HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S146/2025

BETWEEN:

TCXM
Appellant

and

MINISTER FOR IMMIGRATION AND CITIZENSHIP
First Respondent

COMMONWEALTH OF AUSTRALIA
Second Respondent

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SUBMISSIONS IN REPLY OF THE APPELLANT

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PART I CERTIFICATION

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

PART II REPLY

Ground 1: procedural unfairness in the entry of the Interim Arrangement

2 The Respondent's submissions (**RS**) at [10], [28]–[37] say that because the Interim Arrangement was an international agreement, entry could not have been conditioned by a justiciable procedural fairness requirement. Parliament judged to the contrary, in items 9(2), 10 of the Amending Act: Appellant's Submission (**AS**) [32].

3 RS [14] says that "[n]o argument is advanced in this case that could produce 'unlawfulness' except as a consequence of invalidity". That depends on a confusion of concepts. Unlawfulness (contravention of law) is not the consequence of invalidity (statutory effects being switched off if conditions are breached): AS [21]–[44].

4 RS [16] says that item 10 of the Amending Act validates decisions for the purposes of s 198AHAA(1) itself, and therefore unlawful entry into the Interim Arrangement by breach of procedural fairness will have been made lawful by item 10. The submission would be rejected because: (1) item 10(4) causes entries into third country arrangements to be valid "for all purposes", where all the purposes of validity would extend to all the "legal effect[s] which the Parliament intended an exercise of the power to have";[1] and (2) disapplication of natural justice in s 198AHAA(1) was not a legal effect an exercise of the power was intended to have, but the discrete prescription of s 198AHAA(1). Further, item 10(4) does not in terms or effect provide that an ultra vires entry was an "exercise of the executive power", and such an exercise of power (sourced in s 61 of the *Constitution*) is the factum on which s 198AHAA(1) operates.

5 RS [17] deploys s 474, asserting the Amending Act made entry into the Interim Arrangement not to involve jurisdictional error. But "principles of jurisdictional error… do not attend the remedy of injunction… provided in s 75(v)".[2] Section 474 is ineffective to attenuate "[t]he reservation" in s 75(v) to the High Court (and so in s 39B to the Federal Court) of "the jurisdiction in all matters in which the named constitutional writs or an injunction are sought", thus "assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any

[1] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [41] (Brennan CJ).
[2] *Futuris Corporation* (2008) 237 CLR 146, [47] (Gummow, Hayne, Heydon and Callinan JJ).

jurisdiction…", and that official action is "lawful and within jurisdiction".[3]

6 As to RS [18]–[19], item 9(2) does not provide that acts ultra vires the executive power were exercises of the executive power. The Court's interpretive function is not just target-hitting (RS [19]); here, it would produce only a "necessary" meaning.[4]

7 RS [23]–[27] says that s 198AHB(1) denotes a class of agreements entered in exercise of prerogative power. That is not right, because essential incidents are prescribed by s 198AHB(2) and (5). Or, if that is right, denotation of the class still requires construction of s 198AHB(1). For s 198AHB(1) to produce statutory effects, implicatures are required. Thus, the class denoted by s 198AHB(1) is confined to
10 arrangements with characteristics supposed by s 198AHB(2) and (5), and for the purpose of removal of persons holding BVRs. It does not extend to a broad class of arrangements within the ordinary meaning of the words in s 198AHB(1): AS [27]. On the same lines, by statutory construction, a further implicature would be that the class denoted is limited to arrangements entered in accordance with procedural fairness.

8 RS [25] says that s 198AHB would not displace the prerogative because of the provision in s 198AHB(4) that nothing in the section "limits… the executive power". That form of submission was rejected in *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at [41] (French CJ), [141] (Hayne and Bell JJ) and [281]–[283] (Kiefel J), and would be rejected for the same reasons in this matter.

20 9 RS [29] is a submission relying partly on authority from when judicial review of the prerogatives was "in a developing state".[5] The true position is that "the exercise of the prerogative powers for the conduct of foreign relations" is "not… immune from judicial review",[6] and "the issue of justiciability depends, not on general principle, but 'on subject matter and suitability in the particular case'".[7] "The distinguishing factor

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[3] *Plaintiff S157/2002* (2003) 211 CLR 476, [95] and [104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) (underlining added). Cf *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, [43] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
[4] *Minister for Immigration & Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, [48] (Gaudron and Gummow JJ, Callinan J agreeing at [67] fn 46).
[5] *Cohen v Peko-Wallsend Ltd* (1986) 61 ALJR 57, 58 (Gibbs CJ, Mason and Wilson JJ).
[6] *Regina (**Youssef**) v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1457, [24] (Lord Carrwath JSC, Lords Neuberger, Mance, Wilson and Sumption agreeing, underlining added).
[7] *Youssef* [2016] AC 1457, [24] (underlining added) quoting *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 37, [85]. Cf, e.g., *Barton v Commonwealth* (1974) 131 CLR 477 where the High Court entertained a claim that Australia's request to Brazil that Brazil detain the plaintiffs was ultra vires the Commonwealth's executive power.

in the present context" is that the act was "directed at the rights of specific individuals, and in this case of an individual living in" Australia.[8] The Interim Agreement was *ad hominem*. Further, "the taking of a step in the conduct of international relations, whilst of itself neither creating private rights nor imposing such liabilities, may be a step in a process which as a whole may have that effect. In such cases, the process may give rise to matters justiciable at the suit of an individual".[9] That is this case.

10 As to RS [33], there is "no reason" why "procedural propriety" "should not be a ground for judicial review of a decision made under powers of which the ultimate source is the prerogative".[10] As to RS [34], *Plaintiff S10/2011* and *AAG15* are material because
10 in both cases Justices reasoned on the premise that exercises of the "execution and maintenance" limb of s 61 could be conditioned by procedural fairness: AS [31] fn 27.

11 As to RS [36], regardless whether procedural fairness could practicably condition entry into third country reception arrangements that relate to a fluctuating class of persons, the Interim Arrangement relates to a definite class of three identified persons.

Ground 2: s 198 of the *Migration Act*

12 As to RS [38], this Court is not bound by decisions of lower courts.[11]

13 Textually, s 198 can be construed so that it is not reasonably practicable to remove a person to that country if, for "practical health reasons",[12] there is a real risk that they will enter, but will not remain or have an ongoing presence, because they die.

20 14 Were harm in a new country incapable of affecting s 198, s 197C would be surplus. *Contra* RS [57], s 197C does not require that the right to life be ignored.

15 In s 198's context, "remove" means not only from Australia,[13] but to a country where the person may live. It enacts an effective form of deportation.[14] Australia being sea-girt,[15] s 51(xix) has always been exercised by legislation authorising deportation to

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[8] Cf *Youssef* [2016] AC 1457, [26].
[9] *Re Ditfort; ex p Deputy Commissioner of Taxation* (1988) 19 FCR 347, 370 (Gummow J).
[10] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 411 (Lord Diplock).
[11] *O'Toole v Charles David Pty Ltd [No 2]* (1991) 171 CLR 232, 247 (Mason CJ).
[12] *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1, [37] (Gageler CJ, Gordon, Gleeson and Jagot JJ).
[13] See s 5(1) of the Migration Act.
[14] *Robtelmes v Brenan* (1906) 4 CLR 395, 422.3 (O'Connor J).
[15] *Robtelmes v Brenan* (1906) 4 CLR 395, 406–407 (Griffiths CJ).

another country,[16] not expulsion to the border[17] (or a rock, or the ocean).

16 Even the banished "[do] not forfeit the human character, nor consequently [their] right to dwell somewhere on earth".[18] Thus, "there must first and foremost be identified a country to which [the] alien might be removed".[19]

17 A person can only live in a country in which they have the right to reside.[20] Sections 76AAA and 198AHB target BVR-holders (who had no real prospect of removal to a country where they could live),[21] procuring a country where the person has the right to enter and remain (s 76AAA(1)(b)), with the Commonwealth providing financial and other support for their "ongoing presence" there as non-citizens: s 198AHB(1), (2).[22]

10 18 But a right to reside is not an end in itself; it facilitates life in the new country in fact.

19 RS [41] relies on *WAIS v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1625, [58], where French J held that "[t]he term 'as soon as reasonably practicable' in s 198 is an evaluative term which is to be assessed by reference to all the circumstances of the case. What is reasonable is to be determined, inter alia, by reference to the practical difficulties…" (underlining added). That was not limited to "practical considerations": *NATB* (2003) 133 FCR 506, [52].

20 *Contra* RS [45], *ASF17* (2024) 98 ALJR 782 at [38] concerned the construction of s 197C(1) and (2), not s 198. That "the Act accommodates 11th-hour claims" to fear harm "exclusively through… the… non-compellable powers" (*ASF17* at [38])
20 demonstrates only that s 198 is a limited duty of removal, and not a discretionary power apt to respond to a protection claim. RS [46] quotes *MZAPC* (2025) 99 ALJR 486 at [35]. That passage does not decide how s 198 responds to a foreseeable risk of death not covered by s 197C. A footnote in *MZAPC* at [46] – "see also, e.g., *NATB*... at [47]-[55]" – did not incorporate *NATB* as part of the *ratio*.

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[16] See *Robtelmes v Brenan* (1906) 4 CLR 395, 405–407 (Griffiths CJ), 416–417 (Barton J), 421–422 (O'Connor J); *ASF17 v Commonwealth of Australia* (2024) 98 ALJR 782, [35] (the Court).
[17] Cf the discussion about countries with contiguous land borders, in *Attorney-General v Cain* [1906] AC 542, 545–547 and *Fong Yue Ting v United States*, 149 U.S. 698 (1893), 708–9 (Gray J, quoting international law sources), cf 756.3 (Field J, in dissent).
[18] Vattel, *The Law of Nations*, §229.
[19] *ASF17 v Commonwealth of Australia* (2024) 98 ALJR 782, [35] (the plurality).
[20] *ASF17 v Commonwealth of Australia* (2024) 98 ALJR 782, [9] (the plurality).
[21] *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1, [20] and [21] (Gageler CJ, Gordon, Gleeson and Jagot JJ).
[22] Reference will be made at the hearing to the materials in the Respondents' Bundle of Further Materials and to the confidential parts of the judgment below.

21 RS [48] relies on non-compellable powers as a "safety valve". But the question here concerns s 198 at the very point of removal from Australia. At that point, the Minister has not exercised such a power. The question to which the principle of legality applies therefore arises in a context clean of s 195A or any other ministerial power.

22 RS [55] says that "a law that does no more than require the removal from Australia of a non-citizen who has no right to remain does not abrogate or curtail" the right to life. That submission elevates form over substance. It would entail, e.g., that the removal of an alien to capital punishment in a foreign country would be consistent with the value that the law of Australia gives to the protection of human life.[23] In effect, it supposes that pulling the lever infringes no right, because the trolley does the damage.

23 As to RS [59], *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at [47] should not be understood as extending to removals the equivalent of banishment or exile. The authorities in RS fn 88, about whether constitutional due process was required in respect of deportation,[24] stand alongside those in AS [76], and the ratios of the US Supreme Court (in applying the void for vagueness doctrine to immigration statutes) that deportation "is a drastic measure and at times the equivalent of banishment or exile..."[25] and may be "'a particularly severe penalty'".[26]

24 As *NZYQ* (2023) 280 CLR 137 and *YBFZ* (2024) 99 ALJR 1 show, a law for the purpose of expulsion or deportation of aliens is not axiomatically non-punitive.

25 Section 198, if requiring removal to a real risk of death, in combination with the other statutory features here present (see AS [45]–[51]), has a different complexion from other operations of s 198 and earlier deportation statutes considered by this Court.

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[23] Cf s 22(3)(c) of the *Extradition Act 1988* (Cth).
[24] But see *Sessions v Dimaya* 584 U.S. 148 (2018), 156 (Kagan J, delivering the opinion of the Court), 187 fn3 (Gorsuch J concurring); cf 215 (Thomas J, dissenting). And see *A.A.R.P v Trump* 605 U.S.__(2025), 3.
[25] *Jordan v De George*, 341 U.S. 223 (1951), 231 (Vinson CJ, delivering the opinion of the Court).
[26] *Sessions v Dimaya* 584 U.S 148 (2018), 156.