HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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BETWEEN:

NZYQ
Plaintiff

and

Minister for Immigration, Citizenship and Multicultural Affairs
First Defendant

Commonwealth of Australia
Second Defendant

OUTLINE OF ORAL SUBMISSIONS OF THE HUMAN RIGHTS LAW CENTRE & THE KALDOR CENTRE (AS *AMICI CURIAE*)

PART I: CERTIFICATION

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

A. Construction question

2. If the indefinite detention construction of ss 189, 196 and 198 of the *Migration Act 1958* (Cth) (the **Act**) is rejected, the point at which detention ceases to be authorised and required by the Act, and the evidence, should be assessed by inquiring whether, as a matter of reasonable practicability, it is unlikely that the non-citizen will be removed from Australia in the foreseeable future: Further Amended Special Case (**FASC**) [45(c)], **ABFM, p. 15**; as opposed to whether there is no real likelihood or prospect of the non-citizen being removed from Australia in the reasonably foreseeable future: FASC [45(b)], **ABFM, p. 15**.

3. The Court in *Minister for Immigration and Multicultural and Indigenous Affairs v* ***Al Masri*** (2003) 126 FCR 54 made a finding in terms of FASC [45(b)], but did not purport to state a definitive test for when detention ceases to be authorised: *Al Masri* at [121]-[122], [155], **JBA Vol 8, Tab 46, pp. 2674, 2681**.

4. The minority in ***Al-Kateb*** *v Godwin* (2004) 219 CLR 562 asked whether the assumption underlying ss 189, 196 and 198 of the Act—that removal of the non-citizen is reasonably practicable—was satisfied at two points in time: the present and the foreseeable future: *Al-Kateb* at [1], [11] (Gleeson CJ); [122], [124] (Gummow J); [145] (Kirby J); see also

Plaintiff M47/2012 v Director-General of Security (2012) 251 CLR 1 at [524], [530]-[534], **JBA Vol 5, Tab 28, pp. 1620, 1623-1625**.

5. Whichever test is applied, the Court should make findings about the probabilities of the future course of events on the ordinary civil standard of proof: ***Sami*** *v Minister for Home Affairs* [2022] FCA 1513 at [157], **JBA Vol 8, Tab 48, p. 2787**.

6. The difference between the two articulations of the legal test is that, in a case where the non-citizen is unlikely to be removed in the foreseeable future, the FASC [45(b)] test ("no real … prospect") would authorise detention so long as there remained a *non-fanciful possibility* of removal in the foreseeable future, while the FASC [45(c)] test would not.

7. The FASC [45(c)] test should be preferred to the FASC [45(b)] test, because:

   a. it directly adopts the statutory language of s 198(1) ("reasonably practicable");

   b. it picks up the temporal aspect of s 198(1) ("as soon as") by reference to the "foreseeable future";

   c. in directing attention to what is "likely" (i.e., more probable than not), the test:

      i. fits a context in which liberty of the person is involved: *Boughey v The Queen* (1986) 161 CLR 10 at 14, referred to in *Sami* at [50], **JBA Vol 8, Tab 48, p. 2764**; and

      ii. aligns the legal test with the conceptually-separate standard of proof.

8. The FASC [45(c)] test is also to be preferred because it:

   a. gives greater force to the principle of legality by minimising the encroachment on the fundamental common law right—enjoyed by non-aliens and aliens alike—to liberty: *Chu Kheng* ***Lim*** *v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 19, **JBA Vol 3, Tab 16, p. 572**; *amici*'s submissions [19]-[22];

   b. gives greater effect to the principle that a statute is to be construed in conformity with international law, here the prohibition on arbitrary detention in art 9(1) of the International Covenant on Civil and Political Rights: *amici*'s submissions [31]-[35];

   c. is more workable both for the courts and the executive.

B. Validity question

9. If ss 189, 196 and 198 authorise detention even where removal is unlikely as a matter of reasonable practicability in the foreseeable future, those provisions are invalid, as such

detention is not reasonably capable of being seen as necessary for the purpose of removal: *Lim* at 33, **JBA, Vol 3, Tab 16, p. 586**; *amici*'s submissions [51]-[60]. S28/2023

Dated: 7 November 2023

Ruth Higgins SC Adam Hochroth Julian R Murphy Kate Bones