HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 04 Apr 2024 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:	P7/2024
File Title:	ASF17 v. Commonwealth of Australia
Registry:	Perth
Document filed:	Form 27E - Reply
Filing party:	Applicant
Date filed:	04 Apr 2024

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA P7/2024

PERTH REGISTRY

BETWEEN: **ASF17**

Appellant

and

COMMONWEALTH OF AUSTRALIA

Respondent

10

APPELLANT'S REPLY

Part I: FORM OF SUBMISSIONS

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

Part II: ARGUMENT

The logical framework for consideration of all issues raised

2. The critical facts of this case have been fixed since August 2018. It is from that point in time that the analysis is to be carried out. With the issues so historically framed, and recalling that the respondent bore the legal and evidentiary onus, the respondent's contentions require this Court to accept that as of August 2018 and continuing, there was more than "a mere un-foreclosed possibility" that the appellant would change his mind and assist the respondent in the discharge of the removal duty (on an assumption that this was the only "roadblock").[1] This is in circumstances where: (i) the respondent chose to treat removal from Australia as synonymous with removal to Iran;[2] (ii) Iran acts in violation of international law;[3] and (iii) Iran has never been taken to task for that violation. Further, the respondent would have proved that the appellant would change his mind despite fearing harm because of his accepted bisexuality.

3. In assessing the reasonably foreseeable future as of August 2018, and all times thereafter, the answer is clear that there was never even "a mere un-foreclosed possibility" of his removal from Australia becoming practicable.

Assessing the purpose of the law

4. The respondent correctly accepts that the application of the principle in *Lim* is directed to a "single question of characterisation (whether the power is properly characterised as punitive)": **RS [24]**. But it errs in asserting, as though *quod erat demonstrandum,* that since the appellant's detention is stated by it to be for removal, it is not punitive: cf. **RS [24], [44]**.[4] Properly understood, characterisation is concerned with whether the detention power is "reasonably capable of being seen as necessary" for removal. If it is not, then its "default characterisation" is punitive.[5]

---

1 ***NZYQ*** *v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005, [61]; **AS [66]**.
2 See eg **ABFM 13**, [16]-[18], 25 [3.5].
3 See the proposed intervenor's submissions ("**IS**") at **[51]-[52]**.
4 See eg ***Re Woolley****; Ex parte Appellants M27G/2003* (2004) 225 CLR 1, [184] (Kirby J).
5 *NZYQ*, [44].

5. That means two things. *First*, it is analytically wrong to assert that the "objective purpose" of detention is removal, as though it is conclusionary of not being punitive: cf. **RS [11]**, **[25]**, **[35]**, **[44]-[46]**. In the appellant's case, as was the case in *NZYQ*, the actuating question of whether the detention deserves the "default characterisation" of being punitive involves examination of the constitutional facts in issue. Pointing to some abstracted and asserted purpose of detention is not enough. Thus, J [52] on which the respondent relies (see e.g. **RS [4]**), that "the detention of an alien does not lose the objectively determined purpose of removing the alien from Australia", is also wrong. It does not engage with the characterisation question as explained by *Lim*.[6]

6. *Second*, proper characterisation "requires an assessment of both means and ends, and the relationship between the two".[7] On this "means and ends" assessment, or any other form of proportionality more generally, the respondent is essentially silent. The respondent's reason for its conclusionary statement that indefinite detention in this case is not punitive is that "it is within the power of [the appellant] actually to bring their detention to an end by cooperating with their removal": **RS [24]**. However, that does not engage with "means and ends" (or proportionality).

7. *Lim* does not support the respondent's argument that just because it may be within the "power" of the appellant to bring his detention to an end, his detention is therefore not punitive: cf. **RS [24], fn 16**. The impugned detention in *Lim* was also one which the plaintiffs could have brought to an end by requesting removal. That said, significantly influential to this Court's conclusion that the detention in *Lim* was proportionate was the existence of a statutory time limit, which here does not exist.[8] Justice McHugh referred to this characteristic in *Re Woolley*, in a passage which this Court quoted in *NZYQ* about the "tension between *Al-Kateb* and *Lim*".[9]

8. The respondent otherwise relies on *Re Woolley* in aid of its argument that the "fact that detainees may request removal is important to, if not determinative of" a conclusion that the detention is not punitive: **RS [24]**. However, *Re Woolley* concerned detention pending completion of visa application processes, and thus

---

6 *Chu Kheng **Lim** v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.
7 *NZYQ*, [44]; ***Jones** v Commonwealth* (2023) 97 ALJR 936, [43] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [78] (Gordon J), [154]-[155] (Edelman J) and [188] (Steward J).
8 *Lim*, 33-34 (Brennan, Deane and Dawson JJ, Mason CJ agreeing at 10 and Gaudron J agreeing at 58).
9 *NZYQ,* [32] quoting McHugh J in *Re Woolley* at [88].

detention in respect of which there was a natural endpoint for that purpose, even if it was not "chronologically" fixed.[10] It did not address detention pending removal.

9. Further, McHugh J's reasoning on which the respondent relies (see **RS fn 16**) was premised on his rejection of proportionality in determining whether the law offended Ch III.[11] This now must be taken to be wrong, given what this Court has said in *NZYQ* about the primacy of "reasonably capable of being seen as necessary". The reasons of the other Justices in *Re Woolley*, dependent as they were on *Al-Kateb*, must now also be seen in the context of *NZYQ*.

The appellant's "ability" to bring his detention to an end in fact

10. The respondent never sought to establish "a real prospect that at some time in the reasonably foreseeable future the [appellant] will change his mind and will agree to meet with Iranian authorities and otherwise cooperate in arrangements to obtain travel documents for his removal to Iran": J [7]. No such finding was open on the evidence in any event.[12] The respondent nevertheless contends that the appellant could bring his detention "to an end at any time": **RS [4]**, **[24]**, **[46]**. However, there is an important distinction which should not be elided: "cooperating" to obtain a travel document is one thing, but "cooperation" from Iran in receiving a person unwilling to return is another.

11. What the appellant accepted below was that if he "cooperated by writing a letter to the Iranian authorities and by providing such other information as may be requested by the Iranian authorities, then Australia would be able to obtain travel documents for him".[13] He did not concede, nor did the evidence establish that, if the appellant was in possession of an Iranian travel document but still unwilling to return to Iran, Iran would nevertheless accept him: cf. **RS [34]**. Moreover, this is in the context of Iran known to be violating customary international law.[14] And as in *AZC20*, there was no evidence the respondent had attempted to overcome that roadblock.

---

10 Compare *WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 285 FCR 463, [132] (Kenny and Mortimer JJ).

11 *Re Woolley*, [71]-[80].

12 The evidence was no more than it was speculative that the appellant might change his mind. Mr Jones in cross-examination said: "there's nothing in my client's case that gives you any indication he's likely to change his mind? … well, there's nothing that I can point my finger at … But human beings have been known to change their mind": **ABFM 141**, lines 5-9. See also **ABFM 121** [21]; **AS [67]**.

13 **ABFM 147**, lines 37-40.

14 **IS [51]-[52]**.

12. Similarly, the respondent did not establish that the only reason the appellant's detention has not been brought to an end was "because [he] is frustrating or preventing the performance of that duty": cf. **RS [25]**. Likewise, the primary judge did not find that the appellant would "frustrate" or "prevent" removal if the respondent were to attempt to remove him from Australia to a place other than Iran.

Possible change of the appellant's stance

13. The grant of *habeas corpus* is "interlocutory in character".[15] It is concerned with the adjudicative and constitutional facts at a given point in time: cf. **RS [27]**, **[49]-[50]**. Therefore, the speculative possibility that a detainee's reasons for refusing to assist may later become non-genuine is irrelevant to whether detention is constitutionally permissible. Likewise, a detainee's present reluctance to assist cannot be avoided by resorting to a distracting hypothetical scenario in which they are assumed to assist. As Allsop CJ observed: "[t]here is no room for any presumptions in favour of the Executive where the liberty of the subject is concerned".[16]

14. Release because of a finding that detention is not authorised is not equated to a grant of a right to remain: cf. **RS [49]**.[17] The interlocutory character of the relief sought means no more than the appellant's liberty would be temporary, susceptible to being revisited if and when facts change.[18] No "floodgates" issue arises: cf. **RS [49]**.

Appellant's alternative argument, i.e. evidence as to why he declined to assist

15. The respondent does not grapple with the appellant's alternative submission that a detainee declining to assist the respondent with removal means that, factually, there is no real prospect of it occurring: cf. **RS [24]-[27]**, **fn 19**. On the evidence, there was no real prospect of the appellant changing his position in the reasonably foreseeable future,[19] because he genuinely feared harm if returned to Iran due to his sexuality.

16. At **RS [8]**, the respondent seeks to confine the appellant's case on appeal concerning the primary reason for his fear of being removed to Iran, by arguing that the fear was tied to what had happened to him in Iran, those events having been rejected by the

---

15 ***McHugh*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 283 FCR 602, [21] (Allsop CJ).
16 *McHugh*, [53] (Allsop CJ).
17 *NZYQ*, [72].
18 *Al-Kateb v Godwin* (2004) 219 CLR 562, [124] (Gummow J, dissenting), [151] (Kirby J, dissenting).
19 Above n 12.

primary judge (see also **RS [19], [53]-[54]**). However, the appellant's evidence was not so confined, and neither party conducted the trial in that manner.

17. The appellant's evidence was that he never disclosed information about his "sexuality to the Australia authorities due to fear and stigma associated with such … conduct in Iran". He feared "torture or death at the hands of Iranian authorities", if returned, for "*this reason*".[20] The reason was not contingent upon historical events, and the respondent was live to this.[21] Moreover, the appellant's case was clear in distinguishing between the processes under the *Migration Act 1958* (Cth),[22] and the separate "good reason" why he was not volunteering to assist the respondent in his removal: cf. **RS [54]**. The primary judge erred in characterising the appellant's case otherwise: see **AS [60]-[62]**. His Honour's assessment of the appellant's credibility must be understood in light of that error: cf. **RS [21]**.

Application of the proposed intervener

18. The appellant supports the proposed intervener's application, noting his own alternative argument at **AS [54]-[58]**. As the respondent correctly recognises, one key issue arising on this appeal is whether the primary judge was correct to decline to follow *AZC20*: **RS [35]**. On the basis of the parties' estimates (2 hrs and 2.25 hrs), the proposed intervener has time for oral submissions. In addition, if the respondent might seek more time to orally address the proposed intervener's submissions, the appellant would be prepared to confine his oral submissions to under 2 hours.

Dated: 4 April 2024

Lisa De Ferrari
Aickin Chambers
+61 3 9225 8010
lisa.deferrari@vicbar.com.au

Min Guo
Castan Chambers
+61 3 9225 8365
min@guo.com.au

Chris Fitzgerald
Owen Dixon Chambers West
+ 61 447 832 023
chris.fitzgerald@vicbar.com.au

---

20 **ABFM 119** [13] (emphasis added). That evidence was admitted as evidence of the appellant's belief: see **RBFM 29**. See also **AS [62]**. The primary judge's mischaracterisation of the appellant's case concerning his sexuality and associated fear necessarily meant that the judge did not make a finding that the claim was not genuine (cf. **RS [6]**, penultimate and final sentences).

21 See **ABFM 218** (lines 38-41), **225** (lines 45-47) and **226** (lines 1-8).

22 In this regard, **RS [49]** is wrong insofar as it suggests that the "statutory scheme" for determination of protection obligations has been permanently exhausted in respect of the appellant. For example, the Minister always retains the bar-lift power in s 48B. In the other direction, the Minister is empowered to unwind protection findings under s 197D at any time. All of which is to say that the Act does not have a neat sequential process with a definite end-point for consideration of protection claims.