HIGH COURT OF AUSTRALIA

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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

PROPOSED SUBMISSIONS OF THE AUSTRALIAN HUMAN RIGHTS COMMISSION SEEKING LEAVE TO APPEAR AS AMICUS CURIAE

Part I: Publication

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

Part II: Basis of leave to appear

2. The Australian Human Rights Commission (**Commission**) seeks leave to appear as *amicus curiae*, or alternatively leave to intervene, to make submissions in respect of questions 1 and 2 of the Special Case (**SC**). These submissions are made on behalf of the Commission and not the Commonwealth.

Part III: Reasons for leave

3. Section 11(1)(o) of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) gives the Commission the function to intervene in proceedings that involve *"human rights"*, where it considers it appropriate to do so and with the leave of the court hearing the proceedings. The term *"human rights"* is defined in s 3 of the AHRC Act to include the rights and freedoms recognised in the *International Covenant on Civil and Political Rights* (**ICCPR**).[1] The Commission has expertise relating to the interpretation and application of Australia's international human rights obligations, including those arising under the ICCPR. Questions 1 and 2 of the SC engage with the fundamental common law right to liberty, which is recognised in Art 9(1) of the ICCPR. Article 9 provides, relevantly, that *"[e]veryone has the right to liberty"* and that *"[n]o one shall be subject to arbitrary arrest or detention"*. The Commission has previously been granted leave to appear as *amicus curiae* in proceedings dealing with the validity of detention under the *Migration Act 1958* (Cth) (**Act**), including in *Al-Kateb v Godwin* (***Al-Kateb***).[2]

Part IV: Submissions

4. If leave to intervene is granted, the Commission will make the following submissions.

5. *First*, the majority's reasoning in *Al-Kateb* is distinguishable from the present case. The legislative scheme considered in *Al-Kateb* has been amended in key respects since that

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1 ICCPR, opened for signature 16 December 1966, [1980] ATS 23 (entered into force generally 23 March 1976, except Article 41, which came into force generally on 28 March 1979; entered into force for Australia 13 November 1980, except Article 41, which came into force for Australia on 28 January 1993).

2 (2004) 219 CLR 562. See also *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664; *Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* (2004) 225 CLR 1; *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1; *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 (***CPCF***).

decision. Those amendments mean that it is no longer the case (if it ever was) that ss 189, 196 and 198 make clear that *"detention is mandatory and must continue until removal, or deportation, or the grant of a visa"*.[3] The majority's reasons in *Al-Kateb* were premised on the existence of that clarity and, without it, it is open to this Court to reach a different result to the question of statutory construction the majority reached in that case.

6. *Second*, if the Court does not accept that *Al-Kateb* is distinguishable, then the Commission respectfully submits that it should re-open *Al-Kateb* and find that it was wrongly decided.

7. *Third*, the principle of legality together with the special place afforded in the common law and international instruments to the right to liberty, mean that ss 189, 196 and 198 of the Act should be construed as not authorising the detention of an unlawful non-citizen where there is no reasonable prospect or likelihood of them being removed from Australia in the reasonably foreseeable future.

8. *Fourth*, the construction of ss 189, 196 and 198 of the Act advanced by the Commission is consistent with authorities in comparative jurisdictions.

9. *Fifth*, if (contrary to the Commission's primary submissions as to statutory construction), ss 189, 196 and 198 of the Act purport to authorise the detention of an unlawful non-citizen where there is no reasonable prospect or likelihood that they will be removed from Australia in the reasonably foreseeable future, those provisions are contrary to Ch III of the *Constitution* to that extent.

(a) Submission 1: *Al-Kateb* can be distinguished

10. Central to the majority's conclusion in *Al-Kateb* that ss 189, 196 and 198 authorised the detention of an unlawful non-citizen, even if removal from Australia was not reasonably practicable in the foreseeable future was that, read together, the provisions were *"unambiguous"*[4] and made *"clear"*[5] that *"detention is mandatory and must continue until removal, or deportation, or the grant of a visa"*.[6] For Hayne J, this conclusion was fortified by the absence of a statutory or other basis for making an order releasing a non-

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3 *Al-Kateb* at 643 [241] (Hayne J), 662-663 [303] (Heydon J); see also 581 [33] and [35] (McHugh J), 638 [226], 642-643 [240] (Hayne J), 661 [298] (Callinan J).
4 *Al-Kateb* at 581 [35] (McHugh J), 661 [298] (Callinan J).
5 *Al-Kateb* at 643 [241] (Hayne J), 662-663 [303] (Heydon J).
6 *Al-Kateb* at 643 [241] (Hayne J), 662-663 [303] (Heydon J); see also 581 [33] and [35] (McHugh J), 638 [226], 642-643 [240] (Hayne J), 661 [298] (Callinan J).

citizen from detention but imposing conditions on the non-citizen, such as a requirement to live in a particular place.[7]

11. The legislative scheme that applied to Mr Al-Kateb is not the same scheme that applies in the Plaintiff's case. The differences between the legislative schemes mean that it cannot now be said (if it ever could have been) that ss 189, 196 and 198 unambiguously and clearly mandate detention unless one of the events in s 196(1) occurs.

12. By the time of the oral hearing in *Al-Kateb* the *Migration Amendment (Duration of Detention) Act 2003* (Cth) (**2003 Act**) had inserted subsections (4) to (7) into s 196 of the Act. Those amendments, however were not applicable to the particular facts in that case.[8]

10 13. Section 196(4) applies only to persons who have had their visas cancelled under ss 501, 501A, 501B, 501BA or 501F of the Act. It prohibits the release of such a person unless a court has made a *"final determination"* that their detention is unlawful. It proceeds on the basis that orders for the release of a person from immigration detention can be made in respect of persons who are not the subject of visa cancellations on character grounds or, in any case, where the lawfulness of detention has been finally determined. Section 196(4A), which is directed to persons detained pending their deportation under s 200, similarly prevents release until a *final* determination of the lawfulness of detention.

14. Section 196(5) provides that subsections (4) and (4A) apply, relevantly, *"whether or not there is a real likelihood of the person detained being removed from Australia under*
20 *section 198 or 199, or deported under section 200, in the reasonably foreseeable future"*. The obvious inference, notwithstanding that it is expressed for the avoidance of doubt, is that, in cases not controlled by subsections (4) and (4A), the likelihood of removal *is* a matter which bears upon the permissible duration of detention under s 196.

15. This analysis is confirmed by extrinsic material[9] and explained in at least two decisions of the Federal Court.[10] The Migration Amendment (Duration of Detention) Bill 2003 (Cth) was introduced in response to a series of decisions of the Federal Court where orders were made on an *interlocutory* basis releasing a person from immigration detention

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7 *Al-Kateb* at 643-644 [242]-[243] (Hayne J), 661-662 [303] (Heydon J).
8 *Al-Kateb* at 606 [115] (Gummow J).
9 *Acts Interpretation Act 1901* (Cth), s 15AB(1)(a).
10 *BHL19 v Commonwealth of Australia* [2021] FCA 462 at [25]-[31] (Wigney J); *Burgess v Commonwealth* (2020) 276 FCR 548 at 575-580 [98]-[115] (Besanko J).

pending a final determination of the lawfulness of their detention.[11] The introduction of that Bill post-dated the decision of the Full Court of the Federal Court in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri (**Al Masri**)*, which held that a person is entitled to be released from detention if and when the purpose of removal becomes incapable of fulfilment.[12] The majority in *Al-Kateb* disapproved *Al Masri*.[13] However, it is apparent from the extrinsic material that the amendments made by the 2003 Act: (a) were intended to reverse the effect of the authorities regarding release on an *interlocutory* basis and only then in respect of persons whose visas had been cancelled on character grounds or who were to be deported under s 200;[14] (b) did not disturb the holding in *Al Masri*; and (c) did not prevent a Court from ordering the release of a person found on a *final* basis to be unlawfully detained.

16. The explanatory memorandum explicitly acknowledged that detention would be unlawful if the Court decided on a final basis there is no real likelihood that an unlawful non-citizen will be removed from Australia in the reasonably foreseeable future.[15] The effect of what became ss 196(4) and 196(5)(a) was therefore intended to be that a final order for release could be made, as such detention would be unlawful, but that a person subject to those provisions could not be released on an interlocutory basis pending a final determination of whether detention was lawful (for example, whether the relevant cancellation decision was valid).[16] This position was reflected in the second reading speech for the Bill. The Minister said that the amendments were directed at "*the interlocutory release of a person from immigration detention"* and did not affect "*the court's powers to finally determine the lawfulness of a person's detention"* including because it had become

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[11] See, eg, *Applicant VFAD of 2002 v Minister for Immigration and Multicultural Affairs* [2002] FCA 1062; *VHAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 122 FCR 270; *VJAB v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1253; *Minister for Immigration and Multicultural and Indigenous Affairs v VFAD* (2002) 125 FCR 249 at 278-279 [159] (Full Court).

[12] (2003) 126 FCR 54 at 88 [136], 92 [155] (*per curiam*).

[13] See, eg, at 641-642 [237]-[238] (Hayne J), 662 [300] (Callinan J), 662-663 [303] (Heydon J).

[14] In the initial version of the Bill, the amendments applied to all persons in immigration detention, however the Bill was amended so that it only applied to the categories of detainees specified in s 196(4) and s 196(4A): *Burgess v Commonwealth* (2020) 276 FCR 548 at 577-578 [109] (Besanko J).

[15] Explanatory Memorandum, Migration Amendment (Duration of Detention) Bill 2003, at 4 [1]; see further *AJL20 v The Commonwealth* (2020) 279 FCR 549 at 564-565 [49]. Although this Court allowed an appeal from that decision in *Commonwealth v AJL20* (2021) 272 CLR 43 (***AJL20***) it did not comment upon this passage.

[16] Explanatory Memorandum, Migration Amendment (Duration of Detention) Bill 2003, at 4 [3]. For an application of these provisions, see *Ongel v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 239.

"indeterminate".[17] It is apparent that Parliament did not intend to reverse the decision in *Al Masri*. This is not a case where Parliament, relying on *Al Masri*, enacted legislation on an erroneous understanding of the operation of the legislative scheme.[18] Rather, the Act as it applied to Mr Al-Kateb must be read together with the amendments following *Al Masri* *"as a combined statement of the will of the legislature"*.[19] Taking that approach, Parliament should be viewed as having accepted the consequences of the decision in *Al Masri* and sought to modify those consequences, but only in respect of release from detention on an interlocutory basis.[20]

17. After *Al-Kateb* Subdiv B of Div 7 of Part 2 (ss 197AA to 197AG) and s 195A were inserted into the Act by the *Migration Amendment (Detention Arrangements) Act 2005* (Cth) (**2005 Act**). Subdivision B of Div 7 applies to a person who is required or permitted by s 189 to be detained, or who is in detention under that section (see s 197AA). Section 197AB permits the Minister to determine that such a person is *"to reside at a specified place, instead of being detained at a place covered by the definition of immigration detention in subsection 5(1)"* and can specify the conditions with which that person must comply.[21] While the determination is in force and the person resides at the place specified in the determination, the Act applies to the person "*as if the person were being kept in immigration detention at that place in accordance with section 189*" (s 197AC(1)). The words *"as if"* in s 197AC(1) employ a well-recognised drafting technique that creates a *"statutory fiction"* for the purpose of *"reducing the verbiage of an enactment"*.[22] The practical reality is that a person's liberty will be significantly less restrained when subject to the determination. This is confirmed by the explanatory memorandum to the Migration Amendment (Detention Arrangements) Bill which explained that *"detainees would be free to move about in the community without being accompanied or restrained by an*

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[17] Commonwealth, *Parliamentary Debates*, House of Representatives, 18 June 2003, p 16,774 and 26 June 2003, p 17,810 (the Hon Phillip Ruddock MP, Minister for Immigration, Multicultural and Indigenous Affairs).

[18] *Deputy Federal Commissioner of Taxes (SA) v Elder's Trustee and Executor Co Ltd* (1936) 57 CLR 610 at 625-626 (Dixon, Evatt and McTiernan JJ); *Masson v Parsons* (2019) 266 CLR 554 at 573 [28] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

[19] *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 179 at 186 [25] (Crennan, Bell, Gageler and Keane JJ); *Port of Newcastle Operations Pty Limited v Glencore Coal Assets Australia Pty Ltd* (2021) 96 ALJR 56 at 71 [86] (*per curiam*); s 11B(1) of the *Acts Interpretation Act 1901* (Cth).

[20] *Grain Elevators Board (Vict) v Dunmunkle Corporation* (1946) 73 CLR 70 at 85-86 (Dixon J); *Commissioner of Taxation v Anstis* (2010) 241 CLR 443 at 454 [24] (French CJ, Gummow, Kiefel and Bell JJ).

[21] See also the note to s 189, which was also inserted by the 2005 Act.

[22] See *R v Hughes* (2000) 202 CLR 535 at 550-551 [23]-[24] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 203 [115] (McHugh J).

officer under the Act"[23] and that *"the only restraint on a person to whom the Minister's determination applies would be that he or she complies with the conditions specified in that determination"*.[24]

18. As to s 195A of the Act, that section empowers the Minister to grant a visa to a person in detention under s 189 if the Minister thinks it is in the public interest to do so. It is broader than ss 351 and 417, which were the discretionary powers available to the Minister at the time of *Al-Kateb* and which empowered the Minister to substitute for a decision of the Migration Review Tribunal or the Refugee Review Tribunal a decision *"more favourable to the applicant"*.[25] Section 195A is directed to *any* person in immigration detention, which includes persons barred from applying for visas (and therefore unable to seek review in a tribunal), such as an *"unauthorised maritime arrival"*.[26] The effect of s 195A is that the Minister may release a detainee under such conditions as the Minister sees fit where they consider it in the public interest to do so. As the explanatory memorandum to the Migration Amendment (Detention Arrangements) Bill acknowledged, the provision gives the Minister *"the flexibility to grant any visa that is appropriate to that individual's circumstances, including a Removal Pending Bridging Visa where the detainee has no right to remain in Australia but removal is not practicable in the foreseeable future"*.

19. The conferral of the personal and non-compellable powers upon the Minister by ss 195A and 197AB of the Act must be viewed alongside a later set of amendments concerning s 197C. That section was introduced in 2014 and significantly altered in 2021.[27] Section 197C(1) provides that, *"[f]or the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen"*. Section 197C(1) was introduced to overcome the effect of cases including this Court's decision in *Plaintiff M70/2011*[28] which had held that an officer exercising the removal powers under s 198 of the Act was bound to consider Australia's non-refoulement obligations.[29]

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[23] Explanatory memorandum to the Migration Amendment (Detention Arrangements) Bill at [7].
[24] Explanatory memorandum to the Migration Amendment (Detention Arrangements) Bill at [7].
[25] See the Act as compiled on 4 March 2003 (being the version in force on 13 March 2003 at the time of the hearing before von Doussa J: see *SHDB v Goodwin* [2003] FCA 300).
[26] See s 46A of the Act as compiled on 4 March 2003. At that time those persons were "offshore entry persons".
[27] Sections 197C(1) and (2) were introduced by item 2 of Part 1 of Sch 5 to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth); ss 197C(3) to (9) were introduced by the *Migration Amendment (Clarifying International Obligations for Removal) Act* 2021 (Cth) (**2021 Act**).
[28] *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144.
[29] Explanatory memorandum to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 at [1132]-[1135].

The apparent intention was that, henceforth, Australia's non-refoulement obligations would be met through the exercise of the Minister's personal powers rather than by officers exercising the duty under s 198.[30]

20. The amendments to s 197C made by the 2021 Act make clear that the duty of an officer to remove a person under s 198 does not require or authorise the officer to remove the person where to do so would breach Australia's non-refoulement obligations.[31] The effect of this is that, where a person is the subject of a *"protection finding"* for the purposes of s 197C(3), the hedging duty in s 198 ceases to apply with respect to the country with which the person is likely to have the strongest connection. On the approach to construction adopted by the majority in *Al-Kateb*, indefinite detention is a likely consequence subject to the exercise of the Minister's non-compellable powers. That outcome sits awkwardly with accepted principles of statutory construction. As this Court held in the *Offshore Processing Case*, "*it is not readily to be supposed a statutory power to detain a person permits continuation of that detention at the unconstrained discretion of the Executive*".[32] Further, the enforceable nature of the "hedging duties" in s 198 are essential to characterising immigration detention as being non-punitive.[33] Yet, if the analysis of the majority in *Al-Kateb* is applied to the Act in its current form, at least in cases such as the Plaintiff's, the duration of detention is made to depend upon the exercise by the Minister of their non-compellable powers. That is an unlikely construction.

21. Put another way, the legislative scheme that applies to the Plaintiff's case is different in significant respects to the scheme that applied to Mr Al-Kateb. It is not material that the 2005 Act, enacted after *Al-Kateb*, did not deal with ss 189 and 196 in *"much more explicit, direct and blunt form"*, which might have been expected if Parliament had intended to reverse *Al-Kateb*[34] or that s 195A may have been inserted *"to ameliorate individual hardship that might follow from the decision in Al-Kateb"* and therefore accepted that case as a correct expression of the legislature's will.[35] The starting point for construing

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30 Explanatory memorandum to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 at [1143].

31 See further the Revised Explanatory Memorandum to the Migration Amendment (Clarifying International Obligations for Removal) Bill.

32 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at 348 [64] (*per curiam*).

33 *AJL20* at 70 [44] (Kiefel CJ, Gageler, Keane and Steward JJ).

34 See *Plaintiff M47/2013 v Director-General of Security* (2012) 251 CLR 1 (***Plaintiff M47/2013***) at 131 [334] (Heydon J).

35 See *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs, Citizenship* (2013) 251 CLR 322 (***Plaintiff M76/2013***) at 383 [197] (Kiefel and Keane JJ).

the scheme of detention established by the Act is the text of ss 189, 196 and 198, and their context. At the very least, the amendments since *Al-Kateb* create (further) ambiguity as to whether Parliament intended detention to be mandatory where the purposes of detention under s 189 could not be fulfilled. The reasoning of the majority in *Al-Kateb* – which proceeded on the presumption that the Act unambiguously required mandatory detention even though the detainee's removal from Australia was not reasonably practicable in the foreseeable future (see paragraph [10] above) – does not therefore govern the Plaintiff's case.

(b) Submission 2: If *Al-Kateb* cannot be distinguished then it was wrongly decided

10 22. If (contrary to the above submission), the Court concludes that *Al-Kateb* cannot be distinguished from the present case, the Commission respectively submits that the matters canvassed in the Plaintiff's submissions (**PS**) as well as the matters addressed below justify overruling. To the extent that leave is necessary to re-open *Al-Kateb*, it should be granted in relation to questions of statutory construction and, if necessary, constitutional interpretation for the reasons set out at PS [22] and [52] as well as the following.

23. *First*, in *John v Federal Commission of Taxation* the plurality explained that special considerations apply to the doctrine of stare decisis in cases of statutory construction.[36] The Court emphasised that *"the Court should give effect to the intention of the Parliament"* rather than simply follow an earlier decision.[37]

20 24. *Second*, this Court has not subsequently endorsed or applied the reasoning of the majority in *Al-Kateb*. Rather, the Court has declined invitations to reconsider the correctness of *Al-Kateb* for the reason that the issue did not arise on the facts.[38] Most recently, this Court considered aspects of the majority's reasoning in *Al-Kateb* in *Commonwealth v AJL20*[39] but made clear that the correctness of the holding in *Al-Kateb* that ss 189, 196 and 198 of the Act validly authorised and required the detention of an unlawful non-citizen even where removal is not reasonably practicable in the foreseeable future did not arise for

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36 *John v Federal Commission of Taxation* (1989) 166 CLR 417 (***John v FCT***) at 439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

37 *John v FCT* at 440 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

38 See *Plaintiff M76/2013* at 335 [4], 344 [31] (French CJ), 371-372 [145]-[149] (Crennan, Bell and Gageler JJ) declining the invitation to reconsider *Al-Kateb* and at 365-366 [125], 366-367 [128] (Hayne J) and 383 [199] (Kiefel and Keane JJ) deciding that *Al-Kateb* should not be re-opened.

39 See, eg, *AJL20* at 64 [25], 66 [33]-[34], 70 [44], 76-77 [59]-[62] (Kiefel CJ, Gageler, Keane and Steward JJ).

consideration.[40] It follows that the overruling of the majority reasoning in *Al-Kateb* would have no consequential effect on the authority of other cases of this Court.[41]

25. *Third*, it has been accepted that this Court *"may more readily reconsider constitutional issues than it should reconsider questions of statutory construction"*.[42] In addition to questions of statutory construction, the majority's reasoning in *Al-Kateb* addresses constitutional issues that have significant implications for a person's liberty. For the reasons given at PS [25]-[51], as well as the reasons at [48]-[51] below, the majority's reasoning on the constitutional issues conflicts with authorities on Ch III of the *Constitution* and is at odds with case law since *Al-Kateb* which has re-affirmed the core constitutional holding in *Chu Kheng Lim v Minister for Immigration* (***Lim***).[43]

(c) Submission 3: this Court should favour the "temporary detention construction"

26. In *AJL20* the majority stated that (emphasis added):[44]

> *[t]he detention authorised by ss 189(1) and 196(1) of the Act is reasonably capable of being seen as necessary for the legitimate non-punitive purposes of segregation pending investigation and determination of any visa application or removal. This is because the authority and obligation of the Executive to detain unlawful non-citizens is hedged about by enforceable duties, such as that in s 198(6), that give effect to legitimate non-punitive purposes. Upon performance of these duties, the detention is brought to an end.*

27. In *AJL20* officers had failed to perform the duty in s 198. The majority concluded that such a failure may give rise to an entitlement to mandamus compelling performance of the duty but does not render the detention unlawful. *AJL20* did not consider a case where the duty under s 198 was incapable of performance. The Act itself does not expressly provide that a person detained under s 189 of the Act may be kept in immigration detention indefinitely or permanently.[45] In the absence of express provision to that effect,

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40 *AJL20* at 64 [26] (Kiefel CJ, Gageler, Keane and Steward JJ), 88 [91] (Gordon and Gleeson JJ), 95 [106] (Edelman J).

41 See *John v FCT* at 439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

42 *Plaintiff M76/2013* at 366-367 [128] (Hayne J) citing *Australian Agricultural Co Ltd v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261 at 278 (Isaacs J) and *Queensland v The Commonwealth* (1977) 139 CLR 585 at 599 (Gibbs J).

43 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 33 (Brennan, Deane and Dawson JJ), Mason CJ agreeing.

44 *AJL20* at 70 [44] (Kiefel CJ, Gageler, Keane and Steward JJ); see also *Plaintiff S4/2014* (2014) 253 CLR 219 (***Plaintiff S4/2014***) at 231 [26]. The majority in *AJL20* reproduced this passage at 64-65 [27] (Kiefel CJ, Gageler, Keane and Steward JJ) and also referred to *Plaintiff M76/2013* at 370 [140] (Crennan, Bell and Gageler JJ).

45 *Al-Kateb* at 575-576 [13]-[14], [18] (Gleeson CJ).

and in circumstances where the purpose of detention can no longer be fulfilled, a constructional choice is available. That choice should be resolved in favour of the "temporary detention construction" for the reasons at PS [12]-[20] and the following.

28. **Principle of legality:** The constructional choice available means the principle of legality can apply. It is well established that Parliament does not intend to abrogate or curtail common law rights and freedoms unless it does so by legislation that is clear and unambiguous.[46] The common law has long recognised the right to liberty as one of the most elementary and important rights.[47] Where legislation purports to infringe the right to liberty, it is to be construed (if possible) consistently with that right.[48] Indefinite, and perhaps permanent, detention is not a matter to be dealt with by implication, particularly in circumstances where an alternative construction is available.[49] In *Al-Kateb*, Gleeson CJ in dissent considered there to be a constructional choice between treating the obligation in s 189(1) to detain as indefinite or as suspended where the purpose of detention could not be fulfilled. His Honour held that the principle of legality, and the fact that detention was mandatory, favoured the obligation to detain as suspended in such a case.[50]

29. Gummow J, with whom Kirby J agreed,[51] did not expressly refer to the principle of legality in his dissent in *Al-Kateb*.[52] However, his Honour's analysis of the temporal limits on the detention power in s 196 is entirely consistent with the principle, as well as the Court's subsequent analysis of those temporal limits. As his Honour noted, and as members of this Court have observed elsewhere, the temporal obligation in s 198 to effect removal *"as soon as reasonably practicable"* operates as a restriction on the duration of detention under ss 189 and 196.[53] In this way, s 198 also serves to inform the scope and purpose of detention under s 189 and s 196 because removal under s 198 sets the *"outer limit"* of the detention.[54] If removal under s 198 will not occur in the foreseeable future,

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[46] See, eg, *North Australian Aboriginal Justice Agency v Northern Territory* (2015) 256 CLR 569, 581 [11] (French CJ, Kiefel and Bell JJ).

[47] See, eg, *Trobridge v Hardy* (1955) 94 CLR 147 at 152 (Fullagar J); *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 (***Re Bolton***) at 520-523 (Brennan J).

[48] See, eg, *Re Bolton* at 520-523 (Brennan J).

[49] *Al-Kateb* at 577-578 [21] (Gleeson CJ); see also at 607 [117] (Gummow J).

[50] *Al-Kateb* at 577-578 [19]-[22] (Gleeson CJ).

[51] *Al-Kateb* at 615 [145] (Kirby J).

[52] His Honour did, however, begin his analysis of the legislative provisions by stating: "*it is important to eschew, if a construction doing so is reasonably open, a reading of the legislation which recognises a power to keep a detainee in custody for an unlimited time"*: see at 607 [117] (Gummow J); see also *Plaintiff M47/2012* at 60-61 [117]-[119] (Gummow J), [532] (Bell J).

[53] *Al-Kateb* at 608 [121] (Gummow J); *Plaintiff S4/2014* at 233 [30] (*per curiam*); *Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582 (***Plaintiff M96A/2016***) at 600 [44] (Gageler J).

[54] *Plaintiff S4/2014* at 233 [30] (*per curiam*).

detention ceases to be authorised by the Act because the purpose for which detention is authorised becomes unattainable.

30. The temporary detention construction does not, as Hayne J suggested in *Al-Kateb*,[55] depend upon an impermissible transformation of the temporal restriction from one based on *"reasonable practicability"* to some other standard. Once it is accepted that the power to detain in ss 189 and 196 is, relevantly, limited to detention for the purpose of the fulfilment of the obligation to remove a non-citizen as soon as reasonably practicable, it follows that where removal is not reasonably practicable in the foreseeable future (or to adapt the language of Hayne J in *Al-Kateb*, where removal *"appears [un]likely to be possible of proximate performance"*),[56] the detention can no longer reasonably be capable of being seen as *necessary* for the permitted purpose.[57] For the same reasons, the length of detention may be so great that the connection with the purpose of removal becomes so tenuous that the detention cannot be lawfully sustained.[58]

31. Further, Parliament should not lightly be taken to have intended to provide for the deprivation of liberty for a period that cannot be ascertained and enforced by the courts. This does not mean that detention must be for a fixed period; the duration of detention may instead be referable to fixed criteria applicable to a changing factual substratum.[59] Those criteria and their application to the underlying factual circumstances must, however, be capable of objective determination at any particular point in time.[60] The construction adopted by the majority in *Al-Kateb* permits the indefinite detention of a non-citizen regardless of the likelihood of removal in the foreseeable future. In such circumstances, however, the duration of detention ceases to be objectively determinable. This is because if removal is not likely to be reasonably practicable in the foreseeable future, as Hayne J identified in *Al-Kateb*, it is impossible to determine with any degree of certainty whether removal might occur and if so when.[61] In such a case, the duration of detention can only be identified either by speculation as to uncertain possibilities made

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55 *Al-Kateb* at 641 [237] (Hayne J, with whom McHugh J (at 581 [33]) and Heydon J (at 662 [303]) agreed).
56 *Al-Kateb* at 641 [237] (Hayne J, with whom McHugh J (at 581 [33]) and Heydon J (at 662 [303]) agreed).
57 Cf *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 (***Plaintiff M68/2015***) at 111 [184] (Gageler J).
58 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 37 [88] (McHugh J).
59 Cf *Plaintiff M96A/2016* at 597 [31]-[32] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ); *Plaintiff S4/2014* at 232 [29] (*per curiam*).
60 *Plaintiff M96A/2016* at 597 [31]-[32] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).
61 *Al-Kateb* at 639-640 [230]-[231] (Hayne J, with whom Heydon J agreed).

in the absence of evidence[62] or, alternatively, by reference to the subjective intention of the Minister responsible for the detention.[63] Neither of these approaches satisfies the requirement of being an objectively ascertainable criterion capable of determining the duration of detention at any particular time.

32. Related to the previous point, Parliament should be taken to have intended that the lawful duration of detention be determined by the Court and not be made to depend on the unconstrained or unascertainable opinion of the Executive.[64] This proposition reflects the positions taken by Gummow and Kirby JJ in *Al-Kateb*.[65] It is inconsistent with the position taken by the judges forming the majority.[66] In particular, Callinan J expressly held that *"the test"* was whether the Minister, subjectively, continued to hold the intention of removing the non-citizen if and when that possibility became available.[67] His Honour also expressed doubt as to whether a Court could determine when removal would become reasonably practicable.[68] That doubt misses the point. The validity of the detention depends on the Court being able to make an objective determination. If it cannot, then the detention is invalid. In any event, courts are "*well-equipped to assess whether it can be concluded that the achievement of a statutory purpose is a practical possibility or not, and [are] accustomed to doing so"*.[69]

33. It might be asked, how could the Plaintiff "claim a right of release into the country when [he has] no legal right to be here?"[70] Once it is recognised, however, that detention for the *sole* purpose of exclusion or segregation is not permitted under the Act, it becomes obvious that the question is based on a false premise. In any event, the question elides the rights in issue. The Plaintiff does not claim a "right" to be released into the Australian community. He is, however, entitled to personal liberty except if detained pursuant to lawful authority (even if, because of an inability to travel to other countries, the only place

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62 *Al-Kateb* at 639-640 [230]-[231] (Hayne J, with whom Heydon J agreed) and 660 [295] (Callinan J).
63 *Al-Kateb* at 662 [299] (Callinan J).
64 *Plaintiff M96A/2016* at 594 [31] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).
65 *Al-Kateb* at 599 [88] (Gummow J) and 616 [149] (Kirby J).
66 *Al-Kateb* at 586 [50] (McHugh J).
67 *Al-Kateb* at 662 [299] (Callinan J), see also at 659 [291] ("It would only be if the respondents formally and unequivocally abandoned that purpose…").
68 *Al-Kateb* at 658-659 [290] and 660 [295] (Callinan J) ("…indeed as a practical matter it would probably not be possible for him to do so"); see also *Plaintiff M47/2012* at 140 [355] (Heydon J).
69 *CPCF* at 585 [218] (Crennan J); see also *Zaoui v Attorney-General* 1 NZLR 577 (***Zaoui***) at 618 [196] (Hammond J).
70 *Plaintiff M47/2012* at 93 [228] (Heydon J), referring to the question posed in argument by McHugh J in *Al-Kateb* at 565; see also *Al-Kateb* at 662 [299] (Callinan J) ("…that does not mean that a court is entitled to hold that a person who has no right to enter and reside in the community must be released into it").

in which he can exercise his liberty is within Australia). To put it another way, the Plaintiff has no right to resist removal from Australia (should it become practicable), but it does not follow that he is not entitled to be free from executive detention except for the recognised purposes mentioned above.

34. **Consistency with international law:** So far as its language permits, a statute should be construed to be consistent with international law, including any international convention to which Australia is a party.[71] The force of this principle lies in the fact that the Court should not lightly infer that Parliament has chosen to legislate in a manner contrary to Australia's international obligations. One such obligation is the right to liberty enshrined in Art 9(1) of the ICCPR.

35. The judges constituting the majority in *Al-Kateb* each acknowledged this principle,[72] but did not apply it. McHugh J did not apply the presumption when construing ss 189, 196 and 198, instead stating that the language of the provisions was *"unambiguous"*.[73] Heydon J agreed with Hayne J save that his Honour reserved any decision on whether s 196 should be interpreted in a manner consistent with treaty obligations that had not been incorporated into domestic law.[74] Callinan J similarly did not apply the principle because his Honour considered the statutory language was *"clear and unambiguous"*.[75] Hayne J assumed that the principle applied, but, like the other majority judges concluded that the language of the provisions was *"clear"*.[76] His Honour expressed some doubt as to whether the system of mandatory detention under the Act could contravene Art 9 of the ICCPR in circumstances where it was established by law and could be tested in Court.[77] In doing so, his Honour made no reference to the prohibition on *arbitrary* detention in Art 9(1) nor did he consider the opinions expressed by the United Nations Human Rights Committee (**the Committee**) established under Art 28 of the ICCPR.[78]

36. This aspect of the majority's reasoning in *Al-Kateb* is flawed for the following reasons. *First*, for the reasons given above at paragraphs [21] and [27] above, the legislative

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71 See, eg, *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31 at 50 [44] (French CJ and Kiefel J); *D'Arcy v Myriad Genetics Inc* (2015) 258 CLR 334 at 353 [31] (French CJ, Kiefel, Bell and Keane JJ).
72 *Al-Kateb* at 590-591 [65] (McHugh J); 642 [238]-[239] (Hayne J); 661 [298] (Callinan); 662 [303] (Heydon J).
73 *Al-Kateb* at 581 [33] (McHugh J).
74 *Al-Kateb* at 662 [303] (Heydon J).
75 *Al-Kateb* at 661 [298] (Callinan J).
76 *Al-Kateb* at 642 [238]-[239] (Hayne J).
77 *Al-Kateb* at 642 [238] (Hayne J).
78 *Al-Kateb* at 642 [239] (Hayne J).

provisions are not clear as to whether a person detained under s 189 of the Act may be kept in immigration detention where the purposes of detention are not reasonably capable of fulfilment in the foreseeable future. Accordingly, contrary to the majority's reasons, there *is* room for the presumption to operate. *Second*, the majority judges considered whether the provisions were ambiguous in a narrow and technical way. As with matters of context, the operation of the presumption is to be considered as part of the ascertainment of meaning, rather than treating the words as having some natural or objective meaning, divorced from context, which is asserted to be "unambiguous". Other than some brief comments by Hayne J, none of the majority judges engaged with the content of the relevant principles of international law. Unless the content of international law is first identified, the domestic law presumption is unlikely to be given full effect because it will not be possible to determine how a construction in conformity with international law might be achieved.

37. The starting point is the Act and then Art 9(1) of the ICCPR, which prohibits *"arbitrary arrest or detention"*. The Committee's opinions in respect of individual complaints are generally considered to be an authoritative interpretation of the treaty obligations[79] and should be given considerable weight in determining the content of Australia's international obligations under Art 9.[80]

38. The opinions of the Committee make clear that "detention" for the purposes of Art 9 includes immigration detention under the Act.[81] Although administrative detention is permissible in some circumstances, given the importance of the right to liberty any deprivation of liberty must be necessary to achieve a particular legitimate aim and the degree to which liberty is infringed must be proportionate to that aim.[82] This entails

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[79] See M Nowak, *UN Covenant on Civil and Political Rights* (2nd ed 2005), p XXVII [21]; UN Human Rights Committee, *General Comment No. 33, Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, UN Doc CCPR/C/GC/33 (25 June 2009) at [11]-[13].

[80] *CRI026 v Republic of Nauru* (2018) 92 ALJR 529 at 535 [22] (*per curiam*) referring to *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* [2010] ICJ Rep 639 at 664 [66]; *Al Masri* at 91 [148] (*per curiam*); *Minister for Immigration and Citizenship v Anochie* (2012) 209 FCR 497 at 508-510 [45]-[49] (Perram J).

[81] UN Human Rights Committee, *General Comment No. 8, Right to liberty and security of persons (Article 9)*, UN Doc HRI/GEN/Q/Rev1 (30 June 1982). See also: *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997) (***A v Australia***); *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002) (***C v Australia***); and *Baban v Australia*, Communication No. 1014/2001, UN Doc CCPR/C/78/D/1014/2001 (2003) (***Baban v Australia***).

[82] UN Human Rights Committee, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add. 13 (26 May 2004), at [6]; UN Commission on Human Rights, *Siracusa Principles on the Limitation and Derogation Provisions in the International*

consideration of whether there are "less invasive means" of achieving the aim.[83] There is an obligation on a State Party to demonstrate that there was not a less invasive way than detention to achieve the ends of the State Party's immigration policy (for example the imposition of reporting obligations, sureties or other conditions) in order to avoid the conclusion that detention is arbitrary.[84] In short, detention should be a "last resort".[85]

39. The decision to detain must consider relevant factors in the particular case and must be subject to periodic re-evaluation.[86] The discretionary power of the Minister under the Act to grant a visa to a person in detention or to make a residence determination, does not of itself operate to justify detention – one must consider whether and how those measures are used in a particular case.[87]

40. Administrative detention may not continue beyond the period for which a State can provide appropriate justification.[88] Detention that was hitherto lawful may become arbitrary for the purposes of Art 9 when the duration of detention becomes unjust, unreasonable or disproportionate to a legitimate aim.[89] In the specific context of detention pending return to another country, detention will be considered arbitrary for the purposes of Art 9(1) where it assumes "an indefinite character" because the prospects of removal are poor.[90] This position is consistent with comparable decisions on Art 5(1)(f) of the European Convention on Human Rights, which have held that detention for the purpose of deportation remains justified only where deportation procedures are pending and are

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Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4/Annex (28 September 1984); UN Human Rights Committee, *General Comment No. 35, Article 9 (Liberty and security of person)*, UN Doc CCPR/C/GC/35 (16 December 2014) at [10]-[12].

83 *C v Australia* at [8.2] and *A.K. et al v Australia*, Communication No. 2364/2014, UN Doc CCPR/C/132/D/2365/2014 (2022) at [8.5].

84 *C v Australia*; *Shams v Australia*, Communication No. 1255/2004, UN Doc CCPR/C/90/D/1255/2004 (2007) (***Shams v Australia***); *Baban v Australia*; *D and E v Australia*, Communication No. 1050/2002, UN Doc CCPR/C/87/D/1050/2002 (2006).

85 See *Cayzer v Australia*, Communication No. 2981/2017, UN Doc CCPR/C/135/D/2981/2017 (2023) at [8.11].

86 UN Human Rights Committee, *General Comment No. 35, Article 9: Liberty and security of person*, UN Doc CCPR/C/GC/35 (31 October 2014) at [18]. See also *F.K.A.G v Australia*, Communication No. 2094/2011, UN Doc CCPR/C/108/D/2094/2011 (2013) at [9.3] and *M.M.M v Australia*, Communication No. 2136/2012, UN Doc CCPR/C/108/D/2136/2012 (2013) at [10.3].

87 *Shams v Australia* at [4.12] and [7.2]; *Kwok v Australia*, Communication No. 1442/2005, UN Doc CCPR/C/97/D/1442/2005 (2009) at [9.3].

88 *A v Australia* (the fact that the author may abscond if released into the community was not a sufficient reason to justify holding the author in immigration detention for four years); *C v Australia*.

89 See *C v Australia* at [8.2], UN Human Rights Committee, *General Comment 31* (2004) at [6]. See also Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights Cases, Materials and Commentary* (2nd ed, 2004) p 308, at [11.10].

90 *Abdi v United Kingdom of Great Britain and Northern Ireland*, Working Group on Arbitrary Detention, Opinion No. 45/2006, UN Doc A/HRC/7/4/Add.1 at 40 (2008) at [29].

being prosecuted with due diligence.[91] The Committee has been clear that the inability of a State party to the ICCPR to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention.[92]

41. The minority's approach to the construction of ss 189, 196 and 198 in *Al-Kateb* is thus more consistent with Art 9 of the ICCPR than the majority's approach. It does not permit indefinite detention regardless of the circumstances of a particular case, and without regard to whether removal is practicable. It also recognises conditional release as an alternative to detention. Consistent with established principle, that construction ought to be preferred because it is consistent with Australia's international obligations.

10 **(d) Submission 4: the temporary detention construction and comparative jurisdictions**

42. In *Al-Kateb*, various members of the Court[93] referred to the then leading authorities from comparable jurisdictions: the United Kingdom,[94] Hong Kong[95] and the United States.[96] As Gleeson CJ noted in dissent, in considering such authorities, it is important to be mindful of the differing statutory and constitutional contexts.[97] With that caution in mind, however, it is possible to make some general observations regarding the comparative jurisprudence, including authorities decided since *Al-Kateb*.

43. The Courts have read down statutes so as not to conflict with core principles protecting liberty.[98] The Courts have also required statutes to be read in a way that is consistent with their purpose and, accordingly, held that detention can only be justified if it is, relevantly,

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91 *Chahal v United Kingdom* (1997) 23 EHRR 413 at [113]; see also *Saadi v United Kingdom* (2008) 47 EHRR 17 at [72]; *A v United Kingdom* (2009) 49 EHRR 625 at [164]; *Aime v Bulgaria* (European Court of Human Rights, Application No. 58149/08, 12 February 2013) at [72]; *JN v United Kingdom* (2016) Application No. 37289/12 at [82] and *Feilazoo v Malta*, (European Court of Human Rights, Application No. 6865/19, 11 March 2021) at [105]-[108].

92 UN Human Rights Committee, *General Comment No. 35, Article 9: Liberty and security of person*, UN Doc CCPR/C/GC/35 (31 October 2014) at [18]. See also *F.K.A.G v Australia*, Communication No. 2094/2011, UN Doc CCPR/C/108/D/2094/2011 (2013) at [9.3] and *M.M.M v Australia*, Communication No. 2136/2012, UN Doc CCPR/C/108/D/2136/2012 (2013) at [10.3].

93 *Al-Kateb* at 572 [3] (Gleeson CJ), 587-588 [52]-[54] (McHugh J), 607 [118] (Gummow J), 619-620 [159]-[161] (Kirby J), 642-643 [240] (Hayne J), 654-657 [283]-[286] (Callinan J).

94 *R v Governor of Durham Prison; Ex parte Hardial Singh* [1984] 1 WLR 704 (***Hardial Singh***).

95 *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97 (***Tan Te Lam***).

96 *Zadvydas v Davis* 533 US 678 (2001) (***Zadvydas***). In *Al-Kateb*, Gleeson CJ at 572 [3] and Hayne J at 643 [240] distinguished *Zadvydas* because the statute provided for discretionary and not mandatory detention. McHugh J at 587 [52] and Callinan J at 654-657 [283]-[286] distinguished *Zadvydas* because the constitutional arrangements in the US are different. Gummow J at 607 [118] and Kirby J at 615 [145], 616 [149], 619 [159] and 630 [193] relied upon it.

97 *Al-Kateb* at 572 [3] (Gleeson CJ).

98 *Lumba v Secretary of State for the Home Department* [2011] 2 WLR 671 (***Lumba***) at 704 [108] (Lord Dyson), 723 [181] (Lord Walker), 730 [206] (Baroness Hale), 733-734 [219] (Lord Collins); *R (Kambadzi) v Secretary of State for the Home Department* [2011] 1 WLR 1299 (***Kambadzi***) at 1320 [49] (Lord Hope); *Tan Te Lam* at 111E (*per curiam*); *Zadvydas* at 690 (Breyer J; Stevens, O'Connor, Souter and Ginsberg JJ agreeing).

for the purpose of removal.[99] It is for the Court to determine whether the detention is being imposed for a permissible purpose, and that is a question upon which the detaining authority bears the onus.[100] The Courts have, therefore, rejected an approach which might permit indefinite detention regardless of the prospects of removal even though the laws in question have contained no express time limit on detention.[101]

44. It has consistently been held that the power to detain can only be exercised where removal can be achieved within a reasonable time.[102] With this comes a concomitant responsibility on the detaining authority, in order to justify the detention, to take the steps required to achieve removal as soon as possible.[103]

10 45. In the United Kingdom, Hong Kong and New Zealand, the construction of statutes conferring powers of detention has been undertaken by reference to the principle of legality.[104] In the United States, the principle of construction applied is the canon of "constitutional avoidance", by which an interpretation that would avoid a breach of the Constitution is preferred.[105] Those underlying principles are familiar in Australian law.

46. The reasoning in the authorities from the United Kingdom cannot be distinguished on the basis that the statutes under consideration involved the conferral of a discretionary power to detain pending removal rather than a mandatory obligation.[106] Authority following *Al-Kateb* suggests that the same approach is to be adopted where the statute is expressed in

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99 *Hardial Singh* at 706D (Woolf J); *Lumba* at 683 [22] (Lord Dyson); *R (on application of Hemmati and others) v Secretary of State for the Home Department* [2019] UKSC 56 (***Hemmati***) at [41] (*per curiam*); *R (DN (Rwanda)) v Secretary of State for the Home Department* [2020] AC 698 at [18] (Lord Kerr); *Tan Te Lam v* at 111C (*per curiam*); *Zaoui* at 599 [87]-[88] (McGrath J); *Chief Executive of Department of Labour v Yadegary* [2009] 2 NZLR 495 (***Yadegary***) at 525 [126] (Baragwanath J); *Zadvydas* at 699 (Breyer J Stevens, O'Connor, Souter and Ginsberg JJ agreeing).

100 *Tan Te Lam* at 114B (*per curiam*); *Kambadzi* at 1327 [73] (Baroness Hale).

101 *Hardial Singh* at 706D-E (Woolf J); *Lumba* at 683 [22] (Lord Dyson); *Tan Te Lam* at 111C (*per curiam*); *Zaoui* at 599 [87]-[88] (McGrath J); *Yadegary* at 523 [112]-[113] and 526 [135] (Baragwanath J); *Zadvydas* at 689 (Breyer J with whom Stevens, O'Connor, Souter and Ginsberg JJ agreed).

102 *Hardial Singh* at 706E (Woolf J); *Lumba* at 683 [22] (Lord Dyson); *Hemmati* at [41] (*per curiam*); *Tan Te Lam* at 111C (*per curiam*); *Zadvydas* at 699 (Breyer J with whom Stevens, O'Connor, Souter and Ginsberg JJ agreed); *Johnson v Arteaga-Martinez* 596 US ___ (2022) at 2-4 (Breyer J) (***Johnson v Arteaga-Martinez***) but cf at 3 (Thomas J).

103 *Hardial Singh* at 706F (Woolf J); *Lumba* at 683 [22] (Lord Dyson); *Kambadzi* at 1320 [49] (Lord Hope) and 1324 [64] (Baroness Hale); *Hemmati* at [41] (*per curiam*); *Tan Te Lam* at 111C (*per curiam*).

104 *R v Secretary of State for the Home Department; ex parte Simms* [2000] 2 AC 115 at 131 (Lord Hoffmann); *Lumba* at 704 [108] (Lord Dyson), 723 [181] (Lord Walker), 730 [206] (Baroness Hale), 733-734 [219] (Lord Collins); *Kambadzi* at 1306-1307 [11]-[12] (Lord Hope); *Tan Te Lam* at 111E (*per curiam*); *Zaoui* at 611 [156] (Hammond J), 646 [44] and 650 [52] (*per curiam*); *Yadegary* [2009] 2 NZLR 495 at 507-508 [35]-[36] (Baragwanath J).

105 *Clark v Martinez* 543 US 371 (2005) at 385 (Scalia J) and 391 (Thomas J); see also *Johnson v Arteaga-Martinez* at 8 (Sotomayor J for the Court).

106 Cf *Al-Kateb* at 572 [3] (Gleeson CJ), 642-643 [240] (Hayne J).

conditional terms that mandate detention subject to Executive dispensation (i.e akin to the position when ss 189, 196 and 195A are read together).[107]

(e) Submission 5: the indefinite detention construction is contrary to Ch III

47. If (contrary to the Commission's primary submissions), ss 189, 196 and 198 of the Act purport to authorise the detention of an unlawful non-citizen where there is no reasonable prospect or likelihood that they will be removed from Australia in the reasonably foreseeable future, those provisions are contrary to Ch III of the *Constitution* to that extent for the reasons the Plaintiff gives at PS [24]-[52]. The Commission makes the following additional submissions to assist the Court.

48. *First*, the limitation imposed by Ch III (see PS [27]) recognises the fundamental importance of liberty *per se* and serves to protect it;[108] it does not merely preclude non-curial detention as punishment for breach of a norm of conduct.[109] "Punitive", in this context, is merely a shorthand description for forms of detention which are not within, or is closely analogous to, one of the recognised exceptions to the prohibition.[110]

49. This is the foundation of the position stated in *Lim*. That is, subject to certain *"exceptional cases"*[111] there is a constitutional immunity from imprisonment *"except pursuant to an order by a court in the exercise of judicial power"*.[112] Put another way, involuntary detention is, *ipso facto*, *"penal or punitive in character"*, and thus reserved for the exercise of judicial power, save for certain recognised categories of detention that operate as exceptions to the general position.[113] While these statements in *Lim* were made in the context of the detention of citizens, Brennan, Deane and Dawson JJ had earlier acknowledged that the limitations imposed by Ch III also serve to protect non-citizens.[114] The only relevant difference between citizens and non-citizens is that non-citizens are liable to be detained for the purposes identified earlier, connected with decisions as to

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[107] *R (on the application of O) v Secretary of State for the Home Department* [2016] 1 WLR 1717 at [48]-[49] (Lord Wilson, with whom the other members of the Supreme Court agreed); *R (Nouazli) v Secretary of State for the Home Department* [2016] 1 WLR 1565 at [65] (Lord Clarke, with whom the other members of the Supreme Court agreed); *cf.* the position in the United States, *Jennings v Rodriguez* 138 S. Ct. 830 (2018).

[108] *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); *R v Quinn Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 11; *Plaintiff M68/2015* at 86 [97] (Bell J).

[109] *Al-Kateb* at 612 [137] (Gummow J).

[110] See, eg, *Plaintiff M68/2015* at 162 [389] (Gordon J).

[111] *Lim* at 27 (Brennan, Deane and Dawson JJ).

[112] *Lim* at 28-29 (Brennan, Deane and Dawson JJ).

[113] *Lim* at 27 (Brennan, Deane and Dawson JJ).

[114] *Lim* at 19 (Brennan, Deane and Dawson JJ); see also *Abebe v The Commonwealth* (1999) 197 CLR 510 at 560 [137] (Gummow and Hayne JJ); *Plaintiff M47/2012* at 193 [532] (Bell J).

whether to admit them and with their removal from Australia if not admitted.[115] Accordingly, contrary to the approach of the majority in *Al-Kateb*, the appropriate starting to point is not ask whether the detention is "punitive". Rather, the correct question is whether the detention falls within the recognised exception of detention of a non-citizen to effect deportation or removal.[116] More specifically, the question here is whether detention in circumstances where removal is not reasonably practicable in the foreseeable future is reasonably capable of being seen as necessary to effect removal. If it is not, the detention is "punitive" and, therefore, contrary to the separation of judicial power.[117]

50. *Second*, some reasoning in *Al-Kateb* suggests that it is permissible to detain an alien for the purpose of segregation from, or preventing entry into, the Australian community.[118] That is not, however, recognised as a permitted purpose in the later cases.[119] Although temporarily preventing a non-citizen entering the community might be permissible if it is sufficiently related to another legitimate object, such as detention pending the determination of a visa application, or pending removal if the application is refused, it cannot be a permissible basis for detention in itself. The majority in *AJL20* recognised the relationship between segregation and purpose when it said that:[120]

> *[i]t is because the detention mandated by s 189(1) of the Act is temporally constrained by s 196(1) that the detention is capable of being seen as necessary for execution of the legitimate non-punitive purposes of segregation pending receipt, investigation and determination of any visa application or removal.*

51. *Third*, consideration of whether detention is reasonably capable of being seen as *necessary* for the purpose of effecting removal under s 198 invites, and arguably requires, consideration of alternative measures available to achieve that end.[121] That is, could any non-punitive purpose be met to the same extent by reasonable alternatives to the *"the extreme constraint upon liberty of detention"*.[122] Unlike the position at the time *Al-Kateb* was decided, some such alternative measures are now found in the Act itself, such as

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[115] *Plaintiff S4/2014* at 231 [26] (*per curiam*); *Plaintiff M96A* at 594 [22] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ); cf *Plaintiff M76* at 385 [206]-[207] (Kiefel and Keane JJ).
[116] *Garlett v Western Australia* (2022) 96 ALJR 888 at [110] (Gageler J); [176] (Gordon J); [292] (Gleeson J).
[117] See, eg, *Plaintiff M68/2015* at 86 [98] (Bell J) and 111 [184] (Gageler J).
[118] *Al-Kateb* at 584 [45] and 585-586 [47]-[48] (McHugh J), 648 [255] and 651-652 [268]-[269] (Hayne J, with whom Heydon J agreed); cf at 658 [298] (Callinan J).
[119] *Plaintiff S4/2014* at 231 [26] (*per curiam*); *Plaintiff M96A/2016* at 594 [22] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).
[120] *AJL20* at 65 [28] (Kiefel CJ, Gageler, Keane and Steward JJ).
[121] *C v Australia* at [8.2].
[122] *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 169 [226] (Edelman J) applying a form of structured proportionality analysis to whether a law infringes the requirements of Chapter III.

those in ss 195A and s 197AB. Other measures could be imposed in individual cases consistently with the Court's power to impose conditions on the grant of *habeas corpus.*[123] Such conditions could include a requirement for a bond or surety, or the imposition of reporting conditions.

52. *Fourth*, to the extent that s 196(3) purports to prevent this Court making an order requiring the release of a person determined on a final basis to have been unlawfully detained, that provision must be invalid.[124] It would be inconsistent with Ch III and, at least in the case of proceedings in this Court, an impermissible attempt to oust the jurisdiction of this Court to issue an injunction conferred by s 75(v) of the *Constitution*.

10 **Part V: Timing of oral argument**

53. If the Commission is given leave to make oral submissions, it estimates it will require 20 minutes.

Dated: 15 September 2023

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Patrick Knowles
Tenth Floor Chambers
T: (02) 9232 4609
20 E: knowles@tenthfloor.org

……..
Megan Caristo
Banco Chambers
T: (02) 9376 0685
E: megan.caristo@banco.net.au

[123] *Al-Kateb* at 578-580 [22]-[29] (Gleeson CJ); *Plaintiff M47/2012* at 68 [148] (Gummow J), 193 [534] (Bell J).
[124] *Lim* at 36-37 (Brennan, Deane and Dawson JJ), 68 (McHugh J).

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

ANNEXURE TO THE COMMISSION'S SUBMISSIONS

Pursuant to Practice Direction No. 1 of 2019, the Commission sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in its submissions.

No.	Description	Version	Provision(s)
1.	*Constitution*	Current	Ch III, s 75(v)
2.	*Acts Interpretation Act 1901* (Cth)	Compilation No 37 (12 August 2023 to present)	ss 11B, 15AB(1)(a)
3.	*Australian Human Rights Commission Act 1986* (Cth)	Compilation No 53 (13 December 2022 to present)	ss 3, 11
4.	*Migration Act 1958* (Cth)	Compilation No 154 (24 June 2023 to present)	ss 5, 189, 195A, 196, 197AA, 197AB, 197AC, 197AD, 197AE, 197AF, 197AG, 197C, 198, 200, 501, 501A, 501B, 501BA, 501F
5.	*Migration Act 1958* (Cth)	Compilation prepared on 4 March 2003 (24 February 2003 to 19 March 2003)	ss 46A, 189, 196, 198, 351, 417
6.	*Migration Amendment (Duration of Detention) Act 2003* (Cth)	As made	Item 1 of Schedule 1
7.	*Migration Amendment (Detention Arrangements) Act 2005* (Cth)	As made	Items 9, 10 and 11 of Part 1 of Schedule 1

8.	*Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth)	As made	Item 2 of Part 1 of Schedule 5
9.	*Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth)	As made	Item 3 of Schedule 1