

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON, EDELMAN, STEWARD AND GLEESON JJ

COMMONWEALTH OF AUSTRALIA

APPELLANT

AND

AJL20

RESPONDENT

Commonwealth of Australia v AJL20
[2021] HCA 21
Date of Hearing: 13 April 2021
Date of Judgment: 23 June 2021
C16/2020 & C17/2020

ORDER

Matter No C16/2020

1. *Appeal allowed.*
2. *Set aside the orders made by the Federal Court of Australia on 29 September 2020 and, in their place, it be ordered that the proceeding be dismissed with costs.*
3. *The respondent must pay the appellant's costs of the appeal to this Court.*

Matter No C17/2020

1. *Appeal allowed.*
2. *Set aside the orders made by the Federal Court of Australia on 11 September 2020 and, in their place, it be ordered that the application filed in the Federal Circuit Court of Australia on 12 May 2020 and transferred to the Federal Court of Australia on 27 May 2020 be dismissed with costs.*

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3. *The respondent must pay the appellant's costs of the appeal to this Court.*

Representation

S P Donaghue QC, Solicitor-General of the Commonwealth, with G R Kennett SC, C J Tran and N A Wootton for the appellant and for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

J T Gleeson SC with N M Wood and J E Hartley for the respondent (instructed by Human Rights for All)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Commonwealth of Australia v AJL20

Constitutional law (Cth) – Immigration – Tort – False imprisonment – Where respondent "unlawful non-citizen" detained by Executive under ss 189(1) and 196(1) of *Migration Act 1958* (Cth) – Whether period of executive detention authorised and required by ss 189(1) and 196(1) ceases when removal of "unlawful non-citizen" from Australia should have occurred had Executive acted with all reasonable despatch in performance of s 198(6) duty to remove, or continues until actual event of removal or grant of visa – Whether Parliament's power to authorise and require detention until actual event of removal or grant of visa limited by implications of Ch III of *Constitution* – Whether non-performance by Executive of statutory duties erases legitimate non-punitive statutory purposes which those duties support.

Words and phrases – "aliens", "deportation", "duty to remove", "exclusive vesting of the judicial power of the Commonwealth", "executive detention", "executive power", "executive purpose", "false imprisonment", "habeas corpus", "hedging duty", "judicial power", "lawful non-citizen", "legitimate non-punitive purposes", "*Lim* principle", "mandamus", "non-refoulement", "Parliamentary supremacy", "reading down", "removal", "remove as soon as reasonably practicable", "separation of powers", "statutory duty", "statutory purposes", "terminating events", "unlawful non-citizen", "visa".

Constitution, s 51(xix), Ch III.

Migration Act 1958 (Cth), ss 4, 13, 14, 189, 196, 197C, 198.

1 KIEFEL CJ, GAGELER, KEANE AND STEWARD JJ. The respondent is a Syrian citizen, who arrived in Australia in May 2005 as the holder of a child visa. On 2 October 2014, the then Minister for Immigration and Border Protection ("the Minister") cancelled the respondent's child visa on character grounds under s 501(2) of the *Migration Act 1958* (Cth) ("the Act"). Having become an "unlawful non-citizen" in consequence of the cancellation of his visa, the respondent was detained on 8 October 2014, as required by s 189(1) of the Act.

2 The respondent remained in immigration detention until he was released from detention into the community pursuant to the order of the primary judge (Bromberg J) made on 11 September 2020 on the footing that the respondent's continuing detention was unlawful. His Honour held that, because the Executive had not removed the respondent from Australia "as soon as reasonably practicable" in accordance with s 198(6) of the Act, his detention was not for the purpose of removal from Australia and was therefore unlawful. The circumstance that the failure of duty on the part of the Executive was explicable by its desire to comply with Australia's non-refoulement obligations was, by virtue of s 197C, no justification for that failure¹.

3 In this Court, the Commonwealth contended that the respondent's detention under s 189(1) was lawful because it was authorised and, indeed, required by s 196(1) of the Act. The respondent argued to the contrary that s 196(1) does not authorise the Executive to detain an unlawful non-citizen where its officers have failed to remove the unlawful non-citizen from Australia as soon as reasonably practicable. The respondent contended that, as the primary judge held², this construction of the Act was compelled by the need to observe the constitutional limitations on the Commonwealth's legislative power to authorise detention by the Executive.

4 Almost two decades ago in *NAES v Minister for Immigration and Multicultural and Indigenous Affairs*³, Beaumont J rejected an application for *habeas corpus* in circumstances materially the same as the present case. Beaumont J, following the construction of ss 196(1) and 198 adopted by French J (as his Honour then was) in *WAIS v Minister for Immigration and Multicultural*

1 *AJL20 v The Commonwealth* [2020] FCA 1305 at [95]-[99], [123]; see also *DMH16 v Minister for Immigration and Border Protection* (2017) 253 FCR 576 at 581 [26].

2 *AJL20 v The Commonwealth* [2020] FCA 1305 at [17], [34(d)], [44], [75].

3 [2003] FCA 2 at [11]-[15].

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*and Indigenous Affairs*⁴, held that the operation of ss 189(1) and 196(1) in authorising the applicant's detention was not conditioned on the actual achievement of removal of the unlawful non-citizen as soon as reasonably practicable by the Executive. On that footing, an order mandating compliance by the Executive with the duty imposed by s 198 was, as Beaumont J explained, the appropriate remedy for non-compliance with s 198 of the Act. Such an order would give effect to the statutory scheme, whereas an order for the release of an unlawful non-citizen into the community would undermine it.

5 The approach taken by Beaumont J was correct 18 years ago and remains correct today. There is no room for any doubt that the interpretation of ss 196(1) and 198 that his Honour adopted, and that was applied again more recently by the Full Court of the Federal Court (Robertson, Griffiths and Bromwich JJ) in *ASP15 v The Commonwealth*⁵, faithfully reflects the intention of the Act. No constitutional imperative requires departure from it. The primary judge erred in thinking otherwise.

The proceedings

6 After the respondent was detained in October 2014, he made a number of applications for a protection visa. These applications were, however, refused on character grounds under s 501(1) of the Act. On 25 July 2019, following representations made on his behalf, the Minister refused to consider granting the respondent a visa under s 195A of the Act.

7 On 4 November 2019, the respondent commenced proceedings in the Federal Court of Australia seeking damages in respect of his alleged false imprisonment by the Commonwealth since 26 July 2019 ("the compensation proceeding"). On 12 May 2020, the respondent commenced a further proceeding in the Federal Circuit Court of Australia seeking what was described as "an order in the nature of a writ of *habeas corpus*" ("the specific relief proceeding"). The specific relief proceeding was transferred to the Federal Court on 27 May 2020.

8 In this Court, it was expressly conceded by the Commonwealth that, as the primary judge found, the respondent had not been removed from Australia "as soon as reasonably practicable" as required by s 198(6) of the Act. The primary judge's finding in this regard was, in part, based on the circumstance that officers of what

4 [2002] FCA 1625 at [56].

5 (2016) 248 FCR 372 at 382-383 [40]-[42].

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is now the Department of Home Affairs had formed the view that to remove the respondent to Syria would place Australia in breach of its international non-refoulement obligations⁶. By reason of s 197C of the Act, that consideration was irrelevant to whether it was reasonably practicable that the respondent be removed from Australia. This circumstance aside, the primary judge's finding was also based on findings of fact that the Executive could and should have done more to expedite the respondent's removal from Australia⁷.

9 Following the making of an order in the specific relief proceeding on 11 September 2020 that the respondent be released forthwith, on 29 September 2020 the primary judge made a declaration in the compensation proceeding that the respondent's detention since 26 July 2019 was unlawful. The damages recoverable by the respondent were to be assessed separately⁸.

10 In each proceeding, the Commonwealth appealed to the Full Court of the Federal Court, contending that the primary judge erred in concluding that ss 189(1) and 196(1) of the Act did not authorise the respondent's detention. Upon the application of the Attorney-General of the Commonwealth, each appeal to the Full Court was removed into this Court pursuant to s 40 of the *Judiciary Act 1903* (Cth).

11 It is convenient now to set out the relevant provisions of the Act, and to note this Court's settled view of the constitutional validity and proper construction of these provisions and their predecessors in order to lay the ground for a consideration of the reasons of the primary judge and the arguments advanced by the respondent in their support.

The Act

12 Section 4(1) states that the object of the Act is to "regulate, in the national interest, the coming into, and presence in, Australia of non-citizens". Section 4(2) states that, to "advance its object", the Act "provides for visas permitting non-citizens to enter or remain in Australia and the Parliament intends that this Act be the only source of the right of non-citizens to so enter or remain". Section 4(4) further states that, to "advance its object", the Act "provides for the removal ...

6 *AJL20 v The Commonwealth* [2020] FCA 1305 at [10].

7 *AJL20 v The Commonwealth* [2020] FCA 1305 at [105]-[171].

8 *AJL20 v The Commonwealth* [2020] FCA 1305 at [173].

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from Australia of non-citizens whose presence in Australia is not permitted by this Act".

13 Section 14 provides that an "unlawful non-citizen" is a non-citizen who is in the "migration zone" (in broad terms, Australia⁹) and is not a "lawful non-citizen". Section 13 provides that a "lawful non-citizen" is a non-citizen who is in the "migration zone" and holds an effective "visa". A visa provides permission to enter or remain in Australia¹⁰.

14 The dichotomy between lawful non-citizens and unlawful non-citizens is fundamental to the scheme of ss 189, 196 and 198 of the Act whereby an unlawful non-citizen is not at liberty to enter the Australian community. As Hayne J said in *Plaintiff M47/2012 v Director-General of Security*¹¹:

"The Act provides no middle ground between being a lawful non-citizen (entitled to remain in Australia in accordance with any applicable visa requirements) and being an unlawful non-citizen, who may, usually must, be detained and who (assuming there is no pending consideration of a valid visa application) must be removed from Australia as soon as reasonably practicable."

15 To this end, s 189(1) of the Act authorises and requires the Executive to detain unlawful non-citizens. It provides:

"If an officer knows or reasonably suspects that a person in the migration zone ... is an unlawful non-citizen, the officer must detain the person."

16 Read with the definition of "detain" in s 5(1) of the Act, s 189(1) has two distinct and sequential operations. First, it authorises and requires a person in the migration zone to be taken into immigration detention by an officer who knows or reasonably suspects that the person is an unlawful non-citizen. Secondly, it authorises and requires the person, having been taken into immigration detention, to be kept in immigration detention by or at the direction of an officer who knows or reasonably suspects that the person is an unlawful non-citizen.

17 Section 196 governs the period for which a person taken into immigration detention is to be kept in immigration detention under s 189(1) by or at the

9 See the Act, s 5(1).

10 The Act, s 29.

11 (2012) 251 CLR 1 at 78 [178].

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direction of an officer who knows or reasonably suspects that the person is an unlawful non-citizen. It provides relevantly:

- "(1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until:
 - (a) he or she is removed from Australia under section 198 or 199; or
 - (aa) an officer begins to deal with the non-citizen under subsection 198AD(3); or
 - (b) he or she is deported under section 200; or
 - (c) he or she is granted a visa.
- (2) To avoid doubt, subsection (1) does not prevent the release from immigration detention of a citizen or a lawful non-citizen.
- (3) To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than as referred to in paragraph (1)(a), (aa) or (b)) unless the non-citizen has been granted a visa.
- ...
- (6) This section has effect despite any other law.
- (7) In this section:

visa decision means a decision relating to a visa (including a decision not to grant the visa, to cancel the visa or not to reinstate the visa)."

18

The authority and duty to detain an unlawful non-citizen pursuant to s 189(1) for the period specified in s 196(1) is attended by an obligation on the Executive to effect the removal of an unlawful non-citizen "as soon as reasonably practicable". This obligation is contained in s 198, which relevantly provides:

"Removal on request

- (1) An officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed.

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...

Removal of unlawful non-citizens in other circumstances

...

- (6) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:
 - (a) the non-citizen is a detainee; and
 - (b) the non-citizen made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and
 - (c) one of the following applies:
 - (i) the grant of the visa has been refused and the application has been finally determined;
 - (ii) the visa cannot be granted; and
 - (d) the non-citizen has not made another valid application for a substantive visa that can be granted when the applicant is in the migration zone."

19 Section 197C was inserted into the Act to overcome decisions which had interpreted s 198 to the effect that it did not require the removal of an unlawful non-citizen where the removal would place Australia in breach of its non-refoulement obligations¹². At the material time, s 197C provided:

- "(1) For the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.
- (2) An officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 arises irrespective of whether

12 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144; *Minister for Immigration and Citizenship v SZQRB* (2013) 210 FCR 505. See Australia, House of Representatives, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, Explanatory Memorandum at 165-166 [1135]-[1140].

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there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen."

The course of authority

The power of the Parliament

20 Section 51(xix) of the *Constitution* empowers the Commonwealth Parliament to make laws with respect to aliens and immigration. It is uncontroversial that this power includes the making of laws restricting the entry into the Australian community of aliens who have not been given permission to enter under Australian law and providing for the removal of such persons. In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*, Gaudron J said¹³:

"Aliens, not being members of the community that constitutes the body politic of Australia, have no right to enter or remain in Australia unless such right is expressly granted. Laws regulating their entry to and providing for their departure from Australia (including deportation, if necessary) are directly connected with their alien status."

21 It has long been recognised that a law that provides for the executive detention of an alien, in order to prevent unauthorised entry into the Australian community or to facilitate removal from Australia, is also within the scope of s 51(xix). In *Koon Wing Lau v Calwell*¹⁴, Latham CJ, with whom McTiernan J agreed, discussing a challenge to the constitutional validity of a measure that provided for the detention of certain aliens pending deportation, said:

"It is contended that [the measure] is invalid because it permits unlimited imprisonment. Any deprivation of liberty must be shown to be authorized by law before it can be justified. But deportation legislation is a necessary element in the control of immigration into a country. 'The power to deport', Barton J said in *Robtelmes v Brennan*¹⁵, 'is the complement of the power to exclude.' Deportation under legislation of this character, whether it is

13 (1992) 176 CLR 1 at 57.

14 (1949) 80 CLR 533 at 555; see also *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 358 [92].

15 (1906) 4 CLR 395.

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regarded as legislation relating to aliens or legislation relating to immigration, is not imposed as punishment for being an alien or for being an immigrant: *Ex parte Walsh and Johnson; In re Yates*¹⁶."

22 The amplitude of the legislative power conferred by s 51(xix) is qualified by the implications of Ch III of the *Constitution*, involuntary detention being ordinarily within the exclusive province of the courts. In *Lim*¹⁷, Brennan, Deane and Dawson JJ (Gaudron J relevantly agreeing) held that, exceptional cases aside, "the involuntary detention of a citizen in custody by the State is penal or punitive in character and ... exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt". However, as their Honours explained¹⁸, one such exceptional case, in which "authority to detain ... can be conferred on the Executive [by the Parliament] without infringement of Ch III's exclusive vesting of the judicial power of the Commonwealth in the courts which it designates", is:

"authority to detain (or to direct the detention of) an alien in custody for the purposes of expulsion or deportation ... [including] authority to detain an alien in custody, when conferred in the context and for the purposes of executive powers to receive, investigate and determine an application by that alien for an entry permit and (after determination) to admit or deport".

23 Their Honours went on to hold that the predecessors of ss 189, 196(1) and 198 fell within this exception to the Ch III limitation on the power of the Parliament to authorise executive detention because "the detention which they require and authorize is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered"¹⁹. The authority to detain conferred on the Executive by s 54L(1) and (2), the predecessor of ss 189(1) and 196(1), was

16 (1925) 37 CLR 36: see at 60, 96.

17 (1992) 176 CLR 1 at 27.

18 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 32.

19 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 33.

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characterised as an incident of the power to exclude, admit and deport non-citizens²⁰, and was unanimously upheld as valid by the Court.

24 Similarly, in *Re Woolley; Ex parte Applicants M276/2003*²¹, Gleeson CJ, in a passage cited with approval by Crennan, Bell and Gageler JJ in *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship*²², explained that until the completion of the steps that terminate the period of detention of a non-citizen required and authorised by the Act, "the non-citizen has no legal right to enter the community, and a law providing for detention during the process of decision-making is not punitive in nature".

25 Whether a law authorising or requiring detention is reasonably capable of being seen as necessary for the purpose of segregation pending receipt, investigation and determination of any visa application or removal of an unlawful non-citizen depends on the connection between the detention and segregation or removal. In *Al-Kateb v Godwin*²³, McHugh J explained:

"A law requiring the detention of the alien takes its character from the purpose of the detention. As long as the purpose of the detention is to make the alien available for deportation or to prevent the alien from entering Australia or the Australian community, the detention is non-punitive. The Parliament of the Commonwealth is entitled, in accordance with the power conferred by s 51(xix) and without infringing Ch III of the Constitution, to take such steps as are likely to ensure that unlawful non-citizens do not enter Australia or become part of the Australian community and that they are available for deportation when that becomes practicable."

26 The correctness of the constitutional holding in *Al-Kateb*, that ss 189, 196 and 198 are valid insofar as they authorise and require detention of an unlawful non-citizen even where removal is not reasonably practicable in the foreseeable future, does not arise for consideration in the present case.

20 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 33.

21 (2004) 225 CLR 1 at 14 [26].

22 (2013) 251 CLR 322 at 369-370 [139].

23 (2004) 219 CLR 562 at 584 [45].

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27 In *Plaintiff S4/2014 v Minister for Immigration and Border Protection*²⁴, French CJ, Hayne, Crennan, Kiefel and Keane JJ referred to *Lim*, and went on to say that:

"[D]etention under and for the purposes of the Act is limited by the purposes for which the detention is being effected. And it further follows that, when describing and justifying detention as being under and for the purposes of the Act, it will always be necessary to identify the purpose for the detention. Lawfully, that purpose can only be one of three purposes: the purpose of removal from Australia; the purpose of receiving, investigating and determining an application for a visa permitting the alien to enter and remain in Australia; or, in a case such as the present, the purpose of determining whether to permit a valid application for a visa."

28 It 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. In *Plaintiff S4*, their Honours said²⁵:

"Section 196(1) prescribes the duration of immigration detention. It provides that an unlawful non-citizen must be kept in immigration detention until the happening of one of four events: removal from Australia under s 198 or s 199; an officer beginning the process under s 198AD(3) for removal to a regional processing country; deportation under s 200; or the grant of a visa. Of those four events, it is the first – removal from Australia under s 198(2) – which fixed the outer limit to the plaintiff's detention. ...

[I]f none of the [last] three events [mentioned in s 196(1)] occurred, removal under s 198(2) had to occur '*as soon as reasonably practicable*' (emphasis added).

The duration of the plaintiff's lawful detention under the Act was thus ultimately bounded by the Act's requirement to effect his removal as soon as reasonably practicable. It was bounded in this way because the

24 (2014) 253 CLR 219 at 231 [26]; see also *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 370 [140].

25 (2014) 253 CLR 219 at 232-233 [30], [32]-[33].

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requirement to remove was the only event terminating immigration detention which, all else failing, must occur."

29 Their Honours had earlier said that²⁶:

"The duration of any form of detention, and thus its lawfulness, must be capable of being determined at any time and from time to time. Otherwise, the lawfulness of the detention could not be determined and enforced²⁷ by the courts, and, ultimately, by this Court."

30 In *Plaintiff M96A/2016 v The Commonwealth*²⁸, Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ said that, by this last observation in *Plaintiff S4*, it had been meant that "there must be objectively determinable criteria for detention". Their Honours explained that this second limitation on the amplitude of the Parliament's power to authorise executive detention flows from the need to ensure that²⁹:

"Parliament cannot avoid judicial scrutiny of the legality of detention by [legislating] criteria which are too vague to be capable of objective determination. This would include an attempt to make the length of detention at any time dependent upon the unconstrained, and unascertainable, opinion of the Executive³⁰."

31 In *Plaintiff M96A*³¹, the plurality concluded that ss 189(1) and 196(1) did not exceed the Parliament's power on this basis because:

"The duration of the detention of transitory persons who are detained under s 189 of the Act is able to be objectively determined at any time, and

26 *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at 232 [29].

27 *Crowley's Case* (1818) 2 Swans 1 at 61 [36 ER 514 at 531].

28 (2017) 261 CLR 582 at 597 [31].

29 *Plaintiff M96A/2016 v The Commonwealth* (2017) 261 CLR 582 at 597 [31].

30 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 258.

31 (2017) 261 CLR 582 at 597 [32].

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from time to time. At any time it can be concluded that detention in Australia will conclude if any of the various preconditions [in s 196(1)] are met."

32 To similar effect, Gageler J said³²:

"[T]he duration of the detention is capable of objective determination by a court at any time and from time to time. From the moment of the commencement of the detention under s 189, duration of the detention is made by s 196(1)(a) and (aa) to depend on performance of the duty to remove imposed by s 198(1A) or by s 198AD(2)."

The application of the Act

33 The nature of the duty to detain imposed by s 189(1) of the Act was explained by Hayne J (McHugh and Heydon JJ relevantly agreeing) in *Al-Kateb*³³:

"[T]he provision is mandatory; the legislature requires that persons of the identified class be detained and kept in detention. No discretion must, or even can, be exercised. No judgment is called for. The only disputable question is whether the person is an unlawful non-citizen."

34 The duration of the detention required and authorised by s 196(1) is, as Hayne J said in *Al-Kateb*³⁴, "fixed by reference to the occurrence of any of [the four] specified events. Detention must continue 'until' one of those events occurs."

35 The combined effect of ss 189(1) and 196(1) is that a non-citizen can be lawfully within the Australian community only if he or she has been granted a visa³⁵. Otherwise, an unlawful non-citizen must be detained until such time as he or she departs Australia by one of the means referred to in s 196(1), relevantly in this case removal under s 198. That removal is to be effectuated by the

32 *Plaintiff M96A/2016 v The Commonwealth* (2017) 261 CLR 582 at 600 [45].

33 (2004) 219 CLR 562 at 647 [254].

34 (2004) 219 CLR 562 at 638 [226]. See also *Plaintiff M96A/2016 v The Commonwealth* (2017) 261 CLR 582 at 593 [19]; *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at 232-233 [30].

35 Subject to *Love v The Commonwealth* (2020) 94 ALJR 198; 375 ALR 597.

performance of the duty that s 198(6) places on officers of the Commonwealth to remove "as soon as reasonably practicable". This view of the relationship between s 196 and s 198 has consistently been accepted and applied in the Federal Court³⁶.

36 Similarly, with respect to the relationship between s 196 and the duty to grant or refuse a visa under s 65 in a reasonable time, in *ASP15*³⁷ the Full Court held that:

"It follows that once a valid visa application has been made, unless and until a decision is made either to grant or refuse a visa, detention is authorised and required by s 196(1). This conclusion is consistent with the binding authority of *Al-Kateb* as to the nature of lawful detention and the meaning of s 196(1). ... Such detention does not cease to be for the purpose of considering and determining an application for a visa because the necessary process has not been completed within the time required by the *Migration Act*, be that time period express or implied. If in fact a court determines that the process to make a visa decision has gone on for too long, it nonetheless remains detention for that purpose and is both validly authorised and required by s 196(1) of the *Migration Act*. The normal remedy is court action to compel a visa decision to be made, one way or the other."

37 Bearing on each of the two steps in the reasoning of the primary judge now to be considered, the Full Court in *ASP15* continued³⁸:

"Nor does any question of inconsistency with Ch III of the *Constitution of the Commonwealth* arise. Detention while a visa application is being considered does not deprive that detention of its statutory purpose

36 *WAIS v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1625 at [46]-[49]; *NAES v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 2 at [6]-[7]; *SHFB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 29 at [10], [12]-[13]; *SHFB v Goodwin* [2003] FCA 294 at [8]-[12], [23]-[25]; *NAGA v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 224 at [10]-[11], [64]; *Daniel v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 196 ALR 52 at 57 [15]-[16], 63 [36]; *CMA19 v Minister for Home Affairs* [2020] FCA 736 at [225]-[232].

37 (2016) 248 FCR 372 at 382-383 [40].

38 (2016) 248 FCR 372 at 383 [41]-[42].

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because a reasonable time to make a decision about a visa in furtherance of that purpose has been exceeded.

... The regime for immigration detention is valid for the purposes of making a visa decision precisely *because* it imposes an obligation on the Minister to make that decision within whatever time limit applies; detention only remains valid so long as such a purpose under the *Migration Act* continues to exist. In the case of detention pending a visa decision, failure to do so within the required time renders the Minister liable to the issue of a writ of mandamus to compel him or her to perform their statutory duty. However it does not render invalid the provision which authorises detention in the first place. So long as the *Migration Act* validly continues to authorise detention, there can be no claim for false imprisonment or habeas corpus." (emphasis in original)

The reasons of the primary judge

38 The primary judge found that the Commonwealth had failed to remove the respondent "as soon as reasonably practicable" as required by s 198³⁹, and proceeded to hold that this failure by officers of the Executive involved a "departure from the requisite removal purpose for [the respondent's] detention"⁴⁰. On that footing, the primary judge proceeded to the conclusion that the detention of the respondent was no longer for the purpose of removal and was therefore unlawful⁴¹.

39 The primary judge's reasoning involved two steps that are in controversy. First, his Honour read down s 196(1) by treating the period of detention to which it refers as dependent not upon the existence of the duty to remove as soon as reasonably practicable in s 198(6), but upon the performance of that duty in fact by the Executive. His Honour considered this reading down of s 196(1) to be necessary to preserve its constitutional validity. Secondly, his Honour concluded that non-compliance by the Executive with s 198(6) gave rise to a "departure" from the purpose of the detention authorised and required by ss 189(1) and 196(1), so

39 *AJL20 v The Commonwealth* [2020] FCA 1305 at [123]-[125], [170].

40 *AJL20 v The Commonwealth* [2020] FCA 1305 at [128], [171].

41 *AJL20 v The Commonwealth* [2020] FCA 1305 at [75], [128], [171].

that thereafter the detention of the respondent by the Executive was no longer for the purpose of his removal.

40 The primary judge then proceeded to hold that "an order in the nature of a writ of habeas corpus" requiring the respondent's release was necessary to "remediate [his] unlawful detention" and maintain the rule of law⁴². His Honour considered that an order of this kind was not rendered inutile because s 189(1) of the Act would require the respondent to be immediately re-detained. His Honour took that view because, in the proceedings before him, the Commonwealth maintained its adherence to a policy of non-refoulement in relation to the respondent despite the terms of s 197C. That being so, his Honour considered that s 189(1) would not authorise the respondent's re-detention because, by reason of the Executive's erroneous adherence to this policy, any further detention would continue not to be for the purpose of his removal⁴³.

41 For the reasons that follow, the steps by which the learned primary judge reasoned to his conclusion are flawed.

Step 1: Reading down s 196(1)

42 The primary judge approached the construction of s 196 of the Act "in light of the constitutional constraints upon administrative detention which flow from Chapter III of the *Constitution* ... which provides for the separation of judicial power from the executive and legislative powers"⁴⁴. In his Honour's view, endorsed by the respondent on appeal, the scheme of immigration detention could not, given the implications of Ch III, validly be enacted by the Parliament under s 51(xix) of the *Constitution* save where the Executive could be shown in any particular case to perform its obligations to remove the detainee as soon as reasonably practicable. This approach conflated questions of constitutional validity with questions of statutory interpretation, and questions concerning the purpose of the Act with questions concerning the purpose of the officers of the Executive bound by it. It was also contrary to the clear course of authority.

42 *AJL20 v The Commonwealth* [2020] FCA 1305 at [72]-[73], [174]-[175].

43 *AJL20 v The Commonwealth* [2020] FCA 1305 at [175].

44 *AJL20 v The Commonwealth* [2020] FCA 1305 at [17].

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The constitutional and statutory questions

43 When the Executive executes a statute of the Commonwealth, as opposed to exercising its common law prerogatives and capacities⁴⁵ or whatever authority is inherent in s 61 of the *Constitution*⁴⁶, the constitutional question is whether the statutory authority conferred on the Executive is within the competence of the Parliament; the statutory question is whether the executive action in question is authorised by the statute. If the statute, properly construed, can be seen to conform to constitutional limitations upon legislative competence without any need to read it down to save its validity⁴⁷, then it is valid in all its applications, and no further constitutional issue arises. The question then is whether the executive action in question was authorised by the statute, with that question to be resolved by reference to the statute as a matter of administrative law⁴⁸. As French CJ, Gummow, Hayne, Crennan and Bell JJ said in *Wotton v Queensland*⁴⁹:

"[I]f, on its proper construction, the statute complies with the constitutional limitation, without any need to read it down to save its validity, any complaint respecting the exercise of power thereunder in a given case ... does not raise a constitutional question, as distinct from a question of the exercise of statutory power."

44 As has been noted, it is well-settled that the Act does not permit detention of a non-citizen for purposes unconnected with entry into, or exclusion or removal from, the community. The detention authorised by ss 189(1) and 196(1) of the Act

45 See *Davis v The Commonwealth* (1988) 166 CLR 79 at 108; *Williams v The Commonwealth [No 2]* (2014) 252 CLR 416.

46 See *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1.

47 See *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 180; *Acts Interpretation Act 1901* (Cth), s 15A and its State and Territory equivalents.

48 *Wotton v Queensland* (2012) 246 CLR 1 at 9-10 [10], 13-14 [21], [24], 29-30 [74]. See also *Comcare v Banerji* (2019) 267 CLR 373 at 405-406 [44], 421-422 [96]; *Palmer v Western Australia* (2021) 95 ALJR 229 at 245 [65], 254 [118]-[120], 270-271 [200]-[202], 274 [224]; 388 ALR 180 at 196, 208, 229-230, 234.

49 (2012) 246 CLR 1 at 14 [22]; see also *Palmer v Western Australia* (2021) 95 ALJR 229 at 245 [64]-[68], 255 [127], 270-271 [201]-[202], 275 [226], 276 [230]-[231]; 388 ALR 180 at 196-197, 210, 229-230, 235, 236-237.

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 removal⁵⁰. 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.

45 As was explained in *Plaintiff M96A*, the existence of these hedging duties also means that the duration, and thus lawfulness, of the detention authorised by the Act is capable of determination from time to time⁵¹. It is because these duties are enforceable that "the length of detention [is not] at any time dependent upon the unconstrained, and unascertainable, opinion of the Executive"⁵². Accordingly, ss 189(1) and 196(1) are valid. There is no need to read them down to save their validity. They are valid in all their potential applications. As has been observed, it is because the duration of the detention of an unlawful non-citizen must end, either upon the grant of a visa or upon the removal of the non-citizen from Australia, that immigration detention under the Act is not punishment within the exclusive province of judicial power. That is so because the terms of the Act circumscribe the purposes of detention of an unlawful non-citizen so that they do not include punishment. The purposes of the Act, and the consequent validity of the Act, cannot be set at nought by the intents or purposes of the officers of the Executive whose duty it is to enforce the Act.

46 Accordingly, there was no warrant for the primary judge to hold that, in order to preserve its constitutional validity, "it is not possible to read the directive in s 196(1)(a) as authorising detention 'until' the fact or the event of the removal of the detainee from Australia"⁵³. There is likewise no constitutional need to read the words "until ... he or she is removed from Australia" as referring "not to the fact of

50 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 17, 29, 32-34, 36, 38; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 584-586 [45]-[48], 650-651 [266]-[267], 658 [289], 660-661 [295]; *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 31-32 [72]-[73], 75-77 [222]-[228], 85-86 [264].

51 (2017) 261 CLR 582 at 597 [32], 600 [45].

52 Compare *Plaintiff M96A/2016 v The Commonwealth* (2017) 261 CLR 582 at 597 [31].

53 *AJL20 v The Commonwealth* [2020] FCA 1305 at [44]-[45].

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removal but to the time and effort necessary, as a matter of reasonable practicability, to effectuate the purpose of detention"⁵⁴ such that the period of detention authorised under s 196 ceases to be authorised when removal *should* have occurred had officers of the Executive acted with all reasonable despatch⁵⁵.

47 The primary judge noted⁵⁶ that the plurality in *Plaintiff M96A*⁵⁷ said, in relation to the event listed in s 196(1)(a), that "it is a condition that removal must occur as soon as reasonably practicable". His Honour took this statement to support the view that the detention of an unlawful non-citizen ceases to be authorised by the Act immediately, where there has been a delay in the Executive's performance of the duty imposed by s 198. The respondent sought to rely upon the reasoning of Brennan, Deane and Dawson JJ in *Lim*⁵⁸ in support of much the same proposition. The respondent's contention was to the effect that only where the Executive properly performs the duties that establish the legitimate non-punitive purposes of the Act can the unlawful non-citizen's detention ordained by the Parliament be reasonably capable of being seen as necessary for legitimate non-punitive purposes.

48 Neither *Plaintiff M96A* nor *Lim* suggests that the operation of s 189(1) is conditioned upon s 198(6) in this manner, either as a matter of ordinary construction or in order to preserve its constitutional validity. When read in the context of the observation that "detention in Australia will conclude if any of the various preconditions [in s 196(1)] are met"⁵⁹, the statement of the plurality in *Plaintiff M96A* does not suggest that the authority and duty to detain imposed by s 189(1) disappears immediately upon delay in the performance of the hedging duty in s 198(6). Nor can one discern in, or attribute to, the plurality's statement in *Plaintiff M96A* or the reasoning in *Lim* (or the passages in *Plaintiff S4* to which reference has been and will be made) any adherence to the heresy that, where a law is within the Parliament's competence because of the imposition of duties on

54 *AJL20 v The Commonwealth* [2020] FCA 1305 at [45].

55 *AJL20 v The Commonwealth* [2020] FCA 1305 at [89].

56 *AJL20 v The Commonwealth* [2020] FCA 1305 at [48].

57 (2017) 261 CLR 582 at 593 [20].

58 (1992) 176 CLR 1 at 33-36.

59 *Plaintiff M96A/2016 v The Commonwealth* (2017) 261 CLR 582 at 597 [32].

officers of the Executive, delay in performance of those duties by those officers can take the law outside Parliament's competence. A failure by the Executive diligently to perform the duties that give effect to the legitimate non-punitive purposes for which detention is authorised and required by the Act erases neither those duties nor the statutory purposes which those duties support. Were it otherwise, the supremacy of the Parliament over the Executive would be reversed and the rule of law subverted⁶⁰.

Detention until removal

49 As has been seen, it is well-settled that the detention authorised by s 189(1) must continue until the first occurrence of a terminating event specified in s 196(1). The text of s 196(1) is clear: a person detained under s 189 "must be kept in immigration detention until", relevantly, "he or she is removed from Australia under section 198". The word "until", used in its ordinary sense of "up to the time"⁶¹ and in conjunction with the word "kept", refers to an ongoing or continuous state of affairs that is to be maintained up to the time that the event (relevantly, the grant of a visa or removal) *actually occurs*. As much is confirmed by s 196(3), to which the primary judge did not refer, in its provision that an unlawful non-citizen may be "release[d]" from detention *only* in the ways set out in s 196(1). In so providing, s 196 gives effect to the binary division drawn by the Act between lawful non-citizens, who may be at liberty in the community, and unlawful non-citizens, who must not be. Thus, as was explained by Hayne J in *Plaintiff M76*⁶²:

"The requirement of s 196(1) that an unlawful non-citizen detained under s 189 must be kept in immigration detention 'until' the happening of one of [the four terminating events prescribed by s 196(1)] cannot be construed as using the word 'until' in some purposive sense. One of the terminating events is the grant of a visa and it is not to be supposed that detention could be for the purpose of granting the person detained a visa. It thus follows that

60 See Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (1959) at 202-203; *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193.

61 *Oxford English Dictionary*, 2nd ed (1989), vol 19 at 234, Meaning 5(a): "Onward till (a time specified or indicated); up to the time of (an action, occurrence, etc)".

62 (2013) 251 CLR 322 at 366 [126].

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the word 'until' must be read in s 196(1) as fixing the end of detention, not as fixing the purpose or purposes for which detention is or may be effected."

50 As much had earlier been recognised in *WAIS*⁶³, where French J concluded that:

"The language of s 196 ... seems to me to be intractable. The detention there prescribed is ended only by one of the terminating events. The removal obligation for which s 198 provides does not seem to have been enacted for any purpose protective of the rights of detainees. Rather it facilitates the expeditious removal from Australia of unlawful non-citizens. *The remedy for a failure in the discharge of that duty may be mandamus*, possibly directed to the Minister." (emphasis added)

51 The duty imposed upon officers of the Executive by ss 189(1) and 196(1) of the Act is to detain the unlawful non-citizen *until* the occurrence of one of the events referred to in s 196. The duty so imposed by the Act is neither conditional upon, nor co-extensive with, the intents or purposes of officers of the Executive towards the detainee.

52 Where the Executive is dilatory in performing the hedging duties imposed upon it, as French J observed, the remedy of mandamus is available to compel the proper performance of those duties⁶⁴. It is precisely because the hedging duties may be enforced so as to bring the detention of the unlawful non-citizen to an end that the executive detention authorised and required by ss 189 and 196 can be seen to be within the Parliament's power under s 51(xix) of the *Constitution* as limited by the implications of Ch III. These hedging duties are not things written in water. A failure on the part of the responsible officers of the Executive to comply with an order of the court mandating performance of their statutory duties may result in those officers being committed to prison for contempt of court⁶⁵. By this means,

63 [2002] FCA 1625 at [56]; see also *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54 at 88 [134].

64 See *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2015) 255 CLR 231.

65 *M v Home Office* [1994] 1 AC 377; see also *AFX17 v Minister for Home Affairs [No 4]* [2020] FCA 926.

judicial power is exercised to give effect to the scheme of the Act, enforcing the supremacy of the Parliament over the Executive⁶⁶.

53 The duty imposed by s 198(6) was enforceable at all times during the 14 months when the responsible officers of the Executive were failing to perform that duty in the present case. At all times during this period, they were amenable to mandamus to require them to perform that duty. But at all times, their duty was to remove the respondent from Australia. Nothing happened that might, consistently with the Act, require or permit them to set the respondent at large in Australia. Not surprisingly, perhaps, given that Syria was the likely destination for removal, at no stage did the respondent demand that the duty under s 198(6) be performed. The decision of the primary judge is thus attended by the supreme irony that the failure of the Executive to perform a duty which the respondent did not at any time seek to have performed has led to the admission of the respondent into the Australian community contrary to the duty of the Executive and to the clear intention of the Act as to the circumstances in which an unlawful non-citizen might be admitted into the Australian community.

Koon Wing Lau

54 The respondent sought to support the primary judge's view that the word "until" in s 196(1) should be understood as being constrained by the ability and intent of officers of the Executive to give effect to the statutory purpose of detention by reference to *Koon Wing Lau*. That submission cannot be accepted.

55 *Koon Wing Lau*⁶⁷ was relevantly concerned with a challenge to the validity of s 7 of the *War-time Refugees Removal Act 1949* (Cth) ("the WRR Act"), which provided for the detention of "deportees", who included aliens who had entered Australia during the period of the Second World War, or who entered Australia as a place of refuge and had not left Australia since so entering. Section 7 provided relevantly that:

"A deportee may –

- (a) pending his deportation and until he is placed on board a vessel for deportation from Australia;

66 *M v Home Office* [1994] 1 AC 377 at 395.

67 (1949) 80 CLR 533 at 550.

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be kept in such custody as the Minister or an officer directs."

56 In rejecting the challenge to the validity of s 7 on the basis that it permitted "unlimited imprisonment", Latham CJ (with whom McTiernan J agreed) said⁶⁸:

"Section 7 does not create or purport to create a power to keep a deportee in custody for an unlimited period. The power to hold him in custody is only a power to do so pending deportation and until he is placed on board a vessel for deportation ... If it were shown that detention was not being used for these purposes the detention would be unauthorized and a writ of habeas corpus would provide an immediate remedy."

57 Dixon J, having referred to the "imperative language" of s 5 of the WRR Act, which provided that a person in respect of whom a deportation order is made "shall be deported in accordance with [that] Act", said⁶⁹:

"In s 7(1)(a) I think that the words 'pending deportation' imply purpose. The two provisions together mean that a deportee may be held in custody for the purpose of fulfilling the obligation to deport him until he is placed on board the vessel. It appears to me to follow that unless within a reasonable time he is placed on board a vessel he would be entitled to his discharge on habeas. In these circumstances the provision is, I think, a law with respect to the removal of the alien or refugee and falls within the respective powers justifying that removal."

58 Similarly, Williams J said⁷⁰:

"The Act does not provide that a deportee shall be deported from Australia within a specified period. It was submitted that under this provision a deportee could be kept in custody indefinitely and never deported, so that it is not a law with respect to the deportation of aliens at all but a law which in substance and effect authorizes the indefinite incarceration of the members of a certain class of persons. But a deportee may only be kept in custody pending his deportation and until he is placed on board a vessel for deportation from Australia, so that, if it appeared that a deportee was being

68 *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 556.

69 *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 581.

70 *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 586.

kept in custody not with a view to his deportation but simply with a view to his imprisonment for an indefinite period, the custody would be illegal. This fact might be difficult to prove but the omission to fix a period within which the deportee must be placed on board a vessel for deportation from Australia is not sufficient, in my opinion, to prevent s 7 ... being a law with respect to aliens. It would obviously be difficult to fix such a period."

59 These statements do not support the primary judge's construction of "until" in s 196(1) of the Act. Section 7 of the WRR Act applied to aliens who may have been lawfully at liberty within the Australian community unless the WRR Act authorised their detention and deportation. At the time, there was no statutory equivalent of ss 189 and 196 of the Act; and nothing in the report of the case suggests that any of the persons liable to deportation had entered Australia unlawfully. As Callinan J noted in *Al-Kateb*⁷¹, Dixon J was not discussing the scope of the constitutional power with respect to aliens, but was construing the language of the WRR Act and the authority conferred thereby on the Executive. Latham CJ and Williams J were similarly concerned with the extent of the statutory authority conferred on the Executive.

60 Detention of deportees under s 7 was at the discretion of the Executive. If officers of the Executive chose to detain a person for purposes other than to effect their deportation, as might be evidenced by a failure to deport the person within a reasonable time, s 7 did not authorise that person's detention. If a person's detention was unauthorised, it followed that the *status quo ex ante*, being at liberty in the community, ought to be restored by way of *habeas*.

61 In contrast, ss 189 and 196 of the Act require the segregation of unlawful non-citizens, both before they are admitted pursuant to a visa and in order to facilitate their removal if a visa is not granted⁷². Given this statutory requirement, it matters not why an officer of the Executive might detain a person because, provided that person is in fact an unlawful non-citizen, the Parliament has required that he or she be detained⁷³. Because the evident intention of the Act is that an unlawful non-citizen may not, in any circumstances, be at liberty in the Australian

71 (2004) 219 CLR 562 at 657 [288].

72 See *Al-Kateb v Godwin* (2004) 219 CLR 562 at 647 [254].

73 See *Al-Kateb v Godwin* (2004) 219 CLR 562 at 647 [254].

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community, no question of release on *habeas* can arise. As Hayne J, with whom McHugh and Heydon JJ relevantly agreed, said in *Al-Kateb*⁷⁴:

"The questions which arise about mandatory detention do not arise as a choice between detention and freedom. The detention to be examined is not the detention of someone who, but for the fact of detention, would have been, and been entitled to be, free in the Australian community."

62 It is also convenient to note here a statement of the Full Court of the Federal Court (Black CJ, Sundberg and Weinberg JJ) in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri*⁷⁵, in the course of reasoning to a conclusion disapproved by this Court in *Al-Kateb*. After correctly stating that "[i]f the Minister were not fulfilling his duty under s 198(1) to remove as soon as reasonably practicable the detention would ... still be lawful and the appropriate remedy would be an order in the nature of mandamus to compel the Minister to take the steps required for the performance of his duty"⁷⁶, the Full Court went on incorrectly to state⁷⁷:

"The Minister's purpose in detaining, however, must be the bona fide purpose of removal. Otherwise the detention would not be lawful. If the Minister were to hold a person in detention without such a purpose, then the detention would be unlawful and the person entitled to relief in the nature of habeas corpus. This conclusion is consistent with the decision of the High Court in *Park Oh Ho v Minister for Immigration and Ethnic Affairs*⁷⁸".

63 In this regard, the Full Court misunderstood *Park Oh Ho*. In that case, this Court held that a deportation order purportedly made in the exercise of a discretion

74 (2004) 219 CLR 562 at 637 [219], see also at 662 [299]. To similar effect, see *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 379-380 [182]-[183].

75 (2003) 126 FCR 54.

76 *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54 at 88 [134].

77 *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54 at 88 [135].

78 (1989) 167 CLR 637.

to order deportation then conferred by the Act was invalid because the deportation order had been made for the ulterior purpose of keeping the deportees available to be witnesses in a pending criminal prosecution. As a result of the invalidity of the deportation order, the detention of the appellants was unlawful because the authority to detain under the relevant provisions of the Act was confined to "deportees" and they were no longer "deportees"⁷⁹. Nothing in the decision or reasons in *Park Oh Ho* sheds light on the operation of s 189, s 196 or s 198 of the Act.

The validity of s 196(3)

64 In an attempt to avoid the difficulty of reconciling the primary judge's construction of s 196(1) with s 196(3), the respondent argued that s 196(3) is invalid on the same basis its predecessor, s 54R, was held to be invalid in *Lim*. This submission cannot be accepted. Section 54R provided that "[a] court is not to order the release from custody of a designated person". Section 54Q had the effect that a designated person's detention would cease to be authorised upon the expiry of a specified time period. The expression "designated person" was defined in s 54K in such a way that "status ... as a 'designated person' does not automatically cease when detention in custody is no longer authorized by" the Act⁸⁰.

65 In *Lim*⁸¹, Brennan, Deane and Dawson JJ (Gaudron J agreeing) held that, given that circumstances could exist in which a designated person may be unlawfully held in custody in purported pursuance of the Act, "it necessarily follow[ed] that the provision of s 54R [was] invalid". Their Honours went on to say⁸²:

"In terms, s 54R is a direction by the Parliament to the courts as to the manner in which they are to exercise their jurisdiction. It is one thing for the Parliament, within the limits of the legislative power conferred upon it

79 *Park Oh Ho v Minister for Immigration and Ethnic Affairs* (1989) 167 CLR 637 at 640-641, 643.

80 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 35.

81 (1992) 176 CLR 1 at 36.

82 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 36-37.

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by the Constitution, to grant or withhold jurisdiction. It is a quite different thing for the Parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction. The former falls within the legislative power which the Constitution, including Ch III itself, entrusts to the Parliament. The latter constitutes an impermissible intrusion into the judicial power which Ch III vests exclusively in the courts which it designates."

66 In *NAMU of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*⁸³, Black CJ, Sundberg and Weinberg JJ observed, correctly, that "[s] 196 lacks the two features that were fatal to s 54R" in that s 196 is confined in its operation to "unlawful non-citizens", that is, persons who are not lawfully present in Australia; and, further, unlike s 54R, which purported to preclude a court from ordering the release of persons whose detention had become unlawful, s 196 "precludes a court from ordering the release of persons who are lawfully detained". On that basis, s 196 "does no more than restate this axiomatic position"⁸⁴ in order to put beyond doubt the incorrectness of interpretations of the kind adopted by the primary judge. Section 196(2) confirms that this is so.

Step 2: Delay, departure and detention for an unauthorised purpose

67 It must be accepted upon the unchallenged findings of fact made by the primary judge that officers of the Executive were distracted from their duty under s 198(6) of the Act by an irrelevant consideration, namely the breach by Australia of its non-refoulement obligations if the option of removing the respondent to Syria were to be pursued. It may also be accepted that on his Honour's findings of fact, more might have been done to remove the respondent from Australia. The primary judge made the leap, from a finding of a failure by the Executive to remove the respondent as soon as reasonably practicable as required by s 198(6), to the conclusion that the Executive was detaining the respondent for a purpose other than his removal from Australia⁸⁵. This leap was not justified by any finding of

83 (2002) 124 FCR 589 at 595 [10].

84 *NAMU of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 124 FCR 589 at 595 [10].

85 *AJL20 v The Commonwealth* [2020] FCA 1305 at [25]-[34], [40]-[46], [69].

fact, or indeed by any evidence, but was understood by his Honour to be required by the following passage from the reasons of this Court in *Plaintiff S4*⁸⁶:

"The duration of the plaintiff's lawful detention under the Act was thus ultimately bounded by the Act's requirement to effect his removal as soon as reasonably practicable. It was bounded in this way because the requirement to remove was the only event terminating immigration detention which, all else failing, must occur.

It follows that the Executive's consideration (while the plaintiff was in immigration detention) of whether he might seek and be granted a protection visa had to be undertaken within that framework. As already observed, the authority to detain the plaintiff is an incident of the power of the Executive to remove the plaintiff or to permit him to enter and remain in Australia, and the plaintiff's detention is limited to what is reasonably capable of being seen as necessary to effect those purposes. The purpose for his detention had to be carried into effect as soon as reasonably practicable. That is, consideration of whether a protection visa may be sought by or granted to the plaintiff had to be undertaken and completed as soon as reasonably practicable. Departure from that requirement would entail departure from the purpose for his detention and could be justified only if the Act were construed as permitting detention at the discretion of the Executive. The Act is not to be construed as permitting detention of that kind."

68 In this respect, the primary judge was mistaken. *Plaintiff S4* does not authorise reasoning from a finding of want of proper diligence in the performance of the duty to remove to a conclusion that some unauthorised punitive purpose is being pursued by the Executive.

69 In *Plaintiff S4*, the circumstances of the unlawful non-citizen were such as to have engaged the requirement that he be removed from Australia as soon as reasonably practicable pursuant to s 198(2) of the Act. Notwithstanding that the duty to remove had been triggered, the Minister embarked upon a consideration of whether to exercise the power conferred by s 46A(2) of the Act to lift the bar imposed by s 46A(1), preventing the detainee from making a valid application for a visa⁸⁷. As a result, the plaintiff's detention went beyond detention referable only

86 (2014) 253 CLR 219 at 233 [33]-[34].

87 *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at 232-234 [28]-[35].

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to the performance of the duty pursuant to s 198(2) and became detention for the purpose of the Minister's consideration of whether to exercise the s 46A(2) power. The Court held that, because s 198(2) was the dominant provision and the obligation thereunder to remove "as soon as reasonably practicable" had already been triggered, the temporal limit applied also to the decision under s 46A(2). In the context where the plaintiff's detention had been prolonged to allow the Minister to consider whether to exercise the power conferred by s 46A(2), the Minister was not permitted then to exercise the separate power to grant a visa pursuant to s 195A(2). The grant of that visa foreclosed the exercise of the power under s 46A before a decision was made and thus deprived the prolongation of detention of its purpose⁸⁸.

70 When, in *Plaintiff S4*⁸⁹, the Court said that "[d]eparture from that requirement [to carry the purpose into effect as soon as reasonably practicable] would entail departure from the purpose for ... detention [of the unlawful non-citizen] and could be justified only if the Act were construed as permitting detention at the discretion of the Executive", their Honours were concerned to emphasise why administrative steps that prolonged detention must be taken within the framework of the Act and subject to its implicit temporal limits. Their Honours were not expressing a conclusion that failure to comply with a duty to bring about one of the terminating events in s 196(1) had the consequence that, ipso facto, detention became unlawful.

71 The notion that pursuit by the Executive of a purpose that is unauthorised or even prohibited by the Act might render the detention mandated by s 189(1) during the period mandated by s 196(1)(a) invalid is in any event problematic for the reasons that have already been given. Further, as Selway J explained in *Alsalih v Manager, Baxter Immigration Detention Facility*⁹⁰:

"In contrast to the exercise of a discretionary power, there is no necessary requirement that a statutory duty be exercised bona fide and for the purpose for which the power was given. To give a simple example, if a Sheriff has a warrant to hold a prisoner in gaol the duty to do so exists no matter whether the Sheriff is bona fide and no matter what his or her

⁸⁸ *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at 235 [41], 237 [46]-[47].

⁸⁹ (2014) 253 CLR 219 at 233 [34].

⁹⁰ (2004) 136 FCR 291 at 309 [56].

purpose might be. Otherwise, an officer could avoid a statutory duty merely by disagreeing with it."

72 It is enough for the duty to detain imposed by s 189(1) to be sustained in accordance with s 196(1)(a) until completion of the performance of the duty to remove imposed by s 198 that the officer keeping or causing the person to be kept in immigration detention knows or reasonably suspects that the person is an unlawful non-citizen. Provided the requisite knowledge or suspicion continues to exist throughout the period of detention⁹¹, an unauthorised or prohibited purpose on the part of the officer in prolonging the period of detention can affect neither the duty to detain nor the duty to remove nor the appropriate remedy for non-performance of the duty to remove.

Conclusion

73 The conclusion that officers of the Executive have not discharged their statutory duty to remove the respondent from Australia as soon as reasonably practicable affords a basis for orders requiring that they do their duty. Orders to that effect are appropriate to enforce the scheme of the Act. In contrast, to order that the respondent be released into the Australian community because officers of the Executive have not performed their statutory duty to remove him from Australia is to subvert that scheme.

74 It is evident that the Executive found the prospect of the removal of the respondent to Syria in breach of Australia's non-refoulement obligations unpalatable. In that regard, it is equally evident that, if the Minister wished to avoid the realisation of that unpalatable prospect, a visa might be granted to the respondent – precisely as the Explanatory Memorandum to the Bill that introduced s 197C contemplated⁹²:

"Australia will continue to meet its non-refoulement obligations through other mechanisms and not through the removal powers in section 198 of the Migration Act. *For example, Australia's non-refoulement obligations will be met through ... the Minister's personal powers in the*

91 cf *Guo v The Commonwealth* (2017) 258 FCR 31 at 56 [83].

92 Australia, House of Representatives, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, Explanatory Memorandum at 166 [1142]. See also Australia, House of Representatives, *Parliamentary Debates* (Hansard), 25 September 2014 at 10548-10549.

Kiefel CJ
Gageler J
Keane J
Steward J

30.

Migration Act, including those under section ... 195A ... of the Migration Act." (emphasis added)

Orders

- 75 In the compensation proceeding, C16/2020:
- (a) the appeal should be allowed, and the orders of the Federal Court of Australia made on 29 September 2020 be set aside, and in their place it be ordered that the proceeding be dismissed with costs;
 - (b) the respondent must pay the appellant's costs of the appeal to this Court.
- 76 In the specific relief proceeding, C17/2020:
- (a) the appeal should be allowed, and the orders of the Federal Court of Australia made on 11 September 2020 be set aside, and in their place it be ordered that the application filed in the Federal Circuit Court of Australia on 12 May 2020 and transferred to the Federal Court of Australia on 27 May 2020 be dismissed with costs;
 - (b) the respondent must pay the appellant's costs of the appeal to this Court.

77 GORDON AND GLEESON JJ. The *Migration Act 1958* (Cth) authorises the Executive (relevantly referred to as "an officer"⁹³) to detain an unlawful non-citizen⁹⁴ and to keep that person in detention ("immigration detention")⁹⁵. The authority the *Migration Act* gives the Executive to keep a person in immigration detention is not unlimited. The *Migration Act* provides for when detention must begin and when it must end.

78 The plurality in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*⁹⁶ held that there are limits on the Executive's authority to detain an alien in custody "when conferred in the context and for the purposes of executive powers to receive, investigate and determine an application by that alien for an entry permit and (after determination) to admit or deport" and that those limits are necessary to ensure that Executive detention does not infringe Ch III of the *Constitution*.

79 Continuing detention beyond the limits necessary for constitutional validity is unlawful⁹⁷. As Crennan, Bell and Gageler JJ explained in *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship*⁹⁸:

"laws authorising or requiring the detention in custody by the executive of non-citizens, being laws with respect to aliens within s 51(xix) of the *Constitution*, will not contravene Ch III of the *Constitution*, and will therefore be valid, *only* if: 'the detention which they require and authorise is limited to what is reasonably capable of being seen as necessary for the

93 *Migration Act*, s 5(1) definition of "officer".

94 *Migration Act*, ss 13 and 14.

95 *Migration Act*, ss 189, 196, 198. See *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 337 [19]-[20]; *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at 232-233 [30].

96 (1992) 176 CLR 1 at 32. See also *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 161-162 [384]-[385].

97 See *Lim* (1992) 176 CLR 1 at 33-36; see also 11-12, 51, 53.

98 (2013) 251 CLR 322 at 369 [138], quoting *Lim* (1992) 176 CLR 1 at 33. See also *Plaintiff S4* (2014) 253 CLR 219 at 231-232 [25]-[29]; *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at 625 [374].

purposes of deportation or necessary to enable an application for an entry permit to be made and considered.'" (emphasis added; footnote omitted)

80 The Executive has no "prerogative" or non-statutory power to detain a person⁹⁹. The criteria against which the lawfulness of detention must be judged "are set at the start of the detention"¹⁰⁰. As six members of this Court observed in *Plaintiff M96A/2016 v The Commonwealth*¹⁰¹, citing *Australian Communist Party v The Commonwealth*¹⁰², "Parliament cannot avoid judicial scrutiny of the *legality* of detention" by "mak[ing] the length of detention at any time dependent upon the unconstrained, and unascertainable, opinion of the Executive" (emphasis added). Indeed, it is "because immigration detention is *not discretionary*, but is an incident of the execution of particular powers of the Executive, [that] *it must serve the purposes of the Act and its duration must be fixed* by reference to what is both necessary and incidental to the execution of those powers and the fulfilment of those purposes"¹⁰³ (emphasis added).

81 The central dispute in these appeals is whether detention is lawful even though it continues beyond the *time* at which it *should* have come to an end. The detention of the respondent, AJL20, should have been, but was not, brought to an end by removing AJL20 from Australia sooner than he will now be removed. His detention was prolonged because, contrary to ss 196, 197C and 198 of the *Migration Act*, for approximately 14 months¹⁰⁴, officers considered Australia's

99 *Lim* (1992) 176 CLR 1 at 19, 63; *CPCF* (2015) 255 CLR 514 at 567-568 [148]-[150], 599-600 [273]-[275]; *Plaintiff M68* (2016) 257 CLR 42 at 105 [159], 158 [372]. As stated in *Lim* (1992) 176 CLR 1 at 28, it is unnecessary to consider the power of the Executive in times of war.

100 *Plaintiff S4* (2014) 253 CLR 219 at 232 [29].

101 (2017) 261 CLR 582 at 597 [31].

102 (1951) 83 CLR 1 at 258.

103 *Plaintiff S4* (2014) 253 CLR 219 at 232 [29].

104 The period of detention challenged began on 26 July 2019, the day after AJL20's visa application was "finally determined" by reason of the Minister for Home Affairs declining to consider exercising his discretion under s 195A to grant AJL20 a visa, triggering his removal "as soon as reasonably practicable" under s 198(6), and ended on 11 September 2020, when AJL20 was released from detention by order of the Federal Court of Australia.

non-refoulement obligations in respect of AJL20¹⁰⁵. Section 197C made clear, in unambiguous terms, that for the purposes of removal of an unlawful non-citizen under s 198, "it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen"¹⁰⁶, and, further, that the duty to remove an unlawful non-citizen as soon as reasonably practicable arises "irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen"¹⁰⁷.

82 The Commonwealth submitted that immigration detention is lawful until an unlawful non-citizen is "actually removed". That is, the Commonwealth submitted that the authority to detain an unlawful non-citizen continues until the "actual occurrence" of a "terminating event" under s 196(1) – relevantly, removal from Australia – regardless of whether, as the *Migration Act* requires, the Commonwealth removes the person as soon as reasonably practicable.

83 The Commonwealth submitted that even where, as here, the Executive prolonged AJL20's detention (by spending many months considering non-refoulement obligations that the *Migration Act* expressly provided were irrelevant to the Executive's obligation to remove AJL20 as soon as reasonably practicable), the detention was lawful. That would mean that Executive detention would *remain lawful* until such time as an unlawful non-citizen is removed under s 198, *subject only* to the requirement that, throughout the duration of the detention, an officer knows or reasonably suspects that the person is an unlawful non-citizen¹⁰⁸. The logical, and inevitable, consequence of the Commonwealth's submission is that (perhaps absent express malice¹⁰⁹) detention could lawfully continue for so long as the Executive chose, notwithstanding non-compliance with s 196. Put differently, the Commonwealth's contention would enable detention of unlawful non-citizens at the unconstrained discretion of the Executive;

105 See *Al-Kateb v Godwin* (2004) 219 CLR 562 at 636 [218], 639 [227]-[228].

106 *Migration Act*, s 197C(1) (as it stood at the relevant time).

107 *Migration Act*, s 197C(2) (as it stood at the relevant time). See Australia, House of Representatives, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, Explanatory Memorandum at 165 [1132], 166 [1140]-[1141].

108 *Migration Act*, s 189.

109 Which might constitute misfeasance in public office: *Northern Territory v Mengel* (1995) 185 CLR 307 at 345-348; *Sanders v Snell* (1998) 196 CLR 329 at 346-347 [42].

the terminating event may never occur despite being reasonably practicable, yet detention would remain lawful¹¹⁰. That would render the Ch III limits on Executive detention meaningless.

84 The Commonwealth's submissions have no foundation in the text of the *Migration Act*. If they did, there would be a question about the validity of the provisions¹¹¹; but no such question is reached. On the proper construction of the *Migration Act*, the Commonwealth's submissions fail. Sections 189, 196, 197C and 198 must be read together¹¹². That construction has to take place against the constitutional background¹¹³. Both the plain text of the provisions, and the constitutional framework within which they sit and must be read, show that the Executive's authority to keep an unlawful non-citizen in immigration detention stops when time for removal as soon as reasonably practicable has expired. As will be explained, it is not the *event* of removal, but a *time* by which removal must occur, that defines the lawfulness of detention.

85 Section 189(1) provides for a mandatory¹¹⁴ duty to detain an unlawful non-citizen "[i]f an officer knows or reasonably suspects that a person in the migration zone ... is an unlawful non-citizen". The authority to *keep* an unlawful non-citizen in detention is conditioned by s 196. Section 196 identifies a number of "terminating events" the pursuit of which justifies keeping a person in detention¹¹⁵. One of those events is, relevantly, until "he or she is removed from

110 cf *Plaintiff S4* (2014) 253 CLR 219 at 232 [29], 233 [33]-[34]; *Plaintiff M96A* (2017) 261 CLR 582 at 597 [31].

111 *Lim* (1992) 176 CLR 1 at 33, 36, 58. See also *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 556.

112 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[70]; *Al-Kateb* (2004) 219 CLR 562 at 637-638 [223]; *Plaintiff S4* (2014) 253 CLR 219 at 230 [23], 236 [42].

113 *Acts Interpretation Act 1901* (Cth), s 15A; *Lim* (1992) 176 CLR 1 at 14; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 504 [71]; *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at 133 [339]; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 604 [76].

114 *Al-Kateb* (2004) 219 CLR 562 at 647 [254].

115 See *Lim* (1992) 176 CLR 1 at 32-33, 36.

Australia under section 198"¹¹⁶. Section 198, in its various operations, requires that an officer must remove an unlawful non-citizen "as soon as reasonably practicable"¹¹⁷. That obligation is triggered by an objective event. It may be triggered by a written request for removal by the unlawful non-citizen under s 198(1) or, as in this case, it may be triggered by a final decision not to grant a visa under s 198(6). Once that event occurred for AJL20 (as it had on 25 July 2019, when the Minister for Home Affairs declined to consider exercising his discretion under s 195A to grant AJL20 a visa¹¹⁸), AJL20's detention under s 196 was authorised for the Executive to pursue his removal from Australia in accordance with s 198(6), as soon as reasonably practicable, and for no other reason.

86 The Commonwealth's submission elides the distinction between *taking* into detention and the *duration* of detention. The *Migration Act* relevantly defines "detain" to mean¹¹⁹:

"(a) take into immigration detention; *or*

(b) keep, or cause to be kept, in immigration detention;

and includes taking such action and using such force as are reasonably necessary to do so." (emphasis added)

The disjunctive "or" is important and is not to be ignored. It reinforces the distinction between *taking* into detention and the *duration* of – keeping a person in – detention that is reflected in the text of the provisions and in the way the provisions are intended to, and do, operate as a coherent whole.

87 The statutory power to detain an unlawful non-citizen must be understood by reference to two interlocking dimensions – power and duration. The Commonwealth's argument elides the two by focusing only on the power and duty given by s 189 and ignoring the duration fixed by ss 196 and 198, detention until removal as soon as reasonably practicable. The Commonwealth, by eliding power and duration, sought to say that detention for longer than the time authorised by the *Migration Act* was lawful. And yet, the Commonwealth said *mandamus*

116 *Migration Act*, s 196(1)(a).

117 *Migration Act*, s 198(1), (1A), (1C)-(2B), (5), (6)-(9).

118 It was common ground that s 198(6) was engaged in respect of AJL20 by 26 July 2019.

119 *Migration Act*, s 5(1) definition of "detain".

would be available, there being a statutory duty that had not been performed. The statutory duty not performed was the duty to remove as soon as reasonably practicable. The tension in the Commonwealth's position can only be resolved by recognising that the prolongation of the detention was not authorised by the *Migration Act* and was therefore unlawful.

88 At trial, the primary judge held that the Commonwealth failed to take steps to remove AJL20 from Australia to any country for the first period of his detention once s 198(6) was engaged, and failed to take steps to remove him to Syria, his country of nationality, for the whole of his detention, despite reasonably practicable steps being available to do so¹²⁰. The primary judge also found that the onus was on the Commonwealth to establish that the earliest point in time for removal had not yet arrived¹²¹. His Honour found that the Commonwealth had not discharged that onus¹²². That AJL20's detention had been prolonged was not disputed in this Court.

89 If the *Migration Act* operates according to its terms and an unlawful non-citizen is removed as soon as reasonably practicable, there is no occasion to reconsider or re-engage s 189. But where an unlawful non-citizen has been detained unlawfully and remains in detention, s 189 would require the unlawful non-citizen, if released, to be immediately re-detained¹²³. Two points should then be made. First, the unlawful non-citizen could only be detained lawfully – that is, only until they could be removed as soon as reasonably practicable. Second, observing that s 189 would apply to require re-detention does not alter the conclusion that the past period of detention was not authorised by the *Migration Act*. And, not being authorised by the *Migration Act*, the past detention was unlawful¹²⁴.

90 This construction of the provisions is wholly consistent with what the plurality held in *Lim* in respect of legislation not materially different from the

120 *AJL20 v The Commonwealth* [2020] FCA 1305 at [126]-[128], [159], [170]-[171].

121 *AJL20* [2020] FCA 1305 at [88], [91].

122 *AJL20* [2020] FCA 1305 at [88].

123 *Plaintiff M76* (2013) 251 CLR 322 at 380 [183]. See also *Wiest v Director of Public Prosecutions* (1988) 81 ALR 129 at 135-136; *Al-Kateb* (2004) 219 CLR 562 at 641 [236].

124 *Lim* (1992) 176 CLR 1 at 35-36.

legislation now in issue¹²⁵. The plurality in *Lim* recognised that continuing detention beyond the limits fixed by the legislative scheme (being limits necessary for constitutional validity¹²⁶) was unlawful¹²⁷. Here, the relevant limit is removal as soon as reasonably practicable, not the bare fact of removal. And, consistent with the view of the plurality in *Lim*, detention for a period beyond that in which removal is reasonably practicable is unlawful¹²⁸. The contrary conclusion, urged by the Commonwealth, would subvert the existence and efficacy of the limits on Executive detention required by Ch III of the *Constitution*.

91 Much reference was made in argument to *Al-Kateb v Godwin*, but that was a case where the Executive *could not* remove an unlawful non-citizen¹²⁹. These appeals were concerned with a period of 14 months where the Executive *would not* remove. What was said in *Al-Kateb* must be read in the light of the issue in that case – an issue presented by the Executive's inability to remove, not, as here, detention prolonged by the Executive's consideration of non-refoulement obligations which were expressly stated to be irrelevant to whether and when an unlawful non-citizen should be removed.

92 If it is alleged that there has been wrongful detention by the Executive, the nature of the issue – Executive interference with the liberty of the individual – compels the availability of habeas corpus¹³⁰. It is for the Executive to justify detention¹³¹. Whether detention is lawful is a question which must be able to be

125 See *Migration Amendment Act 1992* (Cth), s 3, inserting Div 4B of Pt 2, including what was then ss 54L, 54N, 54P, 54R; see also *Al-Kateb* (2004) 219 CLR 562 at 645-646 [249].

126 *Lim* (1992) 176 CLR 1 at 33-34. See [78]-[79] above.

127 *Lim* (1992) 176 CLR 1 at 35-36; see also 11-12, 51, 53.

128 *Lim* (1992) 176 CLR 1 at 35-36.

129 (2004) 219 CLR 562 at 631 [197]-[198].

130 See *Koon Wing Lau* (1949) 80 CLR 533 at 556, 581; *Lim* (1992) 176 CLR 1 at 31-32; *Al-Kateb* (2004) 219 CLR 562 at 638 [224]; *Plaintiff M47* (2012) 251 CLR 1 at 57-58 [108]; *Plaintiff M68* (2016) 257 CLR 42 at 105 [159].

131 *Liversidge v Anderson* [1942] AC 206 at 245; *Trobridge v Hardy* (1955) 94 CLR 147 at 152; *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285 at 299 [39]; *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 385 ALR 405 at 407 [5].

asked, and the detention justified, at any point of time on any day¹³². And it is a question that must be answered by reference to the criteria set at the commencement of the detention¹³³. Here, the justification for the period of detention was set at the start and is found in s 198, not s 189. The requirement that an officer must maintain their knowledge or reasonable suspicion that a person is an unlawful non-citizen throughout the duration of the person's detention under s 189 of the *Migration Act* is not – and, for the reasons explained above¹³⁴, could not validly be – the only limit on the duration of lawful detention¹³⁵. The temporal limit expressly fixed by s 198 – the terminating bookend – is removal "as soon as reasonably practicable".

93 That mandamus may have been available to compel the Executive to act in accordance with the *Migration Act* is not determinative. Mandamus and habeas are different remedies. The two remedies have different purposes and engage differences in onus of proof¹³⁶. Those differences reflect the differences in the underlying complaint. The concern of habeas is liberty, or, more accurately,

132 *Plaintiff S4* (2014) 253 CLR 219 at 232 [29], citing *Crowley's Case* (1818) 2 Swans 1 at 61 [36 ER 514 at 531]; *Plaintiff M96A* (2017) 261 CLR 582 at 597 [31]-[32].

133 *Plaintiff S4* (2014) 253 CLR 219 at 232 [29]; *Plaintiff M96A* (2017) 261 CLR 582 at 597 [31].

134 See [78]-[79], [82] above.

135 See *Plaintiff M47* (2012) 251 CLR 1 at 143 [361]. See also *Alsali v Manager, Baxter Immigration Detention Facility* (2004) 136 FCR 291 at 309 [57]-[58].

136 For the onus in habeas applications, see *Liversidge* [1942] AC 206 at 245-246; *Trobridge* (1955) 94 CLR 147 at 152; *Plaintiff M47* (2019) 265 CLR 285 at 299 [39]; *McHugh* (2020) 385 ALR 405 at 407 [5]. For the onus in judicial review applications where mandamus is sought, see *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at 616 [67], 623 [91]-[92]; *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173 at 185 [24].

remedying unlawful detention¹³⁷. Mandamus remedies a failure to perform a statutory duty¹³⁸.

94 Habeas is not only part of Australian law but an essential form of relief for unlawful Executive detention¹³⁹. As Brennan J said in *Re Bolton; Ex parte Beane*¹⁴⁰:

"Many of our fundamental freedoms are guaranteed by ancient principles of the common law or by ancient statutes which are so much part of the accepted constitutional framework that their terms, if not their very existence, may be overlooked until a case arises which evokes their contemporary and undiminished force. This is such a case and the common law of habeas corpus and the *Habeas Corpus Act 1679* (31 Car II c 2) as extended by the *Habeas Corpus Act 1816* (56 Geo III c 100) are such laws."

That is why habeas corpus has been described as "the great and efficacious writ in all manner of illegal confinement"¹⁴¹; the "high prerogative writ"¹⁴²;

137 *Plaintiff S4* (2014) 253 CLR 219 at 232 [29], citing *Crowley's Case* (1818) 2 Swans 1 at 61 [36 ER 514 at 531]; *Plaintiff M96A* (2017) 261 CLR 582 at 597 [31].

138 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35; *Plaintiff S157* (2003) 211 CLR 476 at 492 [31], 513-514 [104]; *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 24 [39].

139 *Koon Wing Lau* (1949) 80 CLR 533 at 556, 581, 586; *Lim* (1992) 176 CLR 1 at 31-32, 51; *Al-Kateb* (2004) 219 CLR 562 at 638 [224]; *Plaintiff M47* (2012) 251 CLR 1 at 57-58 [108]; *Plaintiff M68* (2016) 257 CLR 42 at 105 [159]. See also *R v The Governor of the Metropolitan Gaol, Coburg; Ex parte Kimball* [1937] VLR 279; *Bedgood v Keeper of Her Majesty's Penitentiary at Malabar* [1975] 2 NSWLR 144; *MacDonald v Attorney-General* (1980) 24 SASR 294; *Puharka v Webb* [1983] 2 NSWLR 31.

140 (1987) 162 CLR 514 at 520-521.

141 Blackstone, *Commentaries on the Laws of England* (1768), bk 3, ch 8 at 131.

142 Blackstone, *Commentaries on the Laws of England* (1768), bk 3, ch 8 at 131.

a "famous bulwark of our liberties"¹⁴³; and "the most significant means of protecting individual liberty"¹⁴⁴. It is a remedy "the more necessary, because the oppression does not always arise from the ill-nature, but sometimes from the mere inattention, of government"¹⁴⁵. The writ is intended to provide a "swift and imperative remedy in all cases of illegal restraint or confinement"¹⁴⁶. This Court should do nothing that undermines the availability of the writ¹⁴⁷ to protect against unlawful detention by the Executive.

95 The matter may be tested this way. If an unlawful non-citizen was detained and, consistent with ss 196 and 198, removal of that person as soon as reasonably practicable was anticipated to be 100 days but that person was still being detained after 200 days because the Executive had spent 150 days considering non-refoulement obligations, mandamus does not assist. From day 101, the detention was unlawful. There would be an action for damages for unlawful imprisonment and habeas would go to release the unlawful non-citizen from unlawful detention. However, as explained, because of their status as an unlawful non-citizen, s 189 would require the Executive to re-detain the person.

96 Another example makes good the point in relation to the need for, and nature of, habeas: what if, instead of considering non-refoulement obligations, the Executive simply lost an unlawful non-citizen's file as a result of an administrative error and detained the person for 100 days more than the period necessary to remove that person as soon as reasonably practicable? On the Commonwealth's argument, that person would have no remedy for the 100 days that person had been unnecessarily detained (the past) but would only have a prospective remedy requiring the Executive to now remove the person as soon as reasonably practicable. Mandamus is directed at a different issue to habeas, at a different point in time, and would not be swift.

143 Jenks, "The Story of the *Habeas Corpus*", in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History* (1908), vol 2, 531 at 531.

144 Farbey, Sharpe and Atrill, *The Law of Habeas Corpus*, 3rd ed (2011) at 1.

145 Blackstone, *Commentaries on the Laws of England* (1768), bk 3, ch 8 at 137-138.

146 *Secretary of State for Home Affairs v O'Brien* [1923] AC 603 at 609; *Ex parte Walsh and Johnson*; *In re Yates* (1925) 37 CLR 36 at 77.

147 See, eg, the jurisdiction of the High Court in relation to habeas corpus: *Judiciary Act 1903* (Cth), s 33(1)(f); *Plaintiff M47* (2012) 251 CLR 1 at 57-58 [108].

97 All detention, including the period of detention, must be justified¹⁴⁸. Prolonged detention at the unconstrained discretion of the Executive is not only harmful but unlawful¹⁴⁹ and must be able to be remedied, without delay. Habeas is the only process which compels those who detain an individual to justify the lawfulness of detention. The contrary conclusion not only is abdication by the Court of performance of its obligations but would bring the law into disrepute by increasing the costs of detention for government and the debts of those detained, as well as increasing the improbability of an individual bringing action for mandamus in circumstances where there is even the remotest of chances that the Executive may permit them to stay. In any event, singularity of remedy has never been the way of the common law¹⁵⁰.

98 Once it is accepted, as it must be, that the power to detain has temporal bookends (a start and an end point), then detention beyond the terminating bookend is unlawful. The terminating bookend is fixed by removal as soon as reasonably practicable. That is, lawfulness of detention comes to an end at the time by which removal could have been reasonably practicable. The prolonging of detention can be sufficient to demonstrate that a detainee's removal will occur beyond the limit fixed by the legislative scheme – the terminating bookend – removal as soon as reasonably practicable. The Commonwealth's argument depends, implicitly but not explicitly, on reading the terminating bookend as if it was marked by the fact of removal, not, as the Commonwealth said it accepted, the time fixed by s 198, being the time at which removal would have been reasonably practicable.

99 The Commonwealth's submission that its construction would not result in "unbounded, unconstrained or discretionary Executive detention", because failure to comply with the duty to remove an unlawful non-citizen as soon as reasonably practicable may attract mandamus, is glib and unhelpful¹⁵¹. The availability of

148 *Plaintiff S4* (2014) 253 CLR 219 at 232 [29]; *Plaintiff M96A* (2017) 261 CLR 582 at 597 [31].

149 *Plaintiff M61* (2010) 243 CLR 319 at 348 [64], 353 [77]; *Plaintiff S4* (2014) 253 CLR 219 at 230 [22]. See also *Lim* (1992) 176 CLR 1 at 19; *Plaintiff M76* (2013) 251 CLR 322 at 369-370 [139].

150 See, eg, *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 355; *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at 600 [84].

151 A statutory power to detain a person does not permit continuation of that detention at the unconstrained discretion of the Executive: *Plaintiff M61* (2010) 243 CLR 319

mandamus depends on there being a public duty unperformed, not a private duty breach of which sounds in damages¹⁵². The reference to mandamus is glib because there will be some, if not many, cases where an unlawful non-citizen in immigration detention will have no means of obtaining information necessary to mount a case for mandamus. The unlawful prolongation of detention that is brought about by the Executive's failure to remove as soon as reasonably practicable will go unremedied. The person in detention has no claim for damages; the *Bivens* action for damages¹⁵³ is not recognised in Australia¹⁵⁴.

100 The Commonwealth sought to rely upon dicta in *WAIS v Minister for Immigration and Multicultural and Indigenous Affairs*¹⁵⁵ and *NAES v Minister for Immigration and Multicultural and Indigenous Affairs*¹⁵⁶ in support of its submission that mandamus is the only available or appropriate remedy. Those cases were concerned with whether release would be inconsistent with the statutory scheme, and not, as here, with the consequences of detention being prolonged beyond the time permitted by the *Migration Act* and the re-engagement of s 189. To the extent that those cases, or the dicta of the Full Court of the Federal Court in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri*¹⁵⁷, assumed or concluded that detention prolonged beyond the time permitted by the *Migration Act* would be lawful, they are wrong. They are contrary to the express terms of the *Migration Act* and are inconsistent with *Lim*¹⁵⁸.

at 348 [64], 353 [77]; *Plaintiff S4* (2014) 253 CLR 219 at 230 [22]. See also *Lim* (1992) 176 CLR 1 at 19; *Plaintiff M76* (2013) 251 CLR 322 at 369 [139].

152 See, eg, *Cuming Campbell Investments Pty Ltd v Collector of Imposts (Vict)* (1938) 60 CLR 741 at 749; *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 at 404-405.

153 After *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics* (1971) 403 US 388.

154 *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at 52 [40], citing *Kruger v The Commonwealth* (1997) 190 CLR 1 at 46-47, 93, 125-126, 146-148.

155 [2002] FCA 1625 at [56].

156 [2003] FCA 2 at [11]-[13].

157 (2003) 126 FCR 54 at 87-88 [134]-[135].

158 See [90] above.

101 The Commonwealth's reliance on *ASP15 v The Commonwealth*¹⁵⁹ is misplaced. That case concerned delay in the processing of a visa application, but, unlike *Plaintiff S4/2014 v Minister for Immigration and Border Protection*, it was not a case where the duty to remove as soon as reasonably practicable under s 198 had been engaged¹⁶⁰. Thus, the Full Court of the Federal Court's finding that detention will remain "validly authorised" despite "the process to make a visa decision [going] on for too long"¹⁶¹ must be read in light of the Full Court's express acknowledgement that where the duty in s 198 *has* been engaged, as in this case, detention beyond the requirements of that section "could become unlawful"¹⁶². Indeed, the Full Court described the majority reasoning in *Al-Kateb* as meaning that "[i]f a person continued to be detained after [the relevant criterion in s 198 was satisfied and removal was reasonably practicable], it would *inevitably follow* that the detention was for some purpose other than removal as authorised and required by s 198(2)"¹⁶³ (emphasis added).

102 Here, there was no dispute that AJL20 is an unlawful non-citizen of Syrian nationality who was involuntarily detained in the custody of the Executive in 2014 and that, from 26 July 2019, the Executive prolonged his detention because, contrary to ss 196, 197C and 198 of the *Migration Act*, for approximately 14 months, officers considered non-refoulement obligations. His period of detention was prolonged longer than the Executive was lawfully entitled to detain him. The Commonwealth submitted, and the primary judge found, that during the latter part of the time the Executive, through its officers, was considering non-refoulement obligations, it also sought to determine whether AJL20 could be removed to Lebanon. To that extent, and for that time, the Executive detained AJL20 for the purpose of removing him from Australia. But observing that to be so is no answer to the more basic question of whether AJL20 was being detained for removal as soon as reasonably practicable. To establish that to be so, the Commonwealth would have had to show that removal to Lebanon would be

159 (2016) 248 FCR 372.

160 *ASP15* (2016) 248 FCR 372 at 382 [38]-[39]. cf *Plaintiff S4* (2014) 253 CLR 219 at 233 [33].

161 *ASP15* (2016) 248 FCR 372 at 383 [40].

162 *ASP15* (2016) 248 FCR 372 at 382 [38].

163 *ASP15* (2016) 248 FCR 372 at 381 [31].

the most expeditious method that was reasonably practicable to effect removal. The Commonwealth did not attempt to show that to be so¹⁶⁴.

103 The unlawful Executive inaction in this case may also be characterised, as it was by the primary judge, as a departure from the required purpose of AJL20's detention, being his removal from Australia as soon as reasonably practicable¹⁶⁵. The purpose of immigration detention is assessed objectively by reference to all of the circumstances, including the conduct of officers responsible for AJL20's detention¹⁶⁶. As was rightly said by the Federal Court in *Alsalih v Manager, Baxter Immigration Detention Facility*¹⁶⁷, purpose is to be assessed objectively, "[i]t is not obvious ... that the *subjective* purpose of [those] officer[s] has much to do with" the duty to detain an unlawful non-citizen (emphasis added). The lawfulness of detention under s 196(1) depends upon the Executive continuing to act in accordance with one of the statutory purposes for the detention¹⁶⁸. Indeed, as was held in *Al-Kateb*, detention for the purpose of removal under s 198 will cease to be detention for that purpose when the detention extends beyond the time when the removal of the non-citizen has become reasonably practicable¹⁶⁹. In this case, the Executive taking steps contrary to s 197C is what disconnected the detention from removal as soon as reasonably practicable and thus from that point the detention was not under or for the purposes of the *Migration Act*¹⁷⁰. The primary judge's unchallenged findings to the effect that no steps were taken during the relevant periods to pursue AJL20's removal to Syria, the country of his

164 cf *AJL20* [2020] FCA 1305 at [168].

165 *Plaintiff S4* (2014) 253 CLR 219 at 233-234 [35]; *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 360-361 [97]-[98]; *Plaintiff M47* (2019) 265 CLR 285 at 289-290 [2].

166 *Al-Kateb* (2004) 219 CLR 562 at 576 [17]; *Plaintiff M96A* (2017) 261 CLR 582 at 594 [22].

167 (2004) 136 FCR 291 at 309 [58].

168 *Plaintiff M61* (2010) 243 CLR 319 at 341-342 [35]; *Plaintiff M76* (2013) 251 CLR 322 at 343-344 [30], 357 [89]; *Plaintiff S4* (2014) 253 CLR 219 at 231 [26], 232 [28], 233-234 [34]-[35]. See also *Park Oh Ho v Minister for Immigration and Ethnic Affairs* (1989) 167 CLR 637 at 643-644.

169 (2004) 219 CLR 562 at 581 [33], 638-639 [226]-[227], 640 [231], 659 [291], 662-663 [303]. See *ASP15* (2016) 248 FCR 372 at 381 [31].

170 *Plaintiff S4* (2014) 253 CLR 219 at 231 [26].

nationality, despite the availability of reasonably practicable steps towards that end, supported his Honour's conclusion that there had been a departure from the only purpose for which AJL20 could have been detained lawfully, namely, his removal from Australia as soon as reasonably practicable.

Conclusion and orders

104 Damages for false imprisonment for the period of prolonged unlawful detention were and remain available. A writ of habeas was available to be granted to release AJL20 from that unlawful detention. However, consistent with the statutory scheme, on his release, s 189 was re-engaged and "an officer" was under a duty to detain AJL20, an unlawful non-citizen.

105 The orders made by the primary judge should not be disturbed. The Commonwealth chose to take what was said in the reasons of the primary judge as prohibiting it from re-detaining AJL20. But that was not what the orders of the primary judge said and an appeal to this Court is against orders, not reasons¹⁷¹. The appeals to this Court therefore should be dismissed with costs.

171 *Constitution*, s 73; *Perara-Cathcart v The Queen* (2017) 260 CLR 595 at 643-644 [142], citing *Burrell v The Queen* (2008) 238 CLR 218 at 235 [69].

EDELMAN J.

Introduction

106 In *Al-Kateb v Godwin*¹⁷², a bare majority of this Court held that s 189 of the *Migration Act 1958* (Cth) authorised the potentially indefinite detention of a person who fell within the category of "unlawful non-citizen". One reason the majority held the detention to be lawful was that the scope and purposes of the *Migration Act* were not thought to preclude the indefinite detention of an unlawful non-citizen¹⁷³. AJL20 did not challenge that decision on these appeals. But the effect of the Commonwealth's submission on these appeals is to take the decision in *Al-Kateb v Godwin* one large step further. The effect of the Commonwealth's submission, if accepted, is that it would be lawful for the Executive, through Commonwealth officers, to continue the detention of an unlawful non-citizen for an objective purpose that is contrary to an express provision concerning the scope of the *Migration Act*.

107 The Commonwealth's submission should not be accepted. The express and implied boundaries of the *Migration Act* would be exploded if the Executive could act for purposes that are objectively inconsistent with the scope and purposes of the Act. It has long been recognised that instruments conferring authority will contain implied, if not express, boundaries upon the exercise of that authority – by exercise of powers or performance of duties – to ensure that the exercise of authority is not for purposes that are beyond the scope and purposes of the conferral of authority. For instance, a director of a public company is required to exercise powers and to perform duties for purposes properly within the express or implied scope of the director's authority. And statutory authority is generally conferred subject to the implication that it will be exercised within the scope and purposes of the statute, which might, themselves, be constitutionally constrained.

108 It would be very strange if the *Migration Act* were an island of freedom from established legal concepts, permitting the Executive to act for any purpose in the exercise of its powers or the performance of its duties, no matter how far that purpose departs from the express or implied terms of statutory authority. In the circumstances of this case, where the *Migration Act* imposed a "duty" upon the Executive to keep AJL20 in immigration detention, albeit one that was subject to a power to release AJL20 by the grant of a visa, the question is whether the Executive could perform this "duty" for an objective purpose that is inconsistent with the scope and purposes of the Act.

172 (2004) 219 CLR 562.

173 See (2004) 219 CLR 562 at 609 [126].

109 These appeals therefore involve deep questions of Commonwealth Executive authority. Does the apparently open-textured provision, s 189 of the *Migration Act*, permit an unlawful non-citizen to be detained by an officer of the Executive for an objective purpose that is contrary to the terms of the Act? As a general proposition, courts confine open-textured statutory duties, functions, and powers by requiring that they be performed or exercised according to the purposes for which they were conferred. An exception should not be created just for the *Migration Act*. Indeed, in the specific context of the *Migration Act*, the question was resolved in the negative by this Court nearly 30 years ago in a decision which has since been woven into the fabric of the *Migration Act*¹⁷⁴. Section 189 of the *Migration Act* requires an officer to take an unlawful non-citizen into immigration detention but does not require continued detention if the Minister exercises the power to grant a visa (whether or not on application and whether or not the relevant requirements in the *Migration Regulations 1994* (Cth) are satisfied¹⁷⁵) to "a person who is in detention under section 189"¹⁷⁶. The *Migration Act* does not permit continued detention of that person for purposes beyond the scope and purposes of the Act.

110 It is of fundamental importance to these appeals to separate two distinct categories of duty and power contained in Divs 7 and 8 of Pt 2 of the *Migration Act*. In broad terms, Div 7 imposes a "duty" upon the Executive to keep unlawful non-citizens in immigration detention for proper purposes, with a power to cease that detention by granting them a visa. Also in broad terms, Div 8 imposes a duty upon the Executive to remove unlawful non-citizens as soon as reasonably practicable. A breach of one duty does not mean that the other duty has been breached. And the legal response to a breach of each duty is different. The primary legal response to unlawful detention is habeas corpus, and release from detention. The primary legal response to the failure to perform the duty to remove as soon as reasonably practicable is mandamus to compel removal.

111 Two hypothetical examples can illustrate the independence of the two duties. First, suppose that upon the proper cancellation of the visa of a non-citizen, the Executive determined that prior to their removal, the non-citizen should serve two years in immigration detention as a penalty for perceived adverse behaviour, following which the non-citizen would be immediately removed. Suppose also that, coincidentally, evidence before the court was that it would not be reasonably practicable to remove the person for two years. Notwithstanding that the person would be removed as soon as reasonably practicable, the continued detention

174 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

175 *Migration Act 1958* (Cth), ss 195A(2), 195A(3).

176 *Migration Act*, ss 189, 195A, 196(1).

would be a breach of the "duty" of continuing detention for proper purposes. From the moment after detention, the unlawful non-citizen would have been entitled to release, although the non-citizen could always be re-detained for a proper purpose, such as solely for removal within the scope and purposes of the *Migration Act*. In this example, however, there would never have been a breach of the duty to remove as soon as reasonably practicable.

112 Secondly, suppose that an unlawful non-citizen was lawfully detained and that evidence before the court was that removal was possible within weeks of the commencement of detention. Suppose also that owing to dilatory conduct by the Executive, the non-citizen was not removed as soon as reasonably practicable and was still being held in immigration detention for the purpose of removal ten months after detention commenced. Unless the purpose of the Executive was positively *not* to remove as soon as reasonably practicable, then there would be no breach of the "duty" of continuing detention of the non-citizen for proper purposes. In other words, there would be no breach of the "duty" upon the Executive to continue detention only for Executive purposes that are objectively within the scope and purposes of the *Migration Act*. But there would be a breach of the duty to remove the non-citizen as soon as reasonably practicable.

113 In this case, the findings of the primary judge establish a breach of both duties: (i) the "duty" under Div 7 to keep AJL20 in immigration detention only for proper purposes and (ii) the duty under Div 8 to remove as soon as reasonably practicable. It is common ground that from 26 July 2019 the Executive had failed to remove AJL20 as soon as reasonably practicable. The primary judge's findings also establish that the Executive's objective purpose was to remove AJL20 in a manner consistent with Australia's non-refoulement obligations¹⁷⁷. As senior counsel for AJL20 submitted, that purpose could not be consistent with the *Migration Act* because s 197C of the *Migration Act* provides that, for the purposes of s 198 (removal from Australia of unlawful non-citizens), it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen. The purpose of the Executive cannot be characterised as removal generally, shorn of the condition that removal be consistent with Australia's non-refoulement obligations. To characterise the purpose so generally, as senior counsel for AJL20 submitted, would mean that the failure to take any steps for over 13 months toward removal of AJL20 to Syria was "purposeless" or "arbitrary". In effect, as senior counsel submitted, the "Commonwealth went to the hearing and then went to judgment saying [']the circumstances you should act upon are [that] we do not intend to observe [s] 197C[']". As the primary judge correctly held, "[a] policy of

177 *AJL20 v The Commonwealth* [2020] FCA 1305 at [10], [117], [120], [163], [169].

non-refoulement is morally justifiable ... [but] the Commonwealth cannot act as though s 197C does not exist"¹⁷⁸.

114 The conclusion that the purpose of the Executive was not consistent with the *Migration Act* does not mean that the Executive was required to remove AJL20 to Syria. Nor does s 197C have that effect. Rather than detaining AJL20 unlawfully, in order to remove him consistently with Australia's non-refoulement obligations the Minister could have exercised his power under s 195A of the *Migration Act* to grant AJL20 a Subclass 070 – Bridging (Removal Pending) visa¹⁷⁹. The Minister would not then have been required to remove AJL20 without regard for Australia's non-refoulement obligations. Such an outcome was Parliament's intention when s 197C was introduced. As the primary judge observed¹⁸⁰, the Explanatory Memorandum to the Bill which introduced s 197C into the *Migration Act*¹⁸¹ explained that Australia will continue to meet its non-refoulement obligations through mechanisms including the use of the Minister's personal powers under s 195A.

115 The appeals should be dismissed with costs.

The scheme of immigration detention as applied to AJL20

116 The Commonwealth is correct in its submission that the *Migration Act* sets up binary categories of lawful non-citizens and unlawful non-citizens¹⁸². But this division is not the same as a division of those who are entitled to be at liberty in the Australian community and those who are not entitled to be at such liberty¹⁸³. For instance, s 195A(2) permits the Minister to grant a visa to an unlawful non-citizen in detention under s 189, including an unlawful non-citizen who remains subject to removal. And an unlawful non-citizen would have some liberty

178 *AJL20 v The Commonwealth* [2020] FCA 1305 at [123].

179 See *Migration Regulations 1994* (Cth), Sch 1, item 1307, Sch 2, cl 070.111-070.411, read with regs 2.20(12), 2.20A.

180 *AJL20 v The Commonwealth* [2020] FCA 1305 at [121].

181 Australia, House of Representatives, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, Explanatory Memorandum at 166 [1142], 167 [1146].

182 See *Migration Act*, ss 13, 14.

183 Compare *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 379 [182].

if the Minister exercised the power under s 197AB to make a residence determination, which would permit an unlawful non-citizen to reside at a specified place in the community rather than in immigration detention. Nevertheless, putting the various exceptions aside, the detention of unlawful non-citizens within the scope of, and for the purposes of, the *Migration Act* is generally required by s 189 of the *Migration Act*, which includes a general "duty" to continue the detention of a person if "an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen".

117 In 2005, AJL20 arrived in Australia on a child visa. On 2 October 2014, AJL20 became an unlawful non-citizen following the Minister's cancellation of his visa on character grounds¹⁸⁴. On 8 October 2014, AJL20 was validly detained by the Commonwealth in "immigration detention"¹⁸⁵ for the purposes of the *Migration Act* as required by s 189 of the *Migration Act*. But the initial validity of his detention did not mean that his detention would remain valid for all time. By the definition of "detain" in s 5(1) of the *Migration Act*, the general "duty" in s 189 is relevantly one of continuing detention consistently with the scope and purposes of the Act. The "duty" is not limited to taking an unlawful non-citizen into immigration detention for the purposes of the *Migration Act*. It extends to "keep[ing]" the unlawful non-citizen, or "caus[ing] [the unlawful non-citizen] to be kept, in immigration detention"¹⁸⁶.

118 Section 196 provides for the duration of such immigration detention of an unlawful non-citizen "detained under section 189" and hence "kept in immigration detention" under s 189 read with s 5(1). The duration of AJL20's detention was therefore authorised under s 196 only so long as it was "under section 189". As explained below, detention under s 189 must be detention which is consistent with the scope and purposes of the *Migration Act*.

119 Section 198(6) provides that an "officer must remove as soon as reasonably practicable an unlawful non-citizen" if various conditions are met. It was common ground at all stages of this proceeding that AJL20 met those conditions from 26 July 2019. From that date, the Executive was obliged by s 198(6) to remove AJL20 from Australia "as soon as reasonably practicable". Section 197C(1) provides, for the purposes of s 198, that "it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen".

184 See *Migration Act*, s 501(2).

185 See the definitions of "detain" and "immigration detention" in *Migration Act*, s 5(1).

186 See the definition of "detain" in *Migration Act*, s 5(1).

120 On 1 March 2019, the Executive directed that AJL20's administrative status concerning barriers to resolution be changed to "8.7 (non-refoulement obligations)" and an Inspector informed officers within the Department that "we will not be [pursuing] any removal arrangements" for AJL20¹⁸⁷.

121 Two relevant periods of time were identified by the primary judge following the inactivity in relation to removal after 1 March 2019: (i) the first period was from 26 July 2019 until 27 November 2019, during which the Commonwealth took no active steps to effect the removal of AJL20 from Australia; and (ii) the second period was from 28 November 2019 until 11 September 2020 (the date of the primary judge's judgment), during which the Commonwealth pursued the possibility of Lebanon, but not Syria, as a receiving country to enable removal of AJL20.

122 As the Commonwealth rightly conceded in this Court, the distinction between those periods is no longer material because the Commonwealth did not challenge the primary judge's findings that throughout both periods the Executive did not comply with the requirement in s 198(6) to remove AJL20 as soon as reasonably practicable.

123 The primary judge also found, in another unchallenged conclusion, that throughout both periods the Executive maintained its purpose of removing AJL20 consistently with Australia's non-refoulement obligations. Through multiple case reviews in the second period, AJL20's administrative status continued to have a "barrier indicator" of "[8.7] Non-Refoulement" and the documentary evidence showed that non-refoulement obligations were consistently asserted as an obstacle to AJL20's removal. The evidence of the Status Resolution Officer for AJL20 during the second period was that he "was non-removable because he could not be returned to his country of origin because he was owed protection"¹⁸⁸.

Broad statutory duties are limited by legislative scope and purposes

124 It has long been accepted that open-textured statutory powers, with no indication of the purposes or considerations upon which the powers must depend, are nevertheless confined by "the subject matter and the scope and purpose of the statutory enactments"¹⁸⁹. Hence, "[a]n official who lawfully takes a person into

¹⁸⁷ *AJL20 v The Commonwealth* [2020] FCA 1305 at [105], [120].

¹⁸⁸ *AJL20 v The Commonwealth* [2020] FCA 1305 at [157].

¹⁸⁹ *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505. See also *Victorian Railways Commissioners v McCartney and Nicholson* (1935) 52 CLR 383 at 391; *R v Trebilco; Ex parte F S Falkiner & Sons Ltd* (1936) 56 CLR 20 at 32; *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746 at 757-758;

custody cannot continue to hold that person in custody other than for a purpose authorised by the statute conferring the power"¹⁹⁰.

125 The same is true of the authority to perform a statutory duty where the statute contains no express limits on the performance of the duty¹⁹¹. The duty is confined by the scope and purposes of the statutory enactment. Although it is common to speak of the power or duty being constrained by the requirement that the power or duty be exercised or performed "for proper purposes", it would be more precise to speak of the constraint as one to exercise the power or to perform the duty within the scope and purposes expressed or implied in the statute.

126 The "duty" of continuing detention under s 189 of the *Migration Act* is no exception to this general rule. A person can only be "kept" in detention *under* s 189 if the detention is within the scope and purposes of the *Migration Act*. Like any statutory duty, function, or power, s 189 must be performed within the scope and purposes of the enactment.

127 At a high level of generality, the purpose of the *Migration Act* is "to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens"¹⁹². The Act is intended to be "the only source of the right of non-citizens to so enter or remain"¹⁹³ and it aims for the removal "from Australia of non-citizens whose presence in Australia is not permitted by this Act"¹⁹⁴. But these statements of object do not, and cannot, conclusively define the scope and purposes of the *Migration Act*. Plainly, the Act does not permit the Executive to continue the detention of any unlawful non-citizen for any purpose so long as there is *also* an intention ultimately to remove the person from Australia. Indeed, if the *Migration Act* had purported to allow the Executive to do so then it would be

R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd (1979) 144 CLR 45 at 49; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 368; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40; *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 81 [22], 84 [31].

190 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 591 [34].

191 See *Walton v Gardiner* (1993) 177 CLR 378 at 409.

192 *Migration Act*, s 4(1).

193 *Migration Act*, s 4(2).

194 *Migration Act*, s 4(4).

unconstitutional to that extent. In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*¹⁹⁵, in the context of provisions including the predecessor provision to s 189, a joint judgment of Brennan, Deane and Dawson JJ held, in a passage which has been consistently reaffirmed in this Court¹⁹⁶, that the valid purposes for detention were "limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered".

128 The reason that Brennan, Deane and Dawson JJ held that the Executive was constitutionally constrained to a narrow range of legitimate purposes was that other purposes would be punitive, using that concept in a sense extending beyond the narrow conception of criminal punishment as moral desert¹⁹⁷. Their Honours concluded that the Commonwealth Parliament cannot validly authorise the Executive to detain aliens involuntarily beyond the limited period discussed above because to do so would be "penal or punitive in character [which] under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt"¹⁹⁸.

129 As constitutionally constrained, the terms of the *Migration Act* establish the scope and purposes for legitimate Executive action. That Executive action, whether in performance of a duty or in the exercise of a power, cannot be for an illegitimate purpose, namely a purpose that does not conform to the scope and purposes of the Act. As this Court said in *Plaintiff S4/2014 v Minister for Immigration and Border Protection*¹⁹⁹:

"It follows that detention under and for the purposes of the Act is limited by the purposes for which the detention is being effected. And it further follows that, when describing and justifying detention as being under and for the purposes of the Act, it will always be necessary to identify the

195 (1992) 176 CLR 1 at 33. See also at 65.

196 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 11 [14], 13-14 [21]; *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 369 [138]; *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at 231 [26]; *Plaintiff M96A/2016 v The Commonwealth* (2017) 261 CLR 582 at 593 [21].

197 See *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 215-216 [196]-[197], 219 [210]-[213]; 388 ALR 1 at 58-59, 63-64.

198 (1992) 176 CLR 1 at 27.

199 (2014) 253 CLR 219 at 231 [26].

purpose for the detention. Lawfully, that purpose can only be one of three purposes: the purpose of removal from Australia; the purpose of receiving, investigating and determining an application^[200] for a visa permitting the alien to enter and remain in Australia; or, in a case such as the present, the purpose of determining whether to permit a valid application for a visa."

Habeas corpus where detention is beyond the scope and purposes of the statute

130 As a matter of statutory implication, any exercise of statutory power by the Executive will usually be authorised only on the basis that the exercise is within the scope of the legislation and for the purposes for which the power was conferred²⁰¹. It is not necessary that an ulterior purpose be the sole purpose in order for the Executive action to be ultra vires. It suffices "if such a purpose is a substantial purpose"²⁰². The primary remedy for an ultra vires, and therefore unlawful, detention is a writ of habeas corpus. Unlike damages for false imprisonment, which are only a secondary remedy to compensate for losses where the elements of the tort are satisfied, the remedy of habeas corpus, or an order of that nature²⁰³, is a primary remedy by which a person seeks to rectify the unlawful nature of the detention by release: "[w]hen it has been decided that the detention of any person is illegal he is entitled to be discharged"²⁰⁴.

131 In *Koon Wing Lau v Calwell*²⁰⁵, this Court considered the operation of s 7(1)(a) of the *War-time Refugees Removal Act 1949* (Cth), which empowered the Minister or an officer to detain a deportee in custody "pending his deportation and until he is placed on board a vessel for deportation from Australia". Latham CJ,

200 To which can be added the consideration of whether to grant a visa without application, such as under *Migration Act*, s 195A.

201 *Brownells Ltd v Ironmongers' Wages Board* (1950) 81 CLR 108 at 119-120. See also *R v Toohey*; *Ex parte Northern Land Council* (1981) 151 CLR 170 at 186-187.

202 *Thompson v Randwick Corporation* (1950) 81 CLR 87 at 106. See also *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 149 [30]; *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30 at 67 [93].

203 *Ruddock v Vadarlis* (2001) 110 FCR 491 at 509 [66], 518 [106]-[107]. Compare at 546-548 [206]-[215].

204 *Secretary of State for Home Affairs v O'Brien* [1923] AC 603 at 619.

205 (1949) 80 CLR 533.

with whom McTiernan J agreed, said that "[i]f it were shown that detention was not being used for these purposes the detention would be unauthorized and a writ of habeas corpus would provide an immediate remedy"²⁰⁶. The same reasoning was applied in *Park Oh Ho v Minister for Immigration and Ethnic Affairs*²⁰⁷, where this Court held that a power to detain a deportee in custody "pending deportation" did not authorise "the indefinite detention in custody of a person for some ulterior purpose, such as the purpose of being kept available as a witness in a pending criminal prosecution".

132 This established reasoning in relation to statutory powers is equally true of the performance of a statutory duty. The usual statutory implication will be that the performance of a statutory duty will be invalid if it is not performed within the scope of the legislation and for the purposes for which it was imposed. In the *Migration Act*, detention by the Executive for a purpose that is not within the scope and purposes of the *Migration Act* is not detention under the Act. Hence, s 196 describes the requirement to keep an unlawful non-citizen in detention as applicable where the detention is "under section 189". As the Full Court of the Federal Court said in *ASP15 v The Commonwealth*²⁰⁸, referring to detention by the Executive for the purpose of making a visa decision, "detention only remains valid so long as such a purpose under the *Migration Act* continues to exist".

133 The implied requirement that the Executive purpose for performance of a duty must fall within the scope and purposes of the *Migration Act* was also recognised in the consideration of the "duty" of detention in s 189 by both the majority and minority judgments in *Al-Kateb v Godwin*²⁰⁹: Gleeson CJ held that the detention was unlawful because the purpose of removal was not capable of being fulfilled²¹⁰; Gummow J, and Kirby J in similar terms²¹¹, recognised that the purposes of the *Migration Act* "are not at large" and that "the purpose of deportation or expulsion cannot be treated by the legislature as a matter purely for the opinion of the executive government"²¹²; Hayne J proceeded upon the basis

206 (1949) 80 CLR 533 at 556.

207 (1989) 167 CLR 637 at 643.

208 (2016) 248 FCR 372 at 383 [42].

209 (2004) 219 CLR 562.

210 (2004) 219 CLR 562 at 578 [22].

211 (2004) 219 CLR 562 at 630 [193].

212 (2004) 219 CLR 562 at 613 [140].

that the *Migration Act*, like s 7(1)(a) of the *War-time Refugees Removal Act* in *Koon Wing Lau*, provides for detention so long as it is "for the purposes of processing any visa application and removal"²¹³; and Callinan J considered that the detention was lawful because there was no basis to imply a limit to the period of detention of a "'reasonable' period" and because the Executive purpose of detention was within the statutory purpose²¹⁴.

134 Finally, one rationale for the decision of six members of this Court in *Plaintiff M96A/2016 v The Commonwealth*²¹⁵ was that the Executive had to act for purposes within the scope and purposes of the *Migration Act*. In *Plaintiff M96A/2016*, the plaintiffs were brought to Australia from Nauru for medical treatment. They were detained by the Executive under s 189 of the *Migration Act* while they were in Australia. One question was whether the Executive had detained the plaintiffs for purposes that were beyond the scope and purposes of the *Migration Act*. The joint judgment quoted from *Plaintiff S4/2014*²¹⁶ for the proposition that "detention under and for the purposes of the Act is limited by the purposes for which the detention is being effected". It was held that the relevant purposes of detaining the plaintiffs in *Plaintiff M96A/2016* were within the scope of the *Migration Act*. Importantly, a legal purpose is distinct from its foreseeable consequences or effects²¹⁷. A consequence or *effect* of bringing the plaintiffs to Australia for medical treatment was that they were detained in Australia. But the Executive purpose for which the plaintiffs were *detained* was not for medical treatment. The Executive purpose of the detention was for the plaintiffs' subsequent removal from Australia. Indeed, the detention would have come to an end upon commencement of the process of removal even if medical treatment had not been concluded²¹⁸.

135 Apart from these matters of authority, there are also strong reasons of principle why a statute will generally be interpreted to constrain the performance of duties according to the scope and purposes of the statute, just as the exercise of

213 (2004) 219 CLR 562 at 638 [225].

214 (2004) 219 CLR 562 at 661 [298].

215 (2017) 261 CLR 582 at 594 [22].

216 (2014) 253 CLR 219 at 231 [26].

217 See *Unions NSW v New South Wales* (2019) 264 CLR 595 at 656 [170]. See also *Zaburoni v The Queen* (2016) 256 CLR 482 at 489 [10], 504 [66]; *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 395-397 [98]-[102].

218 (2017) 261 CLR 582 at 595 [26].

powers is so constrained. There can be a very fine line between whether a provision is characterised as imposing a duty or as conferring a power or as imposing a duty that is subject to a power. For instance, the so-called "duty" of continuing detention required by s 189 would not need to have been performed in respect of AJL20 if the Minister had exercised the power under s 195A to grant a Subclass 070 – Bridging (Removal Pending) visa to AJL20. In exercising the power under s 195A, the Minister is not bound by Subdiv AA (Applications for visas), AC (Grant of visas) or AF (Bridging visas) of Div 3 of Pt 2 of the *Migration Act* or by the relevant provisions of the *Migration Regulations*²¹⁹. As the Explanatory Memorandum to the Bill that introduced s 195A stated²²⁰:

"[New section 195A] provides the Minister with a non-compellable power to grant a visa to a person who is being held in immigration detention where the Minister is satisfied that it is in the public interest to do so. In the exercise of this power the Minister will not be bound by the provisions of the Migration Act or regulations governing application and grant requirements. The Minister will have 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."

136 It is, at best, misleading to describe any obligation deriving from s 189 as a "duty" upon the Executive to detain AJL20 when the Executive could have released AJL20 by exercise of a general power to grant him a visa under s 195A. As Hohfeld cautioned a century ago, the generalised use of "chameleon-hued words" such as "duties" can constitute a "peril both to clear thought and to lucid expression"²²¹. But, whether or not it would debase the content of a "duty" to speak in terms shrouded in the mystical logic of an obligation of the Executive to do something that it is not obliged to do, it is most unlikely that Parliament intended that significant consequences would turn upon fine questions of abstract legal theory that depended upon a loose characterisation of s 189 as a "duty" rather than a power.

Executive purpose is to be assessed objectively

137 For the reasons above, authority and principle plainly establish that a natural implication from the *Migration Act* is that the Executive cannot exercise a power

219 *Migration Act*, s 195A(3).

220 Australia, House of Representatives, *Migration Amendment (Detention Arrangements) Bill 2005*, Explanatory Memorandum at 3 [10].

221 Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 *Yale Law Journal* 16 at 29.

or perform a duty or function for purposes that are beyond the express or implied scope and purposes of the Act. Without such an implication, the *Migration Act* would authorise the Executive to act for a purpose such as punishment which, if expressed in the *Migration Act*, would be an unconstitutional provision. But, with such an implication, the Executive would be acting ultra vires if it detained an unlawful non-citizen under s 189 for the purposes of punishment, in contravention of an implied constraint in the *Migration Act*. And just as the purposes for which the Executive can act are constrained by implied restrictions based on the scope and purposes of the *Migration Act*, so too the purposes for which the Executive can act are constrained by *express* restrictions on the scope and purposes of the *Migration Act*, including s 197C.

138 The question that then arises is whether the s 197C constraint upon the purpose of the Executive in continuing to detain AJL20 until 11 September 2020 is one which is required to be ascertained subjectively or whether it is to be ascertained objectively by the acts and conduct of officers of the Executive. In relation to powers, the answer is generally that the purpose of the Executive is assessed objectively²²². The same is true in relation to duties. As Gleeson CJ said in *Al-Kateb v Godwin*²²³, "[t]he purpose is objective. What is in question is the purpose of the detention, not the motives or intention of the Minister, or the officers". Consequently, improper purpose is not synonymous with a lack of good faith in a moral sense²²⁴ or with dishonesty²²⁵. Again, six members of this Court in *Plaintiff M96A/2016*²²⁶ said that "the purpose of immigration detention is assessed objectively by reference to all of the circumstances".

139 This objective assessment of whether the purpose of the Executive's exercise of powers or performance of duties is one that is within the scope and purposes of the relevant legislation aligns with the same objective assessment of whether the powers and duties of directors are exercised or performed for proper purposes. In the context of directors' duties, it is established that the exercise of a power or the performance of a duty for an ulterior or impermissible purpose can be invalid notwithstanding that the exercise or performance occurs, as it did in this

222 See *Thompson v Randwick Corporation* (1950) 81 CLR 87 at 106.

223 (2004) 219 CLR 562 at 576 [17].

224 See *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189 at 195 [13], citing Wade and Forsyth, *Administrative Law*, 9th ed (2004) at 416.

225 *Thompson v Randwick Corporation* (1950) 81 CLR 87 at 106; *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30 at 67 [93].

226 (2017) 261 CLR 582 at 594 [22].

case, with "substantially altruistic" motives²²⁷. The court "is entitled to look at the situation objectively"²²⁸. The concern is not with "an almost infinite analysis of the fears and desires, proximate and remote, which, in truth, form the compound motives usually animating human conduct" but is instead with an objective analysis of "the substantial object the accomplishment of which formed the real ground of the board's action"²²⁹. One difference, however, between the duties of the Executive and the duties of directors is that the latter also contain elements of subjectivity in the requirement that duties must also be performed in good faith, or bona fide.

140 In *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri*²³⁰, the Full Court of the Federal Court referred to two purpose-based limitations upon the duty to detain under the *Migration Act*. The first appeared to be subjective: "[i]f the Minister were to hold a person in detention without [a bona fide purpose of removal], then the detention would be unlawful and the person entitled to relief in the nature of habeas corpus". The second, which was rejected in *Al-Kateb v Godwin*, appeared to be objective: there must be a "real likelihood or prospect of the removal of the person from Australia in the reasonably foreseeable future".

141 The question of whether the "duty" to detain was subject to an objective or subjective purpose-based limitation was subsequently answered by Selway J in *Alsali v Manager, Baxter Immigration Detention Facility*²³¹. Though the case concerned the second limitation upon the "duty" to detain, which was rejected in *Al-Kateb v Godwin*, Selway J considered both limitations upon the power to detain. In the passages relevant to this case²³², his Honour correctly explained that "the detention power in the Act is purposive" and expressed the view that the "requirement under the first limitation that the Minister exercise the power bona fide for the purpose of removal is a subjective test of purpose". But he later

227 *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285 at 293.

228 *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 at 832.

229 *Mills v Mills* (1938) 60 CLR 150 at 185-186.

230 (2003) 126 FCR 54 at 88 [135]-[136].

231 (2004) 136 FCR 291.

232 (2004) 136 FCR 291 at 308-309 [54]-[58].

qualified that reasoning by doubting whether such a subjective approach to purpose should be taken²³³:

"In contrast to the exercise of a discretionary power, there is no *necessary* requirement that a statutory duty be exercised bona fide and for the purpose for which the power was given. To give a simple example, if a Sheriff has a warrant to hold a prisoner in gaol the duty to do so exists no matter whether the Sheriff is bona fide and no matter what his or her purpose might be. Otherwise, an officer could avoid a statutory duty merely by disagreeing with it. *In relation to a statutory duty the question of whether there is any objective or subjective purpose is a matter of statutory interpretation.*"

It is plain beyond peradventure that Selway J was not suggesting that the rejection of a subjective purpose requirement meant that the "duty" of continuing detention was not purposive at all. His Honour concluded²³⁴:

"In this case the combined effect of ss 189 and 198 of the [A]ct is to impose a duty upon someone (presumably an officer) to detain an unlawful non-citizen. It is not obvious to me that the subjective purpose of that officer has much to do with that duty. *In my view any inquiry in relation to the purpose of the statutory provision is an inquiry as to objective purpose.*"

The duty to detain lawfully and the duty to remove as soon as reasonably practicable

142 It is necessary to separate (i) the "duty" of the Executive acting under s 189 to detain an unlawful non-citizen lawfully, including within the scope and purposes of the *Migration Act*, from (ii) the duty of the Executive to remove an unlawful non-citizen as soon as reasonably practicable under s 198(6), read with s 196. The primary remedy for a breach of either duty aims to ensure compliance with the law, but different writs have historically evolved (i) where compliance with the law requires release from detention, and (ii) where compliance requires performance of a public act or duty.

143 The primary remedy for a breach of a duty to detain lawfully is to undo the continuing unlawfulness by an order for release by a writ of habeas corpus ad subjiciendum, "for *removing* the injury of unjust and illegal confinement [which] does not always arise from the ill-nature, but sometimes from the mere inattention,

²³³ (2004) 136 FCR 291 at 309 [56] (emphasis added).

²³⁴ (2004) 136 FCR 291 at 309 [58] (emphasis added).

of government"²³⁵. On the other hand, the primary remedy for a breach of the duty to remove an unlawful non-citizen as soon as reasonably practicable is a writ of mandamus, which "issues in all cases where the party [has] a right to have any thing done, and [has] no other specific means of compelling [its] performance"²³⁶. It lies to command "the doing of what ought to be done, and not to undo what has been done"²³⁷.

144 There are remarks in some of the authorities which might, on one view, be read as conflating the two duties. For instance, in *Lim*²³⁸, Mason CJ said that detention may cease to be lawful "by reason of the failure of the Executive to take steps to remove a designated person from Australia in conformity with Div 4B". His Honour gave examples including: (i) a failure to remove the designated person as soon as practicable after the person had asked the Minister in writing to be removed²³⁹; and (ii) a failure to remove the designated person as soon as practicable after the refusal of an entry application for the person and the finalisation of all appeals against, or reviews of, the refusal (if any)²⁴⁰. Another instance is the reasons of Dixon J in *Koon Wing Lau*²⁴¹, where his Honour said of provisions that empowered the detention of a deportee "for the purpose of fulfilling the obligation to deport him until he is placed on board the vessel" that "unless within a reasonable time he is placed on board a vessel he would be entitled to his discharge on habeas".

145 The remarks of Mason CJ and Dixon J should not be understood as conflating the two different duties. In *Lim*, Mason CJ only said that detention "may" cease to be lawful in those circumstances. Whether a detention would cease to be lawful would depend upon whether the purpose for the failure by the Executive to remove the designated person was inconsistent with the scope and purposes of the *Migration Act*. The mere unintentional failure to act as soon as reasonably practicable is not sufficient for an inference that the Executive's

235 Blackstone, *Commentaries on the Laws of England* (1768), bk 3, ch 8 at 137-138 (emphasis in original).

236 Blackstone, *Commentaries on the Laws of England* (1768), bk 3, ch 7 at 110. See also Tapping, *The Law and Practice of the High Prerogative Writ of Mandamus, as it obtains both in England and in Ireland* (1853) at 58-59.

237 Merrill, *Law of Mandamus* (1892) at 47.

238 (1992) 176 CLR 1 at 11-12.

239 Under the provision that was then *Migration Act*, s 54P(1). See now s 198(1).

240 Under the provision that was then *Migration Act*, s 54P(3). See now s 198(6).

241 (1949) 80 CLR 533 at 581.

purpose for detention was inconsistent with the scope and purposes of the *Migration Act*. In *Koon Wing Lau*, the remarks of Dixon J were made in response to a submission that there would be nothing to prevent the Minister directing that a deportee be detained "for life or indefinitely". His Honour was thus contemplating a circumstance where the failure to act within a reasonable time was evidence of a purpose which was beyond the scope and purposes of the *Migration Act*.

Ascertaining the Executive's purpose of detaining AJL20

146 The purpose of an act purportedly performed under a statute must be characterised at the correct level of generality. Suppose that the Executive detained a person under s 189 for the purpose of removing them from Australia specifically to a country to which the *Migration Act* prohibited removal. At a high level of generality, it might be said that the purpose was consistent with the statute: it was to remove the person from Australia. But to express the purpose at such a high level of generality ignores a substantial object of the Executive: to ensure that the person is removed only to the prohibited country.

147 The same reasoning must also apply where the purpose of the Executive is to remove a person from Australia but to do so contrary to the terms of s 197C of the *Migration Act* by *not* removing a person to a particular country due to non-refoulement obligations. Hence, in this case it would be an incomplete statement of the purpose of the Executive to describe the purpose merely as removal of AJL20 from Australia. A statement of purpose at that level of generality does not merely fail to capture the substance of the purpose of the Executive. It also fails to explain why the Executive took no steps at all to remove AJL20 from Australia in the period from at least 26 July 2019 until 27 November 2019.

148 The purpose of the Executive from, at the latest, 26 July 2019 until the date of the primary judge's judgment, 11 September 2020, was to remove AJL20 from Australia consistently with Australia's international non-refoulement obligations. In April 2019, the Minister was asked if he wished to consider exercising his powers under s 195A or s 197AB of the *Migration Act*. Until the Minister declined to consider the exercise of his discretions under either of those provisions on 25 July 2019, it may have been within the scope of the *Migration Act* for the Minister to detain AJL20 in order to consider whether to exercise his powers under s 195A or s 197AB and to remove AJL20 consistently with Australia's international non-refoulement obligations. From 26 July 2019, the purpose of the Executive in detaining AJL20 was solely for removal in a manner consistent with Australia's non-refoulement obligations. That purpose explains the lack of any steps being taken for removal for several months. That purpose also explains the lack of any steps being taken to investigate removal of AJL20 to Syria concurrently with investigations in relation to Lebanon in the second period, from 28 November 2019 until 11 September 2020.

149 Section 189 of the *Migration Act* permits detention only where the purpose of the Executive is within the scope and purposes of the Act. The purpose of the Executive, to remove AJL20 from Australia consistently with Australia's international non-refoulement obligations, was contrary to the express terms of s 197C of the *Migration Act*. The Executive could have detained, and still can detain, AJL20 if it changed its purpose to one of removal that is not inconsistent with the scope and purposes of the *Migration Act*.

150 Further, as explained in the introduction to these reasons, from 1 March 2019, the Executive could have fulfilled its purpose by granting to AJL20 a Subclass 070 – Bridging (Removal Pending) visa under s 195A of the *Migration Act*. Consistently with the requirements for that visa, AJL20 was initially detained lawfully under s 189. It was also open to the Minister to be satisfied that removal of AJL20 to Syria was not reasonably practicable at the point in time when considering the grant of the visa, which is a separate matter from *when* removal would become reasonably practicable.

151 What the Executive could not do was to detain AJL20 with a purpose that was contrary to the terms of the *Migration Act*. Subject to s 196(3) of the *Migration Act*, the unlawful detention of AJL20 between 26 July 2019 and 11 September 2020 was the proper subject of a writ of, or an order in the nature of, habeas corpus.

Section 196(3) cannot preclude release of persons unlawfully detained

152 The Commonwealth relied upon s 196(3) as providing support for the proposition that a person can be released from detention only on the occurrence of one of the events set out in s 196(1), which, in broad terms, are removal, or the process of removal, from Australia, deportation from Australia, or the grant of a visa. Section 196(3) provides:

"To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than as referred to in paragraph (1)(a), (aa) or (b)) unless the non-citizen has been granted a visa."

153 The predecessor provision to s 196(3), in its original numbering, was s 54R of the *Migration Act*. That section provided that "[a] court is not to order the release from custody of a designated person". Despite its literal terms, the "plain intention of Parliament" was "that a designated person should be released from custody" in situations involving removal from Australia or the grant of an entry permit²⁴².

242 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 11.

154 In *Lim*, a majority of this Court held that s 54R of the *Migration Act* could not be read down to permit release of the person from detention where the person was being detained unlawfully. One example given in the joint reasons of Brennan, Deane and Dawson JJ (with which Gaudron J agreed) was where the person continued to be held in detention beyond the express 273-day limit for detention that was then provided by s 54Q of the *Migration Act*²⁴³. In other words, s 54R could not validly preclude a court from releasing from detention a person who was not lawfully detained.

155 If s 196(3) could not be read down so that "detention" meant only "lawful detention"²⁴⁴ then s 196(3) would not permit the release by a court of persons who are unlawful non-citizens, apart from those who are excluded from that concept by necessary disapplication²⁴⁵. It is not possible to exclude from the definition of "unlawful non-citizen" all those persons who are lawfully detained due to that status but whose detention becomes unlawful due to an invalid purpose. And although s 196(4) contemplates the release by a court of various categories of person found to have been unlawfully detained, and whatever may be the effect of making that sub-section subject to paras (a), (b) and (c) of s 196(1), to the extent, if at all, that s 196(3) could prevent the release by a court of a person from detention where that person is found to be detained for a non-statutory purpose, and therefore unlawfully, s 196(3) would be invalid for reasons that are indistinguishable as a matter of principle from the reasons which invalidated s 54R in *Lim*.

Conclusion

156 For a court to uphold a purpose of detention that is beyond the scope and purposes of statutory authority would be to deny "the supremacy of Parliament over the Executive"²⁴⁶. As an unlawful non-citizen, AJL20 was initially detained, and could have continued to have been detained, by the Executive acting within the scope and purposes of the *Migration Act*. But at least from 26 July 2019, the purpose of the Executive was to remove AJL20 consistently with Australia's non-refoulement obligations. That purpose could have been fulfilled by granting AJL20 a Subclass 070 – Bridging (Removal Pending) visa²⁴⁷ under s 195A of the *Migration Act*. But to pursue this purpose whilst AJL20 was in detention,

243 (1992) 176 CLR 1 at 35-36.

244 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 574 [10].

245 *Love v The Commonwealth* (2020) 94 ALJR 198; 375 ALR 597.

246 *R (Public Law Project) v Lord Chancellor* [2016] AC 1531 at 1556 [23].

247 See *Migration Regulations*, reg 2.20(12).

purportedly under s 189, was contrary to the express terms of s 197C of the *Migration Act* and was therefore beyond the scope and purposes of the *Migration Act*. As the primary judge concluded, the Commonwealth consistently maintained its position, whilst detaining AJL20, that Australia's non-refoulement obligations should be treated as precluding his removal to Syria²⁴⁸.

157 AJL20 was entitled to the remedy of habeas corpus for so long as the Executive persisted with its purpose of removing him in a manner contrary to the terms of s 197C. At no stage before the primary judge, or subsequently, did the Executive recant that purpose. Although a writ of habeas corpus may have attached to it conditions that must be observed by the person upon release²⁴⁹, the Commonwealth did not seek from the primary judge, nor did it seek in this Court, any conditions upon the release of AJL20 relating to his removal from Australia. The appeals must be dismissed with costs.

248 *AJL20 v The Commonwealth* [2020] FCA 1305 at [157].

249 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 579-580 [27]; *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at 57-58 [108].