HIGH COURT OF AUSTRALIA

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

TCXM APPELLANT

AND

MINISTER FOR IMMIGRATION AND
CITIZENSHIP & ANOR RESPONDENTS

TCXM v Minister for Immigration and Citizenship
[2026] HCA 13
Date of Hearing: 9 December 2025
Date of Judgment: 6 May 2026
S146/2025

ORDER

Appeal dismissed with costs.

Representation

E M Nekvapil SC with J D Donnelly, C J Fitzgerald and J R G Blaker for the appellant (instructed by Zarifi Lawyers)

S P Donaghue KC, Solicitor-General of the Commonwealth, and P M Knowles SC with B D Kaplan SC and M P A Maynard for the respondents (instructed by Australian Government Solicitor)

N M Wood SC with J E Hartley, H D Ryan and R A Nanthakumar for the Human Rights Law Centre, appearing as amicus curiae (instructed by Human Rights Law Centre)

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

CATCHWORDS

TCXM v Minister for Immigration and Citizenship

Administrative law (Cth) – Procedural fairness – Where appellant granted Bridging R (Class WR) Subclass 070 (Bridging (Removal Pending)) visa ("BVR") and released from immigration detention following decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 – Where Commonwealth of Australia and Republic of Nauru entered into Interim Third Country Reception Arrangement ("Interim Arrangement") contemplated by s 198AHB of *Migration Act 1958* (Cth) for settlement of initial cohort of three non-citizens in Nauru – Where appellant proposed as one of initial cohort without notice to him – Where officer of Department of Home Affairs applied to Government of Nauru for grant to appellant of long-term stay visa without notice to him – Where appellant's BVR ceased under s 76AAA of *Migration Act* following grant of long-term stay visa by Government of Nauru – Where appellant returned to immigration detention pending removal from Australia to Nauru – Where Parliament enacted *Home Affairs Legislation Amendment (2025 Measures No 1) Act 2025* (Cth) ("2025 Amendment Act") prior to removal of appeal into High Court – Where item 10 of Sch 1 to 2025 Amendment Act deemed arrangements including Interim Arrangement valid for all purposes if otherwise invalid only because of failure to observe rules of natural justice – Whether entry into Interim Arrangement unlawful because of failure to afford appellant procedural fairness.

Immigration – Unlawful non-citizens – Where s 198(2B) of *Migration Act* authorised and required removal of appellant "as soon as reasonably practicable" – Where medical services in Nauru inadequate to treat appellant's severe asthma on ongoing basis – Where appellant faced increased imminent risk of premature death from fatal asthma attack in Nauru – Whether removal of appellant to Nauru "reasonably practicable".

Constitutional law (Cth) – Judicial power of Commonwealth – Whether application of ss 198AHB, 76AAA and 198(2B) of *Migration Act* to authorise and require removal of appellant to Nauru contravened Ch III of *Constitution*.

Words and phrases – "consequences of removal", "executive power", "executive punishment", "feasibility of removal", "imminent risk of premature death", "inadequacy of medical services", "invalidity and unlawfulness", "judicial power", "natural justice", "non-refoulement obligations", "*NZYQ* affected person", "penal or punitive", "prima facie punitive", "principle of legality", "procedural fairness", "protection obligations", "punishment", "purposes of punishment", "reasonably practicable", "removal from Australia", "right to life", "risk of harm", "third country reception arrangement", "unlawful non-citizen", "validation provision".

Constitution, Ch III, ss 51(xix), 51(xxvii).
Home Affairs Legislation Amendment (2025 Measures No 1) Act 2025 (Cth), Sch 1, items 8, 9, 10.
Migration Act 1958 (Cth), ss 3A, 36, 76AAA, 197C, 198, 198AHB.
International Covenant on Civil and Political Rights (1966), Arts 2, 6.

1 GAGELER CJ, GLEESON, JAGOT AND BEECH-JONES JJ. This appeal concerns the lawfulness of the Commonwealth of Australia entering into an Interim Third Country Reception Arrangement with the Republic of Nauru ("the Interim Arrangement") for the purpose of s 198AHB of the *Migration Act 1958* (Cth). Other issues are the statutory permissibility and constitutional validity of the proposed removal of the appellant from Australia to Nauru in accordance with the Interim Arrangement and pursuant to ss 76AAA and 198(2B) of the *Migration Act* having regard to the appellant's severe asthma and the inadequacy of medical services available in Nauru to manage his condition on an ongoing basis.

2 The appeal arises under s 24 of the *Federal Court of Australia Act 1976* (Cth) from a judgment of a single judge of the Federal Court of Australia (Moshinsky J) dismissing an application commenced by the appellant against the Minister administering the *Migration Act* and the Commonwealth of Australia in the original jurisdiction of the Federal Court under s 39B of the *Judiciary Act 1903* (Cth). The appeal was pending before the Full Court of the Federal Court, and was removed into this Court upon the application of the Attorney-General of the Commonwealth under s 40(1) of the *Judiciary Act*. The removed appeal is to be determined by this Court exercising the jurisdiction conferred on it by s 40(1) of the *Judiciary Act* under s 76(ii) of the *Constitution*[1] and, being an appeal by way of rehearing, involves the application to the facts found by the primary judge of the law as it exists at the time of this Court giving judgment on the appeal.[2]

3 For reasons to be explained: (1) the issue of the lawfulness of the Commonwealth entering into the Interim Arrangement for the purpose of s 198AHB of the *Migration Act* is conclusively resolved by the operation of item 10 of Sch 1 to the *Home Affairs Legislation Amendment (2025 Measures No 1) Act 2025* (Cth) ("the 2025 Amendment Act"); (2) ss 76AAA and 198(2B) of the *Migration Act* operate on their proper construction to authorise and require the removal of the appellant from Australia to Nauru notwithstanding the inadequacy of the medical services available in Nauru to manage his medical condition after arrival; and (3) in so operating, ss 198AHB, 76AAA and 198(2B) do not contravene Ch III of the *Constitution*.

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1 *Bogan v Estate of Smedley* (2025) 99 ALJR 619 at 629 [43], 636 [87]; 422 ALR 94 at 105, 114, citing *Attorney-General (NSW) v Commonwealth Savings Bank of Australia* (1986) 160 CLR 315 at 324-325.

2 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 553 [21], 556 [31], 593 [153]. See also *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 106-111.

4 The appeal is accordingly to be dismissed.

Legislative framework

5 Sections 76AAA and 198AHB were inserted into the *Migration Act* by the *Migration Amendment Act 2024* (Cth) ("the 2024 Amendment Act") as part of the legislative response by the Commonwealth Parliament to the holding in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*[3] that, in authorising and requiring the immigration detention of an unlawful non-citizen until the non-citizen is removed from Australia under s 198, ss 189 and 196 of the *Migration Act* contravene Ch III of the *Constitution* in their application to a non-citizen whose removal from Australia has no real prospect of becoming practicable in the reasonably foreseeable future. The sections so inserted were designed to operate against the background of amendments made as part of the same legislative response contained in Div 3 of Pt 2 of the *Migration Act*, and in the *Migration Regulations 1994* (Cth), under which an unlawful non-citizen whose removal from Australia has no real prospect of becoming practicable in the reasonably foreseeable future is to be granted a Bridging R (Class WR) Subclass 070 (Bridging (Removal Pending)) visa ("BVR").[4]

6 Section 198AHB of the *Migration Act* relevantly provides:

> "(1) This section applies if the Commonwealth enters into an arrangement (***third country reception arrangement***) with a foreign country in relation to the removal of non-citizens from Australia and their acceptance, receipt or ongoing presence in the foreign country.
>
> ...
>
> (2) The Commonwealth may do all or any of the following:
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> (a) take, or cause to be taken, any action (not including exercising restraint over the liberty of a person) in relation to the third

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3 (2023) 280 CLR 137.

4 See ss 72(1)(b) and 73 of the *Migration Act* and regs 2.20(1) and 2.20(18) and 2.25AB of the *Migration Regulations 1994* (Cth), explained in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 12-13 [20]-[21]; 419 ALR 457 at 469.

country reception arrangement or the third country reception functions of the foreign country;

(b) make payments, or cause payments to be made, in relation to the third country reception arrangement or the third country reception functions of the foreign country;

(c) do anything else that is incidental or conducive to the taking of such action or the making of such payments.

...

(3) To avoid doubt, subsection (2) is intended to ensure that the Commonwealth has capacity and authority to take action, without otherwise affecting the lawfulness of that action.

(4) Nothing in this section limits:

(a) any other power or duty under this Act; or

(b) the executive power of the Commonwealth.

(5) In this section:

action includes action in a foreign country.

arrangement includes an arrangement, agreement, understanding, promise or undertaking, whether or not it is legally binding.

third country reception functions, of a foreign country, means the implementation of any law or policy, or the taking of any action, by that country (including, if the foreign country so decides, exercising restraint over the liberty of a person) in connection with the role of that country as a country which has agreed to the acceptance, receipt or ongoing presence of persons who are not citizens of that country, whether the implementation or the taking of action occurs in that country or another country."

7 Section 76AAA of the *Migration Act* relevantly provides:

"(1) This section applies in relation to a non-citizen if:

(a) the non-citizen holds a Subclass 070 (Bridging (Removal Pending)) visa; and

(b) the non-citizen has permission (however described), granted by a foreign country, to enter and remain in that country; and

(c) the foreign country is a party to a third country reception arrangement (within the meaning of section 198AHB) that is in force; and

(d) none of the following apply:

(i) the non-citizen has made a valid application for a protection visa that has not been finally determined;

(ii) the non-citizen could not be removed to the foreign country because of subsection 197C(3) if the non-citizen were an unlawful non-citizen;

(iii) the non-citizen is a child under 18.

...

(2) The Minister must give the non-citizen notice that this section applies in relation to the non-citizen.

(3) The notice:

(a) must be given as soon as reasonably practicable after this section starts to apply in relation to the non-citizen; and

(b) may be given orally or in writing.

(4) Despite any other provision of this Act or the regulations, the visa ceases to be in effect immediately after:

(a) if the notice is given by a method specified in section 494B – the non-citizen is taken to have received the notice; or

(b) otherwise – the non-citizen receives the notice.

…

(5) The rules of natural justice do not apply to the giving of a notice under subsection (2).

> (6) For the purposes of paragraph (1)(b), a permission to enter the foreign country may be unconditional or a permission to enter that is subject to the non-citizen doing one or more things required by the foreign country that the non-citizen is capable of doing before entering the country."

8 The Revised Explanatory Memorandum for the 2024 Amendment Act explained the design of s 76AAA to be that the giving of notice required by s 76AAA(2) will culminate in the cessation of a BVR by force of s 76AAA(4), so as to result in the non-citizen who was the holder of a BVR becoming an unlawful non-citizen, if a foreign country that is a party to a third country reception arrangement within the meaning of s 198AHB grants the non-citizen permission to enter and remain in that country and if the other conditions in s 76AAA(1) are met.[5] The Revised Explanatory Memorandum further explained the legislative intention to be that the grant by the foreign country of permission to enter and remain in that country would, in certain circumstances, give rise to a real prospect of the non-citizen being removed to that country under s 198 in the reasonably foreseeable future. In that event, ss 189 and 196 would validly authorise and require the detention of the non-citizen until removal occurs.[6]

9 Section 198 of the *Migration Act*, the operation of which in conjunction with ss 189 and 196 has been examined in numerous prior decisions including in *NZYQ* and more recently in *ASF17 v The Commonwealth*[7] and *Minister for Immigration and Multicultural Affairs v MZAPC*,[8] contains a series of provisions each conferring a power and imposing a duty expressed in terms that an "officer" – a term broadly defined for the purposes of the *Migration Act* relevantly to include an officer of the Department of Home Affairs[9] – "must remove as soon as reasonably practicable an unlawful non-citizen" if the condition or conditions specified in the provision are met. Within that series of provisions, s 198(2B) relevantly provides that an officer must remove as soon as reasonably practicable

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5 Australia, Senate, *Migration Amendment Bill 2024*, Revised Explanatory Memorandum at 7 [21].

6 Australia, Senate, *Migration Amendment Bill 2024*, Revised Explanatory Memorandum at 6 [16].

7 (2024) 282 CLR 172.

8 (2025) 99 ALJR 486; 421 ALR 483.

9 Section 5(1) (definition of "officer", para (a)) of the *Migration Act*.

an unlawful non-citizen if a delegate of the Minister has cancelled the visa of the non-citizen on character grounds under s 501(3A) and the Minister, having given notice to and received representations from the non-citizen, has decided not to revoke the delegate's decision. The definition of "remove" for the purposes of the *Migration Act* is simply that it "means remove from Australia".[10]

10 Section 197C(1) and (2) of the *Migration Act* combine to make clear that the duty imposed on an officer by s 198 to remove an unlawful non-citizen from Australia as soon as reasonably practicable is unaffected by any non-refoulement obligations that Australia might have in respect of that unlawful non-citizen, providing respectively that "[f]or the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen" and that "[a]n officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen". The expression "non-refoulement obligations" is relevantly defined for the purposes of the *Migration Act* to include non-refoulement obligations that may arise because Australia is a State Party to the International Covenant on Civil and Political Rights (1966) ("the ICCPR")[11] as well as any obligations accorded by customary international law that are of a similar kind.[12]

11 Section 197C(3) of the *Migration Act*, to which reference is made in s 76AAA(1)(d)(ii), nevertheless qualifies the duty imposed by s 198 in providing that, despite s 197C(1) and (2), s 198 "does not require or authorise an officer to remove an unlawful non-citizen to a country" if the non-citizen has made a valid application for a protection visa that has resulted in an extant "protection finding" for the non-citizen with respect to that country. A "protection finding" includes a finding by the Minister that the non-citizen satisfies the criterion in either s 36(2)(a) or s 36(2)(aa) with respect to the country.[13] The criterion in s 36(2)(a) is met if the Minister is satisfied that "Australia has protection obligations because the [non-citizen] is a refugee". The criterion in s 36(2)(aa) is met if the Minister is satisfied that Australia has protection obligations because the Minister has "substantial grounds for believing that, as a necessary and foreseeable consequence of the non-

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10 Section 5(1) (definition of "remove") of the *Migration Act*.

11 See Sch 2 to the *Australian Human Rights Commission Act 1986* (Cth).

12 Section 5(1) (definition of "non-refoulement obligations") of the *Migration Act*.

13 Section 197C(5)(a) and (b) of the *Migration Act*.

citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm". Section 36(2A) specifies circumstances in which a non-citizen "will suffer significant harm" to include if the non-citizen "will be arbitrarily deprived of his or her life" or "will be subjected to cruel or inhuman treatment or punishment" or "will be subjected to degrading treatment or punishment".

12 The joint reasons of six members of the Court in *ASF17*[14] summarised the combined effect of s 197C(1) and (2) as being to "make clear that, in the absence of an extant protection finding in respect of a country which engages the operation of s 197C(3) ... the power and duty to remove [under s 198] an [unlawful non-citizen] is not affected by any non-refoulement obligations Australia may or may be claimed to have in respect of that [non-citizen]". The joint reasons explained the statutory consequence to be that a claim on the part of the non-citizen to fear harm in the country to which the non-citizen might be removed "is insufficient to preclude removal to that country irrespective of whether that claim might be found on investigation to be genuine or well-founded". The explanation continued by observing that the scheme of the *Migration Act* "accommodates 11th-hour claims of that nature exclusively through the potential for the exercise of one or other of the personal non-compellable powers conferred on the Minister by s 48B or s 195A".

13 Section 48B of the *Migration Act* confers a personal non-compellable power on the Minister to allow a person, who is otherwise disentitled by s 48A from making a further application, to apply for a protection visa. Section 195A confers a personal non-compellable power on the Minister to grant to a person in immigration detention under s 189, including a non-citizen detained after cessation of a BVR through the operation of s 76AAA, a visa of a particular class.

The Interim Arrangement

14 The Interim Arrangement was found by the primary judge to be an agreement or arrangement between the Commonwealth of Australia and the Republic of Nauru constituted by an exchange of letters between the Minister for Home Affairs and the President of Nauru which occurred between 31 January 2025 and 12 February 2025.[15]

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14 (2024) 282 CLR 172 at 189 [38].

15 *TCXM v Minister for Immigration and Multicultural Affairs* [2025] FCA 540 at [50].

15 The Interim Arrangement is expressed: (1) to be a "third country reception arrangement" contemplated by s 198AHB of the *Migration Act*; (2) to have "enter[ed] into force" on 12 February 2025 albeit that it is "not intended to create any legally binding rights or obligations"; (3) to remain in force until replaced by a new third country reception arrangement or ceased by mutual consent; and (4) to apply for so long as it remains in force in relation to the removal from Australia and acceptance, receipt or ongoing presence in Nauru of an initial cohort of up to three non-citizens.

16 Under the terms of the Interim Arrangement so constituted, the "settlement arrangement" for a named person within the initial cohort is to commence on the date on which the Government of Nauru (following receipt of a request from the Department of Home Affairs) notifies the Department of Home Affairs of its willingness to settle the person in Nauru.

17 The Government of Nauru commits by the terms of the Interim Arrangement to grant a person accepted for settlement "an indefinite stay visa to enter and remain in Nauru" on terms which allow the person to leave and re-enter Nauru subject to any reasonable conditions and regulations that the Government of Nauru considers necessary for the good order of Nauru. The Government of Nauru also commits, amongst other things, to "[t]reatment [of all settled people] in accordance with international legal obligations, including relevant obligations under international human rights laws" and "accepts its responsibility to provide support to settled persons to achieve minimum outcomes in line with Nauruan standards of living including, as necessary and as tailored to individual needs ... [a]ccess to health services ... [and] ... [m]aking any other administrative or logistical arrangements required to ensure the safety and wellbeing of settled people and the Nauruan community".

18 The terms of the Interim Arrangement further provide for "a process for interim payments to support Nauru" to be established by way of exchange of letters pending finalisation of negotiations for a comprehensive funding agreement and for payment for a settled person to cease if the person is removed from or otherwise no longer present in Nauru.

The appellant

19 The appellant is a citizen of Iran who arrived in Australia in 1990 and who was granted a protection visa in 1995. In 1999, he was convicted of murdering his wife and sentenced to a long term of imprisonment. His protection visa was cancelled under s 501(3A) of the *Migration Act* in 2015, in a decision not subsequently revoked, as a consequence of which he was detained under s 189 upon completion of his term of imprisonment. On 24 November 2023, having been

identified as a person affected by the holding in *NZYQ*, the appellant was granted a BVR.

20 On 4 February 2025, without notice to him, the appellant was proposed by the Department of Home Affairs to the Government of Nauru to be one of the initial cohort of up to three non-citizens to whom the Interim Arrangement once entered into was to apply. The Interim Arrangement having entered into force on 12 February 2025, on 14 February 2025, again without notice to him, an officer of the Department of Home Affairs applied to the Government of Nauru for the grant to the appellant of a long-term stay visa for a minimum period of 30 years pursuant to regulations made under the *Immigration Act 2014* (Nauru).

21 On 15 February 2025, the Government of Nauru notified the Department of Home Affairs that it had granted the appellant a long-term stay visa as sought in the application. Consistent with the acceptance by the Government of Nauru under the terms of the Interim Arrangement of responsibility to provide access to health services to achieve minimum outcomes in line with Nauruan standards of living, the visa was granted on standard conditions which included that the appellant was to have access to Nauruan health services.[16] On the same day, the appellant received notice that s 76AAA of the *Migration Act* applied to him as a consequence of which his BVR ceased and he was immediately re-detained under s 189 of the *Migration Act*.

22 After commencement on 21 February 2025 of his application in the original jurisdiction of the Federal Court under s 39B of the *Judiciary Act*, the impending removal of the appellant from Australia to Nauru under s 198 of the *Migration Act* was restrained by interlocutory injunction granted on 23 February 2025. The primary judge heard the application on a final basis on 16 and 17 April 2025 and delivered judgment dismissing it on 26 May 2025.

23 The appellant's appeal from the judgment of the primary judge under s 24 of the *Federal Court of Australia Act* was commenced by the filing of a notice of appeal on 14 June 2025 and was removed into this Court on the application of the Attorney-General of the Commonwealth under s 40(1) of the *Judiciary Act* on 29 September 2025 following the enactment and relevant commencement of the 2025 Amendment Act on 5 and 6 September 2025 respectively.

24 At the heart of the appeal is an uncontested finding made by the primary judge on the basis of medical evidence led at the final hearing concerning the

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16 Item 3(d) of Sch 3 to the *Immigration (Long Term Stay Visa) Regulations 2025* (Nauru).

health of the appellant. The evidence established that the appellant, now in his early 60s, has "a long history of severe and uncontrolled asthma, with multiple admissions to intensive care units", and is "very likely to have ongoing asthma attacks" which "are strongly associated with poor patient outcomes, including risk of death". His condition is complicated by the possibility that he also suffers from "Dysfunctional Breathing Syndrome".[17] The medical evidence established that he "requires ongoing professional or specialist help or treatment" and specifically "requires regular specialist follow-up and management, ideally in a specialist asthma service" available in major teaching hospitals in Australia but not available in Nauru. The medical evidence further established that the "possible and likely consequences" of a specialist asthma service not being available to the appellant are "increasing frequency of asthma attacks" and the potential "of having a fatal asthma attack".[18] The critical finding which his Honour made on the basis of this evidence was "that the medical services available in Nauru are inadequate to manage [his] condition of severe asthma on an ongoing basis".[19]

25 The appellant characterises this critical finding as a finding that the appellant would face an imminent risk of premature death from a fatal asthma attack in Nauru were he to be removed there. That characterisation, which is not contested by the respondents, may be accepted, provided it is recognised that the appellant by reason of his condition already faces an imminent risk of premature death from a fatal asthma attack in Australia. The imminent risk of premature death from a fatal asthma attack he would face in Nauru would be an increased risk. That increased risk would be attributable to the medical services which would be available to him in Nauru in line with Nauruan standards of health care being less adequate to manage his condition on an ongoing basis than the medical services that are and would otherwise continue to be available to him in Australia but for his removal from Australia.

The appeal

26 The three principal issues in the appeal have already been outlined and are conveniently addressed in turn.

27 The first issue concerns the lawfulness of the Commonwealth's entry into the Interim Arrangement, which the appellant challenged before the primary judge

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17 *TCXM v Minister for Immigration and Multicultural Affairs* [2025] FCA 540 at [84].

18 *TCXM v Minister for Immigration and Multicultural Affairs* [2025] FCA 540 at [87].

19 *TCXM v Minister for Immigration and Multicultural Affairs* [2025] FCA 540 at [90].

on the basis of a failure to afford him procedural fairness as one of the initial cohort to whom it was proposed to apply. The primary judge rejected the challenge on the basis that the Commonwealth's entry into the Interim Arrangement was an exercise of the non-statutory executive power of the Commonwealth under s 61 of the *Constitution* and was not conditioned on any requirement to afford procedural fairness.[20] The issue was the subject of elaborate argument on the appeal including as to its justiciability, as to whether the applicable source of power to enter into a third country reception arrangement for the purpose of s 198AHB of the *Migration Act* was non-statutory executive power or to be implied from s 198AHB itself, as to the existence of any attendant requirement to afford procedural fairness and as to the availability of relief. Recitation of the detail of much of that argument is redundant given that the outcome of the resolution of the issue will be seen to be foreclosed by reference to the proper construction of item 10 of Sch 1 to the 2025 Amendment Act.

28 The second issue concerns whether the duty imposed on an officer by s 198(2B) of the *Migration Act* to remove the appellant from Australia "as soon as reasonably practicable" authorises and requires his removal to Nauru given that he would face an imminent risk of premature death from a fatal asthma attack in Nauru. The primary judge rejected the appellant's argument that his removal is not so authorised and required on the authority of the holding of the Full Federal Court in *NATB v Minister for Immigration and Multicultural and Indigenous Affairs*[21] to the effect that a risk of harm occurring after removal is irrelevant to the assessment of whether removal is "reasonably practicable" within the meaning of s 198. With the support of the Human Rights Law Centre, which was granted leave to appear amicus curiae, the appellant challenges the correctness of that holding.

29 The final issue, which is raised by the appellant for the first time in this Court, arises for determination if the removal of the appellant to Nauru where he would face an imminent risk of premature death from a fatal asthma attack is authorised and required on the proper construction of s 198(2B) of the *Migration Act*. The issue is whether ss 198AHB, 76AAA and 198(2B) in that application are properly characterised as penal or punitive in character and thereby contravene Ch III of the *Constitution*.

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20 *TCXM v Minister for Immigration and Multicultural Affairs* [2025] FCA 540 at [127], [130].

21 (2003) 133 FCR 506 at 517 [53].

Lawfulness of the Interim Arrangement

30 The 2025 Amendment Act amended the *Migration Act* including by inserting a new s 198AHAA relevantly providing in s 198AHAA(1)(a) that "[t]he rules of natural justice do not apply to an exercise of the executive power of the Commonwealth to ... enter into a third country reception arrangement with a foreign country".[22] The insertion of s 198AHAA and related amendments to the *Migration Act* are expressed by item 9 of Sch 1 to the 2025 Amendment Act to have retroactive effect.

31 For the purpose of resolving the issue of the lawfulness of the Interim Arrangement raised in the appeal, however, it is sufficient to refer to the operation of item 10 of Sch 1 to the 2025 Amendment Act, which is headed "Validation of things done". Item 10 adheres to the familiar pattern of a "validation" provision in a Commonwealth statute through the operation of which "new legal consequences and a new legal status" are attached to "things done which otherwise would [or might] not have had such legal consequences or status".[23]

32 By item 10(1), item 10 is expressed to apply "if a thing done, or purportedly done, before commencement" (that is to say, before 6 September 2025) is covered by item 10(2) and "would, apart from this item, be wholly or partly invalid only because the rules of natural justice were not observed in doing, or purporting to do, the thing". The "things" covered by item 10(2) relevantly include "entering into, or purportedly entering into, a third country reception arrangement with a foreign country" for the purposes of s 198AHB of the *Migration Act*. Item 10(3) makes clear that "it does not matter" for the purposes of item 10(2) whether that thing was done or purportedly done by the Commonwealth as an exercise of executive power or as an exercise of statutory power under a provision of the *Migration Act*. Where item 10 applies, the thing done or purportedly done is by force of item 10(4) "taken for all purposes to be valid and to have always been valid".

33 The appellant accepts that the historical fact of the Interim Arrangement having been constituted by the exchange of letters between the Commonwealth of Australia and the Republic of Nauru in the period between 31 January 2025 and

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22 Item 3 of Sch 1 to the 2025 Amendment Act.

23 *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83 at 98 [25]. See also *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at 137 [36]; *CD v The Commonwealth* (2025) 99 ALJR 1388 at 1396 [19], 1397 [25], 1406 [68]; 425 ALR 93 at 100, 102, 113.

12 February 2025 is sufficient, through item 10(1) read with items 10(2) and 10(3), to make item 10 of Sch 1 to the 2025 Amendment Act applicable irrespective of whether the power to enter into a third country reception arrangement with a foreign country for the purposes of s 198AHB of the *Migration Act* was non-statutory executive power (as the primary judge held) or to be implied from s 198AHB itself (as the appellant principally contends). The appellant further accepts that item 10(4) operates to attach to the Interim Arrangement the status of a "third country reception arrangement" within the meaning of s 198AHB of the *Migration Act* even if the Interim Arrangement would not otherwise have had that legal status by reason of a failure to afford him procedural fairness.

34 The appellant nevertheless argues that, in providing that the entry into the Interim Arrangement is taken for all purposes to be and always to have been "valid", item 10(4) does nothing to deny that the entry into the Interim Arrangement would have been unlawful, and would remain unlawful, if the power to enter into a third country reception arrangement with a foreign country for the purposes of s 198AHB of the *Migration Act*, whatever its source, had been conditioned on a requirement to afford him procedural fairness which had not been observed. The appellant further argues that, on the assumption that he is correct that the power had been so conditioned, the continuing unlawfulness of the entry into the Interim Arrangement would be sufficient to justify the grant of an injunction restraining his removal under s 198(2B) of the *Migration Act* despite the status of the Interim Arrangement as a third country reception arrangement within the meaning of s 198AHB and despite the valid cessation of his BVR through the operation of s 76AAA.[24]

35 The distinction sought to be drawn by the appellant between invalidity and unlawfulness in the context of the operation of item 10(4) is misplaced. "To say that a purported exercise of a power is valid is to say that it has the legal effect which the Parliament intended an exercise of the power to have."[25] For the Commonwealth Parliament itself to say in item 10(4) (when read with items 10(1), 10(2) and 10(3)) that a thing done or purportedly done which was or might have been "invalid" only because the rules of natural justice were not observed is "taken

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24 Citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 393 [100], *Miller v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 278 CLR 628 at 637 [25] and *Minister for Immigration and Multicultural Affairs v MZAPC* (2025) 99 ALJR 486 at 499-501 [39]-[45]; 421 ALR 483 at 498-500.

25 *Project Blue Sky Inc v Australian Broadcasting Corporation* (1998) 194 CLR 355 at 375 [41].

for all purposes" to be and always to have been "valid" is for the Parliament to say in no uncertain terms that it intends the thing to have the entirety of the legal consequences that would attach to its doing or purported doing had the rules of natural justice not been required to be observed in its doing. The operation of item 10(4) therefore leaves no room for the thing to be taken to be valid and yet to remain statutorily non-compliant or otherwise legally defective and thereby "unlawful" by reason of non-observance of an applicable requirement to observe procedural fairness. The measure of validity which item 10(4) confers on the thing encompasses all dimensions of the lawfulness of the thing.

36 Thus, item 10 of Sch 1 to the 2025 Amendment Act attaches to the fact of the Interim Arrangement having been entered into all of the statutory and other legal consequences that would attach to that fact had procedural fairness not been required to be observed in entering into a third country reception arrangement with a foreign country for the purposes of s 198AHB of the *Migration Act*. Whether or not the primary judge was correct to have concluded that procedural fairness was not required to be observed in entering into the Interim Arrangement under the applicable law as it then stood, or as the applicable law might now be required to be taken to have stood as a result of the retroactive application of s 198AHAA, is accordingly moot.

Practicability of removal

37 As was observed in *NZYQ*, the basic structure and text of Div 8 of Pt 2 of the *Migration Act*, and of s 198 within it, has not altered since its insertion in 1994.[26] Section 197C was inserted in its original form, which gave unqualified operation to s 197C(1) and (2), in 2014.[27] Section 197C was amended, to qualify the operation of s 197C(1) and (2) by the addition of s 197C(3), in 2021.[28]

38 The critical text of s 198 of the *Migration Act*, which has remained constant throughout and which is relevantly reflected in s 198(2B), is that an officer "must remove as soon as reasonably practicable an unlawful non-citizen". The text serves to confer a power and to impose a duty connoted by the words "must remove" subject to a qualification connoted by the words "as soon as reasonably

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26 (2023) 280 CLR 137 at 148 [11].

27 See *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth).

28 See *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth).

practicable". The qualification was long ago explained by Gummow J in *Al-Kateb v Godwin*,[29] in language recently adopted by the plurality in *MZAPC*,[30] to involve a temporal element connoted by the words "as soon as" and a substantive element connoted by the words "reasonably practicable", the term "practicable" meaning "that ... which can be effected or accomplished" and the term "reasonably" qualifying "practicable".

39 The minimalist definition of "remove" for the purposes of the *Migration Act*, that is, "remove from Australia", indicates that the power and duty connoted by the words "must remove" in s 198 is a power and duty to remove an unlawful non-citizen "from Australia" without specification or limitation as to the place outside Australia to which the non-citizen might be removed. Exercise of that power and performance of that duty is nevertheless "confined by the practical necessity to find a state that will receive the [non-citizen] who is to be removed".[31]

40 Hence, as was explained in the joint reasons in *ASF17*,[32] for removal to be "practicable", "there must first and foremost be identified a country to which [the non-citizen] might be removed" and removal to that country must be permissible under the *Migration Act* having regard to s 197C(3). Where a country is identified to which a non-citizen might permissibly be removed consistently with s 197C(3), as *ASF17* and *MZAPC* combine to confirm, whether removal to that country is "reasonably practicable" turns on an objective assessment of the steps legally and practically available to be taken by an officer to result in the non-citizen being transported to and received into that country.

41 A medical condition which renders a non-citizen unfit to travel to a country can result in removal of the non-citizen to that country being objectively assessed to be not reasonably practicable. Circumstances within a country, such as an

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29 (2004) 219 CLR 562 at 608 [121].

30 (2025) 99 ALJR 486 at 498 [35]; 421 ALR 483 at 496.

31 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 190 [92].

32 (2024) 282 CLR 172 at 188 [35].

outbreak of disease[33] or a natural disaster or civil unrest,[34] can also bear on an objective assessment of the practicability of removal to that country insofar as those circumstances can impact on the practical and legal capacity for the non-citizen to be transported to and received into that country.

42 The scope of the objective assessment mandated by s 198 of the *Migration Act* as to whether to "remove" a non-citizen is "reasonably practicable" does not, however, encompass an assessment of what will or might be expected to happen to the non-citizen once received into the country to which the non-citizen is removed, once the practical and legal capacity for the non-citizen to be removed to and received into that country is established. There is no novelty in that proposition, which has hitherto been regarded as settled at least since the decision of the Full Court of the Federal Court in *NATB*, which was referred to with approval in *MZAPC*[35] and by which the primary judge correctly considered himself to be bound in the present case.

43 *NATB* concerned whether a risk of death, torture, persecution or other mistreatment of an unlawful non-citizen once received into the country to which the non-citizen was proposed to be removed was required to be taken into account in determining whether removal of the non-citizen to that country was "reasonably practicable" within the meaning of s 198 of the *Migration Act*. Consistently with the earlier holdings of Hayne J in *Re Minister for Immigration and Multicultural Affairs; Ex parte SE*[36] and of a differently constituted Full Court in *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs*,[37] the Full Court of the Federal Court in *NATB* held that it was not.

44 Having observed that "the context for determining reasonable practicability is the proposed physical removal of the person from Australia", the Full Court in *NATB* explained that "removal is complete, at the latest, once [a non-citizen] has been admitted by, and into, the receiving country" and that the reference in s 198

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33 *NATB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 506 at 512 [25]; eg *Arthur as litigation representative for CYG20 v The Commonwealth* [2021] FCA 259.

34 *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 146 at 166 [69].

35 (2025) 99 ALJR 486 at 498 [35]; 421 ALR 483 at 496.

36 (1998) 73 ALJR 123 at 126-127 [14]-[19]; 158 ALR 735 at 739-740.

37 (2003) 131 FCR 146 at 167 [71]-[72], 169 [78], [80]-[81].

of the *Migration Act* to removal being "reasonably practicable" does not require account to be taken of "what is likely, or even virtually certain, to befall the unlawful non-citizen after removal is complete".[38] "Even if it is virtually certain that he or she will be killed, tortured or persecuted in that country", the Full Court explained, "that is not a practical consideration going to the ability to remove from Australia" but rather "a consideration about a likely course of events following removal from Australia".[39]

45 Conformably with the recent observation of the plurality in *MZAPC* to which attention has earlier been drawn, the Full Court in *NATB* went on to explain that a prospect of a non-citizen facing death, torture or persecution is not ignored within the scheme of the *Migration Act* but is rather accommodated in the potential for the exercise by the Minister of personal and non-compellable powers.[40]

46 Subsequently in *WAJZ v Minister for Immigration and Multicultural and Indigenous Affairs [No 2]*,[41] French J correctly treated *NATB* as an authority which bound him to accept that a power and duty of removal of a non-citizen under s 198 of the *Migration Act* was "not conditioned upon the non-existence of any medical condition that would deteriorate upon that person's removal".

47 The arguments advanced by the appellant and the amicus curiae for now departing from that settled understanding of the scope of the inquiry mandated by the substantive element of the qualification that removal of a non-citizen under s 198 of the *Migration Act* must be "reasonably practicable" are not persuasive.

48 The primary argument relies on two overlapping and mutually reinforcing general principles of statutory construction: the first, that a legislative intention to abrogate or curtail a fundamental right or freedom should not be imputed unless clearly manifested by unmistakable and unambiguous language;[42] the second, that legislation should be interpreted and applied, as far as its language permits, to be

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38 (2003) 133 FCR 506 at 517 [52]-[53].

39 (2003) 133 FCR 506 at 517 [53].

40 (2003) 133 FCR 506 at 517-518 [55]-[59].

41 [2004] FCA 1332 at [86].

42 *Coco v The Queen* (1994) 179 CLR 427 at 437; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [30].

in conformity and not in conflict with the established rules of international law.[43] Notably, both principles were relied on in argument in *NATB* and were held to be inapplicable: the first because the class of non-citizens described in s 198 were held to "have no fundamental right or freedom to absolute protection in Australia from death, torture or persecution in the country to which they are to be removed"; the second because s 198 of the *Migration Act* was held to admit of no ambiguity.[44]

49 As to the first of the general principles of statutory construction, the appellant points to recognition at common law of a fundamental right not to be arbitrarily deprived of "life". As to the second, the appellant points to recognition in Art 6(1) of the ICCPR of "[e]very human being [having] the inherent right to life" and to the longstanding expression of opinion that a person who is exiled or banished still has "a right to live somewhere".[45] Through the application of one or both of those principles the appellant argues that the substantive element of the qualification to the power and duty of an officer to remove an unlawful non-citizen under s 198 of the *Migration Act* must be interpreted to confine the authorised and required removal of the non-citizen to removal to a country where the non-citizen can "live": a power which would be exceeded and a duty which would not be fulfilled were the non-citizen to be removed to a country where the non-citizen would face an imminent risk of premature death.

50 The essential difficulty with that primary argument lies in the absence of any demonstrated basis at common law or in international law for considering any of the acknowledged rights to "life" or to "live" on which the appellant relies to be curtailed by an increased or an imminent risk of premature death attributable to a variance in the prevailing standard of health care available to a person in one country as compared to another. Neither of the general principles of statutory construction on which the appellant relies is therefore demonstrated to apply to support a construction of s 198 of the *Migration Act* which would result in its non-application to the appellant.

51 To the extent that Art 2 of the ICCPR "impliedly obligates States Parties not to remove a person from their territory where there are 'substantial grounds' for

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43 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [29].

44 (2003) 133 FCR 506 at 521 [70]-[71].

45 Citing Vattel, *The Law of Nations; or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, Chitty ed (1883), bk 1, ch 19 at 107 §229.

believing that there is a real risk of irreparable harm of the kind contemplated by Arts 6 and 7 in the country to which such removal is to be effected",[46] application of Art 6(1) of the ICCPR to affect the construction or operation of s 198 is in any event reflected in the non-refoulement obligations the relevance of which to s 198 is excluded by s 197C(1) and (2) of the *Migration Act*.[47]

52 The secondary argument relies on the limited scope of the declaration by s 197C(1) and (2) of the *Migration Act* that the power conferred and duty imposed on an officer with respect to an unlawful non-citizen by s 198 is unaffected by any non-refoulement obligations that Australia might have in respect of that unlawful non-citizen. The argument is that limitation of the exclusion to non-refoulement obligations supports attribution of a meaning to the expression "reasonably practicable" that requires consideration of the prospect of the non-citizen facing harm following removal other than to the extent that the harm might engage any such non-refoulement obligations.

53 The secondary argument is contradicted by the legislative history of the insertion of s 197C(1) and (2). That history reveals the legislative purpose to have been to reverse the effect of the decisions of this Court in *Plaintiff M70/2011 v Minister for Immigration and Citizenship*[48] and of the Full Court of the Federal Court in *Minister for Immigration and Citizenship v SZQRB*.[49] Neither of those decisions turned on the content of the concept of "reasonably practicable" in s 198 of the *Migration Act*; rather, they turned on an understanding of the powers and duties imposed by s 198 being limited to conform with Australia's non-refoulement obligations in international law.[50] As spelt out in the Explanatory Memorandum for the amending legislation, the legislative purpose was "to put it beyond doubt that the purpose of section 198 is not to respond to international protection

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46 *CRI026 v Republic of Nauru* (2018) 92 ALJR 529 at 536 [24]; 355 ALR 216 at 223.

47 See *Obligations of States in Respect of Climate Change (Advisory Opinion)* (International Court of Justice, General List No 187, 23 July 2025) at [378].

48 (2011) 244 CLR 144.

49 (2013) 210 FCR 505.

50 See Australia, House of Representatives, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, Explanatory Memorandum at 165-166 [1133]-[1140], noted in *The Commonwealth v AJL20* (2021) 273 CLR 43 at 61 [19].

obligations, but to provide officers with the duty to remove unlawful non-citizens from Australia in the circumstances as set out in section 198".[51]

54 More fundamentally, a construction of s 198 of the *Migration Act* which would result in removal of a non-citizen to a country in which the non-citizen would face an increased or an imminent risk of premature death being not "reasonably practicable" would subvert the operation of s 197C(3) in two significant respects. The first is that it would raise for objective assessment at the time of removal the risk of harm that the non-citizen might face were removal to occur, rather than leaving the determination of any relevant post-removal risk to depend solely on the existence or non-existence of a protection finding made in the course of the administrative consideration of an application for a protection visa. The second is that it would have the potential to prevent removal under s 198 by reference to an objective assessment of the existence of a post-removal risk of harm which might not amount to a risk of "significant harm" within the meaning of s 36(2A) such as would justify the Minister making a protection finding by reference to the criterion in s 36(2)(aa). Illustrating that second point by reference to the statutory significance of the critical finding on which the appellant relies in the circumstances of the present case, on no view could the imminent risk of premature death which the appellant would face in Nauru due to the prevailing standard of health care in that country amount to "significant harm" within the meaning of s 36(2A).

Constitutional validity

55 The final issue is as to whether ss 198AHB, 76AAA and 198(2B) of the *Migration Act*, in their application to authorise and require the removal of the appellant to Nauru where he would face an imminent risk of premature death from a fatal asthma attack, are properly characterised as penal or punitive in character and therefore to repose exclusively judicial power in an officer in contravention of Ch III of the *Constitution*. The issue is within a narrow compass.

56 The appellant advances no argument that his selection as one of the initial cohort of up to three non-citizens to be proposed to be removed to Nauru pursuant to the Interim Arrangement was motivated by a constitutionally impermissible purpose of denunciation of or retribution for his prior criminal conduct.[52]

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51 See Australia, House of Representatives, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, Explanatory Memorandum at 166 [1140].

52 cf *Jones v The Commonwealth* (2023) 280 CLR 62 at 85-86 [54]-[55].

Moreover, the appellant accepts on the authority of *Falzon v Minister for Immigration and Border Protection*[53] that neither cancellation of a visa so as to result in its former holder becoming an unlawful non-citizen nor removal of that non-citizen from Australia under s 198 of the *Migration Act* consequent upon cancellation of the visa is inherently penal or punitive in character.

57 The crucial factor which the appellant argues to warrant the characterisation of ss 198AHB, 76AAA and 198(2B) of the *Migration Act* as penal or punitive in character in their particular application to him is that the exercise of powers and performance of duties under them would result in him facing an imminent risk of premature death in Nauru. That factor, he argues, is to be assessed in the context of other "salient features" identified by him without detailed elaboration as: Australia's protection obligations; Australia's "ongoing involvement" under the Interim Arrangement; the absence of procedural fairness and executive discretion; his lack of connection with Nauru; his effective territorial "confinement" to Nauru; the fact that his visa was cancelled on character grounds following the commission of a criminal offence; and that his proposed removal to Nauru can be described as "banishment" having a "mark of infamy annexed".[54]

58 Neither alone nor in the context of those other "salient features" is the consequence that the appellant would face an imminent risk of premature death in Nauru attributable to the inadequacy of medical services in Nauru sufficient to characterise the application of ss 198AHB, 76AAA and 198(2B) of the *Migration Act* to him as penal or punitive. The increased risk of premature death from a fatal asthma attack which the appellant would face in Nauru bears no analogy to the unjustified deprivations of liberty held by majority to be properly characterised as punitive in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs*[55] and *EGH19 v The Commonwealth.*[56] Even if exposure to that increased risk might be characterised as a detriment, mere imposition of "involuntary

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53 (2018) 262 CLR 333 at 347-348 [47]-[48], 348-349 [52], 358 [92]-[93].

54 Vattel, *The Law of Nations; or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, Chitty ed (1883), bk 1, ch 19 at 106 §228. See also Bentham, *The Rationale of Punishment* (1830) at 139-141.

55 (2024) 99 ALJR 1; 419 ALR 457.

56 [2026] HCA 7.

hardship or detriment", as Gleeson CJ emphasised in *Re Woolley; Ex parte Applicants M276/2003*,[57] "is not an exclusively judicial function".

Disposition

59 The appeal is to be dismissed with costs.

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57 (2004) 225 CLR 1 at 12 [17].

60 GORDON J. The appellant is one of three persons the subject of an interim "third country reception arrangement" ("the Interim Arrangement") between Australia and the Republic of Nauru concerning the removal from Australia to Nauru of persons affected by this Court's decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*.[58]

61 The appellant challenged his removal to Nauru in the Federal Court of Australia on grounds, relevantly, that the entry into the Interim Arrangement was conditioned on the Commonwealth affording him procedural fairness and that his removal to Nauru was not "reasonably practicable" within the meaning of s 198 of the *Migration Act 1958* (Cth) because the medical services in Nauru were not adequate to address his severe asthma. The primary judge dismissed the appellant's challenge.

62 After the appellant appealed to the Full Court of the Federal Court of Australia, the Commonwealth enacted the *Home Affairs Legislation Amendment (2025 Measures No 1) Act 2025* (Cth) ("the 2025 Amendment Act"). The 2025 Amendment Act inserted s 198AHAA into the *Migration Act*, which provision retrospectively disapplied the rules of natural justice to "an exercise of the executive power of the Commonwealth" to "enter into a third country reception arrangement with a foreign country" or to "do anything preparatory to entering into a third country reception arrangement with a foreign country".[59] The 2025 Amendment Act also deemed valid certain things done or purportedly done, including the entry or purported entry into a third country reception arrangement.[60]

63 The appellant's appeal was removed into this Court, and the appellant filed a second further amended notice of appeal. In this Court, there were two issues. The first issue was whether the authority to decide to make, to make, and/or to enter into the Interim Arrangement was conditioned on procedural fairness. The appellant contended that there was such a condition, it was breached, and an injunction should issue restraining the respondents from removing the appellant from Australia to Nauru under s 198 of the *Migration Act*. The appellant contended that the 2025 Amendment Act had not removed the grounds for such an injunction.

64 The second issue was whether the appellant's removal to Nauru was authorised and required by s 198 of the *Migration Act*. The appellant submitted

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58 (2023) 280 CLR 137.

59 2025 Amendment Act, Sch 1, item 3, inserting s 198AHAA(1) into the *Migration Act*.

60 2025 Amendment Act, Sch 1, item 10.

that, having regard to the primary judge's findings as to the inadequacy of the medical services in Nauru to manage his health condition, it was not "reasonably practicable" to remove the appellant from Australia to Nauru. In the alternative, the appellant submitted that s 3A of the *Migration Act* requires s 198(2B) to be construed so as not to require his removal to a real risk of death in Nauru, as s 198(2B) would otherwise be invalid in its application to the appellant, because it would infringe Ch III of the *Constitution* by amounting, in all the circumstances, to punishment.

65 By a notice of contention, the respondents sought for this Court to affirm the decision of the primary judge on the basis that the decision to enter into the Interim Arrangement, and the Interim Arrangement itself, were not justiciable as they related to an exercise of non-statutory executive power in s 61 of the *Constitution* concerning political matters and relations with a foreign State.

66 The appeal must be dismissed with costs. I agree with Gageler CJ, Gleeson, Jagot and Beech-Jones JJ that the 2025 Amendment Act is a complete answer to the appellant's contentions that entry into the Interim Arrangement was conditioned on the Commonwealth affording him procedural fairness, and that the appellant has not established that his removal to Nauru would infringe Ch III of the *Constitution*. My reasons for reaching those conclusions are set out below.

67 Although I agree that the appellant did not establish that it was not "reasonably practicable" within the meaning of s 198 of the *Migration Act* for him to be removed to Nauru on the basis of his health condition, I reach a different conclusion on the scope of what is "reasonably practicable". In addition, these reasons identify a number of important questions about the nature and extent of the power of the Commonwealth to remove an alien from Australia that remain to be determined, including whether the removal, or steps leading to the removal, of an alien may, in certain circumstances, be characterised as prima facie punitive so as to engage the limitation derived from Ch III of the *Constitution*.

68 The legislative framework, the terms of the Interim Arrangement and the facts relating to the appellant are set out in the reasons of Gageler CJ, Gleeson, Jagot and Beech-Jones JJ, and I gratefully adopt them.

Effect of 2025 Amendment Act

69 The 2025 Amendment Act purports to confirm that entry into a "third country reception arrangement" within the meaning of s 198AHB of the *Migration Act* is not conditioned on an obligation to afford procedural fairness or to observe the rules of natural justice.

70 The appellant does not challenge the validity of the 2025 Amendment Act. The appellant's contention, instead, is that the 2025 Amendment Act should be construed so as to render the entry into the Interim Arrangement valid but not

lawful. The appellant's argument proceeded as follows. Contrary to the primary judge's conclusion, the Commonwealth's entry into the Interim Arrangement was conditioned on an obligation to afford procedural fairness. That obligation having been breached,[61] the entry into the Interim Arrangement was unlawful. Consequently, an injunction may issue prohibiting the Commonwealth and its officers from taking further action – namely, removing the appellant to Nauru – based on the Commonwealth's unlawful entry into the Interim Arrangement.

71 The appellant's contentions must be rejected. The 2025 Amendment Act operates as a complete answer to the appellant's contentions in relation to procedural fairness. For the reasons that follow, item 10 of Sch 1 to the 2025 Amendment Act, in terms, operates on the entry into the Interim Arrangement so as to defeat any claim that the appellant was to be afforded procedural fairness, or that an injunction might issue to restrain the appellant's removal to Nauru on the ground that the appellant was not afforded procedural fairness.

Item 10 defeats procedural fairness claim

72 Item 10 of Sch 1 to the 2025 Amendment Act deems valid "for all purposes" a thing done, or purportedly done, before the commencement of the item which "would, apart from this item, be wholly or partly invalid only because the rules of natural justice were not observed in doing, or purporting to do, the thing".[62] The item relevantly applies if "the thing done was entering into, or purportedly entering into, a third country reception arrangement with a foreign country".[63] Sub-item (3) also states expressly that it does not matter whether the thing is done, or purportedly done, by an exercise by the Commonwealth of its executive power, or by an exercise of statutory power under a provision of the *Migration Act*.

73 A "third country reception arrangement" has the meaning given by s 198AHB of the *Migration Act*,[64] being an arrangement entered into by the Commonwealth "with a foreign country in relation to the removal of non-citizens from Australia and their acceptance, receipt or ongoing presence in the foreign country".[65] The appellant does not dispute that the Interim

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61 Before the primary judge, the parties agreed that no procedural fairness had been afforded to the appellant.

62 2025 Amendment Act, Sch 1, item 10(1), (4).

63 2025 Amendment Act, Sch 1, item 10(2)(a).

64 2025 Amendment Act, Sch 1, item 8 definition of "third country reception arrangement".

65 *Migration Act*, s 198AHB(1).

Arrangement is a third country reception arrangement within the meaning of s 198AHB. Nor has the appellant identified any ground, other than procedural fairness, on which the entry into the Interim Arrangement might be invalid (or unlawful).

74 Item 10 of Sch 1 to the 2025 Amendment Act operates, by its terms, to deem the entry into the Interim Arrangement as valid "for all purposes". The appellant's argument was premised on drawing a distinction between unlawfulness and invalidity. Such a distinction was recognised by a majority of this Court in *Project Blue Sky Inc v Australian Broadcasting Authority* in the context of considering the effect of breach of a statutory condition, which condition might have been "an essential preliminary to the exercise of a statutory power or authority" or "a procedural condition for the exercise of a statutory power or authority".[66] In that kind of case, it was appropriate to ask, as their Honours did, "whether it was a purpose of the legislation that an act done in breach of the provision should be invalid".[67] That was a question of statutory construction.

75 There is no equivalent statutory condition in this case. Breach of a requirement to afford procedural fairness, in a case where no procedural fairness has been afforded at all, is an error that goes to the jurisdiction of the decision-maker.[68] The consequence of a finding of jurisdictional error would be invalidity.[69] The decision would properly be regarded as no decision at all.[70]

76 Put another way, *if* the Commonwealth's entry into the Interim Arrangement was conditioned on the requirement to afford the appellant procedural fairness, and that requirement was breached, the consequence of that breach would have been the invalidity of the entry into the arrangement. Item 10(4) of Sch 1 to

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66 (1998) 194 CLR 355 at 389 [92].

67 *Project Blue Sky* (1998) 194 CLR 355 at 390 [93]; see also 388-389 [91], 391-393 [94]-[100].

68 *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321 at 325-326 [2]-[3]. See also *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 132 [23]; *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 455-456 [81]-[83].

69 See, eg, *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 612 [44]; *Disorganized Developments Pty Ltd v South Australia* (2023) 280 CLR 515 at 541 [46]; *Badari v Minister for Territory Families and Urban Housing* (2025) 100 ALJR 30 at 41 [48]; 426 ALR 212 at 226.

70 *Bhardwaj* (2002) 209 CLR 597 at 614-615 [51]; *SZMTA* (2019) 264 CLR 421 at 456 [84]; *LPDT* (2024) 280 CLR 321 at 325 [2].

the 2025 Amendment Act addresses invalidity on that basis. Like similar provisions previously considered by this Court, it does so by "attribut[ing] the consequences of legal validity"[71] and "attach[ing] new legal consequences and a new legal status" to the entry into the Interim Arrangement if it "otherwise would not have had such legal consequences or status".[72]

77 Those legal consequences include that the Interim Arrangement validly satisfied the criterion in s 76AAA(1)(c) of the *Migration Act* that was a prerequisite to the appellant's Bridging R (Class WR) Subclass 070 (Bridging (Removal Pending)) visa ("BVR") ceasing to have effect. The appellant accepted that item 10 of Sch 1 to the 2025 Amendment Act had that effect. Once that construction and operation of item 10 are accepted, the appellant's submissions that, nonetheless, entry into the Interim Arrangement was unlawful and an injunction could issue to restrain his removal must be rejected. The appellant's construction would deny the 2025 Amendment Act the purpose it sought to achieve – to facilitate the appellant's removal to Nauru. By its express words, Parliament intended to make any third country reception arrangement entered into prior to the commencement of the 2025 Amendment Act (including the Interim Arrangement) valid "for all purposes".[73] In those circumstances, it could not be said that Parliament intended to leave it open to a court to grant an injunction to prevent any further action being taken to implement that arrangement.

Unnecessary to consider other provisions of 2025 Amendment Act

78 The respondents relied upon a second, "independent" pathway by which they submitted the provisions of the 2025 Amendment Act answered the appellant's claim, namely, by the operation of s 198AHAA of the *Migration Act*. The second pathway relied upon this Court accepting the primary judge's conclusion that the Interim Arrangement was entered into in the exercise of non-statutory executive power. Given the conclusions reached in relation to item 10 of Sch 1 to the 2025 Amendment Act, it is not necessary to address this contention.

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71 *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83 at 95 [15].

72 *Duncan* (2015) 256 CLR 83 at 98 [25]. See also *CD v The Commonwealth* (2025) 99 ALJR 1388 at 1396 [19], 1397 [25], 1406 [68]; 425 ALR 93 at 100, 102, 113.

73 See also *Project Blue Sky* (1998) 194 CLR 355 at 375 [41].

"Reasonably practicable" in s 198

79 Section 198 of the *Migration Act* sets out various circumstances in which an officer must remove an unlawful non-citizen. Sub-section (2B) relevantly requires an officer to remove "as soon as reasonably practicable" an unlawful non-citizen if:

> "(a) a delegate of the Minister has cancelled a visa of the non-citizen under subsection 501(3A); and
>
> (b) since the delegate's decision, the non-citizen has not made a valid application for a substantive visa that can be granted when the non-citizen is in the migration zone; and
>
> (c) in a case where the non-citizen has been invited, in accordance with section 501CA, to make representations to the Minister about revocation of the delegate's decision – either:
>
> (i) the non-citizen has not made representations in accordance with the invitation and the period for making representations has ended; or
>
> (ii) the non-citizen has made representations in accordance with the invitation and the Minister has decided not to revoke the delegate's decision."

80 Section 197C of the *Migration Act* elaborates on the circumstances in which the duty to remove in s 198 arises.[74] Section 197C(1) provides that "[f]or the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen". Sub-section (3) then provides, in effect, that s 198 does not require or authorise an officer to remove an unlawful non-citizen to a country if a protection finding has been made for the non-citizen with respect to that country (unless certain exceptions apply).

81 The appellant contended that s 198(2B) of the *Migration Act* should be construed so as not to require an unlawful non-citizen to be removed to a country where they face a "real risk of death". During the hearing, the appellant's submissions were developed to refer to circumstances where the non-citizen faces a "real risk of imminent and premature death" from a cause that is not non-refoulement (namely, a cause unrelated to Australia's non-refoulement obligations). The appellant accepted that s 197C of the *Migration Act* would apply

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74 See the discussion of the operation of s 197C in *The Commonwealth v AJL20* (2021) 273 CLR 43 at 57 [2], 61-62 [19], 84-85 [81]-[84], 97-98 [113].

to a cause that might engage Australia's non-refoulement obligations in respect of the non-citizen.

82 The appellant also sought to confine his proposed construction by contending that the relevant risk needed to be "real and substantial", rather than potential. In the appellant's submission, his asthma condition resulted in him facing a "real risk of imminent and premature death" in Nauru; it was an "immediate, historically-proven" condition and, if removed to Nauru, he would face a preventable, imminent and real risk of death from an asthma attack, having regard to the primary judge's finding that the medical services available in Nauru were inadequate to manage the appellant's condition.

Consequences of removal

83 The "core meaning" of the qualification on the power and duty in s 198(2B) ("as soon as reasonably practicable") is that it involves a "temporal element, supplied by the phrase 'as soon as'" and a "substantive element conveyed by the term 'practicable' meaning 'that which is able to be put into practice and which can be effected or accomplished' (which is qualified by 'reasonably')".[75] Another formulation is that "reasonably practicable" involves the question of "whether the removal is possible from the officer's viewpoint".[76] The composite expression "remove as soon as reasonably practicable" also indicates that what must be "reasonably practicable" is the *removal* of the non-citizen. The question to be asked by the officer is whether the removal of the non-citizen is *reasonably* able to be put into practice, effected or accomplished.[77]

84 The relevant question in this case is whether reasonable practicability of removal may have regard to harm that might, or certainly will, befall the non-citizen in the destination country. An anterior question raised by the appellant is whether consideration of "reasonable practicability" with respect to the duty to remove a non-citizen in s 198 of the *Migration Act* may have regard to impacts on, or consequences for, the non-citizen *after* they have arrived in the destination country. The respondents contended that reasonable practicability is concerned

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75 *Minister for Immigration and Multicultural Affairs v MZAPC* (2025) 99 ALJR 486 at 498 [35]; 421 ALR 483 at 496, quoting Gummow J in *Al-Kateb v Godwin* (2004) 219 CLR 562 at 608 [121].

76 *MZAPC* (2025) 99 ALJR 486 at 498 [35]; 421 ALR 483 at 496, quoting *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 146 at 165 [65].

77 *MZAPC* (2025) 99 ALJR 486 at 498 [35]; 421 ALR 483 at 496.

only with the process of removal, rather than the prevailing circumstances in the destination country once removal is complete.

85 First, the term "as soon as reasonably practicable" is an evaluative term which is to be assessed by reference to all the circumstances of the case.[78] As explained by the Full Federal Court in *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs*, whether removal is "reasonably practicable" may direct attention to a range of considerations, including factors relating to the non-citizen facing removal, and the interests of third parties who may be directly affected.[79]

86 Second, the concept of reasonable practicability is not confined to "physical possibility".[80] For example, in *Minister for Immigration and Multicultural Affairs v MZAPC*, a plurality of this Court considered it would not be "reasonably practicable", from the perspective of an officer, to remove a person from Australia if, by such removal, the officer would be contravening an order of a court and exposing themselves to being found to be in contempt.[81]

87 The factors that might make removal "reasonably practicable" are also not limited to ensuring that the person is removed beyond the territorial boundaries of Australia. "Removal means removal *to* a place."[82] In *NATB v Minister for Immigration and Multicultural and Indigenous Affairs*, the Full Federal Court observed that it cannot have been Parliament's intention to oblige or permit an officer to remove an unlawful non-citizen from Australia's territorial boundaries simply by dumping that person in the sea beyond those boundaries.[83] Similarly, it has been observed that it would not be a bona fide fulfilment of the duty to remove a person to a rock in the Pacific Ocean.[84]

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78 *M38* (2003) 131 FCR 146 at 166 [68], quoting *WAIS v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1625 at [58].

79 (2003) 131 FCR 146 at 166 [66].

80 *MZAPC* (2025) 99 ALJR 486 at 498 [35]; 421 ALR 483 at 496.

81 (2025) 99 ALJR 486 at 498 [35]; 421 ALR 483 at 496-497.

82 *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 364 [119] (emphasis in original).

83 (2003) 133 FCR 506 at 515 [44].

84 *Applicant M38/2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 458 at [24].

88 Rather, as explained by Gummow, Hayne, Crennan and Bell JJ in *Plaintiff M70/2011 v Minister for Immigration and Citizenship (Malaysian Declaration Case)*, "Australia's power to remove non-citizens from its territory is confined by the practical necessity to find a state that will receive the person who is to be removed".[85] As a result, for removal of an alien from Australia under s 198 to be "reasonably 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".[86] The concept also encompasses the willingness of another country to allow the person to enter its territorial boundaries.[87]

89 Third, removal to another country, as a matter of practicability, also requires the non-citizen to have some form of right of abode or authorisation to enter and remain in that country. That right or authorisation cannot merely be transitory. It would not be "reasonably practicable" for the Commonwealth to "remove" a person to a country on the basis that the person has authorisation only in the form of short-term visa-free travel in that country.[88] For removal to another country to be "reasonably practicable" the non-citizen must have the ability to enter and, moreover, remain in that country.

90 Reflecting such considerations, it was observed in *ASF17 v The Commonwealth* that, at least at the time, the Department of Home Affairs had a policy of not removing anyone to a country in respect of which they had no right of residency or long-term stay.[89] The considerations underpinning the departmental policy included "the potential for diplomatic controversy were someone to be removed to a country which had not agreed to accept them and the lack of any basis for generally considering that a country would agree to accept anyone who has no right of residency or long-term stay in that country".[90]

91 In *M38*, the Full Federal Court observed that another factor which might lead an officer to conclude that removal was not "reasonably practicable" might be where the only country willing to receive an unlawful non-citizen was suffering

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85 (2011) 244 CLR 144 at 190 [92].

86 *ASF17 v The Commonwealth* (2024) 282 CLR 172 at 188 [35].

87 *NATB* (2003) 133 FCR 506 at 517 [52]; *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 129 [259].

88 cf *BHL19 v The Commonwealth [No 2]* [2022] FCA 313 at [171].

89 (2024) 282 CLR 172 at 181 [9].

90 *ASF17* (2024) 282 CLR 172 at 181 [9].

from a severe natural disaster or in a state of utter civil anarchy.[91] In granting leave to appeal to NATB, a differently constituted Full Federal Court identified a "plague" in the destination country as a similarly relevant factor.[92] Their Honours observed, in this regard, that "[w]hat is likely to happen at the destination may be relevant".[93]

92 The respondents sought to characterise these examples as only concerned with the process of removal. They contended that the Department's policy in *ASF17* was concerned not with the consequences for the appellant in the destination country, but rather the risk that the process of removing someone to that country would cause damage to Australia's diplomatic relations with that country. Natural disasters, civil anarchy and disease were said to be concerned with the availability of operating airports in the destination country, or risks associated with accompanying the non-citizen to the destination country.

93 The authorities are not so confined. The potential for diplomatic controversy was not stated to be the *only* consideration underpinning the departmental policy in *ASF17* and, even if that were the critical consideration, it was not concerned with the practicability of the *process* of removal. The risk of damage to Australia's diplomatic relations with a country to which a non-citizen is removed is a risk associated with the *consequences* of removal to that country, not the process of removal itself. The respondents' characterisation of the policy should not be accepted. Nor do the authorities referring to natural disasters, civil anarchy or plague in the destination country limit those considerations to the process of removal. To the contrary, the Full Federal Court has postulated that "[w]hat is likely to happen at the destination may be relevant".[94] That observation is consistent with the prevailing circumstances in the destination country *upon* the arrival of the non-citizen being relevant to reasonable practicability.

94 No authority of this Court has accepted that the assessment of reasonable practicability precludes *any* consideration of the consequences for a non-citizen upon their arrival in a destination country. To conclude that there are *no* consequences befalling a non-citizen after removal that would be relevant to

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91 (2003) 131 FCR 146 at 166 [69].

92 *NATB v Minister for Immigration & Multicultural & Indigenous Affairs* ("*NATB (Leave to Appeal)*") [2003] FCAFC 185 at [22], quoted in *NATB* (2003) 133 FCR 506 at 512 [25].

93 *NATB (Leave to Appeal)* [2003] FCAFC 185 at [22], cited in *NATB* (2003) 133 FCR 506 at 512 [25].

94 *NATB (Leave to Appeal)* [2003] FCAFC 185 at [22].

whether it is "reasonably practicable" to remove them may be and is likely to be too absolute a statement.[95]

95 It may be accepted that s 197C makes clear, in unambiguous terms, that an officer's duty to remove a non-citizen arises irrespective of whether Australia has non-refoulement obligations in respect of that non-citizen, unless, among other criteria, a protection finding has been made.[96] This reflects an express parliamentary intention that a non-citizen's fears of persecution or even certain death (for reasons related to Australia's non-refoulement obligations) upon removal to the destination country do not affect the officer's duty to remove the person, *if* they are not the subject of a protection finding under Australia's migration regime.

96 However, it is not necessary for the Court to go further and find that *no* consequences for a non-citizen could ever be considered. Section 197C does not address all consequences (or harm) that might befall a non-citizen. Nor does the *Migration Act* express any contrary intention that the requirement that removal be "reasonably practicable" could not embrace consideration of other types of harm – in other words, where that harm arises for reasons *unrelated* to Australia's non-refoulement obligations. Such a contrary intention is also not implied by the presence of s 197C. As submitted by the Human Rights Law Centre, appearing as amicus curiae, a regime for addressing one kind of risk of harm (related to Australia's non-refoulement obligations) does not imply that other kinds of risk (unrelated to Australia's non-refoulement obligations) must be carved out of the scope of considerations relevant to "reasonable practicability".

97 Ultimately, whether removal of a non-citizen is "reasonably practicable" remains a question of fact to be assessed by reference to the circumstances in the particular case. The facts or circumstances that might give rise to a finding that removal is not "reasonably practicable" should not be limited in the way the respondents contend. Resolution of the present case does not call for a determination of the bounds, let alone the outer bounds, of reasonable practicability.

98 The respondents emphasised statements by the Full Federal Court in *NATB* that reasonable practicability "does not require an officer to take into account what

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95 See, eg, *Tajjour v New South Wales* (2014) 254 CLR 508 at 588 [174]; *Zhang v Commissioner of the Australian Federal Police* (2021) 273 CLR 216 at 230 [22]; *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at 248 [57].

96 *AJL20* (2021) 273 CLR 43 at 84 [81].

is likely, or even virtually certain, to befall the unlawful non-citizen after removal is complete", and that:

> "[e]ven if it is virtually certain that [the non-citizen] will be killed, tortured or persecuted in that country, whether on a Refugees Convention ground or not, that is not a practical consideration going to the ability to remove from Australia. Rather, it is a consideration about a likely course of events following removal from Australia."[97]

99 Importantly, the Court was addressing a submission that the appellants' removal would constitute refoulement under one or both of the Refugees Convention or the Convention against Torture.[98] Their Honours' statements should be read with that context in mind. And, as has been explained, s 197C now expressly addresses the relevance of Australia's non-refoulement obligations to the duty to remove. To the extent that the observations in *NATB* go beyond non-refoulement considerations, they should not be adopted.

100 The Minister having a personal non-compellable power[99] to decide, in effect, that a person should not be removed is also not a sufficient or conclusive answer to the issues that may arise. While those powers have been described as providing a "safety valve" where a person does not obtain a protection finding,[100] they have limited application in the context of removal of a non-citizen, and could not be construed as having been intended to "fill the gap" for all purposes. There is also an obvious mismatch between the consequences for an applicant and the exercise of personal powers by a Minister in the public interest, let alone the exercise of a power that is personal to the Minister and not compellable at the suit of the applicant – or anyone – at any time.

Application of s 198 to the appellant

101 That an assessment of reasonable practicability may be capable of embracing consequences for a non-citizen upon their arrival in a destination country does not, however, mean that any harm, or any *risk* of harm, to the non-citizen will be relevant. The appellant's proposed construction was that s 198(2B) would not require an unlawful non-citizen to be removed to a country

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97 (2003) 133 FCR 506 at 517 [53].

98 The Refugees Convention refers to the Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967). The Convention against Torture refers to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

99 See, eg, *Migration Act*, ss 48B, 195A.

100 See *ASF17* (2024) 282 CLR 172 at 214 [113].

where they would face a "real risk of imminent and premature death" from a cause that is not non-refoulement.

102 The primary judge's findings as to the appellant's health condition went no higher than accepting that, if the relevant medical services were not available, the "possible and likely consequences" for the appellant were increasing frequency of asthma attacks and "potentially" having a fatal asthma attack. The appellant contended that those findings showed that he faced a "real risk of imminent and premature death" if removed to Nauru, and that that risk rendered his removal not "reasonably practicable".

103 The appellant's construction of "reasonably practicable" would introduce a standard of uncertain application, and the appellant did not satisfactorily explain how its application might be confined. For example, it was not clear how a "real risk", even a "real and substantial" risk, was to be distinguished from a risk that was merely "potential". It might be argued that, even in Australia, the appellant faces a "real risk" of suffering a potentially fatal asthma attack. The appellant's removal to Nauru, on the primary judge's findings, *might* increase that risk, but an assessment of reasonable practicability of removal could not possibly require an officer to consider an increased risk of mortality in the destination country.

104 The appellant's construction of s 198(2B) – that s 198(2B) should be construed so as not to require an unlawful non-citizen to be removed to a country where they face a "real risk of imminent and premature death" from a cause that is not non-refoulement – might, equally, prevent the appellant from being removed to a country which has sufficiently advanced medical services, but where those services are not accessible without significant financial resources. As observed by the respondents, it would likely prevent a Nauruan citizen with the same health condition as the appellant from being returned to Nauru. Accepting a construction of such wide scope would significantly undermine Australia's existing migration regime.

105 The appellant's construction of s 198(2B) must ultimately be rejected. Accordingly, the appellant did not establish that it was not "reasonably practicable" for him to be removed to Nauru on the basis of his health condition.

Appellant's Ch III argument

106 The appellant contended that if, contrary to his proposed construction, s 198(2B) of the *Migration Act* purported to require his removal to Nauru, that provision would infringe the separation of judicial power as punishment imposed contrary to Ch III of the *Constitution*, because he would face a real risk of death in Nauru. Section 198(2B) would therefore be invalid but for the application of s 3A of the *Migration Act*, which relevantly provides that if a provision of the Act would, apart from s 3A, have an invalid application, but also

has at least one valid application, "it is the Parliament's intention that the provision is not to have the invalid application, but is to have every valid application".[101] Section 3A would require, on the appellant's case, that s 198(2B) not apply to require the appellant's removal to Nauru.

107 The appellant submitted that his removal to Nauru would be prima facie punitive so as to engage the limitation on power derived from Ch III, having regard to certain "salient features"[102] of the statutory scheme in its application, along with the Interim Arrangement, to him.

108 *First*, s 198 of the *Migration Act* would require him to be removed to a "real risk of death" in Nauru. The appellant contended that the "real risk of death" he faced was critical to his Ch III claim and disclaimed any contention that his removal to Nauru would remain punishment if he did not face that real risk of death. *Second*, Australia had protection obligations towards the appellant that meant he could not be repatriated. *Third*, he had no connection to Nauru. The appellant submitted that deportation to a third country with which a person has no connection, for practical and diplomatic reasons has, at least in modern times, been a highly unusual implementation of the power to deport.[103] This could be analogised with exile, which sometimes required a person to remain in an appointed place.[104] *Fourth*, Australia would maintain ongoing involvement in the appellant's presence in Nauru. *Fifth*, he would be territorially confined on an island (Nauru). *Sixth*, his deportation was a direct consequence of the cancellation of his previously held protection visa on character grounds. *Seventh*, his removal to Nauru, with others whose visas were also cancelled on character grounds and who also could not be sent anywhere else, may be likened to a "mark of infamy".[105] *Eighth*, once the Interim Arrangement was agreed, the statutory scheme entailed almost no discretion in its application. *Ninth*, he was not afforded any procedural fairness, despite the Interim Arrangement targeting only three individuals.

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101 *Migration Act*, s 3A(1).

102 cf *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 19 [57]; 419 ALR 457 at 477.

103 cf *Robtelmes v Brenan* (1906) 4 CLR 395 at 421-422.

104 Vattel, *The Law of Nations*, Chitty ed (1883), bk 1 at 107.

105 See Vattel, *The Law of Nations*, Chitty ed (1883), bk 1 at 106-107.

109 The limitations derived from Ch III of the *Constitution* are addressed to legislative and executive power, rather than individual rights.[106] It follows that the question of compliance with the constitutional limitation is answered by the construction of the statute.[107] Section 198 of the *Migration Act* requires an officer to remove a non-citizen when the circumstances set out in the provision are satisfied. Sub-section (2B), the subject of the appellant's challenge, relevantly provides that an officer "must remove as soon as reasonably practicable an unlawful non-citizen if" the non-citizen's visa has been cancelled under s 501(3A) of the *Migration Act* and certain other criteria are met.

110 On its face, s 198(2B) operates to require the removal of a non-citizen from Australia in specified circumstances. The appellant made no argument that s 198(2B) was wholly invalid. Put another way, the appellant did not contend that the Commonwealth lacked legislative power to remove a non-citizen in all cases where the criteria in s 198(2B) were satisfied. Rather, the appellant focused on the operation of the provision in its application to him.

111 The difficulty with the appellant's contention is that the exercise of power to deport or remove an alien has long been accepted to be an incident of executive power.[108] It is not like detention, in respect of which this Court has long held that, exceptional cases aside, it exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.[109] In *Falzon v Minister for Immigration and Border Protection*, a plurality of this Court accepted that "[i]t has long been recognised that the deportation of aliens does not constitute punishment".[110] The appellant did not establish a basis for departing from this general position, such that the Court might find that the power to remove an alien should be, in these circumstances, judicial. A concept of such uncertainty as

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106 *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 355 [80]-[82]; *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 110-111 [71]; *Jones v The Commonwealth* (2023) 280 CLR 62 at 92 [74]-[75]; *EGH19 v The Commonwealth* [2026] HCA 7 at [74].

107 *Palmer v Western Australia* (2021) 272 CLR 505 at 530-531 [65], 546 [118], 573-574 [201]-[202], 578 [219].

108 See, eg, *Robtelmes* (1906) 4 CLR 395 at 416, quoting *Fong Yue Ting v United States* (1893) 149 US 698 at 730; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 32; *Falzon* (2018) 262 CLR 333 at 341 [17]. See also *Li Sing v United States* (1901) 180 US 486 at 494-495.

109 cf *Lim* (1992) 176 CLR 1 at 27.

110 (2018) 262 CLR 333 at 347 [47]; see also 358 [93].

a "real risk of death" could not transform a generally non-punitive executive power into a power that is prima facie punitive in a sense that would engage Ch III.[111]

112 It follows that the appellant did not succeed in establishing that his removal to Nauru, in the circumstances, constituted punishment imposed contrary to Ch III.

Unresolved questions

113 As has repeatedly been stated by this Court, "an alien who is actually within this country enjoys the protection of our law".[112] A number of questions about whether the removal, or steps leading to the removal, of an alien may nonetheless be prima facie punitive so as to engage Ch III were not raised on the evidence in this case. It is appropriate to identify some of those questions. This list is not exhaustive.

(1) Selection for removal or visa cancellation

114 Whether a law provides for the adjudication and punishment of criminal conduct is a matter of substance and not form.[113] The Solicitor-General of the Commonwealth properly conceded that many of the persons affected by this Court's decision in *NZYQ* had a history of criminal offending.[114] The appellant did not contend that he was selected for removal to Nauru, or that his BVR ceased to have effect, for reasons which included the fact that he had committed murder. In other words, the appellant did not argue that his selection for removal or the BVR ceasing to have effect occurred for the purposes of retribution, denunciation or deterrence in relation to his prior criminal conduct.[115]

(2) Removal to a third country

115 This Court's longstanding acceptance that the power to deport or remove an alien is an incident of executive power and does not constitute punishment[116] does not necessitate the conclusion that deportation or removal of non-citizens

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111 cf *YBFZ* (2024) 99 ALJR 1 at 12 [18]; 419 ALR 457 at 468.

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

113 *Lim* (1992) 176 CLR 1 at 27. See also *YBFZ* (2024) 99 ALJR 1 at 12 [16]; 419 ALR 457 at 468; *EGH19* [2026] HCA 7 at [82].

114 See also *YBFZ* (2024) 99 ALJR 1 at 16 [37]; 419 ALR 457 at 473.

115 *Jones* (2023) 280 CLR 62 at 85-86 [54]-[55].

116 See [111] above.

could *never* be recognised as punitive. The possibility that deportation may constitute punishment is not foreclosed.[117] Deportation or removal of an alien might also be likened to banishment, which has a long history of use as punishment for criminal offending and has been recognised by members of this Court as having a penal and punitive character.[118]

(3) Detention in a third country

116 The appellant did not contend that he would be detained, in substance or form, in Nauru, contrary to Ch III.[119] To the contrary, the terms of the Interim Arrangement and the Nauruan visa granted to the appellant stipulate that the appellant is to be granted freedom of movement in Nauru, and is free to leave and re-enter Nauru. The Interim Arrangement also stipulates that there will be "[n]o imposition of detention, except in accordance with ordinary Nauruan law".

117 Ultimately, whether a person is detained, and by whom, depends on the factual circumstances.[120] Whether the appellant's presence in Nauru would involve the imposition of certain detriments on his right to liberty or a "material and relatively long-term" deprivation of his liberty[121] was not in issue in this Court. Whether the appellant would be, as a matter of fact, "free to leave"[122] Nauru was also not before this Court.

Orders

118 I agree with Gageler CJ, Gleeson, Jagot and Beech-Jones JJ that the appeal must be dismissed.

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117 See, eg, *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 60, 96, 112; *O'Keefe v Calwell* (1949) 77 CLR 261 at 278.

118 *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 400-402 [167]-[171], 428 [250].

119 cf *Plaintiff M68* (2016) 257 CLR 42 at 163 [391], 164 [395].

120 See, eg, *Plaintiff M68* (2016) 257 CLR 42 at 152-154 [353]-[354]. In relation to a claim of false imprisonment, see also *R (VT) v Commissioner for the British Indian Ocean Territory* (Supreme Court of the British Indian Ocean Territory, 16 December 2024) at [63]-[82]; *Commissioner for the British Indian Ocean Territory v The King (VT)* ("*VT Appeal*") [2025] BIOT CA (Civ) 1 at [57]-[58], [65]-[76].

121 cf *YBFZ* (2024) 99 ALJR 1 at 17-18 [50]-[52]; 419 ALR 457 at 475-476.

122 cf *VT Appeal* [2025] BIOT CA (Civ) 1 at [65]-[76].

EDELMAN J.

Introduction

119 The appellant, TCXM, is an alien who was released from immigration detention in 2023 after it was determined that his detention was no longer lawful because there was no real prospect of his removal from Australia becoming practicable in the reasonably foreseeable future.[123] Subsequently, the Commonwealth of Australia entered an Interim Third Country Reception Arrangement with the Republic of Nauru ("the Interim Arrangement"). Pursuant to the Interim Arrangement, TCXM was one of three aliens who were given a "long term stay visa" by the government of Nauru and he was returned to immigration detention pending removal from Australia to Nauru.

120 TCXM applied for relief, including an injunction to prevent his removal from Australia, on a number of grounds. That application was dismissed by the primary judge in the Federal Court of Australia (Moshinsky J). An appeal to the Full Court of the Federal Court of Australia was removed into this Court. The grounds and contentions in this Court reduce to three issues. The first issue challenges the legality of the Interim Arrangement. On that issue I agree with the reasons of Gageler CJ, Gleeson, Jagot and Beech-Jones JJ for concluding that the Interim Arrangement is lawful.

121 The second issue raised by TCXM denied that he could be removed under s 198(2B) of the *Migration Act 1958* (Cth). He submitted that it was not "reasonably practicable" within the meaning and application of s 198(2B) to remove him due to the inadequacy of medical services in Nauru to treat his severe asthma, with the consequence of a real risk of premature death in the event of his removal. The central obstacle faced by TCXM is the decision of the Full Court of the Federal Court in *NATB v Minister for Immigration and Multicultural and Indigenous Affairs*.[124] The reasoning in that case was wrong and was inconsistent with later authority. The effect of that reasoning was that it is "reasonably practicable" to remove a person from Australia to a country even if it is near certain that the person will be persecuted, tortured, or killed in that country. But in 2014, the Commonwealth Parliament expressly recognised the inconsistency of authority and legislated in plain terms to reinstate the authority of the reasoning in *NATB*.[125]

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123 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137.

124 (2003) 133 FCR 506.

125 *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth), introducing ss 197C(1) and 197C(2) into the *Migration Act*.

Issues concerning Australia's protection obligations owed to a person who was to be removed from Australia, as well as any of the consequences for that person after removal, were to be determined exclusively through the protection visa regime. TCXM's submissions on the second issue must be rejected for that reason.

122 The final issue raised in this Court by TCXM is that his removal to Nauru would amount to executive punishment, contrary to Ch III of the *Constitution*. But there is no basis in the facts as found by the primary judge to draw an inference that the removal of TCXM, even with the increased harshness to him involving a real risk of premature death, was for any of the purposes of punishment such as retribution, deterrence (specific or general), or incapacitation. The only inference that can be drawn is that his removal is the consequence of him being an alien within the application of s 51(xix) of the *Constitution* without liberty to remain in Australia and subject to an officer's power and duty to remove him from Australia under s 198(2B) of the *Migration Act*.

123 For these reasons, set out in more detail below, the primary judge was correct to dismiss TCXM's application. The appeal to this Court must be dismissed.

Background

124 TCXM is a citizen of Iran. He arrived in Australia in 1990 and he was granted a protection visa[126] in 1995. In 1999, TCXM was convicted of the murder of his wife and sentenced to a lengthy term of imprisonment. In 2015, TCXM's protection visa was cancelled pursuant to s 501(3A) of the *Migration Act*. Section 198(2B) of the *Migration Act*[127] requires that if a delegate of the Minister has cancelled a visa of a non-citizen under s 501(3A) and other conditions are satisfied, "[a]n officer must remove [from Australia] as soon as reasonably practicable an unlawful non-citizen". Following his release from imprisonment, TCXM was held in immigration detention pending removal from Australia.

125 The power and duty of an officer in ss 189(1) and 196(1) to detain a non-citizen pending removal as soon as reasonably practicable under the provisions of s 198, including s 198(2B), was held by this Court in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*[128] to require partial disapplication,[129] relevantly[130] in circumstances where there is no real prospect of

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126 Protection (Class XA) Subclass 866 (Protection) visa.

127 Read with *Migration Act*, s 5(1) (definition of "remove").

128 (2023) 280 CLR 137.

129 See *Migration Act*, s 3A.

130 See also *Love v The Commonwealth* (2020) 270 CLR 152.

removal of a person from Australia becoming practicable in the reasonably foreseeable future. In November 2023, TCXM was released from immigration detention with a bridging visa[131] when it was ascertained that there was at that time no real prospect of his removal from Australia becoming practicable in the reasonably foreseeable future.

126 On 15 February 2025, the government of Nauru issued a long term stay visa to TCXM consistently with the Interim Arrangement. Under ss 76AAA(1)(b) and 76AAA(4) of the *Migration Act*, a bridging visa of the class held by TCXM ceases to be in effect if, together with other conditions, "the non-citizen has permission (however described), granted by a foreign country, to enter and remain in that country". The Minister gave TCXM notice under s 76AAA(2) which the Minister relied upon for the effect that TCXM's bridging visa ceased to be in effect.[132] On 16 February 2025, TCXM was returned to immigration detention, pending his removal from Australia to Nauru under s 198(2B) of the *Migration Act*.

127 On 21 February 2025, TCXM filed an application in the Federal Court seeking final relief including an injunction and writ of prohibition restraining the respondents from removing him from Australia to Nauru. On 23 February 2025, an interlocutory injunction was granted to restrain the Minister from removing TCXM involuntarily from Australia. In the final hearing of the application, TCXM's submissions included that: (i) the entry into the Interim Arrangement was conditioned upon a requirement to afford procedural fairness to TCXM which had not been provided; and (ii) TCXM's removal to Nauru was not authorised by s 198(2B) of the *Migration Act* because it was not reasonably practicable to remove him due to inadequate medical services in Nauru to treat his severe asthma. The primary judge rejected these submissions and dismissed TCXM's application.

128 An appeal was brought to the Full Court of the Federal Court. On 15 August 2025, the Attorney-General of the Commonwealth applied to remove the appeal into this Court.[133] On 4 September 2025, the Commonwealth Parliament passed the *Home Affairs Legislation Amendment (2025 Measures No 1) Act 2025* (Cth). Amongst other amendments, and in broad terms, item 10 of Sch 1 to that Act purported to make "valid", for all purposes, arrangements such as the Interim Arrangement if those arrangements would (but for item 10) be wholly or partly invalid only because the rules of natural justice were not observed in their entry. On 29 September 2025, the appeal was removed into this Court.

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131 Bridging R (Class WR) Subclass 070 (Bridging (Removal Pending)) visa.

132 See *Migration Act*, s 76AAA(4).

133 *Judiciary Act 1903* (Cth), s 40(1).

129 TCXM relies on two of the same arguments made before the primary judge and a third, constitutional argument concerning executive punishment and Ch III of the *Constitution*. The respondents rely upon a number of grounds of contention. The issues, in logical sequence, can be distilled as follows:

(i) **The legality of the Interim Arrangement**. Does the *Home Affairs Legislation Amendment (2025 Measures No 1) Act* preclude any ability of TCXM to successfully establish that any breach of procedural fairness could invalidate the Interim Arrangement? If not, is the decision to enter into the Interim Arrangement justiciable in so far as it related to an exercise of non-statutory executive power under s 61 of the *Constitution* concerning political matters and relations with a foreign State? If so, was the decision to enter the Interim Arrangement conditioned upon the provision of procedural fairness to TCXM? If so, was that procedural fairness provided? If not, did any breach of procedural fairness invalidate TCXM's long term stay visa as a matter of Nauruan law or cause TCXM's long term stay visa to cease to answer the description of "permission (however described)" in s 76AAA(1)(b) of the *Migration Act*?

(ii) **The scope of "reasonably practicable" in s 198(2B) of the *Migration Act***. Is it reasonably practicable to remove TCXM to Nauru in circumstances in which the medical services are inadequate to manage his severe asthma on an ongoing basis?

(iii) **The removal of aliens and the constitutional concept of punishment**. If it were reasonably practicable to remove TCXM then should s 198(2B) of the *Migration Act* be partially disapplied to preclude its application as an executive punishment contrary to Ch III of the *Constitution* because removal would lead to a real risk of premature death to TCXM due to his severe asthma?

130 For the reasons below, each of these issues should be decided adversely to TCXM and his appeal should be dismissed.

The legality of the Interim Arrangement

131 On this issue, I agree with the reasons of Gageler CJ, Gleeson, Jagot and Beech-Jones JJ.[134]

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134 See [30]-[36].

The scope of "reasonably practicable" in s 198(2B) of the *Migration Act*

The origin of "reasonably practicable" in s 198 and the scheme of the Migration Act

132 The progenitor of the requirement that removal be "reasonably practicable" in the various provisions in s 198 was s 54ZF(5) (later renumbered as s 198[135]). Section 54ZF(5) was introduced by the *Migration Reform Act 1992* (Cth), requiring an officer in certain circumstances to "remove as soon as reasonably practicable an unlawful non-citizen". When s 54ZF(5) was enacted, the natural expectation of Parliament was that s 54ZF(5), and the various provisions concerning removal (which were later renumbered as s 198), would only fall for consideration once "any claim by a detainee for refugee status has been refused, or is taken to have been refused, in accordance with the processes established under the [*Migration Act*]".[136] As the Explanatory Memorandum in relation to an early amendment to s 54ZF(5) said:[137]

> "It is not intended that section 54ZF should impact upon the rights that a person has to make an application for refugee status. If a person indicates that he or she is seeking refugee status or is [in] need of protection, following long standing practice, the person will be treated in accordance with the international obligations that Australia has entered into regarding persons seeking refugee status."

133 In a line of decisions culminating in *Minister for Immigration and Citizenship v SZQRB*,[138] the position developed that such protection claims were required to be adjudicated before removal because removal would not be reasonably practicable if it was in breach of Australia's international obligations. For instance, in *SZQRB*, the conditions enlivening a duty to remove SZQRB "as soon as reasonably practicable" to Afghanistan had been satisfied[139] but, as Lander and Gordon JJ explained (with a similar approach taken by Besanko and

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135 *Migration Legislation Amendment Act 1994* (Cth), s 83.

136 *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 146 at 167 [71].

137 Australia, House of Representatives, *Migration Legislation Amendment Bill 1994*, Explanatory Memorandum at 29 [125].

138 (2013) 210 FCR 505. See *Plaintiff M61/2010E v The Commonwealth (Offshore Processing Case)* (2010) 243 CLR 319; *Plaintiff M70/2011 v Minister for Immigration and Citizenship (Malaysian Declaration Case)* (2011) 244 CLR 144.

139 (2013) 210 FCR 505 at 527 [103], [106].

Jagot JJ[140]), an unlawful non-citizen could not be removed "in breach of Australia's international obligations to accord protection ... under the Refugees Convention [Convention relating to the Status of Refugees done at Geneva on 28 July 1951], the [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment done at New York on 10 December 1984] or the [International Covenant on Civil and Political Rights done at New York on 16 December 1966]".[141]

134 It is at least arguable that s 54ZF(5) and its successor provisions did not contemplate either a collateral attack[142] on findings of fact concerning Australia's protection obligations once those findings were finally made, or a parallel system for findings of fact concerning protection obligations. But there can be gaps in the scheme for findings of fact concerning protection obligations which could mean that such findings would not be finally made or a person might be found to be entitled to protection but not to a visa.[143]

The decision in NATB

135 The focus of the argument on this issue of the meaning and application of "reasonably practicable" was the decision of the Full Court of the Federal Court (Wilcox, Lindgren and Bennett JJ) in *NATB*.[144] That decision reiterated and elaborated upon the reasoning of another Full Court (Goldberg, Weinberg and Kenny JJ) approximately six months earlier in *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs*.[145]

136 These two cases were decided before the line of decisions culminating in *SZQRB*. The issue in *NATB* concerned s 198(6) of the *Migration Act*, which required an officer, in certain circumstances, to "remove as soon as reasonably practicable" a non-citizen. Although the circumstances enlivening the duty to remove as soon as reasonably practicable had arisen, the three non-citizen appellants argued that injunctions should have been issued to restrain their removal from Australia because it was not reasonably practicable to remove them. They

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140 (2013) 210 FCR 505 at 560 [313].

141 (2013) 210 FCR 505 at 549 [231].

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

143 *ASF17 v The Commonwealth* (2024) 282 CLR 172 at 213-214 [112].

144 (2003) 133 FCR 506.

145 (2003) 131 FCR 146.

each argued that the lack of reasonable practicability arose because, amongst other things, they feared persecution in the country to which they would be removed.

137 The Full Court could have decided the case simply on the basis that the three non-citizen appellants' fears of persecution had been decided, or could have been decided, in the process for application for a protection visa and that a premise of s 198 was that no collateral attack could be brought to that process. The Full Court quoted remarks which were broadly to this effect.[146] But the Full Court went further and reasoned, inconsistently with the later line of decisions culminating in *SZQRB*, that it was reasonably practicable to remove a person irrespective of any well-founded fears of that person of persecution.

138 The Full Court purported to draw a neat line between (as the respondents in the present case put it) the reasonable practicability of "the process of removal" and "events which may or may not occur after removal is complete". On that view, as the respondents in the present case submitted, "removal is complete (at the latest) when the person removed has been admitted by, and into, the receiving country". The Full Court treated a reasonably practicable process of removal to another country as containing only two very limited constraints. First, the removal must be to "a place": "it cannot have been Parliament's intention to oblige or permit an officer to remove an unlawful non-citizen from Australia's territorial boundaries by dumping that person in the sea beyond those boundaries".[147] Secondly, the determination about the reasonable practicability of removal is not confined to physical considerations such as whether the health of the person permits their transportation, but extends also to non-physical considerations such as whether the receiving country will admit the person.[148]

139 One reason, therefore, that the three non-citizen appellants' appeals were unsuccessful was that their Honours held that reasonable practicability did not extend to consideration of whether the person would be subject to death, torture, or persecution in the country to which they are removed, even if those consequences were nearly certain.[149] But the Full Court provided very little

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146 *NATB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 506 at 519 [60], relevantly quoting *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 146 at 167 [73].

147 *NATB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 506 at 515 [43]-[44].

148 *NATB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 506 at 516-517 [52].

149 *NATB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 506 at 517 [53].

reasoning in support of confining the considerations required by the phrase "remove as soon as reasonably practicable" to the process of removal rather than the consequences of removal. The limited explanation given by the Full Court in *NATB*, and apparently endorsed in part in a subsequent footnote in this Court,[150] was as follows:[151]

> "If Parliament had intended to guard against this possibility [of death, torture or persecution], we would have expected it to do so expressly; for example, by adding to s 198(6) an additional paragraph requiring the officer to be satisfied that the non-citizen would not be likely to suffer death, torture or persecution in the country to which he or she is to be removed.
>
> It seems to us that Parliament sought, by other means, to guard against the situation contemplated by counsel ...
>
> Parliament appreciated the possibility of a non-citizen being removed to a country where he or she might face the prospect of death, torture [or] persecution. Parliament sought to avert that possibility by including specific provisions, each with its own pre-conditions. There may be room for debate about the adequacy of the provisions."

140 This surprising passage turns the principle of legality on its head. On the approach in this passage, unless Parliament uses express words, Parliament will be taken to have intended to subject persons to refoulement even with the consequence of near certain death, torture, or persecution. That treats the principle of legality not as a "guide to what a Parliament in a liberal democracy is likely to have intended"[152] but as a guide to what is likely to have been intended by an abusive regime which violates human rights so systematically and consistently that its likely intent is that an officer would be required to remove a non-citizen to a country where the non-citizen faces near certain death, torture, or persecution. It might be accepted that it would only be in rare circumstances where specific provisions of the *Migration Act* will prove insufficient to prevent removal of a non-citizen to a country in which they will face near certain death, torture, or persecution. And it might be even rarer for those circumstances to be apparent to

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150 *Minister for Immigration and Multicultural Affairs v MZAPC* (2025) 99 ALJR 486 at 498 [35]; 421 ALR 483 at 496.

151 (2003) 133 FCR 506 at 517-518 [55]-[59].

152 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 [21]. See also *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 259 [15]; *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at 135 [30]; *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 310 [312].

an officer. But the point about the surprising reasoning in *NATB* is that, if and when those circumstances did arise, the officer would nevertheless be required to treat it as reasonably practicable to remove the non-citizen.

The proper interpretation of "reasonably practicable" prior to the introduction of s 197C

141 Is it reasonably practicable for an employer to require an employee to take a business trip to a country where it was nearly certain that a major earthquake would occur? Is it reasonably practicable for a sporting club to require an athlete to take a sporting trip to a country where it was nearly certain that the athlete would contract an endemic plague? Something which is practicable is something which is able to be put into practice or is feasible.[153] Contrary to the submissions of the respondents, the notion of putting a course of action into practice or assessing its feasibility need not be limited to whether the course of action *can* be done but includes also whether the course of action *should* be done. The employer or sporting club might be capable of sending the employee or athlete to be exposed to the natural disaster or the plague but it would not be feasible to do so. That conclusion is reinforced by the ordinary range of applications of the meaning of "reasonable", which engages reason in the exercise of determining what is feasible.[154]

142 The considerable flexibility in the elastic notions of reason and feasibility requires that regard be had to statutory and non-statutory executive powers related to the potential removal:[155] the concept of "reasonably practicable" in s 198 "is to be understood as allowing for the duties in s 198 to remove a person to be performed in a way which accommodates other aspects of the statutory scheme of the *Migration Act*, and—for that matter—other relevant and non-statutory exercises of executive power".[156] When considering what is feasible concerning the employee or athlete, the process of engaging reason is not suspended at the

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153 See *Oxford English Dictionary*, 2nd ed (1989), vol 12 at 269, "practicable", sense 1; *Macquarie Dictionary*, 9th ed (2023), vol 2 at 1210, "practicable", sense 1. See also *Minister for Immigration and Multicultural Affairs v MZAPC* (2025) 99 ALJR 486 at 505 [66]; 421 ALR 483 at 505.

154 See *Oxford English Dictionary*, 2nd ed (1989), vol 13 at 291, "reasonable", senses 1, 2b; *Macquarie Dictionary*, 9th ed (2023), vol 2 at 1283, "reasonable", senses 1-3.

155 *Minister for Immigration and Multicultural Affairs v MZAPC* (2025) 99 ALJR 486 at 505 [66]; 421 ALR 483 at 505-506.

156 *WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 285 FCR 463 at 492-493 [115].

point when the employee or athlete crosses the border into a foreign country: "[r]easonableness is relative, and must be proportioned to the circumstances of the case considered as a whole".[157]

143 A lack of reasonable practicability should equally be apparent from the application of ordinary language meaning and the process of reason when considering whether, in the application of the various provisions of s 198, it is reasonably practicable for an officer to remove a non-citizen to a country, including where the non-citizen would be killed, tortured, or persecuted in that country. Again, there is no rational basis to confine the application of reason to an officer's assessment of the feasibility of the removal of a non-citizen to exclude consideration of all consequences of removal. As a differently constituted Full Court (Heerey, Finn and Conti JJ) said in reasons granting leave to appeal to the three non-citizen appellants in *NATB*: "[w]hat is likely to happen at the destination may be relevant. Therefore, it might be said, if misfortune such as earthquakes, plague and anarchy are relevant, why not torture?"[158] To this it might be added, if the consent of the receiving country to receive the non-citizen is relevant,[159] then why not the motivations for that consent (such as to kill, torture, or persecute)?

144 The submission of the respondents on this appeal is effectively that events such as earthquakes or plagues in the receiving country are relevant only to the extent that they prevent a person physically from being removed to the receiving country or being officially processed as an entrant to the receiving country. That submission would have the remarkable consequence that it would be reasonably practicable to remove a person to a country with, for example, a government that will kill, torture, or persecute provided that country has efficient systems for immigration processing and arrivals for those who will be killed, tortured, or persecuted, but not to a country without such efficient systems.

145 The application of ordinary language meaning in this case, consistently with the process of reason, is bolstered by the principle of legality as emphasised in the powerful submissions of the intervener in this proceeding, the Human Rights Law Centre. As a guide to what a reasonable Parliament in a liberal democracy is likely to have intended, the principle of legality represents the reasonable expectation that the greater the interference that an interpretation of a law would have with a person's rights and freedoms, and the more fundamental those rights and freedoms,

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157 *R v Archdall and Roskruge; Ex parte Carrigan and Brown* (1928) 41 CLR 128 at 136.

158 *NATB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 185.

159 *Malaysian Declaration Case* (2011) 244 CLR 144 at 190 [92].

the less likely it is that the law would have been intended to have that interpretation.[160]

146 For these reasons, the decisions in the line culminating in *SZQRB* were correct in implicitly treating the notion of "reasonably practicable" in s 198, prior to 2014, as extending to considerations arising after the point at which the person has been admitted by, and into, the receiving country. Those decisions did so by treating "reasonably practicable" in s 198 as making removal under the various provisions in s 198 subservient to other aspects of the statutory scheme of the *Migration Act*.[161] In other words, although it might be feasible, as a matter of physical process, to remove a person to another country, perhaps while awaiting the result of an extant application for a protection visa, it would not be reasonable to do so for reasons including that the removal might defeat the very basis of the application, being protection from the conditions in that country. In this way, the line of decisions culminating in *SZQRB* took into account events that might occur after the point at which the person has been admitted by, and into, the receiving country.

147 Until 2014, the concept of "reasonably practicable" in its various applications in s 198 of the *Migration Act* was therefore interpreted in the line of decisions culminating in *SZQRB* in a way that permitted consideration of circumstances arising after a non-citizen had been admitted by, and into, a receiving country. In instances where there was a gap in the scheme for findings of fact concerning protection obligations, it would have been consistent with the line of decisions culminating in *SZQRB* to take protection considerations directly into account. In the denial of such an approach, the reasoning in *NATB* was incorrect and inconsistent with that later line of decisions culminating in *SZQRB*.[162] Prior to 2014, therefore, the reasoning in *NATB* did not represent the correct interpretation of "reasonably practicable".

The effect of the introduction of s 197C in 2014

148 In 2014, this interpretation and application of "reasonably practicable" in s 198 was intentionally altered by the Commonwealth Parliament with the passage

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160 *Stephens v The Queen* (2022) 273 CLR 635 at 653 [34]; *Hurt v The King* (2024) 281 CLR 286 at 325 [106].

161 *Minister for Immigration and Multicultural Affairs v MZAPC* (2025) 99 ALJR 486 at 505 [66]; 421 ALR 483 at 505-506, citing *WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 285 FCR 463 at 492-493 [115].

162 (2013) 210 FCR 505. See *Offshore Processing Case* (2010) 243 CLR 319; *Malaysian Declaration Case* (2011) 244 CLR 144.

of ss 197C(1) and 197C(2).[163] Those two provisions, which remain as enacted, are as follows:

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

"[N]on-refoulement obligations" are defined as including, but not limited to, "non-refoulement obligations that may arise because Australia is a party to: (i) the Refugees Convention [Convention relating to the Status of Refugees]; or (ii) the Covenant [International Covenant on Civil and Political Rights]; or (iii) the Convention Against Torture [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment]" as well as any customary international law obligations of a similar kind.[164]

149 As the Explanatory Memorandum to the Bill which introduced ss 197C(1) and 197C(2) explained, these two provisions were intended to reverse the effect of the line of decisions which culminated in *SZQRB* "by making it clear that the removal powers are separate from, unrelated and completely independent of, any provisions in the Migration Act which might be interpreted as implementing Australia's *non-refoulement* obligations".[165] The Commonwealth Parliament intended that the line of decisions which culminated in *SZQRB* were "no longer 'good law'".[166] Instead, as the Explanatory Memorandum made plain, the intention

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163 *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth).

164 *Migration Act*, s 5(1) (definition of "non-refoulement obligations").

165 Australia, House of Representatives, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, Explanatory Memorandum at 166 [1137].

166 Australia, House of Representatives, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, Explanatory Memorandum at 166 [1139]. See also 165-166 [1128]-[1141].

of the Commonwealth Parliament was to restore the effect of the contrary reasoning in *M38/2002* (and, by inference, *NATB*).[167]

150 These 2014 amendments to insert ss 197C(1) and 197C(2) therefore changed the interpretation and application of "reasonably practicable" in each of the relevant provisions in s 198. The application was changed by removing from consideration of what was reasonably practicable any of the non-refoulement obligations owed by Australia in international law. And that change in application was intended to be achieved by a new interpretation of "reasonably practicable", in light of s 197C(1), which would restore the reasoning in *M38/2002* and *NATB*. That new interpretation necessarily confined the considerations relevant to what is reasonably practicable to the practical and legal obstacles to transporting a person for the long term to another country: reasonable practicability "does not require an officer to take into account what is likely, or even virtually certain, to befall the unlawful non-citizen after removal is complete; and removal is complete, at the latest, once the person has been admitted by, and into, the receiving country".[168]

151 Concurrently with the insertion of ss 197C(1) and 197C(2), a separate amendment made in 2014 inserted a new s 198(5A),[169] in order to "preserve[] the policy position that a detainee cannot be removed while they are entitled to apply for a substantive visa"[170] and to "put beyond doubt that a person cannot be removed if they have applied for a protection visa and the grant of the visa has not yet been refused or the application has not yet been finally determined".[171]

152 The change caused by ss 197C(1) and 197C(2) to the interpretation and application of reasonable practicability in s 198 of the *Migration Act* was not altered by a further amendment to s 197C by an Act in 2021 which introduced provisions including s 197C(3).[172] The Bill which introduced this amendment was

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167 Australia, House of Representatives, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, Explanatory Memorandum at 165-166 [1136].

168 *NATB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 506 at 517 [53].

169 *Migration Legislation Amendment Act (No 1) 2014* (Cth), Sch 2, item 2.

170 Australia, House of Representatives, *Migration Legislation Amendment Bill (No 1) 2014*, Explanatory Memorandum at 13 [52].

171 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 March 2014 at 3330.

172 *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth), Sch 1, item 3.

described in the Revised Explanatory Memorandum as "anticipated to operate in relation to the very small cohort of serious character/national security concern detainees who enliven Australia's non-refoulement obligations".[173] The proposed s 197C(3) was expressed to operate "despite" ss 197C(1) and 197C(2) to preclude removal under s 198 in certain circumstances.[174] Unlike s 197C(1), s 197C(3) did not change the interpretation or application of "reasonably practicable" in the various provisions of s 198. Rather, s 197C(3) simply created another exception, alongside s 198(5A), to the power and duty to remove.[175]

The application of "reasonably practicable" in this appeal

153 The submission of TCXM on this issue, supported by the Human Rights Law Centre (intervening), was effectively an attempt to outflank s 197C(1) by denying any reliance upon issues of non-refoulement and relying instead upon Australia's international obligation to protect a person's right to life and not to remove the person from Australia if there is a real risk of irreparable harm of the kind contemplated by that right, as acknowledged in Arts 2(1) and 6(1) of the International Covenant on Civil and Political Rights. In other words, TCXM and the intervener argued that the exclusion from consideration of what is "reasonably practicable" of Australia's non-refoulement obligations under the International Covenant on Civil and Political Rights did not exclude consideration of Australia's obligations under the same Covenant not to remove a person to a country where to do so would be contrary to that person's right to life.

154 TCXM's submission could not be accepted even if it were assumed that the removal of TCXM to Nauru, where the medical services are inadequate to manage his severe asthma on an ongoing basis, amounted to a deprivation of his right to life under Art 6(1) of the International Covenant on Civil and Political Rights. As a matter of the application of "reasonably practicable" in s 198(2B), the effect of s 197C(1) cannot be evaded by switching from the French "refoulement" to the English "remove". Although s 197C(1) uses the particular language of "non-refoulement", the purpose was to exclude from an officer's consideration of what is reasonably practicable any constraint "by reference to Australia's international

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173 Australia, Senate, *Migration Amendment (Clarifying International Obligations for Removal) Bill 2021*, Revised Explanatory Memorandum at 3. See also Australia, Senate, *Parliamentary Debates* (Hansard), 13 May 2021 at 2664.

174 Australia, Senate, *Migration Amendment (Clarifying International Obligations for Removal) Bill 2021*, Revised Explanatory Memorandum at 8 [22].

175 *ASF17 v The Commonwealth* (2024) 282 CLR 172 at 213 [110].

obligations".[176] Perhaps more fundamentally, however, the meaning and application of "reasonably practicable" since 2014 has not permitted an officer to take into account any likely, or even virtually certain, events after the non-citizen has been admitted by, and received into, the foreign country.

155 For these reasons, it is reasonably practicable within the meaning and application of s 198(2B) of the *Migration Act* to remove TCXM to Nauru despite the evidence that the medical services in Nauru are inadequate to manage his severe asthma on an ongoing basis.

The removal of aliens and the constitutional concept of punishment

156 Section 51(xxvii) of the *Constitution* gives the Commonwealth Parliament power to make laws with respect to "immigration and emigration". A person seeking to immigrate to Australia, and given a visa (from visé, meaning "to examine") on arrival, will remain an immigrant, and subject to the reasonable conditions of the visa,[177] until the person has been unconditionally absorbed into the Australian community.[178] The immigration power includes power to legislate to deport an immigrant from Australia, which is the "complement" of the power to exclude that person.[179]

157 The source of legislative power for the *Migration Act*, in its application to immigrants and aliens, is the immigration power in s 51(xxvii) and the aliens power in s 51(xix) of the *Constitution*. Prior to absorption into the Australian

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176 Australia, House of Representatives, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, Explanatory Memorandum at 165-166 [1136].

177 *O'Keefe v Calwell* (1949) 77 CLR 261 at 294. See also *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518 at 533; *R v Director-General of Social Welfare (Vict); Ex parte Henry* (1975) 133 CLR 369 at 373-374, 379-381, 385, 388. Compare *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 561-562.

178 *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 413 [205], citing *Salemi v MacKellar [No 2]* (1977) 137 CLR 396 at 430, *Minister for Immigration and Ethnic Affairs v Pochi* (1981) 149 CLR 139 at 144, and *Pochi v Macphee* (1982) 151 CLR 101 at 110-111.

179 *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 414 [208], citing *Robtelmes v Brenan* (1906) 4 CLR 395 at 415, *Ah Yin v Christie* (1907) 4 CLR 1428 at 1433, *O'Keefe v Calwell* (1949) 77 CLR 261 at 277, *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 555, *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 31, *Love v The Commonwealth* (2020) 270 CLR 152 at 299 [417], and *The Commonwealth v AJL20* (2021) 273 CLR 43 at 62-63 [21].

community, a person who is accepted into Australia as an immigrant will generally be accepted on a conditional basis and subject to reasonable conditions subsequent. During this period of conditionality, the immigrant will not belong to the Australian community; the immigrant will not be one of the "people of the Commonwealth"—a constitutional citizen[180]—and will also therefore be the subject of the aliens power together with others who are temporarily present in Australia, including tourists and temporary workers.[181]

158 There was no evidence before the primary judge of the reasonable conditions of TCXM's protection visa but any express or implied character condition would plainly have been breached when TCXM murdered his wife not long after the grant of the visa in 1995. The precise date of that murder was not provided in the materials before this Court but TCXM was convicted in 1999. That event would have breached a condition subsequent in TCXM's visa.[182] Without more, therefore, the removal of TCXM would be the natural consequence under the *Migration Act* of him being an alien in Australia without a visa. In these circumstances, the criminal offending would be "merely a factum that demonstrated a failure to comply with express or implied conditions for remaining in Australia".[183]

159 The removal of an alien in these circumstances of breach of a reasonable condition subsequent, without more, is no more an instance of executive punishment, which would be contrary to the separation of powers in Ch III of the *Constitution*,[184] than the removal of a status or licence which was subject to a

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180 See Rubenstein, "When a state seeks to deport non-citizens, who are its citizens? Determining membership in the twenty-first century" (2025) 34 *Griffith Law Review* 151 at 156. See also Pillai, "Non-Immigrants, Non-Aliens and People of the Commonwealth: Australian Constitutional Citizenship Revisited" (2013) 39 *Monash University Law Review* 568; Detmold, "Being Here: Aboriginal Constitutional Citizenship" (2020) 64 (April) *Quadrant* 54 at 57-58; Davenport, "*Love v Commonwealth*: The Section 51(xix) Aliens Power and a Constitutional Concept of Community Membership" (2021) 43 *Sydney Law Review* 589 at 600-604.

181 *Jones v The Commonwealth* (2023) 280 CLR 62 at 102-103 [104]-[105].

182 *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 421 [229].

183 *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 428 [249], referring to *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 347 [46], 357 [89].

184 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27.

condition subsequent that no offence be committed.[185] This was really the only point that was intended to be conveyed in the statement made, in terms that are misleadingly absolute, in the joint judgment in *Falzon v Minister for Immigration and Border Protection* to which I was a party, that "[i]t has long been recognised that the deportation of aliens does not constitute punishment".[186]

160 The reasoning above might not universally be true. The harsh consequence of involuntary removal of a person to another country is capable of being characterised as punishment.[187] For instance, removal of an alien might easily be characterised as punishment in a hypothetical scenario where the Executive considered that a term of imprisonment for a particular alien who committed an offence was too lenient and purported to exercise a power to deport the alien in order to increase the sentence. More generally, the exercise of a power or duty by the Executive would be punishment if the circumstances established that a power or duty upon the Executive to remove an alien from Australia following the commission of an offence was not merely a natural response to breach of a condition subsequent but was imposed for sufficient of the "purposes of punishment",[188] including retribution, deterrence (specific or general), and incapacitation.[189] But no case was run before the primary judge, which relied upon any facts concerning the process of selection of TCXM and others for removal, to establish an inference that their selection for removal was for any of the purposes of punishment. Whether or not any material might support that inference cannot be considered for the first time in this Court.

161 It can immediately be accepted that the harshness of the consequences of removal for TCXM is increased by the real risk of premature death faced by TCXM due to the inadequacy of treatment in Nauru for his severe asthma. But there are no facts from which any inference can be drawn that those harsher

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185 *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 at 376 [49], 378-379 [58]-[59], 380 [63], 386 [79]. See also *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350; *Visnic v Australian Securities and Investments Commission* (2007) 231 CLR 381 at 385 [11], 386 [16]; *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542.

186 (2018) 262 CLR 333 at 347 [47].

187 See *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 96; *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 427-428 [249].

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

189 *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450 at 459 [15]; *EGH19 v The Commonwealth* [2026] HCA 7 at [168].

consequences were a factor which supported, in any way, the decision to remove TCXM.

Conclusion

162 The appeal must be dismissed with costs.

163 STEWARD J. I gratefully adopt the description of the facts and of the applicable statutory regime set out in the reasons of Gageler CJ, Gleeson, Jagot and Beech-Jones JJ. I agree that item 10 of Sch 1 to the *Home Affairs Legislation Amendment (2025 Measures No 1) Act 2025* (Cth) is a complete answer to the appellant's challenge to the lawfulness of the Interim Third Country Reception Arrangement entered into between the Commonwealth of Australia and the Republic of Nauru for the purpose of s 198AHB of the *Migration Act 1958* (Cth).

164 I also respectfully agree with Gageler CJ, Gleeson, Jagot and Beech-Jones JJ that the scope of the objective assessment required by s 198(2B) of the *Migration Act* in determining whether it is "reasonably practicable" to remove from Australia an unlawful non-citizen does not encompass a consideration of what might be expected to happen to that non-citizen once they have been received into the country to which they have been removed. I agree with the reasons of their Honours concerning that issue. I also agree with their Honours that the possibility of a non-citizen facing death, torture, persecution or like threats is addressed by the various non-compellable powers vested in the Minister, such as s 195A of the *Migration Act*.[190] These have been settled principles at least since the enactment of s 197C(1) of the *Migration Act*. The contentions advanced by the appellant and the amicus curiae which call for a departure from these principles must be rejected for the reasons given by Gageler CJ, Gleeson, Jagot and Beech-Jones JJ.[191]

165 Finally, the appellant contended that his removal to Nauru pursuant to s 198(2B) would be an unjustifiable exercise of power properly characterised as punitive, and that, as such, that provision contravenes Ch III of the *Constitution*. That proposition is foreclosed by the observation of Kiefel CJ, Bell, Keane and Edelman JJ in *Falzon v Minister for Immigration and Border Protection* that "the deportation of aliens does not constitute punishment".[192]

166 But I would now go further. In *Farmer v Minister for Home Affairs*, I set out authorities for the proposition that ordinarily s 51(xix) of the *Constitution* "supplies Parliament with an unfettered power to pass laws which determine which aliens may enter Australia and which may not".[193] That includes a power to remove an alien. That is an express power conferred on the Federal Parliament. As such, any constitutional implication derived from the structure and text of the

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190 See the reasons of Gageler CJ, Gleeson, Jagot and Beech-Jones JJ at [45].

191 See the reasons of Gageler CJ, Gleeson, Jagot and Beech-Jones JJ at [47]-[54].

192 (2018) 262 CLR 333 at 347 [47].

193 (2025) 99 ALJR 1408 at 1436-1437 [121]-[127]; 425 ALR 116 at 149-151.

Constitution must give way to that power: "constitutional implications cannot be made in the face of express constitutional language".[194]

167 This appeal must be dismissed with costs.

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194 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 175 [507].