



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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#### Important Information

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

No. S28 of 2023

**BETWEEN:**

**NZYQ**

Plaintiff

and

**MINISTER FOR IMMIGRATION, CITIZENSHIP AND  
MULTICULTURAL AFFAIRS**

First Defendant

**COMMONWEALTH OF AUSTRALIA**

Second Defendant

**OUTLINE OF ORAL SUBMISSIONS OF THE  
AUSTRALIAN HUMAN RIGHTS COMMISSION (AMICUS CURIAE)**

## PART I INTERNET PUBLICATION

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

## PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

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### The proper approach to statutory construction

2. Sections 196(1) and 198 of the *Migration Act 1958* (Cth) (the **Act**) impose temporal restraints upon the obligation to detain in s 189(1) of the Act. Removal from Australia sets the outer limit of the duration of detention. Sections 196(1) and 198 also identify the statutory purpose of detention: **AHRC [27]-[29]**; *The Commonwealth v AJL20* [2021] HCA 21; 273 CLR 43 at [28]-[32] (Kiefel CJ, Gageler, Keane and Steward JJ) (**JBA Vol 3 Tab 17 at 652-653**).
3. The Act is premised on an assumption that the statutory purpose of removal is capable of being achieved:
  - (a) The introduction of non-compellable discretionary powers to release a detainee (eg ss 195A, 197AB) confirms rather than undermines that assumption. The Court would not construe the duration of detention to be “at the unconstrained discretion of the Executive”: **AHRC [19]-[20]**; **Def [30]**; *Al-Kateb v Godwin* [2004] HCA 37; 219 CLR 562 at [22] (Gleeson CJ) (**JBA Vol 3 Tab 14 at 422**); *Plaintiff M61/2010E v Commonwealth* [2010] HCA 41; 243 CLR 319 at [64] (the Court) (**JBA Vol 5 Tab 30 at 1675**).
  - (b) The introduction of s 197C reflects an intention that international non-refoulement obligations will be observed. That intention assumes the possibility of removal to a third country, because, without that possibility, detention remains at the unconstrained discretion of the Executive: **AHRC [19]-[20]**; **Def [38]-[39]**.
4. To construe the Act as permitting detention where there is no reasonable prospect of removal in the foreseeable future is contrary to international law and comparative jurisprudence:
  - (a) The prohibition on arbitrary detention means that detention must be justified taking into account the particular circumstances, alternative available measures,

and the practicability of achieving the purpose of detention: **AHRC [37]-[40]**; UN Human Rights Committee, General Comment no 35, Article 9 at [15]-[18] (**JBA Vol 11 Tab 68 at 3741**); *cf Al-Kateb v Godwin* [2004] HCA 37; 219 CLR 562 at [238]-[239] (Hayne J) (**JBA Vol 3 Tab 14 at 486**).

- (b) Statutory schemes of immigration detention are consistently construed as subject to a requirement for reasonableness and limited to the purpose of removal: **AHRC [42]-[45]**; *cf Def [33] and [37]*; *Lumba v Secretary of State for the Home Department* [2012] 1 AC 245 at [22] and [30] (Lord Dyson) (**JBA Vol 10 Tab 53 at 3326-3327 and 3328-3329**); *Clark v Martinez* 543 US 371 (2005) at 384 and 386 (**JBA Vol 9 Tab 51 at 3243 and 3245**).

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### The question of constitutional validity

5. Whether detention is punitive is determined by asking whether it is reasonably necessary (in the sense of being reasonably appropriate and adapted) to effect a legitimate non-punitive purpose: **AHRC [49]**; *Jones v Commonwealth of Australia* [2023] HCA 34 at [42] (Kiefel CJ, Gageler, Gleeson and Jagot JJ):
- (a) Segregation from the community unconnected to the purpose of removal of a non-citizen is not a permissible purpose. Segregation is a hallmark of punishment: **AHRC [50]**; *Commonwealth v AJL20* (2021) 273 CLR 43 at [44] (Kiefel CJ, Gageler, Keane and Steward JJ) (**JBA Vol 3 Tab 17 at 657**); *Benbrika v Minister for Home Affairs* [2023] HCA 33 at [59] (Gordon J).
- (b) Whether a law is *reasonably necessary* in the relevant sense requires the law to be justified. That invites consideration of the reasonableness of detention, and other less restrictive means of achieving the permitted purpose. This analysis is consistent with that undertaken in international and comparative jurisprudence: **AHRC [51]**; *Jones v Commonwealth of Australia* [2023] HCA 34 at [43]-[45] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

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**Dated: 7 November 2023**

Patrick Knowles

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