

HIGH COURT OF AUSTRALIA

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

Matter No M66/2024

CZA19
AND
COMMONWEALTH OF AUSTRALIA & ANOR

APPLICANT

RESPONDENTS

Matter No P34/2024

DBD24
AND
MINISTER FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS & ANOR

PLAINTIFF

DEFENDANTS

CZA19 v Commonwealth of Australia
DBD24 v Minister for Immigration and Multicultural Affairs
[2025] HCA 8
Date of Hearing: 14 November 2024
Date of Judgment: 2 April 2025
M66/2024 & P34/2024

ORDER

In Matter No M66/2024:

- The separate question for determination referred to the Full Court of the Federal Court of Australia pursuant to r 30.01 of the Federal Court Rules 2011 (Cth) which was removed into the High Court under s 40(1) of the Judiciary Act 1903 (Cth) by an order made on 31 July 2024 be answered as follows:*

Question: Whether the Applicant's detention by the Respondents in the period from 10 November 2022 to 13 May 2024 was unlawful?

Answer: No.

2. *The first respondent pay the applicant's costs of the proceeding in this Court on a party-party basis.*

In Matter No P34/2024:

1. *The question stated for the opinion of the Full Court in the special case filed on 4 November 2024 be answered as follows:*

Question: In their purported application to the Plaintiff in the period between 18 December 2023 and 1 October 2024 (or part thereof), were ss 189(1) and 196(1) of the Migration Act 1958 (Cth) invalid on the ground that, following the direction made by the Administrative Appeals Tribunal on 18 December 2023, there was no real prospect of his removal becoming practicable in the reasonably foreseeable future?

Answer: No.

2. *The second defendant pay the plaintiff's costs of the proceeding in this Court on a party-party basis.*

Representation

D J Hooke SC with J R Murphy and C J Fitzgerald for the applicant in M66/2024 (instructed by Zarifi Lawyers)

D J Hooke SC with J D Donnelly and M G S Crowley for the plaintiff in P34/2024 (instructed by Zarifi Lawyers)

S P Donaghue KC, Solicitor-General of the Commonwealth, with P M Knowles SC and M P A Maynard for the respondents in M66/2024 and the defendants in P34/2024 (instructed by Australian Government Solicitor)

LPSP intervening in M66/2024, limited to written submissions

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

CATCHWORDS

CZA19 v Commonwealth of Australia **DBD24 v Minister for Immigration and Multicultural Affairs**

Constitutional law (Cth) – Judicial power of Commonwealth – Immigration detention – Detention without judicial order – Where following release from custody claimants taken into immigration detention under s 189(1) of *Migration Act 1958* (Cth) ("Act") – Where s 196(1) of Act required claimants to be kept in immigration detention until removed from Australia, deported, or granted visa – Where claimants had pending application for protection visa – Where ss 198(1) and 198(6) of Act imposed duty upon officers to remove unlawful non-citizen from Australia as soon as reasonably practicable where request made in writing or visa application finally determined – Where Administrative Appeals Tribunal ("Tribunal") found claimants satisfied criterion for protection visa in s 36(2)(aa) of Act and were owed protection obligations – Where claimants were granted visa and released from immigration detention following Tribunal finding – Where claimants sought declaration that detention from time of Tribunal finding to release from immigration detention unlawful on basis that detention exceeded constitutional limitation identified in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005; 415 ALR 254 – Whether continuing detention of claimants exceeded constitutional limitation identified in *NZYQ* – Whether question of real prospect of removal from Australia becoming practicable in reasonably foreseeable future arose where each claimant had pending application for protection visa – Whether constitutional writ of mandamus available to compel performance of duty to consider claimants' visa applications.

Immigration – Unlawful non-citizens – Where claimants detained as unlawful non-citizens under ss 189(1) and 196(1) of Act – Whether continuing detention of claimants authorised by ss 189(1) and 196(1) of Act.

Words and phrases – "alien", "constitutional limitation expressed in *NZYQ*", "constitutional writ", "continuing detention", "damages", "depriving a person of their liberty", "disproportionality", "executive detention", "habeas corpus", "judicial power of the Commonwealth", "legitimate and non-punitive purpose", "*Lim* principle", "mandamus", "penal", "power or duty", "practicable", "protection finding", "punishment", "punitive", "real prospect", "reasonably capable of being seen as necessary", "reasonably foreseeable future", "removal from Australia", "statutory purpose", "unlawful non-citizen", "visa processing".

Constitution, s 51(xix), Ch III.

Migration Act 1958 (Cth), ss 5, 13, 36, 36A, 45, 47, 65, 189, 196, 197C, 198.

1 GAGELER CJ, GLEESON, JAGOT AND BEECH-JONES JJ. The applicant (CZA19) and the plaintiff (DBD24) (together, "the claimants") each bring proceedings against the Minister for Immigration and Multicultural Affairs¹ ("the Minister") and the Commonwealth of Australia (together, "the respondents") challenging the constitutional validity of their detention as unlawful non-citizens under ss 189(1) and 196(1) of the *Migration Act 1958* (Cth). CZA19's challenge is brought by way of removal to this Court from the Federal Court of Australia of a separate question asking whether CZA19 is entitled to a declaration that CZA19's detention by the respondents in the period from 10 November 2022 to 13 May 2024 was unlawful. DBD24's challenge is brought by way of a special case stating a question of law for the opinion of the Court in these terms:

"In their purported application to the Plaintiff in the period between 18 December 2023 and 1 October 2024 (or part thereof), were ss 189(1) and 196(1) of the *Migration Act 1958* (Cth) invalid on the ground that, following the direction made by the Administrative Appeals Tribunal on 18 December 2023, there was no real prospect of his removal becoming practicable in the reasonably foreseeable future?"

2 In both cases, although each claimant had a pending application for a protection visa while they were detained, CZA19 and DBD24 contend that the constitutionally permissible period of their detention ended once "there [was] no real prospect of removal of [them] from Australia becoming practicable in the reasonably foreseeable future".² In the case of CZA19, this is alleged to be so from 10 November 2022. In the case of DBD24, this is alleged to be so from 18 December 2023.

3 The significance of 10 November 2022 and 18 December 2023 is that on those dates the Administrative Appeals Tribunal ("the Tribunal") directed that CZA19 and DBD24 respectively met the criteria in s 36(2)(aa) of the *Migration Act*. Section 36(2)(aa) applies to "a non-citizen in Australia ... in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm".

1 In the case of CZA19, the relevant Minister is the Minister for Immigration, Citizenship and Multicultural Affairs.

2 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1018 [55]; 415 ALR 254 at 268.

2.

4 In the case of CZA19, the Tribunal's direction was based on the real risk that if removed to his country of citizenship, Poland, CZA19 would be imprisoned as a repeat drug offender and suffer significant harm in prison from criminal groups from which he would or could not be protected by authorities in Poland.

5 In the case of DBD24, the Tribunal's direction was based on the real risk that if removed to his country of citizenship, Vietnam, DBD24 would suffer significant harm by being sentenced to death for drug offences he committed in Australia and for which he had already been convicted and imprisoned in Australia.

6 According to the claimants, once the Tribunal gave these directions, which amounted to "protection findings" with respect to the claimants' countries of citizenship for the purposes of s 197C of the *Migration Act*,³ and because it was not apparent that the claimants' removal to any other country was practicable, their circumstances from 10 November 2022 and 18 December 2023 respectively satisfied the constitutional limitation on the permissible duration of executive detention of an unlawful non-citizen under the *Migration Act* as expressed in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (that is, "there [was] no real prospect of removal of [them] from Australia becoming practicable in the reasonably foreseeable future"⁴). They contend for the application to their detention of this constitutional limitation, despite the fact that their visa applications were pending while they were detained, on the basis that the ultimate sole legitimate and non-punitive purpose of executive detention of an unlawful non-citizen is the removal of the non-citizen from Australia. If this is so, according to the claimants' argument, their pending visa applications became irrelevant to the lawfulness of their detention from the moment that there was no real prospect of their removal from Australia becoming practicable in the reasonably foreseeable future, this fact having been established by the Tribunal giving the direction in respect of CZA19 on 10 November 2022 and in respect of DBD24 on 18 December 2023. The claimants also contend that, on the facts, their continuing detention became unlawful because the processing and determination of their visa applications took an unreasonable amount of time.

7 The claimants' constitutional arguments were supported by those of a third party, LPSP, who was granted leave to file written submissions in LPSP's capacity as the applicant in a representative proceeding before the Federal Court claiming damages for allegedly being held unlawfully in immigration detention after the Tribunal decided that LPSP was a person to whom Australia owed protection

3 See *Migration Act 1958* (Cth), s 197C(3).

4 (2023) 97 ALJR 1005 at 1018 [55]; 415 ALR 254 at 268.

3.

obligations because LPSP was a refugee as provided for in s 36(2)(a) of the *Migration Act*.

8 As explained below, the claimants' arguments fail at the level of constitutional principle and statutory construction.

Statutory provisions

9 Under the *Migration Act* a "non-citizen" means "a person who is not an Australian citizen" (s 5(1)). An "unlawful non-citizen" has the meaning given by s 14 (s 5(1)). Section 14(1) provides that a "non-citizen in the migration zone who is not a lawful non-citizen is an unlawful non-citizen". By s 13(1), a "non-citizen in the migration zone who holds a visa that is in effect is a lawful non-citizen".

10 A non-citizen may make an application for a visa in accordance with s 45 of the *Migration Act*. By s 47(1) of that Act, the Minister is to consider a valid application for a visa. By s 47(2), the requirement for the Minister to consider a valid application for a visa continues until the application is withdrawn, the visa is granted or refused, or further consideration is prevented by certain other provisions of the *Migration Act*. Section 65(1)(a) prescribes that, after considering a valid application for a visa, the Minister is to grant the visa if satisfied as to several matters. By s 65(1)(b), if not so satisfied, the Minister is to refuse to grant the visa.

11 Section 36 of the *Migration Act* applies to protection visas (being visas of a class provided for in s 35A). Section 36 relevantly provides that:

"(1A) An applicant for a protection visa must satisfy:

- (a) both of the criteria in subsections (1B) and (1C); and
- (b) at least one of the criteria in subsection (2).

(1B) A criterion for a protection visa is that the applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*).

(1C) A criterion for a protection visa is that the applicant is not a person whom the Minister considers, on reasonable grounds:

- (a) is a danger to Australia's security; or

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- (b) having been convicted by a final judgment of a particularly serious crime, is a danger to the Australian community.

...

- (2) A criterion for a protection visa is that the applicant for the visa is:

- (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or

- (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm ... "

12

Section 36A of the *Migration Act* provides that:

- "(1) In considering a valid application for a protection visa made by a non-citizen, the Minister must consider and make a record of whether the Minister is satisfied of any of the following:

- (a) the non-citizen satisfies the criterion in paragraph 36(2)(a) with respect to a country and also satisfies the criterion in subsection 36(1C);

- (b) the non-citizen satisfies the criterion in paragraph 36(2)(aa) with respect to a country;

...

- (2) The Minister must do so:

- (a) before deciding whether to grant or refuse to grant the visa; and

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- (b) before considering whether the non-citizen satisfies any other criteria for the grant of the visa; and
- (c) before considering whether the grant of the visa is prevented by any provision of the Act or regulations; and
- (d) without regard to subsections 36(2C) and (3)."

13 Section 189(1) of the *Migration Act* provides that:

"If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person".

14 Section 196(1) of the *Migration Act* provides that:

"An unlawful non-citizen detained under section 189 must be kept in immigration detention until:

- (a) he or she is removed from Australia under section 198 or 199; or
- (aa) an officer begins to deal with the non-citizen under subsection 198AD(3); or
- (b) he or she is deported under section 200; or
- (c) he or she is granted a visa."

15 Section 197C provides that:

"(1) For the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.

...

- (3) Despite subsections (1) and (2), section 198 does not require or authorise an officer to remove an unlawful non-citizen to a country if:
 - (a) the non-citizen has made a valid application for a protection visa that has been finally determined; and
 - (b) in the course of considering the application, a protection finding within the meaning of subsection (4), (5), (6) or (7)

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was made for the non-citizen with respect to the country (whether or not the visa was refused or was granted and has since been cancelled); and

(c) none of the following apply:

- (i) the decision in which the protection finding was made has been quashed or set aside;
- (ii) a decision made under subsection 197D(2) in relation to the non-citizen is complete within the meaning of subsection 197D(6);
- (iii) the non-citizen has asked the Minister, in writing, to be removed to the country.

(4) For the purposes of subsection (3), a ***protection finding*** is made for a non-citizen with respect to a country if a record was made in relation to the non-citizen under section 36A that the Minister is satisfied as mentioned in paragraph 36A(1)(a), (b) or (c) with respect to the country.

(5) For the purposes of subsection (3), a ***protection finding*** is also made for a non-citizen with respect to a country if the Minister was satisfied of any of the following (however expressed and including impliedly):

...

- (b) the non-citizen satisfied the criterion in paragraph 36(2)(aa) with respect to the country;

... "

Section 198 includes the following provisions:

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

...

(6) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

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- (a) the non-citizen is a detainee; and
- (b) the non-citizen made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and
- (c) one of the following applies:
 - (i) the grant of the visa has been refused and the application has been finally determined;
 - (ii) the visa cannot be granted; and
- (d) the non-citizen has not made another valid application for a substantive visa that can be granted when the applicant is in the migration zone.

... "

CZA19

17 CZA19 is a citizen of Poland. CZA19 arrived in Australia in 2009 on a tourist visa. CZA19 was arrested and charged with a drug offence on arrival into Australia. CZA19 was issued a criminal justice stay visa. CZA19 was convicted of the drug offence and imprisoned. CZA19 escaped from prison and was re-imprisoned following conviction for the unlawful escape. CZA19 was released on parole in December 2018. On release from prison CZA19's criminal justice stay visa ceased. CZA19 was immediately detained under s 189(1) of the *Migration Act* as an unlawful non-citizen. CZA19 applied for a protection visa in January 2019. Ultimately, on 10 November 2022 the Tribunal decided as follows in respect of that application for a protection visa:

"The Tribunal remits the matter for reconsideration and directs that there are substantial grounds for believing that, as a necessary and foreseeable consequence of [CZA19] being removed from Australia to a receiving country, there is a real risk that [CZA19] will suffer significant harm."

18 This direction was based on the Tribunal having found that, in accordance with s 36(2)(aa) of the *Migration Act*, there was a real risk that if removed to his country of citizenship, Poland, CZA19 would be imprisoned as a repeat drug offender and suffer significant harm in prison by criminal groups from which he would or could not be protected by authorities in Poland.

19 CZA19 remained in immigration detention until 13 May 2024. On 13 May 2024 a delegate of the Minister refused CZA19's application for a protection visa and granted CZA19 a Bridging (Removal Pending) (Subclass 070) visa by which CZA19 was released from detention subject to conditions.

20 In an amended originating application lodged in the Federal Court on 22 May 2024, CZA19 sought in prayer 1(a) a declaration that CZA19's detention by the respondents in the period from 10 November 2022 until 13 May 2024 was unlawful.

21 On 2 July 2024 Mortimer CJ in the Federal Court ordered that "the question of [CZA19's] entitlement to the relief in prayer 1(a) of his amended originating application dated 22 May 2024 be heard separately and in advance of the remaining issues in the proceeding (the **separate question**)".

22 On 31 July 2024 Gageler CJ in this Court ordered that "[p]ursuant to s 40(1) of the *Judiciary Act 1903* (Cth), that part of the cause pending between the respondents in Federal Court of Australia proceeding number VID 247 of 2024 that is the separate question for determination referred by Chief Justice Mortimer to the Full Court of the Federal Court on 2 July 2024 be removed into the High Court of Australia".

23 According to the amended statement of agreed facts agreed between CZA19, the Commonwealth and the Minister on 22 August 2024 at "no time since at least 10 November 2022 has there been any evidence that would indicate that [CZA19]: (a) could be removed by the Department [of the Minister] to a member State of the European Union; or (b) had a right to enter and reside in any other country".

24 Other agreed facts include that, on or around 27 October 2023, CZA19 requested to be removed to Cambodia.⁵ Between 27 October 2023 and mid-January 2024, the Department investigated the possibility of removing CZA19 to Cambodia, but on 24 January 2024 the Cambodian Embassy confirmed to officers of the Department that CZA19 could not be issued a visa to enter Cambodia.

25 Further, it is an agreed fact that during the period from 10 November 2022 to 13 May 2024, aside from the investigation regarding Cambodia, the Department did not make any inquiry or investigation as to whether there is any country to

5 Noting that it is not suggested that the request was made in writing as referred to in the *Migration Act*, s 198(1).

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which CZA19 could be removed under s 198 of the *Migration Act*. The Department ordinarily does not make such inquiries or investigations while a visa application is still under consideration.

26 The amended statement of agreed facts also records that:

"For the period from 10 November 2022 to 13 May 2024:

- (a) [CZA19's] position is that there was no real prospect of removal from Australia becoming practicable in the reasonably foreseeable future;
- (b) the Respondents:
 - (i) admit there was no real prospect of removal **to the Republic of Poland** becoming practicable in the reasonably foreseeable future due to the Tribunal having directed that [CZA19] satisfied the criterion in s 36(2)(aa) of the [Migration] Act; and
 - (ii) do not admit there was no real prospect of removal **from Australia** becoming practicable in the reasonably foreseeable future in circumstances where the Respondents contend that, until 13 May 2024, there was neither the power nor a duty to remove [CZA19] from Australia.

... For the period since 13 May 2024, there has been no real prospect of [CZA19's] removal from Australia becoming practicable in the reasonably foreseeable future."

DBD24

27 DBD24 is a citizen of Vietnam. DBD24 entered Australia by sea on 22 April 2013 and was taken into detention under s 189(1) of the *Migration Act*. DBD24 was released into community detention on 11 September 2013 under a residence determination made by the Minister under s 197AB but absconded from the place specified in the residence determination on 20 October 2013. The Minister revoked the residence determination on 21 October 2013. DBD24 was an unlawful non-citizen from 21 October 2013. DBD24 was arrested on 24 June 2021. DBD24 was charged with drug offences. DBD24 was convicted of the drug offences in January 2022 and imprisoned. DBD24 was released from prison in June 2023 and taken immediately into immigration detention under s 189(1) of the *Migration Act*.

28 In the meantime, on 15 November 2021, DBD24 applied for a Safe Haven Enterprise (Class XE) (Subclass 790) visa (a form of protection visa). Ultimately, on 18 December 2023 the Tribunal decided as follows:

"The Tribunal remits the matter for reconsideration with the direction that [DBD24] satisfies s 36(2)(aa) of the Migration Act."

29 As noted, this direction was based on the Tribunal having found that, in accordance with s 36(2)(aa) of the *Migration Act*, there was a real risk that if removed to his country of citizenship, Vietnam, DBD24 would suffer significant harm by being sentenced to death for the drug offences for which he had been convicted and served a sentence of imprisonment in Australia (because of, amongst other things, the inferred likely response of Vietnamese authorities to the fact that DBD24's sentence in Australia had been suspended in part).

30 In June 2024 DBD24 filed an amended originating application in the Federal Court seeking, in prayer 1, a writ of habeas corpus directed to the respondents and, in prayer 2, a writ of mandamus requiring the Minister to grant or refuse DBD24's application for the Safe Haven Enterprise visa. On 2 July 2024 Mortimer CJ in the Federal Court ordered that "the question of the [DBD24's] entitlement to the relief in prayer 1 of the amended originating application filed on 7 June 2024 be heard separately and in advance of the remaining issues in the proceeding (the **separate question**)". On 31 July 2024 Gageler CJ in this Court ordered that the separate question be removed to this Court pursuant to s 40(1) of the *Judiciary Act*.

31 On 1 October 2024 DBD24 was granted a Resolution of Status (Subclass 851) visa and was released from immigration detention. As a result, DBD24 reformulated his claim to seek a declaration as to the lawfulness of his earlier detention.

32 On 22 October 2024 DBD24 filed a writ of summons in this Court seeking a declaration that DBD24's detention between either 23 June or 18 December 2023 and 1 October 2024 was unlawful and damages. The parties filed a special case in the proceeding in this Court on 4 November 2024 in which they agreed that:

"30. During the period between 22 April 2013 and 1 October 2024, the Department did not make any inquiry or investigation as to whether there is any third country to which [DBD24] could be removed under s 198 of the [Migration] Act. The Department ordinarily does not make such inquiries or investigations while a visa application is still under consideration.

11.

31. During the period between 18 December 2023 and 1 October 2024, there was no real prospect of [DBD24's] removal to Vietnam becoming practicable in the reasonably foreseeable future due to the Tribunal having directed that he satisfies the criteria in s 36(2)(aa) of the Migration Act.
32. Between at least 18 December 2023 and 1 October 2024, there was no evidence that would indicate that [DBD24] had a right to enter and reside in any third country during that period."

Inconsistency with constitutional principle and statutory scheme

The principle in NZYQ as derived from the Lim principle

33 The claimants' arguments are inconsistent with constitutional principle. The constitutional limitation expressed in *NZYQ*, as derived from the reasoning in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*,⁶ that the lawful duration of executive detention of an alien ends "when there is no real prospect of removal of the alien from Australia becoming practicable in the reasonably foreseeable future"⁷ depends on the alien first having "failed to obtain permission to remain in Australia".⁸

34 In *NZYQ*, six members of the Court said:⁹

"if the only purposes peculiarly capable of justifying executive detention of an alien are, as was said in *Lim*, removal from Australia or enabling an application for permission to remain in Australia to be made and considered, then the absence of any real prospect of achieving removal of the alien from Australia in the reasonably foreseeable future refutes the existence of the first of those purposes".

35 The expression of the constitutional limitation in *NZYQ* reflects: (a) that detention in custody is prima facie punitive and therefore may not be imposed in

6 (1992) 176 CLR 1.

7 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1018 [55]; 415 ALR 254 at 268.

8 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1018 [55]; 415 ALR 254 at 268.

9 (2023) 97 ALJR 1005 at 1016 [46]; 415 ALR 254 at 266.

an exercise of non-judicial power unless the power is reasonably capable of being seen as necessary for a legitimate and non-punitive purpose;¹⁰ (b) the reasoning in *Lim*, from which the constitutional limitation expressed in *NZYQ* is derived, that provisions of the *Migration Act* requiring detention of an alien "will be valid laws if the detention which they require and authorize is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered", each of those being a legitimate and non-punitive purpose;¹¹ (c) the restatement in *NZYQ* that *Lim* insisted "that the detention of an alien must be limited to a period that is 'reasonably capable of being seen as necessary' for one or other of two legitimate and non-punitive purposes, identified in terms of removing the alien from Australia or enabling an application by the alien for permission to remain in Australia to be made and considered",¹² only the former of which was potentially available in *NZYQ*, the latter potential having been exhausted on final determination of *NZYQ*'s visa application;¹³ (d) the facts of *NZYQ*, in which *NZYQ*'s visa application was finally determined;¹⁴ and (e) the operation of the *Migration Act* in which, as explained in *NZYQ*, the final determination of *NZYQ*'s visa application was a condition precedent to the engagement of the power and duty of an officer to remove *NZYQ* from Australia as provided for in s 198(6) of the Act.¹⁵

36

As to this last point, in *ASF17 v The Commonwealth* Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ explained 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

10 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1015 [40]; 415 ALR 254 at 264-265.

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

12 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1014 [31]; 415 ALR 254 at 262-263.

13 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1009 [4]; 415 ALR 254 at 256-257.

14 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1009 [4]; 415 ALR 254 at 256-257.

15 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1010 [13], 1018 [55]; 415 ALR 254 at 258, 268.

of removal of the alien from Australia becoming practicable in the reasonably foreseeable future".¹⁶

37 The detention the claimants impugn as unlawful occurred while each was the subject of a pending visa application. In the case of CZA19, the protection visa application was made in January 2019 and was finally determined by refusal on 13 May 2024. In the case of CZA19, the alleged period of unlawful detention commences on 10 November 2022 (the date of the Tribunal's finding that s 36(2)(aa) applied to CZA19) and extends to CZA19's release from detention on 13 May 2024, at which time CZA19's protection visa application was refused and bridging visa was granted. In the case of DBD24, the Safe Haven Enterprise visa application was made on 15 November 2021 and was finally determined on 1 October 2024 by the grant to DBD24 of the Resolution of Status (Subclass 851) visa. The alleged period of unlawful detention of DBD24 commences on 23 June or 18 December 2023 (being the dates, respectively, when DBD24 was taken into immigration detention after release from prison and when the Tribunal's finding that s 36(2)(aa) applied to DBD24) and ends on 1 October 2024 when DBD24 was granted the Resolution of Status (Subclass 851) visa and released from detention.

38 No authority supports the claimants' argument that, absent other exceptional circumstances that are presently irrelevant,¹⁷ there is but one legitimate and non-punitive purpose justifying the Executive detaining an alien under statutory authority, being the removal of the alien from Australia, so that, if there is no real prospect of removal of the alien from Australia becoming practicable in the reasonably foreseeable future, continued detention of the alien is unlawful whether the alien has a pending visa application or not. *NZYQ*, and all preceding authority including *Lim*, is to the effect that there are relevantly two legitimate and non-punitive purposes capable of making detention of an alien constitutionally permissible if the detention is otherwise authorised by statute. One purpose is to determine if the alien should be permitted to remain in Australia and, if so, on what conditions. The other purpose is to remove the alien from Australia. The claimants do not seek leave to re-open and to overturn any of that authority and therefore cannot be permitted to circumvent that authority.

16 (2024) 98 ALJR 782 at 788-789 [31]; 418 ALR 382 at 390 (emphasis added).

17 See, eg, *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27-29; *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1013 [27]; 415 ALR 254 at 261-262.

39 In *Lim*, Brennan, Deane and Dawson JJ explained that under the aliens power in s 51(xix) of the *Constitution* to make laws with respect to "aliens" a law:¹⁸

"may, without trespassing beyond the reach of the legislative power conferred by s 51(xix), *either* exclude the entry of non-citizens or a particular class of non-citizens into Australia *or* prescribe conditions upon which they may be permitted to enter and remain; *and* it may also provide for their expulsion or deportation".

40 That each specified purpose, permitting an alien entry including on conditions and expelling or deporting an alien, is constitutionally permissible was reinforced by the characterisation of the impugned legislation in *Lim* as "a law or laws with respect to the detention in custody, pending departure *or* the grant of an entry permit, of the class of 'designated' aliens to which they refer".¹⁹ The relevant constitutional limitation in *Lim* was that Ch III of the *Constitution* vested the judicial power of the Commonwealth, including the power of punishment, exclusively in the judiciary. To avoid the characterisation of detention in custody as punishment, the impugned legislation was valid "if the detention which they require and authorize is limited to what is reasonably capable of being seen as necessary for the purposes of deportation *or* necessary to enable an application for an entry permit to be made and considered".²⁰

41 In *Re Woolley; Ex parte Applicants M276/2003*, Gleeson CJ explained that, in *Lim*, Brennan, Deane and Dawson JJ:²¹

"[p]lainly ... did not contemplate that it is essential for a person to be in custody in order to make an application for an entry permit, or that it is only possible for the Executive to consider such an application while the applicant is in custody. They were referring to the time necessarily involved in receiving, investigating and determining an application for an entry permit. ... If a non-citizen enters Australia without permission, then the power to exclude the non-citizen extends to a power to investigate and determine an application by the non-citizen for permission to remain, and to hold the non-citizen in detention for the time necessary to follow the

18 (1992) 176 CLR 1 at 26 (emphasis added).

19 (1992) 176 CLR 1 at 26 (emphasis added).

20 (1992) 176 CLR 1 at 33 (emphasis added); Mason CJ agreeing at 10.

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

required procedures of decision-making. The non-citizen is not being detained as a form of punishment, but as an incident of the process of deciding whether to give the non-citizen permission to enter the Australian community. Without such permission, the non-citizen has no legal right to enter the community, and a law providing for detention during the process of decision-making is not punitive in nature."

42 In *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship*, Crennan, Bell and Gageler JJ explained *Lim* as authority that "the period of detention [must] be limited to the time necessarily taken in administrative processes directed to the limited purposes identified",²² being "processes allowing for application for, and consideration of, the grant of permission to remain in Australia, and providing for deportation or removal if permission is not granted".²³

43 In *Plaintiff S4/2014 v Minister for Immigration and Border Protection*, French CJ, Hayne, Crennan, Kiefel and Keane JJ explained that because of the authoritative reasoning in *Lim*:²⁴

"the provisions of the [Migration] Act which then authorised mandatory detention of certain aliens were valid laws if the detention which those laws required and authorised was limited to what was reasonably capable of being seen as necessary for the purposes of deportation *or* to enable an application for permission to enter and remain in Australia to be made and considered. It follows that detention under and for the purposes of the Act is limited by the purposes for which the detention is being effected. And it further follows that, when describing and justifying detention as being under and for the purposes of the Act, it will always be necessary to identify the purpose for the detention. *Lawfully, that purpose can only be one of three purposes: the purpose of removal from Australia; the purpose of receiving, investigating and determining an application for a visa permitting the alien to enter and remain in Australia; or, in a case such as the present, the purpose of determining whether to permit a valid application for a visa.*"

44 In *Plaintiff M96A/2016 v The Commonwealth*, Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ said that the principle in *Lim* that laws authorising

22 (2013) 251 CLR 322 at 369 [139] (emphasis omitted).

23 (2013) 251 CLR 322 at 369 [139] (emphasis added).

24 (2014) 253 CLR 219 at 231 [26] (emphasis added).

or requiring executive detention of non-citizens must be "reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered"²⁵ requires:²⁶

"two matters to be considered. First, it requires the purpose of the detention to be identified. Secondly, it requires consideration of the time necessarily involved in the particular case to deport the non-citizen *or* to receive, investigate, consider, and determine an application for permission to remain in Australia."

45 The arguments for the claimants that the two separate legitimate and non-punitive purposes of processing a visa application (on the one hand) and facilitating removal of an alien from Australia (on the other hand) collapse into a single purpose of facilitating removal of an alien from Australia, either generally or where there is no real prospect of removal of the alien from Australia becoming practicable in the reasonably foreseeable future, is not only contrary to the unchallenged authority above, but also contrary to the constitutional analysis which underlies the authorities. That analysis is that the aliens power in s 51(xix) of the *Constitution* empowers the Commonwealth Parliament to make laws with respect to each of: prohibiting aliens from entering Australia; determining if aliens should be permitted to remain in Australia once they have entered and, if so, on what conditions; and removing aliens from Australia. Detention of an alien for either of the latter two purposes may infringe on the judicial power of the Commonwealth, vested exclusively in courts by Ch III of the *Constitution*, if and when the detention is no longer "reasonably capable of being seen as necessary" because, from that point, the continued detention of the alien may amount to punishment, which is an exclusively judicial power.²⁷ But each purpose, in and of itself, is a legitimate and non-punitive purpose.

46 Within this analytical framework, continued detention of an alien for the purpose of visa processing does not cease to be "reasonably capable of being seen as necessary" merely because, at one or more times throughout the period of detention or for the duration of the period of detention, there is no real prospect of removal of the alien from Australia becoming practicable in the reasonably

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

26 (2017) 261 CLR 582 at 593-594 [21] (emphasis added; footnotes omitted).

27 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1013 [28]; 415 ALR 254 at 262.

foreseeable future. This is because detention to enable visa processing remains constitutionally permissible for so long as that detention is itself "reasonably capable of being seen as necessary" for the legitimate and non-punitive purpose of visa processing. As the respondents submitted, detention is reasonably capable of being seen as necessary for the purpose of visa processing on at least two overarching bases unconnected to removal of the unlawful non-citizen from Australia. First, it makes an unlawful non-citizen available for investigations into their identity, nationality, criminal history, security profile and health, and allows conditions to be imposed or other steps to be taken to mitigate any risks that are identified as a result, before the non-citizen enters the community. Second, it reduces the risk that the integrity of the visa application process will be undermined by an unlawful non-citizen absconding into the community before their application to enter and remain in Australia can be determined.

47 The claimants' argument, if accepted, would distort the applicable constitutional analytical framework. That there is no real prospect of removal of an alien from Australia becoming practicable in the reasonably foreseeable future does not mean that the Commonwealth Parliament, in the exercise of legislative power under s 51(xix) of the *Constitution*, is thereby prevented from making laws about whether and, if so, on what conditions an alien should be permitted to remain in Australia and lawfully detaining an alien for that purpose. The limit on the duration of that detention remains that expressed in *Lim*, being the reasonable necessity of detention for that legitimate and non-punitive purpose. The limit is enforceable by the constitutional writ of mandamus requiring the Minister to complete the statutory task of consideration of the alien's status and the conditions, if any, on which the alien will be permitted to remain in Australia within a period which, in all the circumstances, is itself reasonable.²⁸

Sufficient justification for detention

48 The claimants' further argument that if the visa processing purpose is an independent purpose capable of justifying the detention of CZA19 and DBD24 then it did not do so because detention was not "sufficiently tailored"²⁹ to the visa processing purpose also misconceives the *Lim* principle, but in a different respect from the claimants' principal argument. The characterisation of a law for the purpose of ascertaining if the law authorises non-judicial punishment and thereby infringes on the exclusive judicial power of the Commonwealth vested in courts by Ch III of the *Constitution* "requires an assessment of both means and ends, and

28 See, eg, *The Commonwealth v AJL20* (2021) 273 CLR 43 at 67-68 [35]-[37].

29 *Jones v The Commonwealth* (2023) 97 ALJR 936 at 953 [78]; 415 ALR 46 at 65.

the relationship between the two".³⁰ As explained in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs*:³¹

"In the constitutional context, in contemporary Australia, the question is whether there is *justification* for a non-judicial exercise of power interfering with liberty or bodily integrity. Justification involves asking if the power having a prima facie punitive character (by default or otherwise) is reasonably capable of being seen to be necessary (in the relevant sense of 'reasonably appropriate and adapted' rather than essential or indispensable) for a legitimate and non-punitive purpose in which event the power's constitutional character is non-punitive. By breaking the question of characterisation into these subsidiary steps, the method and structure of the required analysis accommodates the complexity that is inherent in the question of characterisation."

49 The scheme of the *Migration Act* and unchallenged authority concerning its meaning and operation, along with the fact that the relevant duties that the *Migration Act* imposes (for consideration and determination of an unlawful non-citizen's visa application and otherwise) are enforceable by the constitutional writ of mandamus, work together to ensure that detention of an unlawful non-citizen who has a pending visa application is reasonably capable of being seen to be necessary (in the relevant sense of "reasonably appropriate and adapted" rather than essential or indispensable) to the purpose of visa processing (and ultimate end of visa determination).

50 In *NZYQ* the Court unanimously explained why it would not re-open the construction of the relevant provisions of the *Migration Act* authorising continuing detention of an unlawful non-citizen as determined in *Al-Kateb v Godwin*.³² The relevant construction was that "ss 189(1) and 196(1) on their proper construction

30 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1016 [44]; 415 ALR 254 at 265.

31 (2024) 99 ALJR 1 at 12 [18]; 419 ALR 457 at 468 (footnotes omitted), quoting *Jones v The Commonwealth* (2023) 97 ALJR 936 at 946 [42]; 415 ALR 46 at 56, in turn quoting *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 199-200 [39]. See also *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1015 [40]; 415 ALR 254 at 264-265.

32 (2004) 219 CLR 562 at 643 [241]. See also *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1011 [19]; 415 ALR 254 at 260.

applied to require the continuing detention of" an unlawful non-citizen.³³ In *NZYQ* it was observed that in *The Commonwealth v AJL20*³⁴ Kiefel CJ, Gageler, Keane and Steward JJ:³⁵

"endorsed key aspects of the reasoning of the majority on the issue of statutory construction in *Al-Kateb*. The majority did so in referring to the statutory construction holding in *Al-Kateb*, and saying that the word 'until' in conjunction with the word 'kept' in s 196(1) indicates that detention under s 189(1) is 'an ongoing or continuous state of affairs that is to be maintained up to the time that the event (relevantly, the grant of a visa or removal) *actually occurs*'".

51 In *AJL20* Kiefel CJ, Gageler, Keane and Steward JJ also endorsed the proposition that "the operation of ss 189(1) and 196(1) in authorising the ... detention [of an applicant seeking an order in the nature of habeas corpus] was not conditioned on the actual achievement of removal of the unlawful non-citizen as soon as reasonably practicable by the Executive".³⁶ Their Honours said that this "faithfully reflects the intention of the [Migration] Act" and that "[n]o constitutional imperative requires departure from it".³⁷ That there was no such constitutional imperative reflected in part the fact that detention was "hedged about by enforceable duties, such as that in s 198(6), that give effect to legitimate non-punitive purposes. Upon performance of these duties, the detention is brought to an end."³⁸ Further, and as their Honours put it:³⁹

"Where the Executive is dilatory in performing the hedging duties imposed upon it ... the remedy of mandamus is available to compel the proper performance of those duties. It is precisely because the hedging

33 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1011 [14]; 415 ALR 254 at 258.

34 (2021) 273 CLR 43.

35 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1012 [22]; 415 ALR 254 at 260-261 (emphasis in original).

36 *The Commonwealth v AJL20* (2021) 273 CLR 43 at 57 [4].

37 *The Commonwealth v AJL20* (2021) 273 CLR 43 at 58 [5].

38 *The Commonwealth v AJL20* (2021) 273 CLR 43 at 70 [44].

39 *The Commonwealth v AJL20* (2021) 273 CLR 43 at 73-74 [52] (footnotes omitted).

duties may be enforced so as to bring the detention of the unlawful non-citizen to an end that the executive detention authorised and required by ss 189 and 196 can be seen to be within the Parliament's power under s 51(xix) of the *Constitution* as limited by the implications of Ch III. These hedging duties are not things written in water. A failure on the part of the responsible officers of the Executive to comply with an order of the court mandating performance of their statutory duties may result in those officers being committed to prison for contempt of court. By this means, judicial power is exercised to give effect to the scheme of the [Migration] Act, enforcing the supremacy of the Parliament over the Executive."

52 The claimants' argument that their detention became unlawful after the expiry of a reasonable time to process and determine their visa applications is irreconcilable with the statutory construction of ss 189(1) and 196(1) determined in *Al-Kateb*, which this Court unanimously refused leave to re-open in *NZYQ*.⁴⁰ The claimants cannot be permitted to re-open that issue of statutory construction and thereby by-pass the reasons for this Court refusing leave to do so in *NZYQ*.

53 The reasoning in *Plaintiff S4/2014* provides no support for the claimants' arguments. In saying that in the *Migration Act's* operation, "the requirement to remove unlawful non-citizens as soon as reasonably practicable is to be treated as the leading provision, to which provisions allowing consideration of whether to permit the application for, or the grant of, a visa to an unlawful non-citizen who is being held in detention are to be understood as subordinate",⁴¹ French CJ, Hayne, Crennan, Kiefel and Keane JJ were not suggesting either that the visa processing purpose was subordinate to and not independent from the removal purpose or that the powers and duties of removal (leaving aside s 198(1)) operated irrespective of a pending visa application. They were explaining that because the power and duty of removal was always expressed in terms of compliance "as soon as reasonably practicable" the visa processing purpose also had to be completed "as soon as reasonably practicable". It is this implicit temporal requirement that enables the duty of consideration and determination of a visa to be subject to the writ of mandamus.⁴²

40 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1011-1012 [19]-[23]; 415 ALR 254 at 260-261.

41 (2014) 253 CLR 219 at 233-234 [35] (footnote omitted).

42 See, eg, *The Commonwealth v AJL20* (2021) 273 CLR 43 at 67-68 [35]-[37].

54 The true position under the *Migration Act* is the converse of the claimants' arguments. As exposed by the reasoning in *ASF17*, "[f]or 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*".⁴³ Absent permissibility of removal of an unlawful non-citizen under the *Migration Act*, there is no scope for the question of reasonable practicability of removal to arise and therefore no scope for the constitutional limitation determined in *NZYQ* to be engaged.

55 As to s 198(1), the power and duty to remove an unlawful non-citizen in s 198(1) depends on the unlawful non-citizen making a request in writing for such removal. CZA19 did request removal to Cambodia but not, apparently, in writing. By the terms of s 198(1), an officer must "remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed". In any event, removal of CZA19 to Cambodia as CZA19 requested, on the agreed facts, never became reasonably practicable because Cambodia would not issue CZA19 with a visa permitting CZA19 to enter Cambodia. Accordingly, no power or duty in s 198(1) in fact to remove CZA19 to Cambodia was engaged. DBD24 also never made a request in writing for removal and therefore s 198(1) never applied to DBD24.

56 The only other power and duty to remove an unlawful non-citizen relevant to the present cases, s 198(6), depends on several conditions, including, relevantly, that "the grant of the visa has been refused and the application has been finally determined". For CZA19 that did not occur until 13 May 2024 when CZA19's application for a protection visa was refused, CZA19 was granted a Bridging (Removal Pending) (Subclass 070) visa, and CZA19 was released from detention. For DBD24 that did not occur until 1 October 2024 when DBD24 was granted a Resolution of Status (Subclass 851) visa and was released from immigration detention. Accordingly, until 13 May 2024 and 1 October 2024 there was no power and no duty under s 198(6) for an officer to remove CZA19 or DBD24 respectively from Australia. Their detention therefore remained mandatory under s 196(1). That is, for so long as s 196(1) required continued detention of CZA19 and DBD24 and no request in writing for removal was made under s 198(1), there was no occasion for an officer to decide if removal of either of them was reasonably practicable or not. That question simply never arises and, in accordance with the statutory scheme, could not arise other than by operation of s 198(1).

43 (2024) 98 ALJR 782 at 789 [35]; 418 ALR 382 at 390-391 (emphasis added).

57 Further, on the agreed facts, it cannot be said that there was only a "tenuous" connection⁴⁴ between the end of the visa processing purpose (being determination of the visa applications) and the means of ensuring that purpose could be achieved (being their continued detention). Each of CZA19 and DBD24 made an application for a protection visa. Each lodged an application with the Tribunal for review of the refusal to grant them a protection visa. Each prosecuted their review application before the Tribunal to completion. Each had criminal convictions complicating the assessment of their visa applications. In the case of CZA19 an extradition request had been made by Poland which further complicated the assessment of CZA19's visa application. So too did information obtained by the Department during the processing of CZA19's visa application containing allegations that CZA19 had committed serious criminal conduct outside of Australia. Each of CZA19 and DBD24 also had a history of absconding from lawful custody.

58 Apart from being wholly speculative in this case, that the same end (determination of the visa applications) might have been achievable by other means is no answer to the fact that the claimants' continued detention for the visa processing purpose was reasonably appropriate and adapted to the determination of their visa applications. This also effectively answers the submissions for the intervener, LPSP, to the effect that the task of characterisation of the purpose of a law to determine whether it infringes the vesting of the exclusive judicial power of the Commonwealth in the courts should proceed by a form of structured proportionality analysis.

59 Indeed, nothing in the agreed facts provides a basis for any inference that the continued detention of each of CZA19 and DBD24 was other than reasonably necessary (in the requisite sense of reasonably appropriate and adapted) to the legitimate and non-punitive purpose of processing their respective visa applications.

Conclusions and orders

60 In the case of CZA19 the separate question for determination removed into this Court, asking if CZA19 is entitled to the relief in prayer 1(a) of his amended originating application dated 22 May 2024 (a declaration that CZA19's detention by the respondents in the period from 10 November 2022 to 13 May 2024 was unlawful), is answered as follows:

No.

44 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 37 [88].

61 In the case of DBD24 the question of law in the special case:

"In their purported application to the Plaintiff in the period between 18 December 2023 and 1 October 2024 (or part thereof), were ss 189(1) and 196(1) of the *Migration Act 1958* (Cth) invalid on the ground that, following the direction made by the Administrative Appeals Tribunal on 18 December 2023, there was no real prospect of his removal becoming practicable in the reasonably foreseeable future?"

is answered as follows:

No.

62 In the case of CZA19, the cause was removed on the condition that the Commonwealth pay CZA19's costs of the proceeding in this Court on a party-party basis. In the case of DBD24, the cause was initially removed on the same condition, but after he was released from immigration detention leave was granted on 29 October 2024 for DBD24 to discontinue that proceeding insofar as it had been removed to this Court. In its place, DBD24 commenced his proceeding in the Court's original jurisdiction in which there is no such costs condition. It should accordingly be ordered that the Commonwealth also pay DBD24's costs of the proceeding on a party-party basis.

63 GORDON J. The specific constitutional principle restated and reinforced by *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*⁴⁵ and *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs*⁴⁶ is that, exceptional cases aside,⁴⁷ "a law enacted by the Commonwealth Parliament which authorises the detention of a person, other than through the exercise by a court of the judicial power of the Commonwealth in the performance of the function of adjudging and punishing criminal guilt, will contravene Ch III of the *Constitution* unless the law is reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose".⁴⁸ In other words, detention is "penal or punitive unless justified as otherwise".⁴⁹ Whether a law imposes detention as "punishment" is "ultimately directed to a single question of characterisation" being whether the law "is properly characterised as punitive".⁵⁰

64 The outcomes in both *NZYQ* and *YBFZ* also depended on further important and inter-related principles. First, the "fundamental and long-established principle that no person – alien or non-alien – may be detained by the executive absent statutory authority or judicial mandate",⁵¹ as "an alien who is actually within this country enjoys the protection of our law".⁵² Second, that the "relevant difference between a non-alien and an alien for the purposes of Ch III 'lies in the vulnerability

45 (2023) 97 ALJR 1005; 415 ALR 254.

46 (2024) 99 ALJR 1; 419 ALR 457.

47 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 28-29.

48 *NZYQ* (2023) 97 ALJR 1005 at 1015 [39]; 415 ALR 254 at 264. See also *Lim* (1992) 176 CLR 1 at 33; *Jones v The Commonwealth* (2023) 97 ALJR 936 at 947 [44], [49], 969 [155], 974 [188]; 415 ALR 46 at 56, 57, 86, 93; *YBFZ* (2024) 99 ALJR 1 at 10 [8], 12 [18]; 419 ALR 457 at 465, 468.

49 *NZYQ* (2023) 97 ALJR 1005 at 1015 [39]; 415 ALR 254 at 264. See also *YBFZ* (2024) 99 ALJR 1 at 10 [8]; 419 ALR 457 at 465.

50 *NZYQ* (2023) 97 ALJR 1005 at 1016 [44]; 415 ALR 254 at 265. See also *ASF17 v The Commonwealth* (2024) 98 ALJR 782 at 789 [32]; 418 ALR 382 at 390.

51 *NZYQ* (2023) 97 ALJR 1005 at 1013 [27]; 415 ALR 254 at 262; *YBFZ* (2024) 99 ALJR 1 at 10 [9]; 419 ALR 457 at 465. See also *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 520-521, 528.

52 *Lim* (1992) 176 CLR 1 at 29; *YBFZ* (2024) 99 ALJR 1 at 10 [9]; 419 ALR 457 at 465.

of the alien to exclusion or deportation".⁵³ Third, that a statutory power authorising the executive to detain an alien in custody for the purpose of receiving, investigating, and determining an application by that alien to remain in Australia or, after determination, to admit or deport the alien "is neither punitive in nature nor part of the judicial power of the Commonwealth" but "takes its character from the executive powers to exclude, admit and deport of which it is an incident".⁵⁴ Fourth, a legitimate and non-punitive purpose which in other circumstances would justify a non-citizen being detained in custody ceases to justify the detention 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" ("the NZYQ limit").⁵⁵

65 CZA19 and DBD24 contended that the NZYQ limit also limits the power of the Commonwealth, under the *Migration Act 1958* (Cth), to detain an alien pending determination of their visa application. More particularly, CZA19 and DBD24 contended that the NZYQ limit applies to an alien who is detained for purpose of investigating, considering and determining a visa application in the following specific circumstances:

- (1) CZA19 and DBD24 had each made an application for a protection visa: CZA19 applied for a Protection (Subclass 866) visa and DBD24 applied for a Safe Haven Enterprise (Class XE) (Subclass 790) visa;
- (2) Each protection visa application was refused by a delegate of the Minister on the basis it did not satisfy any protection visa criterion in s 36(2) of the *Migration Act*;
- (3) CZA19 and DBD24 each applied to the Administrative Appeals Tribunal ("the Tribunal") for review of the delegate's decision and the Tribunal remitted their applications to the delegate with a direction to the effect that they each satisfied the complementary protection criterion in s 36(2)(aa) of the *Migration Act* ("the Tribunal's directions");
- (4) Following reconsideration of their protection visa applications, both CZA19 and DBD24 were granted visas and released from immigration

53 *YBFZ* (2024) 99 ALJR 1 at 10 [10]; 419 ALR 457 at 465, quoting *NZYQ* (2023) 97 ALJR 1005 at 1013 [29]; 415 ALR 254 at 262, in turn quoting *Lim* (1992) 176 CLR 1 at 29.

54 *YBFZ* (2024) 99 ALJR 1 at 10 [10]; 419 ALR 457 at 466, quoting *Lim* (1992) 176 CLR 1 at 32.

55 *NZYQ* (2023) 97 ALJR 1005 at 1018 [55]; 415 ALR 254 at 268; *ASF17* (2024) 98 ALJR 782 at 784-785 [1], 788-789 [31]-[32]; 418 ALR 382 at 384, 390; *YBFZ* (2024) 99 ALJR 1 at 10 [11]; 419 ALR 457 at 466.

detention.⁵⁶ CZA19 was refused the visa for which he applied. However, on the same day, he was granted a Bridging R (Class WR) (Removal Pending) (Subclass 070) visa subject to conditions and released from immigration detention because the Department had assessed that "the NZYQ constitutional limit ... has been reached". On 1 October 2024, DBD24 was granted a Resolution of Status (Subclass 851) visa;⁵⁷

- (5) From the time of the Tribunal's directions until CZA19 and DBD24 were released from immigration detention, the statutory basis for their detention was ss 189(1)⁵⁸ and 196(1)(c)⁵⁹ of the *Migration Act*. Both were unlawful non-citizens in the migration zone, who were being kept in immigration detention until they were granted a visa. They were not being kept in immigration detention until they were removed from Australia under s 198⁶⁰ because s 198 did not require their removal from Australia as soon as reasonably practicable;
- (6) Neither CZA19 nor DBD24 had made a request for removal for the purposes of s 198(1) of the *Migration Act*. On or around 27 October 2023, CZA19 requested to be removed to Cambodia. While this request was referred to by CZA19's counsel in oral argument, it was not suggested that this was a request in writing for removal for the purposes of s 198(1). DBD24 never made a request in writing for removal and therefore s 198(1) never applied to DBD24; and

⁵⁶ cf *Migration Act*, s 197AC(1).

⁵⁷ DBD24's application for a Safe Haven Enterprise visa had been converted into an application for this visa by force of reg 2.08G of the *Migration Regulations 1994* (Cth).

⁵⁸ *Migration Act*, s 189(1) provides that "[i]f an officer knows or reasonably suspects that a person in the migration zone ... is an unlawful non-citizen, the officer must detain the person".

⁵⁹ *Migration Act*, s 196(1)(c) provides that "[a]n unlawful non-citizen detained under section 189 must be kept in immigration detention until ... he or she is granted a visa".

⁶⁰ *Migration Act*, s 196(1)(a) relevantly provides for the detention of an unlawful non-citizen until "he or she is removed from Australia under section 198".

27.

- (7) CZA19 and DBD24's visa applications had not been "finally determined" for the purposes of s 198(6) at the time that the Tribunal's directions were made.⁶¹

66 CZA19 and DBD24's argument raised two issues:

- (1) whether this Court's decision in *NZYQ* requires the conclusion that CZA19 and DBD24's detention ceased to be authorised following the Tribunal's directions to the effect that they satisfied s 36(2)(aa) of the *Migration Act* until they were granted visas and released from immigration detention ("the impugned period"); and
- (2) if not, whether ss 189(1) and 196(1) of the *Migration Act*, in their application to CZA19 and DBD24 during the impugned period were invalid because they involved the imposition of "punishment" by the executive, contrary to Ch III of the *Constitution*.

67 For the reasons that follow, *NZYQ* does not supply an answer to these cases because CZA19 and DBD24's detention during the impugned period was not for the purpose of removal. Following the Tribunal's directions, ss 189(1) and 196(1) of the *Migration Act* were valid in their application to CZA19 and DBD24 because their detention pursuant to those provisions was reasonably capable of being seen as necessary for the legitimate non-punitive purpose of processing CZA19 and DBD24's extant visa applications.

68 It is also important to state what these cases do not address. In their written submissions, CZA19 and DBD24 sought to make an alternative argument that authority to detain an alien under the *Migration Act* while their visa application is being decided runs out once the Minister has had a "reasonable time" in which to make the decision but has not done so. In their written submissions in reply, CZA19 and DBD24 did not press for that argument to be determined in this Court and, consistent with that position, did not address that argument in their oral submissions.

***NZYQ* does not supply the answer**

69 CZA19 and DBD24 did not submit that the holding in *NZYQ* required their release for the duration of the impugned period but sought an extension of the *NZYQ* limit to persons in their position in that period. Notwithstanding this, it is necessary to establish what the Court in fact held in *NZYQ*, and why that does not supply the answer to these cases, in order to ascertain the nature and scope of the "extension" to the *NZYQ* limit sought by CZA19 and DBD24.

61 See [72] below.

70 First, the Court's reasoning in *NZYQ* reflects that the NZYQ limit was intended to be, and was, confined to non-citizens in respect of whom the duty to remove in s 198 of the *Migration Act* was engaged. The Court expressly stated the NZYQ limit was "the appropriate expression of the applicable constitutional limitation under a statutory scheme *where there is an enforceable duty to remove an alien from Australia as soon as reasonably practicable*".⁶²

71 Second, that accords with the facts in *NZYQ*: the plaintiff had made a request for removal under s 198(1), and his visa application had been "finally determined".⁶³ There was no doubt his detention at the relevant points in time was for the purpose of removal: the duty to remove had arisen under both ss 198(1) and 198(6) of the *Migration Act*.

72 The position of CZA19 and DBD24 was different; during the impugned period, the duty to remove under s 198 of the *Migration Act* had not been enlivened. Neither CZA19 nor DBD24 had made a request for removal from Australia under s 198(1). CZA19 and DBD24's visa applications had not been "finally determined" for the purposes of s 198(6). Each application was not "finally determined", as it was not the case that a decision made in respect of the application was not, or was no longer, subject to merits review under Pt 7 of the *Migration Act*.⁶⁴ Once the Tribunal decided to remit the matters for reconsideration with the Tribunal's directions, there was no "decision" that had been made in respect of the applications.

73 Following the Tribunal's directions, CZA19 and DBD24's detention for the impugned period was for a different purpose to detention pending removal: it was for the purpose of processing their extant visa applications. Consistent with this, it was agreed by the parties that if CZA19 or DBD24 had either made a request for removal or withdrawn their visa applications following the Tribunal's directions, the Department would have been required to release them from immigration detention if the NZYQ limit was met.

62 *NZYQ* (2023) 97 ALJR 1005 at 1018 [55]; 415 ALR 254 at 268 (emphasis added). See also *ASF17* (2024) 98 ALJR 782 at 788-789 [31]; 418 ALR 382 at 390.

63 *NZYQ* (2023) 97 ALJR 1005 at 1009 [4]-[5], 1010 [13]; 415 ALR 254 at 256-257, 258.

64 *Migration Act* (as in force during the impugned period), s 5(9)(a).

Migration Act authorised CZA19 and DBD24's detention

74 Most recently, in *NZYQ*, the Court said:⁶⁵

"[I]f the only purposes peculiarly capable of justifying executive detention of an alien are, as was said in *Lim*, removal from Australia *or enabling an application for permission to remain in Australia to be made and considered*, then the absence of any real prospect of achieving removal of the alien from Australia in the reasonably foreseeable future refutes the existence of the first of those purposes."

75 That detention for visa processing is a legitimate non-punitive purpose independent of detention for the purpose of removal is well established.⁶⁶ Detention for visa processing is an independent purpose *because* detention may facilitate visa processing: it makes non-citizens, who might otherwise be at risk of absconding, available for investigations into their identity, nationality, criminal history, security profile and health, and allows conditions to be imposed or other steps to be taken to mitigate risks that are identified if they are to be granted a visa and released from immigration detention.

76 But detention merely for the purpose of *segregating* a non-citizen from the Australian community pending the grant of a visa is *not* a legitimate non-punitive purpose.⁶⁷ This is consistent with the principle, recently affirmed by this Court, that "an alien who is actually within this country enjoys the protection of our law".⁶⁸ "[T]he *Constitution* does not permit of different grades or qualities of justice."⁶⁹ To say "segregation" is itself a legitimate non-punitive purpose is tantamount to saying "detention" is itself a legitimate non-punitive purpose. In other words, if segregation itself were a legitimate non-punitive purpose in accordance with Ch III, detention of a non-citizen pending

65 *NZYQ* (2023) 97 ALJR 1005 at 1016 [46]; 415 ALR 254 at 266 (emphasis added).

66 *Lim* (1992) 176 CLR 1 at 32-33; *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 14 [26]; *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 369 [139]; *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at 231 [26].

67 *NZYQ* (2023) 97 ALJR 1005 at 1016 [48]; 415 ALR 254 at 266.

68 *YBFZ* (2024) 99 ALJR 1 at 10 [9]; 419 ALR 457 at 465, quoting *Lim* (1992) 176 CLR 1 at 29.

69 *Wainohu v New South Wales* (2011) 243 CLR 181 at 229 [105].

the grant of a visa would always be "justified".⁷⁰ If so, "the very point of the legitimacy requirement would be undermined".⁷¹

77 CZA19 and DBD24 submitted that their detention during the impugned period was not justified because there was no real prospect of their removal becoming practicable in the reasonably foreseeable future in light of the Tribunal's directions. The Commonwealth and the Minister, however, submitted that detention for the purpose of visa processing is always valid as a person detained for that purpose can seek mandamus to enforce the duty to determine the visa application within a reasonable time.

78 It is not necessary or appropriate to address these submissions. To resolve the dispute between the parties it is sufficient to conclude that, as a matter of fact, CZA19 and DBD24's detention during the impugned period of detention was for the legitimate non-punitive purpose of processing their visa applications. The Department was undertaking enquiries for the purposes of deciding whether to grant CZA19 and DBD24 a visa, including the terms on which to grant them a visa. Keeping CZA19 and DBD24 in detention facilitated the Department making these enquiries, as it addressed any risk of them absconding. In relation to CZA19 – after remittal by the Tribunal, the Department sought and obtained a National Criminal History Check and detention incident reports, and first became aware of allegations that he had committed a number of serious offences outside Australia involving violence. These matters would have been relevant to determining his extant visa application, as well as any conditions to be imposed on CZA19's Bridging R (Class WR) (Removal Pending) (Subclass 070) visa if released because he met the NZYQ limit. In relation to DBD24 – shortly after arrival, DBD24 was released into the community on a residence determination and absconded for eight years until he was subsequently apprehended. His detention therefore addressed the risk he would abscond, which would have affected the Department's ability to make the necessary enquiries to decide his visa application. Thus, the Tribunal's directions did not render CZA19 and DBD24's detention unlawful because the detention was reasonably capable of being seen as necessary for the visa processing purpose.

79 While it is not necessary to decide whether the mere availability of mandamus to compel performance of the duty to decide a visa application means the detention of an unlawful non-citizen who has a pending visa application will always be lawful, it should be noted that this Court's decision in *The Commonwealth v AJL20* did not decide that point: that case concerned the limit on the permissible period of detention *for the purpose of removal*, where the temporal

70 See [64] above.

71 *YBFZ* (2024) 99 ALJR 1 at 23 [82]; 419 ALR 457 at 483.

31.

limit is expressly fixed by s 198⁷² (not detention for the purpose of visa processing, which is authorised under ss 189 and 196(1)(c) of the *Migration Act*). I also remain of the view that the fact "[t]hat mandamus may have been available to compel the Executive to act in accordance with the *Migration Act* is not determinative"⁷³ of whether detention is lawful.

Conclusion and orders

80 For those reasons, CZA19 and DBD24's detention for the impugned period was authorised by ss 189(1) and 196(1) of the *Migration Act*. I agree with the orders proposed by Gageler CJ, Gleeson, Jagot and Beech-Jones JJ.

72 *The Commonwealth v AJL20* (2021) 273 CLR 43 at 88-89 [92].

73 *AJL20* (2021) 273 CLR 43 at 89 [93].

EDELMAN J.

Introduction

81 These two cases, brought by CZA19 and DBD24, respectively involve the removal of a separate question for determination from the Full Court of the Federal Court of Australia to this Court, and the statement of a special case. In broad terms, in each proceeding CZA19 and DBD24 raise two issues in this Court. First, were they entitled to release into the Australian community before their visa applications were determined solely because the outcomes of those applications would inevitably lead to their release into the community? Secondly, were they entitled to release into the Australian community after the expiry of a reasonable period of time for consideration by the Minister of their applications for a visa?

82 Neither CZA19 nor DBD24 is in detention. Both have been granted visas. But both assert that they were unlawfully detained for part of the period in which they were in immigration detention awaiting the determination of the grant of a visa. Both have brought claims for damages based on that part of their detention.

83 The resolution of both issues before this Court requires three essential matters to be identified. First, it is necessary to identify the correct statutory power or duty that is said to support detention. Secondly, it is necessary to identify the correct statutory purpose of that power or duty that could justify detention. Thirdly, if, in light of the statutory purpose, there has been a failure to satisfy a statutory condition upon which the power is granted or the duty imposed (including any condition arising from constitutional disapplication of the power or duty), then it is necessary to identify the correct remedy.

84 The answer to both issues before this Court is "no". The relevant power and duty that was said to support the detention of CZA19 and DBD24 was the power and duty to consider their applications for a visa. The central statutory purpose of that power and duty was to ensure the integrity of any conditions upon a visa which might be granted, including any conditions upon release into the Australian community addressing health risks, security risks, and risks of criminal conduct. And, even if there had been an unreasonable delay by the Minister in considering the visa applications by CZA19 and DBD24, the appropriate remedy would have been a writ of mandamus.

Three essential matters to be identified

Identifying the correct powers or duties said to justify the detention

85 Prior to the release of each of CZA19 and DBD24, each had sought a writ of habeas corpus. The starting point in any application for habeas corpus is to identify the basis for any authority which is said to support the detention of the person seeking release. In *Chu Kheng Lim v Minister for Immigration, Local*

Government and Ethnic Affairs,⁷⁴ it was held that Ch III of the *Constitution* only permits statutory detention of an alien under the *Migration Act 1958* (Cth) for so long as: "is [(i)] reasonably capable of being seen as necessary for the purposes of deportation or [(ii)] necessary to enable an application for an entry permit to be made [or (iii)] necessary to enable an application for an entry permit to be] considered."

86 These three powers and duties can be broadly described as: (i) the power and duty to remove; (ii) the power to enable an application for a visa; and (iii) the power and duty to consider a valid application for a visa (where consideration of the application includes receiving, investigating, and determining the application⁷⁵). They are, so far, the only recognised categories of powers and duties that authorise detention under the *Migration Act*.⁷⁶

87 The limit upon legislative power, imposed by Ch III and recognised in *Lim*, has the effect that each of the three powers and duties must be exercised or performed within the time that is necessary for the exercise or performance of that power or duty. In *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship*,⁷⁷ Crennan, Bell and Gageler JJ said:

"The necessity referred to in that holding in *Lim* is not that detention *itself* be necessary for the purposes of the identified administrative processes but that the *period* of detention be limited to the time necessarily taken in administrative processes directed to the limited purposes identified".

There was no dispute in these cases that the relevant power and duty was to consider a valid application for a visa. Separately from the constitutional limit, there is also an implied statutory duty for any decision concerning whether to permit an application for a visa or, if a valid application is made, concerning whether to grant a visa, to be made as soon as reasonably practicable.⁷⁸

74 (1992) 176 CLR 1 at 33.

75 *Lim* (1992) 176 CLR 1 at 10; *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 13 [20].

76 *Plaintiff M96A/2016 v The Commonwealth* (2017) 261 CLR 582 at 594 [22]-[23].

77 (2013) 251 CLR 322 at 369 [139] (emphasis in original).

78 *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at 232 [28], 233-234 [35].

Identifying the correct statutory purpose of the power or duty for detention

88 In *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*,⁷⁹ six members of this Court spoke of a purpose of detention as being "to prevent the alien from entering Australia or the Australian community' pending the making of a decision as to whether or not they will be allowed entry". In other words, the purpose of depriving a person of their liberty in the community is to deprive a person of their liberty in the community. The description in *NZYQ* should not be understood literally but should be understood as referring to the power and duty to consider a valid application for a visa rather than the *purpose* of detention in the process of considering the application.

89 In these cases, the Commonwealth and the Minister's submissions similarly described a purpose of detaining a visa applicant as being to allow for consideration of their application for a visa. The consideration by the Executive of a visa application (including the receipt, investigation, and determination of the application) is also not a purpose which, itself, could justify a person's detention. Other than as a disproportionate means to ensure that the person is readily available to answer any questions in the course of considering their visa application, there is rarely a need to detain a person in order to facilitate such consideration. As Gleeson CJ explained in *Re Woolley; Ex parte Applicants M276/2003*,⁸⁰ it was not contemplated by the members of this Court who were parties to the joint judgment in *Lim*⁸¹ that "it is essential for a person to be in custody in order to make an application for an entry permit, or that it is only possible for the Executive to consider such an application while the applicant is in custody".

90 A number of purposes may underlie the detention of a visa applicant in order to consider their visa application. One purpose, which is the only "relevant" purpose when a visa has been finally refused, is "to ensure that the unlawful non-citizen will remain 'available for deportation when that becomes practicable'".⁸² Another purpose, which applies while a visa application is being considered, is to ensure the integrity of any conditions upon a visa which might be granted. As the Solicitor-General of the Commonwealth explained in oral submissions, such conditions might address health risks, security risks, and risks of criminal conduct when the person is released into the community. The integrity of such conditions

79 (2023) 97 ALJR 1005 at 1016 [44]; 415 ALR 254 at 265, quoting *Al-Kateb v Godwin* (2004) 219 CLR 562 at 584 [45].

80 (2004) 225 CLR 1 at 14 [26].

81 (1992) 176 CLR 1.

82 *NZYQ* (2023) 97 ALJR 1005 at 1017 [53]; 415 ALR 254 at 268.

could be impaired if a person were released into the community before the conditions had been determined and imposed.

91 None of the purposes of detention while a visa application is being considered is "punitive" and contrary to Ch III of the *Constitution*, in the genuine sense of being a "purpose[] of punishment".⁸³ The reason that none of the purposes is punitive is that none of the purposes is concerned with the purposes of retribution and deterrence, which include responses to past commission of crimes based on anticipation of future commission of crime.⁸⁴

92 There is, however, a fictitious sense recognised in *Lim* in which detention is deemed not to have been imposed by Parliament for any of these purposes, and therefore deemed to be punitive and contrary to Ch III of the *Constitution*. In the joint judgment in *Lim*,⁸⁵ in a passage endorsed by the Court in *NZYQ*,⁸⁶ it was said that the validity of detention under the *Migration Act* required the detention to be limited to "what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered".

93 On the approach of six members of this Court in *NZYQ*, this was understood as follows. If in a particular case a person's detention is disproportionate to (that is, not "'reasonably capable of being seen as necessary' for") any of the "legitimate and non-punitive purposes"⁸⁷ then the detention in that case will be deemed to have been imposed by Parliament for the purposes of punishment. Hence, once the Executive has concluded the consideration of a visa, the detention of an alien for the remaining purpose of removal will be deemed to be punitive if it is disproportionate insofar as there is "no real prospect of the removal of the alien from Australia becoming practicable in the reasonably foreseeable future".⁸⁸ This is not using the likely length of detention as the basis for an inference of fact that the Executive is detaining the alien for purposes other than those of the

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

84 *ASF17 v The Commonwealth* (2024) 98 ALJR 782 at 801 [97]; 418 ALR 382 at 406; *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 24-25 [91]; 419 ALR 457 at 485.

85 (1992) 176 CLR 1 at 33.

86 (2023) 97 ALJR 1005 at 1013-1014 [30]; 415 ALR 254 at 262.

87 *NZYQ* (2023) 97 ALJR 1005 at 1014 [31]; 415 ALR 254 at 262-263, quoting *Lim* (1992) 176 CLR 1 at 33.

88 *NZYQ* (2023) 97 ALJR 1005 at 1016 [44]; 415 ALR 254 at 265.

legislation.⁸⁹ Rather, as presently justified, the legal rule articulated by six members of this Court in *NZYQ* deems the disproportionate application of the legislation to detention in every such case to have been imposed by Parliament for the purposes of punishment, thus requiring ss 189(1) and 196(1) of the *Migration Act* to be disapplied to that extent.⁹⁰

Identifying the correct remedy

94 The functions of the prerogative and constitutional writs are generally to provide a remedy to compel the performance of a public duty or to quash any effect of, or to prohibit, the purported performance of a public duty that is without authority. Or, as Blackstone expressed these functions, these writs remedy the "refusal or neglect of justice" or the "encroachment of jurisdiction".⁹¹ Their remedial functions are, as far as possible, intended to secure the result that is required by the law. As Lee CJ said in *R v Lord Montacute*,⁹² where a person has a right to have a public obligation performed, "it would be absurd, ridiculous, and a shame to the law" if there were no remedy.

95 If there is no purpose for the detention of a person and the law requiring detention in ss 189(1) and 196(1) of the *Migration Act* is deemed to be for the purposes of punishment and thus invalid, the public duty must be to release the person in detention. This public duty is enforced by the writ of habeas corpus ("that you have the body to submit to"⁹³). The writ of habeas corpus is such a natural and basic response where there is no statutory authority to detain that it has been described as a "great bulwark of liberty".⁹⁴ In the 1898 Convention Debates, Sir Edmund Barton said that it was unnecessary to include the writ of habeas corpus in s 75(v) of the *Constitution* because it "is one of the rights which the subject carries with him so long as he is within British territory".⁹⁵

89 See *The Commonwealth v AJL20* (2021) 273 CLR 43 at 96 [109].

90 *Migration Act 1958* (Cth), s 3A.

91 Blackstone, *Commentaries on the Laws of England* (1768), bk 3, ch 7 at 109, 111.

92 (1750) 1 Black W 60 at 64 [96 ER 33 at 34].

93 *Black's Law Dictionary*, 12th ed (2024) at 850, "habeas corpus ad subjiciendum".

94 *Wall v The King; Ex parte King Won and Wah On [No 2]* (1927) 39 CLR 266 at 272.

95 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 4 March 1898 at 1884.

96 On the other hand, where there remains a statutory purpose for detention, and the law requiring detention is not deemed to be punitive and invalid, the public duty cannot be to release the detainee. If the power or duty giving effect to the statutory purpose is not being exercised or performed lawfully, then the public duty is for it to be exercised or performed lawfully. Hence, if the performance of a duty to consider an application for a visa has not occurred within a reasonable time, then the public duty is to process the visa application as soon as reasonably possible and the remedy is to compel performance of that public duty. The different duties (not to detain without authority and to consider a visa application within a reasonable time) are enforced by different writs. The former is enforced by a writ of habeas corpus and the latter is enforced by a writ of mandamus.⁹⁶

Application of the three essential matters to the circumstances of CZA19 and DBD24

CZA19

97 CZA19 has been in Australia since 2009 when he was arrested on his arrival on a tourist visa and subsequently charged with a drug importation offence. In 2010, CZA19's tourist visa ceased and he was granted a criminal justice stay visa for the duration of the criminal proceedings relating to the drug importation offence and his subsequent term of imprisonment. In December 2018, after his release on parole, CZA19's criminal justice stay visa ceased. CZA19 was then detained in immigration detention.

98 In January 2019, CZA19 applied for a protection visa. That application was refused by a delegate of the Minister. But, following CZA19's exercise of his rights of review, on 10 November 2022, the (then) Administrative Appeals Tribunal remitted the matter for reconsideration with a direction, relying upon s 36(2)(aa) of the *Migration Act*, that "there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm".⁹⁷

99 On 27 March 2024, after waiting for more than 16 months for a decision from a delegate of the Minister, CZA19 commenced these proceedings in the Federal Court of Australia. On 13 May 2024, a delegate of the Minister refused CZA19's application for a protection visa but granted CZA19 a bridging visa subject to conditions on the basis that there was no real prospect of the removal of

96 See *The Commonwealth v AJL20* (2021) 273 CLR 43 at 96 [110].

97 See *Migration Act*, s 36(2)(aa).

CZA19 "becoming practicable in the reasonably foreseeable future".⁹⁸ Hence, it is an agreed fact that from 13 May 2024, CZA19 had no real prospect of removal in the reasonably foreseeable future. CZA19 was then released from detention. CZA19 asserts that he was unlawfully detained from 10 November 2022 to 13 May 2024.

DBD24

100 DBD24 arrived in Australia in 2013 as an "unlawful non-citizen" within the meaning of the *Migration Act*. He was detained in immigration detention until, later that year, he was released into the community following a residence determination made by the Minister under s 197AB of the *Migration Act*. On 21 October 2013, after DBD24 absconded from community detention, the Minister revoked the residence determination. For nearly eight years, DBD24 remained unlawfully at liberty in the community.

101 On 24 June 2021, DBD24 was arrested and taken into custody for drug offences. DBD24 remained in custody after he was sentenced to three years' imprisonment by the Supreme Court of the Northern Territory. On 23 June 2023, DBD24 was released from prison. He was then immediately detained under s 189(1) of the *Migration Act*.

102 On 15 November 2021, while he was in prison, DBD24 applied for a protection visa. That application was refused by a delegate of the Minister on 11 January 2022. DBD24 then applied for review by the Administrative Appeals Tribunal. On 18 December 2023, the Tribunal remitted the visa application for reconsideration with a direction, like that given with respect to CZA19's application, that DBD24 "satisfies s 36(2)(aa) of the [*Migration Act*]". On 21 June 2024, a case officer at the Department of Home Affairs sent the plaintiff a Notice of Intention to Consider Refusal under s 501(1) of the *Migration Act*. On 1 October 2024, DBD24 was granted a visa,⁹⁹ and was released from immigration detention. DBD24 asserts that he was unlawfully detained in immigration detention between 23 June 2023 (or, alternatively, 18 December 2023) and 1 October 2024.

The submissions of CZA19 and DBD24

103 Two issues were raised by the submissions of CZA19 and DBD24 on their cases in this Court. First, they submitted that their detention had been unlawful from the time that there was no real prospect that they could be removed from Australia in the reasonably foreseeable future. From that time, they submitted, they

⁹⁸ See *Migration Regulations 1994* (Cth), reg 2.25AB.

⁹⁹ See *Migration Regulations 1994* (Cth), reg 2.08G and Sch 2, Subclass 851—Resolution of Status.

were entitled to a writ of habeas corpus requiring their release from detention. Secondly, and in the alternative, they submitted that there was no authority to detain them under the *Migration Act* once the Minister had had a reasonable time in which to make a decision on their visa applications but had failed to do so.

104 The two issues raised by CZA19 and DBD24 neatly reflect the two "matters to be considered" which six members of this Court described in *Plaintiff M96A/2016 v The Commonwealth*¹⁰⁰ as follows:

"First, it requires the purpose of the detention to be identified. Secondly, it requires consideration of the time necessarily involved in the particular case to deport the non-citizen or to receive, investigate, consider, and determine an application for permission to remain in Australia."

The submission of a lack of any purpose to justify detention

105 The first issue raised in the submissions of CZA19 and DBD24 correctly identified: (i) the source of the power by which they were detained as being ss 189(1) and 196(1) of the *Migration Act*; and (ii) the powers and duties said to justify detention as being the power and duty to consider an application for a visa and the power and duty to remove if that application is refused. The major premise of the submission by CZA19 and DBD24 of a lack of any purpose to justify their detention was that the purposes that supported their detention during the consideration of their applications for a visa were "intrinsically related" to the purpose of ensuring their availability for removal "because it is only the prospect of removal (contingent on an adverse visa decision) that can justify mandatory (or any) detention for so long as a visa application remains undecided". Hence, CZA19 and DBD24 argued, if the purpose of ensuring their availability for removal could not justify their detention, then their detention could not be justified while their applications for a visa were being considered.

106 The minor premise of the submission by CZA19 and DBD24 was that the detention of each of them for the purpose of ensuring that they would remain "available for deportation when that becomes practicable"¹⁰¹ was disproportionate because there was no real prospect of their removal in the reasonably foreseeable future. The minor premise was supported by powerful submissions of an intervener, LPSP (the lead applicant in a separate representative proceeding), that identified resonances between the approaches to applying the boundaries of constraints upon legislative power in different contexts. In particular, it is difficult to see why there should be different approaches when assessing, respectively:

100 (2017) 261 CLR 582 at 593 [21] (footnotes omitted).

101 *NZYQ* (2023) 97 ALJR 1005 at 1017 [53]; 415 ALR 254 at 268, quoting *Al-Kateb v Godwin* (2004) 219 CLR 562 at 584 [45].

(i) disproportionality between the legitimate purposes of a law and the effect of the law on a person's detention; (ii) disproportionality between the legitimate purposes of a law and the effect of the law on the implied freedom of political communication; and (iii) disproportionality between the legislative purposes of a law and the effect of the law on the requirement for informed electoral choice derived from ss 7 and 24 of the *Constitution*. Ultimately, however, the minor premise of the submission by CZA19 and DBD24 need not be addressed because the major premise cannot be accepted.

107 The power and duty of the Minister or delegate, or the Administrative Appeals Tribunal, to consider CZA19's and DBD24's valid applications for a visa, including receiving, investigating, and determining the applications, existed throughout the entire duration of each of the periods of alleged unlawful detention. During those periods, CZA19's application for a protection visa was before the Minister for consideration and DBD24's application for a protection visa was before the Minister or the Administrative Appeals Tribunal for consideration.

108 In many cases, the "relevant" purpose of detention will be "to ensure that the unlawful non-citizen will remain 'available for deportation when that becomes practicable'".¹⁰² But, as explained above, while a visa application is being considered, other purposes of detention are independently engaged. The other purposes include ensuring the integrity of any visa conditions that might be imposed concerning health risks, security risks, and risks of criminal conduct should the visa applicant be released into the community. The circumstances of CZA19's and DBD24's cases illustrate that the purposes of ensuring the integrity of any visa conditions may require detention even if a visa were ultimately certain to be granted. For instance, the assessment of the conditions to impose on DBD24's visa concerning security risks and risks of criminal conduct would have required consideration of his activities during the nearly eight years after his absconson from community detention, while DBD24 was unlawfully in the Australian community. So too, an assessment of the conditions to impose on CZA19's visa would have required investigation and consideration of allegations, made known to the Department during the period of consideration, that CZA19 had committed offences overseas over a period of 16 years, including alleged offences of violence, sexual violence, illegal use of firearms, fraud, theft, and the supply of drugs. In each case, even if it had been certain that neither person was to be removed, their detention during the consideration of their visa applications was necessary to ensure that they would not be released without appropriate conditions. It is a separate question, with which these cases are not concerned, as to when visa conditions may appropriately be imposed by the Executive and when conditions should be imposed only by the Judiciary.

102 *NZYQ* (2023) 97 ALJR 1005 at 1017 [53]; 415 ALR 254 at 268, quoting *Al-Kateb v Godwin* (2004) 219 CLR 562 at 584 [45].

109 The time required for the fulfilment of the power and duty to consider a visa application, in light of the correct purposes for the exercise of that power and performance of that duty, is a different issue which will vary according to the case. The circumstances of each of CZA19's and DBD24's cases described above illustrate that a reasonable time required for processing their visa applications would have exceeded that which would have been required for a simple visa application.

The submission of a failure to decide visa applications within a reasonable time

110 In their written submissions, CZA19 and DBD24 asserted that a failure of the Minister to decide their visa applications within a reasonable time entitled them to release. In reply, they maintained that assertion, although they accepted that the issue could be remitted, for determination by a primary judge or the Full Court of the Federal Court of Australia, if there were insufficient facts to decide whether a reasonable time had been exceeded.

111 There is no need to determine whether a reasonable time was exceeded in this case because, even if a reasonable time had been exceeded, CZA19 and DBD24 would not have been entitled to release on that basis. As explained above, so long as a visa application, or the anterior process of deciding whether to allow a visa application to be made, is being considered, the purposes for detention during the period of consideration provide constitutional justification for the statutory detention. If a reasonable time for consideration of a visa application has been exceeded, then the natural remedy is a writ of mandamus to compel the Minister to perform the duty to decide the visa application within a specified period of time.

Conclusion

112 Orders should be made as proposed by Gageler CJ, Gleeson, Jagot and Beech-Jones JJ.

113 STEWARD J. Subject to three qualifications, I respectfully agree with the reasons of Gordon J and the conclusion that the detention of CZA19 and DBD24 for the respective periods in issue was authorised by the *Migration Act 1958* (Cth). I therefore also agree with the orders proposed by Gageler CJ, Gleeson, Jagot and Beech-Jones JJ. The qualifications are as follows.

114 First, I adhere to the views I expressed in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs*¹⁰³ concerning this Court's very recent and new jurisprudence concerning Ch III of the *Constitution* and the correct application of the doctrine established by *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*.¹⁰⁴ That qualification does not preclude me from agreeing that the reach of the *Lim* doctrine, as restated in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*,¹⁰⁵ is confined to detention for the purpose of removal.

115 Second, the proposition that an alien is entitled to the protection of the law¹⁰⁶ must be qualified by what Kiefel CJ, Bell, Keane and Edelman JJ said in *Falzon v Minister for Immigration and Border Protection*.¹⁰⁷ An alien's "rights and immunities under the law differ from those of an Australian citizen in a number of important respects".¹⁰⁸

116 Third, and with great respect, I do consider that the availability of mandamus to secure the performance of a duty to process a visa application precludes any conclusion that detention during the time when the visa application is awaiting processing can be invalid.¹⁰⁹ Mandamus is relevantly an adequate remedy for dilatory government behaviour or for any other failure to discharge a lawful public duty.

103 (2024) 99 ALJR 1 at 44-45 [176]; 419 ALR 457 at 511-512.

104 (1992) 176 CLR 1.

105 (2023) 97 ALJR 1005; 415 ALR 254.

106 See the reasons of Gordon J at [76].

107 (2018) 262 CLR 333.

108 (2018) 262 CLR 333 at 346 [39].

109 *The Commonwealth v AJL20* (2021) 273 CLR 43 at 67-68 [35]-[37].

