HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

M84 and M85 of 2022 M84/2022

BETWEEN:

AZC20
Appellant

and

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs
First Respondent

Commonwealth of Australia
Second Respondent

Secretary, Department of Home Affairs
Third Respondent

APPELLANT'S SUBMISSIONS

PART I: These submissions are in a form suitable for publication on the internet.

PART II: ISSUES

1. The issues in these appeals are:

   a. whether there was a 'matter' before the Full Court of the Federal Court of Australia (**FCAFC**) within the meaning of Chapter III of the Constitution, in circumstances where the orders that were the subject of the appeal before it had not come into effect and had no prospect of ever coming into effect, and where the Respondents did not seek to disturb the costs orders made by the primary judge (ground 1i);

   b. whether, in the same circumstances, the FCAFC erred in granting the Respondents leave to appeal the interlocutory order numbered 3 made by the Federal Court of Australia on 13 October 2021 in proceeding VID89/2021 and VID503/2021 (**primary order 3**), being the order by which the Appellant was to be detained in a home (**home detention order**) (ground 1ii);

   c. whether paragraph (a) of the definition of 'immigration detention' (**definition**) in s 5(1) of the *Migration Act 1958* (Cth) (**Act**) is limited temporally or purposively (ground 2a);

   d. whether the detention envisaged by primary order 3 satisfied any temporal or purposive limit in the definition (ground 2b); and

   e. whether primary order 3 was within the power granted by ss 22 or 23 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) (ground 2c).

PART III: The Appellant has given notice under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: REPORTS OF THE JUDGMENTS BELOW

2. The judgment of the primary judge has not been reported; its medium neutral citation is *AZC20 v Minister for Home Affairs* [2021] FCA 1234. The judgment of the FCAFC has been reported; its citation is *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AZC20* (2022) 290 FCR 149.

PART V: FACTS

3. The Appellant is a citizen of Iran who qualified and worked as a metallurgical engineer before he fled Iran because of fears of harm arising from his interest in the Baha'i faith.[1]

4. The Appellant arrived in Australian by boat on 15 July 2013. He was immediately liable to be detained in immigration detention and he has been so detained since then.

5. The Appellant was also then-liable to be taken to a regional processing country.[2] The Federal Court found that it was reasonably practicable to have taken him to such a country 'no later than the end of September 2013' (Core Appeal Book (**CAB**) 40 [106]).

6. On 13 August 2015, the Appellant was first permitted to apply for a protection visa.[3] He applied a few weeks later. On 24 May 2016, a delegate of the First Respondent (**Minister**) found that the Appellant was owed protection under s 36 of the Act (Appellant's Book of Further Materials (**ABFM**) 11–37).

7. No visa was issued to the Appellant as a result of that delegate's assessment. Instead, he was notified almost two years later that his application had been assigned to a different delegate (ABFM 8 [9]–[10]). That delegate concluded that the Appellant was not owed protection on 9 May 2018 (ABFM 39–57). That decision was ultimately affirmed by the Immigration Assessment Authority on 12 February 2021 (after two earlier decisions of the Authority were quashed by the then-Federal Circuit Court of Australia).

8. On 25 February 2021, the Appellant initiated proceedings without representation by which he sought to bring his detention to an end. He engaged legal representation by court referral. The Appellant sought release by way of *habeas corpus* relying on the first-instance decision in *AJL20*.[4] About one month after the two-day trial of the Appellant's *habeas* application, this Court allowed the appeal in *AJL20*[5] and, as a result, a further day of trial in the Appellant's matter was arranged and occurred on 15 September 2021.

9. Mandamus was then sought by the Appellant relying on this Court's *AJL20* judgment. The Respondents accepted that it was reasonably practicable to remove the Appellant to

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[1] Further details of the Appellant's personal history can be found at ABFM 93–5.
[2] Act pt 2 div 8 sub-div B.
[3] By exercise of the power in Act s 46A.
[4] *AJL20 v Commonwealth* (2020) 279 FCR 549.
[5] On 23 June 2021; *Commonwealth v AJL20* (2021) 273 CLR 43 (***AJL20***).

a regional processing country but contended, relevantly, that s 198AD did not apply to the Appellant (CAB 21 [22]–[23]). The primary judge held that the duty in s 198AD(2) applied and that the Secretary had failed to perform that duty (CAB 45 [123], 55 [166]). M84/2022

10. On 13 October 2021, the primary judge made orders requiring the Appellant to be taken to a regional processing country. As at that date, by Ministerial direction, the Appellant could only be taken to Nauru (ABFM 276; CAB 21 [21]).

11. Pending that and to reduce the harm caused by the location of his detention, the primary judge ordered that the Appellant be detained at a different location, being a home. Uncontested and uncontradicted evidence was relied upon by the Appellant to the effect that his post-traumatic stress disorder and mental health had deteriorated, and could not be expected to improve significantly while he was detained in his then-current conditions (CAB 54 [158]–[159]). A clinical psychologist, Guy Coffey, emphasised that the Appellant's 'periodic self-harm and suicide attempts, and his emotional volatility' (ABFM 106 [81], see generally ABFM 105–6) were 'a product of the interaction between emotional dysregulation associated with PTSD, chronic demoralisat[i]on, and the effect of extended detention on his personality functioning' (ABFM 107 [84]). Accordingly, Mr Coffey concluded that 'the largest contribution to his mental state has been his extended detention' (ABFM 108 [87]). Looking forward, Mr Coffey did 'not anticipate any significant improvement in his mental health while he is detained in his current circumstances' but that 'significant therapeutic gains' could be made if the Appellant were in the community, including a likelihood that 'he would desist in harming himself, would become less subject to distressing posttraumatic symptoms including distressing memories, and would be significantly less volatile and impulsive' (ABFM 109–10). This conclusion was relevant because a retired teacher, Anette Hermann, and her husband were among those willing to have the Appellant in their (six-bedroom) home as long as was required, and to have any detaining officers there as well (CAB 53–4 [157]).

12. Orders requiring the continuation of any immigration detention at that home pending the Appellant being taken to a regional processing country were to come into effect by '1.00pm [AWST] on 27 October 2021'. That is, the Respondents were given 14 days to effect the Appellant being taken to Nauru. That period was seven times the 48-hour period required to do so, on the only evidence before the primary judge (CAB 40 [105]).

13. Mediation was ordered to facilitate the home detention logistical arrangements, including with Ms Hermann and her husband. Following that mediation (ABFM 202–3, 205–6) and in chronological order all on 27 October 2021 (in or adjusted to AWST):

a. at 6:34am, Nauru advised an officer, in writing, that it would not accept the Appellant (ABFM 136 [5], 139–40; 189 [2(a)], 192 [9]) (the **first mooting event**);

b. at 8:12am, the Respondents' lawyers learned of Nauru's advice (ABFM 136 [5]);

c. at about 9:30am, the Appellant was told by detention officers to vacate his room at Perth Immigration Detention Centre ahead of being taken to Ms Hermann's home, also in Perth (ABFM 144 [2]);

d. at about 1:30pm, the Appellant was waiting to be so taken but was told by detention officers to return to his compound in the detention centre (ABFM 144 [3]);

e. before 3:00pm, a Minister determined in writing that the Appellant could not be taken to any regional processing country (ABFM 136 [6], 142; see also ABFM 190 [2(b)], 192 [9]). (This power under s 198AE of the Act was one held by one of the parties solely and personally, being the Minister – that is, it was her voluntary, unilateral act which brought about this **second mooting event**.[6] Section 198AE had first been available to be exercised in respect of the Appellant 3,025 days earlier);

f. at 3:34pm, the Respondents applied to vacate the mandamus order and the home detention order (ABFM 259–60, 185 [6]); and

g. at 8:51pm, the Appellant applied to require compliance with the home detention order or to vary it to make it dependent on any 'terminating event' under s 196 of the Act (ABFM 263–4, 185 [7], 186 [10]–[11], 187 [14]).

14. The first of these events on 27 October 2021 is significant for ground one of this appeal. It was from that moment that the Federal Court's mandamus order and the home detention order became moot. This is so because, by operation of the Minister's direction under s 198AD(5) (ABFM 476) coupled with Nauru's advice under s 198AG (ABFM 136 [5], 139–40), the Appellant could no longer be taken to any regional processing country. That, in turn, removed the legal foundation for the home detention order.

15. To the extent to which lawyers for all parties were in doubt about the degree to which the mandamus and the home detention orders were connected at the time (ABFM 184–7, 194–6), the primary judge dispelled that doubt when, on 29 October 2021, he dismissed all parties' applications (summarised at paragraphs 13.f and 13.g above) arising from the events of 27 October 2021.[7] His Honour did so having accepted the Respondents' submissions that, by that time, the taking 'duty no longer exists … [and thus the home

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[6] Ministerial action was highlighted in a similar context (albeit, there, involuntarily) in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CPJ16* (2020) 276 FCR 1, 6 [18], 7 [23], [26] (the Court) (***CPJ19***).

[7] The primary judge made no written orders to this effect and the Appellant does not have access to a recording or a transcript of that hearing.

detention order] no longer has any practical effect' (ABFM 190 [4]; see also 192 [10]–[11]). This was so, the Respondents submitted, because the home detention order was 'ancillary or incidental to [the mandamus order]. It was not a freestanding order' but was 'conditional on continued non-compliance with [the mandamus order]' (ABFM 193 [17], 195 [27], 196 [29]).

16. Notwithstanding the above, about two weeks later, the Respondents appealed the orders of the primary judge. The Appellant's lawyers responded by letter stating that the appeals were 'moot', the orders were 'spent' and that the appeals would be 'academic' and 'would be [seeking], in effect, an advisory opinion' (ABFM 266–7).

17. In a fresh proceeding, filed days after the Respondents' notices of appeal, the Appellant sought mandamus for removal under s 198 of the Act and a home detention order (ABFM 199 [6], 214–5). That application was adjourned by the same primary judge, pending the outcome of the FCAFC appeal (ABFM 200 [8], 228–9 [17(b)], 290 at lines 33–41). As at the date of these submissions, that application has not been listed for a final hearing.

18. Following the hearing on 8 February 2022 of the appeals in the FCAFC, the Respondents amended their notices of appeal to reflect their position at the hearing that, relevantly, they would not seek costs from the Appellant if their appeals succeeded (CAB 70–5).

19. On 5 April 2022, the FCAFC relevantly granted the Respondents leave to appeal the home detention order and allowed the appeals (CAB 78–9), despite noting that the mandamus order 'was rendered inapplicable, and there was no basis for the [home] detention … orders to be carried into effect' (CAB 83 [16]).

20. The Appellant has attempted suicide a number of times, including by hanging in 2015. Since then he has been unable to speak (ABFM 96 [31]). On 13 October 2022, he was approved by a first doctor to engage the Western Australian voluntary assisted dying law.[8]

21. The Appellant remains detained at Perth Immigration Detention Centre. He has now spent almost a decade in Australian immigration detention.

PART VI: ARGUMENT

A. Ground 1i: There was no 'matter' before the FCAFC

22. The FCAFC's jurisdiction depended on there being a 'matter' within the meaning of Chapter III of the Constitution. A 'matter' requires a controversy necessitating the determination of an immediate right, duty or liability. There was no right, duty or liability requiring determination in the FCAFC. It was therefore not exercising judicial power of the Commonwealth when it determined the Respondents' applications and appeals.

[8] *Voluntary Assisted Dying Act 2019* (WA). Evidence to this effect was filed by the Appellant by affidavit dated 31 October 2022 in the proceeding referred to at paragraph 17 above.

23. The Respondents' applications and appeals in the FCAFC relied upon jurisdiction conferred by s 24 of the FCA Act. That Act was made by exercise of Parliament's power in s 77(i) of the Constitution to 'make laws … defining the jurisdiction of any federal court other than the High Court'. That power, in turn, is limited to 'any matters mentioned in the last two sections', i.e. ss 75 and 76. '[F]ederal jurisdiction is [thereby] limited to deciding "matters"'[9] such that the FCAFC required a 'matter' in the Chapter III sense in order to have jurisdiction, including when hearing and determining the Respondents' applications for extensions of time and leave to appeal.[10] The prohibition inhering in the word 'matter' on deciding issues which are 'moot' or 'hypothetical' or on offering 'advisory opinions' operates on the Federal Court[11] 'whether in its appellate or its original jurisdiction'.[12]

24. A 'matter' requires 'some immediate right, duty or liability to be established by the determination of the Court'.[13] A right, duty or liability is different from an interest.[14] 'The "controversy" [about the right, duty or liability] must be real and immediate … Hypothetical questions give rise to no matter'.[15] The controversy must be 'genuine'[16] or, as it has been expressed in the US and the UK, 'actual'.[17]

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[9] *Abebe v Commonwealth* (1999) 197 CLR 510, 524 [24] (Gleeson CJ & McHugh J) (***Abebe***). See also *BHP Group Ltd v Impiombato* (2022) 96 ALJR 956, 967 [48] (Gordon, Edelman & Steward JJ); *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261, 290 (Mason, Brennan & Deane JJ); *Kable v DPP (NSW)* (1996) 189 CLR 51, 136–7 (Gummow J); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 542 [10] (Gleeson CJ) (***Re Wakim***).

[10] A court hearing and determining such applications may not be exercising appellate jurisdiction in the general sense, but it is still exercising power under s 24 of the FCA Act: *Dobson v Australian Postal Corporation* [2013] HCASL 140, [3] (Kiefel & Keane JJ).

[11] *IMF (Australia) Ltd v Sons of Gwalia Ltd* (2004) 211 ALR 231, 243 [43] (French J); *Bainbridge v Minister for Immigration and Citizenship* (2010) 181 FCR 569, 573 [11] (Moore & Perram JJ)

[12] *DPP (SA) v B* (1998) 194 CLR 566, 580 [25] (Gaudron, Gummow & Hayne JJ). See also *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595, 612 (Brennan CJ, Dawson, Toohey, Gaudron & Gummow JJ); *A-G (NSW) v Commonwealth Savings Bank of Australia* (1986) 160 CLR 315, 323 (the Court) and, in the US, *United States v Sanchez-Gomez* (2018) 138 S Ct 1532, 1537 (Roberts CJ for the Court) (***Sanchez-Gomez***). Australian law's hostility to advisory opinions also finds expression in the answering of cases stated or questions reserved: *DPP (SA) v B* (1998) 194 CLR 566, 576 [11] (Gaudron, Gummow & Hayne JJ); *DPP (Vic) v JM* (2013) 250 CLR 135.

[13] *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265 (Knox CJ, Gavan Duffy, Powers, Rich & Starke JJ) (***Re Judiciary and Navigation Acts***); see also *Abebe* 523–5 [24]–[25] (Gleeson CJ & McHugh J).

[14] See, in a different context, *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 352–3 [75] (the Court) (***Plaintiff M61/2010E***).

[15] *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, 458 [242] (Hayne J) (***Re McBain***); see also *Kuczborski v Queensland* (2014) 254 CLR 51, 130–1 [278] (Bell J) (***Kuczborski***); James Allsop, 'Federal Jurisdiction and the Jurisdiction of the Federal Court of Australia in 2002' (2002) 23 *Australian Bar Review* 29, 35.

[16] *Palmer v Ayres* (2017) 259 CLR 478, 490–1 [26]–[27] (Kiefel, Keane, Nettle & Gordon JJ).

[17] See the requirement for an 'actual, ongoing controvers[y] between litigants' under the US constitution: *Deakins v Monaghan* (1988) 484 US 193, 199 (Blackmun J for the Court); and similarly for a 'real and substantial controversy': *Preiser v Newkirk* (1975) 422 US 395, 401 (Burger CJ for the Court) or the requirement for 'actual and concrete disputes, the resolutions of which have direct consequences on the parties involved': *Sanchez-Gomez* 1537 (Roberts CJ for the Court). British general law needs an 'actual controversy which the House undertakes to decide as a living issue': *Sun Life Assurance Co of Canada v Jervis* [1944] AC 111, 114 (Viscount Simon LC; Lords Atkin, Thankerton, Russell & Porter agreeing) (***Sun Life***).

25. There is thus no 'matter' if the dispute involves only 'abstract questions of law without the right or duty of any body or person being involved'.[18] This is because it is not an exercise of judicial power under the Constitution 'to make a declaration of the law divorced from any attempt to administer that law'.[19] M84/2022

26. It may be that the above position is different in an appeal against otherwise moot orders concerning the constitutional validity of a law,[20] as in *Attorney-General (Cth) v Alinta Ltd*.[21] However, there was and is no question of constitutional validity in this case, and thus *Alinta* is distinguishable.[22]

27. The concept of a 'matter' thus defines 'the scope within which the judicial power [of the Commonwealth] is to be exercised'.[23] It serves as a 'filtration device'[24] to direct away from the judiciary questions which it is constitutionally ill-suited to answering. There are two dimensions to this constitutional purpose worth highlighting.

28. *First*, the requirement that a matter involve the quelling of a real, immediate, genuine or actual controversy about an immediate right, duty or liability preserves the perception and reality of 'the independence and impartiality of the judiciary and the maintenance of some distance between it and the political arms of government'.[25] It was this concern that led the constitutional framers to observe that advisory opinions are 'utterly foreign to the atmosphere of the tribunal' and would 'seriously impair public confidence in a court'.[26] Quick and Garran later suggested that empowering the Court to give advisory opinions would have meant that '[t]he Judges would be liable to be hindered in the discharge of their appropriate duties by being employed, in this manner, as the law advisors of the

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[18] *Re Judiciary and Navigation Acts* 267 (Knox CJ, Gavan Duffy, Powers, Rich & Starke JJ). Their Honours were there accepting the submission of Owen Dixon that a 'matter' requires 'a claim of right in litigation between parties, and an abstract question of law is not a "matter"': 258.

[19] *Re Judiciary and Navigation Acts* 266 (Knox CJ, Gavan Duffy, Powers, Rich & Starke JJ); see also *Mellifont v A-G (Queensland)* (1991) 173 CLR 289, 303 (Mason CJ, Deane, Dawson, Gaudron & McHugh JJ); *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595, 612 (Brennan CJ, Dawson, Toohey, Gaudron & Gummow JJ); *Re McBain* 389 [4], [6], 396 [26] (Gleeson CJ).

[20] That a 'matter' may more readily emerge and the related rules of standing may be more liberal in such a context is consistent with *Croome v Tasmania* (1997) 191 CLR 119, 125 (Brennan CJ, Dawson & Toohey JJ) (***Croome***).

[21] *A-G (Cth) v Alinta Ltd* (2008) 233 CLR 542, 567–8 [65]–[67] (Hayne J), see also 558–9 [31]–[33] (Kirby J) (***Alinta***) and also *Re McBain* 396 [26] (Gleeson CJ) and Leslie Zines, 'Advisory Opinions & Declaratory Judgments at the Suit of Governments' (2010) 22(3) *Bond Law Review* 156, 167–8.

[22] The same point was emphasised in *Harrington v Rich* (2008) 166 FCR 440, 447 [30] (the Court).

[23] *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 319 (Josiah Symon); see also 320 (Edmund Barton) (***Convention Debates***).

[24] James Stellios, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis, 2nd ed, 2020) [3.45].

[25] Ibid [4.30].

[26] Convention Debates, Melbourne, 1 March 1898, 1687 (Bernhard Wise); see also 1689 (Henry Higgins) and Adelaide, 20 April 1897, 965 (Josiah Symon). See also John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), 767 (***Annotated Constitution***).

Crown — a position which might lead to the undesirable entanglement of the Bench in political matters'.[27] M84/2022

29. *Second*, the concept of a 'matter' is informed by the experience that the judicial mind is sharpest[28] when it is determining disputes with immediate, real-world consequences for the parties before it. As Higgins emphasised in the convention debates: 'a judge does not give that same attention … to a suppositious case as when he feels the pressure of the consequences to a litigant before him. If he feels that the effect of his decision will be ruin to this man or that man he will take the utmost pains in considering his decision'.[29]

30. The position federally[30] in Australia is thus similar to the United States, whose constitutional model was the template for Chapter III.[31] There, if a 'judgment becomes moot, federal judicial power may not be exercised by appellate consideration of the merits, but extends only to orders for the proper disposition of the proceedings'.[32] The relief granted, where by 'unilateral action' or voluntary forfeiture a party makes a proceeding moot any time before judgment, is to 'vacate the judgment below and remand with a direction to dismiss… [which has the legal effect that it] eliminates a judgment'.[33]

31. In the present case, there was no right, duty or liability to be determined by the FCAFC and thus no 'matter'. At the time the appeals were filed,[34] the mandamus order had doubly lost its foundation: Nauru had engaged s 198AG and the Minister had voluntarily engaged s 198AE such that s 198AD did not apply to the Appellant in two ways. (It is notable that one of those ways arose solely by the personal and unilateral exercise of power by the Minister, a party to the proceedings.) The FCAFC appeals' purpose was thus only to

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[27] John Quick and Robert Garran, *Annotated Constitution*, 767. See similarly *A-G (Cth) v The Queen* (1957) 95 CLR 529, 541 (Privy Council). See also Australian Judicial System Advisory Committee, Parliament of Australia, *Report of the Advisory Committee on the Australian Judicial System* (Parliamentary Paper No 307, September 1987) 59–60; *Grollo v Palmer* (1995) 184 CLR 348, 391–2 (Gummow J); James Stellios, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis 2nd ed, 2020) [4.30].

[28] The adjective used to similar effect in *Adams v The Queen* (2008) 234 CLR 143, 150 [17] (Heydon J).

[29] See by analogy *Convention Debates,* Adelaide, 20 April 1897, 966–7 (Henry Higgins) and similarly from an American jurist, 'advisory opinions are bound to move in an unreal atmosphere. The impact of actuality and the intensities of immediacy are wanting': Felix Frankfurter, 'A Note on Advisory Opinions' (1924) 37 *Harvard Law Review* 1002, 1006.

[30] It may be different when state judicial power is being exercised: *D'Anastasi v Environment, Climate Change & Water (NSW)* (2011) 81 NSWLR 82, 86 [24] (Young JA, Campbell JA & Sackville AJA agreeing); see also Will Bateman and James Stellios, 'Chapter III of the *Constitution*, Federal Jurisdiction and Dialogue Charters of Human Rights' (2012) 36(1) *Melbourne University Law Review* 1.

[31] Although it is unsettled as to the extent to which its jurisprudence applies: *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Limited* (2000) 200 CLR 591, 603 [21] (Gleeson CJ & McHugh J), [119] (Gummow J); *Croome* 133 (Gaudron, McHugh & Gummow JJ).

[32] *Re McBain* 395–6 [24] (Gleeson CJ).

[33] *United States v Munsingwear Inc* (1950) 340 US 36, 39–40 (Douglas J for the Court); *US Bancorp Mortgage Co v Bonner Mall Partnership* (1994) 513 US 18, 25 (Scalia J for the Court). A relatively recent example of this relief being given by the US Supreme Court was in *Sanchez-Gomez*.

[34] The time at which the notice of appeal was filed was considered significant in, eg, *People With Disability Australia Inc v Minister for Disability Services* [2011] NSWCA 253, [12] (Beazley JA).

explore whether to add a different way for s 198AD to not apply. Since the home detention order was dependent on the mandamus order, the events rendering the mandamus order inoperative similarly made the home detention order inoperative. As the FCAFC itself acknowledged, the appeals before it were 'in substance largely unrelated to any ongoing effect of the primary judge's orders for the [Appellant]' (CAB 83 [19], see also [16]). It followed that the appeals (and the related applications) were moot and the constructional questions under the Act (at least) were academic.[35] There was therefore no 'matter' in the Chapter III sense.

32. At the time the Respondents filed their notices of appeal, the two mooting events described above at paragraphs 13.a and 13.e had occurred and the Appellant's fresh proceeding seeking a home detention order had not been issued. Even if there was a 'matter' then, there ceased to be a 'matter' from the moment during the FCAFC hearing (CAB 83–4 [19]–[20], 90 [39], 91 [44], 107 [113]) that the Respondents undertook not to seek the costs of the trial or the appeal.[36] At that point, the Appellant ceased to have a 'true interest'[37] or a 'personal stake in the outcome'[38] of the appeal. Whether or not he retained standing,[39] there ceased to be a 'genuine' controversy:[40] there was no 'actual dispute between adverse parties'.[41] The hearing became no more than an informed debate.

33. None of the above is changed by the FCAFC's concerns about system-wide efficiency and the desire to utilise the case before it to determine questions that that Court considered were likely to arise in the future. 'Convenience and public importance do not control the application of basic constitutional principles',[42] even where a mooted appeal arguably involves questions of 'substantial public importance'[43] or class action-like claims.[44]

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[35] Compare *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480, 497 [40]–[41] (the Court).
[36] As to the significance of this, see *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54, 61–2 [19]–[21] (the Court); *South Australia v Lampard-Trevorrow* [2008] SASC 370, [25]–[27]; *Leibler v Air New Zealand Ltd* [1998] 2 VR 525, 529–30 (Phillips JA, Winneke P & Kenny JA agreeing); *Jardin v Metcash Ltd* (2011) 285 ALR 677, 685 [36] (Campbell JA, Young & Meagher JJA agreeing) noting the emphasis placed on the scale of the costs order as being a basis justifying continuation of the appeal.
[37] *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 96 ALJR 234, 246 [32] (Kiefel CJ, Keane & Gordon JJ).
[38] *Sanchez-Gomez* 1537 (Roberts CJ for the Court).
[39] A juridical question which overlaps with, but is not the same as, whether there is a 'matter': *Kuczborski* 60–1 [5] (French CJ), 87 [98], 88 [100] (Hayne J), 130–1 [278] (Bell J); *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 96 ALJR 234, 245–6 [31] (Kiefel CJ, Keane & Gordon JJ); *Abebe* 528 [32] (Gleeson CJ & McHugh J); cf *Croome* 132–3 (Gaudron, McHugh & Gummow JJ); see also *DaimlerChrysler Corp v Cuno* (2006) 547 US 332, 352 (Roberts CJ for the Court).
[40] *Palmer v Ayres* (2017) 259 CLR 478, 491 [27] (Kiefel, Keane, Nettle & Gordon JJ).
[41] *Richardson v Ramirez* (1974) 418 US 24, 36 (Rehnquist J for the Court).
[42] *Alinta* 556–7 [25] (Kirby J). Cf *Re Wakim* 548–9 [34] (McHugh J), 569 [94] (Gummow & Hayne JJ).
[43] *Tchoylak v Minister for Immigration and Multicultural Affairs* (2001) 111 FCR 302, 310 [47] (the Court); *CPJ16* 7 [27] (the Court).
[44] *Sanchez-Gomez* 1540 (Roberts CJ for the Court).

34. The case had become a 'mongrel suit' with which the framers intended Chapter III courts 'not mix themselves up'.[45] There being no controversy concerning an immediate right, duty or liability of the parties, there was no 'matter'. M84/2022

B. Ground 1ii: FCAFC erred in granting leave to appeal primary order 3

35. Alternatively, the FCAFC erred in granting the Respondents leave to appeal primary order 3. Leave was required by s 24(1A) of the FCA Act because primary order 3 was an interlocutory order (CAB 57 [174]).

36. Authority of the Federal Court (and State courts much earlier[46]) was consistent that the question of whether to grant leave to appeal interlocutory orders was guided, if not determined, by reference to a two-part test. Both parts must be satisfied.[47]

37. The test sets the 'major considerations' on an application for leave as being:

    a. whether, in all the circumstances, the decision at first instance is attended by sufficient doubt to warrant its reconsideration; and

    b. whether substantial injustice would result if leave were refused, supposing the decision to be wrong.[48]

38. The 'substantial injustice' aspect of the test reinforces the default position that a court should not indulge academic legal disputes. It has been considered to be worthy of 'greater emphasis' than the first aspect.[49] This is so not least because courts, as a public resource,[50] 'cannot afford the luxury of spending time on interesting questions of law which, because they have been overtaken by events, have become of academic interest only'.[51] This aspect also ensures that s 24(1A) of the FCA Act is 'construed to discourage unnecessary litigation, to reduce wasting time and cost and to preserve the dignity of the law'.[52]

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[45] See by analogy *Convention Debates,* Adelaide, 20 April 1897, 965–6 (Josiah Symon).
[46] See, eg, *Perry v Smith* (1901) 27 VLR 66, 68 (the Court), noting the imperative language used to describe the test. This authority continues to be applied in State courts: see, eg, *Macquarie Bank Ltd v National Mutual Life Association of Australia Ltd* (1996) 40 NSWLR 543, 600 (Powell JA, Priestley & Clarke JJA agreeing); *Shammas v Canberra Institute of Technology* [2013] ACTCA 50, [31] (Nield AJ).
[47] See, eg, *Sharp v Deputy Commissioner of Taxation* (1988) 19 ATR 908, 910 (Burchett J); and more recently *Rawson Finances Pty Ltd v Deputy Commissioner of Taxation* [2010] 81 ATR 36, 38 [4]–[5] (the Court).
[48] *Décor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397, 398–9 (the Court); *Re Roger Charles Steedman and Margaret Olive Steedman v Golden Fleece Petroleum Limited Vg* [1984] FCA 106 noting that s 24(1A) was introduced in the same year by the *Statute Law (Miscellaneous Provisions) Act (No 1)* 1984 (Cth).
[49] *Niemann v Electronic Industries Ltd* (1978) VR 431, 441 (Murphy J, McInerney & Gillard JJ agreeing).
[50] *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, 188–9 [23]–[24], 192 [30] (French CJ); *Long v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 438, [16] (the Court).
[51] *Beitseen v Johnson* [1989] 29 IR 336, 338 (the Court); see also *Mayne Nickless Ltd v Transport Workers Union of Australia* [1998] FCA 984 (Black CJ, Von Doussa & Carr JJ); *South Australia v Lampard-Trevorrow* [2008] SASC 370, [20]–[24] (White J).
[52] *Nathanson v Minister for Home Affairs* (2022) 96 ALJR 737, 747 [30] (Kiefel CJ, Keane & Gleeson JJ); see also *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 357 [49] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne & Callinan JJ) and *Re Will of Gilbert* (1946) 46 SR (NSW) 318, 323 (Jordan CJ).

39. The two elements set out above at paragraph 37 in respect of interlocutory order appeals are now so entrenched in authority as to be described as a 'test' by single judges,[53] Full Courts[54] and even in this Court[55] (or a 'requisite'[56] or a 'requirement'[57]) for leave to be granted. Indeed, the Minister has accepted that what were described as 'considerations' in earlier case law are now 'requirements' to benefit from s 24(1A) of the FCA Act.[58] M84/2022

40. Even if that concession was wrong and that 'requirement' does not set a 'rigid rule',[59] the Federal Court has applied that two-stage test except in rare circumstances. Those include where the interlocutory orders invite the Court to resolve conflicting appellate authority.[60] No such circumstance arose here. Indeed, the only other judges[61] who had considered whether the Federal Court was empowered to make an order like primary order 3 came to the same conclusion as that reached by the primary judge.

41. There was no injustice to the Respondents (or anyone else[62]) by primary order 3 when their appeals were filed or since. Primary order 3 never came into effect, as the FCAFC emphasised (CAB 83 [16], [19]). Yet, for no identified reason, the FCAFC paid no regard to the question of 'substantial injustice'. Their Honours did not even mention that element of the test.

42. Rather, the FCAFC seemed to reason that it was appropriate to grant leave to appeal inoperative interlocutory orders where the first-instance losing party pays the costs of the successful one on the moot appeals (CAB 83–4 [19]–[20], 90 [39], 91 [44], 107 [113]). Such an approach upends the rule of law: it leaves wealthy parties with the power to engage courts in the resolution of legal disputes in which the other party has no immediate interest, but which the wealthy party would like resolved.

43. On existing authority, it was not enough that an appellant in the FCAFC may be a public office holder with 'a genuine interest in having the legal issues resolved for the benefit of its administration of the Act in future cases which may arise',[63] nor was it enough that a

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[53] See, eg, *Bhatt v Minister for Home Affairs* [2021] FCA 1490, [3] (O'Bryan J); *Bahonko v Sterjov* [2007] FCA 1717, [32] (Lander J).
[54] See, eg, *Porter v Dyer* (2022) 402 ALR 659, 662–3 [12], 665 [24] (Besanko & Abraham JJ) (***Porter***); *Cabcharge Australia Ltd v ACCC* [2010] FCAFC 111, [20] (the Court).
[55] See, eg, *Plaintiff S284/2017 v Minister for Immigration and Border Protection* [2019] HCATrans 34 (Edelman J) and noting the imperative language in *Bienstein v Bienstein* (2003) 195 ALR 225, 231 [29] (the Court).
[56] See, eg, *Singh v Minister for Immigration and Border Protection* [2018] FCA 186, [21] (Derrington J).
[57] See, eg, *Syed v Minister for Immigration and Border Protection* [2017] FCA 887, [19] (Derrington J).
[58] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v MB* [2021] FCAFC 194, [29] (Stewart J) (***MB***).
[59] *Seven Network Ltd v News Ltd* (2005) 144 FCR 379, 380 [5] (Branson J, Allsop and Edmonds JJ agreeing).
[60] *ASIC v P Dawson Nominees Pty Ltd* (2008) 169 FCR 227, 230 [10] (the Court).
[61] Being French J and Whitlam J in separate matters: *WAIS v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1625, [56] (French J) (***WAIS***); *Daniel v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 196 ALR 52, 57 [15]–[16], 63 [36] (Whitlam J) (***Daniel***).
[62] Such a broad view was left open at *Porter* 662–3 [12] (Besanko & Abraham JJ).
[63] *Civil Aviation Authority v Administrative Appeals Tribunal* [2001] 33 AAR 439, 444 [17] (Cooper J).

moot appeal might provide the Court with an opportunity to pronounce upon a 'very important issue of statutory interpretation'.[64] Notwithstanding those compounding principles of judicial restraint, the FCAFC here granted leave, apparently to prophylactically resolve questions that *may* arise for single judges and *may* require those judges to engage with 'issues of comity' (CAB 89 [37]). M84/2022

44. So expressed, the hypothetical nature of the FCAFC's judgment is apparent and, even if there was a 'matter', the only reasonable exercise of the discretion in this case was for the FCAFC to refuse leave. Alternatively, the FCAFC's failure to apply the 'substantial injustice' principle – which has been developed to ensure that the law is predictable and consistent[65] – resulted in it acting on a wrong principle or failing to take into account a material 'criteri[on]'[66] or 'consideration'[67] in the *House* sense.[68]

C. Ground 2: The home detention order was within power

45. The FCAFC was wrong to conclude that primary order 3 was beyond power because:

a. paragraph (a) of the definition is not temporally or purposively limited or, if it is, the detention envisaged by primary order 3 fell within the definition so limited; and

b. the Federal Court was empowered to make primary order 3 by ss 22 or 23 of the FCA Act.

C.1 Definition of 'immigration detention' not temporally or purposively limited

46. The definition of 'immigration detention' in s 5(1) of the Act is embedded within the defined term 'detain' in the same s 5(1) and 'detain', in turn, is used in s 189, which mandates detention of certain people.

47. The FCAFC concluded that paragraph (a) (and not paragraph (b)) of the definition was limited temporally and purposively. That conclusion is evident in the FCAFC's reasons at [86], [89], [94] and [99], which refer to such detention having a 'transitory nature'; it being 'about temporary or transitory custody [and] … purposive in character'; it 'contemplating a form of deprivation of liberty … for a short period of time or temporary purpose'; and it being 'directed at much more transitory and temporary circumstances, likely purposive'. That interpretative conclusion was flawed for two reasons.

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[64] *Hope Downs Management Services Ltd v Hamersley Iron Pty Ltd* [1999] FCA 1652, [12] (the Court).
[65] *Oshlack v Richmond River Council* (1998) 193 CLR 72, 96 [65] (McHugh J), 121 [134] (Kirby J) (***Oshlack***).
[66] See, eg, *Shepherd v Watt* [2022] FCAFC 78, [54] (the Court) (***Shepherd***).
[67] See, eg, *ACE Insurance Ltd v Trifunovski* (2012) 291 ALR 46, 48 [7].
[68] *House v The King* (1936) 55 CLR 499, 505 (Dixon, Evatt & McTiernan JJ). See also *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194, 205 [21] (Gleeson CJ, Gaudron & Hayne JJ); *Shepherd* [60]–[69] (the Court). As to the outcome aspect of the *House* principles, see *ACCC v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25, 39–40 [49]–[52] (the Court).

48. *First*, the FCAFC impermissibly glossed the words chosen by Parliament.[69] That was problematic because those words were intended to bring clarity by exhaustively defining a term that might otherwise be ambiguous. There is no textual or contextual basis upon which to add or imply the temporal or the purposive element to paragraph (a) of the definition. The introduction of such elements runs counter to the 'flexibility' that the FCAFC correctly accepted was a feature of the definition (CAB 101 [93]). M84/2022

49. That flexibility has constitutional and other legal significance. The flexibility allows for the valid co-existence and continued operation of federal and state laws applicable to the location of a person's immigration detention.[70] The flexibility permits the executive to act 'in aid of the judicial power',[71] such as when there are family law orders relating to parenting arrangements which require attendance at supervised contact between a detainee and their non-detained children. The flexibility accomodates a detainee to attend court in order to participate in or witness their own court hearing.[72] The flexibility ensures compliance with the detainer's common law duties – for example, to get a detainee to a medical specialist or, if a fire engulfed a detention centre, to evacuate detainees. The flexibility also facilitates compliance with the duty of removal or taking, (as in this case) where the location of detention is altered to ensure that it remains reasonably practicable to remove or take the detainee from Australia. In each scenario requiring flexibility in detention, the Minister is not required to designate each location of continued detention in the way contemplated by part (b) of the definition or, if the Minister did, such a designation need not be valid in order for the detention to remain lawful under the Act.

50. The only identified textual basis for the implied limit was that paragraph (a) was said by the FCAFC to concern 'temporary, transitory custody … [because of] the use of the word "company"' (CAB 99 [85]) (which is absent in paragraph (b)). However, the phrase 'in the company of' has no natural temporal limit: cell mates or conjoined twins can be 'in the company of' one another for life.

51. *Second*, the supposed temporal and/or purposive limits on the definition are imprecise and unworkable, as well as being contrary to authority.

52. As to imprecision, in the context of this Act, the words 'temporary' and 'transitory' are dislocated from their natural meaning. A person can be a '*transitory* person' under this

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[69] *HFM043 v Republic of Nauru* (2018) 359 ALR 176, 180 [24] (the Court).
[70] For example, the state laws concerning youth supervision regimes and mental health treatment plans discussed respectively in *AA* and *Subramaniam v Mental Health Review Tribunal* (2012) 83 NSWLR 171.
[71] *New South Wales v Commonwealth [No 1]* (1932) 46 CLR 155, 185 (Starke J).
[72] See, eg, *Ibrahim v Minister for Immigration and Border Protection* [2017] FCA 1140, [5]–[6] (White J) (***Ibrahim***).

Act for the rest of their life.[73] A *temporary* visa under this Act[74] commonly lasts years. In M84/2022 that context, the words added by the FCAFC to the definition insert a source of uncertainty on which the text of the definition is silent. Adding uncertain qualifications does not achieve clarity.[75] It also conflicts with the principle that provisions concerning detention should be 'plainly stated and readily ascertainable'.[76]

53. As to unworkability, a temporal and/or purposive limit creates difficulties for detainers and detainees (and courts supervising the lawfulness of detention) to discern whether and when a person, despite still being physically in the company of and restrained by an officer, would no longer be in 'immigration detention'. What happens when the putative detention loses its character of being temporary or transitory, or its purpose changes? Would reaching that time or changing the purpose give rise to a complete defence to a criminal charge under s 197A of the Act (which relies on the same definition) if someone then helped the detainee leave? Would the detainer then be engaging in tortious conduct?

54. So much can be further demonstrated by taking the FCAFC's analysis to its natural conclusion. Suppose a person is detained under paragraph (a) of the definition for the purpose of attending a heart check-up. Then, during that check-up, suppose the person suffers a heart attack from which they require long-term, residential rehabilitation. Suppose too that the Minister does not designate that rehabilitation centre in the way contemplated by paragraph (b) of the definition promptly or does so invalidly. Does that person cease to be in 'immigration detention' after the temporary or transitory period of time has passed despite still being 'in the company of' an officer? Does that person cease to be in 'immigration detention' after the purpose of the detention changed from attending the check-up to undergoing rehabilitation?[77] On the FCAFC's analysis, the answer to these questions would seem to be 'yes'. In these ways, among others, the limits added by the FCAFC to the definition make administering detention unworkable.

55. Any such limits of character or purpose seem to conflict too with authority about the 'intractable' language of s 196, by which Parliament 'specified precise criteria by

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[73] Having regard to the definition of that term in s 5 of the Act and by parity of reasoning with *BXT17 v Minister for Home Affairs* (2021) 283 FCR 248, 272 [76]–[77], 277–8 [96]–[97], 280 [106] (the Court) (***BXT17***).
[74] Act s 30(2).
[75] *Federal Commissioner of Taxation v BHP Billiton Ltd* (2011) 244 CLR 325, 342 [55] (French CJ, Heydon, Crennan & Bell JJ); *Construction, Forestry, Mining and Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619, 634–5 [48]–[49] (the Court).
[76] *Donaldson v Broomby* (1982) 60 FLR 124, 126 (Deane J, Fisher J agreeing). See also *Smith v Corrective Services Commission (NSW)* (1980) 147 CLR 134, 139 (the Court).
[77] Noting the purpose of complying with the detainer's duty of care highlighted in CAB 96–7 [106]–[107] and the broad approach taken to purposive designations under this Act in *BXT17* 279 [101], 280 [105] (the Court).

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'.[78] M84/2022

56. In further conflict with authority, the FCAFC's reasoning suggests that immigration detention might permissibly have different purposes at different times (without saying what the purposes might be or who might determine them), and that that is a characteristic which distinguishes detention under paragraph (a) of the definition from other immigration detention. However, this Court has held that immigration detention is solely for the purpose of segregation during visa processing or for removal; it is not conditional upon, nor co-extensive with, the purposes of officers towards the detainee.[79]

57. Thus the FCAFC's supposed clear point of delineation on the scope of paragraph (a) of the definition offered neither clarity nor delineation, and it was contrary to authority.

58. The FCAFC seemed also to misconstrue paragraph (b) of the definition in an important respect, especially at [86] of its reasons (CAB 99). It is true that paragraph (b) identifies locations of detention. However, the fact that a detainee may be stuck in one location does not mean they are 'held' there under paragraph (b). A person can only be so 'held' if the place is prescribed (parts i-iv) or specifically designated in writing by the Minister (part v). It does not become a place in which a person is 'held' for the purposes of paragraph (b) of the definition by any other means. The mere passing of time by a detainee at a location does not make that location a prescribed or designated place in which that *or any other* detainee can be 'held'.

59. This then might explain why their Honours at [82] and [87] wrongly recast primary order 3 (CAB 98–99). The primary judge's order did not add to the list of places in which *any* detainee can be 'held'. So much is made clear by the fact that his Honour did not contemplate that anyone other than the Appellant would be detained at that location, and by that particular place not being one prescribed or designated under paragraph (b). Rather, the location his Honour identified was a place of temporary detention for 'a particular detainee' under paragraph (a). Similarly, his Honour did not remove 'decisional freedom' for the Respondents as to the location of detention (*contra* CAB 101 [93]). Rather, his Honour required Court involvement in the supervision of the consequences of his order for mandamus, which expressly contemplated any party having liberty to apply to change the interlocutory detention arrangement at any time (CAB 90 [43]).

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[78] *WAIS* [56] (French J), partly quoted with approval in *AJL20* 73 [50] (Kiefel CJ, Gageler, Keane & Steward JJ).
[79] *AJL20* 64 [25], 64–5 [27], 70 [44], 73 [51] (Kiefel CJ, Gageler, Keane & Steward JJ).

C.2 In any event, the detention envisaged by primary order 3 fell within the definition M84/2022

60. The FCAFC found that the primary judge's 'orders could not be described as short term' because they were *potentially* of a longer duration and 'especially given the *delays to this point* in any action being taken by the executive about the [Appellant's] circumstances' (CAB 98 [81]–[82] (emphasis added); see also 102 [98]). The FCAFC thus held that the orders were not 'short term' and were thus beyond power. This was said to be so because, at the time of the primary judge's decision and in light of the Respondents' previous unlawful delay, there was a potential for the Respondents to continue to ignore both their 'hedging duty'[80] and his Honour's mandamus order enforcing it. That analysis was flawed in two ways.

61. *First*, as to time, the FCAFC's analysis replaced the evidence and the primary judge's findings on it. The primary judge found that it was reasonably practicable to take the Appellant to a regional processing country at the time of judgment (which was not contested by the Respondents). The duration of the Appellant's continued detention was thus solely in the control of the Respondents (CAB 41 [108], 55 [163]). It was in that context that his Honour adverted to the possibility that removal might take 'weeks, or months, or longer' (CAB 55 [165]). His Honour's reference there is properly understood to be a reference to what might occur if and only if the Respondents were again derelict in their duty. The detention thus contemplated by primary order 3 was intended to be temporary and transitory, and not a 'longer term living arrangement' (CAB 102 [98]).

62. *Second*, as to purpose, had his Honour's order come into operation, the detention it envisaged would have had the requisite purposive character, namely, to preserve the Appellant and maintain detention in order to allow the Appellant to be taken by the Respondents from Australia (see paragraph 68 below).[81] For so long as the Respondents were derelict in their duty, detention there would have continued to serve both purposes.

63. That is, the detention resulting from primary order 3 could have been short-term (and would have been on his Honour's findings), and it could have been purposive (and would have been on his Honour's findings).

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[80] *AJL20* 73–4 [52] (Kiefel CJ, Gageler, Keane & Steward JJ).
[81] *AJL20* 64 [25], 64–5 [27], 70 [44], 73 [51] (Kiefel CJ, Gageler, Keane & Steward JJ).

C.3 Section 23 of the FCA Act

64. Section 23 of the FCA Act empowers the Federal Court to make orders it considers 'appropriate'. Being a provision 'granting powers to a court', it should be read liberally, without 'imposing limitations which are not found in the express words'.[82]

65. The broad power in s 23 (CAB 103–4 [102]), like the rest of the FCA Act, is subject to ouster or limit by the Act.[83] But there is none in the Act.[84] To the Parliament, that is beyond doubt.[85] It is for that reason that the Federal Court has previously utilised s 23 of the FCA Act to make orders with respect to the conditions or location of immigration detention, whether on the basis of findings of harm[86] or for convenience.[87]

66. Notwithstanding, the FCAFC here considered that primary order 3 had an insufficient connection with the mandamus order to engage s 23 of the FCA Act (CAB 104 [103]–[105]). That was in error for two reasons.

67. *First*, properly characterised, primary order 3 was an order of the character contemplated by French J in *WAIS*: that is, an order directing 'conditions of detention which are calculated to minimise the harm suffered by the detainee as a consequence of the delay in effecting removal'.[88] That primary order 3 included a designation of the location at which the Appellant was to be detained was simply a product of the evidence. It made plain that the 'conditions of detention' at that place were likely to reduce harm to him (CAB 54 [158]–[160]). If the Respondents had put on evidence as to means by which harm to the Appellant could be reduced anywhere else (including in a detention centre) then primary order 3 might have been different. However its nature as one conforming with an order of the kind contemplated by French J would be unchanged.

68. *Second*, even if it were accepted that s 23 of the FCA Act could only empower orders to facilitate removal (CAB 104 [103]), primary order 3 met that description. That is because the primary judge found that the Appellant's mental health was poor and was deteriorating in a detention centre (CAB 54 [158]–[160]). Once that finding is understood against the background understanding derived from logic, experience and authority that a sufficiently poor mental state makes taking a person from Australia not 'reasonably practicable' under

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[82] *Owners of Ship Shin Kobe Maru v Empire Shipping Co Inc* (1994) 181 CLR 404, 421 (the Court). See also *Knight v FP Special Assets Ltd* (1992) 174 CLR 178, 205 (Gaudron J).
[83] *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 283 FCR 602, 648 [187] (Mortimer J).
[84] CAB 51 [145]; *Ibrahim* [6] (White J).
[85] The Act contains 81 provisions seeking to 'avoid doubt' on the interaction between a provision of that Act and another provision of Commonwealth law. Section 23 of the FCA Act is not mentioned at all in the Act.
[86] See, eg, *MZYYR v Secretary, Department of Immigration and Citizenship* (2012) 292 ALR 659, 669 [39], 671 [55] (Gordon J); *BNL20 v Minister for Home Affairs* [2020] FCA 1180, [30]–[31] (Murphy J) and the cases cited.
[87] See, eg, *Ibrahim* [5]–[6] (White J).
[88] *WAIS* [56] (French J).

the Act,[89] it can be seen that an order to preserve or improve the Appellant's mental health was facilitative of that taking process. M84/2022

69. The home detention order was not a reward to the Appellant for surviving more than then-eight years in immigration detention. It was not a punishment for the Respondents' dereliction of duty. Rather primary order 3 was prophylactic. It was 'needed to ensure the effective exercise of the jurisdiction invoked'.[90] It was a means to ensure that taking the Appellant remained 'reasonably practicable'. The home detention order was thus granted to ensure the mandamus order was effective and able to be promptly[91] performed. It promoted the administration of justice.[92] It was thus within the power granted by s 23.

10 *C.4 Section 22 of the FCA Act*

70. By s 22, the Federal Court had an alternative power to grant any remedy 'to which any of the parties appears to be entitled', 'on such terms or conditions as the Court thinks just'. As its terms make clear, and consistent with authority, this provision is construed liberally.[93] It also therefore empowered the primary judge to attach conditions to an order in the nature of mandamus even absent the connection required by s 23.[94]

71. The attraction of s 22 as an alternative source of power for primary order 3 is heightened by precedent. The language of 'conditions' matches the terminology employed by French J in *WAIS* as endorsed by Whitlam J in *Daniel.*[95] Further, the only two members of this Court in *Al Kateb* to consider how immigration detention may be tempered pending
20 removal concluded that s 22 empowered the Federal Court to qualify a person's liberty pending removal. Chief Justice Gleeson observed that 's 22 … extends to the imposition of conditions designed to ensure an unlawful non-citizen's availability for removal if and when that becomes reasonably practicable'.[96] Justice Gummow agreed.[97]

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[89] *WAJZ v Minister for Immigration and Multicultural and Indigenous Affairs [No 2]* (2004) 84 ALD 655, 675 [78] (French J), see also 674–5 [77], 677 [86]; *AOU21 v Minister for Home Affairs* [2021] FCAFC 60, [159] (the Court); *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 146, 166 [69] (the Court).

[90] *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1, 32–3 [35] (Brennan CJ, McHugh, Gummow, Kirby & Hayne JJ), see also 61–2 [127] (Gaudron J).

[91] Being the word this Court used synonymously for 'as soon as reasonably practicable' in *Plaintiff M61/2010E* 341–2 [35] (the Court); see also *Al-Kateb v Godwin* (2004) 219 CLR 562 (***Al-Kateb***), [33], [295] and also *New South Wales v Robinson* (2019) 266 CLR 619, 641 [35] (Kiefel CJ, Keane & Nettle JJ).

[92] As to that being sufficient to engage FCA Act s 23, see *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380, 393–4 [25]–[26] (Gaudron, McHugh, Gummow & Callinan JJ) and the authorities of this Court cited at *AWB Ltd v Cole [No 4]* [2006] FCA 1050, [7] (Young J).

[93] *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457, 489 (Gibbs J).

[94] Section 22 was raised by the Appellant at first instance and on appeal, although neither reasons address it. This is probably explained by the primary judge being satisfied that s 23 was a sufficient source of power and by the FCAFC concluding that, regardless of there being a source of power, a home detention order was impermissible.

[95] *Daniel* 57 [15]–[16], 63 [36] (Whitlam J).

[96] *Al-Kateb* 580 [28] (Gleeson CJ).

[97] *Al-Kateb* 614 [142] (Gummow J).

72. Because ss 22 and 23 provide that terms or conditions are to be imposed by reference to what is thought to be 'just' or 'appropriate', no *a priori* rules can be stated to prescribe the Court's power. What is 'just' or 'appropriate' necessarily turns on the facts of the particular case. While it can be accepted that those 'wide discretionary powers' do not involve global analyses of just-ness or appropriateness, where they are utilised to be remedially responsive to factual findings and legal consequences, that utilisation will be within power.[98] Primary order 3 was thus within power and ground 2 ought to succeed. M84/2022

PART VII: ORDERS SOUGHT

73. The orders sought are in two alternative parts. Which part applies depends on the Court's determination of ground 1i: if there was no 'matter' in the FCAFC, the remainder of the appeal does not need to be determined. That said, the Appellant still presses for and is primarily interested in the declaration concerning primary order 3.

74. The Appellant seeks that the appeal be allowed with costs and with the orders and declaration in his notices of appeal (CAB 120–2, 124–6) but with minor modification underlined and struck-through below:

If the Appellant is successful on ground 1<u>(i)</u>

a. Orders numbered 1 to 4 made by the FCAFC on 5 April 2022 in proceedings VID659/2021 and VID660/2021 be set aside and in lieu thereof: the respondents' applications for leave to appeal orders made by the Federal Court on 13 October 2021 in proceeding VID89/2021 and VID503/2021 be refused and the respondents' appeals otherwise be dismissed.

Alternatively, if the Appellant is successful on ground <u>1(ii) or</u> 2

b. Orders <u>1c,</u> 3 and 4 made by the FCAFC on 5 April 2022 in proceeding VID659/2021 and VID660/2021 as each related to primary order 3 be set aside and in lieu thereof~~:~~ the Respondents' applications for leave to appeal orders made by the Federal Court on 13 October 2021 in proceedings VID89/2021 and VID503/2021 be refused~~; and the respondents' appeals otherwise be dismissed~~.

c. A declaration that primary order 3 was within the power of the Federal Court.

75. The Appellant's appeals to this Court have principled but limited personal significance to him. The primary personal significance to him lies in the declaration. It might be said the orders sought by these appeals are of 'indifference to the [Appellant] whether the [Respondents] win or lose. The [Appellant] will be in exactly the same position in either case. He has nothing to fight for, because he has already [lost] everything that he can

[98] *Wotton v Queensland [No 5]* (2016) 352 ALR 146, 561 [1786] (Mortimer J).

possibly [lose], however the appeal turns out, and cannot be [further] deprived of it'.[99] M84/2022 However, the limited benefit to the Appellant of the appeals being allowed would be that it would reduce the precedential effect of the FCAFC's reasoning on the home detention order.[100] That, in turn, would leave open the possibility that the Appellant may again be successful in arguing for an order to alleviate the harmful effects to him of being in a detention centre pending removal. Therefore, while the declaration he seeks would have no immediate consequence for him, it would have a 'foreseeable' one,[101] given he seeks a home detention order in an extant proceeding under the same Act against the same Respondents.

10 76. If the appeals are dismissed, the Appellant seeks that each party bear their own costs of these appeals. These appeals involve an important constitutional question and, if reached, matters of wide legal significance.[102] For this latter reason, the FCAFC made unusual costs orders (CAB 83–4 [19]–[20], 91 [44], 107 [113]). For the same reason, the Appellant should not face an adverse costs order in the situation where his case was run first (and thus reached this Court) on a significant point. That is, the Appellant is the named party in the interests of the expedient administration of justice, not merely to pursue his own modest and passing interests.[103] This is also the appropriate costs disposition because, by reason of his 'indelible' status as an 'unauthorised maritime arrival' and his ongoing pursuit of removal, any such costs order will be futile.[104]

20 **PART VIII: The Appellant estimates he will require 2 hours for oral argument.**

Dated: 13 January 2023

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[99] *Sun Life* 113 (Viscount Simon LC, Lords Atkin, Thankerton, Russell & Porter agreeing), cited with approval in *Cadbury-Fry-Pascall Pty Ltd v Federal Commissioner of Taxation* (1944) 70 CLR 362, 386 (Starke J).
[100] By, for example, rendering it *obiter dictum* as foreshadowed in *R v Secretary of State for the Home Department; Ex parte Wynne* [1993] 1 WLR 115, 120 (Lord Goff, Lords Templeman, Jauncey, Mustill & Slynn agreeing). See also *Adams v The Queen* (2008) 234 CLR 143, 150 [17] (Heydon J).
[101] *Plaintiff M61/2010E* 359–60 [102]–[103] (the Court).
[102] CAB 75 [19], 77 [26], 81 [37], 83 [44] (the Court). The relevant case law on this point, including this Court's reasons in *Oshlack*, is neatly summarised at *Collard v Western Australia [No 4]* [2013] WASC 455 (S), [9]–[26] (Pritchard J), reversed in *Western Australia v Collard* [2015] WASCA 86 but without criticism of the summary of the principles; see also *Minister for Immigration and Multicultural Affairs v Singh* (2000) 98 FCR 469, 484 [65] (Black CJ, Sundberg, Katz & Hely JJ, Kiefel J agreeing at 496 [108]).
[103] Compare *Momcilovic v The Queen* (2011) 245 CLR 1, 123 [279] (Gummow J), 123 [280] (Hayne J), 185 [457], 198 [502] (Heydon J), 240 [658] (Crennan & Kiefel JJ); see also 75 [113] (French CJ, Bell J agreeing at 255 [702]).
[104] *MB* [20] (Griffiths J, Thomas & Stewart JJ agreeing). As to the Appellant's status, see CAB 72 [3].

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

M84 and M85 of 2022

BETWEEN:

AZC20
Appellant

and

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs
First Respondent

Commonwealth of Australia
Second Respondent

Secretary, Department of Home Affairs
Third Respondent

ANNEXURE TO THE SUBMISSIONS OF THE APPELLANT

Pursuant to Practice Direction No.1 of 2019, the Appellant sets out below a list of the constitutional provisions and statutes referred to in these submissions.

No.	Description	Version	Provisions
1	*Constitution of the Commonwealth of Australia*	Current	ss 75-77
2	*Federal Court of Australia Act* 1976 (Cth)	Compilation No. 55 (date 1 September 2021)	ss 22-24
3	*Migration Act* 1958 (Cth)	Compilation No. 152 (date 1 September 2021)	ss 5, 36, 46A, 189, 196, 197A, 198, 198AD, 198AE, 198AG