (Law Book Co, 2nd ed, 1997) 540.
[12] *Mellifont v A-G (Qld)* (1991) 173 CLR 289, 305 (Mason CJ, Deane, Dawson, Gaudron & McHugh JJ); cf *Australian Information Commissioner v Elstone Pty Ltd* (2018) 260 FCR 470, 479–80 [43]–[45] (Griffiths J).
[13] See and compare *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CPJ16* (2020) 276 FCR 1, 6 [18] (the Court).
[14] *Abebe v Commonwealth* (1999) 197 CLR 510, 524–5 [25] (Gleeson CJ & McHugh J).
[15] *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232.

extracted by the Respondents, their Honours had in mind the questions reserved procedure. And, as was explained in *Mellifont*, the answering of such questions constitutes an 'integral part of the process of determining the rights and obligations of the parties which are at stake in the proceedings in which the questions are reserved'.[16] M85/2022

7. As to the Respondents' second and third arguments (RS [29]–[34]), it is not the case that there was a 'live controversy between the parties concerning the power of the Court to make detention arrangements orders' (RS [29]). It is also incorrect that the separate proceedings 'arose out of an *identical* substratum of facts' (RS [31]). That separate mandamus application will be determined (if ever) on a presently unknowable concatenation, including all the following uncertainties being found to be certain: the Appellant being alive and detained and in Australia, and the Respondents not exercising power under s 198AE(1A) of the *Migration Act 1958* (Cth) and continuing to fail to lawfully perform their duty under s 198(1). Unless and until there is such a foundation for mandamus, the question about home detention orders remains 'contingent'.[17] Even once a foundation was established for mandamus, a home detention order would remain contingent on a further finding, on the evidence at that future time, that the Appellant is in a place that does not 'minimise the harm suffered as a consequence of that default' (CAB 51 [146]) and there being a different place that did. The separate proceedings did not give rise to a matter before the FCAFC because the FCAFC could not be 'apprised of, [n]or find, the facts necessary to determine the controversy'.[18] It was, in this way, relying on a hypothetical that was, in turn, reliant on an assumption of legal and factual stasis.[19] '[T]he ordinary jurisdiction of a Court does not extend to answering questions as problems of law dependent on facts yet unascertained.'[20] This is what the FCAFC did.

8. The comfort the Respondents seek to gain from *Plaintiff M68/2015*[21] is misplaced because the future conduct that was the factual foundation for the declaration sought was outside the control of the parties (RS [33]–[34]). Rather, the position is more like that in *Kuczborski*.[22] In *Kuczborski*, the plaintiff sought answers to questions that were only raised on an assumption that the plaintiff himself would act contrary to law in the future.[23] The Court held that the plaintiff did not have standing, because the substantive question he asked the

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[16] *Mellifont v A-G (Qld)* (1991) 173 CLR 289, 305 (Mason CJ, Deane, Dawson, Gaudron & McHugh JJ).
[17] *IMF (Australia) Ltd v Sons of Gwalia Ltd (admin apptd)* (2004) 211 ALR 231, [44] 243 (French J).
[18] *CTC Resources NL v Commissioner of Taxation* [1994] FCA 76, [55] (Hill J).
[19] Such an assumption in respect of this Act is particularly adventurous, as courts have noted; see eg *R v Schelvis* (2016) 263 A Crim R 1, 30 [81] (Fraser JA, Morrison JA and Peter Lyons J agreeing).
[20] *Australian Commonwealth Shipping Board v Federated Seamen's Union of Australasia* (1925) 36 CLR 442, 451 (Isaacs J).
[21] *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42.
[22] *Kuczborski v Queensland* (2014) 254 CLR 51 (*Kuczborski)*.
[23] *Kuczborski*, [99] (Hayne J), [151] (Crennan, Kiefel, Gageler & Keane JJ), [280] (Bell J).

Court to answer (as to the validity of the impugned law) would not materially affect his legal position (unless he engaged in unlawful conduct, which he had not said that he would).[24] The same is true here: a future mandamus only arises if the Respondents were derelict in performing their s 198 duty in respect of the Appellant and the home detention order would only arise if they were derelict in that way and also did not provide detention that minimized harm awaiting his removal. M85/2022

9. Moreover and to return to the Respondents' reliance on *Plaintiff M68/2015*, the result in that case may be explained by reference to it being concerned with 'the plaintiff's private right to liberty'.[25] That is the one thing the Appellant in this case cannot have in his present predicament.[26]

B. Ground 1ii: FCAFC erred in granting leave to appeal primary order 3

10. While the substantial injustice test is not a rigid rule, it represents a century of learning about the circumstances in which it is appropriate to grant leave to appeal an interlocutory order (AS fn 46). The FCAFC's failure to refer to the test or identify any substantial injustice resulting from primary order 3, together with the fact this case does not fall within the recognised exceptions to the test, leads to a conclusion that the power miscarried. The Respondents gain nothing from s 37M of the *Federal Court of Australia Act 1976* (Cth) (the ***FCA Act***) (RS [38], [40]) which concerns the efficient and quick resolution of disputes. The dispute here was resolved by the mooting events (cf CAB 91 [44]).

C. Ground 2: Home detention order was within power

C.1 The definition of immigration detention and the present home detention order

11. The Respondents seem not to embrace the temporal and purposive limits introduced by the FCAFC into the definition of immigration detention (AS [47], cf RS [42]). Instead, the Respondents submit that the FCAFC held home detention to be outside the definition because it was a place-based order (RS [43]). That analysis seeks to obscure an obvious point: even when the person is detained in the company of and restrained by a designated person (ie part (a) of the definition), that still has to occur at a place.

12. In any event, the primary judge's orders are not properly characterised as concerning a place-based form of detention (RS [44]). The fact that primary order 3 referred to a place was the product of the evidence before his Honour as to where else the Appellant could be detained 'in the company of and restrained by' a designated person in conditions to ameliorate his detention. Only the Appellant put forward any alternative to what his Honour found was the harmful detention location. The Respondents elected to put on no evidence

[24] *Kuczborski*, [151] (Crennan, Kiefel, Gageler & Keane JJ).
[25] *Unions* [55]–[56] (Edelman J), [94] (Steward J).
[26] *Commonwealth v AJL20* (2021) 273 CLR 43, 70–1 [44]–[45], 73–4 [52].

as to how the effect of being at that detention centre could be made less harmful. In addition, his Honour granted express liberty to apply: the Respondents could have sought to vary the order to another place (including a detention centre) if one was identified that would ameliorate the conditions of the Appellant's detention, pending him being taken. M85/2022

13. That order for liberty to apply concerning the interlocutory home detention order has further significance in respect of the FCAFC's concept of 'decisional freedom' (RS [44]). In short, what the primary judge did was order judicial supervision of the exercise of that 'freedom': the Minister could change the place of the Appellant's detention provided she or he could justify that to the Court concerned, by reason of the mandamus, with the Respondents' ongoing failure to perform a hedging duty imposed by law on them.

14. The FCAFC's references to 'restraint' were in the context of making observations as to the hypothetical practical consequences that might flow from an interpretation of para (a) of the definition that did not include the temporal or purposive condition. The FCAFC was postulating reasons that it considered fortified its interpretative gloss on para (a). The notion of 'restraint' was thus not an independent basis for the FCAFC's holding (cf RS [46]). In any event, those postulations did not marry with the absence of dispute before the FCAFC that the word 'restrained' in this context must be understood to include a person 'being confined, physically *or by direction*, to a particular place' (CAB 48 [136]; 101–2 [94]).

C.2 Sections 22 and 23 of the FCA Act

15. The Respondents would read ss 22 and 23 of the FCA Act narrowly, despite authority that they ought be interpreted liberally (AS [64]). Justice Steward has held that s 22 could support a precise framing of a mandamus order because that provision, like s 32 of the *Judiciary Act 1903* (Cth), 'gave this Court the ability to put beyond doubt what the Minister must now do'.[27] The power has also been relied upon to make supplemental[28] or ancillary[29] orders in aid of the enforcement of primary orders, as occurred here.

Dated: 3 March 2023

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[27] *EPU19 v Minister for Home Affair*s [2020] FCA 541, [56] (Steward J).
[28] *Remington Products Australia Pty Ltd v Energizer Australia Pty Ltd* (2008) 246 ALR 113, 116 [17] (Tamberlin, Jacobson & Edmonds JJ), citing *ACCC v Shell Co of Australia Ltd* (1997) 72 FCR 386, 395 (Drummond J); *EPU19 v Minister for Home Affairs* [2020] FCA 541, [8] (Steward J).
[29] *Pelechowski v Registrar, Court of Appeal* (1999) 198 CLR 435, 452 [51] (Gaudron, Gummow & Callinan JJ).