HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 19 Feb 2021 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	C16/2020
File Title:	Commonwealth of Australia v. AJL20
Registry:	Canberra
Document filed:	Form 27A - Appellant's submissions
Filing party:	Applicant
Date filed:	19 Feb 2021

Important Information

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IN THE HIGH COURT OF AUSTRALIA

CANBERRA REGISTRY **NO C 16 OF 2020**

BETWEEN: **COMMONWEALTH OF AUSTRALIA**

Appellant

AND: **AJL20**

Respondent

NO C 17 OF 2020

BETWEEN: **COMMONWEALTH OF AUSTRALIA**

Appellant

AND: **AJL20**

Respondent

SUBMISSIONS OF THE APPELLANT

Filed on behalf of the Appellant by:

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Date of this document: 19 February 2021

File ref: 20207392

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PART I FORM OF SUBMISSIONS

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

PART II ISSUES PRESENTED BY THE APPEALS

2. These appeals are brought on the now undisputed premise that the Commonwealth, through its officers, had not complied with the duty in s 198 of the *Migration Act 1958* (Cth) (**the Act**) to remove the respondent, an unlawful non-citizen, from Australia as soon as reasonably practicable. The issues which arise concern the consequences of that non-compliance. Bromberg J held that non-compliance with s 198 had four primary consequences. ***First***, that the purpose of the respondent's detention was not removal. ***Second***, that ss 189(1) and 196(1) did not authorise the respondent's detention. ***Third***, that the respondent was entitled to an order in the nature of *habeas corpus* for his release into the community. ***Fourth***, that such a remedy was not inutile because it was not open to the Commonwealth's officers to re-detain the respondent under s 189 of the Act.

3. The Commonwealth submits that each of Bromberg J's conclusions was wrong. The consequence of non-compliance with s 198 should be an order mandating compliance with the duty imposed by that section. It is not the disapplication of other provisions of the Act. Unlawful executive inaction provides no warrant for disregarding other lawful requirements imposed by Parliament, including the requirement in s 196(1) that unlawful non-citizens must be kept in immigration detention until removed or granted a visa.

PART III SECTION 78B NOTICE

4. The Commonwealth has issued a notice under s 78B of the *Judiciary Act 1903* (Cth).

PART IV REPORTS OF DECISIONS BELOW

5. The judgment of Bromberg J has not been reported. Its medium neutral citation is *AJL20 v Commonwealth of Australia* [2020] FCA 1305.

PART V FACTS

A. Procedural history

6. On 4 November 2019, the respondent commenced proceedings in the Federal Court claiming damages for false imprisonment since 26 July 2019. As the respondent also

sought release from immigration detention, another proceeding was commenced in the Federal Circuit Court on 13 May 2020 making the same allegations but seeking, relevantly, an order in the nature of *habeas corpus* [**CAB 4-8**]. That proceeding was then transferred to the Federal Court on 27 May 2020 under s 39 of the *Federal Circuit Court of Australia Act 1999* (Cth) [**CAB 23-24**]. The proceedings were commenced in the Federal Circuit Court to avoid a potential limit on the Federal Court's power to issue such an order.[1]

7. On 11 September 2020, Bromberg J ordered that the respondent be released forthwith and published reasons for making that order [**CAB 84, 27-82**]. On 29 September 2020, his Honour made a declaration that the respondent's detention was unlawful between 26 July 2019 and 27 November 2019 (**the first period**) and since 28 November 2019 (**the second period**) [**CAB 86**].

8. On 2 October 2020, the Commonwealth filed notices of appeal in the Full Court of the Federal Court in each proceeding. Upon the application of the Attorney-General of the Commonwealth under s 40 of the *Judiciary Act 1903* (Cth), those appeals have been removed into this Court.

9. Bromberg J made the order for the respondent's release in the transferred Federal Circuit Court proceeding [**CAB 84**]. The notice of appeal against that order is in Tab 8 [**CAB 95-99**] and the order for removal is in Tab 13 [**CAB 121-122**]. Bromberg J declared the respondent's detention to be unlawful in the Federal Court proceeding for damages, with the intention of then dealing with the quantification of damages separately [**CAB 86-87**]. The notice of appeal against that declaration is in Tab 7 [**CAB 89-92**] and the order for removal is in Tab 12 [**CAB 118-119**].

B. Facts and Bromberg J's decision at first instance

10. The respondent is a citizen of Syria who arrived in Australia in May 2005 on a child visa. On or about 2 October 2014, the Minister cancelled that visa under s 501(2) of the Act. On 8 October 2014 the respondent was detained under s 189(1), and he remained in detention until Bromberg J ordered his release. Various departmental, merits review and judicial review processes were on foot during that time in detention.

[1] See *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 416 (appeal allowed: [2020] FCAFC 223).

11. The respondent alleged that his detention was unlawful from 26 July 2019, that being the day after the Minister declined to consider granting him a visa under s 195A of the Act. However, by its defence, the Commonwealth alleged that the respondent's detention was authorised by ss 189(1) and 196(1) at all relevant times, and more specifically that it had commenced engaging with Lebanon to determine if it would receive the respondent from 28 November 2019. It was this specific allegation that gave rise to a distinction between the "first period" and the "second period". However, that distinction is no longer material, Bromberg J having found that in both periods the Commonwealth, through its officers, had not complied with s 198 of the Act [**PJ[123]-[125], [170], CAB 68-69, 80**]. The Commonwealth has not challenged those findings on appeal.

12. Bromberg J reasoned from his findings that officers had not complied with s 198 that there had been "a departure from the requisite removal purpose for the [respondent's] detention" and that, "as a consequence, the [respondent's] detention by the Commonwealth was unlawful" [**PJ[128], [171], CAB 69, 80**]. That reasoning depended upon a particular reading of *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (***Plaintiff S4***).[2] Bromberg J read that decision as establishing that a failure to perform the relevant purpose of removal as soon as reasonably practicable necessitated the conclusion that detention was not for that purpose at all, and that detention was therefore unlawful [**PJ[31], [34], [43], [75], CAB 43, 44, 47, 56**]. In reaching that conclusion his Honour did not clearly separate questions of statutory construction and constitutional validity. However, his conclusion was plainly significantly influenced by his view that s 196(1)(a) could not be given effect in accordance with its terms without contravening Ch III [eg **PJ[43]-[44], CAB 47**].

13. In ordering the release of the respondent, Bromberg J declined to apply the reasoning of Kiefel and Keane JJ in *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (***Plaintiff M76***)[3] that s 189 would require the respondent's re-detention (so as to render such an order inutile). Bromberg J said that their Honours' judgment was "not readily reconciled with the preponderance of High Court authority" and "should not govern my approach to construction or the approach I take to relief" [**PJ[59], [64], CAB 51, 53**]. His Honour then went on to hold that it would not be lawful

2 (2014) 253 CLR 219 at [34] (French CJ, Hayne, Crennan, Kiefel and Keane JJ).
3 (2013) 251 CLR 322 at [182]-[183].

to re-detain the respondent [**PJ[175], CAB 81**]. Given that ruling, the Commonwealth has not sought to re-detain the respondent, notwithstanding his continuing status as an unlawful non-citizen.

PART VI ARGUMENT

A. The statutory scheme

14. Section 4(1) provides that the object of the Act is to "regulate, in the national interest, the coming into, and presence in, Australia of non-citizens". Section 4(2) states that, to "advance its object", the Act "provides for visas permitting non-citizens to enter or remain in Australia and the Parliament intends that this Act be the only source of the right of non-citizens to so enter or remain" (emphasis added). Section 4(4) further states that, to "advance its object", the Act "provides for the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted by this Act".

15. Consistently with those objects, for over 25 years the three principal features of the scheme of the Act have been:[4]

(a) *first*, subject to a limited exception,[5] non-citizens may enter the Australian community only if they have permission (in the form of a visa) to do so, and they may remain in Australia only for so long as they have permission (again in the form of a visa) to do so;

(b) *secondly*, if a non-citizen has entered Australia without permission, or no longer has permission to remain here, that non-citizen must be detained; and

(c) *thirdly*, the detention of a non-citizen is to end upon that person's removal or deportation from Australia or upon the person obtaining a visa.

16. These three features of the Act are critical to the proper construction of ss 189 and 196. Any construction of those sections that has the result that they do not authorise the detention of a non-citizen until the time when the grant of a visa or removal from Australia actually occurs would require the Court to accept that Parliament intended to allow non-citizens to enter the Australian community without a visa, contrary to the objects and

4 *Al-Kateb* (2004) 219 CLR 562 at [204]-[210], [223] (Hayne J, McHugh and Heydon JJ agreeing).

5 The exemption is for an allowed inhabitant of the Protected Zone who is in a protected area in connection with the performance of traditional activities: s 13(2).

principal features of the Act. It would mean that some non-citizens could enter the Australian community irrespective of the reason that they were refused a visa permitting them to do just that. Far from "best achieving" the objects of the Act, such a construction would directly undermine those objects.[6] It would leave a gap in the statutory scheme.[7] Those contextual factors therefore powerfully reinforce the clear and unambiguous textual meaning of ss 189 and 196.[8]

17. Section 189(1) imposes a duty to detain "[i]f an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen". An officer has no discretion not to detain a person if the officer holds the state of mind upon which s 189(1) depends. That is important, because it means that the purpose of detention is determined by the legislature, unlike a scheme where detention occurs only because of a choice made by the executive. As Hayne J (with whom McHugh and Heydon JJ relevantly agreed) explained in *Al-Kateb v Godwin* (***Al-Kateb***):[9]

> the provision is mandatory; the legislature requires that persons of the identified class be detained and kept in detention. No discretion must, or even can, be exercised. No judgment is called for. The only disputable question is whether the person is an unlawful non-citizen.

18. Section 196(1) specifies the duration of detention. It provides (emphasis added):

> An unlawful non-citizen detained under section 189 must be kept in immigration detention until:
>
> (a) he or she is removed from Australia under section 198 or 199; or
>
> (aa) an officer begins to deal with the non-citizen under subsection 198AD(3); or
>
> (b) he or she is deported under section 200; or
>
> (c) he or she is granted a visa.

19. Under s 196(1) the lawful duration of detention is "fixed by reference to the occurrence of any of the [four] specified events. Detention must continue 'until' one of those events

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6 Contrary to s 15AA of the *Acts Interpretation Act 1901* (Cth).

7 *Plaintiff M76* (2013) 251 CLR 322 at [186]-[189] (Kiefel and Keane JJ); see also at [182], [184]; *Plaintiff M47/2012* (2012) 251 CLR 1 at [269] (Heydon J).

8 *Al-Kateb* (2004) 219 CLR 562 at [33] (McHugh J), [223] and [241] (Hayne J, Heydon J agreeing), [298] (Callinan J); *Plaintiff M76* (2013) 251 CLR 322 at [182] and [189] (Kiefel and Keane JJ).

9 (2004) 219 CLR 562 at [254]. See also *Re Woolley; Ex parte M276/2003* (2004) 225 CLR 1 at [224].

occurs".[10] The text is clear and intractable.[11] The word "until" – used in the ordinary sense of "up to the time"[12] – refers (particularly in conjunction with "kept") to an ongoing or continuous state of affairs that is to be maintained up to the time that the relevant event (eg removal or visa grant) actually occurs. That is, s 196 requires that detention "must continue until removal, or deportation, or the grant of a visa".[13] So much is confirmed by s 196(3), which provides: "To avoid doubt, [s 196(1)] prevents the release, even by a court, of an unlawful non-citizen (otherwise than as referred to in paragraph l(a), (aa) or (b)) unless the non-citizen has been granted a visa".[14] The parenthetical statement confirms that a person may be "released" from detention only in the ways set out in s 196(1). That is also powerfully confirmed by the principal features of the Act outlined above, which would be undermined if non-citizens could be required to be released into the Australian community notwithstanding the fact that they were denied a visa.

20. For the above reasons, it is not open on the text of s 196 to construe that provision as revealing an intention that detention may cease to be authorised even though none of the events identified in s 196(1) has actually occurred. Specifically, the text cannot accommodate the conclusion that detention ceases to be authorised at a time when the non-citizen should have been removed, or (as Bromberg J held) at such earlier time as a court assesses there to have been a "departure" from the purpose of removal because an officer has failed to "undertake" sufficient "steps in pursuance of removal" (against whatever standard that is to be determined): cf **PJ[89], CAB 59**.

21. Instead, the combined effect of ss 189(1) and 196(1) is that, subject to a limited statutory exemption, a non-citizen (other than an Australian Aboriginal who satisfies the tripartite test[15]) can be lawfully within the Australian community only if he or she has been granted

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10 *Al-Kateb* (2004) 219 CLR 562 at [226] (Hayne J, McHugh and Heydon JJ agreeing). See also *Plaintiff M96A* (2017) 261 CLR 582 at [19] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ); *Plaintiff S4* (2014) 253 CLR 219 at [30].

11 *Al-Kateb* (2004) 219 CLR 562 at [232] and [241] (Hayne J, with whom McHugh and Heydon JJ agreed); see also [33], [51]-[54] (McHugh J), [296], [298] (Callinan J); *Plaintiff M76* (2013) 251 CLR 322 at [189] (Kiefel and Keane JJ).

12 *Oxford English Dictionary*, Sense II Meaning 5(a) ("Onward till (a time specified or indicated); up to the time of (an action, occurrence, etc.)").

13 *Al-Kateb* (2004) 219 CLR 562 at [241] (Hayne J, Heydon J agreeing); see also [34] (McHugh J).

14 *Al-Kateb* (2004) 219 CLR 562 at [35] (McHugh J). Of course, s 196(3) cannot oust the Court's jurisdiction to order a person's release from *unlawfitl* detention: *Al-Kateb* (2004) 219 CLR 562 at [10] (Gleeson CJ).

15 *Love v Commonwealth* (2020) 94 ALJR 198 at [81].

a visa (s 196(1)(c)).[16] Otherwise, an unlawful non-citizen must be detained and can leave immigration detention only by departing Australia by one of the means referred to in s 196(1): that is, by being removed under ss 198 or 199; taken to a regional processing country under s 198AD; or deported under s 200. In this way, the Act gives effect to the object in s 4(2) that visas are "the only source of the right of non-citizens" to enter or remain in Australia. As Hayne J said in *Plaintiff M47*:[17]

> The Act provides no middle ground between being a lawful non-citizen (entitled to remain in Australia in accordance with any applicable visa requirements) and being an unlawful non-citizen, who may, usually must, be detained and who (assuming there is no pending consideration of a valid visa application) must be removed from Australia as soon as reasonably practicable.

10 **B. The constitutional context**

22. *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (***Lim***)[18] and this Court's later decisions establish that executive detention of non-citizens is permissible as an incident of the executive function of receiving, investigating and determining an application for a visa, and removing a non-citizen not otherwise entitled to be in Australia.[19] They also recognise that it is an aspect of the purpose of removing a non-citizen who has been denied entry to the Australian community that the non-citizen be separated from the Australian community pending removal, in order both to give effect to the decision not to admit that non-citizen and to ensure that the non-citizen is available for removal when removal becomes reasonably practicable.[20]

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23. There are two constitutional limits on executive detention of this kind: the duration of

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16 In which case the non-citizen is a lawful non-citizen: Act, ss 13-14. The exemption is for allowed inhabitants of the Protected Zone who are in a protected area in connection with the performance of traditional activities:s 13(2). A residence determination under Subdivision B of Division 7 of Part 2 is not an exception, because the unlawful non-citizen is deemed to be in immigration detention: see s 197AC(1).

17 (2012) 251 CLR 1 at [178]. The words "may, usually must" reflect the fact that in unusual circumstances detention is discretionary: see s 189(4). See also *Plaintiff M76* (2013) 251 CLR 322 at [118] (Hayne J).

18 (1992) 176 CLR 1.

19 See, eg, *Lim* (1992) 176 CLR 1 at 32 (Brennan, Deane and Dawson JJ); *Plaintiff S4* (1992) 176 CLR 1 at [26].

20 *Plaintiff M76* (2013) 251 CLR 322 at [202] and [207] (Kiefel and Keane JJ), approving *Re Woolley* (2004) 225 CLR 1 at [227] (Hayne J, Heydon J agreeing); *Al-Kateb* at [45]-[46] and [48] (McHugh J), [255]-[256], [267] (Hayne J, Heydon J agreeing), [289] (Callinan J). See also [17] (Gleeson CJ).

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detention must be "reasonably capable of being seen as necessary for the completion of the administrative processes directed to those purposes";[21] and the legality of detention must be capable of determination by a court from time to time.[22]

24. As to the first limit, the Act tethers the duration of detention to the completion of certain processes leading to the grant of a visa or removal, and imposes duties on the executive to bring about one of those terminating events. For those reasons, the detention which the Act requires is reasonably capable of being seen as necessary for the completion of such processes. Where a non-citizen is (or may become) liable to be removed from Australia, detention until the fact of removal ensures that that removal can be effected. Where the grant of a visa is being considered, detention prevents the non-citizen from joining the Australian community, until permission to do so is granted.

25. As to the second limit, in *Plaintiff M96A* six Justices explained that ss 189 and 196 satisfy that limit because:[23]

> The duration of the detention of … persons who are detained under s 189 of the Act is able to be objectively determined at any time, and from time to time. At any time it can be concluded that detention in Australia will conclude if any of the various preconditions explained above are met.

To similar effect, Gageler J said:[24]

> [T]he duration of the detention is capable of objective determination by a court at any time and from time to time. From the moment of the commencement of the detention under s 189, duration of the detention is made by s 196(1)(a) and (aa) to depend on performance of the duty to remove imposed by s 198(1A) or by s 198AD(2).

26. While detention must continue until the first occurrence of a terminating event specified in s 196(1), other parts of the Act expressly or impliedly impose duties to bring about those terminating events within particular times. It is the performance of those duties that brings immigration detention to an end. If necessary, courts may make orders requiring compliance with those duties, such as orders enforcing the duty to grant or refuse a visa under s 65 within a reasonable time,[25] or enforcing the duty to remove under s 198 "as soon as reasonably practicable". Orders of either kind will bring detention to an end, and

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21 *Plaintiff M76* (2013) 251 CLR 322 at [140] (Crennan, Bell and Gageler JJ).

22 *Plaintiff S4* (2014) 253 CLR 219 at [29].

23 (2017) 261 CLR 582 at [32] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).

24 (2017) 261 CLR 582 at [45] (emphasis added).

25 *ASP15 v Commonwealth* (2016) 248 FCR 372 at [40] (Robertson, Griffiths and Bromwich JJ); *Plaintiff S297 v Minister for Immigration and Border Protection* (2015) 255 CLR 231.

will do so in a way that is consistent with the text, scheme and objects of the Act.

27. The availability of orders of the above kinds to bring detention to an end means that the detention authorised by s 196 is neither arbitrary nor at the unconstrained discretion of the executive [cf **PJ [43], [87], CAB 47, 58**]. To the contrary, it is subject to limits that the courts can enforce robustly and substantively. That being so, the constitutional context provides no reason not to give effect to s 196(1) in accordance with its terms: cf **PJ[8], [43]-[44], CAB 35, 47**. Indeed, it is necessary to apply that provision consistently with its terms in order to give effect to a fundamental attribute of Australia's sovereignty, being the right to determine which non-citizens will be admitted into the Australian community.[26] In that respect, it is important not to lose sight of the fundamental point that, while aliens within Australia are not "outlaws", their vulnerability to exclusion and deporation means that their rights differ in important respects from those of citizens.[27] That is why:[28]

> [t]he questions which arise about mandatory detention do not arise as a choice between detention and freedom. The detention to be examined is not the detention of someone who, but for the fact of detention, would have been, and been entitled to be, free in the Australian community.

C. The authorities

28. This Court has not previously needed to decide whether non-compliance with the duty to remove a non-citizen as soon as reasonably practicable affects the legality of detention. It has, however, frequently been required to construe ss 189, 196 and 198, and in doing so it has explained the proper construction of those provisions in a way that is inconsistent with Bromberg J's judgment. But before turning to the decisions of this Court, it is useful to begin with various Federal Court decisions that have specifically confronted the effect of a failure to remove a non-citizen as soon as reasonably practicable (or a failure to bring about other terminating events within the time that the Act requires). These decisions have held that such a failure does not result in detention becoming unlawful.

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26 See *Robtelmes v Brenan* (1907) 4 CLR 395 at 400; *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at [92] (Nettle J).

27 *Lim* (1992) 176 CLR 1 at 29 (Brennan, Deane and Dawson JJ).

28 *Al-Kateb* (2004) 219 CLR 562 at [219] (Hayne J, with whom McHugh and Heydon JJ relevantly agreed). See also at [299] (Callinan J). To similar effect, see *Plaintiff M76* (2013) 251 CLR 322 at [184] (Kiefel and Keane JJ). Bromberg J seemingly overlooked this difference [**PJ[18], CAB 38**].

C.1 Federal Court authorities

29. The leading judgment in the relevant line of Federal Court authorities is that of French J in *WAIS v Minister for Immigration and Multicultural and Indigenous Affairs*.[29] His Honour explained that "[t]he obligation which it [s 196(1)] creates is unqualified and in terms unlimited in time except by reference to the [then] three terminating events. That is emphasised by subs 196(3)".[30] While removal under s 198 "necessarily terminates the continuing detention under s 196", the obligation to remove as soon as reasonably practicable "does not, on the face of it, import any express or implied limitation upon the obligation to detain the unlawful non-citizen under s 196. That obligation or liability is terminated by the event of removal".[31] His Honour concluded:[32]

> The language of s 196 … seems to me intractable. The detention there prescribed is ended only by one of the terminating events. The removal obligation for which s 198 provides does not seem to have been enacted for any purpose protective of the rights of detainees. Rather it facilitates the expeditious removal from Australia of unlawful non-citizens. The remedy for a failure in the discharge of that duty may be mandamus, possibly directed to the Minister. … The Parliament has specified precise criteria by reference to particular events, upon which detention under s 196 will terminate. It is difficult to see how the Court can in effect legislate another limiting condition.

30. That analysis is unimpeachable. It has been followed by single judges in the Federal Court on numerous occasions,[33] and there are Full Court authorities to the same effect. In particular, in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri,* a Full Court of the Federal Court said that "[i]f the Minister were not fulfilling his duty under s 198(1) to remove as soon as reasonably practicable the detention would, in our view, still be lawful and the appropriate remedy would be an order in the nature of mandamus to compel the Minister to take the steps required for the performance of his duty".[34] That aspect of the reasoning in *Al Masri* was not disapproved in *Al-Kateb*.

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29 [2002] FCA 1625.

30 [2002] FCA 1625 at [47].

31 [2002] FCA 1625 at [49].

32 [2002] FCA 1625 at [56] (emphasis added).

33 See *NAES v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 2 at [6]-[7] (Beaumont J); *SHFB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 29 at [10], [12]-[13] (Selway J); *SHFB v Goodwin* [2003] FCA 294 at [8]-[12], [23]-[25], [30] (von Doussa J); *NAGA v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 224 at [10]-[11], [64] (Emmett J); *Daniel v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 196 ALR 52 at [15], [36] (Whitlam J).

34 (2003) 126 FCR 54 at [134].

31. More recently, in *ASP15 v Commonwealth*, a Full Court of the Federal Court said that:[35]

> It follows that once a valid visa application has been made, unless and until a decision is made either to grant or refuse a visa, detention is authorised and required by s 196(1). This conclusion is consistent with the binding authority of *Al-Kateb* as to the nature of lawful detention and the meaning of s 196(1). … Such detention does not cease to be for the purpose of considering and determining an application for a visa because the necessary process has not been completed within the time required by the Migration Act, be that time period express or implied. If in fact a court determines that the process to make a visa decision has gone on for too long, it nonetheless remains detention for that purpose and is both validly authorised and required by s 196(1) of the Migration Act. The normal remedy is court action to compel a visa decision to be made, one way or the other.

While *ASP15* was about delay in processing a visa application, there is no reason in principle to treat delay in bringing about that potential terminating event any differently from delay in bringing about removal. Just as delay by the executive in processing a visa application does not deny that the legislative purpose of detention remains to process a visa application, delay in removal does not deny that detention is for the purpose of removal. At most, it means that relief should issue directed to bringing an end to that delay, thereby bringing about one of the events that Parliament has specified as the only events that bring detention to an end.

32. These Federal Court authorities strongly support the construction of s 196 for which the Commonwealth contends.

C.2 *Al-Kateb*

33. The same is true of the decisions of this Court, where the leading authority concerning the interpretation and interaction of ss 189, 196 and 198 is *Al-Kateb*. There, the majority construed s 196(1) consistently with the submissions advanced in paragraphs 19 to 21 above.[36] Bromberg J's conclusion [**PJ[44], [75], CAB 47, 56**] that s 196(1) does not authorise detention "until" one of the terminating events identified in that section actually occurs is contrary to the reasoning of the majority in that case.

34. ***Hayne J (Heydon J agreeing, McHugh J agreeing on statutory construction).*** Starting with the leading judgment of Hayne J, his Honour identified the three "principal features"

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35 (2016) 248 FCR 372 at [40] (Robertson, Griffiths and Bromwich JJ).

36 See also *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at [114] where Gummow J (who dissented in *Al-Kateb*) accepted that the majority in *Al-Kateb* had read the word "until" in s 196(1) to mean "unless".

of the Act identified in paragraph 15 above. The third feature was that "the detention of a non-citizen is to end only upon that person's removal or deportation from Australia or upon the person obtaining a visa permitting him or her to remain in the country".[37] His Honour went on to repeat that "[t]he period of detention is fixed by reference to the occurrence of any of three specified events. Detention must continue 'until' one of those events occurs."[38]

35. Hayne J did state at one point that "[t]he legislature having authorised detention until the first point at which removal is reasonably practicable, it is not possible to construe the words used as being subject to some narrower limitation".[39] Importantly, however, that was said in the course of rejecting Mr Al-Kateb's argument that he should be released because it was not, and was unlikely to become, reasonably practicable to remove him. That statement cannot properly be read as holding that detention ceased to be lawful if removal was practicable but did not occur, because to read the statement in that way would contradict both the statements quoted in the previous paragraph and the principal features of the Act upon which Hayne J relied to support his construction.[40]

36. The conclusion that Hayne J did not interpret s 196 as ceasing to authorise detention if removal was practicable but did not occur is confirmed by his Honour's judgments in subsequent cases. For example, in *Re Woolley; Ex parte M276/2003* (***Re Woolley***), Hayne J (with Heydon J again agreeing) said that "[t]he Act provides that the detention of an unlawful non-citizen *must* continue until the detainee is removed or deported or granted a visa (s 196) and removal *must* occur "as soon as reasonably practicable" (ss 198, 199) after the occurrence of events which the Act identifies".[41] Nine years later, in *Plaintiff M76*, Hayne J said that he saw no reason to reopen the questions of construction and validity that had been decided in *Al-Kateb*. He said that "[a]n unlawful non-citizen detained under s 189 must be kept (s 196(1)) in immigration detention until the

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37 (2004) 219 CLR 562 at [210].

38 (2004) 219 CLR 562 at [226] (emphasis added). See also at [241].

39 (2004) 219 CLR 562 at [231]. Bromberg J referred to that statement [**PJ[84], CAB 58**], but did not ultimately adopt it [**PJ[87], CAB 58**].

40 In that respect, see *Plaintiff M76* (2013) 251 CLR 322 at [127], where Hayne J said that s 196 was "central to effecting the overall purpose of the whole of Pt 2", being "to control the arrival and presence of non-citizens in Australia".

41 (2004) 225 CLR 1 at [224] (emphasis in original).

occurrence of one of four terminating events"[42] set out in that sub-section. His Honour repeated that point in three other paragraphs of his judgment,[43] the last of which is precisely on point and warrants close attention:[44]

> The Act fixes the end of immigration detention by reference to the occurrence of one of the four terminating events prescribed by s 196(1) and referred to at the start of these reasons: removal from Australia, deportation, grant of a visa, or an officer beginning to deal with the non-citizen for the purpose of taking that person to a regional processing country. The requirement of s 196(1) that an unlawful non-citizen detained under s 189 must be kept in immigration detention "until" the happening of one of those events cannot be construed as using the word "until" in some purposive sense. … [T]he word "until" must be read in s 196(1) as fixing the end of detention, not as fixing the purpose or purposes for which detention is or may be effected.

37. ***McHugh J.*** Returning to *Al-Kateb*, McHugh J stated: "[f]or the reasons given by Hayne J, ss 189, 196 and 198 of the Act require Mr Al-Kateb to be kept in immigration detention until he is removed from Australia. The words of ss 196 and 198 are unambiguous".[45] It is true that in the next paragraph McHugh J said that "[d]etention under s 196 for the purpose of removal under s 198 will cease to be detention for that purpose only when the detention extends beyond the time when the removal of the non-citizen has become 'reasonably practicable'".[46] But that observation must be read in the context of the argument to which the Court was responding. McHugh J should not be understood as holding that release was required if a non-citizen should have been (but was not) removed: that is apparent from the very next paragraph, where his Honour emphatically stated that "[t]he unambiguous language of s 196 — particularly sub-s (3) — indicates that Parliament intends detention to continue until one of the conditions expressly identified therein — removal, deportation or granting of a visa —is satisfied".[47]

38. ***Callinan J.*** Like the other members of the majority, Callinan J rejected the submission that s 198 could be used to introduce a temporal limit on the lawfulness of detention under s 196, stating: "[t]he words 'as soon as reasonably practicable' in s 198 of the *Migration Act* are intended to ensure that all reasonable means are employed to remove an illegal

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42 (2013) 251 CLR 322 at [33].
43 (2013) 251 CLR 322 at [77], [117], [126].
44 (2013) 251 CLR 322 at [126] (emphasis added).
45 (2004) 219 CLR 562 at [33] (emphasis added).
46 (2004) 219 CLR 562 at [34].
47 (2004) 219 CLR 562 at [35].

entrant, and not to define a period or event beyond which his detention should be deemed to be unlawful".[48]

C.3 Other relevant decisions of this Court

39. Since *Al-Kateb*, this Court has repeatedly recognised that s 196(1) should be construed in the manner outlined above.[49] For example, in *Plaintiff M61* the whole Court said that "the relevant operation of s 196(1) is that each plaintiff must be kept in detention until he is either removed from Australia or granted a visa".[50] More recently, in *Plaintiff M96A/2016 v Commonwealth*,[51] the joint judgment stated:[52]

> Section 189(1) creates an obligation upon an officer to detain a person who is in the migration zone if the officer knows or reasonably suspects that the person is an unlawful non-citizen. Section 196(1) provides that an unlawful non-citizen must be kept in immigration detention until the happening of one of four events: (i) removal from Australia under s 198 or s 199; (ii) an officer beginning the s 198AD(3) process for removal to a regional processing country; (iii) deportation under s 200; or (iv) the grant of a visa.

40. Indeed, even in *Plaintiff S4* (upon which the respondent and Bromberg J relied), the Court said that s 196(1) provides that unlawful non-citizens must be kept in detention "until the happening of one of the four events".[53]

41. There is no occasion to allow the construction of s 196 to be re-opened,[54] particularly as the Parliament has amended the Act on the basis of the correctness of the construction adopted by the majority in *Al-Kateb*.[55] Bromberg J was bound to apply the settled

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48 (2004) 219 CLR 562 at [295] (emphasis added).

49 See *Re Woolley* (2004) 225 CLR 1 at [4]-[5] (Gleeson CJ), [126] (Hayne J, Heydon J agreeing), [178] (Kirby J); *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at [28] (French CJ), [268]-[269], [361] (Heydon J), [468] (Kiefel J); *Plaintiff M76* (2013) 251 CLR 322 at [182]-[183] (Kiefel and Keane JJ); *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at [12] (Kiefel CJ, Bell, Keane and Edelman JJ).

50 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at [19].

51 (2017) 261 CLR 582.

52 (2017) 261 CLR 582 at [19] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ) (emphasis added).

53 *Plaintiff S4* (2014) 253 CLR 219 at [30]; see also [32].

54 *Plaintiff M76* (2013) 251 CLR 322 at [125] (Hayne J), [199] (Kiefel and Keane JJ), stating that whatever the original balance between the competing views in *Al-Kateb*, "the decision should now be regarded as having decisively quelled the controversy as to the interpretation of the Act which arose in that case".

55 As was accepted in *Plaintiff M76* (2013) 251 CLR 322 at [36] (Hayne J), [195]-[197] (Kiefel and Keane JJ, referring to the enactment of s 195A); *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at [334] (Heydon J). As to the significance of such amendment, see *Platz v Osborne* (1943) 68 CLR 133 at 141 (Rich J), 145-146 (McTiernan J), 146-147 (Williams J); *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1 at [52] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

construction identified above. Instead, however, his Honour held that s 196(1) permitted a non-citizen to be released "irrespective" of whether any of the events specified in s 196(1) had in fact occurred [**PJ[44], [75], CAB 47, 56**]. He justified that course almost exclusively on the basis of his understanding of this Court's judgment in *Plaintiff S4*, which he erroneously treated as the leading authority [**PJ[22], CAB 40**].

C.4 *Plaintiff S4*

42. *Plaintiff S4* concerned the validity of the grant of a visa under s 195A in circumstances where that grant had the effect of precluding the plaintiff from making an application for a protection visa, notwithstanding the fact that his detention had been prolonged while the Minister considered exercising his power under s 46A to permit such an application to be made. It was not a constitutional case, as is evident from the fact that no s 78B notices were issued and the Court was constituted by only five Justices. Further, as the judgment records,[56] there was no dispute as to the legality of detention, let alone as to the validity of detention after removal was reasonably practicable (the plaintiff having been released from detention when he was granted a visa). No doubt because no issue arose in relation to the legality of detention, no argument was directed to the construction of ss 189, 196 or 198, or to the relevant authorities on that topic (for example, *Al-Kateb*, *Re Woolley*, *Al Masri* or *WAIS*), and there is no reference in the judgment to any of those authorities. In those circumstances, *Plaintiff S4* is an unlikely case in which to find either a constitutional limit on the operation of s 196 or an implicit overruling of *Al-Kateb*.

43. The substance of the reasoning in *Plaintiff S4* at [21]-[35] was directed to establishing that there is an implicit temporal limit on inquiries that extend the duration of detention by delaying the occurrence of one of the terminating events listed in s 196(1). Specifically, the Court held that there was an implicit requirement to decide as soon as reasonably practicable whether to exercise the power under s 46A(2) to permit a protection visa application to be made, and also to consider any such application within a reasonable time.[57] However, the Court did not go on to hold that that limit had been breached, let alone to consider the consequences if such a breach had occurred. Instead, the Court held that the Minister's decision to consider whether to lift the bar under s 46A

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56 *Plaintiff S4* (2014) 253 CLR 219 at [21].

57 *Plaintiff S4* (2014) 253 CLR 219 at [28], [34].

had prolonged the plaintiff's detention, and that this had the consequence that s 46A abstracted from the Minister's power to grant a different visa if that would be repugnant to the purpose for which his detention had been prolonged.[58] That decision, and the reasoning that supported it, is far removed from the proper construction of s 196(1). In those circumstances, *Plaintiff S4* should not be thought to qualify the clear statements addressed to that topic in the previous authorities in this Court and the Federal Court.

44. In those circumstances, Bromberg J's reliance upon the observation in *Plaintiff S4* that "[d]eparture from that requirement [to carry the purpose into effect as soon as reasonably practicable] would entail departure from the purpose for his detention and could be justified only if the Act were construed as permitting detention at the discretion of the Executive" [**PJ [43], [87], CAB 47, 58**] was misplaced.[59] The construction advanced by the Minister and supported by the authorities discussed above did not involve detention at the discretion of the Executive, for the reasons addressed in paragraph 26 to 27 above. The passage in *Plaintiff S4* just quoted was directed to explaining why administrative steps that prolonged detention must be subject to an implicit temporal limit. It was <u>not</u> a holding that the remedy for a failure to comply with a duty to bring about one of the terminating events in s 196(1) within any applicable express or implied temporal limit is release into the community. The Court did not consider that question at all. It certainly did not overrule the Federal Court authorities holding that the proper remedy in such a case was to enforce the duty that had been breached, rather than to order release from detention. In those circumstances, Bromberg J erred in treating the High Court cases (and *Plaintiff S4* in particular) as overtaking those authorities: cf **PJ [69], CAB 54**.

D. The grounds of appeal

45. If the above submissions are accepted, each of the grounds of appeal should be upheld. It is convenient briefly to identify how those submissions support the specific grounds.

<u>D.1 The purpose of detention (ground one in both appeals)</u>

46. The purpose of the respondent's detention since 26 July 2019 was his removal from Australia (or, more completely,[60] to deny him entry to the Australian community until such time as he was removed) [**PJ[6]-[7], CAB 34**]. Bromberg J held that that was <u>not</u>

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58 *Plaintiff S4* (2014) 253 CLR 219 at [47].

59 *Plaintiff S4* (2014) 253 CLR 219 at 233 [34].

60 See paragraph 24 above.

the purpose of his detention only because the Commonwealth, through its officers, had not complied with s 198. Relying on principles said to emerge from *Plaintiff S4*, his Honour said [**PJ[75], CAB 56**, drawing on **PJ[34], CAB 44**]:

> Where there is a departure from the permissible purpose for the detention, the detention will no longer be lawful irrespective of whether one or other of the events specified in s 196(1) has in fact occurred. That is so because it is a condition of the lawfulness of a detention that the detention be for a permissible purpose. (emphasis added)

It was the suggested "departure" from the permissible purpose of detention that resulted from failure to comply with s 198 that led directly to the order that the respondent be released [**PJ[128], [171], CAB 69, 80**]. It was therefore central to Bromberg J's reasons.

47. That reasoning mistakes the place of "purpose" in the analysis of the legality of immigration detention. This Court's decisions establish that the purpose of detention is relevant to whether "laws authorising or requiring the detention in custody … being laws with respect to aliens within s 51(xix) of the *Constitution* … contravene Ch III".[61] Such laws will not contravene Ch III if they are reasonably capable of being seen as necessary for the completion of administrative processes directed to the admission or removal of non-citizens.[62] That test requires analysis at the level of the law itself, the purpose of which is determined through a process of statutory construction.[63] That very analysis was undertaken in *Al-Kateb*, where the majority held that ss 189 and 196 "had to be construed as meaning what they say, and that those provisions were not beyond the legislative powers of the Parliament".[64] Specifically, while ss 189 and 196 "do not expressly refer to the purpose of detention",[65] those provisions should be read as "providing for detention for the purposes of processing any visa application and removal"[66] (or, more specifically, for the purpose of "removal from Australia, *and* by segregation from the community by

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61 *Plaintiff M76* (2013) 251 CLR 322 at [138] (Crennan, Bell and Gageler JJ) (emphasis added), explaining *Lim*, which at 19 speaks of whether detention was "justified by a valid statutory provision". This analysis was endorsed in *Plaintiff M96A* (2017) 261 CLR 582 at [21].

62 *Plaintiff M76* (2013) 251 CLR 322 at [140] (Crennan, Bell and Gageler JJ); *Plaintiff M96A* (2017) 261 CLR 582 at [21].

63 See and compare *Unions NSW v New South Wales* (2013) 252 CLR 530 at [50]; *Unions NSW v New South Wales* (2019) 264 CLR 595 at [171]; *Clubb v Edwards* (2019) 267 CLR 171 at [257].

64 *Plaintiff M76* (2013) 251 CLR 322 at [35] (Hayne J). See also [126], [128] (Hayne J).

65 *Al-Kateb* (2004) 219 CLR 562 at [224]. See also *Plaintiff M76* (2013) 251 CLR 322 at [175] (Kiefel and Keane JJ).

66 *Plaintiff S4* (2014) 253 CLR 219 at 233 [25]. See *Al-Kateb* (2004) 219 CLR 562 at 638 [225] (Hayne J, McHugh and Heydon JJ relevantly agreeing).

detention in the meantime[67]). Detention for those purposes is compatible with Ch III. Indeed, the separation of powers has little to say about such a law, for "[a] law which requires the detention of a person who has no permission to travel to and enter Australia and no permission to remain in Australia until that person is removed from Australia does not constitute any exercise of the judicial power of the Commonwealth … It is a law within the legislative powers of the Parliament and is valid".[68]

48. Bromberg J plainly was not entitled to depart from this Court's conclusions concerning either the construction or validity of s 196. Indeed, this Court should not re-open them.[69] Section 196 having been construed to mean what it says, and nevertheless to comply with Ch III, no constitutional question arises in the application of that section in individual cases.[70] Specifically, Chapter III does not require an assessment of the purpose (whether objective or subjective) of any or all of the officers who actually implement the detention of any particular unlawful non-citizen. Parliament having imposed duties on the executive that control when detention must start and end, the rule of law requires the executive to comply with those duties. It must do so irrespective of the wishes or purposes of individual officers.[71] Failure to comply with those duties involves ultra vires administrative action that may attract mandamus, but it cannot alter the purpose of the detention because that purpose has been mandated by the Parliament. As Hayne J (with whom Heydon J agreed) observed in *Re Woolley*:[72]

> [c]ontinued detention under s 196 is predicated upon the person being an unlawful non-citizen. It … does not depend on the formation of any opinion of the Executive about whether detention is necessary or desirable <u>whether for purposes of investigation or any other purpose</u>. <u>That judgment has been made by the legislature</u>.

49. For the above reasons, Bromberg J erred in holding that a failure to comply with the duty imposed by s 198 involved a "departure from the permissible purpose for the detention",

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67 *Plaintiff M76* (2013) 251 CLR 322 at [202] and [207] (Kiefel and Keane JJ), approving *Re Woolley* (2004) 225 CLR 1 at [227] (Hayne J, Heydon J agreeing); *Al-Kateb* (2004) 219 CLR 562 at [45]-[46] and [48] (McHugh J), at [255] and [267] (Hayne J, Heydon J agreeing), [289] (Callinan J).

68 *Plaintiff M76* (2013) 251 CLR 322 at [130] (Hayne J), treating that as decided by *Al-Kateb*.

69 *Plaintiff M76* (2013) 251 CLR 322 at [36], [125] (Hayne J), [199] (Kiefel and Keane JJ).

70 *Wotton v Queensland* (2012) 246 CLR 1 at [10], [21]; *Comcare v Banerji* (2019) 93 ALJR 900 at [96] (Gageler J), [210]-[211] (Edelman J); Both these cases concern discretions, but the point is even clearer in relation to mandatory duties.

71 See, eg, *Re Woolley* (2013) 251 CLR 322 at [126] (Hayne J, Heydon J agreeing).

72 *Re Woolley* (2004) 225 CLR 1 at [224] (Hayne J, Heydon J agreeing) (emphasis added). See also [4] (Gleeson CJ), [36] (McHugh J), [127] (Gummow J).

such that detention became unlawful even though none of the events specified in s 196(1) had occurred.

D.2 The lawfulness of detention (ground two in both appeals)

50. As explained above, the text of ss 189(1) and 196(1) intractably require that detention must continue unless and until one of the terminating events in s 196(1) actually occurs. Bromberg J erred in relying on *Plaintiff S4* to hold that, for constitutional reasons, s 196(1) could not be read in that way [**PJ[43]-[44], CAB 47**]. As addressed above, the more relevant authorities were to the opposite effect.[73] Applying those authorities, the respondent's detention was required by s 196(1) and was therefore lawful.

D.3 The appropriate remedy (ground three in Proceeding C17/2020)

51. For the following reasons, Bromberg J erred in ordering the release of the respondent.

52. ***First***, such an order lacked utility because, as Kiefel and Keane JJ explained in *Plaintiff M76*,[74] the Commonwealth's officers are and were required to redetain him under s 189. Bromberg J was wrong to decline to adopt their Honours' analysis, which he erred in treating as inconsistent with the preponderance of authority in this Court: **PJ[59], [64], CAB 51, 53**.

53. Furthermore, contrary to Bromberg J's reasons, neither Hayne J's acceptance in *Al-Kateb* that ss 189, 196 and 198 must be read together, nor Gageler J's explanation of the constitutional limits on detention in *Plaintiff M96A*, stands against redetention being required by s 189 [**cf PJ[62], CAB 52**]. Both are consistent with the position that detention is authorised until removal occurs, and that the judiciary can supervise detention at all times, and from time to time, by enforcing compliance with the duty to remove.

54. ***Second***, the order releasing the respondent is irreconcilable with the text of s 196(3).[75] Absent a finding that s 196(3) is invalid, Bromberg J had no power to order the respondent's release.

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73 See, in particular, *Al-Kateb* (2004) 219 CLR 562 at [226], [241] (Hayne J, Heydon J agreeing); *Plaintiff M76* (2013) 251 CLR 322 at [182], [189] (Kiefel and Keane JJ).

74 (2013) 251 CLR 322 at [182]-[183].

75 See *Kanhalingam v Minister for Home Affairs* [2020] HCATrans 122; *Kazemi v Minister for Home Affairs* [2020] HCATrans 124; *Plaintiff M168/2010 v Commonwealth* (2011) 85 ALJR 790 at 796 [35] (Crennan J).

55. ***Third***, contrary to Bromberg J's suggestion, s 196(4) and 5(a) do not contemplate an unlawful non-citizen being at liberty in the community [**PJ[49], CAB 49**]. Those provisions were intended to address decisions of the Federal Court permitting the release of unlawful non-citizens on an interlocutory basis and at a time when *Al-Kateb* had not yet been decided.[76] It is impossible to find in these provisions a legislative intention that unlawful non-citizens may be at liberty in the community.

56. ***Fourth***, despite Bromberg J's reference to it, *Koon Wing Lau v Calwell* (***Calwell***)[77] [**PJ[24]**, **CAB 41**] has no bearing on the issues before the Court. Members of the Court in *Calwell* said that *habeas corpus* would be available to compel release when the purpose of a person's detention under the *War-time Refugees Removal Act 1949* (Cth) had not been effected within implied statutory limits.[78] But those observations were made in the context of a statute that did not provide for mandatory detention. *Calwell* is distinguishable on that basis.

PART VII ORDERS SOUGHT

57. The Commonwealth seeks the orders set out in each notice of appeal [**CAB 91, 97**]

PART VIII ESTIMATE OF HOURS

58. The Commonwealth estimates that 2.5 hours will be required for oral argument (including reply).

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[76] See *Burgess v Commonwealth* (2020) 378 ALR 501 at [114] (Besanko J).
[77] (1949) 80 CLR 533.
[78] (1949) 80 CLR 533 at 556 (Latham CJ), 581 (Dixon J). Cf *Plaintiff M76* (2013) 251 CLR 322 at [139].