HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S65/2021

BETWEEN

SAFWAT ABDEL-HADY
Plaintiff

AND

COMMONWEALTH OF AUSTRALIA
Defendant

SUBMISSIONS OF THE DEFENDANT

PART I FORM OF SUBMISSIONS

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

PART II ISSUES

2. The plaintiff seeks damages for false imprisonment for being taken into, and held in, immigration detention under ss 189(1) and 196(1) of the *Migration Act 1958* (Cth) (**Migration Act**), including for the period 28 July 2022 and 8 November 2023 (the **relevant period**). During the relevant period there was no reasonable prospect of his removal from Australia becoming practicable in the reasonably foreseeable future, with the consequence that ss 189(1) and 196(1) did not validly authorise his detention for the reasons explained in ***NZYQ*** *v Minister for Immigration, Citizenship and Multicultural Affairs.*[1]

3. The question of law that has been referred to the Full Court is whether the Commonwealth and its officers have a defence to liability for the tort of false imprisonment with respect to the immigration detention of the plaintiff throughout the relevant period: **SCB 53**. The Commonwealth contends that they did, and therefore that the answer to the question that has been referred for the opinion of the Court is "yes".

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[1] (2023) 280 CLR 137.

PART III SECTION 78B NOTICES

4. The Commonwealth gave notice under s 78B of the *Judiciary Act 1903* (Cth) on 29 August 2025.

PART IV FACTS

5. The plaintiff is a citizen of Austria. Since approximately 1981, he has suffered from an aggressive form of thrombophilia, being an extreme tendency to the formation of blood clots within arterial or venous blood vessels: **SCB 49 [2]-[3]**.

6. The plaintiff arrived in Australia in 1997 by aeroplane and travelled by aeroplane to and from Australia on 12 different occasions in the period 1997 to 2006. The plaintiff was granted several visas of various classes over the period 1997 to 2013: **SCB 49 [4]-[5]**.

7. On 31 March 2017, a delegate of the Minister for Immigration and Border Protection cancelled the plaintiff's visa under s 501(2) of the Migration Act: **SCB 50 [6]**. On 22 August 2017, the plaintiff was located and detained by an officer of the Commonwealth (the **detaining officer**) pursuant to s 189(1) of the Migration Act: **SCB 50, 52 [7], [17.2]**.

8. This proceeding was commenced in the original jurisdiction of this Court on 6 May 2021. The plaintiff's application for declaratory and other relief in respect of his immigration detention was remitted to the Federal Circuit and Family Court of Australia (**FCFCOA**): **SCB 50 [9]-[11]**. His claim for damages for false imprisonment remained in this Court.

9. On 8 November 2023, this Court made orders in *NZYQ*. Both before and after that date, the parties were in contest as to the plaintiff's fitness to travel from Australia to Austria following an episode of thrombophilia in July 2022: **SCB 51 [13.1]-[13.4]**.

10. On 13 February 2024, the plaintiff was granted a Bridging Visa E and released from immigration detention. This was done because the Commonwealth accepted, having regard to medical assessments that were then available, that from 28 July 2022 the plaintiff's thrombophilia had rendered him medically unfit to travel by any commercial aeroplane. On that basis, the Commonwealth accepted that, from 28 July 2022, there had been no reasonable prospect of the plaintiff's removal from Australia becoming practicable in the reasonably foreseeable future (**SCB 51 [13.5]-[13.6]**). In the remitted part of the proceeding, the FCFCOA, by consent, made declarations to that effect: **SCB 51-52 [15]-[16], 62**.

11. Throughout the relevant period, the detaining officer's duties included assessing from time to time whether he knew or reasonably suspected that certain specific individuals, including the plaintiff, were unlawful non-citizens and, if so, keeping them in detention under ss 189(1)

and 196(1). Throughout the same period, the plaintiff was in fact an unlawful non-citizen, and the detaining officer reasonably suspected that fact: **SCB 52 [17.1], [18]**.

12. In ***Al-Kateb*** *v Godwin*,[2] ss 189(1) and 196(1) of the Migration Act had been held validly to authorise and require the detention of an unlawful non-citizen who was detained for the purposes of removal until that non-citizen was actually removed from Australia, even if there was no real prospect of removal becoming practicable in the reasonably foreseeable future. Accordingly, throughout the relevant period the detaining officer, who was required by s 13(4) of the *Public Service Act 1999* (Cth) (**Public Service Act**) to comply with all applicable laws, reasonably understood his duty to be to keep the plaintiff in immigration detention until he was actually removed from Australia: **SCB 52 [19]**.

PART V ARGUMENT

Overview

13. The tort of false imprisonment has two elements: that the defendant intentionally detained the plaintiff; and that the detention was unlawful.[3] The Commonwealth accepts that both elements of the tort of false imprisonment are made out against the detaining officer here. Specifically:

    a. As to the first element, the Commonwealth admits that the detaining officer intentionally detained the plaintiff: **SCB 34 [18B], 42 [18B]**.

    b. As to the second element, the Commonwealth admits that the plaintiff's detention in the relevant period was not lawfully authorised or required by the Migration Act: **SCB 44 [32(b)]**, **52 [19.4]**. Thus, the Commonwealth does not contend that *NZYQ* operated only prospectively. Instead, as will be developed below, the significance of *Al-Kateb* for present purposes is that, as a decision of this Court, detaining officers had a duty to discharge their functions in accordance with that decision unless and until it was overturned.

14. Notwithstanding the above, the Commonwealth and the detaining officer should be held to have a defence protecting them from liability for detaining the plaintiff during the relevant period. Given the notorious confusion associated with the word "defence" in the tort law

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2 (2004) 219 CLR 562.

3 See *Lewis v Australian Capital Territory* (2020) 271 CLR 192 at [24]-[25] (Gageler J) and, concerning the intention to detain, see *The Law of Torts*, Fleming (10th ed, 2011) at [2.80], cited in *Darcy v New South Wales* [2011] NSWCA 413 at [141] (Whealy JA, Allsop P and Beazley JA agreeing); *Williams v Milotin* (1957) 97 CLR 465 at 474 (Dixon CJ, McTiernan, Williams, Webb and Kitto JJ); *McHale v Watson* (1964) 111 CLR 384 at 388 (Windeyer J).

context, it is appropriate to emphasise that the Commonwealth here uses the word "defence" to describe a rule that results in a verdict for the defendant even though all of the elements of the tort are established.[4] That is consistent with *Queensland v* ***Stradford*** *(a pseudonym)*, where the plurality described the common law defence that was held to apply in that case as a "protection from civil liability",[5] which had the effect of "justifying"[6] or "excusing"[7] tortious acts. Thus, notwithstanding the fact that the elements of the tort of false imprisonment were made out in *Stradford*, the defence served not merely to deny relief, but to deny liability. That is, the conduct in issue was not "civilly or criminally wrongful".[8]

15. In *Stradford*, this Court recognised that the common law of Australia affords protection from liability for false imprisonment where a person acts under a duty to enforce court orders, even if those orders are invalid and so do not lawfully authorise the imprisonment.[9] The Commonwealth submits that an analogous defence[10] should be recognised in this case for reasons that align closely with the rationale for the defence recognised in *Stradford*. Put shortly, the detaining officer was under a duty – as an aspect of the broader obligation to obey the law as declared by the courts – to give effect to this Court's holding in *Al-Kateb* as to the effect and validity of ss 189(1) and 196(1). It would undermine the authority of this Court and the separation of powers, and it would create unfairness and legal incoherence, if the detaining officer were to be held liable for doing what he was required to do by a duty authoritatively held by this Court to have been validly imposed by the Parliament.

16. The common law method is that general principles are "built up" from the "collation of decided cases" and "monitored by reference to how well they fit within the wider body of the law".[11] "The law develops case by case, the Court in each case deciding so much as is necessary to dispose of the case before it".[12] This method recognises that performance of an

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4 J Goudkamp, *Tort Law Defences* (2013) at [1.2.1]-[1.2.2], esp pp 6-7. See also *Fairfax Media Publications Pty Ltd v Voller* (2021) 273 CLR 346 at [74] (Gageler and Gordon JJ), [118] (Edelman J).

5 *Stradford* (2025) 99 ALJR 396 at [13], [149] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

6 *Stradford* (2025) 99 ALJR 396 at [130] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

7 *Stradford* (2025) 99 ALJR 396 at [132] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

8 *Stradford* (2025) 99 ALJR 396 at [222] (Edelman J); J Goudkamp, *Tort Law Defences* (2013) p 7 [1.2.2].

9 (2025) 99 ALJR 396 at [13], [149] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), [264], [319]-[320] (Edelman J), [325] (Steward J).

10 In *Brookfield Multiplex v Owners – Strata Plan No 61288* (2014) 254 CLR 185 at [25], French CJ observed that "[m]uch legal reasoning in relation to novel cases can proceed by way of analogy", citing Sunstein, *One Case at a time: Judicial Minimalism on the Supreme Court* (1999) pp 42-43 (stating "Analogical reasoning reduces the need for theory-building, and for generating law from the ground up, by creating a shared and relatively fixed background from which diverse judges can work"). That passage from *Brookfield* was recently cited in support of the necessity of "an incremental and analogical approach" in *Mallonland Pty Ltd v Advanta Seeds Pty Ltd* (2024) 98 ALJR 956 at [37] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).

11 *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at [79]-[81] (Gageler J, citing Jordan, *Appreciations* (1950) pp 58-59); see also [199] (Nettle, Gordon and Edelman JJ).

12 *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 490 (Barwick CJ).

adjudicative function in an adversarial setting proceeds best when it proceeds no further than is necessary to determine the particular legal right or liability in controversy between the parties.[13]

17. Consistently with this methodology, this Court should confine itself to deciding whether a common law defence is available on the material facts of this case. Those facts are that the plaintiff was detained: (i) by an officer of the executive government whose duty to obey the law as declared by this Court was reinforced by the Public Service Act; (ii) acting pursuant to an apparent statutory duty to detain; (iii) during a period of time when current and binding High Court authority held that the duty to detain validly applied to require such detention.

18. It is possible that one or more of the above facts is not essential. For example, a common law defence might be available if a person was detained by a person who was not subject to the Public Service Act,[14] or who acted pursuant to a statutory power rather than duty;[15] if there was no issue of validity, but instead a question of acting in good faith in applying the judicial interpretation of a provision;[16] or if the validity of the provision in question had been upheld by a court other than this Court (or simply had not been held to be invalid). Overseas authorities suggest that a defence might be available in those situations. But whether the common law should recognise a defence in such cases would depend upon different considerations than arise on the material facts just identified, and therefore should not be decided until the facts before the Court make it necessary for that question to be determined.

19. These submissions are structured as follows:

    a. **Section A** addresses the common law defence that was recognised and applied in *Stradford*.

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13 See *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at [58] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), citing *Clubb v Edwards* (2019) 267 CLR 171 at [136]-[137] (Gageler J). Those decisions, and the authorities to which they refer, make plain that this is a broader principle which is not confined to the prudential approach to the resolution of constitutional questions.

14 As discussed below, the defence recognised in *Stradford* was available to contracted private security guards who were not officers of the court or the executive and who were not subject to the Public Service Act. See also, eg, *Filarsky v Delia* (2012) 566 U.S. 377.

15 For example, in cases involving a statutory power rather than a duty, questions as to the relevance of good faith and proper purposes might arise, as they have in the Canadian jurisprudence discussed below. As such, this case does not require any consideration of the dissenting reasons of McHugh J and Kirby J in *Ruddock v Taylor* (2005) 222 CLR 612.

16 Cf *Cowell v Commissioner of Corrective Services* (1988) 13 NSWLR 714 in which reliance on the construction of a provision concerning a prisoner's remissions, later overturned, was argued (unsuccessfully) to afford a defence because "fault" had not been established: see 743 (Clarke JA).

b. **Section B** addresses the analogous common law defence for which the Commonwealth contends in this case, drawing upon the principled foundation for the defence recognised and applied in *Stradford*.

c. **Section C** identifies the analogous defence in several comparable overseas jurisdictions, in which the competing considerations have been reconciled consistently with the defence for which the Commonwealth contends.

A. The common law defence recognised and applied in *Stradford*

20. No Australian authority has decided whether there is a common law defence that is applicable where a detaining officer's conduct was of a kind that had been held in this Court to have been authorised and required by a valid legislative duty, but where a later decision of the Court established that the legislation was unconstitutional in its relevant application.

21. There is, however, a line of authority, which was recognised and applied in *Stradford*, establishing an analogous defence for a person who acts in obedience to invalid judicial orders. In *Stradford*, this Court found that that defence had been recognised in numerous Australian authorities,[17] applying English authorities dating back to the 17th century.[18] This line of cases identified two propositions upon which the defence depends, which we examine below. For the reasons addressed in Section B, those same propositions "resonate[] in ascertaining the appropriate common law principle applicable"[19] in this case.

(i) A legal duty to detain

22. The first proposition is that officers can be subject to a legal duty to detain arising from their general obligation to enforce orders made by a court, being a duty which may exist even if the particular orders that they are called upon to enforce are invalid.

23. In *Stradford*, Gageler CJ, Gleeson, Jagot and Beech-Jones JJ explained that the common law's protection was available to those "who have a legal duty to enforce or execute orders or warrants made or issued in judicial proceedings"[20] or who are subject to "an obligation

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17 See, in particular, the analysis in *Stradford* (2025) 99 ALJR 396 of *Smith v Collis* (1910) 10 SR (NSW) 800 (at [130], [271]); *Commissioner for Railways v* ***Cavanough*** (1935) 53 CLR 220 (at [128], [226]); *Ward v Murphy* (1937) 38 SR (NSW) 85 (at [130], [143], [152], [265], [269]); *Posner v Collector for Interstate Destitute Persons (Vic)* (1946) 74 CLR 641 (at [130], [141], [268]); *Robertson v The Queen* (1997) 92 A Crim R 115 (at [130], [271]); *Kable v New South Wales* (2012) 268 FLR 1 (at [128]).

18 See, eg, *Olliet v Bessey* (1682) 84 ER 1223 at 1224; *Moravia v Sloper* (1737) 125 ER 1039; *Andrews v Marris* (1841) 113 ER 1030; *Mayor and Aldermen of the City of London v Cox* (1867) LR 2 HL 239 at 263; *Greaves v Keane* (1879) 40 LT Rep 216; *Henderson v Preston* (1888) 21 QBD 362; *Demer v Cook* (1903) 88 LT 629 at 631; *Sirros v Moore* [1975] QB 118.

19 *Stradford* (2025) 99 ALJR 396 at [128] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

20 *Stradford* (2025) 99 ALJR 396 at [13]; see also [149].

imposed by law to enforce an order or warrant".[21] That defence was available even if the order requiring imprisonment, and so the imprisonment itself, was not lawful.[22] The duty in question therefore did not arise from the order in question, but rather depended on the detaining officers' separate and broader obligation to enforce orders of the court. This kind of legal duty had been recognised as early as 1610 in *Dr Drury's Case*, in speaking of the protection afforded to acts done according to a judicial order which was later reversed. Such acts were "acts done in the administration of justice, which are compulsive",[23] that statement having been approved by this Court in *Cavanough*.[24]

24. The Court in *Stradford*, in speaking of people who are under a "legal duty" or "obligation imposed by law" to enforce court orders, made clear that it was not limiting the defence to officers who come under a special or narrow form of legal obligation, such as holding a position which renders the officer amenable to supervision or punishment by the court. Such a narrow approach was recognised as providing an "unsatisfactory basis" for distinguishing between those who are and are not entitled to the benefit of the defence.[25] Moreover, it would have been inconsistent with authorities that had accepted that the protection of the defence was available to persons – such as gaolers[26] and garnishees[27] – who had no such immediate relationship of obedience to the court. The plurality held that the defence extended to "those who have a legal duty to enforce or execute orders … regardless of whether such persons are amenable to the supervision and punishment of the court as court officers".[28] To like effect, Edelman J held that there was no basis in principle to distinguish between such persons and "those who fulfil their duty based upon a statutory role following a legal direction from the court".[29]

25. The plurality in *Stradford* explained how the legal duty may arise for different officers and officials accountable through systems of discipline outside of the courts. This included the systems applicable to Commonwealth Sheriffs and Marshals appointed under the Public

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21 *Stradford* (2025) 99 ALJR 396 at [133].
22 *Stradford* (2025) 99 ALJR 396 at [132]. See also *Corbett v The King* (1932) 47 CLR 317 at 339 (Starke J); *Mooney v Commissioner of Taxation (NSW)* (1906) 3 CLR 221 at 241-242 (Griffith CJ).
23 (1610) 77 ER 688 at 691 (emphasis added), quoted in *Stradford* (2025) 99 ALJR 396 at [128] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ) and [266] (Edelman J).
24 (1935) 53 CLR 220 at 225 (Rich, Dixon, Evatt and McTiernan JJ), discussed with apparent approval in *Stradford* (2025) 99 ALJR 396 at [128] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ) and [266] (Edelman J)
25 *Stradford* (2025) 99 ALJR 396 at [133], [147].
26 *Stradford* (2025) 99 ALJR 396 at [136] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ) and [269] (Edelman J) citing *Olliet v Bessey* (1682) 84 ER 1223.
27 *Stradford* (2025) 99 ALJR 396 at [142] citing *Mayor and Aldermen of the City of London v Cox* (1867) LR 2 HL 239 at 269.
28 *Stradford* (2025) 99 ALJR 396 at [149].
29 *Stradford* (2025) 99 ALJR 396 at [264].

Service Act, which the plurality noted "has an extensive regime dealing with the discipline of persons appointed under it".[30] In the result, the Queensland police and correctional officers who had detained Mr Stradford were held to have been charged by law with the duty of enforcing the Court's orders.[31] The same protection was available to the MSS Guards who were employed by a private security firm which had contracted with the Commonwealth to provide security services at the Court. This was so notwithstanding that the guards had not been specifically authorised by legislation to assist the Marshal, and had not been named in the warrant. The plurality held that, in view of their contractual obligations, and the oral command given to them by Judge Vasta, they acted under an equivalent legal duty.[32]

(ii) The unacceptable ramifications of imposing liability

26. The second key proposition underpinning the common law defence in *Stradford* was that to hold detaining officers liable for acting in accordance with their duty to detain would have unacceptable ramifications for fundamental legal values, because it would undermine the authority of judicial proceedings and create unfairness and incoherence in the law.

27. In *Stradford*, the plurality stated that the protection of acts done according to the exigency of a judicial order was an aspect of the "protection of the authority of judicial proceedings".[33] Their Honours held that the authority of judicial proceedings was best served by recognising the common law defence because "[t]o perform their role effectively, courts must have their orders enforced and that must be done by officials not subject to the unreasonable burden of having to investigate the validity of the orders or warrants presented to them".[34]

28. The plurality also recognised the unjustness and hardship that would result from the imposition of liability for acts done in executing invalid orders on those who were obliged to execute them.[35] In support of that point, the plurality cited *Moravia v Sloper*, where the Lord Chief Justice said "it would be unjust that a man should be punished if he does not do a thing and should be liable to an action if he does".[36] The plurality also cited *Andrews v Marris*, where Denman CJ said of an officer bound to execute a warrant: "There would

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30 *Stradford* (2025) 99 ALJR 396 at [147], citing Public Service Act s 13, which contains the APS Code of Conduct, breach of which can attract sanctions under s 15 of that Act.

31 *Stradford* (2025) 99 ALJR 396 at [155]-[156], those officers being subject to their own respective systems of discipline under Queensland legislation.

32 *Stradford* (2025) 99 ALJR 396 at [157]-[159].

33 *Stradford* (2025) 99 ALJR 396 at [128], [148] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), quoting Allsop P in *Kable v New South Wales* (2012) 268 FLR 1 at [27] and [35].

34 *Stradford* (2025) 99 ALJR 396 at [149] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

35 *Stradford* (2025) 99 ALJR 396 at [138], [145] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

36 *Moravia v Sloper* (1737) 125 ER 1039 at 1041-1042, quoted in *Stradford* (2025) 99 ALJR 396 at [138] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ) and [269] (Edelman J). See also *Shergold v Holloway* (1734) 93 ER 156 at 157.

therefore be something very unreasonable in the law if it placed him in the position of being punishable by the Court for disobedience, and at the same time suable by the party for obedience to the warrant. The law, however, is not so".[37] That same passage had also been approved in earlier decisions of this Court.[38] Finally, the plurality also noted the discussion of unfairness and incoherence in *Ward v Murphy*.[39] There, Davidson J described the situation had the common law defence not been available, where the sheriff would have been made to choose between obeying the invalid order of the Court (and be liable for doing so), or disobeying the order, in which event "his neglect of his duties under the *Prisons Act* 'would render him liable to an action for damages'". That same kind of unfairness would have arisen in *Stradford*, had the defence been unavailable, as individuals would have been exposed either to liability for false imprisonment or liability under the "system of discipline" imposed by the legislative (or contractual) regimes to which they were subject.[40]

B. The analogous common law defence upon which the Commonwealth relies

29. The question before the Court is whether the principled basis for the defence recognised and applied in *Stradford* warrants the conclusion that an analogous defence applies where detention occurs because an officer acts in accordance with an incorrect determination by this Court of the validity of a legislative duty to detain. The Commonwealth submits that it does. To hold the detaining officer liable in those circumstances would undermine the authority of this Court (and the separation of powers more generally) and would introduce unfairness and incoherence in the law. As such, recognition of a common law defence analogous to that recognised in *Stradford* as an answer to the plaintiff's claim would reflect a principled and incremental extension to the common law of Australia.

30. In developing that submission, we address the same two propositions that were discussed above and that underpin the decision in *Stradford*: *first*, the existence of the legal duty of the detaining officer to comply with the law as declared and upheld by this court; *secondly*, the unfairness and incoherence that would result from imposing liability on the detaining officer who acts in accordance with such a statutory duty.

(i) A legal duty to detain

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37 (1841) 1 QBD 3 at 16, quoted in *Stradford* (2025) 99 ALJR 396 at [140] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ) and discussed at [267] (Edelman J).

38 See *Posner v Collector for Interstate Destitute Persons (Vic)* (1946) 74 CLR 461 at 481-482 (Dixon J); *Mooney v Commissioners of Taxation (NSW)* (1905) 3 CLR 221 at 241-242 (Griffith CJ).

39 (1937) 38 SR (NSW) 85 at 99, considered in *Stradford* (2025) 99 ALJR 397 at [143]; also Edelman J at [269].

40 *Stradford* (2025) 99 ALJR 396 at [147], [157]-[159] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), [318] (Edelman J).

31. The detaining officer was under a legal duty to detain the plaintiff, notwithstanding that *NZYQ* subsequently revealed ss 189(1) and 196(1) to have been invalid in their application to the plaintiff during the relevant period. That duty arose from the obligation of the executive branch to obey the law as the judicial branch has authoritatively declared it to be, which duty was reinforced (and breach of which was made amenable to sanction) by the statutory system of public service discipline to which the detaining officer was subject.

32. ***The rule of law:*** The Constitution is "framed upon the assumption of the rule of law".[41] The "irreducible" meaning of the rule of law is that "Government should be under law, that the law should apply to and be observed by Government and its agencies, those given power in the community, just as it applies to the ordinary citizen".[42] As such "[p]ublic power is not to be exercised in a way that is contrary to law".[43] As Brennan J observed in *A v Hayden (No 2)*, "[w]hat Clark J said in delivering the opinion of the Supreme Court of the United States in *Mapp v Ohio*, is manifestly true: 'Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.' No agency of the executive government is beyond the rule of law".[44]

33. As Marshall CJ famously declared in *Marbury v Madison*, it is "the province and duty of the judicial department to say what the law is".[45] That principle is accepted as "axiomatic"[46] in our constitutional system. What this means in practice is that, at least in cases where this Court has declared the meaning and proper content of a law of the Parliament (it being unnecessary and, therefore, inappropriate to consider the position of lower courts), the Executive cannot administer the law "in a manner contrary to the meaning and content as declared by the Court".[47] The statement in *Indooroopilly*, that "[w]hat should not occur is a course of conduct whereby it appears that the courts and their central function under [Chapter] III of the Constitution of the Commonwealth are being ignored by the executive in the carrying out of its function under [Chapter] II of the Constitution, in particular its

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41 ***Plaintiff S157****/2002 v Commonwealth* (2003) 211 CLR 476 at [31] (Gleeson CJ); *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193 (Dixon J).

42 ***MZAPC*** *v Minister for Immigration and Citizenship* (2021) 273 CLR 506 at [91] (Gordon and Steward JJ).

43 *MZAPC* (2021) 273 CLR 506 at [95] (Gordon and Steward JJ).

44 (1984) 156 CLR 532 at 588, quoting *Mapp v Ohio* (1961) 367 US 643 at 659. See also 562 (Murphy J), cited with approval in *Re Residential Tenancies Tribunal (NSW) and Henderson; Ex parte the Defence Housing Authority* (1997) 190 CLR 410 at 443-444 (Dawson, Toohey and Gaudron JJ).

45 (1803) 5 US 87 at 111. See also *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35 (Brennan J).

46 ***Graham*** *v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at [40] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ), citing *Australian Community Party v Commonwealth* (1951) 83 CLR 1 at 262-263 (Fullagar J).

47 ***Indooroopilly*** *Children Services (Qld) Pty Ltd* (2007) 158 FCR 325 at [3] (Allsop J, Stone and Edmonds JJ agreeing). See also *Majera, R (on the application of) v Secretary of State for the Home Department* [2021] UKSC 46 at [45]; *R (Lunn) v Governor of Moorland Prison* [2006] EWCA Civ 700 at [22].

function under s 61 of the Constitution of the execution and maintenance of the laws of the Commonwealth" must apply with its greatest force where this Court has declared the meaning of a law.[48]

34. Section 75(v) of the Constitution reflects this conception of the relationship between the three branches of government, s 75(v) being a means of "assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them".[49] The "presence of s 75(v) thus 'secures a basic element of the rule of law'".[50] If the executive is "dilatory" in performing duties imposed upon it by Parliament, mandamus will issue to compel performance of the duty: "[b]y this means, judicial power is exercised to give effect to the scheme of the Act, enforcing the supremacy of the Parliament over the Executive".[51]

35. In light of the above fundamental principles, the detaining officer could not properly have treated the decision of this Court in *Al-Kateb* as something akin to a non-binding guide to how ss 189(1) and 196(1) should be applied. Throughout the relevant period the detaining officer was bound to comply with the duties imposed upon him by ss 189 and 196 of the Migration Act, as construed and held to be valid by this Court in *Al-Kateb*.

36. It is an agreed fact that, throughout the relevant period, the plaintiff was, and the detaining officer reasonably suspected him to be, an "unlawful non-citizen": **SCB 52 [17.1]** and **[18.3]**. Consistently with *Al-Kateb*, the plaintiff was therefore required to be held in immigration detention unless and until such time as he was removed from Australia or granted a visa, whether or not there was a real prospect of removal in the reasonably foreseeable future.[52] That would have been the case irrespective of whether or not the detaining officer disagreed[53] with the reasoning in *Al-Kateb*, or personally thought that in future it would be overruled (for the officer obviously could not properly prefer their own opinion over the decision of this Court). In complying with the law as this Court had held it to be, the detaining officer therefore complied with his legal duty, notwithstanding that it eventually came to pass that this Court overruled its prior decision. Until that occurred, the duty of the

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48 *Indooroopilly* (2007) 158 FCR 325 at [3] (Allsop J, Stone and Edmonds JJ agreeing).
49 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
50 *Graham* (2017) 263 CLR 1 at [44] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
51 *Commonwealth v AJL20* (2021) 273 CLR 43 at [52] (Kiefel CJ, Gageler, Keane and Steward JJ), citing *M v Home Office* [1994] 1 AC 377; *AFX17 v Minister for Home Affairs [No 4]* (2020) 279 FCR 170.
52 *Al-Kateb* (2004) 219 CLR 562 at [33] (McHugh J), [210], [224]-[227] (Hayne J), [292] (Callinan J), [303] (Heydon J).
53 See, eg, *Tran v Minister for Immigration and Multicultural Affairs* (2006) 154 FCR 536 at [9] (Rares J).

detaining officer to keep the plaintiff in detention was no less "compulsive" than a duty to detain arising by reason of a judicial order that turns out to be invalid.[54]

37. That submission should not be mischaracterised as a submission that *Al-Kateb* was correct until it was overturned, or that *NZYQ* operated only prospectively.[55] The Commonwealth makes no such submission. It does submit – to adapt what was said in *Kable (No 2)*[56] – that the holding in *Al-Kateb* was "a thing in fact" which had legal consequences, just as the invalid orders in *Stradford* had legal consequences for the duty of the detaining officers in that case. Insofar as that duty applied to the detaining officer in respect of the plaintiff, it came to an end only when this Court reopened and overruled *Al-Kateb* in *NZYQ* on 8 November 2023 (that being the date that marks the end of the relevant period).

38. ***Public Service Act:*** The legal duty on the detaining officer throughout the relevant period to detain the plaintiff also arose, and was directly reinforced, by reason of the system of discipline imposed on Australian Public Service (**APS**) employees under the Public Service Act. Section 13(4) of the Code of Conduct imposed by that Act obliged APS employees to "comply with all applicable Australian laws" when acting in connection with APS employment. A breach of that obligation would have exposed the detaining officer – who was an APS employee (**SCB 52 [18.1]**) – to sanctions of varying degrees of severity, including the termination of employment, reduction in classification, reduction or deductions of salary, or reassignment of duties.[57] Accordingly, the detaining officer was subject to the same system of discipline as was recognised in *Stradford* (in the context of the Sheriff and Marshal of the Federal Circuit Court) to impose the requisite legal duty.[58]

39. For the above reasons, there is no relevant distinction between the legal duty to detain recognised in *Stradford* and that to which the detaining officer was subject in this case.

(ii) The unacceptable ramifications of imposing liability

40. The unacceptable ramifications of imposing liability on an officer for obeying the duty identified above also align closely with the ramifications discussed in *Stradford*. For reasons already explained, it is unthinkable that a detaining officer might properly choose not to act in accordance with a judgment of this Court as to the meaning and validity of a statutory

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54 Cf *Cavanough* (1935) 53 CLR 220 at 225 (Rich, Dixon, Evatt and McTiernan JJ), quoting *Dr Drury's Case* (1610) 77 ER 688 at 691.

55 Australian law does not recognise prospective overruling: see, eg, *Ha v New South Wales* (1997) 189 CLR 465 at 503-504 (Brennan CJ, McHugh, Gummow and Kirby JJ), 515 (Dawson, Toohey and Gaudron JJ); *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at [55] (Kiefel CJ, Bell, Keane and Gordon JJ).

56 *New South Wales v* ***Kable (No 2)*** (2013) 252 CLR 118 at [52] (Gageler J).

57 Public Service Act, s 15(1).

58 *Stradford* (2025) 99 ALJR 396 at [147], [157]-[159] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

duty. To tolerate that would be to undermine the rule of law and the authority of the judicial branch of government. The concern in *Stradford* to protect the authority of judicial processes applies with at least equal force in the present circumstances as it did in that case.

41. The concerns identified in *Stradford* concerning the injustice and incoherence of holding officers liable whether they obey or disobey an apparent duty are likewise applicable in this case. As already noted, detaining officers were required to adhere to what this Court had determined to be the scope and validity of the statutory duty imposed by ss 189(1) and 196(1) of the Migration Act. Failure to do so would have been capable of correction by mandamus, and it would also have exposed the detaining officer to disciplinary measures under the Public Service Act.

42. There is manifest injustice and incoherence in recognising the legal duty of officers of the executive to obey a statute that this Court has held to be valid, only to hold those officers personally liable for having complied with that duty in the event that this Court decides to overrule its earlier decision. Such a position would be impossible to reconcile with the importance of the "coherence of law" as a "central policy consideration" in the development of other areas of the law.[59] As Professor Campbell put it:[60]

> Agencies of government may understandably be disconcerted by a legal system in which the judicial branch of government on the one hand strongly urges officers of the executive branch to act in accordance with the "superior orders" of the legislative branch and judicial interpretations of those orders, but which on the other hand fixes liabilities on the agents of the executive branch when the judges subsequently alter the "superior orders", and do so retrospectively.

43. The need to avoid absurdities of this kind was recognised in *Stradford*, and in the earlier authorities considered in that decision (see paragraph 27 above). The repugnance of that kind of incoherence has also been recognised in other contexts. For example, in *Mock Sing v Dat*, it was explained that if the people charged with executing an order cannot rely on its validity, then no one would dare to act under the order until they first satisfied themselves that it was correct; a result that Stephen ACJ described as "monstrous" and Owen J as a "ridiculous position" and "a perfect farce".[61]

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59 See *Miller v Miller* (2011) 242 CLR 446 at [15] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), citing *Sullivan v Moody* (2001) 207 CLR 562 at [42], [53]-[55] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at [100] (Gummow, Hayne and Kiefel JJ); *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390 at [39]-[42] (Gummow, Heydon and Crennan JJ).

60 E Campbell, "The Retrospectivity of Judicial Decisions and the Legality of Governmental Acts" (2003) 29(1) *Monash University Law Review* 49 at 67.

61 *Mock Sing v Dat* (1902) 2 SR (NSW) 333 at 338, 339 (Stephen ACJ) and at 340-341 (Owen J). See also *Revell v Blake* (1873) LR 8 CP 533 at 541-542.

44. To similar effect, in *Kable (No 2)* this Court, in discussing "fundamental considerations about the operation of any developed legal system", recognised the difficulties with individuals affected by orders – including the executive – having "to choose whether to disobey the order (and run the risk of contempt of court or some other coercive process) or incur tortious liability".[62] The "decision to disobey the order would have required both the individual gaoler and the Executive Government of New South Wales to predict whether this Court would accept what were then novel constitutional arguments".[63] Their Honours, quoting legal philosopher Hans Kelsen, said that a "status where everybody is authorised to declare every norm, that is to say, everything which presents itself as a norm, as nul[l], is almost a status of anarchy".[64]

45. The salience of the above observations is illustrated by considering what it is expected that the detaining officer could or should have done in order to avoid being liable to the plaintiff for false imprisonment. Absent a defence, the only alternative to liability would have been not to detain the plaintiff. This would have involved ignoring the binding decision in *Al-Kateb*, predicting instead that this Court would re-open and overturn that decision and, on the basis of that prediction, disregarding the apparently clear commands of the democratically elected Parliament and risking disciplinary sanctions for doing so. The law cannot countenance, let alone require, such a course. That being so, it cannot coherently impose liability upon the detaining officer for acting in the only way that was open to him. For those reasons, the common law defence to liability for which the Commonwealth contends should be held to be available.

C. The common law defence is consistent with overseas authorities

46. Recognition of the proposed common law defence would be consistent with (albeit narrower than) defences recognised in Canada, the United States and the United Kingdom.

(i) Canadian authority

47. In ***Guimond*** *v Quebec (Attorney General)*,[65] the plaintiff sought damages under s 24(1) of the *Canadian* ***Charter*** *of Rights and Fundamental Freedoms* arising from his detention purportedly pursuant to sentencing legislation which had been held to be invalid. In

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62 *Kable (No 2)* (2013) 252 CLR 118 at [38]-[39] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

63 *Kable (No 2)* (2013) 252 CLR 118 at [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

64 *Kable (No 2)* (2013) 252 CLR 118 at [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). Similar concerns were expressed, in the context of a system of military discipline, about a situation in which a person was imprisoned by orders of an invalid military court: see *Haskins v Commonwealth* (2011) 244 CLR 22 at [64] and [67] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

65 [1996] 3 SCR 347.

upholding a defence to that claim, the Canadian Supreme Court referred with approval to its earlier holding in *Central Canada Potash Co v Government of Saskatchewan*,[66] which recognised a similar defence to the tort of intimidation. In that case, Martland J, on behalf of the Court, said that the conduct of the relevant official "must be considered in relation to the circumstances existing at the time the alleged threat was made".[67] His Honour concluded that "it would be unfortunate … if it were to be held that a government official, charged with the enforcement of legislation, could be held to be guilty of intimidation because of his enforcement of a statute whenever a statute whose provisions he is under a duty to enforce is subsequently held to be *ultra vires*".[68]

48. Applying that approach in *Guimond* to false imprisonment, Gonthier J said:[69]

> A qualified immunity for government officials is a means of balancing the protection of constitutional rights against the needs of effective government ... A government official is obliged to exercise power in good faith and to comply with "settled, indisputable" law defining constitutional rights. However, if the official acts reasonably in the light of the current state of the law and it is only subsequently determined that the action was unconstitutional, there will be no liability. To hold the official liable in this latter situation might "deter his willingness to execute his office with the decisiveness and judgment required by the public good".

49. In ***Mackin*** *v New Brunswick*, the Canadian Supreme Court held unconstitutional a law abolishing the system of supernumerary judges and replacing it with retired judges paid on a per diem basis, but dismissed a claim for damages based on the financial loss suffered as a result of the invalid law.[70] Gonthier J, for the majority, observed that "[a]ccording to the general rule of public law, absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional".[71] In that sense, public officials "enjoy limited immunity against actions in civil liability based on the fact that a legislative instrument is invalid".[72] His Honour continued:[73]

> [T]he government and its representatives are required to exercise their powers in good faith and to respect the "established and indisputable" laws that define the constitutional rights of individuals. However, if they act in good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional, they will not be liable. Otherwise, the effectiveness and efficiency of government action would be excessively constrained. Laws must be

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66 [1979] 1 SCR 42.
67 [1979] 1 SCR 42 at 88.
68 [1979] 1 SCR 42 at 90, quoted in *Guimond* [1996] 3 SCR 347 at 357-358.
69 *Guimond* [1996] 3 SCR 347 at 359, quoting M L Pilkington, "Monetary Redress for Charter Infringement" in R J Sharpe (ed), *Charter Litigation* (1987) 307 at 319-320 (emphasis added by Gonthier J).
70 [2002] 1 SCR 405.
71 *Mackin* [2002] 1 SCR 405 at 441-442 (emphasis added).
72 *Mackin* [2002] 1 SCR 405 at 442 (emphasis in original).
73 *Mackin* [2002] 1 SCR 405 at 442-443 (citations omitted).

> given their full force as long as they are not declared invalid. Thus it is only in the event of conduct that is clearly wrong, in bad faith or an abuse of power that damages may be awarded.

50. *Mackin* has subsequently been applied by the Supreme Court of Canada, in referring to "well-established principles of public law [which] rule out the possibility of awarding damages when legislation is declared unconstitutional, be it on the grounds of a violation of the separation of legislative powers or of non-compliance with the Canadian Charter".[74] This line of authority is well established in Canada,[75] and it has been applied to cases where detention occurred pursuant to an unconstitutional law.[76] The Canadian authorities are instructive because, while the defence that they recognise is wider than that identified in *Stradford* (and wider than the defence for which the Commonwealth contends in this case), that defence gives effect to similar policy considerations with respect to executive action undertaken pursuant to legislation that is subsequently held to be invalid.

(ii) United States authority

51. A similar line of authority in the United States recognises a "qualified immunity" that provides protection from liability (under both the common law and the § 1983 of the *Civil Rights Act of 1871*) where action is taken under a law that is subsequently held to be unconstitutional. Most relevantly, in ***Pierson*** *v Ray*,[77] Warren CJ, delivering the judgment of the Supreme Court, observed that "a policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does". Warren CJ then observed that, "[a]lthough the matter is not entirely free from doubt, the same consideration would seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional on its face or as applied".[78] Warren CJ went on to accept that "a police officer is not charged with predicting the future course of constitutional law", but said that "the petitioners in this case did not simply argue that they were arrested under a statute later held to be unconstitutional".[79] But, having recounted the contest

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74 *Quebec v Montreal* [2004] 1 SCR 789 at 801 (LeBel J for the Court).

75 See also *Vancouver (City) v Ward* [2010] 2 SCR 28 at [41]-[43] (McLachlin CJ, for the Court); *Conseil scolaire francophone de la Colombie-Britannique v British Columbia* [2020] 1 SCR 678 at [169] (Wagner CJ, for the majority).

76 In addition to *Guimond*, see, eg, *Mullins v Levy* [2005] BCSC 1217 at [191] stating, in the context of a challenge to the mental health legislation pursuant to which the plaintiff had been detained, that "if [the] defendants acted in accordance with the Act, in good faith and for no improper purpose they would not be held liable in damages even if the Act were subsequently held invalid".

77 (1967) 386 US 547. The existence of this immunity is well settled: see, eg, *Filarsky v Delia* (2012) 566 US 377 at 383-384, where the main issue was whether the immunity was available to an individual hired by the government to do its work on other than a permanent or full-time basis. The Supreme Court held that it was.

78 *Pierson* (1967) 386 US 547 at 555 (emphasis added).

79 *Pierson* (1967) 386 US 547 at 557.

between the parties on the facts, Warren CJ concluded that "if the officers reasonably believed in good faith that the arrest was constitutional, then a verdict for the officers would follow even though the arrest was in fact unconstitutional".[80]

(iii) English authority

52. English decisions are of less immediate relevance, because for obvious reasons English courts have not needed to grapple with the consequences of action taken pursuant to unconstitutional legislation. Nevertheless, at least one decision appears to recognise a similar defence to that for which the Commonwealth contends, for reasons which echo the same basic legal policy concerns.

53. In ***Percy*** *v Hall*,[81] the plaintiffs were arrested without warrant and charged with breaches of certain byelaws, which were later held invalid for uncertainty. They then brought actions for wrongful arrest and false imprisonment against the constables who had carried out their arrest. The Court of Appeal held that the byelaws were valid. However, the Court went on to observe that, even if they had been invalid, they would still have provided the foundation for a defence to the tortious claims against the constables. Specifically, Simon Brown LJ (Peter Gibson LJ and Schiemann LJ relevantly agreeing) observed:[82]

> The central question raised here is whether these constables were acting tortiously in arresting the plaintiffs or whether instead they enjoy at common law a defence of lawful justification. This question … falls to be answered at the time of the events complained of. At that time these byelaws were apparently valid; they were in law to be presumed valid; in the public interest, moreover, they needed to be enforced. It seems to me one thing to accept, as I readily do, that a subsequent declaration as to their invalidity operates retrospectively to entitle a person convicted of their breach to have that conviction set aside; quite another to hold that it transforms what, judged at the time, was to be regarded as the lawful discharge of the constables' duty into what must later be found actionably tortious conduct.

His Lordship concluded that there were "no sound policy reasons for making innocent constables liable in law, even though such liability would be underwritten by public funds".[83]

54. *Percy* has been cited with apparent approval by the UK Supreme Court and the Privy Council,[84] the former having recognised that treating a decision or act as legally non-existent may override important legal values "such as the public interest in legal certainty, orderly

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80 *Pierson* (1967) 386 US 547 at 557.
81 [1997] QB 924.
82 *Percy* [1997] QB 924 at 947-948.
83 *Percy* [1997] QB 924 at 948.
84 *R (**Majera**) v Secretary of State for the Home Department* [2021] UKSC 46 at [31]; *Mossell (Jamaica) Ltd (t/a Digicel) v Office of Utilities Regulations* [2010] UKPC 1 at [44].

administration, and respect for the rule of law".[85] The Supreme Court's reasoning[86] resonates with the recognition in *Kable (No 2)*, discussed above, that an invalid decision or order (and, a fortiori, an invalid statutory provision) is a "thing in fact" that is capable of having legal consequences for the assessment of liability even if it later turns out to have been invalid.[87]

55. The Commonwealth also draws attention to *R v Governor of Brockhill Prison, ex parte* ***Evans*** *[No 2]*,[88] in which the House of Lords held that the Governor had no defence to a claim of false imprisonment in having calculated Ms Evans' period of detention consistently with prevailing authority as to the proper construction of the relevant provisions, being authority that was held to be wrong (by the Court of Appeal in *Evans* itself). However, the facts and reasoning in *Evans* are different in important respects from this case, and in other respects are impossible to reconcile with *Stradford*. Further, *Evans* does not cast doubt on *Percy* which, as noted, has continued to be cited with apparent approval.

D. Conclusion

56. The common law of Australia should recognise a defence to actions for false imprisonment that applies at least to detention by officers of the executive who are subject to the Public Service Act, and who detain pursuant to a statutory duty that this Court has held to be constitutionally valid. Such a defence is necessary to give proper effect to the rule of law and to avoid incoherence in the imposition of liability upon officers who could not properly have acted other than as they did. Recognition of such a defence would be consistent with authority in Canada, the United States and England. It would also be a natural, incremental and principled development from the defence recognised by this Court in *Stradford*.

57. For the above reasons, while the detaining officer was the Commonwealth's employee, and as such the Commonwealth admits that it would be vicariously liable for any liability of the detaining officer with respect to the plaintiff's detention during the relevant period, the detaining officer should be found to be protected from liability by the common law defence.

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85 *Majera* [2021] UKSC 46 at [32].

86 See, eg, *Majera* [2021] UKSC 46 at [27], [31].

87 *Kable (No 2)* (2013) 252 CLR 118 at [52] (Gageler J). See also E Campbell, "The Retrospectivity of Judicial Decisions and the Legality of Governmental Acts" (2003) 29(1) *Monash University Law Review* 49 at 84: there may be a need to "separate the principles which are applied by courts in determination of the validity of governmental acts, by reference to the principles of public law, from the principles to be applied by courts in determination of claims for damages".

88 [2001] 2 AC 19.

There being no underlying liability in the detaining officer for that period, there can be no vicarious liability on the part of the Commonwealth.[89]

58. If the plaintiff's separate allegation that the Commonwealth is directly liable to him for false imprisonment in the relevant period is pressed, that allegation is denied. It is answered by the common law defence discussed above, which must have the same application to the Commonwealth as it does to Commonwealth officers. It also faces insurmountable difficulties including that (i) the plaintiff was not detained by the Commonwealth itself (the very concept of "immigration detention" being defined in s 5 of the Act to mean being held or restrained by or on behalf of "an officer");[90] (ii) the Commonwealth did not itself have the necessary intention to detain;[91] and (iii) the need for liability to be vicarious is consistent with conventional common law principle reflected in a long line of authority in this Court.[92] If necessary, this allegation will be addressed further in Reply.

PART VI ORDERS SOUGHT

59. The question in the Special Case (**SCB 53**) should be answered "Yes".

PART VII ESTIMATED TIME

60. The Commonwealth estimates that up to 2.5 hours will be required to present oral argument (including reply).

Dated: 16 September 2025

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89 See generally *Bird v DP* (2025) 98 ALJR 1349.

90 In *NZYQ* (2023) 280 CLR 137 at [11], this Court recognised that the "critical provisions [of the Migration Act] operate by imposing duties on 'officers'".

91 See, eg, *The Admiralty v Owners of the Steamship Davina* [1952] P 1; *Western Australia v Watson* [1990] WAR 248.

92 See *Shaw Savill and Albion Co Ltd v Commonwealth* (1940) 66 CLR 344 at 360 (Dixon J); *Parker v Commonwealth* (1965) 112 CLR 295 at 301 (Windeyer J); *Groves v Commonwealth* (1982) 150 CLR 113 at 121-122 (Stephen, Mason, Aickin and Wilson JJ); *Haskins v Commonwealth* (2011) 244 CLR 22 at [43]-[44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

ANNEXURE TO THE COMMONWEALTH'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates
1	*Commonwealth Constitution*	Current	ss 61, 75	In force at all relevant times	All relevant times
2	*Migration Act 1958* (Cth)	Compilation No 156 (1 Nov 2013 – 17 Nov 2013)	ss 5, 189, 196	Compilation in force immediately prior to orders in *NZYQ*; for illustrative purposes	All relevant times
3	*Public Governance, Performance and Accountability Act 2013* (Cth)	Current	s 65	For illustrative purposes	At all relevant times
4	*Public Service Act 1999* (Cth)	Compilation No 20 (29 Dec 2018 – 26 Aug 2024)	ss 13, 15	Compilation in force immediately prior to orders in *NZYQ*; for illustrative purposes	All relevant times