

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

ASF17

APPELLANT

AND

COMMONWEALTH OF AUSTRALIA

RESPONDENT

ASF17 v Commonwealth of Australia

[2024] HCA 19

Date of Hearing: 17 April 2024

Date of Judgment: 10 May 2024

P7/2024

ORDER

Appeal dismissed with costs.

Representation

L G De Ferrari SC with M W Guo and C J Fitzgerald for the appellant
(instructed by Zarifi Lawyers)

S P Donaghue KC, Solicitor-General of the Commonwealth, with
B D Kaplan and N A Wootton for the respondent (instructed by Australian
Government Solicitor)

C L Lenehan SC with T M Wood and J R Murphy for AZC20, intervening
(instructed by Human Rights Law Centre)

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formal revision prior to publication in the Commonwealth Law
Reports.

CATCHWORDS

ASF17 v Commonwealth of Australia

Constitutional law (Cth) – Judicial power of Commonwealth – Immigration detention – Continuing detention – Where appellant citizen of Iran – Where appellant arrived in Australia as unlawful non-citizen and held in immigration detention under s 189(1) of *Migration Act 1958* (Cth) ("Act") – Where appellant's application for Safe Haven Enterprise Visa refused and finally determined – Where s 198(6) of Act imposed duty upon officers of Department of Home Affairs to remove appellant from Australia as soon as reasonably practicable – Where s 196(1) of Act required appellant to be kept in immigration detention until removed from Australia – Where appellant refused to cooperate in administrative processes necessary to facilitate removal of appellant to Iran – Where no country identified where appellant might be removed other than Iran – Where appellant applied for writ of habeas corpus on basis that continuing detention exceeded constitutional limitation identified in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 – Whether continuing detention of appellant exceeds constitutional limitation identified in *NZYQ* – Whether real prospect of removal of appellant to Iran becoming practicable in reasonably foreseeable future.

Words and phrases – "alien", "consent", "constitutional limitation identified in *NZYQ*", "continuing detention", "executive detention", "habeas corpus", "*Lim* principle", "non-cooperation", "non-punitive purpose", "penal", "practicable", "protection finding", "punitive", "real prospect", "reasonably capable of being seen to be necessary", "reasonably foreseeable future", "refusal to cooperate", "removal from Australia".

Constitution, Ch III.

Migration Act 1958 (Cth), ss 36, 48B, 189, 195A, 196, 197C, 198.

1 GAGELER CJ, GORDON, STEWARD, GLEESON, JAGOT AND
BEECH-JONES JJ. *NZYQ v Minister for Immigration, Citizenship and
Multicultural Affairs*¹ held that the continuing detention under ss 189(1) and
196(1) of the *Migration Act 1958* (Cth) ("the Act") of an alien required to be
removed from Australia under s 198(1) or s 198(6) of the Act exceeds the temporal
limitation on the valid application of those provisions imposed by Ch III of the
Constitution if and for so long as there is no real prospect of removal of the alien
from Australia becoming practicable in the reasonably foreseeable future. *NZYQ*
further held that where an alien detainee who seeks a writ of habeas corpus
establishes reason to suppose that their continuing detention exceeds the
constitutional limitation, the detainer bears the legal burden of establishing that the
constitutional limitation is not exceeded.²

2 The application of those principles in *NZYQ* to hold that ss 189(1) and
196(1) of the Act did not validly apply to authorise the continuing detention of the
alien detainee in that case was noted to have been in a factual context in which the
detainee had cooperated with officers in the undertaking of administrative
processes directed to facilitating his removal from Australia.³

3 This appeal concerns the application of those principles to a case in which
an alien detainee who claims that their continuing detention exceeds the
constitutional limitation identified in *NZYQ* has refused to cooperate in the
undertaking of administrative processes necessary to facilitate their removal from
Australia.

Factual background and procedural history

4 The appellant, ASF17, is a citizen of Iran. He arrived in Australia as an
unlawful non-citizen at the age of 27 in 2013. Except for a short period during
which he held a bridging visa between 2013 and 2014, he has been held in
immigration detention continuously since his arrival.

5 While in immigration detention, ASF17 in 2015 made an application for a
Safe Haven Enterprise Visa ("SHEV"). The application was refused by a delegate

1 (2023) 97 ALJR 1005 at 1018 [55], 1018-1019 [59].

2 (2023) 97 ALJR 1005 at 1019 [59].

3 (2023) 97 ALJR 1005 at 1019 [62].

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of the Minister for Immigration and Border Protection in 2017. An application for judicial review of the decision of the delegate was dismissed by the Federal Circuit Court of Australia in 2017⁴ in a decision which was upheld on appeal to the Federal Court of Australia in 2018.⁵

6 The final determination of his application for a SHEV which occurred upon the dismissal of the appeal in 2018 engaged the duty imposed on officers of the Department of Home Affairs ("the Department") by s 198(6) of the Act to remove ASF17 from Australia as soon as reasonably practicable. Unlike the plaintiff in *NZYQ*,⁶ ASF17 has never formally requested to be removed from Australia so as to engage the other duty to remove imposed on officers of the Department by s 198(1) of the Act.

7 For the purpose of facilitating removal of ASF17 from Australia, officers of the Department conducted regular interviews with him from 2018. Throughout those interviews, he consistently told officers that he would not voluntarily return to Iran. He consistently refused to sign a request for removal or to engage with Iranian authorities in planning for his removal. He repeatedly told officers that he would agree to be sent to any country other than Iran. However, he did not suggest that there was any country to which he might be removed other than Iran.

8 Iranian citizens cannot enter Iran from Australia without a travel document issued by Iranian authorities and Iranian authorities have a longstanding policy of not issuing travel documents to involuntary returnees.

9 The Department has a policy of not removing anyone to a country in respect of which they have no right of residency or long-term stay ("the third country removal policy"). Considerations underpinning the third country removal policy include the potential for diplomatic controversy were someone to be removed to a country which had not agreed to accept them and the lack of any basis for generally considering that a country would agree to accept anyone who has no right of residency or long-term stay in that country.

4 *ASF17 v Minister for Immigration and Border Protection* [2017] FCCA 2498.

5 *ASF17 v Minister for Immigration and Border Protection* [2018] FCA 1149.

6 See (2023) 97 ALJR 1005 at 1009 [4].

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10 The consistent refusal of ASF17 to cooperate in facilitating his removal
from Australia to Iran combined with his failure to identify any third country in
which he might have a right of residency or long-term stay therefore resulted in an
impasse. His position was described in a record of the Department in 2022 as
"intractable".

11 In 2023, barely a week after the pronouncement of the orders in *NZYQ*,
ASF17 applied to the Federal Court of Australia for a writ of habeas corpus on the
basis that his continuing detention exceeded the constitutional limitation identified
in those orders. In support of that application, ASF17 filed affidavits deposing to
his reasons for refusing to return to Iran. Those reasons included that he is bisexual
and that he feared being harmed in Iran because of his bisexuality. He gave an
account of having been caught by his wife in bed with a man in Iran and of his
wife having reported the incident to police who had attempted to arrest him. He
had not claimed to fear being harmed in Iran because of his sexual orientation in
his application for a SHEV in 2015 and the delegate of the Minister for
Immigration and Border Protection had accordingly not considered whether he had
a well-founded fear of persecution because of his sexual orientation in refusing the
application in 2017.

12 Responding to the application for a writ of habeas corpus, the
Commonwealth accepted the burden of establishing that the continuing detention
of ASF17 did not exceed the constitutional limitation identified in *NZYQ*. The
Commonwealth sought to discharge that burden by establishing that ASF17 could
be removed to Iran were he to cooperate in returning voluntarily to Iran.

13 Having been given appropriate expedition, the application for a writ of
habeas corpus was heard by the primary judge, Colvin J, in a three-day hearing
which involved extensive cross-examination of ASF17. His Honour dismissed the
application for reasons set out in a reserved judgment delivered three weeks later.⁷

14 ASF17 appealed from the decision of the primary judge to the Full Court of
the Federal Court of Australia under s 24 of the *Federal Court of Australia Act*
1976 (Cth). The appeal was removed into this Court on the application of the
Attorney-General of the Commonwealth under s 40(1) of the *Judiciary Act 1903*
(Cth).

7 *ASF17 v The Commonwealth* [2024] FCA 7.

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15 On the hearing of the appeal in this Court, leave to intervene was granted to AZC20, an alien and former detainee who had been granted a writ of habeas corpus by Kennett J in *AZC20 v Secretary, Department of Home Affairs [No 2]*⁸ during the period between the pronouncement of the orders in *NZYQ* and the commencement of the hearing before Colvin J.

16 While "ordinarily" intervention will not be permitted to a party who may only suffer an "indirect or contingent affection of [their] legal interests following from the extra-curial operation of the principles enunciated in the decision of the Court",⁹ there were circumstances peculiar to AZC20 which warranted the Court granting the limited intervention he was afforded. AZC20 had been released from detention pursuant to the writ of habeas corpus granted by Kennett J in *AZC20*. Kennett J's decision was the subject of an appeal by the Secretary of the Department and the Minister for Immigration, Citizenship and Multicultural Affairs; however, that appeal was discontinued. Even so, neither the Minister nor the Secretary disavowed any intention to detain AZC20 in the event that the appeal in this matter failed in relation to the scope of the principle in *NZYQ*, even though there may be no change in the factual circumstances affecting the prospect of his removal. Thus, although AZC20 secured his release from detention based on a judgment concerning the scope of the principle in *NZYQ*, absent a grant of leave to intervene he faced the prospect of being re-detained without being heard. Moreover, the arguments sought to be presented by AZC20 as intervener were shown by his written application for intervention to be additional and complementary to those presented by ASF17.

The primary judge's findings of fact

17 Before examining the path of reasoning of the primary judge to reach the conclusion that the continuing detention of ASF17 did not exceed the constitutional limitation identified in *NZYQ*, it is convenient to record his Honour's principal findings of primary fact.

8 [2023] FCA 1497.

9 *Roadshow Films Pty Ltd v iiNet Ltd [No 1]* (2011) 248 CLR 37 at 39 [2].

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18 The primary judge found, on the basis of a formal concession by counsel for the Commonwealth, that sexual intercourse between males is illegal in Iran and can attract the death penalty.¹⁰

19 The primary judge accepted that ASF17's present sexual orientation is bisexual and found that he has had recent sexual encounters with men while in immigration detention.¹¹ However, the primary judge did not accept the truthfulness of the account given by ASF17 of having been caught by his wife in bed with a man in Iran,¹² did not accept that ASF17 was telling the truth about why he did not want to return to Iran,¹³ and did not accept that ASF17 was willing to be removed to a country other than Iran.¹⁴ The primary judge found that ASF17 did not have a genuine subjective fear of harm in Iran and that the reason ASF17 was refusing to undertake voluntary actions to assist in his return to Iran was that he wanted to remain in Australia.¹⁵

20 Though ASF17 challenged those findings of the primary judge as to his credibility, and sought in substitution a finding that his refusal to cooperate in bringing about his return to Iran was because he had a genuine subjective fear of harm in Iran, his counsel advanced no convincing basis for disturbing any of those findings as either "glaringly improbable" or "contrary to compelling inferences".¹⁶ In particular, ASF17's counsel advanced no reason to consider that the primary judge mischaracterised ASF17's central contention concerning his claim to fear harm in Iran by reason of his bisexuality when stating that the contention "depended upon his account as to events that occurred in Iran when he said he was

10 [2024] FCA 7 at [132].

11 [2024] FCA 7 at [95], [126(1)].

12 [2024] FCA 7 at [96]-[113], [126(2)].

13 [2024] FCA 7 at [115]-[118], [130].

14 [2024] FCA 7 at [126(6)].

15 [2024] FCA 7 at [115]-[118], [130].

16 *Lee v Lee* (2019) 266 CLR 129 at 148-149 [55].

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found by his wife in bed with another man and the alleged consequences of that event".¹⁷

21 In the result, ASF17 advanced no basis for doubting the primary judge's summation that ASF17 "has made a voluntary decision not to cooperate in meeting with Iranian authorities to facilitate his removal to Iran, a decision which he has the capacity to change but which he chooses not to change".¹⁸

22 Following on from that summation and bearing centrally on whether there is a real prospect of removal to Iran becoming practicable in the reasonably foreseeable future, the primary judge found that, if ASF17 cooperated by writing a letter to Iranian authorities and by providing such other information as may be requested by Iranian authorities, the Commonwealth would be able to obtain travel documents for him to travel to Iran.¹⁹ ASF17 has not challenged that finding. His counsel sought to argue on the appeal that the Commonwealth had not established that he could have been removed to Iran even if he had travel documents. But that argument was not open to him on the appeal given the basis upon which issues of fact had been joined before the primary judge. As the primary judge correctly recorded, ASF17 accepted before the primary judge "that the evidence adduced by the Commonwealth establishes that, with his cooperation, he could be removed to Iran".²⁰

23 Finally, the primary judge found that there is no country other than Iran to which it may be possible to effect ASF17's removal.²¹ Despite that finding not being challenged in ASF17's grounds of appeal, his counsel argued on the appeal that the evidence before the primary judge was insufficient to support such a global conclusion. The thrust of the argument was to the effect that adherence by officers of the Department to the third country removal policy had so "straitjacketed" investigation of whether there is a country other than Iran to which ASF17 might be removed as to make impossible a conclusion that there is no such country. The Solicitor-General of the Commonwealth correctly noted in response to the

17 [2024] FCA 7 at [130].

18 [2024] FCA 7 at [37].

19 [2024] FCA 7 at [131].

20 [2024] FCA 7 at [12].

21 [2024] FCA 7 at [131].

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argument that for ASF17 to point to a theoretical possibility of removal to an unidentified third country cannot assist him in circumstances where the Commonwealth has accepted the legal burden of establishing that there is a real prospect of his removal from Australia becoming practicable in the reasonably foreseeable future and where the only country to which the Commonwealth has sought to establish that there is a real prospect of removing him is Iran.

The primary judge's process of reasoning

24 Reasoning to the conclusion that the continuing detention of ASF17 did not exceed the constitutional limitation identified in *NZYQ*, the primary judge adopted and acted upon the view that "in determining whether there is a real prospect of removal becoming practicable in the reasonably foreseeable future there is to be regard to all actions that might be taken with the cooperation of the person being detained, save only for instances where the person is incapable of cooperating".²² His Honour explained that view to encompass regard to all actions as might be taken with the cooperation of the detainee "irrespective of whether the detainee is refusing to undertake those actions in respect of removal to a particular place because of a genuine subjective fear of harm if removed to that place".²³

25 The primary judge distinguished *AZC20* as a case in which the detainee was incapable of cooperating due to mental health problems,²⁴ specifically disagreeing²⁵ with the view expressed by Kennett J in that case to the effect that regard is to be had to actions that might be taken but are not being taken due to the non-cooperation of the detainee only where the detainee has embarked on "a deliberate strategy of preventing their removal from Australia".²⁶

26 ASF17 challenged the primary judge's process of reasoning on two principal grounds. The first and broadest of those grounds was to the effect that, as a detainee has no statutory duty to cooperate in their own removal from Australia, non-cooperation on the part of a detainee in the undertaking of an

22 [2024] FCA 7 at [128].

23 [2024] FCA 7 at [64].

24 [2024] FCA 7 at [37]-[39].

25 [2024] FCA 7 at [128]. See also at [41], [53].

26 *AZC20 v Secretary, Department of Home Affairs [No 2]* [2023] FCA 1497 at [65(a)].

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administrative process necessary to facilitate their removal from Australia is to be regarded as an objective fact which can suffice to negate the existence of a real prospect of removal becoming practicable in the reasonably foreseeable future no matter what the reason for the non-cooperation.

27 The second ground of challenge to the primary judge's process of reasoning was in the alternative to, and was narrower than, the first ground. Drawing on language used in *Plaintiff M47/2018 v Minister for Home Affairs*,²⁷ this ground was ultimately formulated in terms that non-cooperation can operate to negate a real prospect of removal becoming practicable in the reasonably foreseeable future if the detainee has a "good reason" for not cooperating. It was argued for ASF17 that a genuine subjective fear of harm can amount to a "good reason", as can any other reason which does not involve the detainee acting deliberately to frustrate removal.

28 AZC20 advanced a variation of the second of those grounds. AZC20 emphasised that the question whether there is a real prospect of removal becoming practicable in the reasonably foreseeable future was said in *NZYQ* to be one of constitutional fact.²⁸ In forming the evaluative judgment necessary to decide that question, AZC20 argued, non-cooperation on the part of the detainee may be a relevant factor but cannot be determinative. It was said that non-cooperation covers a spectrum of conduct. The relevance of the reason a detainee may have for not cooperating in doing something which would facilitate their removal to the prospect of removal becoming practicable in the reasonably foreseeable future, according to AZC20, is that the quality of the reason for the detainee being uncooperative in the past and in the present is probative of the likelihood or unlikelihood of the detainee remaining uncooperative in the reasonably foreseeable future. A "good reason" for non-cooperation, according to AZC20, translates to a reason sufficient to justify the conclusion of fact that the detainee is likely to continue to have that reason and so to continue to be uncooperative into the reasonably foreseeable future.

29 The Solicitor-General of the Commonwealth rejected the notion that the evaluative judgment necessary to decide the question of constitutional fact can be formed without regard to the constitutional principle from which the question

27 (2019) 265 CLR 285 at 297 [30]-[32].

28 See *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1015 [40]-[41], 1016 [44]-[46], 1018-1019 [59], 1020 [70].

whether there is a real prospect of removal becoming practicable in the reasonably foreseeable future is derived. He argued that deliberate non-cooperation on the part of a detainee in the undertaking of an administrative process necessary to facilitate their removal from Australia suffices to prevent the constitutional limitation identified in *NZYQ* from being engaged so that no question arises as to whether there is a real prospect of removal becoming practicable in the reasonably foreseeable future. He argued in the alternative for the view adopted and acted upon by the primary judge.

30 The appeal should be dismissed for the following reasons.

The constitutional limitation

31 The constitutional limitation unanimously expressed in *NZYQ* in terms that the constitutionally permissible period of executive detention of an alien who has failed to obtain permission to remain in Australia comes to an end when "there is no real prospect of removal of the alien from Australia becoming practicable in the reasonably foreseeable future" was unanimously explained in *NZYQ*²⁹ to follow directly from the principle in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*³⁰ and to be an appropriate expression of the *Lim* principle in the context of the Act.

32 That explanation of the constitutional limitation was given in *NZYQ* against the background of the *Lim* principle having been unanimously explained to mean that "a Commonwealth statute which authorises executive detention must limit the duration of that detention to what is reasonably capable of being seen to be necessary to effectuate an identified statutory purpose which is reasonably capable of being achieved"³¹ and against the background of the application of the *Lim* principle having been further explained by six members of the Court to be

29 (2023) 97 ALJR 1005 at 1018 [55].

30 (1992) 176 CLR 1. See (2023) 97 ALJR 1005 at 1015 [39].

31 (2023) 97 ALJR 1005 at 1015 [41].

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"ultimately directed to a single question of characterisation",³² though one which requires an assessment of both means and ends.³³

33 The precise question of characterisation to which the question whether there is a real prospect of removal of an alien from Australia becoming practicable in the reasonably foreseeable future is directed is whether the detention of the alien under ss 189(1) and 196(1) of the Act is justified, at the point in time when an application for a writ of habeas corpus is determined, as reasonably capable of being seen to be necessary for the identified statutory purpose of removing the alien from Australia under s 198(1) or s 198(6) of the Act. The question is one of characterisation in that, unless the detention is justified at that time on the basis of there then being a real prospect of removal of the alien from Australia becoming practicable in the reasonably foreseeable future, the application of ss 189(1) and 196(1) of the Act to authorise the continuing detention of the alien must be characterised by reference to the default characterisation of detention as "penal or punitive" and for that reason as repugnant to Ch III of the *Constitution*.³⁴

34 The notions of practicability and of the reasonably foreseeable future embedded in the expression of the constitutional limitation were unanimously explained in *NZYQ* to be "essential to anchoring the expression of the constitutional limitation in factual reality"³⁵ and to accommodate "the real world difficulties that attach to such removal".³⁶

35 For the removal of an alien from Australia under s 198(1) or s 198(6) of the Act to be practicable, there must first and foremost be identified a country to which that alien might be removed, and removal of that alien to that country must be permissible under the Act. Before noting the range of difficulties of a practical nature that can attach to removal of an alien detainee under s 198(1) or s 198(6) of the Act, it is appropriate to turn attention to the statutory constraint on the duties

32 (2023) 97 ALJR 1005 at 1016 [44].

33 (2023) 97 ALJR 1005 at 1016 [44].

34 (2023) 97 ALJR 1005 at 1015 [39], 1016 [44].

35 (2023) 97 ALJR 1005 at 1018 [57].

36 (2023) 97 ALJR 1005 at 1019 [61].

of removal imposed by those provisions that can arise through the operation of s 197C(3) of the Act.

36 Section 197C(3) of the Act operates to prevent s 198(1) and (6) from requiring or authorising involuntary removal of an alien to a country if the alien has made a valid application for a protection visa which has resulted in an extant "protection finding" in respect of that country. A "protection finding" includes a finding by the Minister administering the Act that the alien meets the criterion for the grant of a protection visa in s 36(2)(a) (as a person in respect of whom Australia has protection obligations because the person is a refugee) or s 36(2)(aa) (as a person in respect of whom Australia has complementary protection obligations because of substantial grounds for believing that there is a real risk that the person will suffer significant harm³⁷ as a necessary and foreseeable consequence of being removed from Australia to a receiving country) even if the alien has been refused or denied a protection visa.³⁸

37 The operation of s 197C can be illustrated by reference to the circumstances of ASF17. Section 197C(3) of the Act would operate to prevent involuntary removal of ASF17 to Iran if: ASF17 had raised a claim to fear harm in Iran in his original application for a SHEV, which resulted in a finding under s 36(2)(a) or s 36(2)(aa); or the bar imposed by s 48A against ASF17 making a further application for a protection visa were to be lifted in the exercise of the personal non-compellable power conferred on the Minister by s 48B and a further application by him raising a claim to fear harm in Iran by reason of his sexual orientation were made resulting in a finding under s 36(2)(a) or s 36(2)(aa); or the Minister were to make such a finding in the course of considering the exercise of the personal non-compellable power conferred on the Minister by s 195A.

38 Section 197C(1) combines with s 197C(2) to make clear that, in the absence of an extant protection finding in respect of a country which engages the operation of s 197C(3) of the Act, the power and duty to remove an alien detainee under s 198(1) or s 198(6) of the Act is not affected by any non-refoulement obligations Australia may or may be claimed to have in respect of that alien. The statutory consequence is that a claim on the part of a detainee facing removal to fear harm in a country to which the detainee might be removed is insufficient to preclude removal to that country irrespective of whether that claim might be found on

37 Defined in s 36(2A) of the Act.

38 Section 197C(5) and (8) of the Act.

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investigation to be genuine or well-founded. The scheme of the Act accommodates eleventh-hour claims of that nature exclusively through the potential for the exercise of one or other of the personal non-compellable powers conferred on the Minister by s 48B or s 195A.³⁹

39 Conversely, where an alien detainee has the benefit of a protection finding, the power and duty to remove the detainee is affected by Australia's non-refoulement obligations under s 197C, and whether there is a real prospect of removal of the detainee from Australia becoming practicable in the reasonably foreseeable future is then relevant to whether the detention of the alien under ss 189(1) and 196(1) of the Act is justified. That is, it would be punitive to detain an alien with the benefit of a protection finding if there were no real prospect of removal of the detainee from Australia becoming practicable in the reasonably foreseeable future to any country other than the country the subject of the protection finding.

40 Real world difficulties may well be encountered at the initial stage of identifying a country to which the detainee might permissibly be removed under s 198(1) or s 198(6). The difficulties may be especially grave and persistent in the case of an alien detainee who is stateless or whose removal to their country of origin is precluded by s 197C(3). Indeed, intractable difficulties of that nature were the root of the problem in *NZYQ* and before that were the root of the problem in *Al-Kateb v Godwin*.⁴⁰ Difficulties of that nature have arisen in other cases before the Court.⁴¹ Difficulties of that nature are categorically not the problem in this case. There has been no difficulty identifying a country to which ASF17 might permissibly be removed under s 198(1) or s 198(6) consistently with s 197C of the Act. As an Iranian citizen, he might permissibly be removed to Iran.

41 Where a country has been identified to which a detainee might permissibly be removed under s 198(1) or s 198(6) consistently with s 197C of the Act, the

39 See also s 198(5A) which provides that an officer must not remove an unlawful non-citizen if the non-citizen has made a valid application for a protection visa and either the grant of the visa has not been refused or the application has not been finally determined.

40 (2004) 219 CLR 562.

41 eg, *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322.

question of whether there is a real prospect of removal of the detainee from Australia to that country becoming practicable in the reasonably foreseeable future is a question of whether there are steps which are practically available to be taken which, if taken, can realistically be predicted to result in the removal of the detainee to that country in the reasonably foreseeable future. The steps practically available to be taken can be expected frequently to include administrative processes directed to removal which require the cooperation of the detainee and in which the detainee has the capacity to cooperate. That such steps are to be regarded as remaining practically available to be taken in circumstances where the detainee refuses to cooperate in the taking of them reflects the nature of the constitutional limitation to which the inquiry is directed.

42 The short point is that, conformably with the *Lim* principle, continuing detention for a non-punitive purpose that is occurring because of a voluntary decision of the detainee cannot be characterised as penal or punitive. The non-punitive statutory purpose of removing an alien detainee from Australia under s 198(1) or s 198(6) of the Act remains a non-punitive purpose that is reasonably capable of being achieved if and for so long as removal could be achieved in the reasonably foreseeable future were the detainee to decide to cooperate in the undertaking of administrative processes necessary to facilitate that removal.

43 The point is illustrated by the reasoning in *Lim* itself. As summarised by McHugh J in *Re Woolley; Ex parte Applicants M276/2003*,⁴² "[i]n *Lim*, the Court regarded the ability of a detainee to bring about the end of his or her detention by requesting removal to be a critical element with respect to the constitutionality of the detention regime". In concluding that the continuing detention of long-term alien detainees under the regime considered in *Lim* was properly characterised as "non-punitive", Brennan, Deane and Dawson JJ, with whom Mason CJ relevantly agreed, stressed with reference to the precursor of s 198(1) of the Act⁴³ that it lay within the "power" of a detainee to bring their detention to an end by requesting to be removed with the result that detention could continue only if the detainee "elect[ed]" to remain in Australia by failing to make that choice.⁴⁴ McHugh J referred to the same provision as making it "impossible to regard [the regime] in its ordinary operation as a punishment", adding that "for the purpose of the doctrine

42 (2004) 225 CLR 1 at 39 [97].

43 Section 54P(1).

44 (1992) 176 CLR 1 at 34.

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of the separation of powers, the difference between involuntary detention and detention with the concurrence or acquiescence of the 'detainee' is vital".⁴⁵

44 Properly understood, *Plaintiff M47/2018* is a further illustration. There, the Court was unanimous in refusing to draw the invited inference that there was "no real prospect or likelihood that the plaintiff will be removed from Australia within the reasonably foreseeable future" in circumstances where the plaintiff, who had been in immigration detention for almost a decade, had failed to cooperate by providing accurate and verifiable information which might assist in his removal by establishing his identity and country of origin.⁴⁶ References in the reasons of Kiefel CJ, Keane, Nettle and Edelman JJ to the plaintiff having "no good reason" for his non-cooperation are fairly to be read in context as references to his failure to provide the requisite information not being explicable on the basis of incapacity by reason of, for example, any medical condition or mental illness.⁴⁷ The critical consideration was that it was within the "power" of the plaintiff to provide the information.⁴⁸ The reasons of Bell, Gageler and Gordon JJ were to substantially identical effect in recording that there was "nothing in the special case to suggest that the plaintiff suffers from a psychiatric or other medical condition which would affect his capacity to give a coherent, factual account of his background" and in drawing the inference that "the plaintiff has deliberately failed to assist the defendants in their attempts to establish his true identity".⁴⁹

45 To sum up in language used by French J in *WAIS v Minister for Immigration and Multicultural and Indigenous Affairs*,⁵⁰ to which attention was drawn in *NZYQ*,⁵¹ "[a] detainee cannot, in effect, create a circumstance which negatives any reasonable likelihood that he can be removed in the foreseeable future by withholding his consent or cooperation to a particular avenue for removal and

45 (1992) 176 CLR 1 at 72.

46 (2019) 265 CLR 285 at 292 [10], 300 [42], 302 [49].

47 (2019) 265 CLR 285 at 297 [30]-[32].

48 (2019) 265 CLR 285 at 293 [15].

49 (2019) 265 CLR 285 at 301-302 [47].

50 [2002] FCA 1625.

51 (2023) 97 ALJR 1005 at 1019 [61], fn 72.

15.

specifically to removal to the country from which he came".⁵² That, in a nutshell, is what ASF17 has tried and failed to do.

Conclusion

46 The statutory position of ASF17 is unambiguous. His removal from Australia is required by s 198(6) of the Act. In the absence of an extant protection finding, which would engage the operation of s 197C(3), his removal to Iran is permissible under s 198(6).

47 The litigious position of ASF17 is correspondingly uncompromising. He has not sought a writ of mandamus to compel his removal from Australia. No question has therefore arisen as to whether his removal from Australia, whether to Iran or to anywhere else, could be compelled under s 198(6) of the Act. He has not sought that the Minister exercise any personal non-compellable power under s 48B or s 195A which may result in a protection finding by reason of his claimed fear of harm in Iran based on his sexual orientation. He has sought only a writ of habeas corpus. By it, he has sought to secure his immediate release from detention in Australia. The sole question which has arisen, and on which issue has been joined at the hearing and on appeal, is whether ASF17's continuing detention in Australia under ss 189(1) and 196(1) for the purpose of removal under s 198(6) exceeds the constitutional limitation on the valid application of ss 189(1) and 196(1) identified in *NZYQ*.

48 ASF17 could be removed to Iran if he cooperated in the process of obtaining the requisite travel documents from Iranian authorities. He has decided not to cooperate. He has the capacity to change his mind. He chooses not to do so.

49 On those undisturbed findings of primary fact, the evaluative characterisation of the primary judge, that there is a real prospect of removal of ASF17 from Australia to Iran becoming practicable in the reasonably foreseeable future, such that the constitutional limitation identified in *NZYQ* has not been exceeded, is correct. ASF17's continuing detention under ss 189(1) and 196(1) of the Act does not exceed the temporal limitation on the valid application of those provisions imposed by Ch III of the *Constitution*.

50 The appeal will be dismissed with costs.

52 [2002] FCA 1625 at [61].

EDELMAN J.

Introduction

51 ASF17 is a bisexual man who arrived in Australia by boat in 2013. He has been convicted of no offence in this country. But he has been continuously detained in immigration detention since 2014. He has now said that he is prepared to be removed willingly from Australia to any country in the world except Iran. But for a decade he has refused to assist the Commonwealth in his removal to Iran, where private and consensual sexual intercourse between men may attract the death penalty and where persons may face persecution for a choice "to live ... aspects of their lives that are related to, or informed by, their sexuality".⁵³ ASF17 has refused to sign a request for his removal to Iran and has refused to engage with Iranian authorities in order to obtain travel documents required by Iran for his removal to that country.

52 There has been no dispute in this proceeding about ASF17's sexuality. But prior to this proceeding, in separate administrative and judicial review proceedings concerning his application for a protection visa, ASF17 did not raise his sexuality as a ground for alleged persecution. He said that this failure was due to "fear and stigma associated with such ... conduct in Iran" and he relied on other grounds in his claim for a protection visa. Some of those grounds were rejected by a delegate of the Minister. Others have never been properly decided. In his application for habeas corpus before the primary judge, and in this Court, ASF17 relied upon his sexuality as the reason for his refusal to assist with his removal to Iran.

53 The intervener, AZC20, is also an Iranian man who was held in immigration detention for ten years. He also has been convicted of no offence in this country. As his detention became more intractable he made multiple suicide attempts, engaged in a hunger strike and lost 25 kilograms, swallowed razor blades and took overdoses of drugs. Over the ten years he spent in detention he persistently sought to be removed from Australia. He sought mandamus to be removed anywhere except Iran. For ten years Iran has been the only country to which he persistently refused to consent to be returned on the basis that he fears persecution in Iran.⁵⁴

54 ASF17 and AZC20 presented their cases for writs of habeas corpus⁵⁵ in the Federal Court of Australia as a direct application of the reasons of this Court in

53 *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 at 501 [81].

54 *AZC20 v Secretary, Department of Home Affairs [No 2]* [2023] FCA 1497 at [65].

55 *Federal Court of Australia Act 1976* (Cth), s 23. See Cane, "The making of Australian administrative law" (2003) 24 *Australian Bar Review* 114 at 115, 132.

NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs ("NZYQ").⁵⁶ In that case, six members of this Court held that if there is no real prospect of a person being removed from Australia in the reasonably foreseeable future then the existence of the legitimate purpose of the Commonwealth Parliament to remove certain classes of aliens from Australia⁵⁷ would be "refute[d]" in respect of that person.⁵⁸

55 ASF17 failed in his application for habeas corpus. But AZC20 succeeded. ASF17 appealed to the Full Court of the Federal Court in his case. The Commonwealth appealed to the Full Court in AZC20's case. ASF17's appeal to the Full Court was removed into this Court. And although the Commonwealth discontinued AZC20's appeal, AZC20 was granted leave to intervene in this proceeding in the particular circumstances in which his liberty could be indirectly affected by the reasoning of this Court in ASF17's case.

56 In this Court, ASF17 argued that it was an error for the primary judge to conclude that because ASF17 was *capable* of agreeing to be returned to Iran, there was a real prospect that he *would* be removed in the reasonably foreseeable future. His reliance upon the reasoning of this Court in *NZYQ* invited consideration of whether there can be a legitimate purpose to remove him from Australia where he claims that his refusal to consent to removal: (i) will not change; (ii) is genuine; and, if it be legally relevant, (iii) is reasonable (with the expression "good reasons" being used by ASF17 to cover (ii) or, if necessary, (iii)). As ASF17 said of the force of his conviction to prefer a decade in immigration detention over return to Iran: "who will leave their family and prefer the prison? Who can do that?"

57 Although the strict logic of the approach of six members of this Court in *NZYQ* was said by ASF17 to require that his appeal be allowed, I do not consider that *NZYQ* clearly established a precedent, or was part of any stream of authority, to the effect that one of the legitimate legislative purposes⁵⁹ of ss 189(1) and 196(1) of the *Migration Act 1958* (Cth) (to remove classes of aliens from Australia) becomes illegitimate, or will be refuted, merely because in the application of those provisions there is no real prospect that removal of a small cohort of aliens will be practicable in the reasonably foreseeable future. I did not join in that part of the

56 (2023) 97 ALJR 1005 at 1016 [46].

57 In particular, those aliens referred to in *Migration Act 1958* (Cth), s 196(1)(a), (aa) and (b).

58 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1016 [44], [46].

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

reasoning in *NZYQ*. For the further reasons below, I maintain my opposition to that reasoning.

58 In *NZYQ*, I relied upon a separate basis for disapplying ss 189(1) and 196(1) of the *Migration Act*. In *NZYQ*,⁶⁰ all members of this Court referred to the decision in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* ("*Lim*")⁶¹ as requiring that a law enacted by the Commonwealth Parliament for the non-judicial detention of a person must be "reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose". The reference to the purpose being required to be non-punitive *in addition to* legitimate was the foundation for my reasoning. That foundation is solidly based in the reasoning in *Lim*.⁶² In *Lim*, four members of this Court held that a law would be "punitive" (in the sense of being disproportionate to a legitimate purpose) and invalid if it authorised detention that was not reasonably capable of being seen as necessary for a legitimate purpose. Since near-exhaustive searches had revealed that there was no country which would accept the removal of *NZYQ*, the detention of *NZYQ* was "not reasonably capable of being seen as necessary"⁶³ for the legitimate purpose of removal from Australia where there was no real prospect of removal of *NZYQ* from Australia becoming practicable in the reasonably foreseeable future.

59 This reasoning additionally applies to circumstances where: (i) the consent of aliens to their removal is required because the only country that will accept the aliens does not permit involuntary removal, but (ii) the aliens are incapable of providing that consent for reasons including psychiatric illness. In such circumstances, the detention required by ss 189(1) and 196(1) will not be "reasonably capable of being seen as necessary" for removal from Australia.

60 This reasoning also applies to aliens whose refusal to consent to removal under the *Migration Act* is based, in part or in whole, upon circumstances reflected in a "protection finding" made in relation to them under the *Migration Act*,⁶⁴ including a protection finding made on the basis that the alien has a genuine and

60 (2023) 97 ALJR 1005 at 1015 [39].

61 (1992) 176 CLR 1.

62 (1992) 176 CLR 1 at 33, 58.

63 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1018 [54]. See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 33.

64 *Migration Act*, s 197C(4)-(7), and particularly s 197C(4).

well-founded fear of persecution⁶⁵ (used in these reasons to mean persecution for reasons of race, nationality, membership of a particular social group including one based on sexuality, or political opinion). The *Migration Act* scheme recognises that an alien might have such a genuine and well-founded fear and, where a protection finding has been made, prevents removal of the alien without their consent to the place where protection is required.⁶⁶

61 The application of the general provisions of ss 189(1) and 196(1) of the *Migration Act* would require detention pending removal from Australia of those aliens who are not granted a visa, even when the only real prospect of their removal in the reasonably foreseeable future is to the country which is the subject of a protection finding. That application of those general provisions cannot be reasonably capable of being seen as necessary for the legitimate purpose of removal of such aliens from Australia where the only real prospect of removal requires the alien's consent to be returned to a country where they have been found to have a well-founded fear of persecution. An approach which would treat ss 189(1) and 196(1) as requiring the continuing detention of aliens until they consent to be removed to a place where they have been found to require protection would require overruling *Lim*.

62 On the other hand, contrary to the submissions of ASF17 and AZC20 but subject to any issues arising from significant gaps in the *Migration Act* scheme, ss 189(1) and 196(1) will generally be reasonably capable of being seen as necessary for the purpose of removal from Australia of aliens who might refuse, without any incapacity (including psychiatric illness) or protection finding under the *Migration Act*, to provide necessary assistance in the removal process. In such circumstances the means of detention are proportionate to the end of removal of certain classes of aliens from Australia because, perhaps with advice, counselling and relocation assistance, there is a real prospect that such persons might consent to removal in the reasonably foreseeable future.

63 There has never been any suggestion that ASF17 lacks capacity in any way, unlike AZC20. Further, a delegate of the Minister found (in a decision that was not quashed on judicial review to the Federal Circuit Court of Australia⁶⁷ or on further appeal to the Federal Court of Australia⁶⁸) that ASF17 did not have a well-founded fear of persecution. Although the delegate was found not to have properly

65 *AKH16 v Minister for Immigration and Border Protection* (2019) 269 FCR 168 at 181 [58].

66 *Migration Act*, s 197C(3)(c)(iii), s 36A and s 36, and particularly s 36(2)(a) and (aa).

67 *ASF17 v Minister for Immigration and Border Protection* [2017] FCCA 2498.

68 *ASF17 v Minister for Immigration and Border Protection* [2018] FCA 1149.

considered all aspects of ASF17's claim for a protection visa,⁶⁹ so that ASF17 has never received a proper consideration of whether he is entitled to a "protection finding",⁷⁰ the delegate's refusal of ASF17's application for a protection visa (a Safe Haven Enterprise Visa⁷¹) was upheld due to ASF17's provision of a bogus document.⁷²

64 In this proceeding, it appears that ASF17 only sought to bring a collateral challenge to the valid finding of the delegate that he had no well-founded fear of persecution. There were no substantial submissions in this Court concerning whether such a collateral challenge should be permitted or how the success of such a collateral challenge to findings of fact should affect the validity of the broader *Migration Act* scheme for detention, including the making and adjudication of claims for protection, which involves a parallel process by which the same issues of fact relevant to detention are decided, reviewed, and sometimes even redecided by administrative or judicial processes. The primary judge considered the collateral challenge but concluded that ASF17 did not have a "genuine subjective fear of harm".⁷³

65 The material before this Court suggests that before the primary judge ASF17 only alleged a fear of persecution due to his bisexuality on a narrow factual basis arising from an incident which the primary judge found did not occur. On that basis, the conclusion of the primary judge must be accepted. In circumstances in which ASF17 cannot be said to have a genuine subjective fear of persecution, and therefore cannot have a well-founded fear of persecution, the detention of ASF17 pending removal must be valid under ss 189(1) and 196(1) of the *Migration Act*.

69 *ASF17 v Minister for Immigration and Border Protection* [2017] FCCA 2498 at [49]; *ASF17 v Minister for Immigration and Border Protection* [2018] FCA 1149 at [29]. See *Migration Act*, s 36(2)(aa).

70 Within the meaning of *Migration Act*, s 197C(4) read with s 36A(1)(b) and s 36(2)(aa).

71 *Migration Act*, s 35A.

72 *ASF17 v Minister for Immigration and Border Protection* [2017] FCCA 2498 at [62]; *ASF17 v Minister for Immigration and Border Protection* [2018] FCA 1149 at [30]. See *Migration Act*, s 91WA.

73 *ASF17 v The Commonwealth* [2024] FCA 7 at [130].

NZYQ redux: two relevant requirements for a law requiring administrative detention of aliens

66 In *NZYQ*,⁷⁴ this Court unanimously held that there were two requirements for the validity of a law that authorises or requires the detention of aliens. The law must have a purpose that is "both legitimate *and* non-punitive".⁷⁵ A legitimate purpose is the "end" that is sought by Parliament. Hence, the first requirement is that the purpose or end sought to be achieved by the law must be legitimate. The purpose will not be legitimate if it is punitive (in the strict sense of "punishment"). But the law must also impose detention by an appropriate means to achieve that end: "the principle in *Lim* ... requires an assessment of both means and ends, and the relationship between the two".⁷⁶ Thus, the second requirement is that the relationship between means and ends must not be disproportionate. A law providing for the detention of aliens will be "punitive" (in a loose sense of punishment meaning "disproportionate") if the means that the law adopts are not reasonably capable of being seen as necessary for the end (or legitimate purpose) sought to be achieved.

67 As to the first requirement, in oral submissions in *NZYQ* the defendants had repeatedly emphasised that they were not submitting that "segregation, per se, is a legitimate purpose". They were correct not to make the submission that segregation (by detention) is a legitimate purpose. Detention is the thing to be justified by a legitimate purpose. Detention is not the purpose itself. Instead, the purpose relied upon by the defendants was described as segregation of aliens "[p]ending removal" from Australia and segregation of aliens "until such time as removal becomes possible". In other words, the focus of the defendants was on the general purpose of removal of aliens from Australia (and more particularly, those classes of aliens referred to in s 196(1)(a), (aa) and (b) of the *Migration Act*), even if that purpose was not able to be achieved for all aliens in the reasonably foreseeable future. But the conclusion of six members of this Court in *NZYQ* was that the asserted purpose of removal of an alien from Australia was "refute[d]" by "the absence of any real prospect of achieving removal of the alien from Australia in the reasonably foreseeable future".⁷⁷ Their Honours considered that "[t]he terms in which the

74 (2023) 97 ALJR 1005.

75 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1015 [40] (emphasis in original).

76 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1016 [44].

77 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1016 [46].

defendants couched the postulated purpose demonstrated its constitutional illegitimacy".⁷⁸

68 In effect, their Honours in *NZYQ* held that the purpose of the Commonwealth Parliament in ss 189(1) and 196(1) of the *Migration Act* was not, or was no longer, the legitimate purpose of removal of classes of aliens from Australia in the individual instances where it turned out that the purpose was not achievable as a matter of practicality. In those cases, as Professor Twomey correctly explained, the reasoning of the six members of this Court was that "if the legitimate purpose is effectively unachievable, then it is no longer the purpose, and the default [punitive] purpose of punishment springs back into place".⁷⁹ Hence, six members of this Court relied on contravention of the first requirement to hold that ss 189(1) and 196(1) of the *Migration Act* should be disapplied.

69 On this point, I departed from the reasoning of the other members of the Court.⁸⁰ I relied on the second requirement. There is a difference between a legitimate purpose and the manner in which that purpose is implemented. That is a difference between ends and means. The purpose of the Commonwealth Parliament in removing classes of aliens from Australia is legitimate, and consistent with the first requirement, even if *in the implementation of that purpose* removal is not practicable in the reasonably foreseeable future in some cases. Indeed, it is common that a legislative purpose will not be able to be achieved in every instance of its application. Nevertheless, as *Lim* requires, the choice by the Commonwealth Parliament of the means by which its purposes will be implemented must respect the constitutional separation of powers and the exclusivity of the judicial power to punish.

70 To reiterate: the constitutional separation of powers was held in *Lim* to require that the means of detention chosen by the Commonwealth Parliament for the legitimate purpose of removal of classes of aliens from Australia must not be "punitive".⁸¹ The term "punitive" was used in a novel sense to describe those

78 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1016 [49].

79 Twomey, "NZYQ v Minister for Immigration and Its Legislative Progeny" (2024) 98 *Australian Law Journal* 103 at 104.

80 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1017-1018 [53].

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

measures which are "disproportionate to [Parliament's] legitimate purpose".⁸² Hence, in *Lim*⁸³ it was said that a law that authorised detention of aliens for the purpose of removal would be "of a punitive nature" if the means authorised ("the detention which [the two] sections require and authorize") are not "limited to what is reasonably capable of being seen as necessary for the purpose[] of [removal]".

71 Consistently with that orthodox reasoning in *Lim*, in *NZYQ* I held that Parliament's purpose of removal of classes of aliens from Australia in ss 189(1) and 196(1) of the *Migration Act*, although legitimate, involved a means that was "punitive" (disproportionate) to the extent that it required the detention of aliens for whom there was no real prospect of removal becoming practicable in the reasonably foreseeable future. Detention in such circumstances was not reasonably capable of being seen as necessary for the legitimate purpose of removal of classes of aliens from Australia. The operation of ss 189(1) and 196(1) was required to be disapplied to that extent for persons in the position of *NZYQ*.

This appeal and the intervention of AZC20

The reasons of the primary judges in AZC20 and in this case

72 As explained at the outset of these reasons, prior to the decision of the primary judge, in the different matter of *AZC20 v Secretary, Department of Home Affairs [No 2]* ("*AZC20*")⁸⁴ a different primary judge, Kennett J, granted an order for habeas corpus based upon the reasoning in *NZYQ*. In *AZC20*, the Commonwealth respondents proceeded on the basis that the only country to which there could be a real prospect of returning *AZC20* was Iran but that return to Iran would depend upon the issue of a travel document and Iran would not issue a travel document without *AZC20*'s consent to removal to Iran.⁸⁵ Kennett J properly and faithfully applied the principle in *NZYQ* and concluded that the Commonwealth respondents had not satisfied their onus of proving that there was a real prospect of removal of *AZC20* from Australia becoming practicable in the reasonably foreseeable future.⁸⁶

82 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1017 [52].

83 (1992) 176 CLR 1 at 33.

84 [2023] FCA 1497.

85 *AZC20 v Secretary, Department of Home Affairs [No 2]* [2023] FCA 1497 at [49].

86 *AZC20 v Secretary, Department of Home Affairs [No 2]* [2023] FCA 1497 at [54]-[55].

73 Although Kennett J loosely described the disapplication in *NZYQ* of ss 189(1) and 196(1) of the *Migration Act*—a process concerned with not *applying* statutory meaning rather than "reading" (or interpreting) the meaning⁸⁷—as the "[r]eading down" of ss 189(1) and 196(1),⁸⁸ Kennett J correctly held that *NZYQ* required that those provisions be disapplied so as not to require the detention of AZC20. His Honour reached this conclusion because AZC20 "has had mental health problems over a lengthy period" as a result of which Kennett J was "not persuaded that it is realistically within [AZC20's] power to change his approach to one of cooperation with removal to Iran".⁸⁹

74 Also correctly, Kennett J did not treat ss 189(1) and 196(1) of the *Migration Act* as requiring disapplication in a case in which "an alien who has no legal right to remain in Australia ... [attempts] to engineer their own release into the community by frustrating the efforts of officers to carry out their duty [to remove the alien]".⁹⁰ The application of ss 189(1) and 196(1) to such aliens is reasonably capable of being seen as necessary for the purpose of their removal from Australia. It is a valid premise, upon which the Commonwealth Parliament can legislate, that if persons in that category are capable of assisting in their removal and are not in need of protection in the country to which they would be removed, then there is a real chance that they will provide the required assistance in the reasonably foreseeable future (especially if provided with counselling, advice and relocation assistance).

75 The primary judge in this case, however, considered the reasoning of Kennett J to be plainly wrong.⁹¹ The primary judge took a different approach by which he introduced a legal fiction that deemed it to be "practicable" to remove an alien in the reasonably foreseeable future whenever the alien fails to "cooperate" in achieving their removal.⁹² If "cooperate" is taken in the sense in which the Solicitor-General of the Commonwealth submitted that it had been intended by the

87 *Migration Act*, s 3A ("the provision is not to have the invalid application"). See *Clubb v Edwards* (2019) 267 CLR 171 at 313-322 [415]-[433]. See also *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at 35 [89]; *Thoms v The Commonwealth* (2022) 96 ALJR 635 at 651-652 [75]-[77]; 401 ALR 529 at 547-548.

88 *AZC20 v Secretary, Department of Home Affairs [No 2]* [2023] FCA 1497 at [23].

89 *AZC20 v Secretary, Department of Home Affairs [No 2]* [2023] FCA 1497 at [65(d)].

90 *AZC20 v Secretary, Department of Home Affairs [No 2]* [2023] FCA 1497 at [64].

91 *ASF17 v The Commonwealth* [2024] FCA 7 at [40]-[41].

92 *ASF17 v The Commonwealth* [2024] FCA 7 at [52].

primary judge, this approach would apparently justify indefinite detention even if the alien's failure to cooperate arose in circumstances where it had been found under the *Migration Act* that the alien had a genuine and well-founded belief that their removal would result in persecution (including execution) but the alien refused to provide written consent for their removal to that country.⁹³

76 The primary judge referred to ASF17's expressed willingness to be removed to any other country apart from Iran but observed that ASF17 had not advanced any basis upon which he might be removed to any other country and that there was no evidence that supported the existence of any such country.⁹⁴ The primary judge thus found that there was no country other than Iran to which it was possible to remove ASF17 and that ASF17 could be removed to Iran if he wrote a letter to the Iranian authorities and provided such other information as may be necessary for the Commonwealth to obtain the documents needed for him to travel to Iran.⁹⁵

77 As explained in more detail below, the primary judge held that ASF17 was bisexual but rejected ASF17's claim to fear persecution in Iran based upon his sexuality. The primary judge held that ASF17's claimed fear of persecution was brought only on the basis of what ASF17 said were the consequences for him of his claim to have been caught by his wife in bed with another man. The primary judge rejected ASF17's evidence about this event⁹⁶ and held that ASF17's long period in detention was "consistent with a singular focus upon being able to secure permission to be released into the Australian community rather than face economic difficulty if he was to be made to return to Iran".⁹⁷ The primary judge observed that despite the long delay, ASF17 retained hope of being permitted to remain in Australia and had made repeated requests for ministerial intervention.⁹⁸

The submissions in this appeal by ASF17 and AZC20

78 In this appeal the primary submission of ASF17 was that the logic of six members of this Court in *NZYQ* should be applied to ASF17. For a decade, ASF17 has steadfastly refused to assist the Commonwealth with his removal to Iran. It was submitted that ASF17's refusal to provide the necessary assistance for his removal to Iran (as the only country to which his removal would otherwise be

93 See *Migration Act*, s 197C(3)(c)(iii).

94 *ASF17 v The Commonwealth* [2024] FCA 7 at [65], [114].

95 *ASF17 v The Commonwealth* [2024] FCA 7 at [131].

96 *ASF17 v The Commonwealth* [2024] FCA 7 at [130].

97 *ASF17 v The Commonwealth* [2024] FCA 7 at [116].

98 *ASF17 v The Commonwealth* [2024] FCA 7 at [116].

practicable) meant that there was no real prospect of his removal to Iran becoming practicable in the reasonably foreseeable future. Ergo, it was said, applying the logic of six members of this Court in *NZYQ*, there was no legitimate purpose to justify the detention of ASF17.

79 The submission of ASF17 was refined in the approach proposed by the intervener, AZC20, which ASF17 also appeared to adopt as an alternative. AZC20 sought leave to intervene in this appeal to make a submission which developed the reasoning in the decision of Kennett J in AZC20's application for judicial review.⁹⁹ Senior counsel for AZC20 submitted that an intransigent refusal to be removed which was not based upon any "good reason", such as a professed fear of persecution that was not genuinely held, may invite the inference to be drawn that the person is refusing to consent in order "to engineer their own release into the community".¹⁰⁰ It was submitted that if such an inference is drawn then the further inference might be drawn that the person will abandon their refusal "if the possibility of their release into the community has dissipated".

80 As a consequence of the finding of the primary judge that ASF17 did not have a genuinely held subjective fear of persecution, ASF17 relied upon a ground of appeal challenging that factual finding. By the conclusion of submissions in reply, ASF17's submission was, in effect, that the primary judge should have found that ASF17 had a genuine and (if necessary) well-founded fear of persecution. The effect of the submission was that ASF17's continued detention was not reasonably capable of being seen as necessary for the purpose of removal from Australia in circumstances in which he could only be removed to Iran with his consent and assistance and his refusal to consent was based upon a well-founded fear of persecution in Iran.

Allowing the intervention by AZC20 in this appeal

81 On 23 January 2024, ASF17 lodged a notice of appeal to the Full Court of the Federal Court of Australia from the decision of the primary judge. On 19 January 2024, the Commonwealth lodged a notice of appeal from the decision of Kennett J granting habeas corpus to AZC20. On 25 January 2024, the Federal Court wrote to the parties to both appeals saying that the Court was considering listing the appeals together for a joint hearing of the appeals. On 1 February 2024, the Commonwealth lodged a notice of discontinuance of its appeal from the judgment of Kennett J, which had the effect of an order dismissing that appeal.¹⁰¹

⁹⁹ *AZC20 v Secretary, Department of Home Affairs [No 2]* [2023] FCA 1497.

¹⁰⁰ *AZC20 v Secretary, Department of Home Affairs [No 2]* [2023] FCA 1497 at [64].

¹⁰¹ *Federal Court Rules 2011* (Cth), r 36.73(2).

82 The consequence of this manoeuvring by the Commonwealth was that AZC20's liberty following the order of Kennett J for habeas corpus was precarious. If the decision of the primary judge were upheld in ASF17's appeal then AZC20 would be liable to be redetained. But the discontinuance by the Commonwealth of its appeal from the decision of Kennett J meant that AZC20 would be denied the right of making submissions in an appeal which challenged the reasoning of Kennett J. On 15 February 2024, the solicitors for AZC20 therefore wrote to the Commonwealth seeking a written assurance that AZC20 would not be redetained based upon any reasoning of the Full Court of the Federal Court in ASF17's appeal. No assurance was provided. Instead, on 15 February 2024, the Commonwealth applied to remove ASF17's appeal into this Court. That application was granted on 23 February 2024.

83 AZC20 properly accepted that his "interests" (his "rights against or liabilities to any party to the action in respect of the subject matter of the action"¹⁰²) will not be directly affected by any orders in this appeal. But there is a discretion to grant intervention where a person's rights or liabilities will be indirectly, but "substantially", affected by the orders made.¹⁰³ "Substantially" is one of those weasel words that concede the impossibility of any formula which could apply in every circumstance to distinguish those persons for whom the precedential effect of a decision will never be sufficient to allow intervention from those for whom it might be sufficient.

84 There is no doubt that AZC20's "interests" will be substantially affected by the orders of this Court. The liberty of AZC20 to remain in the Australian community under his temporary bridging visa may depend upon there being no change to the basis upon which the order for habeas corpus was granted by Kennett J. The discontinuance of the Commonwealth's appeal from the orders of Kennett J means that without intervention AZC20 would be denied the ability to defend his interests in an appeal where the reasoning of Kennett J was challenged. In addition, the high quality of AZC20's submissions demonstrated that they were likely to be of assistance to this Court. For those reasons, I joined in the exercise of discretion to grant leave to AZC20 to intervene by making both written and oral submissions.

Application of the first requirement to this appeal

The logic of ASF17's primary submission

85 ASF17's primary submission was that the inescapable logic of the reasons of six members of this Court in *NZYQ* required that he be granted an order for

102 *Pegang Mining Co Ltd v Choong Sam* [1969] 2 MLJ 52 at 56.

103 *Roadshow Films Pty Ltd v iiNet Ltd [No 1]* (2011) 248 CLR 37 at 38-39 [2].

habeas corpus. If the legislative purpose of removing classes of aliens from Australia were truly to be "refuted" in individual cases where there is no real prospect of that purpose being achieved in the reasonably foreseeable future, then the *reason* that there is no real prospect should be irrelevant. Either the purpose is practically capable of being achieved (in which case it remains an extant purpose) or it cannot be (in which case the Commonwealth Parliament has failed to demonstrate a legitimate purpose).

86 This Court held in *NZYQ* that the notions of "practicability" and "the reasonably foreseeable future" are matters of "factual reality".¹⁰⁴ They are issues of what is "capable of being achieved in fact".¹⁰⁵ If "the absence of any real prospect of achieving removal of the alien from Australia in the reasonably foreseeable future refutes the existence of the [purpose of removal of classes of aliens from Australia]"¹⁰⁶ then it should not matter what the factual basis is for that refutation. According to this strict logic, if the Commonwealth Parliament cannot have a purpose to achieve something which there is no real prospect of achieving as a matter of fact, then the factual basis which renders the purpose practically unachievable should not matter.

87 ASF17's primary submission illustrates one of the flaws in treating the general purpose of a law that permits or requires the detention of classes of aliens for the purpose of removal from Australia as "refuted" in particular cases based on factual matters in those cases. The submission would logically also extend to allow any alien within those classes to undermine the exercise of a core sovereign power of this nation by an unreasonable, irrational, and intransigent refusal to be removed to a country that does not accept involuntary removals.

The attempt to distinguish the asserted logic of NZYQ

88 The primary judge sought to avoid the asserted logic of ASF17's submission by reasoning that if an alien chooses not to "cooperate" in achieving their removal then the "removal of th[at] person remains 'practicable' in the foreseeable future".¹⁰⁷ But that conclusion could only be reached by a legal fiction that deems an alien to be "cooperative" in the assessment of whether there is a real prospect

104 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1018 [57].

105 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1018 [58].

106 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1016 [46].

107 *ASF17 v The Commonwealth* [2024] FCA 7 at [52].

of removing the alien in the reasonably foreseeable future. In other words, the removal of the alien would be practicable (capable of being put into practice) only by a legal fiction which deems that they will "cooperate".

89 A further difficulty is the contortion of the concept of cooperation in this legal fiction. As the Solicitor-General of the Commonwealth rightly accepted, a conclusion that "cooperation" is required does not use the concept of "cooperate" in its common meaning of "to work or act together or jointly",¹⁰⁸ a meaning which implies reasonableness on the part of both parties. Rather, what appears to have been meant by "cooperate" is "subjugate": "to bring under complete control".¹⁰⁹

The decision of Plaintiff M47/2018 v Minister for Home Affairs

90 The primary judge rationalised the legal fiction as a qualification to the reasoning of six members of this Court in *NZYQ* by reliance upon the decision of this Court in *Plaintiff M47/2018 v Minister for Home Affairs* ("*Plaintiff M47/2018*"),¹¹⁰ a decision which was said to establish "that unless there is an inability to cooperate (for medical reasons or a lack of knowledge), in the absence of cooperation as to matters relating to removal it cannot be concluded that there is no real prospect of the person's removal from Australia becoming practicable in the reasonably foreseeable future".¹¹¹ That proposition was not the subject of any argument in *Plaintiff M47/2018*. It was not part of the reasoning in the decision. Its correctness was not even assumed.¹¹² The decision in *Plaintiff M47/2018* establishes only that a plaintiff who engages in deliberate obfuscation cannot be said to have no real prospect of being removed from Australia in the reasonably foreseeable future.

91 In *Plaintiff M47/2018* the plaintiff had arrived in Australia on a Norwegian passport which he destroyed. He had previously identified himself to authorities in Denmark, the Netherlands, Iceland, Singapore and Germany by the use of various different names and various different dates of birth. He used another name again with Australian immigration authorities and provided various different versions of

108 *The Macquarie Dictionary*, 3rd (Federation) ed (2001), vol 1 at 426, "cooperate", sense 1.

109 *The Macquarie Dictionary*, 3rd (Federation) ed (2001), vol 2 at 1871, "subjugate", sense 1.

110 (2019) 265 CLR 285.

111 *ASF17 v The Commonwealth* [2024] FCA 7 at [60].

112 See *Felton v Mulligan* (1971) 124 CLR 367 at 413; *CSR Ltd v Eddy* (2005) 226 CLR 1 at 11 [13]; *Spence v Queensland* (2019) 268 CLR 355 at 486-487 [294]; *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 346 [28].

his place of birth, family location and parentage. The plaintiff's argument was blunt. The defendants were said to bear the onus of proving issues of identity and the plaintiff's place of birth and that there was a real prospect that the plaintiff would be removed from Australia within a reasonable time.

92 This Court held that although the onus was upon the defendants to justify the plaintiff's detention in his claim for habeas corpus, the plaintiff carried an initial evidential burden to establish that the detention had ceased to be lawful because it was no longer reasonably foreseeable that he might be removed from Australia.¹¹³ The Court declined to draw the inference invited by the plaintiff that there was "no real prospect or likelihood that [he] will be removed from Australia within the reasonably foreseeable future".¹¹⁴

93 In the joint reasons of Kiefel CJ, Keane, Nettle and Edelman JJ in *Plaintiff M47/2018*, it was explained that there was "[n]o good reason" for the plaintiff's posture (of, at best, "non-cooperation"),¹¹⁵ which involved "the deployment of falsehoods".¹¹⁶ The plaintiff's inconsistent accounts were not suggested to be due to any medical condition or psychiatric illness.¹¹⁷ The plaintiff's accounts were "not explicable by genuine uncertainty or ignorance".¹¹⁸ Instead, the plaintiff sought to take advantage of his own wrongful conduct. The plaintiff "deliberately failed to assist ... when ... *he does not appear to have anything legitimate to lose by cooperating*".¹¹⁹ It was concluded that it could not "be assumed that it is beyond [the plaintiff's] power to provide further information concerning his identity that may shed positive light on his prospects of removal".¹²⁰

113 *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285 at 299-300 [39].

114 *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285 at 292 [10], [12].

115 *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285 at 297 [30]. See also at 301-302 [47].

116 *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285 at 298 [35].

117 *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285 at 297 [30]. See also at 301-302 [47].

118 *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285 at 300 [41].

119 *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285 at 298 [34] (emphasis added).

120 *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285 at 300 [41].

94 In summary, neither the argument, nor the reasoning, nor the result in *Plaintiff M47/2018* supports the proposition that for the purposes of assessing whether there is a real prospect of removing an alien from Australia in the reasonably foreseeable future, the alien will be deemed to cooperate (in the sense of "capitulate"), particularly to a demand that they consent to be returned to a country in which they have a genuine and well-founded fear of persecution, or alternatively a genuine fear of persecution.

No invalidity arises from the application of the first requirement

95 The first requirement should not be treated as satisfied by the creation of, and reliance on, a legal fiction. Nor should it be treated as satisfied by reference to the authority of *Plaintiff M47/2018*. Instead, the first requirement should only be applied where the end sought to be achieved by a law is punitive in the strict sense of punishment, rather than the loose sense in which the term was used in *Lim* as meaning a disproportionate means to achieve a legitimate end.

96 As the majority of this Court accepted in *The Commonwealth v AJL20*,¹²¹ the purposes of ss 189(1) and 196(1) of the *Migration Act* which are applied to authorise or require the detention of classes of aliens are "segregation pending receipt, investigation and determination of any visa application or removal" and those purposes are "legitimate non-punitive purposes". Not only does the purpose of removal of classes of aliens from Australia not change merely because it is not attainable (as a "real prospect") in every instance of its application in the reasonably foreseeable future, but to treat that purpose as capable of being deconstructed in this way undermines the foundational constitutional principle of representative democracy which requires latitude to be given to the Commonwealth Parliament to pursue broad and general ends, or purposes, in legislation. The purpose of laws must usually be expressed as a single purpose at a level of relative generality rather than as a series of purposes at the level of application to particular individuals.

97 A legislative purpose will only be a punitive purpose, and therefore illegitimate because it is contrary to the constitutional separation of powers, if the law empowers the executive to detain aliens in order to pursue "purposes of punishment" either as the sole purpose(s) or in addition to other, legitimate purposes.¹²² In this context, the concept of "punishment" is used in its strict sense

121 (2021) 273 CLR 43 at 65 [28].

122 *Plaintiff M96A/2016 v The Commonwealth* (2017) 261 CLR 582 at 594 [22].

as based upon notions such as retribution and deterrence and some analogous circumstances of "protective punishment".¹²³

98 An extreme hypothetical example where the first requirement is contravened might be where legislation authorised the executive to detain aliens who have committed an offence for a period to be chosen by the executive based on the offence. An inference might be drawn that the true purpose of the law is to confer on the executive a power of executive punishment.¹²⁴ Alternatively, an inference that the true purpose of a law is to permit executive punishment might arguably be drawn if, in the absence of provisions in the *Migration Act* such as ss 197C and 198(5A), the executive had the power or duty to remove an alien who had committed an offence to a place where the alien had been found to have (or was awaiting a finding concerning) a need for protection.

99 Where the circumstances do not support such an inference of executive punishment (using "punishment" in its strict sense), the general legislative purpose of removal of classes of aliens from Australia is not "refuted" because it applies in a blunt manner. As members of this Court have correctly said of the power of removal which the purpose seeks to support, "[o]ne would expect any sovereign legislature to have such a power, which is essential to national security".¹²⁵ The importance of that power precludes any narrow, deconstructed approach to the purpose for which it exists. The legitimate purpose of removal of classes of aliens from Australia does not vanish merely because the law which effects that purpose might, at the boundaries and in limited cases, "have very little, or no, effect in advancing the purpose".¹²⁶

100 An analogy that illustrates this point is the decision of Gageler J in *Unions NSW v New South Wales*.¹²⁷ In that case, his Honour was one of only two members of the Court positively to uphold the legitimacy of the purpose of s 29(10) of the *Electoral Funding Act 2018* (NSW). His Honour held that the legitimate purpose of the provision was to achieve a level playing field for all participants in political

123 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1017 [51]. See *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 155-159 [197]-[204], 161-164 [210]-[214].

124 See also the less extreme example in *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 37 [88].

125 *Pochi v Macphee* (1982) 151 CLR 101 at 106. See also *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 358 [92].

126 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1017-1018 [53].

127 (2019) 264 CLR 595.

discourse.¹²⁸ This purpose remained legitimate even though Gageler J also recognised that the means adopted to achieve this legitimate purpose might not permit some third-party campaigners "meaningfully to compete on the playing field".¹²⁹ In other words, it is a different question from that of legitimacy of purpose to ask whether the *means* by which a law implements Parliament's purpose are proportionate, including where the purpose is contradicted or frustrated in some of its applications.

101 In the absence of established and clear precedent and in the absence of any stream of authority, I maintain the view that I expressed in *NZYQ* that the Commonwealth Parliament in ss 189(1) and 196(1) of the *Migration Act* is pursuing only the legitimate purpose of removal of classes of aliens from Australia. Indeed, that view is consistent with the approach to the interpretation of ss 189(1) and 196(1) taken by Hayne J (with whom McHugh J and Heydon J agreed on this point) and Callinan J in the majority of this Court in *Al-Kateb v Godwin*,¹³⁰ which was upheld in *NZYQ* in relation to the statutory interpretation holding.¹³¹ On that question of interpretation, this Court in *NZYQ* did not accept the minority approach of Gummow J, whose articulation of the statutory purpose of ss 189(1) and 196(1) was the removal of aliens from Australia "which is reasonably in prospect".¹³² In short, the purpose of ss 189(1) and 196(1), properly articulated, is the general removal of classes of aliens from Australia. It is not a purpose to be further qualified or deconstructed according to the individual circumstances of particular aliens. This general purpose therefore is not refuted simply because the removal of ASF17 from Australia is not practicable in the reasonably foreseeable future.

Application of the second requirement to this appeal

The requirement arising from Lim

102 The second requirement that must be satisfied for the validity of a law that authorises the detention of aliens is that the law be "non-punitive". In relation to this second requirement, "punitive" is used in a novel sense to describe a law that adopts means (detention) that are "disproportionate" to its legitimate end or

128 *Unions NSW v New South Wales* (2019) 264 CLR 595 at 630 [90]. See also Nettle J's reasons at 638 [110].

129 *Unions NSW v New South Wales* (2019) 264 CLR 595 at 633-634 [101].

130 (2004) 219 CLR 562 at 640 [231], 658-659 [290]-[291]. See also at 581 [33], 662-663 [303].

131 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1012 [23].

132 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 608 [122].

purpose.¹³³ The requirement of proportionality is a requirement that the law imposing detention does so in a manner that is reasonably capable of being seen as necessary for a legitimate purpose. This requirement was established in the decision of *Lim*.¹³⁴

103 In *Lim*, the joint judgment of Brennan, Deane and Dawson JJ (with whom Gaudron J relevantly agreed¹³⁵) recognised that it is a legitimate purpose of the exercise of power under s 51(xix) of the *Constitution* for the Commonwealth Parliament to confer upon the executive "authority to detain (or to direct the detention of) an alien in custody for the purposes of expulsion or deportation".¹³⁶ But, their Honours explained, laws that provide for the purpose of deportation will only be valid "if the detention which they require and authorize is limited to what is reasonably capable of being seen as necessary for the purpose[] of deportation".¹³⁷ If the detention is not reasonably capable of being seen as necessary for the purpose of deportation, it was said, the law "will be of a punitive nature and contravene Ch III's insistence that the judicial power of the Commonwealth be vested exclusively in the courts which it designates".¹³⁸

104 This proportionality limit on Parliament's ability to create executive power to detain reflects the jealous treatment of individual liberty as generally the province of the judiciary and, at a high level of generality, informs the constitutional separation of powers.¹³⁹ The concern is generally "whether there are alternative, reasonably practicable, means of achieving the same object but which

133 *Jones v The Commonwealth* (2023) 97 ALJR 936 at 967 [149].

134 (1992) 176 CLR 1.

135 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 53, 58.

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

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

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

139 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27-29; *Benbrika v Minister for Home Affairs* (2023) 97 ALJR 899 at 919 [86]. Compare *Al-Kateb v Godwin* (2004) 219 CLR 562 at 647 [253].

have a less restrictive effect".¹⁴⁰ The expression "reasonably capable of being seen as" emphasises the degree of latitude, or margin of appreciation, afforded to Parliament in formulating laws to advance a legitimate purpose.¹⁴¹

105 In *Lim*,¹⁴² the joint judgment gave an example of a provision which would be "punitive" in this novel sense of disproportionate. It was the provision that was then s 54Q of the *Migration Act*, which empowered the executive to detain a "designated person" for up to 273 days for processing of an application, even if the person had already been held in detention for years previously. The otherwise disproportionate effect of that provision was only removed by s 54P, which required a designated person to be removed from Australia as soon as practicable if that person requested removal.¹⁴³

Application of the second requirement to ss 189(1) and 196(1) of the Migration Act

106 In this appeal, the Commonwealth relied heavily on the reasoning of the joint judgment in *Lim*, concerning what was then s 54P of the *Migration Act*, by which the validity of the legislative scheme was preserved because "it always lies within the power of a designated person to bring his or her detention in custody to an end by requesting to be removed from Australia".¹⁴⁴ But their Honours in *Lim* were not contemplating, or addressing, a scenario where a person is not capable (for medical reasons or due to psychiatric illness) of requesting removal from Australia. Nor were they contemplating, or addressing, a scenario in which an alien *did* request removal from Australia but refused to consent to removal to a particular country in circumstances where that person had been found to have a well-founded belief that their removal would result in persecution (including execution).¹⁴⁵

140 *Brown v Tasmania* (2017) 261 CLR 328 at 371 [139]. See also *Unions NSW v New South Wales* (2013) 252 CLR 530 at 556 [44]; *McCloy v New South Wales* (2015) 257 CLR 178 at 194-195 [2].

141 *Clubb v Edwards* (2019) 267 CLR 171 at 337 [478]. See *Jones v The Commonwealth* (2023) 97 ALJR 936 at 968 [152].

142 (1992) 176 CLR 1.

143 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 33-34.

144 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 34.

145 See at [60] regarding the meaning of "persecution".

(1) Sections 189(1) and 196(1) must be disapplied in cases of incapacity to assist in removal

107 In *NZYQ*, the disproportionate application of ss 189(1) and 196(1) of the *Migration Act* between the means of detention and the legitimate purpose of removal of classes of aliens from Australia arose from the refusal of any country to accept the removal of NZYQ. The same reasoning applies where a detained alien, for reasons of a medical or psychiatric nature, is unable to provide the necessary assistance to the Commonwealth for their removal to the only country where there is any real prospect of removal in the reasonably foreseeable future. The Solicitor-General of the Commonwealth thus appeared to accept, correctly, that ss 189(1) and 196(1) of the *Migration Act* must be disapplied from their application to situations involving removal of aliens who lack capacity.

108 Contrary to the submissions of ASF17, however, and subject to the circumstances discussed below concerning aliens who require protection in the country to which their removal is sought, the same conclusion cannot be reached in relation to aliens who are capable of consenting but refuse to be removed to a country that requires voluntary removal. The detention of that class of aliens is reasonably capable of being seen as necessary for their removal from Australia because there is a real prospect that aliens in that class (perhaps with counselling, advice and relocation assistance) will consent to be removed from Australia in the reasonably foreseeable future.

(2) Sections 189(1) and 196(1) must be disapplied in cases of a protection finding

109 In oral submissions in reply, senior counsel for ASF17 submitted that ASF17 was being detained in circumstances where the only country to which the Commonwealth sought to remove him was a country where he has a genuine and well-founded fear of persecution or execution. This submission can be expressed in terms of the second requirement as a claim that ss 189(1) and 196(1) of the *Migration Act* in authorising the detention of persons in the position of ASF17 are not reasonably capable of being seen as necessary for the purpose of removal of classes of aliens from Australia and therefore those provisions must be disapplied from such circumstances.

110 For the reasons explained above,¹⁴⁶ ss 197C and 198(5A) of the *Migration Act* preclude a conclusion that ss 189(1) and 196(1) could have an illegitimate purpose of executive punishment by authorising the removal of an alien to a place where they have a well-founded fear of persecution. Section 197C prevents removal of a person to a place where they had, and have,¹⁴⁷ a well-founded fear of

146 At [97]-[98].

147 In accordance with *Migration Act*, s 197C(3)(c)(ii) read with s 197D(2) and (6).

persecution as determined by a protection finding made under the *Migration Act* scheme.¹⁴⁸ Section 197C is complemented by s 198(5A), which prevents the removal of an alien pending the final determination of their valid application for a protection visa. The consequence of these provisions is that a person who obtains (or might obtain) a protection finding under the *Migration Act* scheme cannot be removed without their written consent¹⁴⁹ to the country to which the protection finding applies (or would apply).

111 Under the *Migration Act* scheme, ss 189(1) and 196(1) provide for potentially indefinite detention in circumstances where: (i) in the reasonably foreseeable future the only country that would accept the removal from Australia of a person who is an alien in Australia is a country the subject of a protection finding; and (ii) the alien steadfastly refuses to consent to be returned to that country. As explained at the outset of these reasons,¹⁵⁰ the requirement in ss 189(1) and 196(1) for the detention of such aliens is not reasonably capable of being seen as necessary for the purpose of their removal from Australia. There is nothing proportionate about a legal scheme that provides for the detention of aliens until they consent to be removed to a place in circumstances where it has been determined that they require protection in that place. Sections 189(1) and 196(1) would need to be disapplied from such circumstances.

112 There are gaps in the *Migration Act* scheme by which a person with a need for protection, including based upon a well-founded fear of persecution, might not obtain a protection finding. For instance, the circumstances in another country that give rise to a well-founded fear of persecution might arise after the protection visa application has been finally determined. Or, as in this case, in the administrative process for considering a protection visa application an applicant might not raise the issue upon which they might arguably have a well-founded fear of persecution. Another gap, also evident in this case, is where the administrative decision concerning a protection finding is found to have been flawed in one respect but the decision to refuse a protection visa is not quashed because refusal of the protection visa was required for other reasons (here, the provision of a bogus document).

113 Sections 48B, 195A and 197AB of the *Migration Act* provide a safety valve for cases that fall within these gaps. Section 48B confers, broadly, a power on the Minister, in the public interest, to permit a subsequent protection visa application to be made even if an earlier protection visa application had been made and refused (which would otherwise be barred under s 48A). Section 195A permits the Minister to grant a visa to a person in detention even without an application.

148 *Migration Act*, s 197C(3)-(7) and especially s 197C(4) read with s 36A(1).

149 *Migration Act*, s 197C(3)(c)(iii).

150 At [61].

Section 197AB permits the Minister to make a residence determination, requiring a specified person or persons to reside at a specific place rather than being detained in immigration detention, if the Minister thinks it is in the public interest to do so. The effect of s 195A, and to a lesser extent (because it may be subject to conditions) the power to make a residence determination in s 197AB, is to give the Minister a non-compellable power to release an alien from immigration detention.

114 Neither ASF17 nor AZC20 submitted that the safety valve provided by provisions such as ss 48B, 195A and 197AB was insufficient to make the detention required by ss 189(1) and 196(1) reasonably capable of being seen as necessary for the removal of aliens who might have failed to raise some material fact or who had not received the benefit of a proper assessment of all grounds for protection. Instead, ASF17 brought a "collateral challenge"¹⁵¹ to the valid administrative finding that he had no well-founded fear of persecution.

115 Whether or not a collateral challenge to findings of fact is generally permissible in an application for habeas corpus,¹⁵² there may be significant obstacles to such a collateral challenge where the habeas corpus application is based upon the constitutional limit of laws concerning the detention of aliens and specifically the requirement that those laws be proportionate. The proper question is whether the application of the law imposing the detention is reasonably capable of being seen as necessary for the purpose of removal of classes of aliens from Australia. That ultimate question is not whether the imposition of detention is reasonably capable of being seen as necessary for the purpose of removal of a particular individual alien from Australia.

116 A collateral challenge might indicate gaps in the *Migration Act* scheme which may be relevant to an assessment of the proportionality of the legislative means of detention by which the end of removal of classes of aliens from Australia is generally achieved. But there may be difficulties in accepting that a successful collateral challenge to an administrative factual finding concerning a particular individual alien, by itself and without more, demonstrates the disproportionate nature, and invalidity, of the means of detention adopted by the law generally. Ultimately, it is unnecessary to address this issue in the absence of any submissions on it and in light of the conclusion that I reach on ASF17's collateral challenge to the administrative finding.

151 See *Ousley v The Queen* (1997) 192 CLR 69 at 98-99.

152 See *Ferraro v Woodward* (1978) 143 CLR 102. See also Farbey, Sharpe and Atrill, *The Law of Habeas Corpus*, 3rd ed (2011) at 72-73.

ASF17's collateral challenge to the administrative finding

117 ASF17's affidavit evidence before the primary judge included that his "wife caught [him] having sex with another man one time, when she returned home unexpectedly from shopping". He said that his wife reported the incident to police and that on the basis of the police complaint his wife was able to obtain a court-ordered divorce. He said that he had not "disclosed information about [his] sexuality to the Australian authorities due to fear and stigma associated with such ... conduct in Iran". He said that he was genuinely fearful that if anyone in the detention centre "found out about my bisexuality (known as 'Hamjinsgar' in Iran), which they consider a crime against God and is punishable by death in Iran, they may harm me". ASF17 said that he knew that he would "face torture or death at the hands of Iranian authorities" if he were returned to Iran, because of his sexuality. Until ASF17's disclosure in his affidavit before the primary judge, he had not revealed his sexuality to anyone except three men with whom he had had sexual relations in immigration detention and whom he named during re-examination.

118 ASF17 was cross-examined on his affidavit evidence. He was cross-examined on the implausibility of his account about having sex with another man in his house in Iran. But there was no challenge to his affidavit evidence that he was bisexual. There was also no challenge to his evidence, repeated in cross-examination, that he had had sex with three men in immigration detention and that, before these proceedings, those men were the only people who were aware of ASF17's sexual interest in men. Nor was there any challenge to his affidavit evidence that he had not disclosed his sexuality to any authorities in Australia due to "fear and stigma associated with such ... conduct in Iran". And during the course of cross-examination, senior counsel for the Commonwealth properly conceded that sexual intercourse between men is illegal in Iran and can attract the death penalty.

119 Nevertheless, senior counsel for the Commonwealth challenged ASF17's affidavit evidence that he believed that he would face torture or death at the hands of Iranian authorities. It was put to ASF17 that he did not fear harm due to his bisexuality if he were returned to Iran. His answer:

"So if I didn't fear harm, I wouldn't have stayed in this camp for 10 years. I would have quickly gone back to begin with the first day. Who ... will leave their family and prefer the prison? Who can do that?"

120 The primary judge rejected the evidence of ASF17 that when he was in Iran, he was found by his wife in bed with another man.¹⁵³ That finding was undoubtedly based upon an assessment of the credit of ASF17 in cross-examination on this

153 *ASF17 v The Commonwealth* [2024] FCA 7 at [126(2)].

topic. It is not open to challenge that finding as "glaringly improbable" or "contrary to compelling inferences".¹⁵⁴ The primary judge reasoned from that finding, together with a rejection of ASF17's other claims of persecution based upon his religion, ethnicity and opposition to Iran's mistreatment of women, to the conclusion that ASF17 did not have a genuine subjective fear of harm if removed to Iran. In relation to ASF17's sexuality, the reasoning of his Honour was that ASF17's subjective fear of harm was based upon the alleged event of being discovered by his wife and its "alleged consequences" (an apparent reference to ASF17's wife reporting him to police).¹⁵⁵ A rejection of that alleged event and its consequences was considered by the primary judge to be sufficient to conclude that ASF17 had no subjective fear of harm as a bisexual man in a country where homosexual activity is subject to the death penalty.

121 In *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*,¹⁵⁶ senior counsel for the Minister submitted to this Court that the Refugee Review Tribunal was correct to reject the applicants' claims to fear physical harm as homosexual men in Bangladesh because there was no reason to expect that they would not be discreet.¹⁵⁷ But a majority of this Court held that it was an error for the Refugee Review Tribunal not to consider *why* the applicants might live discreetly and whether the decision to live in that way was influenced by a fear of harm. As Gummow and Hayne JJ expressed the point, "to say that an applicant for protection is 'expected' to live discreetly is both wrong and irrelevant to the task to be undertaken".¹⁵⁸ And as McHugh and Kirby JJ said:¹⁵⁹

"The notion that it is reasonable for a person to take action that will avoid persecutory harm invariably leads a tribunal of fact into a failure to consider properly whether there is a real chance of persecution if the person is returned to the country of nationality ... [T]he well-founded fear of persecution held by [an] applicant is the fear that, unless that person acts to avoid the harmful conduct, he or she will suffer harm. It is the *threat* of

154 *Lee v Lee* (2019) 266 CLR 129 at 148 [55].

155 *ASF17 v The Commonwealth* [2024] FCA 7 at [130].

156 (2003) 216 CLR 473.

157 *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 at 476.

158 *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 at 501 [82].

159 *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 at 490 [43] (emphasis in original).

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serious harm with its menacing implications that constitutes the persecutory conduct."

122 None of these matters was considered by the primary judge. There was no consideration of whether ASF17, as a bisexual man, would find it necessary to act or behave in a way that conceals his sexuality to avoid the threat of execution. It is, however, unclear from the materials before this Court whether a fear of persecution on this basis was ever raised by ASF17. Perhaps the closest that this issue came to being raised before the primary judge was in the unconfined assertion by the Commonwealth in cross-examination of ASF17 that ASF17 would not fear harm on return to Iran because he was bisexual.

123 In this Court, the Solicitor-General of the Commonwealth submitted, without demur from ASF17, that in relation to matters of this nature "there was nothing before [the primary judge] of the kind that would need to be considered by a decision-maker to properly evaluate whether non-refoulement obligations are engaged". In the absence of any dispute on this point, and based on the materials before this Court, it must be concluded that ASF17 presented no case before the primary judge other than on the narrow basis, rejected by the primary judge, that he would be persecuted due to the knowledge of the authorities of the event when he was found by his wife in bed with another man. On that basis, this Court could not disturb the primary judge's finding that ASF17 did not have "a genuine subjective fear of harm if removed to Iran based upon the claims he has made as to the reasons for that subjective fear".¹⁶⁰

Conclusion

124 In *The Commonwealth v AJL20*,¹⁶¹ the majority joint judgment said that ss 189(1) and 196(1) of the *Migration Act* "are valid in all their potential applications". In the context of the whole of their reasons, their Honours cannot be taken to have expressed that proposition without qualification.¹⁶² In *NZYQ*, six members of the Court qualified the proposition in *The Commonwealth v AJL20* by holding that ss 189(1) and 196(1) did not apply where the legitimate purpose of removal of classes of aliens from Australia was "refute[d]" in particular cases in which removal had no real prospect of being achieved as a matter of practicality in the reasonably foreseeable future.¹⁶³ Again, in the context of the whole of their

¹⁶⁰ *ASF17 v The Commonwealth* [2024] FCA 7 at [130].

¹⁶¹ (2021) 273 CLR 43 at 70-71 [45].

¹⁶² See *The Commonwealth v AJL20* (2021) 273 CLR 43 at 64 [26], 67 [35] fn 70.

¹⁶³ *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1016 [44], [46].

reasons, their Honours cannot be taken to have expressed that proposition without qualification.¹⁶⁴ The proposition should be heavily qualified. A Commonwealth law that authorises or requires executive detention will only have an illegitimate, punitive purpose (in the strict sense of punishment) if an inference can be drawn that the law concerns the purposes of punishment, such as retribution or deterrence. No such inference can be drawn concerning ss 189(1) and 196(1) in the context of the *Migration Act* as a whole.

125 The means of detention adopted in ss 189(1) and 196(1) are also not "punitive" (in the different, loose, sense of disproportionate) in their application to aliens in the position of ASF17. In the absence of any submission suggesting any significant gap in the scheme of protection provided for in the *Migration Act*, it must be accepted that the detention required by ss 189(1) and 196(1) is reasonably capable of being seen as necessary for the purpose of removal of classes of aliens whose removal can occur with their assistance to a country where they have been found under the *Migration Act* scheme not to be in need of protection.

126 ASF17 is capable of providing the assistance required to remove him and he has been found by a delegate of the Minister not to have a genuine and well-founded fear of persecution in Iran. Although other aspects of ASF17's claim for protection have never been validly decided, the claim by ASF17 before the primary judge proceeded as a collateral challenge only to the valid finding of the delegate of the Minister under the *Migration Act*. Even if success on this collateral challenge could by itself have been sufficient to justify an order for habeas corpus, ASF17's collateral challenge based on his sexuality was rejected by the primary judge by reference to the terms upon which it was brought. This Court cannot revisit the factual basis upon which it was rejected.

127 There remains instead only the possibility of executive decisions, under provisions such as s 48B or s 195A of the *Migration Act*, concerning whether issues arising from ASF17's bisexuality (raised and considered only on a narrow basis by the primary judge) should be reassessed under the *Migration Act* scheme, or whether ASF17 should continue to be detained in immigration detention pending his consent to be returned to a country where he might be executed if he were to express, privately and consensually, what has been found to be his genuine sexual identity.

128 The appeal should be dismissed with costs.

164 See *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1019 [62].

