IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M47 of 2012

B E T W E E N

PLAINTIFF M47/2012
Plaintiff

and

DIRECTOR GENERAL OF SECURITY

First Defendant

THE OFFICER IN CHARGE, MELBOURNE IMMIGRATION TRANSIT ACCOMMODATION

Second Defendant

SECRETARY, DEPARTMENT OF IMMIGRATION AND CITIZENSHIP

Third Defendant

MINISTER FOR IMMIGRATION AND CITIZENSHIP

Fourth Defendant

COMMONWEALTH OF AUSTRALIA

Fifth Defendant

SUBMISSIONS ON BEHALF OF THE AUSTRALIAN HUMAN RIGHTS COMMISSION

Date of document: 8 June 2012
Filed on behalf of:

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I: CERTIFICATION

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

II: BASIS OF INTERVENTION

2. The basis of the proposed intervention is s 11(1)(o) of the *Australian Human Rights Commission Act 1986* (Cth).[1] These proceedings involve issues concerning the human rights of the Plaintiff, and others held in immigration detention in Australia in similar circumstances, in particular the right to liberty.

III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. The Australian Human Rights Commission (the **Commission**) has an interest and expertise in relation to the rights and treatment of asylum seekers and refugees generally, and persons in immigration detention more particularly, as set out in the affidavit of Catherine Branson filed on 8 June 2012. Accordingly it will be able to assist the Court by way of these written submissions and, if appropriate, by way of oral submissions. The Commission's submissions are filed in support of the Plaintiff. The Commission has confined its submissions so as to offer the Court assistance the Plaintiff may not be able to offer on the same issues or in the same detail, given the truncated timetable.[2]

IV: APPLICABLE STATUTORY PROVISIONS

4. The applicable statutory provisions are set out in the attached Annexure.

V: ISSUES ON WHICH THE COMMISSION MAKES SUBMISSIONS

5. If leave to intervene is granted, the Commission will make the following submissions:

   (1) Australia's international obligations, together with the principle of legality and the limits imposed by Ch III of the *Constitution* (in particular concerning unregulated decision making by the executive about a 'safe' third country), mean that s 198(2) of the *Migration Act 1958* (Cth) (**the Act**) should be construed as not imposing a duty to remove a person to whom Australia owes protection obligations.

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1 The section provides that one of the functions of the Commission is to intervene in legal proceedings that involve human rights issues, with the leave of the court, where the Commission considers it appropriate to do so. 'Human rights' is defined in s 3 of the AHRC Act to include the rights and freedoms recognised in the *International Covenant on Civil and Political Rights* [1980] ATS 23 (**ICCPR**). Australia ratified the ICCPR on 13 August 1980 and the ICCPR entered into force for Australia on 13 November 1980, except for Article 41 which entered into force on 28 January 1993.

2 See discussion in *Levy v Victoria* (1997) 189 CLR 579 at 68-91 (Brennan J).

(2) Australia's international obligations, the special place afforded in the common law and international instruments to the right to liberty, together with the principle of legality and the limits imposed by Ch III, mean that s 196(1) should be construed as not authorising indefinite detention of a person to whom Australia has decided it has protection obligations and whose removal is unlikely to be reasonably practicable. If necessary, the Commission also contends that this Court should find that *Al-Kateb v Godwin*[3] (***Al-Kateb***) is wrongly decided, but the Commission's primary contention is that *Al-Kateb* may not need to be revisited in its terms because it did not concern a refugee.

(3) The content of the Australian Security Intelligence Organisation's (**ASIO's**) duty to afford procedural fairness, in making a security assessment under s 37 of the *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**), must be commensurate with the interest at stake – here, liberty. Consistently with the interpretative approach outlined in these submissions, that means a person must be given sufficient information about the allegations against him or her to enable him or her to give an effective response to those allegations. Where it is impossible to separate out allegations from evidence and, in turn, evidence from its sources, national security may need to give way to the interests of a fair hearing. The process by which that occurs can be the subject of considerable flexibility.

A. Answers to Questions posed by the Special Case

6. The Commission:

(1) on Question 1, makes submissions only on the content of the duty under s 37(1), not whether it has been breached;

(2) submits the answer to Question 2 is "no";

(3) submits the answer to Question 3 is "no"; and

(4) makes no submissions on Question 4.

B. Introductory propositions

7. The facts set out in the Special Case disclose the following matters relevant to the likelihood of removing the Plaintiff from Australia:

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3 (2004) 219 CLR 562.

(1) the Plaintiff is a person to whom Australia owes protection obligations under the Refugees Convention as amended by the Refugees Protocol (**Refugees Convention**), by reason of a determination made under the Act;[4]

(2) should the Plaintiff be returned to Sri Lanka there is a real chance that he will be persecuted by way of abduction, torture or death;[5]

(3) ASIO has furnished adverse security assessments in December 2009 and May 2012 in respect of the Plaintiff;[6]

(4) the Defendants do not propose or intend to remove the Plaintiff to Sri Lanka and, at present, there is no other country to which the Plaintiff can be sent;[7]

(5) the Plaintiff has informed the Department of Immigration and Citizenship that he has no relatives in third countries;[8]

(6) since May 2010, the Third and Fourth Defendants have approached the governments of eleven countries requesting resettlement assistance in relation to groups of persons sharing relevant characteristics with the Plaintiff (for example, refugees with adverse security assessments).[9] However, no government has offered assistance. Responses are outstanding from four countries;[10]

(7) a representative of the Third Defendant intends to raise resettlement "of persons in circumstances that include those of the Plaintiff with counterparts from some additional countries in the margins of" a meeting of the Annual Tripartite Consultations on Resettlement (**ATCR**) in Geneva in July 2012,[11] as he did without success at the July 2011 ATCR meeting.[12]

(8) although the Special Case describes two situations where persons have been accepted into other countries after adverse security assessments by

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4 Special Case [14]-[17]. Although he has been refused a visa, as a refugee physically present in Australia, the Plaintiff is entitled to such of the protection obligations under the Refugees Convention which Australia has undertaken as a signatory to afford to a refugee physically within its territory. Those obligations extend beyond Art. 33, to rights such as non discrimination (Art. 3), freedom of religion (Art. 4), access to the courts (Art. 16), education (Art. 22) right to identity papers (Art. 27), freedom from punishment for illegal entry and freedom from unnecessary restrictions on movement (Art. 31). See James Hathaway, *The Rights of Refugees under International Law* (2005) at 159, 171.

5 Special Case [16].

6 Special Case [23], [25].

7 Special Case [31]-[32].

8 Special Case [33.2].

9 Special Case [33]. In relation to all but one of these requests, the Special Case does not expressly state that the Plaintiff was included in the group of persons in respect of whom the request was made.

10 Special Case [33].

11 Special Case [33.5].

12 Special Case [33.3].

Australia, in neither case does this appear to have occurred as a result of steps taken by the Third and Fourth Defendants.[13] Moreover, these cases reveal nothing about the likelihood of removal of the Plaintiff.

8. The Commission submits that these facts should lead the Court to find, as the premise on which the argument in this Court should proceed, that there is no real likelihood or prospect of removal of the Plaintiff from Australia. A similar finding was made by the Federal Court at first instance in *Al-Kateb*[14] with respect to Mr Al-Kateb.

9. All three issues on which the Commission makes submissions involve statutory construction, and the Commission's arguments are underpinned by two well established interpretative principles. The first is the presumption that Parliament does not intend to abrogate or curtail common law rights and freedoms unless it does so clearly and unambiguously. That principle - now sometimes referred to as the principle of legality - has been applied on many occasions by this Court, a number of them recently.[15] The second is that statutes should be construed, so far as their language permits, so as to be consistent with international law or conventions to which Australia is a party.[16]

10. At the centre of this case is the right to liberty. The common law has long recognised liberty as one of the most fundamental rights.[17] Justice Fullagar described it as "the

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13 Special Case [34]-[35].

14 (2004) 219 CLR 562 at 572 [2], 580 [31], 603 [105], 631 [197].

15 *Potter v Minahan* (1908) 7 CLR 277 at 304; *Bropho v Western Australia* (1990) 171 CLR 1 at 18; *Coco v The Queen* (1994) 179 CLR 427 at 436-437; *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 at 553 [11]; *Plaintiff S157 v The Commonwealth* (2003) 211 CLR 476 at 492 [30]; *Al-Kateb* (2004) 219 CLR 562 at 577 [19]-[20], 643 [241]; *Electrolux Home Products Pty Ltd v The Australian Workers' Union* (2004) 221 CLR 309 at 329 [21]; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 520 [47]; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 258 [15]; *Momcilovic v The Queen* (2011) 280 ALR 221; 85 ALJR 957; [2011] HCA 34 at [43]; *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [43]; *Australian Education Union v General Manager of Fair Work Australia* (2012) 286 ALR 625 at [30].

16 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363; *Polites v The Commonwealth* (1945) 70 CLR 60 at 68-69, 77, 80-81; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287; *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 384 [97]; *Momcilovic v The Queen* (2011) 280 ALR 221; 85 ALJR 957; [2011] HCA 34 at [18], citing *Jumbunna, Zachariassen v The Commonwealth* (1917) 24 CLR 166 at 181; *Polites, Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298 at 304-305; *Garland v British Rail Engineering Ltd* [1983] 2 AC 751 at 771; *R v Secretary of State for the Home Department; Ex parte Brind* [1991] 1 AC 696 at 747-748.

17 See, eg, *Whittaker v The King* (1928) 41 CLR 230 at 248; *Trobridge v Hardy* (1955) 94 CLR 147 at 152; *Watson v Marshall and Cade* (1971) 124 CLR 621 at 632; *Williams v The Queen* (1986) 161 CLR 278 at 292; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 520-523; *McGarry v The Queen* (2001) 207 CLR 121 at 140-142 [59]-[61]; *Al-Kateb* (2004) 219 CLR 562 at 577 [19]; *South Australia v Totani* (2010) 242 CLR 1 at 155-156 [423]. See also *A v Secretary of State for the Home Department* [2005] 2 AC 68 at [81], [88], [99]-[101]. Lord Hoffman said, at [88]: "The technical issue in this appeal is whether such a power can be justified on the ground that there exists a 'war or other public emergency threatening the life of the nation' within the meaning of article 15 of the European Convention on Human Rights. But I would not like anyone to think that we are concerned with some special doctrine of European law. Freedom from arbitrary arrest and detention is a quintessentially British liberty, enjoyed by the inhabitants of this country when most of the population of Europe could be thrown into prison at the whim of their rulers. It was incorporated into the European Convention in order to entrench the same liberty in

most elementary and important of all common law rights".[18] Where legislation purports to infringe the right to personal liberty, it is to be interpreted (if possible) so as to respect that right.[19] The right to liberty is enshrined in Art. 9(1) of the ICCPR.

C. Construction of s 198(2)

11. The nature and scope of the obligation in s 198(2) is to be determined not only by examining text, context and purpose but also by directing attention to the repository of the duty. The Commission submits there are constructional consequences for the interpretation of s 198(2) in that respect. Like the duty to detain in s 189 (and, by inference, the duty to keep in detention in s 196), the duty to remove is imposed on an "officer". By its definition in s 5 of the Act, the term is not only ambulatory depending on executive discretion (see paragraphs (f) and (g) of the definition) but also encompasses persons such as customs officials, police officers, private contractors responsible for administering Australia's immigration detention system and officers of the Department of Immigration.

12. The definition does not extend to the Minister. Insofar as the mandatory detention obligation is concerned, that may be unsurprising. Insofar as the removal obligation is concerned, the facts of this Special Case and indeed any understanding of the matters referred to by the Court in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (***M70***)[20] at [91]-[96] make it clear that the obligation is performed subject to executive direction as to manner and timing. Sitting behind, and controlling, the performance of the duty in s 198(2) is high level decision making by the Commonwealth Executive, which the provision does not in its terms even appear to recognise, let alone regulate. It must be inferred that in circumstances such as the Plaintiff's, there is some kind of executive direction to an officer to perform the duty imposed by s 198(2).

13. Even if justiciable,[21] the statute provides no criteria for this executive choice (cf s 198A, Subdivisions AI and AK, none of which apply), no standard of satisfaction or proof, indeed not even any identification of who is to make the choice: rather, only an identification of who is ultimately to perform the act of removal.

14. The obligation on an officer to remove "as soon as reasonably practicable" in s 198(2) of the Act is to be read in light of other provisions in the Act: *Plaintiff*

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countries which had recently been under Nazi occupation. The United Kingdom subscribed to the Convention because it set out the rights which British subjects enjoyed under the common law."

18 *Trobridge v Hardy* (1955) 94 CLR 147 at 152.

19 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 520-523.

20 (2011) 244 CLR 144.

21 See *Al-Kateb* at 575 [13] (Gleeson CJ).

M61/2010E v Commonwealth of Australia (***M61***)[22] at [71]. In *Al-Kateb* there was no material difference between the majority and minority judgments in finding that the word "practicable", in context, directed attention to what is capable of being put into practice or carried out.[23] While those words may, therefore, raise considerations of whether there is as a practical reality a country which will accept a person being detained for removal, they do not, the Commission submits, constitute the only constraint or limit on the duty imposed.

15. Other constraints or limits are to be found, as the Court recognised in *M61* and *M70*, in the text, context and purpose of the Act itself and in Australia's international obligations. The scheme of the Act - through a series of "elaborate and interconnected" provisions - is designed to implement Australia's obligations under the Refugees Convention.[24]

16. Although earlier decisions of this Court may have paid less attention to the practicalities of removal and the need for the co-operation of other states and therefore expressed propositions about sovereign power to expel in absolute terms[25], those decisions predate not only the much tighter border controls imposed by most states[26] but also the suite of human rights instruments in which states have agreed, amongst other things, to impose limits (some absolute[27]) on involuntary movements of human beings, and which have become core aspects of states' governmental and judicial decision making since their accession. This Court has recognised the realities of human movement and migration in the 21st century in *M70* when it observed that:[28]

> Australia's power to remove non-citizens from its territory is confined by the practical necessity to find a state that will receive the person who is to be removed.

17. However the Court went on to observe,[29] consequent upon the matters referred to in [16] above, that there are qualifications to the proposition that the country to which Australia would usually look is the person's country of nationality and that chief

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22 (2010) 243 CLR 319.

23 See Hayne J at 638 [226] (McHugh J agreeing at 581 [33]), Callinan J at 660 [293], Gummow J at 608 [121].

24 *M61* at 339 [27]; *M70* at 189 [90].

25 For example, *Robtelmes v Brenan* (1906) 4 CLR 395. In *Robtelmes* at 406, Griffith CJ said that all a sovereign state can do "is exclude the alien. What becomes of him afterwards is for him, not them". That is not the case any more, and especially it is not the case with this Plaintiff.

26 See for example, Savitri Taylor, "From Border Control to Migration Management: The Case for a Paradigm Change in the Western Response to Transborder Population Movement", (2005) 39(6) *Social Policy & Administration* 563.

27 Such as the non-refoulement obligation in Art. 3 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).

28 At 190 [92].

29 At 190 [94].

amongst them is Australia's obligation of non-refoulement under the Refugees Convention. To that can and should be added the absolute prohibition on refoulement to a place where there are substantial grounds for believing that a person would be in danger of being subjected to torture, or cruel, inhuman or degrading treatment.[30]

18. Accordingly, despite what appears to be clear language, the duty imposed by s 198(2) has been, and is properly, construed as being subject to limits and conditions. Relevantly this Court has held them to be:

(1) the removal obligation in 198(2) accommodates an opportunity located elsewhere in the statute for the executive to consider and assess claims for protection of persons not entitled under the Act to make application for a protection visa: *M61* at [23].

(2) the general provisions of s 198(2) give way to the specific provisions of s 198A in relation to persons whose claims for protection have not been assessed and s 198A is the only authority in the Act to remove such people from Australia: *M70* at [95].

(3) the duty is limited by Australia's obligations under Art. 33 of the Refugees Convention: *M70* at [94].

19. Consistently with the third limit referred to above, the Commission submits other obligations under the Refugees Convention may limit, qualify or affect the duty in s 198(2). Principally, these include Art. 32 and Art. 33(2). Neither are engaged in this case for the reasons advanced by the Plaintiff in his submissions.

20. Once the conditions and limitations on s 198(2) referred to above are acknowledged, it is apparent that extending the duty in s 198(2) to a person to whom Australia owes protection obligations involves affording to the executive an unregulated choice about what might and might not be a "safe" third country to which to send a refugee. That in turn leaves the refugee in a position where: a) the length of his or her detention is wholly within the control of the executive,[31] b) his or her fate in terms of where he or she will be sent is within the choice of the executive, and c) the law which is said to "determine the limits and govern the exercise" of that executive choice is unspecified and uncertain, such that those limits are not capable

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30 CAT, Art. 3; ICCPR, Art. 7. See generally, Lauterpacht and Bethlehem, "The scope and content of the principle of non-refoulement: Opinion" in E Feller, V Turk and F Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press (2003). And now see also s 36(2)(aa) of the Act, the complementary protection visa.

31 *M61* at 349 [65].

of being enforced by a Chapter III Court.[32] The Commission submits that is not a construction the Court should prefer and the better construction is that s 198(2) does not apply to refugees.

D. Construction of s 196(1)

21. These submissions are relevant only if the Court finds s 198(2) extends to refugees. The word "detention" in s 196(1) is to be understood as meaning lawful detention, and therefore the critical question is what, if any, are the limits on lawful detention under the Act.[33] The language in s 196 assumes the possibility of compliance with the apparently unqualified duty in s 198(2)[34] and the period of detention is expressed to be finite by reference to an event (removal) which will bring it to an end, rather than by an express period of time. That event is not within the control of the detainee, nor wholly within the control of the executive.[35] However, the Act does not expressly say that detention can continue indefinitely where there is no likelihood of removal. Nor does it say that detention must cease (or be suspended to use Gleeson CJ's description) when there is no reasonable likelihood of removal. There is a constructional choice.[36] In truth, the majority in *Al-Kateb* exercised a constructional choice as much as the minority did. The choice is about the application of *Chu Kheng Lim v Minister for Immigration (Lim)*[37] and when the purpose - which all members of the Court accept must exist for executive detention under statute to be lawful - is or is not present.

22. The constructional choice made by the majority in *Al-Kateb* is to see the purpose of detention for removal as subsisting unless and until it is possible to say removal can never occur.[38] The choice made by the minority is to see the purpose of detention for removal as being suspended unless it is possible to say that there is a real likelihood of removal,[39] or that removal is "unlikely as a matter of reasonable practicability". [40]

23. The Commission submits that if *Al-Kateb* cannot be distinguished (which may be possible because of the Plaintiff's position as a refugee), then the reasons of the minority should be preferred and this Court should overrule *Al-Kateb*.

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32 See *Vasiljkovic v The Commonwealth* (2006) 227 CLR 614 at [116].
33 *Al-Kateb* at 574 [10] (Gleeson CJ).
34 But which, for reasons set out above, is qualified.
35 *Al-Kateb* at 574[12] (Gleeson CJ), also at 636 [217]-[218] (Hayne J).
36 See *Al-Kateb* at 576 [18] (Gleeson CJ).
37 (1992) 176 CLR 1.
38 *Al-Kateb* at 639 [227]-[230] (Hayne J), read with 646 [251] (Heydon J agreeing); 581 [34] (McHugh J); 658 [290] (Callinan J).
39 *Al-Kateb* at 578 [22] (Gleeson CJ); 615 [145] (Kirby J); 608 [122]-[124] (Gummow J).
40 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 52 [134] (Gummow J).

24. Gleeson CJ held that s 196(1) is predicated on the assumption that detention will come to an end, either by the grant of a visa or by removal from Australia.[41] In so far as it provides for detention for the purpose of removal, s 196 is therefore predicated on the assumption that removal under s 198 is possible.[42] Consistently with that assumption, the Act does not expressly provide for a case where removal may not be possible and does not expressly provide that a refugee may be kept in immigration detention indefinitely or permanently.[43] In the absence of express provision to that effect, and in circumstances where that purpose cannot be fulfilled, there was a constructional choice between treating the obligation to detain as indefinite or as suspended. His Honour resolved that constructional choice by reference to the "principle of legality"[44] and the fact that detention was mandatory, not discretionary, to hold that the obligation to detain suspended in such a case.[45]

25. Gummow J, with whom Kirby J agreed,[46] observed that ss 196 and 198 contain several "temporal elements" of significance to their construction, including the requirement in s 196(1) to keep an unlawful non-citizen in detention "*until* he or she is ... *removed* from Australia *under* section 198" and the phrase "*as soon as* reasonably practicable" in s 198.[47] His Honour considered that these temporal elements are "linked to the purposive nature of the detention requirement in the legislation".[48] In circumstances where a detainee cannot presently be removed and as a matter of reasonable practicability is unlikely to be removed, s 198 "no longer retains a present purpose of facilitating removal from Australia which is reasonably in prospect and to that extent its operation is spent".[49] Although his Honour did not refer to the principle of legality, he commenced his analysis of the construction of the relevant provision with the statement that "it is important to eschew, if a construction doing so is reasonably open, a reading of the legislation which recognises a power to keep a detainee in custody for an unlimited time."[50] Both Gleeson CJ and Gummow J accepted that Mr Al-Kateb remained liable to renewed

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41 *Al-Kateb* at 571-572 [1].
42 *Al-Kateb* at 578 [22]. See also at 639 [227].
43 *Al-Kateb* at 575-576 [13]-[14], [18].
44 *Al-Kateb* at 577 [19].
45 *Al-Kateb* at 578 [22].
46 *Al-Kateb* at 615 [145].
47 *Al-Kateb* at 608 [121].
48 *Al-Kateb* at 607 [117].
49 *Al-Kateb* at 608 [122].
50 *Al-Kateb* at 607 [117].

detention to facilitate his removal if the prospects of removal became a matter of real likelihood.[51]

26. As Gummow J observed, the temporal elements of ss 196 and 198 are "linked to the purposive nature of the detention requirement in the legislation":[52] the words "as soon as reasonably practicable" in s 198(2) assume that the event concerned, removal, can happen; and the word "until" in s 196(1) assumes that detention will come to an end. As Hayne J observed, "if there is any uncertainty, it is about *when* the event will happen, not *whether* it will."[53]

27. In circumstances where there is no real likelihood of removal of a detainee, it may be accepted that it cannot be said that it will *never* happen. Equally however no positive proposition can be made: that is, it cannot be said that removal *will* happen in the detainee's lifetime. The constructional question that then arises is whether, in those circumstances, the statute treats the purpose of removal as being presently capable of fulfillment so as to sustain the power and duty of detention under s 196(1).

28. That constructional question should be resolved by application of the principle of legality and the presumption of consistency with Australia's international obligations (where liberty of the individual is at stake over a period of years, not months).

29. It should also be resolved by reference to the fact that the continued viability of a purpose of removal is, in the first instance, a matter of executive judgment or opinion. Is that judgment or opinion to be accepted so long as the executive honestly holds the opinion that there remains a possibility of removal, no matter how small, at some indeterminate time in the future? In this regard, Gummow J in *Al-Kateb* observed that "the continued viability of the purposes of deportation or expulsion cannot be treated by the legislature as a matter purely for the opinion of the executive government."[54] His Honour repeated that observation in *Re Woolley*.[55] Indeed, one of the fundamental purposes of the separation of powers mandated by Chapter III of the Constitution must be the protection it affords to individuals detained by the executive, in the form of judicial oversight of that detention.[56]

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51 Gleeson CJ did so implicitly in his treatment of the obligation to detain under s 196(1) as suspended: see at 578 [22]. Gummow J did so explicitly: see at 608-609 [124].

52 *Al-Kateb* at 607 [117].

53 *Al-Kateb* (2004) 219 CLR 562 at 639 [227] (Hayne J).

54 *Al-Kateb* (2004) 219 CLR 562 at 613 [140]. See also *M 61* (2010) 243 CLR 319 at 348 [64].

55 (2004 225 CLR 1 at 55 [150]

56 *Al-Kateb* (2004) 219 CLR 562 at 612 [137], 613 [140] (Gummow J); *South Australia v Totani* (2010) 242 CLR 1 at 155-156 [423] (Crennan and Bell JJ).

30. This approach is supported by the additional considerations because the Plaintiff is a refugee. For the reasons outlined in *M61*[57] and *M70*[58] and referred to at [18] above,. Australia's obligations under the Refugees Convention inform the construction of s 196(1) of the Act as well.

31. Australia's protection obligations include those concerned with its treatment of refugees in its territory. Art. 31(2) of the Refugees Convention provides that the Contracting States "*shall not apply to the movements of [refugees unlawfully in the country of refuge] restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularised or they obtain admission into another country.*" In the Commission's submission, to detain a refugee in the position of the Plaintiff for an indeterminate or indefinite period is to apply an unnecessary restriction.[59] The restriction is not necessary because security concerns about the refugee's release into the community can be addressed by a range of measures (for example, reporting requirements) and removal is not likely in the immediate future. For this reason, the Commission submits that it would be inconsistent with Australia's obligations under the Refugees Convention, including Art. 31(2), to construe s 196 as permitting the indefinite detention of a refugee.

32. The validity of executive detention has been said to depend on whether the detention is for non-punitive purposes.[60] While the distinction between "punitive" and "non-punitive" detention has been powerfully criticised,[61] it is clear that these purposes of detention are determined objectively, not subjectively. Laws impinging on constitutional guarantees and limitations must be assessed as a matter of substance having regard to the practical operation of the law.[62]

33. Drawing on s 92 of the Constitution, the "purpose" of a law is identified objectively, and is similar to identifying the mischief that a law is intended to address.[63] The practical operation (that is, *effect*) of a law is relevant in determining its purposes.[64] A law that has a disproportionate effect will not be reasonably necessary to achieve

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57 (2010) 243 CLR 319 at 348 [64].
58 (2011) 244 CLR 144 at 189 [90].
59 In this regard, see the observation of the New Zealand Supreme Court in *Zaoui v Attorney-General* [2005] 1 NZLR 577 at 661 [101].
60 For example, *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at [62], [77], [262]; see also [26], [227].
61 *Al-Kateb* at [137] (Gummow J); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [80]-[82] (Gummow J).
62 For example, *Sweedman v Transport Accident Commission* (2006) 226 CLR 362 at 408 [59], citing *Ha v New South Wales* (1997) 189 CLR 465 at 498.
63 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 394 [178]; see also 462 [423].
64 For example, *Cole v Whitfield* (1988) 165 CLR 365 at 399-400, 407-8; see also *Street v Queensland Bar Association* (1989) 168 CLR 461 (discussing s 117 of the Constitution).

its object;[65] alternatively, it may be analysed as not in truth having a non-protectionist purpose.[66] A similar analysis is to ask whether a law is "manifestly disproportionate" and unnecessarily harmful to the interest protected by the Constitution[67] (here, the protection of liberty by Ch III of the Constitution).

34. Involuntary detention is presumptively punitive, because it withdraws the basic right to liberty. As this is an area involving a constitutional guarantee (Ch III being a guarantee of liberty), the concept of proportionality or reasonable necessity assists in assessing whether the prima facie infringement of a constitutional principle is permissible in pursuit of some other legitimate governmental object.[68] If the means adopted in the governmental measure are manifestly disproportionate to the achievement of the claimed object, then the measure cannot be characterised as truly made in pursuance of that object. This assessment involves an examination of the nature and effects of the means adopted, along with consideration of whether any measure less restrictive of the protected interest could have been employed.[69]

35. Here, the longer the detention, the more repetitive the efforts to find a country, the more often they are met without success, the more tenuous the connection with a real likelihood of removal, the more indefinite the detention becomes and the less proportionality exists with the purpose of detention and the more likely it is that the detention cannot objectively be characterised as for the purpose of removal. A construction of s 196 which authorised and required detention in such circumstances would be so manifestly disproportionate to the achievement of the purpose of facilitating removal that it could not be characterised as a law for that purpose and should be read down.

36. For these reasons, the Commission submits that s 196(1) should be construed such that the existence of a continuing purpose of removal cannot be sustained in circumstances where there is no real likelihood of removal and it cannot be said that removal will *ever* be possible and that the continued detention of a person in such circumstances is neither authorized nor required.

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65 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 479 [110], 480 [112] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ); see also *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 135 [441] (Kiefel J, dissenting in the result).

66 *Betfair* (2008) 234 CLR 418 at 488 [145] (Heydon J). The plurality did not need to consider that argument: at 480 [113].

67 *Rowe* at 141-142 [464] (Kiefel J, dissenting in the result).

68 Note *Leask v Commonwealth* (1996) 187 CLR 579 at 593-5, 606. This is consistent with the application of the "reasonable necessity" test in s 92: *Betfair* (2008) 234 CLR 418 at 477 [102]-[103], and consistent with the application of the "reasonably appropriated and adapted test" with the implied freedom of political communication: *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520 at 561-2.

69 *Rowe* (2010) 243 CLR 1 at 134-136 [436]-[444] (alternative practicable means), 136-142 [445]-[466] (other tests of proportionality) (Kiefel J, dissenting in the result).

37. A review of international case law post-*Al-Kateb* confirms that the thread running through decisions of common law courts concerning executive detention and/or indefinite detention is that the right of liberty is paramount, and must be carefully protected by the courts, rather than left entirely in the hands of the executive. This Court should be "no less defensive of personal liberty" than the ultimate appellate and constitutional courts of other jurisdictions.[70]

38. In the United States, *Zadvydas v Davis*[71] remains the leading authority concerning indefinite detention of aliens.[72] Recent decisions in the United Kingdom,[73] New Zealand[74] and Canada[75] confirm the fundamental nature of the liberty right, and the high level of protection afforded to that right by the courts. That is so regardless of the different constitutional and statutory frameworks extant in those countries.

39. In New Zealand, the leading case is that of *Zaoui v Attorney-General* (*Zaoui*). Mr Zaoui, an Algerian national found to be a refugee, was detained under a warrant issued under s 114O of the *Immigration Act* 1987 (NZ). Section 114O is found within Part 4A of that Act, which provides for special procedures in immigration cases where there are national security concerns.[76] Section 114O imposed a duty on a judge to issue a warrant of commitment once certain of the person's identity. Mr Zaoui challenged his detention on various grounds. Of relevance here is the Supreme Court's determination of the question whether the High Court had jurisdiction or power to order Mr Zaoui's release on bail from detention, despite section 114O imposing a duty. The Supreme Court unanimously held that the High Court retained its inherent jurisdiction to grant bail.[77] In so doing, the Court observed:[78]

> "This is a case where national security issues arise. It is also a case about the liberty of someone who has refugee status in New Zealand and who is entitled to the benefit of the Refugee Convention requirement that only such restrictions upon his liberty as are necessary should be imposed upon him. The applications fall to be considered against the background of

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70 *Al-Kateb* at 616 [149].
71 533 US 678 (2001).
72 *Zadvydas* was applied by the United States Supreme Court in *Clark v Martinez* 543 US 371 (2005). See also *Tijani v Willis* 430 F.3d 1241 (9th Cir 2005).
73 See, e.g., *Shepherd Kambadzi (previously SK (Zimbabwe)) v SSHD* [2011] UKSC 23 at 49-50; *Lumba v Home Secretary* [2011] UKSC 12 [2011] 2 WLR 671; *R (Mahfoud) v SSHD* [2010] EWHC 2057 (Admin) at [6].
74 See, eg, *Zaoui v Attorney-General* [2005] 1 NZLR 577; *Mohebbi v Department of Labour* [2007] NZHC 1197 at [25], [37], [66], [68], [71].
75 See, eg, *Charkaoui v Canada (Citizenship and Immigration)* [2007] 1 SCR 350; *Canada (Citizenship and Immigration) v Li* 2009 FCA 85 (17 March 2009).
76 *Zaoui* at 637 [1].
77 *Zaoui* at 653 [67]-[69].
78 *Zaoui* at 661 [101].

concern for liberty recognised by the Bill of Rights Act and the common law."

40. The Commission acknowledges that a consequence of the construction it advances is that the Plaintiff would be released from detention. However, as discussed by Gleeson CJ in *Al-Kateb*,[79] such release may be subject to supervision. Indeed, there is a range of options for ensuring supervision of persons in the position of the Plaintiff, if released. Apart from legislative options under the *Migration Act* (such as the creation of a new class of visa, subject to certain conditions), other options would include a grant of bail (as occurred in *Zaoui*).

E. Content of natural justice obligation under s 37 of the ASIO Act

41. But for ASIO's decision under s 37(1) of the ASIO Act for the purposes of the criteria prescribed by the *Migration Regulations*,[80] the Plaintiff – as a refugee – would not be facing expulsion, and would not be detained. The Commission submits that the content of the procedural fairness obligation upon the exercise of s 37(1) should be determined consistently with the nature of the interests at stake: here, the liberty of the Plaintiff and his expulsion from a country that accepts it owes him protection obligations. Section 17A of the ASIO Act also informs the content of the obligation (see below). Consistently with the principle of legality and Australia's international obligations,[81] where the interest at stake is liberty (and possibly indefinite deprivation of liberty), a person must be given sufficient information about the allegations against him to enable him to give an effective response and if, in the opinion of the executive, that cannot be done consistently with the requirements of national security, national security must give way to the interests of procedural fairness.

Procedural fairness at common law

42. Identification of the content of the duty to afford procedural fairness in the exercise of a statutory function or power is a matter of statutory construction.[82] The duty is a flexible one and its content will vary according to the circumstances of the particular case.[83] In *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs*,[84] Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ endorsed the following

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79 *Al-Kateb* at 578-580 [23]-[28].

80 Namely, an applicant "is not assessed by [ASIO] to be directly or indirectly a risk to security, within the meaning of section 4 of the [ASIO Act]": *Migration Regulations*, Sch 2, clause 866.225(a) and Sch 4, Public Interest Criterion 4002. .

81 See Art. 9(1) and Art. 13 of the ICCPR.

82 *Kioa v West* (1985) 159 CLR 550 at 609; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 258 [11]-[15].

83 *Kioa v West* at 612; *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 550 152 at 160-161 [26]; *Saeed* at 258 [18].

84 (2006) 228 CLR 550 152 at 162 [32].

statement of the principle by the Full Court of the Federal Court in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd*:[85]

> "It is a fundamental principle that where the rules of procedural fairness apply to a decision-making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard. *That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues* and to be informed of the nature and content of adverse material." (emphasis added by the Court in *SZBEL*)

Importance of the nature of the interests at stake

43. The nature of the interests at stake is critical to the determination of the content of the duty to afford procedural fairness in any case. In order to identify the interests that may be affected by the exercise of the function conferred by s 37(1) of the ASIO Act, it is necessary to consider "the provisions with which it interacts".[86]

44. The interests at stake under s 37(1) will depend upon what the "prescribed administrative action" is for the purposes of the definition of "security assessment" in s 36(1). That definition picks up a wide range of Commonwealth administrative action across different statutory schemes. It includes the furnishing of security assessments in relation to the exercise of any power or the performance of any function in relation to a person under the *Migration Act* or regulations made under it.[87] Relevantly, the "prescribed administrative action" here was the grant or refusal of a visa under s 65 of the *Migration Act*. The making of an adverse security assessment in relation to an applicant for a visa precludes the grant of a visa under s 65.

45. The scheme of mandatory detention under the *Migration Act*[88] means that the refusal of a visa will result in detention (if the person has a temporary or bridging visa and is in the community and is therefore a lawful non citizen) or continued detention (if the person is an unlawful non citizen). The interest at stake upon the making of a security assessment under s 37(1) of the ASIO Act in relation to s 65 of the *Migration Act* as prescribed administrative action generally, and not specifically for protection visa applicants, will therefore include liberty.

46. This circumstance attracts the two related principles of statutory construction referred to at the outset of these submissions. Whether seen as interpretation consistently with Australia's international obligations[89] or with fundamental common

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85 (1994) 49 FCR 576 at 590-591.
86 *Saeed* at 258 [34].
87 See par (b) of the definition of "prescribed administrative action" in s 35(1).
88 Discretionary detention in "offshore entry places" is not relevant for the purpose of this analysis.
89 Especially Arts 9(1) and 13 of the ICCPR.

law rights, there is no material difference when the right in contemplation is liberty. For that reason, the analysis of foreign domestic and international courts of what is required by way of procedural fairness by the ICCPR and other international human rights instruments when personal liberty is at stake is capable of informing the proper construction of s 37(1) of the ASIO Act. Indeed, courts in other common law jurisdictions have observed that the procedural protections required by the human rights instruments in force in those jurisdictions are consonant with the common law rules of procedural fairness.[90]

International authority

47. As with the common law duty, the content of procedural fairness as it is understood in international human rights jurisprudence depends upon all the circumstances, including the nature of the proceedings and the nature of the interests at stake.[91] Where personal liberty is at stake, procedural protections assume particular significance.[92]

48. *A v United Kingdom*[93] concerned the question of whether control orders imposed on persons suspected of being involved in terrorism-related activity complied with the requirements of Art. 5(4) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, the equivalent of Art. 9(4) of the ICCPR. The control orders were made by the Home Secretary and were subject to review by the Special Immigration Appeals Court. The rules governing the review hearing permitted the court to act on "closed material" not disclosed to the person subject to the control order (**the detainee**) or his or her legal representatives for reasons of national security. The closed material could only be disclosed to a special advocate who could not thereafter communicate with the detainee. The Grand Chamber of the European Court of Human Rights (**ECtHR**) held:

(1) "[t]he requirement of procedural fairness under Article 5§4 does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances": at [203];

(2) in view of the dramatic impact of the lengthy and potentially indefinite deprivation of liberty brought about by the making of a control order,

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90 *Suresh v Canada (Minister for Citizenship and Immigration)* [202] 1 SCR 3 at [113]; *Secretary of State for the Home Department v AF* [2010] 2 AC 269 at [61].

91 *AF* at [57]; *R v Parole Board; ex parte West* [2005] 1 WLR 350 at [30]; *Charkaoui v Canada (Minister for Citizenship and Immigration)* [2007] 1 SCR 350 at [20], [25].

92 See *Suresh* at [118]: "[t]he greater the effect on the life of the individual by the decision, the greater the need for procedural protections to meet the common law duty of fairness and the requirements of fundamental justice under s 7 of the *Charter*"; and *Charkaoui v Canada (Minister for Citizenship and Immigration)* [2007] 1 SCR 350 at [60].

procedural fairness required that the detainee be provided "with sufficient information about the allegations against him to enable him to give effective instructions" in relation to them to his lawyers or to the special advocate: at [217]-[220].

49. These principles were subsequently applied by the House of Lords in *Secretary of State for the Home Department v AF*[94] to revised procedures[95] for making control orders and their subsequent review by the High Court. Lord Phillips, who gave the leading judgment, said that the essence of the judgment of the ECtHR in *A v United Kingdom* was that:[96]

> "the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be."

50. Notably, Lord Scott observed that the common law, without the aid of Strasbourg jurisprudence, would have led to the same conclusion.[97] Disclosure of the substance of essential allegations against the detainee did not necessarily require disclosure of the underlying or the sources of the allegations.[98] However, where it was "impossible to separate out allegations from evidence and, in turn, evidence from its sources, ... national security may need to give way to the interests of a fair hearing".[99] *AF* has been applied in other contexts in the United Kingdom.[100]

51. Similar principles have been developed in Canada. In *Charkaoui v Canada (Minister for Citizenship and Immigration)*,[101] the Canadian Supreme Court was concerned with legislation which empowered the executive to issue a certificate declaring that a foreign national was inadmissible to Canada on security grounds. The issue of such a certificate led to the mandatory detention of the person named in it. The certificate and the detention were subject to review by a federal court in a process under which

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93 (2009) 49 EHRR 29; [2009] ECHR 301.

94 [2010] 2 AC 269.

95 Under the *Prevention of Terrorism Act 2005* (UK), which replaced the control order regime in the *Anti-Terrorism, Crime and Security Act 2001* (UK).

96 *AF* at [59].

97 *AF* at [96]. See also Lord Phillips, at [61], referring to *John v Rees* [1970] Ch 345 at 402; and Lord Hope, at [86], referring to *Charkaoui* at [53] and *Hamdi v Rumsfeld* (2004) 542 US 507 at 533.

98 *AF* at [86], [120].

99 *AF* at [121].

100 See *Al Rawi v Security Service* [2011] 3 WLR 38; [2011] UKSC 34; and *Home Office v Tariq* [2011] 3 WLR 322; [2011] UKSC 35.

101 [2007] 1 SCR 350.

the person could be deprived of some or all of the information on the basis of which the certificate was issued. Two of the three appellants were persons who had been recognized as Convention refugees. Both had been detained for some years. One remained in detention.

52. The Supreme Court held that the legislation infringed the guarantee in s 7 of the *Canadian Charter of Rights and Freedoms* of the right to life, liberty and security and the right not to be deprived thereof except in accordance with the principles of fundamental justice. The Court said that principles of fundamental justice included "a guarantee of procedural fairness" and that the procedures required to meet that guarantee depended upon the circumstances, including "the nature of the proceedings and the interests at stake".[102] The Court said:[103]

> "The overarching principle of fundamental justice that applies here is this: before the state can detain people for significant periods of time, it must accord them a fair judicial process. 'It is an ancient and venerable principle that no person shall lose his or her liberty without due process according to the law, which must involve a meaningful judicial process'. This principle emerged in the era of feudal monarchy, in the form of the right to be brought before a judge on a motion of *habeas corpus*. It remains as fundamental to our modern conception of liberty as it was in the days of King John.
>
> This basic principle has a number of facets. It comprises the right to a *hearing*. It requires that the hearing be *before an independent and impartial magistrate*. It demands a *decision by the magistrate on the facts and the law*. And it entails the *right to know the case put against one*, and the *right to answer that case*. Precisely how these requirements are met will vary with the context. But for s 7 to be satisfied, each of them must be met in substance." (Emphasis in original, citations omitted.)

53. The Court accepted that "[t]he right to know the case to be met is not absolute"[104] and that national security considerations can limit the extent of disclosure of information to an affected individual.[105] However, it concluded that the procedures in the legislation did not conform to the requirements of s 7 of the Charter[106] and that they could not be justified under s 1 on security grounds.[107]

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102 *Charkaoui* at [19]-[20], [25].
103 *Charkaoui* at [28]-[29].
104 *Charkaoui* at [57].
105 *Charkaoui* at [58].
106 *Charkaoui* at [64]-[65].
107 *Charkaoui* at [66]-[87].

Section 17A of the ASIO Act

54. The content of the duty to afford procedural fairness in this case must also be determined having regard to s 17A of the ASIO Act, which provides:

> "This Act shall not limit the right of persons to engage in lawful advocacy, protest or dissent and the exercise of that right shall not, by itself, be regarded as prejudicial to security, and the functions of the Organisation shall be construed accordingly".

55. Section 17A recognizes that the exercise of powers and functions conferred by the ASIO Act, including the function in s 37(1), must conform to the implied constitutional freedom of political communication. If all that a person proposes to do in Australia is something captured by s 17A, it would be unlawful to give an adverse security assessment on that basis. Section 17A therefore operates as a limit on the power to give an adverse security assessment, but it should also inform the content of the natural justice obligation. That is, a person should be given an opportunity to be heard as to what they propose to do in Australia.

56. A similar issue arose in *Holder, Attorney-General v Humanitarian Law Project*,[108] in relation to a statutory provision making it an offence to "knowingly provide material support or resources to a foreign terrorist organization", which could include, among other things, "training" and "expert advice or assistance", and which gave the executive power to declare an organization to be a "foreign terrorist organization". The Plaintiffs brought a pre-enforcement challenge to the statute on the grounds that it was impermissibly vague and infringed the First Amendment. A majority of the United States Supreme Court held that the statute, as applied to the particular speech in which the Plaintiffs proposed to engage, did not infringe the First Amendment. However, the majority emphasised that the statute was carefully and narrowly drawn so as not to capture independent advocacy of the legitimacy of declared organisations[109] and the majority expressly did not decide whether any future application of the statute to political advocacy may infringe the First Amendment.[110]

57. In this case, the First Defendant's affidavit[111] makes it clear that a reason for the adverse security assessment (indeed, on the statute, probably the only lawful reason) was what the Plaintiff might do henceforth in Australia if he were to be given permission to remain. The duty to accord procedural fairness to the Plaintiff under

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108 No 08-1498, 21 June 2010.
109 Slip opinion, 31.
110 Slip opinion, 34.
111 Attachment 6 to the Special Case, [4(c)].

s 37(1), construed in light of s 17A, requires that he be given information about what it is apprehended he might do in the future, and an opportunity to respond to those apprehensions, including so he (and a Court on review) can assess whether ASIO exceeded the power under s 37(1), construed in light of s 17A.

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M47 of 2012

BETWEEN

PLAINTIFF M47/2012
Plaintiff

and

DIRECTOR GENERAL OF SECURITY

First Defendant

THE OFFICER IN CHARGE, MELBOURNE IMMIGRATION TRANSIT ACCOMMODATION

Second Defendant

SECRETARY, DEPARTMENT OF IMMIGRATION AND CITIZENSHIP

Third Defendant

MINISTER FOR IMMIGRATION AND CITIZENSHIP

Fourth Defendant

COMMONWEALTH OF AUSTRALIA

Fifth Defendant

ANNEXURE TO THE SUBMISSIONS ON BEHALF OF THE AUSTRALIAN HUMAN RIGHTS COMMISSION

Date of document: 8 June 2012
Filed on behalf of:

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A. APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The provisions set out below are still in force, in this form, at the date of making these submissions.

***Australian Human Rights Commission Act 1986* (Cth)**

Part II, Div 2

11 Functions of Commission

(1) The functions of the Commission are:

...

(o) where the Commission considers it appropriate to do so, with the leave of the court hearing the proceedings and subject to any conditions imposed by the court, to intervene in proceedings that involve human rights issues; and

(p) to do anything incidental or conducive to the performance of any of the preceding functions.

***Australian Security Intelligence Organisation Act 1979* (Cth)**

Part III, Div 1

17A Act not concerned with lawful dissent etc.

This Act shall not limit the right of persons to engage in lawful advocacy, protest or dissent and the exercise of that right shall not, by itself, be regarded as prejudicial to security, and the functions of the Organisation shall be construed accordingly.

Part IV, Div 1

Section 35 – Interpretation

(1) In this Part, unless the contrary intention appears:

"adverse security assessment" means a security assessment in respect of a person that contains:

(a) any opinion or advice, or any qualification of any opinion or advice, or any information, that is or could be prejudicial to the interests of the person; and

(b) a recommendation that prescribed administrative action be taken or not be taken in respect of the person, being a recommendation the implementation of which would be prejudicial to the interests of the person.

...

"prescribed administrative action" means:

(a) action that relates to or affects:

(i) access by a person to any information or place access to which is controlled or limited on security grounds; or

(ii) a person's ability to perform an activity in relation to, or involving, a thing (other than information or a place), if that ability is controlled or limited on security grounds;

including action affecting the occupancy of any office or position under the Commonwealth or an authority of the Commonwealth or under a State or an authority of a State, or in the service of a Commonwealth contractor, the occupant of which has or may have any such access or ability;

(b) the exercise of any power, or the performance of any function, in relation to a person under the *Migration Act 1958* or the regulations under that Act; or

(c) the exercise of any power, or the performance of any function, in relation to a person under the *Australian Citizenship Act 2007*, the *Australian Passports Act 2005* or the regulations under either of those Acts; or

(d) the exercise of a power under section 58A, or subection 581(3) of the *Telecommunications Act 1997*, of the.

Note: An obligation, prohibition or restriction imposed by a control order is not prescribed administrative action (see subsection (2)).

"qualified security assessment" means a security assessment in respect of a person that:

(a) contains any opinion or advice, or any qualification of any opinion or advice, or any information, that is or could be prejudicial to the interests of the person; and

(b) does not contain a recommendation of the kind referred to in paragraph (b) of the definition of adverse security assessment;

whether or not the matters contained in the assessment would, by themselves, justify prescribed administrative action being taken or not being taken in respect of the person to the prejudice of the interests of the person.

"security assessment or ***assessment"*** means a statement in writing furnished by the Organisation to a Commonwealth agency expressing any recommendation, opinion or advice on, or otherwise referring to, the question whether it would be consistent with the requirements of security for prescribed administrative action to be taken in respect of a person or the question whether the requirements of security make it necessary or desirable for prescribed administrative action to be taken in respect of a person, and includes any qualification or comment expressed in connection with any such recommendation, opinion or advice, being a qualification or comment that relates or that could relate to that question.

...

Section 36 Part not to apply to certain assessments

This Part (other than subsections 37(1), (3) and (4)) does not apply to or in

relation to:

(a) a security assessment in relation to the employment, by engagement outside Australia for duties outside Australia, of a person who is not an Australian citizen or is not normally resident in Australia; or

(b) a security assessment in relation to action of a kind referred to in paragraph (b) of the definition of ***prescribed administrative action*** in section 35 (other than an assessment made for the purposes of subsection 202(1) of the *Migration Act 1958*) in respect of a person who is not:

(i) an Australian citizen;

(ii) a person who is, within the meaning of the *Migration Act 1958*, the holder of a valid permanent visa; or

(iii) a person who holds a special category visa or is taken by subsection 33(2) of the *Migration Act 1958* to have been granted a special purpose visa; or

(c) a security assessment in relation to the engagement, or proposed engagement, of a person by or in the Organisation, or an intelligence or security agency, as a staff member of the Organisation or agency.

Part IV, Div 1

Section 37 Security assessments

(1) The functions of the Organisation referred to in paragraph 17(1)(c) include the furnishing to Commonwealth agencies of security assessments relevant to their functions and responsibilities.

(2) An adverse or qualified security assessment shall be accompanied by a statement of the grounds for the assessment, and that statement:

(a) shall contain all information that has been relied on by the Organisation in making the assessment, other than information the inclusion of which would, in the opinion of the Director-General, be contrary to the requirements of security; and

(b) shall, for the purposes of this Part, be deemed to be part of the assessment.

(3) The regulations may prescribe matters that are to be taken into account, the manner in which those matters are to be taken into account, and matters that are not to be taken into account, in the making of assessments, or of assessments of a particular class, and any such regulations are binding on the Organisation and on the Tribunal.

(4) Subject to any regulations made in accordance with subsection (3), the Director-General shall, in consultation with the Minister, determine matters of a kind referred to in subsection (3), but nothing in this subsection affects the powers of the Tribunal.

(5) No proceedings, other than an application to the Tribunal under section 54, shall be brought in any court or tribunal in respect of the making of an assessment or anything done in respect of an assessment in accordance with this Act.

Part 2, Div 3, Subdiv A

36 Protection visas

(1) There is a class of visas to be known as protection visas.

Note: See also Subdivision AL.

(2) A criterion for a protection visa is that the applicant for the visa is:

(a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or

...

Part 2, Div 7, Subdiv A

65 Decision to grant or refuse to grant visa

(1) After considering a valid application for a visa, the Minister:

(a) if satisfied that:

(i) the health criteria for it (if any) have been satisfied; and

(ii) the other criteria for it prescribed by this Act or the regulations have been satisfied; and

(iii) the grant of the visa is not prevented by section 40 (circumstances when granted), 500A (refusal or cancellation of temporary safe haven visas), 501 (special power to refuse or cancel) or any other provision of this Act or of any other law of the Commonwealth; and

(iv) any amount of visa application charge payable in relation to the application has been paid;

is to grant the visa; or

(b) if not so satisfied, is to refuse to grant the visa.

Note: See also section 195A, under which the Minister has a non-compellable power to grant a visa to a person in detention under section 189 (whether or not the person has applied for the visa). Subdivision AA, this Subdivision, Subdivision AF and the regulations do not apply to the Minister's power under that section.

(2) To avoid doubt, an application put aside under section 94 is not taken for the purposes of subsection (1) to have been considered until it has been removed from the pool under subsection 95(3).

Part 2, Div 7, Subdiv A

189 Detention of unlawful non-citizens

(1) If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer

must detain the person.

(2) If an officer reasonably suspects that a person in Australia but outside the migration zone:

(a) is seeking to enter the migration zone (other than an excised offshore place); and

(b) would, if in the migration zone, be an unlawful non-citizen;

the officer must detain the person.

(3) If an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer may detain the person.

(4) If an officer reasonably suspects that a person in Australia but outside the migration zone:

(a) is seeking to enter an excised offshore place; and

(b) would, if in the migration zone, be an unlawful non-citizen;

the officer may detain the person.

(5) In subsections (3) and (4) and any other provisions of this Act that relate to those subsections, ***officer*** means an officer within the meaning of section 5, and includes a member of the Australian Defence Force.

Note: See Subdivision B for the Minister's power to determine that people who are required or permitted by this section to be detained may reside at places not covered by the definition of ***immigration detention*** in subsection 5(1).

...

195A Minister may grant detainee visa (whether or not on application)

Persons to whom section applies

(1) This section applies to a person who is in detention under section 189.

Minister may grant visa

(2) If the Minister thinks that it is in the public interest to do so, the Minister may grant a person to whom this section applies a visa of a particular class (whether or not the person has applied for the visa).

(3) In exercising the power under subsection (2), the Minister is not bound by Subdivision AA, AC or AF of Division 3 of this Part or by the regulations, but is bound by all other provisions of this Act.

Minister not under duty to consider whether to exercise power

(4) The Minister does not have a duty to consider whether to exercise the power under subsection (2), whether he or she is requested to do so by any person, or in any other circumstances.

Minister to exercise power personally

(5) The power under subsection (2) may only be exercised by the Minister personally.

...

196 Duration of detention

(1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:

(a) removed from Australia under section 198 or 199; or

(b) deported under section 200; or

(c) granted a visa.

(2) To avoid doubt, subsection (1) does not prevent the release from immigration detention of a citizen or a lawful non-citizen.

(3) To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa.

...

Part 2, Div 8

198 Removal from Australia of unlawful non-citizens

(1) An officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed.

(1A) In the case of an unlawful non-citizen who has been brought to Australia under section 198B for a temporary purpose, an officer must remove the person as soon as reasonably practicable after the person no longer needs to be in Australia for that purpose (whether or not the purpose has been achieved).

(2) An officer must remove as soon as reasonably practicable an unlawful non-citizen:

(a) who is covered by subparagraph 193(1)(a)(i), (ii) or (iii) or paragraph 193(1)(b), (c) or (d); and

(b) who has not subsequently been immigration cleared; and

(c) who either:

(i) has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; or

(ii) has made a valid application for a substantive visa, that can be granted when the applicant is in the migration zone, that has been finally determined.

(2A) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is covered by subparagraph 193(1)(a)(iv); and

(b) since the Minister's decision (the ***original decision***) referred to in subparagraph 193(1)(a)(iv), the non-citizen has not made a valid application for a substantive visa that can be granted when the non-citizen is in the migration zone; and

(c) in a case where the non-citizen has been invited, in accordance with section 501C, to make representations to the Minister about revocation of the original decision—either:

(i) the non-citizen has not made representations in accordance with the invitation and the period for making representations has ended; or

(ii) the non-citizen has made representations in accordance with the invitation and the Minister has decided not to revoke the original decision.

Note: The only visa that the non-citizen could apply for is a protection visa or a visa specified in regulations under section 501E.

(3) The fact that an unlawful non-citizen is eligible to apply for a substantive visa that can be granted when the applicant is in the migration zone but has not done so does not prevent the application of subsection (2) or (2A) to him or her.

...

198A Offshore entry person may be taken to a declared country

(1) An officer may take an offshore entry person from Australia to a country in respect of which a declaration is in force under subsection (3).

(2) The power under subsection (1) includes the power to do any of the following things within or outside Australia:

(a) place the person on a vehicle or vessel;

(b) restrain the person on a vehicle or vessel;

(c) remove the person from a vehicle or vessel;

(d) use such force as is necessary and reasonable.

(3) The Minister may:

(a) declare in writing that a specified country:

(i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and

(ii) provides protection for persons seeking asylum, pending determination of their refugee status; and

(iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and

(iv) meets relevant human rights standards in providing that protection; and

(b) in writing, revoke a declaration made under paragraph (a).

(4) An offshore entry person who is being dealt with under this section is taken not to be in ***immigration detention*** (as defined in subsection 5(1)).

(5) In this section, ***officer*** means an officer within the meaning of section 5, and includes a member of the Australian Defence Force.

Migration Regulations 2004 (Cth)

Sch 2, clause 866.225

The applicant:

(a) satisfies public interest criteria 4001, 4002 and 4003A; and
(b) if the applicant had turned 18 at the time of application — satisfies public interest criterion 4019.

Sch 4, Part 1

4002 The applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security, within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*.

B. RELEVANT INTERNATIONAL INSTRUMENTS

Convention Against Torture and Other Cruel, Inhuman or Degrading or Punishment **[1989] ATS 21**

Article 3

1. No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to **torture** .

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

International Covenant on Civil and Political Rights **[1980] ATS 23**

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Convention relating to the Status of Refugees [1954] ATS 5

Article 3 – Non-discrimination

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

Article 4 - Religion

The Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practice their religion and freedom as regards the religious education of their children.

Article 16 – Access to courts

1. A refugee shall have free access to the courts of law on the territory of all Contracting States.

2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from *cautio judicatum solvi*.

3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

Article 22 – Public education

1. The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.

2. The Contracting States shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.

Article 27 – Identity papers

The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document.

Article 31 – Refugees unlawfully in the country of refuge

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularised or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

Article 32 - Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33 - Prohibition of expulsion or return (*refoulement*)

1. No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.