HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY
BETWEEN:

No. S146/2025

TCXM
Appellant

and

MINISTER FOR IMMIGRATION AND CITIZENSHIP
First Respondent

COMMONWEALTH OF AUSTRALIA
Second Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

PART I INTERNET PUBLICATION

This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

1. Does s 198(2B) of the *Migration Act 1958* (Cth) authorise and require the removal of the Appellant from Australia to Nauru? In answering "yes", the primary judge (**PJ**) erred.

Some facts

2. Facts about the Interim Arrangement (J [40]–[73]) and real risk of death: J [77]–[94].

Ground 2

3. If there was a serious risk the Appellant would die from a fatal asthma attack in Nauru, it was not reasonably practicable to remove him from Australia to Nauru: *contra* J [182]–[185]. Being bound by *NATB* (2003) 133 FCR 506, [53] (J [186]), the PJ made no findings.

4. Section 198(2B)'s text can be construed so that it is not reasonably practicable to remove a person to a country where they face a real risk of death (that does not engage s 197C).

5. That is supported by an understanding of context and purpose.

   (1) The duty is to remove to a country where a person can *live*: Reply [15]–[18].

   (2) Thus, it is only reasonably practicable to remove a person to a country where they have a right to reside.

      (a) The Appellant was granted a BVR, because there was no real prospect of removal from Australia to a country becoming practicable in the reasonably foreseeable future: *YBFZ* (2024) 99 ALJR 1, [20]–[21].

      (b) Sections 76AAA and 198AHB were enacted to create such prospect (J [33], Revised Ex Mem, [16]), by procuring a country where a BVR-holder had a right to enter and remain (s 76AAA(1)(b)).

   (3) But a right to reside is relevant to the reasonable practicability of removal, not for the right itself, but because it ensures the person can *live* there once removed. Section 198AHB(1) and (5) ensured the Appellant could have an "ongoing presence" (s 198AHB(1), (2), (5)), supported by the Commonwealth: s 198AHB(1), (2), (5).

   (4) Understood in that context, s 198's text can be construed so that it is not reasonably practicable to remove to a country where the person will not live, but will die.

   (5) Further, if risk of harm after removal to a "receiving country" were incapable of affecting reasonable practicability of removal, 197C(1) would have no work to do.

6. With the principle of legality, s 198's text would be construed in that way.

(1) The pre-eminent value of the right to life reflects the irreducible status of each human being, including aliens in Australia: AS [60]; *YBFZ* (2024) 99 ALJR 1, [9], [12], [14]. That value underpins s 198's premise of a country where a person may live. On the Respondents' construction, s 198 requires removal to a country notwithstanding a real risk the person will not live, but will die.

(2) That the right to life is most fundamental requires the greatest degree of clarity for Parliament to curtail it: AS [58]; *Hurt v The King* (2024) 98 ALJR 485, [106].

(3) Except by s 197C, s 198 does not irresistibly-clearly say it is reasonably practicable to remove a person to a country where there is a real risk that they will die.

7. Otherwise, s 3A would require that construction to ensure validity.

(1) So construed, in context of ss 76AAA and 198AHB, s 198 was prima facie punitive. Salient features are: (a) duty to remove to a real risk of death; (b) Australia's protection obligations; (c) no connection to Nauru; (d) Australia's ongoing involvement; (e) confinement to an island; (f) character grounds; (g) a "mark of infamy"; (h) no executive discretion; (i) no procedural fairness.

(2) Those features make this unlike anything contemplated in *Fong Yue Ting v United States*, 149 U.S. 698 (1893), *Attorney-General v Cain* [1906] AC 542, *Robtelmes v Brenan* (1906) 4 CLR 395, *Koon Wing Lau v Calwell* (1949) 80 CLR 533, *Ex parte Walsh and Johnson; Re Yates* (1925) 37 CLR 36, *O'Keefe v Calwell* (1949) 77 CLR 261, or *Chu Kheng Lim* (1992) 176 CLR 1; or, for that matter, in *M38* (2003) 131 FCR 146, *NATB* (2003) 133 FCR 506, or any other case on removal under s 198.

(3) So construed, s 198 is prima facie punitive.

(4) A law for expulsion or deportation is not axiomatically non-punitive: Reply, [24].

(5) So construed, s 198 is not reasonably capable of being seen as necessary. A less drastic means for a person with a real risk of death would be to afford procedural fairness or to extend the special administrative scheme for protection claims.

8. On ground 2, this Court would remit to the Federal Court for further hearing.

Ground 1

9. The decision to enter the Interim Arrangement was an exercise of statutory power: AS [22]–[28]; s 198AHB(1), (2), (5).

(1) The prerogative power has been displaced: AS [22], [28]; Reply, [8]; *Jarratt* (2005) 224 CLR 44, [85].

(2) *Plaintiff M68/2015* (2016) 257 CLR 42 does not decide or is different: AS [28].

10. That statutory power was conditioned by procedural fairness; its exercise, directed to, and affecting the interests of, three individuals, required something: AS [29]; *Badari* [2025] HCA 47, [16]–[19], [34]–[43]; J [42], [44], [47], [49]–[50], [52] (reg 4(2)), [54]–[64].

11. Or, if non-statutory executive power, either the statute required the Interim Arrangement be entered with procedural fairness or the executive source of power was conditioned on the Interim Arrangement being attended by procedural fairness: AS [30]–[32]; Reply, [7].

12. Nothing was done by way of procedural fairness: AS [33], J [15(a)].

13. The claim of breach was justiciable: AS [31]–[32]; Reply [2], [9], [10].

14. Entry into the Interim Arrangement was therefore unlawful, in that it was done in breach of a condition on the power to enter the Interim Arrangement: AS [34].

15. The Amending Act does not make it lawful: AS [34]–[40]; Reply [3], [4], [6].

(1) Unlawfulness (contravention of law) precedes invalidity (result of contravention), and is not its consequence: AS [38]; Reply [3]; *Project Blue Sky Inc* (1998) 194 CLR 355, [66], [91], [100].

(2) Item 10 validates for s 76AAA, but does not make lawful: AS [37]–[40]; Reply [4].

(3) Section 198AHAA(1)(a), with item 9(2), does not make lawful: AS [36]; Reply [6].

(4) That construction of the Amending Act is confirmed by the principle described in *Bhardwaj* (2002) 209 CLR 597, [48]: AS [39]; Reply [6].

16. An injunction may restrain a body from taking further action based on an act that is valid but unlawful: *Project Blue Sky Inc* (1998) 194 CLR 355, [100]; AS [41]–[44].

17. Section 474 does not preclude grant of such an injunction: AS [41]–[42]; Reply, [5].

18. The s 198 duty accommodates an injunction: *MZAPC* (2025) 99 ALJR 486.

19. On ground 1, this Court would grant an injunction.

Date: 9 December 2025

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