HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S28/2023
File Title:	NZYQ v. Minister for Immigration, Citizenship and Multicultu
Registry:	Sydney
Document filed:	Form 27F - Outline of oral argument
Filing party:	Defendants
Date filed:	07 Nov 2023

Important Information

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: **NZYQ**

Plaintiff

AND:

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS

First Defendant

COMMONWEALTH OF AUSTRALIA

Second Defendant

OUTLINE OF ORAL SUBMISSIONS OF THE DEFENDANTS

PART I INTERNET PUBLICATION

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

Leave to re-open *Al-Kateb* should be refused (DS [10]-[18])

2. The application to re-open *Al-Kateb* requires an evaluation of factors informed by a "strongly conservative cautionary principle", giving effect to values of continuity and consistency: *Vanderstock v Victoria* [2023] HCA 30 at [843]-[844] **(Vol 9, Tab 49)**; *Plaintiff M76* (2013) 251 CLR 322 at [125]-[130], [192]-[199] **(Vol 6, Tab 32)**. That is so even where a Justice considers a constitutional decision to be wrong: *Second Territory Senators Case* (1977) 139 CLR 585 at 599-600, 603-604 **(Vol 6, Tab 35)**.

3. As to the **first *John* factor**: the issues in *Al-Kateb* were thoroughly ventilated over at least 11 cases in the Federal Court: *Al Masri* (2003) 126 FCR 54 at [167]-[170] **(Vol 8, Tab 46)**. The Plaintiff's construction argument is also inconsistent with *AJL20* (2021) 273 CLR 43 at [33]-[35], [49]-[50] **(Vol 3, Tab 17)**, which plainly rested on a construction developed in a succession of cases.

4. As to the **second factor**: there was no relevant difference in reasoning between the majority Justices in *Al-Kateb*: *Plaintiff M76* (2013) 251 CLR 322 at [193] **(Vol 6, Tab 32)**; *Al-Kateb* (2004) 219 CLR 562 at [226], [231]-[232], [241] (Hayne J, McHugh and Heydon JJ relevantly agreeing), [292]-[299] (Callinan J) **(Vol 3, Tab 14)**.

5. The **third factor** is not concerned with the harshness of the results in a policy sense, but with difficulties and uncertainties in the law. In any case, amendments since *Al-Kateb* have ameliorated potential harshness. Further, the Plaintiff's construction would cause considerable practical difficulties and uncertainties concerning the operation of the Act.

6. As to the **fourth factor**: the Executive and the Parliament have consistently acted upon *Al-Kateb*. Overturning *Al-Kateb* would retrospectively alter the legal basis upon which the Executive has been required to administer the Act since 2004, with obvious ramifications for the legality of past detention. Further, Parliament has frequently amended the Act so as to take account of the construction adopted in *Al-Kateb*, rather than to overturn it: *Plaintiff M76* (2013) 251 CLR 322 at [194], [197] (**Vol 6, Tab 32**). As to s 195A, s 197AA and Part 8C: see **Vol 2, Tab 8** (items 10, 11, 19); **Vol 11, Tab 62** (at [7], [10]). As to s 197C(3), see **Vol 11, Tab 62** pp 13-14; *Minister for Immigration v*

SZQRB (2013) 210 FCR 505 at [191], [198], [231]. Nor do ss 196(4)-(5A) provide any basis to distinguish *Al-Kateb*: cf **AHRC [12]-[16]**.

The "temporary detention" construction is wrong (DS [19]-[40])

7. The Plaintiff and amici raise three main criticisms of the majority's reasoning in *Al-Kateb* on the construction issue, concerning: (1) the principle of legality; (2) the interpretation of statute consistently with international obligations; and (3) the absence of consideration by the majority in *Al-Kateb* of the construction of former s 88 of the Act in *Lim* (1992) 176 CLR 1 **(Vol 3, Tab 16)**. None of those criticisms withstand scrutiny.

8. **As to (1)**: the principle of legality featured in argument in *Al-Kateb*, and was properly held by the majority to be of no assistance because there is no room in the statutory language for the principle to operate: *Al-Kateb* (2004) 219 CLR 562 at [33], [241], [297], [300]; *Plaintiff M76* (2013) 251 CLR 322 at [182], [194] **(Vol 6, Tab 32)**. Further, the statutory rights of an alien are not equivalent to the fundamental right of citizens to be at liberty in the community: *AJL20* (2021) 273 CLR 43 at [61] **(Vol 3, Tab 17)**.

9. **As to (2)**: ss 189(1) and 196(1) leave no room for a construction in light of international obligations: *Al-Kateb* (2004) 219 CLR 562 at [238]-[239], [297]-[298] **(Vol 3, Tab 14)**.

10. **As to (3)**: argument on s 88 was advanced in *Al-Kateb* and properly rejected.

11. The Act is premised on a binary structure. It leaves no room for a category of unlawful non-citizens who are entitled to be at liberty in the Australian community. The lack of any textual foundation for such a category is highlighted by the disagreement as to the test for its identification: PS [8], [13], [19], [41]-[43]; HRLC [5(b)], [44]. The adoption of the posited tests would place an unworkable gloss on s 189(1), and would make detention depend on fluctuating facts that cannot be accurately assessed: *Al Masri* (2003) 126 FCR 54 at [18] **(Vol 8, Tab 46)**; *Sami* [2022] FCA 1513 at [144] **(Vol 8, Tab 48)**.

The constitutional argument (DS [41]-[49])

12. The majority in *Al-Kateb* concluded that ss 189(1) and 196(1) are not contrary to Ch III after detailed consideration of *Lim*. In *Lim*, the Court held a provision that was relevantly indistinguishable to s 196(1) did not infringe Ch III.

13. There is no debate concerning the formulation in *Lim* at 33 **(Vol 3, Tab 16)** that, to be consistent with Ch III, detention must be "limited to what is reasonably capable of being seen as necessary" for the purpose of exclusion, admission or removal. That statement is directed to the duration of detention, and not whether detention itself is necessary to

achieve that purpose: *Plaintiff M76* (2013) 251 CLR 322 at [139]; *Plaintiff M96A* (2017) 261 CLR 582 at [21], [33]. There is no place for considering "alternative measures": cf AHRC [51].

14. The exclusion of non-citizens extends to preventing them from entering the Australian community both while any application for admission is considered and, if such an application is rejected, until the non-citizen is actually removed. That is the legitimate non-punitive purpose of ss 189(1) and 196(1), which are valid in all their applications: *Al-Kateb* (2004) 219 CLR 562 at [45]-[49] (McHugh J), [251], [255], [261]-[262], [266]-[267] (Hayne J, Heydon J agreeing), [289]-[299] (Callinan J) **(Vol 3, Tab 14)**; *Plaintiff M76* (2013) 251 CLR 322 at [207] **(Vol 6, Tab 32)**; *AJL20* (2021) 273 CLR 43 at [28], [42]-[45], [61] **(Vol 3, Tab 17)**.

The Plaintiff's present detention is lawful (FASC [46(3)-(4)])

15. The Defendants are in active negotiations, with direct Ministerial involvement, to attempt to remove the Plaintiff to the United States **(BFM Vol 2, Tabs 3-4)**. The Plaintiff seeks a finding, in uncompromising terms, that there is no real likelihood or prospect of removal within the reasonably foreseeable future: cf *Plaintiff M76* (2013) 251 CLR 322 at [147] **(Vol 6, Tab 32)**; *Plaintiff M47* (2019) 265 CLR 285 at [36] **(Vol 5, Tab 29)**; *Agha* (2004) 205 ALR 377 at [92]; *Al Masri* (2003) 126 FCR 54 at [175] **(Vol 8, Tab 46)**.

16. Findings concerning the prospects of removal must take into account real world difficulties associated with removal: *WAIS* [2002] FCA 1625 **(Vol 9, Tab 50)**. This aspect of the case is limited to the Plaintiff's present detention (FASC [46(3)-(4)]) and is not concerned with: reasonable prospects of removal in the past, any prior delay, the length of the Plaintiff's detention, or the time removal efforts have been underway.

17. The factual material plainly demonstrates that there is a real likelihood or prospect of the Plaintiff's removal from Australia within the reasonably foreseeable future: cf *BHL19* [2022] FCA 313; *Plaintiff M47*; *Michael Trail* [2023] FCA 1061. Material relating to US law has no bearing on that conclusion **(BFM Vol 2, Tab 2)**.

18. The fluid nature of the ongoing US negotiations, in light of the nature of the relief sought, warrants the Court granting leave to file updating affidavits/submissions after the hearing.

Dated: 7 November 2023

Stephen Donaghue Perry Herzfeld Zelie Heger Alison Hammond