HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA P7/2024

PERTH REGISTRY

BETWEEN: **ASF17**

Appellant

and

COMMONWEALTH OF AUSTRALIA

Respondent

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APPELLANT'S OUTLINE OF ORAL ARGUMENT

17 APRIL 2024

Part I: FORM OF SUBMISSIONS

1. This outline of oral submissions is in a form suitable for publication on the internet.

Part II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

2. The key facts are at **AS [9]-[28]** (also **RS fn 2**). ASF17's visa application was finally determined on 16 January 2017: **Chronology**. It was then that the Cth's duty in s 198(6) arose. From that date, the only permissible purpose of ASF17's detention (unless, e.g., the Minister lifted the bar in s 48B and ASF17 then made a further application for a visa) was removal from Australia (noting that the Cth could have had him not deprived of liberty and still have pursued removal: see ss 73, 195A, 197AB; **AS [36]-[37]**). Assuming it demonstrated that it was not reasonably practicable to remove him whilst judicial review was occurring, judicial review came to an end on 3 August 2018: **Chronology**.

3. The issue before the primary judge was whether ss 189 and 196 had ceased to validly apply to ASF17 by the time of the hearing of his application for the writ of *habeas corpus*. The Cth conceded probable cause, thus accepting it bore the legal and evidentiary onus to show that the detention of ASF17 was lawful as at that time.

4. The key facts have never changed: **AR [2]-[3]**. The Cth led no evidence to suggest they might change at any foreseeable time—e.g., by the Cth addressing Iran's "roadblock": **AR [10]-[11]**. To the contrary, the evidence was that the Cth would continue with the approach it had pursued since mid-November 2018: **ABFM 17-18, [36], [39]** ([40] was ruled inadmissible); **126 ln 43—127 ln 26**; **128 lnn 22-30**; **133 lnn 6-16**; **134 lnn 10-24**; **136 lnn 42-45**; **137 lnn 15-26**. Mr Jones conceded there was nothing to suggest ASF17 would change his mind: **ABFM 141, lnn 5-7**; J [7]. This, in circumstances where nothing else could ever have disturbed the *status quo*: **AR [2]**.

5. The Cth had assessed ASF17's case as "intractable" since at least 31 August 2021: **ABFM 54**; **138 ln 35—140 ln 44**. There were many occasions of (at least some steps towards) consideration of the non-compellable powers (i.e., ss 48B, 195A, 197AB): Dec 2017; June 2018; April 2019; Sept 2019; Sept 2022; Sept 2023: **ABFM 44-45, 52, 54, 72, 115 [20], 121 [20]-[21], 143 lnn 5-19**; **RBFM 18, 22-23**. There was no evidence it was ASF17 "pursuing" requests for MIs: cf. J [117]. The requests were being made by Cth officers, because, under *Al-Kateb*, his case was seen as "intractable": **AS [65]**.

6. ASF17 was never under a statutory obligation to assist: **AS [53]**; *AZC20*, [64]; cf. J [8]. As well, s 198(6) imposes a duty to remove from Australia—not a duty limited to removal to a country selected for policy: **AS [26], [50], [64]**; **AR [1]**; cf. **ABFM 25**.

Assessing the purpose of detention (Grounds 1 and 2)

7. No person may be detained absent statutory authority or judicial mandate: *NZYQ*, [27]. The "default characterisation" is punitive. Thus, detention by the Executive is punitive, unless its purpose falls within one of the "exceptional" cases: *NZYQ*, [39], [40], [44].

8. Detention of an alien for the purpose of their removal is an exception only for so long as it is "reasonably capable of being seen as necessary" (an objective test): *Lim,* 27-28, 29-31, 33; *NZYQ*, [44], [46]. The Cth must show a real prospect of removal from Australia becoming practicable in the reasonably foreseeable future: *NZYQ*, [55]. A "mere un-foreclosed possibility" is insufficient: *NZYQ*, [61]; **AR [1]**.

9. Characterisation is a "means and ends" analysis: *NZYQ,* [44]; *Jones*, [43], [78], [154]-[155], [188]. Detaining on a possibility of a change of mind cannot be characterised as not punitive. The ends do not justify the means; this is including because the Act allows for the Executive not to detain an alien whilst their removal is being pursued: **AS [36]-[38], [40], [41], [44]**. More broadly, detention predicated on "hope" cannot be "reasonably capable of being seen as necessary": *Lim*, 33; *AZC20,* [64]; **AR [1]**; cf. **RS [29]**.

10. The Cth's primary argument was (see J [8]-[10]), and remains that:
    (i) it commenced seeking to discharge the duty imposed by s 198(6) in mid-November 2018; and
    (ii) there was in December 2023 (meaning, there must always have been: **AR [1]**) a real prospect of removal becoming practicable in the reasonably foreseeable future because it was in ASF17's power to be removed to Iran ("three-walled" detention).

11. This argument requires reading words into s 198(6) to the effect that:
    (i) Time for completion of the duty is suspended (i.e., left open-ended). Why? Because a detainee must assist the Cth in their removal (including when it will only consider removal to a particular country, thus making "practicability" depend on its choice).
    (ii) Time for completion is suspended for so long as the detainee declines to assist.

12. This argument fails because it cannot be reconciled with *AJL20*, [44]-[45], and because an asserted (i.e., no foothold in the statutory language) obligation to assist in discharge by the Cth of the duty in s 198 cannot determine characterisation of ss 189 and 196: **AR [6]-[9]** (regarding *Re Woolley* [71]-[80], [88]); cf. **RS [23]-[24]**. Nothing in *Plaintiff M47* supports the primary judge's finding of principle: **AS [31]-[33]**; cf. J [60].

Relevance of a person's "power" or "ability to choose" (Grounds 3 and 4)

13. Whether the constitutional limitation has been reached depends on a "prospective and

probabilistic" assessment of the facts, accounting for "real world difficulties": *NZYQ*, [40], [60]-[61]. Alternatively to [7]-[12] above, that fact-finding task allows consideration of the reasons why the detainee is not assisting, which, if for "good reasons", will support the finding that there is no real prospect of removal becoming practicable in the reasonably foreseeable future: *NZYQ*, [61]; *Sami*, [157]-[158]; **AS [54]-[58]**; cf. **RS [54]**.

14. There is no "power", no ability to exercise a "choice" to remove oneself from detention, if the only way is to "leap from the window", "to the ground at the risk of life or limb": *Burton*, 30. Genuine fear of being harmed in a particular country is a "good reason". The construct of "three-walled" detention is then not apt: *Lo Pak*, 228, 247-8, 250; *Ruddock v Taylor*, [64], [164]; *McFadzean*, [36], [42]-[49]; *VCCL*, [57]-[65]; *Ruddock v Vadarlis*, [79], [210]-[211]; cf. **RS [24]**.

15. If, in another case, the evidence should be that: (i) knowledge of the detainee's identity is needed before their removal from Australia to anywhere could occur; and (ii) the detainee is capable of assisting in that regard, a court's finding may well be that the constitutional limitation had not been reached. This is not such a case. See: *AZC20*, [64]-[65]; *NZYQ*, [16]; **AS [50], [54]-[58]**; cf. **RS [35]**.

Why ASF17 has not been removed from Australia

16. The Cth bore the onus of establishing the lawfulness of ASF17's detention: *NZYQ*, [59]. It never considered his removal to any country other than Iran. Even if ASF17 assisted by engaging with the Iranian authorities, the Cth did not establish Iran would necessarily accept him: **AR [10]-[11]**; **ABFM 146 ln 41—147 ln 45;** cf. **RS [24]**.

17. ASF17 is bisexual, expresses his sexuality by having sex with men, intercourse between men is illegal in Iran, attracting the death penalty: J [95], [126], [132]. He fears (present tense) harm by reason of his sexuality. That is a "good reason": by analogy, *S395*, [49], [82]; cf. J [118]. ASF17's case was mischaracterised: **AS [61]-[62]**; **AR [17]**; cf. J [130].

18. As to willingness to be removed anywhere else, the primary judge's adverse finding (J [115]-[116]) was bound up with the erroneous approach that also led to the finding that ASF17's "singular focus" was to secure his release into the Australian community: **AS [63]-[64]**. That he has endured many years in detention (whilst it was officers of the Cth that were pursuing possible MIs), supports both his fear being genuine, and the glaringly improbability of the primary judge's finding of a "singular focus".

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