HIGH COURT OF AUSTRALIA

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### Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **NZYQ**
Plaintiff

and

**MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS**
First Defendant
**COMMONWEALTH OF AUSTRALIA**
Second Defendant

# SUBMISSIONS OF THE HUMAN RIGHTS LAW CENTRE & KALDOR CENTRE FOR INTERNATIONAL REFUGEE LAW SEEKING LEAVE TO BE HEARD AS *AMICI CURIAE*

## PART I: CERTIFICATION

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

## PART II: BASIS OF APPLICATION FOR LEAVE TO BE HEARD

2. The Human Rights Law Centre (**HRLC**) and the Kaldor Centre for International Refugee Law (**Kaldor Centre**) (together, ***amici***) jointly seek leave to be heard as *amici curiae* on questions 1 and 2 of the special case (**construction** and **validity question** respectively).[1]

## PART III: WHY LEAVE TO BE HEARD SHOULD BE GRANTED

3. The HRLC and the Kaldor Centre conduct research, policy advocacy and casework advancing the rights of non-citizens under Australia's migration laws, particularly those persons detained or vulnerable to immigration detention. Both organisations have engaged in this work for decades, and have considerable institutional experience and expertise in respect of the issues before the Court.

4. The HRLC has previously offered assistance to the Court as *amicus curiae* on four occasions.[2] Professor Guy Goodwin-Gill has authored scholarship on refugee law that has been cited by this Court on approximately 18 occasions.[3] Leave to be heard should be granted because the *amici* can provide the Court with "the benefit of a larger view of the matter before it than the parties are able or willing to offer".[4]

5. If leave to be heard is granted, the *amici* will make submissions:

   (a) in support of the proposition that *Al-Kateb* was not correctly decided and should be re-opened, for reasons that cohere with, but differ in certain respects from, the submissions advanced by the Plaintiff;

   (b) in support of the proposition that the point at which ss 189 and 196 of the *Migration Act 1958* (Cth) (**Act**) cease to authorise or require detention is when, as a matter of reasonable practicability, it is *unlikely* that a detainee

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[1] This Court has previously granted joint applications to be heard as *amici curiae*, for example in *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 and *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533.

[2] ***Momcilovic*** *v The Queen* (2011) 245 CLR 1; *Attorney General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1; *Brown v Tasmania* (2017) 261 CLR 328; *Clubb v Edwards* (2019) 267 CLR 171. See also Affidavit of Sanmati Verma, affirmed 14 September 2023, [8]-[15].

[3] Affidavit of Professor Guy Goodwin-Gill, affirmed 13 September 2023, [9].

[4] *Wurridjal v The Commonwealth* (2009) 237 CLR 309, 312 (French CJ).

will be removed from Australia in the foreseeable future. That is a lower threshold for when detention will become unlawful than is advanced by the Plaintiff. However, it is open to the Court on the terms of the Special Case to find that the lower threshold is the endpoint of lawful detention under the Act. If the Court is minded to overrule *Al-Kateb*, the point at which detention becomes unlawful is a matter of considerable public importance and it is appropriate for the Court to determine that issue in resolving the correct construction of the Act;[5]

(c) in support of the proposition that, where a detainee's removal is unlikely as a matter of reasonable practicability in the foreseeable future, their detention under ss 189 and 196 of the Act will not be "reasonably capable of being seen as necessary" for the purpose of their removal, and will accordingly infringe Ch III.[6] This is a more demanding requirement than that relied upon by the Plaintiff, but again is open on the Special Case.

6. A grant of leave to the *amici* would not add materially to the parties' preparation for the hearing or the length of the oral hearing itself.[7]

## PART IV: ARGUMENT

### CONSTRUCTION QUESTION

7. Two constructional questions arise:

(a) *First*, is the construction of ss 189 and 196 of the Act adopted by the majority in *Al-Kateb* (the **indefinite detention construction**) correct? (*Amici's* answer: no.)

(b) *Second*, if not, what is the correct construction of ss 189 and 196 of the Act? (*Amici's* answer: they do not authorise or require detention of an unlawful non-citizen when, as a matter of reasonable practicability, it is unlikely that the person will be removed from Australia in the foreseeable future.)

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[5] See, illustrating the practical importance of such resolution, *Sami v Minister for Home Affairs* [2022] FCA 1513, [42] (Mortimer J, as her Honour then was) ("unless and until *Al-Kateb* is overruled, no-one will know what the correct legal test is for any limit imposed on the mandatory detention of an individual").

[6] *Chu Kheng **Lim** v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 33 (Brennan, Deane and Dawson JJ).

[7] *Roadshow Films Pty Ltd v iiNet Limited (No. 1)* (2011) 248 CLR 37, [4] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) affirming *Levy v Victoria* (1997) 189 CLR 579, 604-5 (Brennan CJ).

8. The Special Case, at [45], records the following agreed facts as at 30 May 2023: (i) at present, the Plaintiff cannot be removed from Australia; (ii) there is no real likelihood or prospect of the Plaintiff being removed from Australia in the reasonably foreseeable future; and (iii) as a matter of reasonable practicability, it is unlikely that the Plaintiff will be removed from Australia in the foreseeable future.

9. The Plaintiff bases his arguments, both as to construction and validity, on the fact recorded in SC [45(b)]: Plaintiff's submissions (**PS**) [8], [13], [19], [41]-[43]. However, if the indefinite detention construction is wrong, the precise point at which detention under ss 189 and 196 becomes unlawful is a matter of considerable public importance, both for detainees and for the Commonwealth as their detainer. The prudential considerations in this case do not favour leaving the issue unresolved; it is a question that has seen "decades of reflection and debate" where "nothing would be achieved by putting off its resolution to another case".[8]

10. The *amici* respectfully submit that: (i) the indefinite detention construction is incorrect; (ii) it is appropriate for this Court to re-open *Al-Kateb* and so hold; and (iii) the point at which detention under ss 189 and 196 becomes unlawful is when, as a matter of reasonable practicability, it is unlikely that a detainee will be removed from Australia in the foreseeable future.

11. **The indefinite detention construction is incorrect:** The indefinite detention construction should be rejected on the cumulative bases of text, context, purpose, the principle of legality, and a construction that conforms with international law.

12. ***Text*:** Beyond the matters in PS [12]-[13], the statutory text does not support the indefinite detention construction. The word "until" in s 196(1) denotes the occurrence of an anticipated future event.[9] Courts, including this Court, have long spoken of the events in s 196(1) as "terminating events"[10] and have described s 196(1) as providing a "temporal constrain[t]" on detention under s 189(1).[11] The word "until" indicates that Parliament enacted s 196(1) on the assumption of such a

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[8] *Private R v Cowen* (2020) 271 CLR 316, [107] (Gageler J); see also [159] (Edelman J).

[9] See the dictionary definition referred to in *The Commonwealth v* ***AJL20*** (2021) 273 CLR 43, [49] (Kiefel CJ, Gageler, Keane and Steward JJ). *Oxford English Dictionary* (2nd ed, 1989), vol 19, 234, meaning 5(a): "Onward till (a time specified or indicated); up to the time of (an action, occurrence, etc)" (emphasis added).

[10] *WAIS v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1625, [47] (French J); ***Plaintiff M76/2013*** *v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322, [33] (Hayne J); *AJL20* [49] (Kiefel CJ, Gageler, Keane and Steward JJ).

[11] *AJL20* [28] (Kiefel CJ, Gageler, Keane and Steward JJ).

terminating event being foreseeable, or at the very least, did not address the circumstance in which a terminating event was not foreseeable.[12]

13. The word "duration" in the heading of s 196 also tells against indefinite detention.[13] Duration means "a specified length of time".[14] The term is inapt to describe detention without any foreseeable endpoint. If that were the connotation of "duration" in s 196 it could hardly be described as a "temporal constrain[t]" on detention under s 189(1),[15] nor as "fix[ing]" any "outer limit"[16] or "end" to detention.[17] The "duration" of detention in s 196(1) is "bounded" by an event which "must occur".[18]

14. ***Context*:** Sections 189 and 196 must be construed in their immediate statutory context, which in the case of the Plaintiff, is s 198. As Gummow J recognised in *Al-Kateb*, there are three temporal elements to the detention authorised by those provisions:[19] (i) removal is required to occur "as soon as" reasonably practicable; (ii) "practicable" means "that which is able to be put into practice and which can be effected or accomplished"; and (iii) the qualifier "reasonably", "introduces an assessment or judgment of a period which is appropriate or suitable to the purpose of the legislative scheme".

15. Thus, detention under ss 189 and 196 is built on an assumption as to "the reasonable practicability of removal".[20] The use of the term "until" in s 196 "assumes the possibility of compliance with the requirement imposed by s 198 of removal as soon as reasonably practicable".[21] The requirement or "condition"[22] in s 198 is "not merely removal, but removal as soon as reasonably practicable".[23]

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[12] *Minister for Immigration and Multicultural and Indigenous Affairs v* ***Al Masri*** (2003) 126 FCR 54, [118] (the Court); ***Plaintiff M47/2012*** *v Director-General of Security* (2012) 251 CLR 1, [114], [116] (Gummow J).

[13] *Acts Interpretation Act 1901* (Cth) s 13(1).

[14] *Australian Concise Oxford Dictionary* (5th ed, 2009) meaning 2, 438.

[15] *AJL20* [28] (Kiefel CJ, Gageler, Keane and Steward JJ). The language of constraint is also used in *Plaintiff M76/2013* [139] (Crennan, Bell and Gageler JJ).

[16] ***Plaintiff S4/2014*** *v Minister for Immigration and Border Protection* (2014) 253 CLR 219, [30] (the Court).

[17] *Plaintiff M76/2013* [126] (Hayne J).

[18] *Plaintiff S4/2014* [33] (the Court).

[19] *Al-Kateb* [121] (Gummow J); see also *Plaintiff M47/2012* [530] (Bell J adopting these observations).

[20] *Al-Kateb* [18], see also [22] (Gleeson CJ).

[21] *Plaintiff M47/2012* [116] (Gummow J).

[22] ***Plaintiff M96A/2016*** *v Commonwealth* (2017) 261 CLR 582, [20] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).

[23] *Al-Kateb* [17] (Gleeson CJ); see also *Plaintiff S4/2014* [33]; *AJL20* [90] (Gordon and Gleeson JJ).

16. ***Purpose*:** The statutory purpose, addressed only briefly by the Plaintiff (PS [13]), also tells against the indefinite detention construction. The object of the Act as stated in s 4(1) is "to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens". The legislative history of the Act reveals its detention provisions to have been – and to remain – primarily directed towards the admission and removal of persons to and from Australia.[24] The segregation of persons has never been an independent purpose of the Act.[25] Rather, the Act's powers of segregation (initially by imprisonment and now by detention) have always been in aid of the orderly and efficient admission to, and removal, of persons from Australia.[26] Focusing particularly on removal, the statutory purpose of detention was historically understood as being to ensure that a person was "available for deportation".[27] That is why the Act can still be described as providing for "segregation pending … removal".[28] That purpose is not advanced by reading the provisions to authorise and require the indefinite detention of a person whose removal is unlikely in the foreseeable future, as a matter of reasonable practicability.

17. This would not confer on an unlawful non-citizen a right "to remain" in Australia.[29] The removal duty in s 198(1) continues even after a person's detention becomes unlawful and they are released. The person may again become liable to detention "if and when removal becomes reasonably practicable"[30] as a matter of "real likelihood".[31]

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[24] *Lim* 10 (Mason CJ).

[25] This is reflected in s 4 of Act, which identifies various matters that the Act "provides for" in order to "advance its object", including visas and removal, but *not* including segregation.

[26] See the description of the three purposes of detention in *Plaintiff S4/2014* [26] (the Court).

[27] *Kumar v Minister for Immigration, Local Government and Ethnic Affairs* (Federal Court of Australia, 4 August 1989, BC8908278) p 29 (Beaumont J), citing a policy statement tabled in Parliament on 17 October 1985. The policy statement refers specifically to persons who have a "record of evading the Department, failing to report or escaping from custody" as well as persons who have bypassed immigration screening, suggesting that detention was to be used (or at least primarily used) where there was otherwise a serious risk of absconsion.

[28] *AJL20* [25] (Kiefel CJ, Gageler, Keane and Steward JJ).

[29] Cf *Plaintiff M47/2012* [269] (Heydon J). See also ***Zadvydas** v Davis*, 533 US 678 (2001), 695 ("[t]he question before us is not of 'confer[ring] on those admitted the right to remain against the national will' or 'sufferance of aliens' who should be removed. Rather, the issue we address is whether aliens that the [Executive] finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States.") (Breyer J, delivering the opinion of the Court in which Stevens, O'Connor, Souter and Ginsburg JJ joined).

[30] *Al-Kateb* [23] (Gleeson CJ).

[31] *Al-Kateb* [124] (Gummow J).

18. At the very least, the text, context and purpose of the Act leave open a "constructional choice"[32] as to whether ss 189 and 196 authorise and require detention where a detention-ending event is unlikely in the foreseeable future.[33]

19. ***Principle of legality*:** The following builds upon PS [17]-[18]. The principle of legality does not require ambiguity before it is engaged, only that a "constructional choice" is open.[34] The principle has been refined, or more clearly articulated, in recent years as a result of "sustained judicial reflection on the methodology of statutory interpretation".[35]

20. The rationale for the principle is now more clearly understood to be – at least in part[36] – the enhancement of the democratic process by the insistence on legislative transparency and accountability to the electorate on matters involving the infringement of fundamental rights.[37] Australia's treatment of unlawful non-citizens is such a matter. Application of the principle to s 196 thus closely aligns with its rationale:[38] to require Parliament to speak clearly if it wishes to require the Executive to detain a non-citizen indefinitely.

21. The force of the principle varies depending on the importance of the right and the degree of the potential limitation.[39] Beyond the matters identified at PS [17]-[18], two further matters weigh in favour of the forceful application of the principle of legality to ss 189 and 196. *First*, the Act here purports not just to *authorise* indefinite detention but to *require* it. The mandatory deprivation of liberty is something to

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[32] *Momcilovic* [43] (French CJ).

[33] See further *Al Masri* [118] (the Court); *Al-Kateb* [1], [21] (Gleeson CJ).

[34] *Momcilovic* [43] (French CJ). See also Chief Justice French, 'Foreword' to Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) v, vii.

[35] Cheryl Saunders, 'Constitutional Dimensions of Statutory Interpretation' in Anthony J Connolly and Daniel Stewart (eds), *Public Law in the Age of Statutes: Essays in Honour of Dennis Pearce* (Federation Press, 2015) 27, 36.

[36] The constraint of executive power may provide another rationale for the principle of legality: Brendan Lim, 'Executive Power and the Principle of Legality' in Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020) 76.

[37] *Coco v The Queen* (1994) 179 CLR 427, 437-8 (Mason CJ, Brennan, Gaudron and McHugh JJ); *R v Secretary of State for Home Department; Ex parte Simms* [2000] 2 AC 115, 131 (Lord Hoffman); *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, [312] (Gageler and Keane JJ). As to the developments in understandings as to the principle's rationale, see Scott Stephenson, *From Dialogue to Disagreement in Comparative Rights Constitutionalism* (Federation Press, 2016) 67-9.

[38] Cf *Lee v NSW Crime Commission* (2013) 251 CLR 196, [313] (Gageler and Keane JJ).

[39] *Federal Commissioner of Taxation v Tomaras* (2018) 265 CLR 434, [101] (Edelman J).

which the common law has long been hostile.[40] *Second*, insofar as a feature of our "general system of law"[41] is that the detention of persons be readily able to be supervised by the courts, the indefinite detention construction of the Act erodes that principle by making the "hedging duty" in s 198 practically unenforceable by a court.

22. That the principle of legality cautions against too readily reading a statute to authorise indefinite detention, is illustrated by reference to the interpretative practices of the courts of other jurisdictions sharing the common law approach to statutory interpretation.[42] Those countries, such as the United Kingdom[43] and New Zealand,[44] have construed detention-authorising legislation as subject to implied limits so as not to authorise indefinite detention.[45] The interpretative approaches of other courts can properly inform that to be taken by this Court, whether by analogy or contradistinction.[46] An openness to understanding the experience of other jurisdictions is particularly apt in applying the principle of legality, which can be traced back to England, and then earlier still, to the United States.[47]

23. ***Conformity with international law*:** A statute is to be construed, as far as its language permits, so that it is in conformity, and not in conflict, with established rules of international law.[48] The rationale for that principle, and the statutory context of the Act, supply particularly strong reason for its application in the present case.

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[40] *Al-Kateb* [117] (Gummow J); *M61/2010E* [64] (the Court); *Plaintiff M47/2012* [529] (Bell J); *Lim* 19 (Brennan, Deane and Dawson JJ).

[41] *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J).

[42] For a synthesis of common law methods of statutory interpretation across jurisdictions see Francis Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (Oxford University Press, 2009) 1-3, 177.

[43] *R v Governor of Durham Prison ex p Hardial Singh* [1984] 1 WLR 704.

[44] *Chief Executive of the Department of Labour v Yadegary* [2009] 2 NZLR 495.

[45] See also the restrictive approach taken to the interpretation of detention-authorising provisions in South Africa: *Ulde v Minister of Home Affairs* (2009) (8) BCLR 840 (SCA), [7] (Cachalia JA, Mpati P, Streicher, Ponnan JJA and Hurt AJA agreeing); *Arse v Minister of Home Affairs* (2010) (7) BCLR 640 (SCA), [10] (Malan JA, Mpati P, Cloete, Cachalia JJA and Theron AJA agreeing); *Bula v Minister of Home Affairs* (2012) (4) SA 560 (SCA), [84] (Navsa JA, Cloete, Maya, Bosielo and Leach JJA agreeing).

[46] *Momcilovic* [18]-[19] (French CJ).

[47] *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, [307]-[308] (Gageler and Keane JJ) referring to *United States v Fisher*, 6 US 358 (1805), 390 (Marshall CJ), *Maxwell on the Interpretation of Statutes* (4th ed, Sweet & Maxwell, 1905) 121-2 and *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J).

[48] *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363 (O'Connor J); *Kartinyeri v The Commonwealth* (1998) 195 CLR 337, [97] (Gummow and Hayne JJ).

24. Rationale: The principle flows from the proposition that "Parliament, prima facie, intends to give effect to Australia's obligations under international law".[49] As with the principle of legality, that rationale is not always, or only, understood as a "factual prediction" about actual legislative intent,[50] but rather as "an expression of a legal value, respected by the courts, and acknowledged by the courts to be respected by Parliament".[51] The legal value of compliance with international law has two dimensions. *First*, ratification of a treaty involves an "undertaking by the Executive government to adhere (in good faith) to the terms of a given international instrument as a solemn assurance made to the international community and to the Australian people".[52] *Second*: "The violation of an international treaty or custom is a violation of international law *qua* law" and as such can be considered a "matter of deep and lasting significance".[53]

25. A construction of a statute that authorises or requires the Executive to act inconsistently with its "solemn assurance" should only be reached if the language clearly demands it.[54] Curial insistence on "unequivocal legislative intent to default on an international obligation"[55] enhances the democratic process by ensuring due attention to, and accountability for, such measures.

26. Statutory context: While the principle just described operates generally – because the "values and principles [of customary and conventional international law] form part of the context in which statutes are enacted"[56] – it applies particularly to a statute as enmeshed in international concerns as is the Act.

27. At the time *Al-Kateb* was decided, the prevailing jurisprudence of the Federal Court was that the removal duty imposed by s 198 was not constrained by Australia's *non-*

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[49] *Minister for Immigration and Ethnic Affairs v* ***Teoh*** (1995) 183 CLR 273, 287 (Mason CJ and Deane J).

[50] Cf *Al-Kateb* [63]-[65] (McHugh J).

[51] *Al-Kateb* [20] (Gleeson CJ).

[52] *Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v* ***CWY20*** (2021) 288 FCR 565, [3] (Allsop CJ); *Teoh* 287 (Mason CJ and Deane J).

[53] *CWY20* [5] (Allsop CJ).

[54] There is a separation of powers dimension to the presumption, as it ensures that Parliament is not too readily understood to interfere in the sensitive and dynamic field of international relations, which has typically been left to the Executive: see, in the United States, Curtis A Bradley, 'The Charming Betsy Canon and the Separation of Powers: Rethinking the Interpretative Role of International Law' (1997) 86 *Georgetown Law Journal* 479; *Commodity Futures Trading Commission v Nahas*, 738 F2d 487 (DC Circuit, 1984), 494 n13.

[55] *R v* ***Hape*** [2007] 2 S.C.R. 292, [53] (McLachlin CJ, LeBel, Deschamps, Fish and Charron JJ).

[56] *Hape* [53] (McLachlin CJ, LeBel, Deschamps, Fish and Charron JJ).

*refoulement* obligations.[57] This soon shifted. In *Plaintiff M61/2010E v The Commonwealth,* this Court held that "read as a whole, the Migration Act contains an elaborated and interconnected set of statutory provisions directed to the purpose of responding to the international obligations which Australia has undertaken in the Refugees Convention and the Refugees Protocol."[58] The Act "proceeds, in important respects, from the assumption that Australia has protection obligations to individuals."[59] This was a contextual matter of foremost importance to the construction of the Act's provisions, including its provisions concerning detention and removal.[60] It likewise provided the basis for construing limits on removal powers, despite their apparent generality, in *Plaintiff M70/2011.*[61]

28. Since those cases were decided, the Act's imbrication with international law has become more pronounced. Whereas it was long the case that "the Refugees Convention has been placed at the heart of the operation of the Act",[62] the Act was amended in 2011 to incorporate provisions directed to responding to international obligations in the International Covenant on Civil and Political Rights (**ICCPR**) and other treaties.[63] The purpose of the amendments was to provide for protection claims under these treaties to be assessed through the single protection visa application process, to "both enhance the integrity of Australia's arrangements for meeting its *non-refoulement* obligations and *better reflect Australia's longstanding commitment* to protecting those at risk of the most serious forms of human rights abuses".[64]

29. The insertion of s 197C(1) in 2014[65] had the effect that the removal of an unlawful non-citizen was required even where the individual had been found to engage

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[57] *NATB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 506, [53]-[55], [60]-[61] (the Court); cf Response [10].

[58] ***Plaintiff M61/2010E*** *v Commonwealth* (2010) 243 CLR 319, [27] (the Court).

[59] *Plaintiff M61/2010E* [27].

[60] *Plaintiff M61/2010E* [23], [26]-[27], [35].

[61] *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, [44] (French CJ), [90], [94]-[95] (Gummow, Hayne, Crennan and Bell JJ).

[62] *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1, [14] (Allsop CJ and Katzmann J).

[63] *Migration Amendment (Complementary Protection) Act 2011* (Cth). See ***SZTAL*** *v Minister for Immigration and Border Protection* (2017) 262 CLR 362, [1] (Kiefel CJ, Nettle and Gordon JJ), [43] (Gageler J).

[64] Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011, 1 (emphasis added).

[65] *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth), Sch 5, item 2.

Australia's *non-refoulement* obligations.[66] That effect was reversed by the amendments to s 197C in 2021, with the stated purpose of "clarifying" that the removal of an individual is not authorised where it would breach *non-refoulement* obligations, including under the ICCPR.[67] Section 197C(3) serves to tie the Act more closely to Australia's obligations at international law.

30. There is thus a particularly strong imperative to construe the Act conformably with the ICCPR as far as the statutory language permits. The Act protects the Plaintiff from being *refouled* to Myanmar, thus ensuring Australia's compliance with Article 7 of the ICCPR. But, if the indefinite detention construction is correct, the Act simultaneously authorises a violation of the Plaintiff's human rights in Australia (ICCPR Article 9). The text of s 196 is susceptible of a construction that avoids this discordance within the Act and pursues the Act's purposes by coherent means.[68]

31. The prohibition on arbitrary detention: Article 9(1) of the ICCPR recognises the right to liberty and provides that: "No one shall be subjected to arbitrary arrest or detention". That prohibition is distinct from the limitation that follows it, that: "No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." Consistently with that textual distinction, arbitrariness is not to be equated with "against the law", and must be interpreted "to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality."[69]

32. Detention in the context of removal will be arbitrary unless it is reasonable, necessary, and proportionate in the individual case.[70] It follows that a decision to detain must involve consideration of the individual's circumstances and whether

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[66] *DMH16 v Minister for Immigration and Border Protection* (2017) 253 FCR 576, [26]-[27], [30] (North ACJ); *AJL20* [19] (Kiefel CJ, Gageler, Keane and Steward JJ).

[67] Explanatory Memorandum, Migration Amendment (Clarifying International Obligations for Removal) Bill 2021, 2-3. The intended purpose of s 197C(1) was "to limit the opportunity for a person to obtain a court injunction to stop the removal process where the Minister or delegate had already found that an UNC did not engage *non-refoulement* obligations. It was not intended to operate to require the removal of an UNC who had been found to engage *non-refoulement* obligations": 7.

[68] *SAS Trustee Corporation v Miles* (2018) 265 CLR 137, [20] (Kiefel CJ, Bell and Nettle JJ); [41] (Gageler J).

[69] UN Human Rights Committee, ***General Comment No. 35***, *Article 9 (Liberty and security of person)*, UN Doc CCPR/C/GC/35 (2014), [12]; *van Alphen v The Netherlands*, Communication No. 305/1988, UN Doc CCPR/C/39/D/305/1988 (1990), [5.8]; *Al Masri* [143]-[152] (the Court).

[70] General Comment No. 35, [18]; *F.K.A.G v Australia*, Communication No. 2094/2011, UN Doc CCPR/C/108/D/2094/2011 (2013), [9.3].

there are less invasive means of achieving the same ends.[71] Detention that is initially lawful may become arbitrary; the justification for detention must be reassessed as it extends in time.[72]

33. The inability of a State to carry out removal of an individual does not justify indefinite detention.[73] The application of art 9(1) in such circumstances is reflected in draft articles governing the expulsion of aliens prepared by the International Law Commission in 2014.[74] The articles provide that detention for the purpose of expulsion shall be limited to such period as is reasonably necessary for expulsion to be carried out; that any excessive duration is prohibited, and that detention "shall end when the expulsion cannot be carried out", except where the reasons are attributable to the person concerned.[75]

34. Further, art 9(4) requires that detention must be subject to review by a court empowered to determine the lawfulness of detention and to order release if the detention is not lawful. The review required by art 9(4) is not limited to establishing compliance with domestic law. It must be real and not merely formal, entailing consideration of whether, in an individual's circumstances, detention is arbitrary.[76]

35. If the Act is construed to authorise and require detention "irrespective of the foreseeable prospects of removal and irrespective of the personal circumstances of the individual",[77] without the possibility for review and release by a court, it is in conflict with these obligations. A construction that detention ceases to be authorised where removal in the foreseeable future is unlikely as a matter of reasonable

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[71] General Comment No. 35, [18]; *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002), [8.2].

[72] General Comment No. 35, [18]; *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997), [9.4].

[73] General Comment No. 35, [18]. See also UN Human Rights Council, *Report of the Working Group on Arbitrary Detention*, UN Doc A/HRC/39/45 (2018), Revised deliberation No. 5 on deprivation of liberty of migrants, [25]-[26]; Guy S. Goodwin-Gill & Jane McAdam, *The Refugee in International Law* (4th ed, Oxford University Press, 2021) 469.

[74] International Law Commission, 'Expulsion of aliens – Text of the draft articles and commentaries thereto', *Report*, Sixty-sixth session, GAOR, 69th Session, UN Doc A/69/10 (2014). The text continues to be before the General Assembly: see UNGA res. 75/137 (15 Dec 2020).

[75] Ibid, article 19. While some States expressed concerns regarding aspects of the draft articles, none were raised with respect to these provisions: 'Report of the International Law Commission on the work of its sixty sixth session. Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-ninth session, prepared by the Secretariat', A/CN.4/678 (2015), [97].

[76] *M.M.M v Australia*, Communication No. 2136/2012, UN Doc CCPR/C/108/D/2136/2012 (2013), [10.6]. Cf *Al-Kateb* [238] (Hayne J).

[77] *Al Masri* [153] (the Court).

practicability, better accommodates elements of reasonableness and necessity required to avoid arbitrary detention. That construction should be preferred because it would "more closely align"[78] with international law.

***Al-Kateb* should be re-opened and overruled**

36. This Court should re-open and overrule *Al-Kateb* for the reasons identified by the Plaintiff at PS [22], and the following further reasons.

37. *First*, developments since *Al-Kateb* point to the incorrectness of its holding. The refinement of the principle of legality, amendments to the Act, and greater recognition of the Act's connection with international law, all tend in favour of this Court now recognising that *Al-Kateb*'s construction "was wrong, that it was wrong in a significant respect, and that the Court should give effect to the intention of the Parliament".[79]

38. *Second*, where an incorrect interpretation is restrictive of common law rights, this Court should be more ready to correct it so as to reinstate the enjoyment of those rights.[80]

39. *Third*, as to the "injustice or inconvenience" of departing from, or adhering to, the previous construction of a statute,[81] the majority itself in *Al-Kateb* considered that their interpretation of the Act had "tragic" consequences.[82] If the Court now inclined to a view that the correct construction of the Act does not compel those consequences, it ought to so rule.

40. *Fourth*, the question of whether to overturn a previous decision of statutory interpretation can properly be informed by the acknowledged desirability of Australian legislation being consistent with international law[83] and with the practice

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[78] *SZTAL* [43]-[44] (Gageler J).

[79] *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 440 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

[80] Drew C Ensign, 'The Impact of Liberty on Stare Decisis: The Rehnquist Court from *Casey* to *Lawrence*' (2006) 81(3) *New York University Law Review* 1137.

[81] *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1, 13 (Mason J).

[82] *Al-Kateb* [31] (McHugh J), see also [269] (Hayne J).

[83] Cf Michael P Van Alstine, 'Stare Decisis and Foreign Affairs' (2012) 61(5) *Duke Law Journal* 1024.

of comparable common law jurisdictions with which Australia shares modes of statutory interpretation.[84]

41. *Fifth*, in determining whether to overturn a past decision of statutory interpretation, it is appropriate that the Court acknowledge the factors that may have prevented Parliament from enacting "appropriate remedial legislation".[85] Decisions in favour of unpopular minorities "tend to be unpopular, but are the essence of human rights protection".[86] Where, as here, the rights of a small minority of politically disempowered persons are affected,[87] the systemic pressures against legislative action to correct a rights-limiting interpretation of the statute – and the protection the judiciary enjoys from such pressures – provides an additional reason for this Court to intervene.[88] This Court should not take Parliament's failure to correct the interpretative holding in *Al-Kateb* as a legislative endorsement of that holding.[89] Rather, Parliament may have concluded that the subject was simply "too difficult or sensitive to tackle."[90]

42. *Sixth,* the amendments to the Act do not show that "Parliament has acted on the basis of the correctness of *Al-Kateb*"[91] in any way that militates against its reconsideration. Enacting a law on a false assumption does not enact that assumption into law.[92] The notion of "legislative approval" can be "quite artificial"[93] and calls for a discerning

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[84] Cheryl Saunders, 'Constitutional Dimensions of Statutory Interpretation' in Anthony J Connolly and Daniel Stewart (eds), *Public Law in the Age of Statutes: Essays in Honour of Dennis Pearce* (2015) 27, 27.

[85] ***Babaniaris*** *v Lutony Fashions Pty Ltd* (1987) 163 CLR 1, 14 (Mason J).

[86] Lord Bingham of Cornhill, 'The Judges: Active or Passive' (2006) 139 *Proceedings of the British Academy* 55, 71.

[87] *Minister of Home Affairs v* ***Rahim*** (2016) (3) SA 218 (CC), [23] (Nugent JA, Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Nkabinde J, Van der Westhuizen J and Zondo J agreeing).

[88] *Rahim* [23] (Nugent AJ, Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Nkabinde J, Van der Westhuizen J and Zondo J agreeing). John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) 103; Rosalind Dixon, 'The Core Case for Weak-Form Judicial Review' (2017) 38 *Cardozo Law Review* 2193, 2203-20.

[89] *Babaniaris* 24 (Wilson and Dawson JJ).

[90] See, by analogy, *Howden v Ministry of Transport* [1987] 2 NZLR 747, 750 (Cooke P). See generally William N Eskridge Jr, 'Interpreting Legislative Inaction' (1988) 87(1) *Michigan Law Review* 67.

[91] Response [11].

[92] *Inland Revenue Commissioners v Dowdall, O'Mahoney & Co Ltd* [1952] AC 401, 426 (Lord Radcliffe); *West Midland Baptist Association v Birmingham Corporation* [1970] AC 874, 898 (Lord Reid); *Honeywood v Munnings* (2006) 67 NSWLR 466, [37]-[40] (Handley JA, Giles JA and Hislop J agreeing).

[93] *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310, 329, 351 (Toohey, McHugh and Gummow JJ) citing *R v Reynhoudt* (1962) 107 CLR 381, 388 (Dixon CJ).

application.[94] The relevant provisions have not been re-enacted, and "mere amendment of a statute not involving any re-enactment of the words in question could seldom if ever constitute approval of an interpretation of those words."[95]

43. No *objective* intention of Parliament as to the correctness or otherwise of *Al-Kateb* can be discerned from its insertion of certain beneficial provisions into the Act (ss 195A, 197AB and Pt 8C[96] and also s 197C(3)), merely because those provisions are *capable* of ameliorating the consequences of *Al-Kateb* if it be correct. The provisions have utility regardless of whether *Al-Kateb* is correct. Nor do "practical difficulties"[97] arise. The Minister's power to grant a visa to a detainee under s 195A, and the provisions of Pt 8C requiring reporting to the Commonwealth Ombudsman on long-term detainees, would continue to operate if the correct construction of the Act is that indefinite detention is not authorised.

**The proper construction of ss 189 and 196**

44. The Plaintiff's submission is that ss 189 and 196 of the Act do not authorise or require his detention, because there is "no real prospect or likelihood of [him] being removed from Australia in the reasonably foreseeable future": PS [5].

45. The *amici* agree with the Plaintiff that his detention is not authorised or required by ss 189 and 196, but submit further that, on their proper construction, there is a lower threshold at which ss 189 and 196 cease to authorise or require detention, namely when, as a matter of reasonable practicability, it is *unlikely* that a detainee will be removed from Australia in the foreseeable future. The articulation of this limit on the legality of detention under the Act finds support at various points in the dissents in *Al-Kateb*[98] and in judgments of Gummow J and Bell J in subsequent cases.[99] The text

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[94] ***Director of Public Prosecutions Reference No 1 of 2019*** (2021) 274 CLR 177, [51] (Gageler, Gordon and Steward JJ).

[95] *Flaherty v Girgis* (1987) 162 CLR 574, 594 (Mason ACJ, Wilson and Dawson JJ); *Director of Public Prosecutions Reference No 1 of 2019* [53] (Gageler, Gordon and Steward JJ). Cf *Platz v Osborne* (1943) 68 CLR 133, 145-6 (McTiernan J), 146-7 (Williams J), where amendment involving the addition of a proviso within the relevant section was a circumstance tending against overruling a longstanding construction, where the prevailing construction gave "full effect to the general principle of law that a person shall not be placed in peril twice for the same offence except by a statute the words of which are clear, express and free from ambiguity" and the Court "considered it is right".

[96] *Migration Amendment (Detention Arrangements) Act 2005* (Cth), Sch 1, items 10, 11 and 19.

[97] Response [11].

[98] *Al Kateb* [122] (Gummow J, Kirby J expressing support at [150]); [11], [14], [18], [28] (Gleeson CJ). See also [33] (McHugh J); [145] (Kirby J); [290] (Callinan J).

[99] ***Re Woolley; Ex parte Applicants 276/2003*** (2004) 225 CLR 1, [134] (Gummow J); *Plaintiff M47/2012* [7], [116]-[117] (Gummow J); [524], [530] (Bell J).

of ss 189 and 196 does not point in favour of one threshold over the other. However, the lower threshold is the better construction for the following reasons.

46. *First*, the statutory context and purpose supports the lower threshold. Removal under s 198 is to be effected "as soon as reasonably practicable". Detention is authorised for that purpose. If it is unlikely as a matter of reasonable practicability (on the balance of probabilities) that a detainee will be removed from Australia in the foreseeable future, that is sufficient for a court to conclude that the detention no longer serves the purpose which marks its lawful outer limit.

47. *Second*, the lower threshold gives greater force to the principle of legality, which is appropriate for the reasons set out at [19]-[22] above. To hold that ss 189 and 196 *continue* to authorise and require a person's detention even where it is *unlikely* as a matter of reasonable practicability that the detainee will be removed from Australia in the foreseeable future, is to countenance a greater degree of interference with individual liberty, when a lesser degree of interference is open on the statutory text.

48. *Third*, as submitted at [35] above, the lower threshold more closely aligns with Australia's international obligations to avoid arbitrary detention.

49. *Fourth*, the lower threshold provides a more workable criterion of lawfulness, which is able to be assessed and determined by a court, applying the usual civil standard of proof by which courts determine the existence or non-existence of facts.

50. *Fifth*, for the reasons developed below, the lower threshold construction avoids constitutional invalidity.

**VALIDITY QUESTION**

51. These submissions supplement and expand on the Plaintiff's submissions on invalidity, in particular in relation to certain aspects of the condition that detention be "limited to what is reasonably capable of being seen as necessary" for the purpose of removing a person from Australia: PS [34].[100] The *amici* submit that this condition will not be met, and so the limits imposed by Ch III contravened, if ss 189 and 196 authorise and require detention where it is unlikely as a matter of reasonable practicability that a detainee will be removed from Australia in the foreseeable future.

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[100] *Lim* 33 (Brennan, Deane and Dawson JJ).

52. The constitutional holding in *Lim* is that laws for the detention of non-citizens will not contravene Ch III if, "and only if",[101] "the detention which they require and authorise is limited to what is reasonably capable of being seen as necessary" for the purpose of, relevantly, deportation.[102] The relevant focus of the necessity "is not that detention *itself* be necessary for the purposes of the identified administrative processes but that the *period* of detention be limited to the time necessarily taken in administrative processes directed to the limited purposes identified".[103] The constitutional concern with the *duration* of detention is made clear in *Plaintiff S4*: the duration of detention must be capable of being determined at any time, and "must be fixed by reference to what is both necessary and incidental" to execution of the executive power of removal.[104]

53. The enquiry as to whether a power of detention "is necessary in the Ch III sense is an enquiry as to the true purpose of the law authorising detention".[105] The inquiry involves a search for "justification".[106] For that reason, the conclusion that a detention regime is "limited to what is *reasonably capable* of being seen as necessary" requires a legal value judgment about the limitations on the period of detention. Such value judgments are not unusual in this Court's practice of constitutional law,[107] nor are they objectionable, so long as the process of reaching them is transparently elaborated.[108] The "potential for the outcome to turn on a contestable judgment of degree" does not alleviate "the judicial responsibility to undertake the close scrutiny of legislation necessary to provide an answer."[109] The

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[101] *Plaintiff M76/2013* [140] (Crennan, Bell and Gageler JJ); *Plaintiff M96A/2016* [21] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).

[102] *Lim* 33 (Brennan, Deane and Dawson JJ); *Re Woolley; Ex parte Applicants M276/2003* [14], [21] (Gleeson CJ); *Plaintiff M76/2013* [138] (Crennan, Bell and Gageler JJ); *Plaintiff S4/2014* [26] (the Court); *Plaintiff M96A/2016* [21] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).

[103] *Plaintiff M76/2013* [139] (and [140]) (Crennan, Bell and Gageler JJ) (emphasis added); *Plaintiff M96A/2016* [21] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).

[104] *Plaintiff S4/2014* [29] (the Court).

[105] ***Falzon*** *v Minister for Immigration and Border Protection* (2018) 262 CLR 333, [31] (Kiefel CJ, Bell, Keane and Edelman JJ).

[106] *Falzon* [33] (Kiefel CJ, Bell, Keane and Edelman JJ).

[107] See, eg, James Stellios, 'Constitutional Characterisation: Embedding Value Judgments About the Relationship Between the Legislature and the Judiciary' (2021) 45 *Melbourne University Law Review* 277.

[108] See, eg, *Garlett v Western Australia* (2022) 96 ALJR 888, [127] (Gageler J).

[109] *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, [99] (Gageler J).

*amici* submit that the close scrutiny entailed in the application of the *Lim* limit should be informed by the following matters.

54. *First*, the exigency of the limit is informed by its rationale and constitutional purpose, which is to give effect to the separation of powers as a "safeguard of individual liberty".[110] The *Lim* limit must be applied with an appreciation of the importance of this "core value",[111] and the history and tradition of liberty being "jealously safeguarded"[112] by the courts. Viewed in that context, the concept of necessity in the *Lim* formulation is not easily to be satisfied.[113]

55. *Second*, and relatedly, the concept of necessity in the *Lim* formulation is helpfully illuminated by reference to its obverse, arbitrariness.[114] If and when the period of detention purportedly authorised by a law becomes arbitrary, it follows that it cannot normally be characterised as "limited to what is reasonably capable of being seen as necessary" for the purpose of removal.

56. *Third*, judicial application of the *Lim* limit serves the dynamic constitutional function of "establishing and maintaining the relationship between the individual and the state within our inherited conception of the rule of law."[115] While differing conceptions of the individual-State relationship may be acknowledged,[116] any contemporary statement of that relationship must justify departure from the idea that "the very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive".[117]

57. *Fourth*, the question of whether detention is "limited to what is reasonably capable of being seen as necessary" can permissibly be informed by comparative experience. Just as proportionality testing permits consideration of overseas models of regulation, at the point of considering whether there are less-restrictive alternatives,

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[110] *R v Davison* (1954) 90 CLR 353, 381 (Kitto J).

[111] ***Vella*** *v Commissioner of Police (NSW)* (2019) 269 CLR 219, [141] (Gageler J).

[112] *Vella* [140] (Gageler J).

[113] See, further, Jeffrey Steven Gordon, 'Imprisonment and the Separation of Judicial Power: A Defence of a Categorical Immunity from Non-criminal Detention' (2012) 36 *Melbourne University Law Review* 41, 77.

[114] See, eg, *Lim* 27 (Brennan, Deane and Dawson JJ); *Plaintiff M76/2013* [139] (Crennan, Bell and Gageler JJ).

[115] *Garlett v Western Australia* (2022) 96 ALJR 888, [133] (Gageler J).

[116] James Stellios, 'Liberty as a Constitutional Value: The Difficulty of Differing Conceptions of "The Relationship of the Individual to the State"' in R Dixon (ed), *Australian Constitutional Values* (2018) 177.

[117] *Hamdi v Rumsfeld*, 542 US 507 (2004), 554-5 (Scalia J, for Scalia and Stevens JJ), cited in *Al-Kateb* [137] (Gummow J).

so too ought the second *Lim* condition permit consideration of the necessity or otherwise of indefinite periods of detention for the purpose of removal in comparable jurisdictions. The common thread running through the approaches in comparable jurisdictions – such as the United Kingdom,[118] the United States,[119] New Zealand[120] and the European Union[121] – is reasonableness, in various expressions. Statutory time limits on the duration of detention are common.[122] In none of these jurisdictions has mandatory indefinite detention been tolerated.

**Application of the *Lim* limit to the indefinite detention construction**

58. These considerations support the Plaintiff's application of the *Lim* limit at PS [41]-[42]. The *amici* further submit that the relevant "temporal limit"[123] on detention is removal as soon as is reasonably practicable. If removal is unlikely as a matter of reasonable practicability in the foreseeable future, this limit has fallen away.

59. In *Lim,* the application of the principle turned not only on the ability of the individual to request removal and so bring their detention to an end, but also on the "significant restraint" in the form of the time limit in the statutory scheme as it then stood. That limit was set at 273 days after the making of an application for an entry permit.[124] As

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[118] *Immigration Act 1971* (UK) Sch 3 para 2 as applied in *R v Governor of Durham Prison, Ex p Hardial Singh* [1984] 1 WLR 704; *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, [22] (Lord Dyson) ("the deportee may only be detained for a period that is reasonable in all the circumstances; if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention").

[119] *Immigration and Nationality Act 1952* § 236, 241 as applied in *Zadvydas* 682, 689, 699 (limiting "post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States"; "once removal is no longer reasonably foreseeable, continued detention is no longer authorized").

[120] *Immigration Act 2009* (NZ) s 317(2) (a Court authorising detention must be satisfied that removal will not be delayed for "an unreasonable period"); *Tesimale v Manukau District Court* [2021] NZHC 2599.

[121] *Directive 2008/ 115/ EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals* (**EU Return Directive**) art 15 ("Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence"; "When it appears that a reasonable prospect of removal no longer exists for legal or other considerations … detention ceases to be justified and the person concerned shall be released immediately".)

[122] Eg, *Immigration and Nationality Act 1952* (US) § 241(a)(1)(A) ("removal period" custody limited to 90 days; the previous statutory timeframe had been six months (*Zadvydas* 701)); *Immigration Act 2009* (NZ) ss 313, 316 (authorising an initial period of detention for 96 hours, after which authorisation must be obtained from the District Court for further detention up to 28 days); *Immigration and Refugee Protection Act 2001* (Canada) ss 55, 57 (entitlement to review of the reasons for continued detention after 48 hours, 7 days, and then at least every 30 days); EU Return Directive art 15(5)-(6) (Member States are to set a limited period of detention which may not exceed six months, which may be extended not in excess of 12 months on limited grounds).

[123] *Plaintiff M76/2013* [139] (Crennan, Bell and Gageler JJ).

[124] *Lim* 33 (Brennan, Deane and Dawson JJ).

the provisions had the potential to authorise a further 273 days of detention of persons who had already been detained for years when the provisions commenced, "those limitations would not … have gone far enough"; but for the consideration that it was within the power of an individual to bring their detention to an end "at any time" by requesting removal.[125] This aspect of the reasoning reveals that the analysis required by *Lim* is concerned with more than a facial statutory connection to an end point of removal. The duration, in the real sense of the time a person is deprived of their liberty, is the core concern. Detention with no time limit, and no determinable end point, where the asserted purpose of removal is unlikely as a matter of reasonable practicability, cannot be "reasonably capable of being seen as necessary" for that purpose.

60. The Plaintiff submits that ss 189 and 196 of the Act infringe Ch III in their application to him, because there is "no real prospect" of his removal in the reasonably foreseeable future (PS [41]-[43]). The *amici* agree, but submit that Ch III is *also* infringed on the basis that the Plaintiff's removal is "unlikely as a matter of reasonable practicability in the foreseeable future", as a result of which at least the second *Lim* condition is not satisfied. It is open to the Court to adopt that more demanding requirement given the terms of Special Case, [45(c)].

## PART V: ESTIMATED TIME

61. If granted leave to make oral submissions, the *amici* estimate that they will require 20 minutes.

Dated: 15 September 2023

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[125] *Lim* 33-4 (Brennan, Deane and Dawson JJ); 46 (Toohey J) ("thereby ensuring that detention is not for any lengthy period").

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **NZYQ**
Plaintiff

and

**MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS**
First Defendant
**COMMONWEALTH OF AUSTRALIA**
Second Defendant

## ANNEXURE TO THE SUBMISSIONS OF THE HUMAN RIGHTS LAW CENTRE & KALDOR CENTRE FOR INTERNATIONAL REFUGEE LAW SEEKING LEAVE TO BE HEARD AS *AMICI CURIAE*

Pursuant to Practice Direction No. 1 of 2019, the Human Rights Law Centre and Kaldor Centre for International Refugee Law set out below a list of the constitutional provisions, statutes and statutory instruments referred to in their submissions.

| No. | Description | Version | Provisions |
|---|---|---|---|
| 1. | *Constitution* | Current | Ch III |
| 2. | *Migration Act 1958* (Cth) | Current (Compilation No 154 (24 June 2023 to present)) | ss 4, 189, 196, 197C, 198 |
| 3. | *Migration Act 1958* (Cth) | Compilation prepared on 9 April 2003 (20 March to 2 June 2003) | ss 189, 196, 198 |
| 4. | *Migration Amendment (Complementary Protection) Act 2011* (Cth) | As made | Entire Act |
| 5. | *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum* | As made | Sch 5, item 2 |

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|---|---|---|---|
| | *Legacy Caseload) Act 2014* (Cth) | | |
| 6. | *Migration Amendment (Detention Arrangements) Act 2005* (Cth) | As made | Sch 1, items 10, 11 and 19 |
| 7. | *Acts Interpretation Act 1901* (Cth) | Current (Compilation No 37 (12 August 2023 to present)) | s 13 |