IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M47 of 2018

BETWEEN:

Plaintiff M47/2018
Plaintiff

and

Minister for Home Affairs
First Defendant

The Commonwealth of Australia
Second Defendant

PLAINTIFF'S REDACTED SUBMISSIONS

Part I: Publication on the internet

1. This submission is in a form suitable for publication on the internet.

Part II: The issues presented by the Revised Special Case

2. The plaintiff is stateless. He has been restrained in immigration detention by the Commonwealth for almost 9 years. He seeks release from that detention. The issues are identified in the questions set out in the Revised Special Case (**RSC**) at [82] (**Questions**).

Part III: Notices under s 78B of the *Judiciary Act 1903* (Cth)

3. Notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) was given in April 2018.

Part IV: Relevant facts

4. ***Circumstances of the plaintiff's arrival and detention:*** The plaintiff arrived in Australia on 28 January 2010 as an unlawful non-citizen under s 14 of the *Migration Act 1958* (Cth) (**Act**). At all times since shortly thereafter, he has been detained by officers of the Commonwealth. He is currently detained at Villawood Immigration Detention Centre. Thus far, his detention has lasted almost 9 years: RSC [9]-[12], [19]. The defendants rely on ss 189 and 196 of the Act to authorise the detention, both past and present: RSC [12].
5. The plaintiff has sworn an affidavit in these proceedings in which he deposes that: (a) he does not know but believes he was born in the Canary Islands, Spain, and was taken to Western Sahara as a new-born baby; (b) he does not know the name, date of birth or ethnicity of his mother but he believes his mother resided in Western Sahara around the time of his birth; and (c) he has no information about his father: RSC [13]. Western Sahara is a disputed territory, sovereignty over which is claimed by both the Kingdom of Morocco and the Polisario Front, and is identified by the United Nations as a "Non-Self-Governing Territory": RSC [14]. These matters provide some context for the

Human Rights for All Pty Ltd
PO Box 391, Lindfield, NSW, 2070
Email: alison.battisson@hr4a.com.au
Telephone: +61(0)400635110
Fax: N/A
Ref: Alison Battisson / M47 2018

circumstances in which the plaintiff arrived in Australia by plane at Melbourne airport. He travelled on a Norwegian passport in the name of "MB", but destroyed the passport and presented himself to immigration officers as "YeY", a "citizen" of Western Sahara: RSC [19].[1]

6. The defendants are unsatisfied as to the plaintiff's identity: RSC [32], [73]-[76]. They do not accept that he is stateless,[2] but agree that there is currently no third country willing to accept him as a national or as a person with a right of entry: RSC [77].

7. At the time of his arrival in Australia, the plaintiff held, in his own name, a Norwegian temporary residence permit which entitled him to reside in Norway ("**Norwegian Permit**"). During the currency of that permit, on 29 March 2010, the plaintiff made a written request to the Department that he be removed from Australia: RSC [57]. The Norwegian Permit expired on 24 September 2010: RSC [53]-[69].[3] The plaintiff applied for the renewal of the Norwegian Permit but the application was rejected by the Norwegian government on or around 7 November 2011: RSC [72].

8. The plaintiff has not been the subject of any adverse security assessment by any Australian security agency: RSC [80]. At no time since his arrival in Australia has he been the subject of any criminal proceedings or been detained as a consequence of, or pursuant to, any court order. He has exhausted his appeal and review rights under Australian law in respect of his unsuccessful applications for a protection visa and for a safe haven enterprise visa: RSC [20]-[21], [26], [33]-[34], [36], [41]-[44], [47]-[49]. He has no pending application or proceeding under Australian law which may result in the grant of a visa: RSC [49].

9. The Minister, without giving reasons, has declined to exercise his non-compellable powers to grant the plaintiff a visa under ss 195A or 417 of the Act: RSC [35], [37], [39], [45], [46], [50]. The Minister's most recent refusal under s 195A occurred on 12 November 2018: RSC [50].

10. Departmental officers undertook investigations (which included the investigations set out in RSC [74]-[75]) into the plaintiff's identity between 3 February 2010 and around 24

---

[1] In the Minister's delegate's decision dated 2 January 2018 (**2018 Delegate Decision**; see RSC [47] and Special Case Book (**SCB**) 463), the delegate was satisfied that the plaintiff's explanation for destroying or disposing of his Norwegian passport was reasonable, on the basis of the plaintiff's previously unsuccessful migration experiences as described in the decision.

[2] Defence filed 10 August 2018 (**Defence**) [5.3].

[3] Some 23 days before his arrival in Australia, on or around 5 January 2010, the plaintiff had sought asylum in Germany but was returned to Norway by the German authorities: RSC [18].

April 2010, again from November 2011 to around 11 February 2015, and again from 5 January 2017, resulting in a "Complex Identity Advice" dated 21 September 2018 which identifies certain avenues of ongoing investigation: RSC [73]. The defendants are presently unable to point to any avenue of inquiry that is likely to succeed in establishing, to their satisfaction, the plaintiff's identity: RSC [76]. In the absence of new information, the defendants will likely remain unsatisfied as to the plaintiff's identity: RSC [76].[4]

11. Since 18 October 2018, the Minister's Department has made approaches to various countries to ascertain whether they might be prepared to accept the plaintiff, notwithstanding that the defendants have not identified a country willing to accept the plaintiff as a national or as a person with a right of entry and that the defendants have not been able to satisfy themselves as to the plaintiff's identity. None of those approaches has resulted in a favourable response: RSC [77]-[78].

12. ***Key conclusions:*** Despite the defendants' continuing uncertainty as to the plaintiff's identity, the following matters may be taken to have been established by the materials before this Court in the RSC and the SCB, including by the decisions of the Minister's delegates, the Refugee Review Tribunal (**RRT**) and the Full Court of the Federal Court (in the proceeding to which the Minister was a party) in respect of the plaintiff's unsuccessful applications referred to at [8] above.

13. *First,* the plaintiff is not considered as a national by any state under the operation of its law and is therefore considered to be a stateless person under international law (*Convention Relating to the Status of Stateless Persons*, art 1).[5] *Second,* Norway is the only country in which the plaintiff has had habitual residence before his arrival in Australia, and is the sole "receiving country" in respect of the plaintiff for the purpose of assessing his claims for protection and other visas in accordance with ss 36 and 37A, and the definition of "receiving country" in s 5(1), of the Act.[6] *Third,* although the plaintiff claimed "possible links" to Western Sahara, Morocco and Algeria, there was nothing

---

[4] In the 2018 Delegate Decision (RSC [47], SCB 463), the delegate found that s 91W(2) of the Act did not apply to the plaintiff as, since his arrival in Australia, he had taken reasonable steps to obtain evidence of his identity, nationality and citizenship, being the steps summarised at SCB 463.

[5] See RSC [77]; RRT decision dated 20 September 2010 (**2010 RRT Decision**) at SCB 147 [93]-[94]; decision of the Minister's delegate dated 26 March 2014 (**2014 Delegate Decision**) at SCB 216; RRT decision dated 19 May 2014 (**2014 RRT Decision**) at SCB 234, 240ff [23]-[46], 255 [84]; decision of the Federal Circuit Court in *SZUNZ v Minister for Immigration* [2014] FCCA 2256 (**FCC Decision**) at SCB 272 [4]; decision of the Full Court of the Federal Court in *SZUNZ v Minister for Immigration* (2015) 230 FCR 272 (**FCAFC Decision**) at SCB 366 (at [1], [14], [38] (Buchanan J), [43], [68], [70], [74] (Flick J), [81], [124], [128] (Wigney J)); and the 2018 Delegate Decision at SCB 459.

[6] Ibid.

before the RRT or the Full Court to demonstrate any actual links to those places or countries.[7] *Fourth*, Morocco has not accepted that the plaintiff has any links to Morocco.[8] *Fifth*, Algeria has not accepted that the plaintiff has any links to Algeria.[9] *Sixth*, any belief held by the Department on the basis of non-expert views that the plaintiff speaks Arabic with an Algerian accent and therefore is or might be a citizen of, or have links to, Algeria is inconsistent with its own expert language analysis in the Updated Report, which concluded, with 80% confidence (that is, "four out of five"), on the basis of reliable recordings of the plaintiff's Arabic, that his Arabic was consistent with having a Moroccan dialect.[10] *Seventh*, on the most recent finding of the Minister's delegate on 2 January 2018, based on the available evidence, the plaintiff's name, date, place of birth and his citizenship and/or nationality are currently unknown.[11]

14. By reason of the matters set out above, the material before the Court establishes that there is no real possibility, prospect or likelihood of the plaintiff being removed from Australia, at any time. In particular, the Court may infer this given that the defendants remain unsatisfied of the plaintiff's identity and have been unable to locate any country to which he could be removed, notwithstanding all the steps they have taken during the period of almost 9 years that the plaintiff has spent in detention. In *Plaintiff M47/2012 v D-G of Security*,[12] an inference was properly drawn by Gummow and Bell JJ from similar (albeit less extreme) facts stated in a special case – although their Honours respectively confined that inference to one of "present practicability" and the period of the "foreseeable future".

Part V: Plaintiff's argument

Introduction

15. "Cases are only authorities for what they decide". They can "have no wider ratio decidendi than what was in issue".[13] The statutory and constitutional holdings of the 4:3 majority in *Al-Kateb v Godwin*[14] were not reached in a vacuum. Their Honours found that ss 189, 196 and 198 of the Act authorised the continued detention of an unlawful non-

---

[7] See the 2014 RRT Decision at SCB 244 [43]-[46]; FCAFC Decision at SCB 384 [68]-[70] (Flick J), 313 [121], [124] (Wigney J); see also the 2018 Delegate Decision at SCB 465.

[8] See RSC [75], [77], [78.1]; 2014 RRT Decision at SCB 245 [45]-[46]; FCC Decision at SCB 287-288 [40], 295 [60]; Identity Progress Report dated 11 February 2015 (**2015 Report**) at SCB 307; Identity Assessment Report dated 11 January 2017 with addendum dated 27 November 2017 (**2017 Report**) at SCB 439; Updated investigation report dated 21 September 2018 (**Updated Report**) at SCB 502 [35].

[9] See RSC [77]; 2014 RRT Decision at SCB 245 [45]-[46]; 2015 Report at SCB 310; 2017 Report at SCB 439.

[10] SCB 507 [53]; cf SCB 508 [56], 487.

[11] 2018 Delegate Decision at SCB 467.

[12] (2012) 251 CLR 1 (***M47/2012***) at [148] (Gummow J), [524] (Bell J).

[13] *Coleman v Power* (2004) 220 CLR 1 at [79] (McHugh J).

[14] (2004) 219 CLR 562 (***Al-Kateb***).

citizen even in circumstances where his removal from Australia was not reasonably practicable in the foreseeable future.[15] But that finding necessarily contained two critical parameters, reflecting the issues between the parties: (i) that result followed from the provisions *construed in the context of the statute as it then stood*; and (ii) that result responded to the *particular factual finding* made by von Doussa J in the proceedings below: that, although the "possibility of removal in the future remained",[16] there was "no real likelihood or prospect of removal of the appellant in the reasonably foreseeable future".[17] The majority's constitutional holdings proceeded on the same footing.[18] If the statutory or factual parameters underpinning the decision in *Al-Kateb* are absent, that decision will not govern this case, and this Court can approach the issues afresh.

16. The case law since *Al-Kateb* has reaffirmed and, if anything, expansively restated the core constitutional holding in *Chu Kheng Lim v Minister for Immigration*.[19] A majority of this Court has since held, not only that any custodial *detention* of aliens authorised by statute must be reasonably capable of being seen as necessary for (*inter alia*) the purposes of deportation, but that the *period* of that detention must be "limited to the time necessarily taken in administrative processes directed to the limited purposes identified".[20] "What begins as lawful custody under a valid statutory provision can cease to be so".[21] That principle assumes particular significance in circumstances where the plaintiff has been restrained in the Commonwealth's custody for nearly 9 years – many years longer than Mr Al-Kateb. Further, the Court has continually reiterated that the principle of legality, an aspect of the rule of law, renders it "highly improbable that Parliament would act to depart from fundamental rights or principles without expressing itself with 'irresistible clearness'"[22] – and, critically, requires the selection of an available statutory construction

---

[15] *Al-Kateb* at [33]-[35] (McHugh J), [226]-[232], [241] (Hayne J), [295]-[301] (Callinan J), [303] (Heydon J); *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 (***M76***) at [174] (Kiefel and Keane JJ); see also at [124] (Hayne J), [142] (Crennan, Bell and Gageler JJ).

[16] *Al-Kateb* at [105] (Gummow J); see also at [18] (Gleeson CJ), [230] (Hayne J), [295] (Callinan J).

[17] *Al-Kateb* at [2] (Gleeson CJ), [31], [33] (McHugh J), [105] (Gummow J), [145] (Kirby J), [231] (Hayne J), [278], [299] (Callinan J), [303] [Heydon J).

[18] See *Al-Kateb* at [31] (McHugh J), [197]-[198] (Hayne J), [290] (Callinan J).

[19] (1992) 176 CLR 1 (***Lim***) at 33 (Brennan, Deane and Dawson JJ), Mason CJ agreeing.

[20] *M76* at [138]-[139] (Crennan, Bell and Gageler JJ); *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 (***S4***) at [26], [29] (per curiam); *Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582 (***M96A***) at [21] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).

[21] *M76* at [139] (Crennan, Bell and Gageler J).

[22] *Australian Crime Commission v Stoddart* (2011) 244 CLR 554 at [182] (Crennan, Kiefel and Bell JJ); *NAAJA v Northern Territory* (2015) 256 CLR 569 (***NAAJA***) at [11] (French CJ, Kiefel and Bell JJ); see also *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [17] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

that involves the least interference with the liberty of the subject.[23] These developments can inform the question whether *Al-Kateb* is distinguishable on the ground that different facts, or different features of the statutory scheme, are material even if they might not previously have been so regarded. If necessary to decide, these matters also go to the question of whether *Al-Kateb* should be re-opened and overruled.

17. Against that backdrop, the plaintiff's case reduces to the following propositions.

18. *First*: the facts here are distinguishable from *Al-Kateb*. There is no real possibility, prospect or likelihood that the plaintiff will be removed from Australia during the course of his natural life. These circumstances raise the question of whether the consequences approved by the *Al-Kateb* majority hold in a distinct and more extreme case, going beyond the factual bounds that previously confronted the Court: a situation where removal is not likely *ever* to be reasonably practicable. The correct answer is no. The plaintiff's continuing detention in that context is not authorised by the statute.

19. *Second*, and in the alternative: the majority's reasoning in *Al-Kateb* no longer governs the construction of the Act as it now stands, given two key amendments subsequently made to the statutory regime. Division 7 Subdiv B now provides for non-custodial immigration detention in the form of non-delegable discretionary "residence determinations" by the Minister, which have the effect that an unlawful non-citizen may be in the community residing at a specified address but still in "immigration detention" in accordance with ss 189 and 196 of the Act. Further, there is now a significantly expanded discretionary power conferred upon the Minister (in s 195A) to grant any detainee in immigration detention any visa (whether or not the subject of an application). This is a materially different scheme of detention from the limited discretionary visa granting powers available to the Minister at the time of *Al-Kateb* (being ss 351 and 417). In those circumstances – even assuming the correctness of that decision – does the intractability of language found by the *Al-Kateb* majority to authorise mandatory and indefinite custodial detention still pervade the statutory regime? The correct answer is no. The present scheme should be construed so as not to authorise the plaintiff's present custodial detention.

20. *Third*, and in the further alternative: *Al-Kateb* was wrongly decided. To the extent necessary, leave should be granted to re-open that decision, and it should be overruled. Relying on *Lim*,[24] the plaintiff contends that his present detention is not reasonably

---

[23] *NAAJA* at [11] (French CJ, Kiefel and Bell JJ).

[24] At 33 (Brennan, Deane and Dawson JJ); see also at 53 (Gaudron J), 65-66 (McHugh J).

capable of being seen as necessary for the purposes of his deportation in circumstances where: the defendants acknowledge he cannot be removed in the foreseeable future (RSC [76]-[77]); no line of enquiry is currently identifiable that might give rise to the possibility of confirming the plaintiff's identity (and thereby perhaps removal) in the future (RSC [76]); and these facts and other material before the Court establish that there is no real possibility, prospect or likelihood of the plaintiff being removed from Australia (see [14] above).

21. To the extent that ss 189 and 196 purport to authorise the plaintiff's continued detention, they are invalid and should be read down so as to suspend the requirement that he be detained until such time as his removal is "reasonably practicable". Conditions imposing reasonable restraints on the plaintiff, so as to ensure his availability to be removed if such removal subsequently becomes reasonably practicable, should instead be imposed.[25]

Sections 189, 196 and 198 of the Act

22. At all relevant times, s 189(1) of the Act has required an officer of the Commonwealth to "detain" any person in the migration zone (other than an excised offshore place) who he or she knows or reasonably suspects is an unlawful non-citizen. "Detain" in this context means to take into or keep in "immigration detention", relevantly defined as being "in the company of, and restrained by", an officer, or being "held by, or on behalf of", an officer in a detention centre or other prescribed place: s 5(1). Section 196(1) provides that an unlawful non-citizen detained under s 189 must be "kept in immigration detention until" (*inter alia*) he or she is removed from Australia under ss 198 or 199, deported under s 200 or granted a visa.

23. As will be seen, important qualifications on the operation of ss 189, 196(1) and relevant definitions in s 5(1) as described above are now provided by ss 197AB-197AC and 195A.

24. Section 198 relevantly provides that an officer must remove as soon as practicable an unlawful non-citizen who: (i) asks the Minister in writing to be so removed (s 198(1)); or (ii) is a detainee, made a valid visa application which either was refused and finally determined or could not be granted, and has not made another valid visa application (s 198(6)).

25. Detention under ss 189 and 196 is only lawful for "one of three purposes: the purpose of removal from Australia; the purpose of receiving, investigating and determining an

---

[25] The availability of relief on conditions to this effect was recognised in *Al-Kateb* at [28] (Gleeson CJ, with whom Gummow relevantly agreed at [142]) and in *M47/2012* at [108], [149] (Gummow J), [534] (Bell J).

application for a visa permitting the alien to enter and remain in Australia; or [...] the purpose of determining whether to permit a valid application for a visa".[26]

First argument: Al-Kateb is factually distinguishable

26. In contrast to *Al-Kateb*, the circumstances here give rise to an inference that there is no "real likelihood",[27] or real possibility or prospect, that the plaintiff will be removed from Australia *at any time* during his natural life (see [14] above). As already explained, the decision in *Al-Kateb* was limited to the consideration of the operation and validity of ss 189, 196 and 198 in circumstances of a factual finding that "there was no real likelihood or prospect of removal of the appellant *in the reasonably foreseeable future*" (emphasis added).[28] Accordingly, the plaintiff's case raises a materially different question: in this, more extreme, scenario, is his detention validly authorised by the statute?

27. The defendants accept that "in the absence of new information, [they] will likely remain unsatisfied as to the plaintiff's identity" (RSC at [76]). The plaintiff contends he has no knowledge as to his parentage or family (RSC at [13]). The Minister has already undertaken exhaustive enquiries (including through fingerprint checks and other enquiries with Algeria, Belgium, Canada, Denmark, Finland, France, Germany, Iceland, Italy, Lebanon, Morocco, the Netherlands, New Zealand, Norway, Spain, Sweden, Tunisia, the United Kingdom and the United States of America) over a period of almost 9 years.[29] Without corroborative material substantiating the plaintiff's identity, there is no real possibility, prospect or likelihood of identifying any country to which the plaintiff could be returned. And there is no real possibility, prospect or likelihood of any new information coming to light.

28. The plaintiff's statelessness here is of a different nature from that in *Al-Kateb*. There, the fact of an identifiable country of return provided the possibility (in the event of political changes affecting that country) of return.[30] Here, the plaintiff has no historical or familial connection on which to found any real possibility, prospect or likelihood of return. Further:

    28.1. the plaintiff has no claims under the Refugee Convention, and associated agencies such as the United Nations High Commissioner for Refugees cannot be of assistance;

---

[26] *S4* at [26] (per curiam); *M96A* at [22] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).
[27] The phrase "real likelihood" is used in s 196(5), albeit in a different context.
[28] *Al-Kateb* at [33]-[35] (McHugh J), [226]-[232], [241] (Hayne J), [295]-[301] (Callinan J), [303] (Heydon J).
[29] RSC [74.6].
[30] See *Al-Kateb* at [230] (Hayne J).

28.2. the plaintiff has no identifiable family that could provide the plaintiff with an avenue for entry to a third country; and

28.3. the practical impediment to the processing of any visa application made by the plaintiff in Australia (being his inability to demonstrate his identity to the defendants' satisfaction) will equally affect his ability to enter any third country.

29. In the context of the plaintiff's history, his extended and continuing time in detention in Australia is likely to have an adverse effect on such prospects.

30. Finally, the length of time that the plaintiff has been detained in itself provides a strong factual inference that there is therefore no "reasonable future prospect" (to adopt the language of Kiefel and Keane JJ in *M76* at [161]) of the plaintiff being removed from Australia over his lifetime.

31. The plaintiff is not entitled to the grant of a visa, and otherwise does not meet (and is not capable of meeting) any of the other conditions prescribed in section 196(1) for the termination of his detention. He cannot compel the Minister to issue a residence determination, or a s 195A visa, that would permit his release from custody on certain conditions (see [36]-[43] below). The defendants admit that the plaintiff's continuing detention is no longer for the purpose of assessment for entry into the Australian community.[31] Instead, the defendants plead that the plaintiff is presently detained "for the purpose of removal from Australia as soon as that becomes reasonably practicable".[32]

32. Because there is no "real likelihood" or "reasonable future prospect" of the plaintiff being removed from Australia, his detention can no longer properly be regarded as for the purposes of removal. The authority conferred under ss 189, 196 and 198 is spent. Further, because there is no "real likelihood" of the plaintiff being removed from Australia, the duration of his detention is not "capable of being determined at any time, and from time to time."[33] As his removal from Australia is the only basis on which his detention under ss 189 and 196 can come to an end, it must be capable of occurring.[34] Otherwise, no objectively ascertainable criteria exist by which the length of his detention can be determined.[35]

33. For these reasons, ss 189, 196 and 198 do not authorise the plaintiff's present detention.

---

[31] Defence [51], relevantly admitting the allegation in [51] of the Statement of Claim filed 19 July 2018.
[32] Defence [50.1.3].
[33] See *M96A* at [29], [31] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).
[34] *S4* at [33]-[34] (per curiam).
[35] Without such criteria, the detention becomes impermissibly arbitrary: see *S4* at [29] (per curiam) and *M76* at [139] (Crennan, Bell and Gageler JJ). See also [65] below.

Second argument: Al-Kateb does not govern the current legislative framework

34. In *Al-Kateb*, central to the majority's conclusion that s 189, 196 and 198 authorised the appellant's detention was its conclusion that the statutory language was "intractable"[36] and "unambiguous"[37] in *mandating* the continued detention of unlawful non-citizens until removal, deportation or the grant of a visa. In Hayne J's words, the period of detention under s 196 was "fixed by reference to the occurrence of any of [those] three specified events" – and until one of those events occurs, "[d]etention must continue".[38] Justice Hayne (McHugh and Heydon JJ apparently agreeing) distinguished this from the "discretionary power to detain" in foreign cases including *R v Governor of Durham Prison; Ex parte Hardial Singh.*[39] Relatedly, Hayne J considered that there was no "statutory or other basis" for making an order "releasing a non-citizen from detention but imposing conditions ... such as conditions requiring the non-citizen to report to authorities periodically or to live in a particular place".[40] Similar reasoning concerning the "exhaustive" nature of the regime created by ss 189, 196 and 198 later assumed prominence in Heydon J's judgment in *M47/2012*, his Honour stating: "[t]he plaintiff's argument that some unlawful non-citizens cannot lawfully be detained or removed would leave a hole in the statutory scheme".[41]

35. Critically, however, two amendments effected by the *Migration Amendment (Detention Arrangements) Act 2005* (Cth) (**2005 Act**), post-dating *Al-Kateb*, significantly expanded the circumstances in which unlawful-non-citizens may be released from custody – to the point that the previously "mandatory" nature of s 196(1)'s command to keep such persons in "immigration detention" as then defined (see [22]-[23] above) has materially changed. The statutory backdrop provided by Div 7 Subdiv B and s 195A renders inaccurate a key premise for the *Al-Kateb* majority's construction. It is thus appropriate for this Court to conduct the interpretive exercise afresh, by reference to the Act as it now stands, in the context of the plaintiff's present detention.

36. ***Residence determinations:*** Div 7 Subdiv B, which applies to any person required or permitted by s 189 to be detained or who is in detention under that provision (s 197AA), permits the Minister to determine (if he or she thinks it in the public interest to do so) that

---

[36] *Al-Kateb* at [241] (Hayne J, Heydon J agreeing at [303]).
[37] *Al-Kateb* at [35] (McHugh J), [298] (Callinan J).
[38] *Al-Kateb* at [226] (Hayne J); see also at [33] (McHugh J) and [303] (Heydon J).
[39] [1984] 1 WLR 704 (***Hardial Singh***). See *Al-Kateb* at [240] (Hayne J), [33] (McHugh J), [303] (Heydon J).
[40] *Al-Kateb* at [242] (Hayne J).
[41] *M47/2012* at [269] (Heydon J). See similarly *M76* at [189] (Kiefel and Keane JJ).

such a person is "*to reside* at a specified place *instead of being detained* at a place covered by the definition of 'immigration detention' in s 5(1)" and to specify conditions with which the person must comply (s 197AB, emphasis added). The effect of such a determination is that the Act applies to the person "*as if* the person were being kept in immigration detention" at the specified place "in accordance with s 189" (s 197AC(1), emphasis added). The 2005 Act's new notes to the definitions of "detain", "detainee" and "immigration detention" in s 5(1) acknowledge that result, providing that the definitions "extend ... to persons covered by residence determinations". Similarly, the new note to s 189 refers back to Subdiv B, "clarify[ing] that section 189 is not an exhaustive statement of the powers relating to how a person is required or permitted to be detained under the Act".[42]

37. Importantly, this deeming device does not change the practical and legal reality that a person subject to a residence determination is free from the core characteristics of the form of detention that is *prima facie* the preserve of the judiciary, that is the subject of a writ seeking habeas corpus,[43] and that most sharply raises the concern for "personal liberty"[44] manifested by the principle of legality: "involuntary detention ... *in custody by the State*",[45] such as "immigration detention" as previously defined in s 5(1) of the Act. So much was acknowledged in the 2005 EM, which stated that, whilst there was no limit on the types of conditions that could be placed on a residence determination, "detainees would be free to move about in the community without being accompanied or restrained by an officer under the Act".[46] The effect of these provisions is to accord the Minister a very wide statutory discretion, bounded only by his or her view of the public interest, to release an unlawful non-citizen from involuntary restraint in custody. That species of conditional release is not far removed from the orders favoured by the minority in *Al-Kateb*.[47]

38. Thus, although ss 189 and 196 require "detention", it is no longer accurate to state that they *mandate* the continued restraint *in the State's custody* of unlawful non-citizens, or

---

[42] Explanatory Memorandum to the Migration Amendment (Detention Arrangements) Bill 2005 (Cth) (**2005 EM**) at [17].

[43] See *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 (***M68***) at [155]-[159], [165] (Gageler J).

[44] See *M47/2012* at [120] (Gummow J); *Al-Kateb* at [19] (Gleeson CJ).

[45] *Lim* at 27 (Brennan, Deane and Dawson JJ); *M76* at [138] (Crennan, Bell and Gageler J); *M68* at [30] (French CJ, Kiefel and Nettle JJ), [98] (Bell J), [238] (Keane J); see also *Thomas v Mowbray* (2007) 233 CLR 307 at [116] (Gummow and Crennan JJ); *South Australia v Totani* (2010) 42 CLR 1 at [383] (Heydon J).

[46] 2005 EM at [7].

[47] *Al-Kateb* at [26]-[29] (Gleeson CJ), [141] (Gummow J), [194] (Kirby J).

that the statutory scheme affords no facility for releasing such a person from restraint in custody on condition that (for example) the person report to authorities. For the purposes of understanding whether any obligation in ss 189 and 196 to restrain in custody is truly unyielding, the residence determination provisions should not be characterised as mere "statutory exceptions", "limited to their own specific fields of operation".[48] They inform the character of the primary rule itself – not least by transforming the very nature of "immigration detention" as defined in s 5(1).

39. Sections 189 and 196 read with the broad dispensing power in s 197AB are not significantly different in structure from the discretionary regime considered in *Hardial Singh*,[49] which relevantly provided that a person against whom a deportation order was in force could be detained and, if already detained when the order was made, "shall continue to be detained unless the Secretary of State directs otherwise". Likewise, they are not far removed from the scheme considered by the US Supreme Court in *Zadvydas v Davis*,[50] which mandated an initial 90-day detention period and provided that the Government "may" continue to detain an alien after that time or release the alien under supervision.

40. ***Visa grant power:*** Section 195A of the Act now empowers the Minister to grant a visa to *any* person detained under s 189, if the Minister thinks that it is in the public interest to do so. This power is significantly broader than the discretions available to the Minister at the time of *Al-Kateb* (ss 351 and 417) – and, much like s 197AB, its particular features render it, in its practical and legal effect, a broad discretionary power to dispense with non-custodial detention. First, the power is specific to that class of non-citizens who are in detention under s 189 (s 195A(1)), such that the power to grant a visa is coterminous with the power (and duty) to detain. By contrast, ss 351 and 417 (empowering the Minister to substitute, for decisions made by the then Migration Review Tribunal and RRT, decisions "more favourable" to a visa applicant if it was in the public interest to do so) were not directed towards immigration detainees and, indeed, excluded whole categories of such persons from their reach: for example, those who were barred from applying for visas[51] and therefore could not seek the Tribunal's review of any refusal decision.

---

[48] Cf *M47/2012* at [336] (Heydon J).

[49] See at 704 fn 1.

[50] 533 US 678 at 682-683 (2001). The plaintiff submits that these decisions, and *Tan Te Lam v Superintendent of Tai A Chan Detention Centre* [1997] AC 97, are relevant to the power conferred under the present statutory regime: cf *Al-Kateb* at [3] (Gleeson CJ), [118] (Gummow J), [159]-[161] (Kirby J). See also [55] below.

[51] See s 46A, which precludes "unauthorised maritime arrivals" (at the time of *Al-Kateb*, "offshore entry persons") from applying for visas.

41. Secondly, the power has a wider field of operation than ss 351 and 417: by s 195A(3), "the Minister is not bound by the usual requirements that apply to the grant of visas"[52] under Pt 2 Div 3 Pts AA, AC and AF. In effect, s 195A is a further provision conferring upon the Minister, where he or she considers it in the public interest to do so, an express power to release a detainee under such conditions as the Minister sees fit.

42. ***Conclusions:*** For present purposes, these amendments have two key consequences. First, when ss 189, 196 and 198 are read in the context of Subdiv B and s 195A, the proposition that they still "intractably" require detention by way of restraint in custody pending (*inter alia*) removal can no longer be supported. In substance, the requirement in s 196 to keep a person in traditional forms of immigration detention is terminable at the Minister's election to release the person from custody on a residence determination or a s 195A visa. As a consequence of this material change in the scheme, the *Al-Kateb* majority's reasoning on construction no longer has continuing application to the Act as it now stands. Whether Parliament intended one or more of these provisions to "have the function of overturning *Al-Kateb*",[53] or alternatively proceeded on an assumption that that decision "stands as an accurate interpretation of the legislative will",[54] is, with respect, beside the point. The legislative "intention" pursued through the constructional task is one "indicative of the constitutional relationship between the arms of government respecting the making, interpretation and application of laws" – one in respect of which the principle of legality "provides strongest guidance".[55] And the "intractability" or otherwise of the law's text is a matter that should be assessed by reference to the text itself, read in its context.

43. Secondly, these new discretionary powers are not of a kind to suggest that the leading provisions *are* in fact directed towards indefinite administrative detention. Given the absence of objective criteria for their exercise (ss 197AB(1), 195A(2)) and the inability of a detained person to compel the Minister to consider exercising them (ss 197AE, 195A(4)), the nature of the constraint on the continuation of detention in custody under s 196 would not readily lead this Court to conclude that the latter detention may proceed regardless of whether the permitted purpose (relevantly, removal) is capable of

---

[52] 2005 EM at [21].
[53] *M47/2012* at [334] (Heydon J).
[54] *M76* at [197] (Kiefel and Keane JJ).
[55] *M47/2012* at [118]-[119] (Gummow J, relevantly dissenting in the result).

fulfilment.[56] Rather, these provisions perform a different function: their very existence as non-custodial options available to the Minister diminishes the extent to which the statutory scheme can be said to pursue, rigidly and single-mindedly, a mandate of immigration detention in custody. Whilst detainees cannot compel the Minister to make a residence determination or to grant a visa, that does not mean that continuation of the custodial detention in a given factual setting, despite those non-custodial options, is lawful.

44. ***Statutory construction revisited***: Because the reasoning of the majority in *Al-Kateb* does not govern the current statutory regime, the construction and operation of ss 189, 196 and 198 in the plaintiff's case must be considered afresh – and, in particular, with an eye to the Court's constitutional holdings in *Lim*.[57] As this Court summarized in *S4*:[58] provisions of the Act authorising and requiring mandatory detention of certain aliens are valid if the detention so authorised and required is limited to what is reasonably capable of being seen as necessary for (*inter alia*) the purposes of deportation.

45. There is no real possibility, prospect or likelihood of the plaintiff being removed from Australia. There is, at its highest, only a theoretical possibility of the plaintiff's removal in the course of his lifetime, best characterized as a mere subjective opinion, intention or hope on the Minister's part. The plaintiff's continued detention is not reasonably capable of being seen as necessary for the purposes of his removal from Australia. The question therefore arises not as to whether the plaintiff has a statutory entitlement to be released into the community (he does not), but whether the defendants are lawfully empowered to continue his present detention in circumstances where the premise on which the detention rests (the capability of his removal) has been falsified.

46. On their face, ss 189, 196 and 198 might plausibly bear an interpretation allowing the indefinite detention of the plaintiff. But that construction is neither "intractable" nor "unambiguous". It has not squarely been confronted by the Parliament. By operation of the principle of legality, an alternative constructional choice should be preferred: that the plaintiff's current detention, in circumstances where removal is not a practical possibility, must be suspended (see [54]-[55] below).

---

[56] Cf *Al-Kateb* at [22] (Gleeson CJ, hypothesising about a power to detain "coupled with a discretion enabling its operation to be related to the circumstances of individual cases, including, in particular, danger to the community and likelihood of absconding").

[57] At 33 (Brennan, Deane and Dawson JJ); see also at 53 (Gaudron J), 65-66 (McHugh J).

[58] At [26] (per curiam).

47. Further, for the reasons given at [56]-[65] below, ss 189 and 196 would have an unconstitutional operation if they were construed as authorising the present detention of the plaintiff where there is no real possibility, prospect or likelihood of his removal from Australia. The provisions should be read down, in accordance with s 15A of the *Acts Interpretation Act 1901* (Cth), to avoid inconsistency with Ch III of the Constitution. That is best achieved by construing the words "unlawful non-citizen" in ss 189 and 196 as excluding a person in respect of whom there is no real possibility, prospect or likelihood of removal. When so construed, the relevant provisions have an independent and severable operation upon the subjects within power, which is unaffected by the process of reading down to avoid the excess of power.[59]

Third argument: Al-Kateb was wrongly decided

48. If (contrary to the above submissions), the Court concludes that the majority's reasoning in *Al-Kateb* governs the present case, the plaintiff respectfully submits that, to the extent necessary, leave should be granted to re-open *Al-Kateb*. The factors relevant to the overruling of an earlier decision in this Court[60] support the conclusion that the majority's reasoning should not be followed or should be overruled.

49. *First, Al-Kateb* was not the result of a line of cases ventilating and establishing the meaning and effect of ss 189 and 196 of the Act. As Bell J observed in *M47/2012* (at [525]-[526]), prior to *Al-Kateb*, the Full Court of the Federal Court had concluded that the power to detain under s 196(1)(a) was subject to implied limitation in circumstances in which there is no real likelihood of removal in the reasonably foreseeable future.[61] This Court, by a slim majority, rejected that interpretation in *Al-Kateb*. Therefore it is not correct to characterise *Al-Kateb* as a decision "rest[ing] upon a principle carefully worked out in a significant succession of cases."[62]

50. *Second,* the relevant justification for not following an earlier decision of the Court on the construction of a statute, particularly a decision reached by a majority, is that the earlier decision appears to have erred in a significant respect in the applicable principles of statutory interpretation.[63] For the reasons given in *M47/2012* by Gummow J (at [118]-

---

[59] See *Victoria v Commonwealth* (1996) 187 CLR 416 at 502-503 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

[60] *Queensland v Commonwealth* (1977) 139 CLR 585 at 620-631; *Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49 at 55-58; *John v Commissioner of Taxation* (1989) 166 CLR 417 (***John***) at 438-440; *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [65]-[71].

[61] *Minister for Immigration and Multicultural and Indigenous Affairs v Al-Masri* (2003) 126 FCR 54.

[62] *M47/2012* at [526] (Bell J), referring to *John* at 438.

[63] *John* at 439-440.

[120]) and by Bell J (at [528]-[533]), the majority reasons in *Al-Kateb* suffer from such an error, namely a failure to consider and apply the principle of legality as expounded by Gleeson CJ in his dissenting reasons in *Al-Kateb*.[64]

51. *Third, Al-Kateb* is not part of a definite stream of authorities. The critical part of the reasoning of the majority has not been endorsed or applied by a majority in any subsequent decision of this Court. Only a minority of the Court has subsequently decided that *Al-Kateb* should not be re-opened.[65] The majority reasoning in *Al-Kateb* can be overruled or not followed without affecting an established line of cases.

52. *Fourth,* as Bell J emphasised in *M47/2012* (at [526]),[66] to observe that *Al-Kateb* has been acted upon by those administering the Act "is not to identify some aspect of those circumstances that militates against reconsideration".

53. *Fifth, Al-Kateb* deals with an issue of statutory interpretation, and a constitutional issue, of public importance with potentially far-reaching consequences adverse to personal liberty. The Court may more readily reconsider constitutional issues than questions of construction.[67] For the reasons developed below, the majority approach in *Al-Kateb* is wrong in principle and cannot be supported. This Court should indicate that it will not follow that reasoning.

i. The minority reasoning in Al-Kateb on the proper construction of ss 189, 196 and 198 is correct

54. In *M47/2012*, Bell J said (at [529]):

> The statutory scheme here under consideration is one said to admit of mandatory administrative detention for an indefinite period that may extend to the balance of the detainee's life. Putting to one side the constitutional validity of such a scheme, the application of the principle of legality requires that the legislature make plain that it has addressed that consequence and that it is the intended consequence.

55. For the reasons variously given in *Al-Kateb* by Gleeson CJ (at [12]-[22]), by Gummow J (at [121]-[125]) and by Kirby J (at [193]), and those given in *M47/2012* by Gummow J (at [114]-[120], [145]-[148]) and by Bell J (at [528]-[534]): ss 189, 196 and 198, upon their proper construction, do not authorise or mandate the plaintiff's present detention in

---

[64] *Al-Kateb* at [19]-[21] (Gleeson CJ),

[65] *M76* at [125], [128] (Hayne J), [199] (Kiefel and Keane JJ). French CJ (at [4] and [31]) and Crennan, Bell and Gageler JJ (at [145] and [148]-[149]) declined the invitation in that case to reconsider the correctness of *Al-Kateb*.

[66] Referring to *John* at 438-439.

[67] *Australian Agricultural Co Ltd v Federated Engine-Drivers* (1913) 17 CLR 361 at 278 (Isaacs J); *Queensland v Commonwealth* (1977) 139 CLR 585 at 599 (Gibbs J).

circumstances where there is now no real possibility, prospect or likelihood of his removal from Australia. In particular:

55.1. The word "until" in s 196(1) does not mean "unless"; its meaning is constrained by the ability and intent to give effect to the purpose of removal.[68]

55.2. The period of detention in custody under s 196(1) is limited to the period during which removal under s 198 is reasonably practicable, and the power to detain is suspended when removal is not reasonably practicable.[69]

55.3. When removal is not reasonably practicable, the assumption upon which ss 196 and 198 operate is falsified.[70]

55.4. This construction gives effect to the temporal elements in the text of ss 196 and 198.[71]

55.5. The majority's reasoning in *Al-Kateb* is weakened by the Court's subsequent analysis of the temporal limits on the detention power (see [32] above), and by insufficient consideration of the principle of legality, which is engaged due to the impingement on personal liberty.[72] Where there is a constructional choice, the principle of legality favours the construction that the power to detain in custody is suspended when removal ceases to be reasonable practicable, for as long as that situation continues, rather than that the detainee spends the remainder of his or her life in detention.[73]

ii. The minority reasoning in Al-Kateb as to the invalidity of ss 189, 196 and 198, in the event they purport to authorise indefinite detention, is correct

56. If (contrary to the above submissions), ss 189 and 196 authorise the plaintiff's present detention, they are invalid to that extent as they are inconsistent with the exclusive vesting of the judicial power of the Commonwealth in the courts designated by Ch III. Thus, in their continuing operation upon the plaintiff, the provisions are beyond Commonwealth legislative power.

---

[68] *M47/2012* at [114] (Gummow J); *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 555-556 (Latham CJ), 581 (Dixon J), 586-587 (Williams J).

[69] *Al-Kateb* at [19]-[22] (Gleeson CJ), [122]-[125] (Gummow J); *M47/2012* at [110]-[120], [145]-[149] (Gummow J), [516]-[534] (Bell J).

[70] *Al-Kateb* at [17]-[22] (Gleeson CJ), [118]-[125] (Gummow J), [193] (Kirby J).

[71] *Al-Kateb* at [121]-[122] (Gummow J).

[72] See, eg, *Al-Kateb* at [137] (Gummow J).

[73] *Al-Kateb* at [19]-[21] (Gleeson CJ), [117] (Gummow J) and *M47/2012* at [117]-[119] (Gummow J), [532] (Bell J), referring to *Coco v The Queen* (1994) 179 CLR 427 at 437, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [30] and *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 at [11].

57. The power of the Parliament to make laws with respect to naturalisation and aliens (s 51(xix)) or immigration and emigration (s 51(xxvii) is expressly made "subject to this Constitution", including Ch III. Exceptional cases aside, the involuntary detention of a person in custody by the Executive is permissible only as a consequential step in the adjudication of criminal guilt for past acts, and is part of the judicial power of the Commonwealth entrusted exclusively to Ch III courts.[74] Under the exception to that principle recognised in *Lim*, an alien may be detained for the limited purposes of determining entry, permission to remain and removal, but the detention must be restricted to what is reasonably capable of being seen as necessary for such purposes.[75]

10 58. The continued viability of the purpose of deportation or expulsion cannot be treated by the legislature as a matter purely for the opinion of the Executive. It cannot be for the Executive to determine the placing from time to time of the boundary line which marks off a category of deprivation of liberty from the reach of Ch III; the location of that boundary line is itself a question arising under the Constitution or involving its interpretation.[76]

59. In that respect, for the reasons given by Gummow J in *Al-Kateb* (at [135]-[138]),[77] the distinction between a "punitive" and "non-punitive" purpose should not be accepted as the criterion upon which the Ch III limitations on administrative detention are enlivened.

60. The majority's reasoning in *Al-Kateb* was materially influenced by propositions which
20 have subsequently been rejected by the Court. Three members of the majority in *Al-Kateb*[78] identified, and a fourth member tentatively supported,[79] an additional permissible purpose of detention (segregation from, or preventing entry to, the Australian community). That is inconsistent with the subsequent unanimous holding in *S4* (at [26]) and the decision of six Justices in *M96A*,[80] which confine the permissible purposes of detention to only three purposes: removal; receiving, investigating and determining a visa

---

[74] *Lim* at 10 (Mason CJ), 27, 28-29 (Brennan, Deane and Dawson JJ); *Al-Kateb* at [126]-[133] (Gummow J); *Fardon v A-G (Qld)* (2004) 223 CLR 575 (***Fardon***) at [76]-[81] (Gummow J); *M47/2012* at [101]-[105] (Gummow J); *Falzon v Minister for Immigration and Border Protection* (2018) 351 ALR 61 (***Falzon***) at [15]-[16] (Kiefel CJ, Bell, Keane and Edelman JJ).

[75] *Lim* at 33 (Brennan, Deane and Dawson JJ), 53 (Gaudron J), 65-66 (McHugh J); *M76* at [138] (Crennan, Bell and Gageler JJ); *S4* at [26], [34] (per curiam); *M68* at [98] (Bell J), [379]-[381], [386] (Gordon J); *M96A* at [21] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ), [44] (Gageler J); *Falzon* at [26]-[32], [39] (Kiefel CJ, Bell, Keane and Edelman JJ), [81]-[82] (Gageler and Gordon JJ, with whom Nettle J agreed).

[76] *Al-Kateb* at [88], [140] (Gummow J), referring to *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 and *A-G (WA) v Marquet* (2003) 217 CLR 545 at [66].

[77] See also *Fardon* at [80]-[82] (Gummow J), [196] (Hayne J).

[78] At [45], [48]-[49] (McHugh J), [255] (Hayne J, with whom Heydon J relevantly agreed at [303]).

[79] *Al-Kateb* at [289] (Callinan J).

[80] At [22] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).

application; or determining whether to permit such an application. Further, two members of the majority in *Al-Kateb*[81] expressed doubts as to the correctness of the constitutional holding in *Lim*[82] which restricted permissible detention to that which is "reasonably capable of being seen as necessary" for the identified purposes. However, that formulation has subsequently been accepted as correct, and applied, by the whole Court on no fewer than three occasions: in *S4*,[83] in *M96A*[84] and in *Falzon*.[85] It must now be treated as settled.

61. Finally, in *Re Woolley; Ex parte Applicants M276/2003*,[86] McHugh J, expressing himself as adopting the approach of Hayne J and Heydon J in *Al-Kateb*, concluded that *Lim* should no longer be followed insofar as it established that, subject to clear exceptions, the power to authorise detention in custody is necessarily and exclusively judicial. That, too, is contrary to more recent authority in this Court, which relevantly accords with the dictum in *Lim*.[87] Given that these significant elements of the majority's reasoning in *Al-Kateb* have been displaced by subsequent authority, that reasoning should no longer be followed.

62. If ss 189 and 196 authorise detention where removal is not, or has ceased to be, reasonably practicable, such detention does not have the necessary connection with the purpose of removal and cannot be said to be reasonably capable of being seen as necessary for removal.[88] Thus, the exception recognised in *Lim* is not satisfied and, in their operation upon the plaintiff, ss 189 and 196 contravene Ch III. The plaintiff is not susceptible under federal law to continued detention, outside any operation of the criminal law requiring that detention, where the prospects of removal to another country are so remote that continued detention cannot be for the purpose of removal.[89]

63. Further, the duration of executive detention in custody must be confined to that which is reasonably necessary to effectuate a purpose which is identified in the statute conferring the power to detain and which is capable of fulfilment. Relevantly here, the detention must be limited to such period of time as is reasonably capable of being seen as necessary for the completion of administrative processes directed to the limited purpose of removing

---

[81] At [253], [256] (Hayne J, with whom Heydon J relevantly agreed at [303]).
[82] At 33 (Brennan, Deane and Dawson JJ); see also at 53 (Gaudron J), 65-66 (McHugh J).
[83] At [26], [34] (per curiam).
[84] At [21] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ), [44] (Gageler J).
[85] At [26]-[32], [39] (Kiefel CJ, Bell, Keane and Edelman JJ), [81]-[82] (Gageler and Gordon JJ, with whom Nettle J agreed).
[86] (2004) 225 CLR 1 at [59] (McHugh J).
[87] *Falzon* at [15]-[17] (Kiefel CJ, Bell, Keane and Edelman JJ).
[88] *Al-Kateb* at [98], [128], [139]-[140] (Gummow J).
[89] *Al-Kateb* at [98] (Gummow J).

the plaintiff.[90] In addition, the detention's duration must be capable of objective determination by a court at any time and from time to time (see [32] above).[91]

64. In their continuing operation upon the plaintiff, ss 189 and 196 fail to conform to either of those constitutional imperatives. First, almost 9 years in detention exceeds the period of time which is reasonably capable of being seen as necessary for the purpose of completing the processes of denial of permission to enter and of removal.

65. Secondly, because removal from Australia has ceased to be a real possibility, prospect or likelihood, the plaintiff's detention in custody will only be brought to an end if the Minister exercises his non-compellable powers under ss 197AB or s 195A – which lie in the Minister's discretion, are not guided by any objective criteria and are not accompanied by any obligation to give reasons. Hence the duration of the plaintiff's detention has ceased to be capable of objective determination by a court. The practical effect of ss 189, 196 and 198 in this case is that there are no longer "objectively determinable criteria for [the plaintiff's] detention", and the length of his detention is "dependent upon the unconstrained, and unascertainable, opinion of the Executive".[92]

Part VI: Orders sought by the plaintiff

66. The Questions should be answered: **(1)** No. **(2)** If Question 1 is answered "No", then Question 2 should be answered: "Unnecessary to answer." If Question 1 is answered "Yes", then Question 2 should be answered: "Yes." **(3)** Orders should be made in the following terms: **(a)** A writ of mandamus be issued compelling the defendants to release the plaintiff from detention, or alternatively a final injunction be granted to that effect, on such conditions as may be determined by a single Justice; **(b)** alternatively to (a), a writ of habeas corpus be issued requiring the release of the plaintiff from detention, on such conditions as may be determined by a single Justice; **(c)** The defendants are to pay the plaintiff's costs of the proceedings.

67. Alternatively, if Questions 1 and 2 are both answered adversely to the plaintiff, it will be necessary for the claim pleaded by the plaintiff at [22]-[43] of the Statement of Claim filed 19 July 2018 (which the parties agree cannot be determined in this Court: RSC [81]) to be remitted for determination in the Federal Circuit Court.

---

[90] *M76* at [139]-[140] (Crennan, Bell and Gageler JJ); *S4* at [29] (per curiam); *CPCF v Minister for Immigration* (2015) 255 CLR 514 at [374], [381] (Gageler J); *M68* at [101] (Bell J), [184] (Gageler J); *M96A* at [21] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).

[91] *S4* at [29] (per curiam); *M68* at [184] (Gageler J); *M96A* at [29], [31] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).

[92] *M96A* at [31] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).

Part VII: Estimate of time for oral argument

68. The plaintiff estimates that he will require 2.5 hours inclusive of submissions in reply.

Dated: 2 January 2019

p.p.

R Merkel QC
Tel: (03) 9225 6394
ronmerkel@vicbar.com.au

L T Livingston
Tel: (02) 9151 2065
livingston@newchambers.com.au

I Chatterjee
Tel: (02) 8239 3266
ichatterjee@chambers.net.au

C G Winnett
Tel: (02) 8915 2673
cwinnett@sixthfloor.com.au