HIGH COURT OF AUSTRALIA

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

MINISTER FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS & ORS APPELLANTS

AND

MZAPC RESPONDENT

Minister for Immigration and Multicultural Affairs v MZAPC
[2025] HCA 5
Date of Hearing: 13 August & 13 November 2024
Date of Judgment: 5 March 2025
P21/2024

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

P D Herzfeld SC with J G Wherrett for the appellants and on behalf of the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

C L Lenehan SC with A F L Krohn, C J Tran and A R Sapienza for the respondent (instructed by Pinnacle Lawyers)

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

CATCHWORDS

Minister for Immigration and Multicultural Affairs v MZAPC

Immigration – Unlawful non-citizens – Where proceeding for declaration that departmental officer exceeded executive power of Commonwealth – Where departmental officer declined to refer to Minister request for exercise of power under s 195A of *Migration Act 1958* (Cth) – Where s 198(6) of *Migration Act* imposed duty on officers to remove unlawful non-citizen as soon as reasonably practicable – Where proceeding did not challenge valid application of s 198(6) to unlawful non-citizen – Whether Federal Court could make interlocutory order restraining officers from removing unlawful non-citizen notwithstanding duty imposed by s 198(6) – Meaning of "reasonably practicable" – Relevance of *Tait v The Queen* (1962) 108 CLR 620.

Words and phrases – "balance of convenience", "effective exercise of jurisdiction", "executive power", "incidental power", "integrity of court processes", "interlocutory injunction", "interpretative accommodation", "liberty to consider", "non-compellable power", "personal power", "preserve subject matter", "preserve utility of final relief", "prima facie case", "principle of legality", "procedural decision", "reasonably practicable", "remove unlawful non-citizen", "statutory duty", "statutory power", "statutory process".

Migration Act 1958 (Cth), ss 195A, 198(6).

1 GAGELER CJ, GORDON, GLEESON AND JAGOT JJ. Section 198(6) of the *Migration Act 1958* (Cth) confers a power and imposes a duty on an officer to remove from Australia "as soon as reasonably practicable" an unlawful non-citizen who is in immigration detention and whose application for a substantive visa has been refused and finally determined.

2 Section 195A of the *Migration Act* confers a personal and non-compellable power on the Minister to grant a person who is in immigration detention a visa of a particular class if the Minister thinks that it is in the public interest to do so. The requirement of s 195A that "[t]he power ... may only be exercised by the Minister personally" was held in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*[1] to create a "zone of exclusive Ministerial personal decision-making power" into which no other executive officer of the Commonwealth may transgress. The effect of the statutory zone of exclusion is that the executive power of the Commonwealth does not extend to permit the Minister to authorise a departmental officer to decide that it is not in the public interest to grant a visa as a basis for declining to refer to the Minister a request for an exercise of power under that section.

3 In a proceeding for a declaration that a departmental officer had exceeded the executive power of the Commonwealth in declining to refer to the Minister a request by an unlawful non-citizen who is in immigration detention for an exercise of power under s 195A of the *Migration Act*, can the Federal Court of Australia make an interlocutory order restraining officers from removing the unlawful non-citizen, notwithstanding the duty imposed on officers by s 198(6) to remove the unlawful non-citizen as soon as reasonably practicable, where the proceeding does not challenge the valid application of s 198(6) to the unlawful non-citizen?

4 The answer is that it can. In the exercise of its incidental and statutory power to protect the integrity of its own processes, including by "preserv[ing] any subject matter ... pending a decision"[2] and by "ensur[ing] the effective exercise of the

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1 (2023) 97 ALJR 214 at 263-264 [251]-[254], 270 [292], 271 [302], 272 [310], 273 [313], 273 [315], 274 [319]; 408 ALR 381 at 443-444, 452, 454, 456-457.

2 *Tait v The Queen* (1962) 108 CLR 620 at 623.

jurisdiction invoked",[3] the Federal Court[4] has power to make an interlocutory order which restrains officers from removing an unlawful non-citizen, whether the proceeding challenges the valid application of s 198(6) of the *Migration Act* to the unlawful non-citizen or not. The power and the duty of an officer to remove an unlawful non-citizen from Australia as soon as reasonably practicable in s 198(6) is to be construed as accommodating to the power of the Federal Court to grant an interlocutory injunction restraining officers from removing an unlawful non-citizen. To comply with the injunction is not to breach the statutory duty.

5 Therefore, and as explained below, the appeal is to be dismissed with costs.

Background

The originating application and application for an interlocutory injunction

6 On 8 August 2023 the respondent, an unlawful non-citizen held in immigration detention pending removal from Australia, filed an originating application in the Federal Court of Australia. In that application the respondent sought declaratory and related relief. The form of the declaration sought was refined before this Court to a declaration in these terms:

> "Declare that the decisions made by officers of the Commonwealth in respect of the respondent from 2016 to 2022 in purported compliance with the 'Guidelines on Minister's detention intervention power (s 195A of the *Migration Act*)' (November 2016) exceeded the executive power of the Commonwealth."

7 In the originating application the respondent also sought an interlocutory injunction restraining the Minister for Immigration and Multicultural Affairs, the Secretary of the Department of Home Affairs, and the relevant officers acting under s 198(6) of the *Migration Act* (together, the appellants) from removing the respondent from Australia pending the final determination of the proceeding.

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3 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 33 [35], citing *Tait v The Queen* (1962) 108 CLR 620.

4 And, where applicable, the other courts having such jurisdiction in respect of a proceeding of a kind brought by the respondent, being this Court and the Federal Circuit and Family Court of Australia (Division 2).

The primary judge grants an interlocutory injunction

8 The primary judge (Feutrill J) heard the application for the interlocutory injunction on 9 and 18 August 2023. The primary judge granted the interlocutory injunction on 21 August 2023.

9 In determining to grant the interlocutory injunction, the primary judge recorded that the substantive relief sought in the originating application (the declaration and related orders) depended on claims that "officers of the Commonwealth exceeded the executive power of the Commonwealth in making a number of decisions in purported compliance with ministerial guidelines in respect of requests the [respondent] made for the Minister to consider exercising [several personal and non-compellable Ministerial] powers [including that conferred by s 195A of the *Migration Act*] to grant the [respondent] a visa".[5]

10 The primary judge found that "with respect to the 2016 Ministerial Guidelines, the factors that the Department is instructed to assess and balance operate as 'an approximation of the public interest'. Therefore, it is reasonably arguable that the Minister has purported to entrust the dispositive evaluation of the public interest to departmental officers and thereby exceeded the statutory limit on executive power imposed by s 195A(1)."[6] As a result, the primary judge concluded that there was "a sound legal basis for, at least, the declaratory relief the [respondent] seeks in the proceedings".[7]

11 The primary judge also found that the affidavits adduced as evidence in respect of the application for the interlocutory injunction demonstrated, "at the very least, that the Department made assessments of the [respondent's] circumstances against the 2016 Ministerial Guidelines and 'decided' based on those assessments not to refer his case to the Minister for consideration of the exercise of the Minister's power under s 195A". As a result, the primary judge considered

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5 *MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 989 at [2].

6 *MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 989 at [13].

7 *MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 989 at [14].

that the respondent had established a factual foundation for the declaratory relief sought in the originating application.[8]

12 The primary judge, having thereby found "a serious question to be tried"[9] existed, in assessing the balance of convenience said that the question was whether the duty to remove the respondent under s 198(6) of the *Migration Act* would "frustrate the Court's processes".[10] In answering that question in the affirmative, the primary judge found that:[11]

> " ... the [respondent's] ability to represent himself and, if legally represented, maintain his instructions, will be significantly impeded if he were removed from Australia. In such circumstances, there is a very real prospect that due to physical harm or medical ailment he would not be able to continue to prosecute these proceedings from India."

13 Further, the primary judge found that:[12]

> " ... while remote, any possibility of the grant of a visa under s 195A would be lost if the [respondent] were removed from Australia. These proceedings are a step along the way to bringing to fruition that remote possibility. Thus, removal from Australia would practically deprive the applicant of the subject matter of the proceeding (his interest in remaining in Australia)."

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8 *MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 989 at [49].

9 *MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 989 at [73].

10 *MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 989 at [52].

11 *MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 989 at [67].

12 *MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 989 at [57].

14 The primary judge, explaining why the interlocutory injunction restraining the respondent's removal from Australia would be granted, concluded that:[13]

> "In this case, granting an interlocutory injunction is the course that carries the lower risk of injustice. In so doing, I accept that 'risk of injustice' in the context of public law and impeding or frustrating legislative intention falls within the concept of 'injustice' for the purposes of assessment of that risk. But, here, the countervailing and greater risk of injustice is that of frustrating the Court's supervisory jurisdiction that entails ensuring that the exercise of executive power takes place within the legislative limits of that power."

The Full Court dismisses the appeal

15 The appellants applied for leave to appeal from the orders of the primary judge granting the interlocutory injunction. The Full Court of the Federal Court of Australia (Sarah C Derrington, Colvin and Jackson JJ) granted leave to appeal and by majority dismissed the appeal.[14]

16 Sarah C Derrington J, in dissent on the appeal, considered that "[t]he preconditions specified in s 198(6) having been met, and there being no legal challenge to any of those preconditions which have engaged the Court's processes, it cannot be correct that the interlocutory injunction sought by [the respondent] is intended to prevent the abuse or frustration of the Court's process, which has been engaged in relation to different provisions of the *Migration Act* that confer personal, non-compellable powers of intervention on the Minister. The relief sought by [the respondent] is not connected to the preconditions for the exercise of the statutory duty in s 198(6)."[15]

17 Colvin and Jackson JJ, in the majority on the appeal, identified the Minister's contention of error by the primary judge as the primary judge having granted "an injunction to restrain the performance of the statute when there was no challenge to the lawful operation of the statute (which requires the removal of the

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13 *MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 989 at [75].

14 *Minister for Immigration, Citizenship and Multicultural Affairs v MZAPC* (2024) 302 FCR 159.

15 *Minister for Immigration, Citizenship and Multicultural Affairs v MZAPC* (2024) 302 FCR 159 at 174 [54].

[respondent] from Australia as soon as reasonably practicable)".[16] Their Honours reasoned that "an injunction may be granted by the Court to restrain the performance of a clear statutory duty (such as the duty to remove under s 198(6)), but it will only do so to preserve the subject matter of the proceedings and the integrity of its own procedures".[17] On that basis, they concluded that the primary judge had not erred in granting the interlocutory injunction as:[18]

> " ... even though the [respondent] accepted that there is a present duty to remove him from Australia, interlocutory relief may be granted to restrain the removal of the [respondent] from Australia pending the determination of claims to relief which, if granted, would require action to be taken which may give rise to the possibility of the Minister acceding to the request. This is not because of a claim that the making of a request of itself qualifies the duty imposed by s 198(6) to remove (a claim rejected by each of Colvin J, Rares J and Wigney J) but because of a claim that there has been a *Davis*-type excess of authority in rejecting a request which, if upheld, gives rise to the future possibility that relief may be granted that requires steps to be taken to reinvigorate that request and, consequently, the possibility of the request being acceded to thereby, at that time, bringing the party making the request outside of the operation of s 198(6)."

18 The reference in that conclusion to Colvin, Rares and Wigney JJ having rejected an argument that the making of a request by a person for the Minister to exercise the personal non-compellable power in, relevantly, s 195A of the *Migration Act* qualifies the duty of removal in s 198(6) of that Act is a reference to their respective decisions in *MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs*,[19] *BJM16 v Minister for Immigration, Citizenship and Multicultural Affairs*,[20] and *ASU22 v Minister for Immigration, Citizenship and*

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16 *Minister for Immigration, Citizenship and Multicultural Affairs v MZAPC* (2024) 302 FCR 159 at 183 [97].

17 *Minister for Immigration, Citizenship and Multicultural Affairs v MZAPC* (2024) 302 FCR 159 at 188 [130].

18 *Minister for Immigration, Citizenship and Multicultural Affairs v MZAPC* (2024) 302 FCR 159 at 189 [133].

19 [2023] FCA 877.

20 (2023) 300 FCR 143.

Multicultural Affairs.[21] In the first of these decisions, involving the respondent, Colvin J dismissed the respondent's application for leave to appeal against an order of the Federal Circuit and Family Court of Australia (Division 2) dismissing the respondent's application for an interlocutory injunction restraining the Minister (and others) from removing him from Australia under s 198(6) on the basis that because the respondent had "'pending requests' for the exercise in his favour of certain powers conferred by the *Migration Act* upon the Minister it would be unlawful for him to be removed from Australia".[22] The subsequent decisions applied Colvin J's reasoning.

The appeal to this Court

19 The appellants obtained special leave to appeal to this Court on 9 May 2024. The sole ground of appeal was that the majority in the Full Court "erred in concluding that the primary judge had power to grant an interlocutory injunction restraining the respondent's removal from Australia". The respondent filed a notice of contention to the effect that if, on its proper construction, s 198(6) of the *Migration Act* prevents a court in the exercise of the judicial power of the Commonwealth from granting interlocutory relief to preserve the subject-matter in dispute or to protect the integrity of its own processes, then s 198(6) is inconsistent with Ch III of the *Constitution* and is therefore incapable of applying to the extent that it is invalid, including by operation of s 3A of the *Migration Act*.[23]

20 When the appeal came before this Court for hearing it became apparent that, although the matter had proceeded before the primary judge and the Full Court on the basis that, properly construed, s 198(6) applied and required an officer to remove the respondent from Australia, it being reasonably practicable to do so notwithstanding the pending proceeding based on *Davis* in which the respondent sought the declaration,[24] the construction of s 198(6) underlying that common

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21 [2023] FCA 1326.

22 *MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 877 at [1].

23 Section 3A(1) provides, in part, that if a provision of the *Migration Act* would have an invalid application and 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".

24 In accordance with *MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 877.

ground was in issue. As the respondent put it, the dispute between the parties was whether "the time for performance of [the duty under s 198(6)] ha[d] crystallised". The Court invited the respondent to amend his notice of contention to raise the construction of s 198(6) directly. The hearing was adjourned at the appellants' request to enable further written submissions to be filed. In a further amended notice of contention the respondent raised additional contentions as follows:

> "1. That, properly construed, s 198(6) of the *Migration Act 1958* (Cth) does not require or permit the removal of the respondent in circumstances where:
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> ...
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> b. the respondent has made a request to the first appellant for the exercise of a personal non-compellable power in respect of the respondent and that request has not been brought to the first appellant's attention by the second appellant; or
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> c. an injunction restraining removal is in force."

21 The appellants and the Attorney-General of the Commonwealth (intervening) submitted that, on its proper construction, s 198(6) of the *Migration Act*, in framing the power and duty of an officer to remove a person in the specified circumstances "as soon as reasonably practicable", contemplated only the practical capacity of removal, not any other circumstance. According to the appellants and the Attorney-General, the power and duty of an officer in s 198(6) yields in a case where the Minister has made a "procedural decision" to consider the exercise of the Minister's personal and non-compellable power,[25] not because it was thereby not "reasonably practicable" for an officer to remove the person, but only because s 198(6) is to be construed as subject to an implied exception where such a "procedural decision" has been made. The making of such a "procedural decision", the appellants and the Attorney-General argued, is critical because such a decision alone makes the length of time for which the power and duty is "postponed or suspended or deferred", and therefore the length of time for which an unlawful non-citizen may be detained, determinate rather than impermissibly indeterminate. In this case, however, the Minister had not made a "procedural decision". That an officer decided not to bring the respondent's request(s) to the Minister's attention,

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25 See, in respect of a "procedural decision" in this context, *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 214 at 224 [14], 238 [99], 254-255 [198], 270 [296]; 408 ALR 381 at 389, 407-408, 431, 453.

according to the appellants and the Attorney-General, did not involve the officer usurping any part of the personal powers of the Minister under the *Migration Act* as the Minister had not instructed the officer one way or another about the request(s) (either individually or as part of a class). Therefore, the power and the duty in s 198(6) was not "postponed or suspended or deferred" but applied according to the terms of the provision.

22 On this basis, while the appellants and the Attorney-General accepted the principle that the Federal Court has power to grant an interlocutory injunction to ensure the effective exercise of jurisdiction invoked in a proceeding before it, including to preserve the subject-matter of the proceeding and to prevent the frustration of the proceeding, they submitted that this power was qualified in the present case as: (a) the power cannot be exercised to permit non-compliance with a valid statute (in this case, s 198(6)); (b) if the power could be exercised to permit non-compliance with a valid statute, there would be no method by which the court could evaluate the balance of convenience; (c) the power is exercisable only in connection with the preservation of the rights and obligations of the parties in the proceeding and, in this case, the final relief sought does not extend to any challenge to or prevention of the exercise of the power and duty of removal in s 198(6); and (d) for the interlocutory injunction to have any utility it would need to continue after the declaration sought has been made, the effect of which would be to preclude removal of the respondent from Australia contrary to the duty in s 198(6).

Power to grant an interlocutory injunction to prevent removal

23 No court has an unlimited power to grant an interlocutory injunction[26] and an order "must be framed so as to come within the limits set by the purpose which [the order] can properly be intended to serve".[27] Further, the primary purpose of an interlocutory injunction remains "to keep matters in statu quo until the rights of the parties can be determined at the hearing of the suit".[28] The condition precedent remains that "a plaintiff seeking an interlocutory injunction must be able to show sufficient colour of right to the final relief, in aid of which interlocutory relief is

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26 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 29 [27]-[28], 32-33 [35].

27 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 625.

28 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 216 [9], quoting Jordan, *Chapters on Equity in New South Wales*, 6th ed (1945) at 146.

sought",[29] the usual description of the sufficiency of that colour of right being the establishment of a serious question to be tried or a prima facie case.[30]

24 It is not the case, however, that the power of a court to make an interlocutory order, including to grant an interlocutory injunction, is confined to an order (albeit on an interim basis) to the same effect as the final order sought. Rather, as Gummow and Hayne JJ said in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*, while "it is necessary to identify the legal ... or equitable rights which are to be determined at trial and in respect of which there is sought final relief", the final relief sought "may or may not be injunctive in nature".[31] In stating in the same case that "[i]f the [applicant] cannot show a sufficient colour of right of the kind sought to be vindicated by final relief, the foundation of the claim for interlocutory relief disappears",[32] Gleeson CJ was making the point that there is no "'free-standing' right to interlocutory relief" because, absent a serious question to be tried or a prima facie case to final relief being established, "[t]here is then no justice in maintaining the status quo, because that depends upon restraining the [respondent] from doing something which, by hypothesis, the [applicant] has no right to prevent".[33] In other words, it is the establishment of the serious question to be tried or the prima facie case, and therefore a sufficient colour of right to final relief, which conditions the grant of an interlocutory injunction, the grant otherwise depending on justification "by the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation of such principles".[34]

25 The principle apposite to the present case is the power of a court to protect the integrity of its own processes by ensuring its capacity to effectively exercise its jurisdiction invoked in a proceeding pending before it. Applied to the present

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29 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 217 [11].

30 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 217-218 [13], referring to *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148 at 153.

31 (2001) 208 CLR 199 at 241 [91].

32 (2001) 208 CLR 199 at 218 [15].

33 (2001) 208 CLR 199 at 218 [16].

34 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 241 [91], quoting *Muschinski v Dodds* (1985) 160 CLR 583 at 615.

case, the power of the Federal Court to protect the integrity of its own processes in a proceeding pending before it of the kind brought by the respondent is not confined to an interlocutory injunction preventing the removal of an unlawful non-citizen from Australia only where the final relief sought is an order that the person cannot be lawfully removed from Australia. As an incident of its statutory power to make such interlocutory orders as are judicially considered to be appropriate,[35] the power of the Federal Court to "*protect* the integrity" of the processes before it "once set in motion"[36] includes the vindication of its own authority to ensure it can determine the proceeding before it and grant final relief of utility.[37]

26 *Tait v The Queen*[38] is directly on point. In *Tait*, there were two proceedings in respect of a prisoner who had been convicted and sentenced to death. The first proceeding, between the petitioner, D H F Scott, and the Chief Secretary of Victoria, involved a request for a direction that an inquiry into the prisoner's sanity be held. Counsel for the petitioner argued that, if an inquiry were ordered and the prisoner were found as a result of the inquiry to be insane, his execution would be contrary to the common law as applicable in Victoria.[39] The second proceeding, between the prisoner and the Crown in right of Victoria, involved an application for the respite of execution of the sentence of death to which the prisoner had been subjected. Both the request and the application had been rejected and were subject to applications for special leave to appeal to this Court. Counsel in each proceeding brought a preliminary application for an adjournment of the hearing of the application for special leave to appeal and for a stay of the execution of the prisoner. The preliminary applications were heard together. After Dixon CJ observed during argument that he had "never had any doubt that the incidental powers of the Court can preserve any subject matter, human or not, pending a decision",[40] the Court ordered a stay of execution of the prisoner to enable the two applications for special leave to appeal and any appeals to be determined "entirely

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35 *Federal Court of Australia Act 1976* (Cth), s 23.

36 *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 391.

37 *Tait v The Queen* (1962) 108 CLR 620 at 623-624.

38 (1962) 108 CLR 620. Also reported as *Scott v Chief Secretary of Victoria* (1962) 36 ALJR 330. See Feltham, "The Common Law and the Execution of Insane Criminals" (1964) 4 *Melbourne University Law Review* 434 at 447-448, 471-473.

39 (1962) 108 CLR 620 at 623.

40 *Tait v The Queen* (1962) 108 CLR 620 at 623.

so that the authority of this Court may be maintained".[41] By this, the Court was vindicating its authority to determine each of the two proceedings before it and acting to preserve the utility of so doing, including by preserving the utility of the direction for an inquiry sought in the first proceeding. The formal order of the Court was entered in both proceedings, recorded that it was made upon applications made to the Court "severally" by counsel on behalf of the petitioner and counsel on behalf of the prisoner, and was expressed in terms that "the execution of the … prisoner … be not carried out but be stayed pending the disposal of the aforesaid applications to this Court for special leave to appeal and of any appeal or appeals to this Court in consequence of such applications". The submission for the appellants and the Attorney-General in the present case that the interlocutory order in *Tait*[42] was referable solely to the second proceeding is wrong.

27 Contrary to other submissions for the appellants and the Attorney-General, *Simsek v Macphee*[43] does not support a purported limit on the power contrary to *Tait*. In *Simsek* Stephen J merely confirmed that the incidental power of a court is "not to be exercised as of course" and is not to be "used to circumvent the safeguard which the requirement that a prima facie case be made out provides in ensuring that the potent weapon of interlocutory injunctive relief is not misused".[44] The applicant in that case failed to establish a prima facie case for any final relief.[45] The applicants in *Re Minister for Immigration and Multicultural Affairs; Ex parte Fejzullahu*, whose applications for interlocutory injunctions to restrain the Minister from removing them from Australia relied on the same power, failed at the same hurdle of establishing a prima facie case for final relief.[46] In *P1/2003 v Minister for Immigration & Multicultural & Indigenous Affairs* French J concluded only that an interlocutory injunction preventing an unlawful non-citizen's removal from Australia would be "inappropriate"[47] in circumstances where it could not be said that the plaintiff's claims would be "destroyed by the

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41 *Tait v The Queen* (1962) 108 CLR 620 at 624.

42 *Tait v The Queen* (1962) 108 CLR 620 at 624.

43 (1982) 148 CLR 636.

44 (1982) 148 CLR 636 at 641.

45 (1982) 148 CLR 636 at 645.

46 (2000) 74 ALJR 830 at 832 [8]; 171 ALR 341 at 343.

47 [2003] FCA 1029 at [52].

removal of the plaintiff from Australia, albeit that removal might impose considerable practical difficulties upon his ability to instruct lawyers and to pursue those claims".[48] In *CPK20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* Mortimer J evaluated the prima facie case for final relief to be weak[49] and concluded, on the facts, that "the preservation of the subject matter of this proceeding does not require interlocutory relief to be granted".[50] These are all findings of fact in the particular circumstances of the case. They do not establish the limiting principle for which the appellants and the Attorney-General contend (that the scope of an appropriate interlocutory order is confined to the scope of the final order sought in the matter). So much is apparent from the fact that, in further observing in *CPK20* that the interlocutory relief sought had "no substantive connection with the controversy between the parties in the proceeding, nor with the final relief sought", Mortimer J immediately thereafter said that the case before her was "rather, a *Tait* kind of application".[51] In referring to a "*Tait* kind of application", Mortimer J was conveying the broad scope of a court's power to protect the integrity of its own processes by ensuring its capacity to effectively exercise its jurisdiction in a proceeding pending before it by any order appropriately framed to that purpose, as demonstrated by *Tait*.[52]

28 While Beaumont J (with whom Black CJ agreed) said in *Minister for Immigration, Local Government and Ethnic Affairs v Msilanga* that the "claim for interim relief is clearly related to the claim for final relief and thus the necessary relationship has been established"[53] so that the reservations expressed in *Elmi v Minister for Immigration and Ethnic Affairs*[54] had no application, both that statement and the reservations expressed in *Elmi* must be understood in context. Beaumont J in *Msilanga* was considering whether an interlocutory order (for release of an unlawful non-citizen from detention) was "appropriate" to be made, as referred to in s 23 of the *Federal Court of Australia Act 1976* (Cth). The existence of the connection between the interlocutory order and the final order put

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48 [2003] FCA 1029 at [46].

49 [2020] FCA 825 at [63].

50 [2020] FCA 825 at [80].

51 [2020] FCA 825 at [80], referring to *Tait v The Queen* (1962) 108 CLR 620.

52 *Tait v The Queen* (1962) 108 CLR 620 at 623-624.

53 (1992) 34 FCR 169 at 181.

54 (1988) 17 ALD 471.

that issue of fact beyond question. In *Elmi* Gummow J's concern, expressed in obiter dicta, was that the principle that s 23 of the *Federal Court of Australia Act* "will not generally be read as giving power to grant additional remedies of a kind already specifically provided for in other legislation where that legislation is directed to a particular head of jurisdiction of the court and is to be seen as a comprehensive statement of the remedies there available"[55] might be engaged given that the application in that case was brought under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) which, in s 15, gave the Federal Court power to suspend the operation of a decision and stay proceedings under a decision.

29 None of the authorities to which the appellants and Attorney-General referred cast any doubt on the breadth of the power of the Federal Court to make an interlocutory order to protect the integrity of its own processes by ensuring its capacity to effectively exercise its jurisdiction in a proceeding pending before it, including an order to preserve the subject-matter of the proceeding and an order to preserve the utility of the final relief that is sought.

30 This power extends to the making of an interlocutory order to prevent the appellants from removing the respondent from Australia in purported compliance with s 198(6) of the *Migration Act*. It does so notwithstanding that the final relief sought by the respondent does not challenge the valid application to him of s 198(6) but, rather, challenges the validity of officers dealing with his request(s) to the Minister to exercise the Minister's personal and non-compellable power to grant the respondent a visa.

31 Given that s 195A of the *Migration Act* "applies to a person who is in detention under section 189" and the primary judge found that there was a prima facie case established that, in respect of the respondent's request(s), "the Minister has purported to entrust the dispositive evaluation of the public interest to departmental officers and thereby exceeded the statutory limit on executive power imposed by s 195A(1)",[56] the Federal Court was empowered to grant an interlocutory injunction restraining the removal of the respondent from Australia in order to protect the integrity of its own processes by ensuring its capacity to effectively exercise its jurisdiction in a proceeding pending before it. That is, the respondent having instituted a proceeding seeking the declaration as of right, the

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55 (1988) 17 ALD 471 at 472, referring to *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 162-163.

56 *MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 989 at [13].

Federal Court was empowered to vindicate its authority by preserving the subject-matter and utility of the proceeding which, in this case (given the terms of s 195A(1) of the *Migration Act*), depended on the respondent remaining in detention in Australia so that the Minister retained power to deal with the respondent's request(s) lawfully. Further, the finding by the primary judge that if the respondent were removed from Australia there was a "very real prospect" of the respondent being unable to continue to prosecute the proceeding[57] was also an independent factual foundation sufficient to enable the primary judge to grant the interlocutory injunction.

32 To the extent the appellants and Attorney-General submitted that the interlocutory injunction must persist if the declaration is made or the interlocutory injunction will have had no utility, three responses may be given. First, the utility is that it will enable the respondent to continue to prosecute the proceeding in which the declaration is sought. Second, there is undoubted utility in the declaration being made if the respondent establishes an entitlement to it in the proceeding. The utility "would follow from the declaration of right that [the respondent's] request for an exercise of the power conferred by [s 195A] of the Act is yet lawfully to be finalised".[58] Third, and as a result, the Minister will be able to consider whether or not to exercise the power under s 195A at the conclusion of the proceeding.

Section 198(6) to be construed to accommodate interlocutory injunction

33 Section 198(6) of the *Migration Act* is to be construed "by reference to the language of the [Act] viewed as a whole",[59] and "so that it is consistent with the language and purpose of all the provisions of the" Act.[60] The *Migration Act* is also to be construed "on the prima facie basis that its provisions are intended to give effect to harmonious goals", so that "[w]here conflict appears to arise from the

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57 *MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 989 at [67].

58 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 214 at 230 [62]; 408 ALR 381 at 398.

59 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69], quoting *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320.

60 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69].

language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions",[61] and "so far as possible to operate in harmony and not in conflict" with other legislation enacted by the Commonwealth Parliament.[62]

34 The provisions of the *Migration Act* with which the power and the duty in s 198(6) must be harmonised include s 195A and the other personal and non-compellable powers of the Minister enabling the Minister, if satisfied that it is in the public interest, to grant a visa, to otherwise substitute for a decision of the relevant tribunal a decision that is more favourable to the applicant, or to enable an unlawful non-citizen to apply for the grant of a visa.

35 It may be accepted that the core meaning of the qualification on the power and duty in s 198(6) ("as soon as reasonably practicable") is as Gummow J described in *Al-Kateb v Godwin.* That is, s 198(6) 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").[63] Another formulation which has been adopted is that "reasonably practicable" involves the question "whether the removal is possible from the officer's viewpoint".[64] These observations do not suggest, however, that the concept of "reasonable practicability" is confined to "physical possibility". Indeed, it would be more than odd to construe a statutory provision as contemplating that, from the perspective of an officer, it is "reasonably practicable" 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 of court. Yet that possible circumstance is the assumed foundation for the appellants and the

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61 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [70].

62 *Commissioner of Police (NSW) v Eaton* (2013) 252 CLR 1 at 33 [98].

63 (2004) 219 CLR 562 at 608 [121]. See also, eg, *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 146 at 165-166 [65]-[69]; *NATB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 506 at 516-517 [47]-[55].

64 *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 146 at 165 [65].

Attorney-General's argument that the power of a court to make an interlocutory order to protect its own processes yields to the power and the duty of an officer to remove an unlawful non-citizen in s 198(6) of the *Migration Act*. To the contrary, however, the very fact that such a construction of s 198(6) would involve this conflict between, on the one hand, the Federal Court exercising its power to protect the integrity of its own processes by ensuring its capacity to effectively exercise its jurisdiction in a proceeding pending before it and, on the other hand, an officer complying with the duty of removal in s 198(6) is itself a powerful indicator that the construction is wrong.

36 The provisions of the *Migration Act* recognise this Court, the Federal Court, and the Federal Circuit and Family Court of Australia (Division 2) as courts having jurisdiction as conferred by that Act and otherwise by s 75(v) of the *Constitution* and s 39B of the *Judiciary Act 1903* (Cth).[65] The High Court or a Justice "may at any time make such order as is necessary to effectuate the grant of original or appellate jurisdiction in the Court"[66] and the Federal Court has power to make orders, including interlocutory orders, in relation to matters in which it has jurisdiction, as the Court thinks appropriate.[67] By s 140 of the *Federal Circuit and Family Court of Australia Act 2021* (Cth) the Federal Circuit and Family Court of Australia (Division 2) has power, in relation to matters in which it has jurisdiction, to "make orders of such kinds, including interlocutory orders, as the Court considers appropriate". Therefore, these Courts each have power to grant an interlocutory injunction to make orders to protect the integrity of their own processes by ensuring their capacity to effectively exercise their jurisdiction in a proceeding pending before them, including orders to preserve the subject-matter of the proceeding and to prevent the determination of that proceeding being frustrated. Section 198(6) of the *Migration Act*, accordingly, is to be construed in this common law and statutory context. The appellants and Attorney-General's construction of s 198(6) treats the provision as if it operates in a legal vacuum divorced from the reality of the jurisdiction and power of these Courts.

37 Recognising that "judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with

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65 See, eg, *Migration Act*, Div 2 of Pt 8, Pt 8A, Pt 8B, s 494.

66 *High Court Rules 2004* (Cth), r 8.07.1.

67 *Federal Court of Australia Act 1976* (Cth), s 23.

respect to the making, interpretation and application of laws",[68] it is unlikely in the extreme that the legislature intended to create an irremediable conflict between the duty of an officer to comply with an interlocutory injunction to prevent an unlawful non-citizen being removed from Australia and the duty of an officer to remove such a person from Australia in accordance with s 198(6). It is also unlikely in the extreme that the legislature intended that the power of the High Court, the Federal Court and the Federal Circuit and Family Court of Australia (Division 2) to ensure the effective exercise of jurisdiction in a proceeding before them should, by mere implication, yield to the power and the duty of an officer to remove an unlawful non-citizen from Australia when that power and duty is expressly qualified by the expression "as soon as reasonably practicable". The qualification on the power and the duty in s 198(6) in the words "as soon as reasonably practicable" is ample to prevent any such irremediable conflict by ensuring that the power and the duty in s 198(6) accommodate to, and do not arise for so long as, the interlocutory injunction preventing removal remains in force.

38 *Plaintiff M61/2010E v The Commonwealth*[69] is not authority for the proposition that such an interpretative accommodation may only be reached in a case where the Minister has made a "procedural decision" to consider the exercise of the Minister's relevant personal and non-compellable powers. The appellants and Attorney-General's submission to this effect depended on an assumption that, but for the making of such a procedural decision, the interpretative accommodation would mean that the statutory provisions purport to authorise detention by the Executive for an indeterminate period. In *Plaintiff M61/2010E* the relevant power and duty of removal in s 198(2), in common with that in s 198(6), was qualified by the words "as soon as reasonably practicable". The Minister argued that the mere possibility of the Minister exercising the relevant personal and non-compellable powers suspended the obligation to bring to an end the detention of the unlawful non-citizens who might be the subject of any such exercise.[70] In rejecting that argument, French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ said that because the result of the Minister's argument would be impermissible indeterminate detention of the unlawful non-citizens at the will of the Executive, a "firmer statutory foundation" for the lawfulness of the continuing

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68 *Zheng v Cai* (2009) 239 CLR 446 at 455 [28]. See also *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78]; *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 591-592 [43].

69 (2010) 243 CLR 319.

70 (2010) 243 CLR 319 at 348-349 [64].

detention of the unlawful non-citizens had to be found.[71] That firmer foundation existed in the Minister having made the "procedural decision", applying to all the relevant unlawful non-citizens, to consider the exercise of the relevant personal and non-compellable powers.[72]

39 In the present case the respondent invoked the jurisdiction of the Federal Court to obtain a declaration to the effect that his request(s) had not been dealt with according to law, and that Court granted the interlocutory injunction to prevent the frustration of that proceeding. In these circumstances, the distinction between, on the one hand, the Minister making a "procedural decision" engaging statutory rather than non-statutory power and, on the other hand, the respondent having made request(s) not engaging statutory power is not material. The grant of the interlocutory injunction to prevent the removal of the respondent pending final determination of the proceeding ensures that the respondent's continuing detention for the purpose of enabling the determination of the proceeding and, thereafter, enabling the Minister (if the Minister wishes) to consider the request(s) within a reasonable time does not involve detention of the respondent within the sole control of the Executive and of indeterminate duration. Section 198(6), by reason of the qualification of the power and the duty to remove conveyed by the words "as soon as reasonably practicable", yields to the fact of the grant of the interlocutory injunction to prevent frustration of the proceeding.

40 So construed, there is also no postponement, suspension or deferral of the power and duty in s 198(6) of the *Migration Act*. Rather, on the grant of the interlocutory injunction and for so long as it remains in force, the occasion for the exercise of the power and the discharge of the duty in s 198(6) does not exist. It follows that there can never be an inconsistency between, on the one hand, the duty of an officer to remove an unlawful non-citizen under s 198(6) and, on the other hand, the operation of an interlocutory injunction granted by this Court, the Federal Court, or the Federal Circuit and Family Court of Australia (Division 2) (as relevant) restraining an officer from removing an unlawful non-citizen in purported compliance with the duty in s 198(6). Therefore, the question whether the power to grant an interlocutory injunction permits non-compliance with a valid statute does not arise.[73]

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71 (2010) 243 CLR 319 at 349 [65].

72 (2010) 243 CLR 319 at 351 [71].

73 cf *Reid v Howard* (1995) 184 CLR 1 at 16.

41 The reasoning in *Plaintiff S4/2014 v Minister for Immigration and Border Protection*[74] is consistent with this conclusion. The point which French CJ, Hayne, Crennan, Kiefel and Keane JJ were making in *Plaintiff S4/2014*, as relevant to the present case, is that the qualification on the removal duty "as soon as reasonably practicable" in s 198(2) (being the same as the qualification in s 198(6) and the other provisions for removal in s 198), in its temporal dimension, fixes an end point for detention. That is, once it is reasonably practicable for removal to be effected, that removal is to be effected "as soon" as such reasonable practicability exists. As their Honours put it:[75]

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

42 By this means, detention by the Executive in *Plaintiff S4/2014* was both for a legitimate and non-punitive purpose (described as "the purpose of removal from Australia; the purpose of receiving, investigating and determining an application for a visa permitting the alien to enter and remain in Australia; or ... the purpose of determining whether to permit a valid application for a visa"[76]) and of a determinate and not indeterminate period.

43 In *Plaintiff S4/2014* French CJ, Hayne, Crennan, Kiefel and Keane JJ then said:[77]

> "In the Act's operation with respect to the plaintiff, the requirement to remove unlawful non-citizens as soon as reasonably practicable is to be treated as the leading provision, to which provisions allowing consideration of whether to permit the application for, or the grant of, a visa to an unlawful non-citizen who is being held in detention are to be understood as subordinate. The powers to consider whether to permit the application for, and the grant of, a visa had themselves to be pursued as soon as reasonably practicable. Unless those powers were to be exercised in a way that

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74 (2014) 253 CLR 219.

75 (2014) 253 CLR 219 at 233 [33].

76 (2014) 253 CLR 219 at 231 [26].

77 (2014) 253 CLR 219 at 233-234 [35] (citation omitted).

> culminated in the plaintiff's successfully applying for the grant of a visa, his detention had to be brought to an end by his removal from Australia as soon as reasonably practicable. That is, the decision to exercise the power under s 46A, any necessary inquiry, and the decision itself, must all be made as soon as reasonably practicable. Otherwise, the plaintiff's detention would be unlawful."

44 In characterising the removal power and duty in s 198(2) as the "leading provision" and the Minister's personal and non-compellable power in s 46A (to permit an application for a visa to be made) as "subordinate",[78] their Honours were saying that because the removal power and duty in s 198(2) was to be exercised "as soon as reasonably practicable", it followed that the Minister's consideration (and, therefore, also non-consideration) of the Minister's personal and non-compellable power in s 46A also had to be completed "as soon as reasonably practicable". It is in that sense that s 198(2) is the leading provision and s 46A the subordinate provision.

45 Similarly, in the present case, if the respondent obtains the declaration sought in respect of his request(s) to the Minister that the Minister exercise the personal and non-compellable power in s 195A to grant the respondent a visa, the words "as soon as reasonably practicable" in s 198(6) will apply also to any consideration by the Minister of the exercise of the personal and non-compellable power in s 195A. That is, the qualification in s 198(6) "as soon as reasonably practicable" performs multiple important functions in the statutory scheme. The qualification functions as both constraint and compulsion. As constraint, it ensures that the power and duty to remove in s 198(6) does not operate if it is not reasonably practicable to remove an unlawful non-citizen (which, as explained, it is not if the High Court, Federal Court or Federal Circuit and Family Court of Australia (Division 2) has granted an interlocutory injunction restraining removal pending the determination of a proceeding). As compulsion, it ensures that once it is reasonably practicable to remove an unlawful non-citizen, that removal must occur as soon as reasonably practicable thereafter. By reason of its "leading" provision status, the temporal obligation s 198(6) imposes also applies, by implication, to the exercise or non-exercise of the Minister's personal and non-compellable power under s 195A to grant a visa so that the mere availability of that power cannot result in detention of an unlawful non-citizen at the will of the Executive and for an indeterminate duration.

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78 See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [70].

46 Nothing in *Minister for Immigration and Border Protection v SZSSJ*[79] is to the contrary of these conclusions. That "processes undertaken by the Department to assist in the Minister's consideration of the possible exercise of a non-compellable power derive their character from what the Minister personally has or has not done"[80] remains so. But in all cases, procedural decision or not, content is given to the temporal and substantive components of s 198(6) by the facts as they exist from time to time. Once the proceeding is finally determined, it is the actions or non-actions of the respondent and the Minister that will shape the relevant facts. At this stage, no speculation as to those facts, or their legal consequences, is helpful.

47 These conclusions are sufficient to determine the appeal against the appellants. The respondent obtained the interlocutory injunction and that event disengaged the power and duty to remove in s 198(6). Ground 1(c) of the further amended notice of contention must be upheld.

48 It is not necessary and not appropriate to consider the respondent's broader contention in ground 1(b) to the effect that the mere making of the request that the Minister exercise the personal and non-compellable power in s 195A suffices to disengage the power and duty of removal in s 198(6). That is not the present case. Nor does the respondent's constitutional issue in ground 2 of the further amended notice of contention arise because s 198(6) of the *Migration Act* does not prevent a court from exercising judicial power to protect the integrity of its own processes by ensuring its capacity to effectively exercise its jurisdiction in a proceeding pending before it.

Order

49 For these reasons, the appeal should be dismissed with costs.

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79 (2016) 259 CLR 180.

80 (2016) 259 CLR 180 at 200 [54].

EDELMAN J.

Introduction: the real question on this appeal

50 The Minister[81] summarises a question raised by this appeal in very simple terms: "Does the Federal Court's power to grant an interlocutory injunction include the power to direct officers of the Commonwealth to disobey the [statutory] law?". In more detail: did the Federal Court of Australia have power to direct officers of the Commonwealth to disobey the statutory duty in s 198(6) of the *Migration Act 1958* (Cth) (the validity of which was unchallenged) which required MZAPC to be removed "as soon as reasonably practicable"?

51 Before the primary judge[82] and before the Full Court of the Federal Court of Australia[83] it was assumed that removal of MZAPC was validly required by s 198(6) of the *Migration Act*. The primary judge considered that the question was whether "the undoubted duty to remove [MZAPC] [under s 198(6)] will frustrate the Court's processes".[84] The majority of the Full Court expressed the question as whether the Federal Court had power to order "restraint of the performance of a statutory duty".[85] Both the primary judge and the majority of the Full Court held that the Federal Court had such a power,[86] despite, as the majority of the Full Court recognised, "the seriousness of restraining the enforcement of a valid law".[87] The primary judge and the majority of the Full Court relied upon the need for a court to protect its own processes as the basis for a power to make an order that directed officers of the Commonwealth to disobey the statutory duty in s 198(6) of the

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81 The appellants and the Attorney-General of the Commonwealth (intervening) put their case collectively and will be referred to as "the Minister".

82 *MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 989 at [68].

83 *Minister for Immigration, Citizenship and Multicultural Affairs v MZAPC* (2024) 302 FCR 159 at 178 [74], 183 [97].

84 *MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 989 at [52].

85 *Minister for Immigration, Citizenship and Multicultural Affairs v MZAPC* (2024) 302 FCR 159 at 187 [123].

86 *MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 989 at [15]; *Minister for Immigration, Citizenship and Multicultural Affairs v MZAPC* (2024) 302 FCR 159 at 187 [123], 188-189 [129]-[131].

87 *Minister for Immigration, Citizenship and Multicultural Affairs v MZAPC* (2024) 302 FCR 159 at 188 [126]-[127].

Migration Act, which was assumed by their Honours to require the removal of MZAPC.[88]

52 In short, the primary judge and the majority of the Full Court answered the simple question as expressed by the Minister "yes". With great respect to the primary judge and to the majority of the Full Court, the correct answer to the simple question of the Minister should have been "no". Absent any issue concerning the application of the law or the validity of the law, no court has the power to direct any person to disobey a law of the Parliament.[89] The process of the Federal Court is statutory. The statutory process of the Federal Court cannot be protected from abuse by ordering any person to disobey another statute. The reasoning on this point by Sarah C Derrington J, in dissent in the Full Court, is impeccable. As her Honour said:[90]

> "The preconditions specified in s 198(6) having been met, and there being no legal challenge to any of those preconditions which have engaged the Court's processes, it cannot be correct that the interlocutory injunction sought by MZAPC is intended to prevent the abuse or frustration of the Court's process".

53 However, the simple question as expressed by the Minister, and the approach taken in the courts below, concealed an anterior question which was agitated for the first time by a further amended notice of contention filed after questions from this Court on the first oral hearing of this appeal. The anterior question was: was removal required by s 198(6) of the *Migration Act* in this case? Section 198(6) did not permit an officer to take all steps, however unfeasible and however impracticable, to remove MZAPC immediately. Until it was reasonably practicable to remove MZAPC, there was no power to remove him under s 198(6).

54 If there was a prima facie case, in the sense of it being reasonably arguable or there being a "probability" that removal of MZAPC was not reasonably practicable, then subject to the balance of convenience the Federal Court had power to issue an interlocutory injunction.[91] In light of the unchallenged reasoning of the Full Court that the balance of convenience (which includes the potential

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88 *MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 989 at [52]; *Minister for Immigration, Citizenship and Multicultural Affairs v MZAPC* (2024) 302 FCR 159 at 186 [116].

89 See *Reid v Howard* (1995) 184 CLR 1 at 16.

90 *Minister for Immigration, Citizenship and Multicultural Affairs v MZAPC* (2024) 302 FCR 159 at 174 [54].

91 *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 at 622-623.

injury to MZAPC's ability to vindicate his claim should the injunction be refused,[92] in this case, by removal) strongly favoured an order restraining the removal of MZAPC,[93] the prima facie case did not need to be particularly strong.[94] In such circumstances, an interlocutory injunction could be issued because the Federal Court would be acting consistently with the statutory command of s 198(6) of the *Migration Act* to preserve the status quo pending the determination of what the requirements of reasonable practicability demanded.

55 Strictly, therefore, the central issue on this appeal should have been whether MZAPC's proposed application to this case of the words "reasonably practicable" in s 198(6) was sufficiently arguable to justify the grant of an interlocutory injunction. The narrowness of such a question in this Court might have been a good reason for special leave to have been refused. But, since special leave was granted, and since the further amended notice of contention filed by MZAPC expresses this issue as one concerned with the proper construction of s 198(6) of the *Migration Act*, rather than merely a reasonably arguable construction of s 198(6), it is appropriate on the appeal for this Court to go further and to express a view, in seriously considered obiter dicta, as to the application of the meaning of the words "reasonably practicable" in s 198(6) of the *Migration Act* as properly interpreted.

56 For the reasons below, the duty in s 198(6) did not apply to MZAPC because his removal was not reasonably practicable. The reason that the removal of MZAPC was not reasonably practicable was because MZAPC had a pending application for declaratory relief in proceedings that had not yet been finalised in the Federal Court of Australia and which was conceded on this appeal by the Minister to be reasonably arguable. The declaratory relief sought by MZAPC was formulated in this Court as follows:

> "Declare that the decisions made by officers of the Commonwealth in respect of the respondent from 2016 to 2022 in purported compliance with the 'Guidelines on Minister's detention intervention power (s 195A of the *Migration Act*)' (November 2016) exceeded the executive power of the Commonwealth."

In other words, it was not reasonably practicable to remove MZAPC while a court was considering a reasonable argument that the Minister had unlawfully been impeded by the actions of members of the executive from his liberty to consider

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92 *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 at 623; *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148 at 153.

93 *Minister for Immigration, Citizenship and Multicultural Affairs v MZAPC* (2024) 302 FCR 159 at 188 [127], 188-189 [130].

94 *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 at 622.

MZAPC's request for the Minister to exercise the personal non-compellable power in s 195A of the *Migration Act* to grant a visa. Ground one of MZAPC's further amended notice of contention should be upheld and the appeal should be dismissed.

The power of the Federal Court to protect its own processes

57 The power of the Federal Court is limited by the statute that creates that court. Sometimes it is said that the Federal Court has "inherent" power in addition to its "statutory" power but that "slippery"[95] use of "inherent" should not be taken to suggest that the Federal Court has some non-statutory power that arises like a ghost in the machine of Parliament's creation. The reference to "inherent" jurisdiction and "inherent" power is also slippery in relation to State courts that are sometimes said to have "inherent" jurisdiction and "inherent" power by virtue of the broad terms of conferral of jurisdiction as courts of record in their constituent instruments.[96] That conferral remains, ultimately, a statutory source, although the general terms of the conferral can require consideration of large questions concerning the evolution of that jurisdiction and power, including where it was created by reference to the jurisdiction of the courts at Westminster. None of those questions arise on this appeal.

58 It is well established, and beyond question, that the power of the Federal Court is limited to power that is "expressly or impliedly conferred by the legislation governing the court and 'such powers as are incidental and necessary to the exercise of the jurisdiction or the powers so conferred'".[97] The powers that are

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95 *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 263-264 [5].

96 See, eg, *Justice, New South Wales Act 1823* (Imp) (4 Geo IV c 96), s 2 with respect to the Supreme Court of New South Wales and the Supreme Court of Tasmania and *Supreme Court Act 1970* (NSW), s 22; *Govt of Western Australia Act 1829* (Imp) (10 Geo IV c 22), s 1, *Supreme Court Ordinance 1861* (WA), s 4 and *Supreme Court Act 1935* (WA), s 16; *South Australia Act 1834* (Imp) (4 & 5 Will IV c 95), *Supreme Court Act 1855-56* (SA), s 7 and *Supreme Court Act 1935* (SA) ss 6, 17*; Australian Constitutions Act 1850* (Imp) (13 & 14 Vict c 59), s 28 and *Supreme Court Act 1986* (Vic), ss 10, 17; *Supreme Court Constitution Amendment Act 1861* (Qld), s 2, *Supreme Court Act 1863* (Qld), s 2 and *Supreme Court of Queensland Act 1991* (Qld), ss 29, 45.

97 *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 263 [5], quoting *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 590 [64], which in turn quotes *Harris v Caladine* (1991) 172 CLR 84 at 136, which in turn quotes *Parsons v Martin* (1984) 5 FCR 235 at 241. See also *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 630-631.

"incidental and necessary" to the exercise of express or implied statutory powers are, of course, also an implication from the statute,[98] although they are in the nature of an implicature which depends less upon the text and more upon the incidents of the power and the necessity for its exercise. There is nothing magically inherent in the powers of the Federal Court; all the power that inheres in it is conferred by statute.

59 Section 23 of the *Federal Court of Australia Act 1976* (Cth) provides that the Federal Court "has power, in relation to matters in which it has jurisdiction, to make orders of such kinds ... as the Court thinks appropriate". It is well established that such a statutory power includes an implied power for the court to prevent its processes being abused and the "counterpart" power to protect the integrity of its processes.[99] Indeed, the same implication would naturally be recognised in relation to the powers of any court created by statute.

60 The implied power of any court to protect the integrity of its own processes is a statutory power. It is not a power to read down, sever, or disapply the valid and unchallenged provisions of other statutes. Nor is it a power to ignore the unchallenged orders of other courts. In *Reid v Howard*,[100] four members of this Court said that neither the implied ("inherent") powers of the Supreme Court of New South Wales, nor the "completely general terms" of the express statutory grant of "all jurisdiction which may be necessary for the administration of justice in New South Wales",[101] could "authorise the making of orders excusing compliance with obligations or preventing the exercise of authority deriving from statute".[102]

61 In this respect, I agree entirely with the analysis by Beech-Jones J of the treatment by this Court of the obligation to execute Mr Tait in *Tait v The Queen*.[103] Neither the High Court of Australia, nor any other court, had the power to stay an unchallenged order for execution based only upon the existence of an administrative process that might establish gross unfairness in the execution of a person who might be found by that process to be suffering from a serious

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98 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623-624, quoting *Jackson v Sterling Industries Ltd* (1986) 69 ALR 92 at 97.

99 *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 391, referring to *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 619, 621, 639.

100 (1995) 184 CLR 1.

101 *Supreme Court Act 1970* (NSW), s 23.

102 (1995) 184 CLR 1 at 16.

103 (1962) 108 CLR 620.

psychiatric illness. A perception of gross unfairness is not a sufficient basis for a court to refuse to follow the law. The only alternative for a judge whose conscience does not permit them to refuse a stay due to their perception of gross unfairness is resignation. However, as Beech-Jones J explains, the stay ordered by this Court in both applications in *Tait v The Queen* was based upon concern that the execution of Mr Tait would be unlawful and therefore that the order for execution (and consequential warrant) might be set aside.

The statutory duty in s 198(6) of the *Migration Act*

62 Section 198(6) of the *Migration Act* relevantly provides:

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

63 There was no dispute that the jurisdictional preconditions in (a), (b), (c), and (d) were satisfied. There was therefore a statutory obligation upon the relevant officer to remove MZAPC "as soon as reasonably practicable". That statutory obligation was not merely the conferral of a power but a duty to exercise that power to remove. There was no challenge to the validity of that provision in its application to MZAPC. No court had any power to restrain the statutory obligation imposed by s 198(6).

64 The relevant officer's statutory duty to remove MZAPC, once enlivened, cannot be stayed by circularly reasoning that even if the jurisdictional preconditions of s 198(6) of the *Migration Act* are satisfied, s 198(6) should not be interpreted in a manner that would require an officer to place themselves in jeopardy of contempt of court if a court granted an injunction to restrain removal. That reasoning is circular because it assumes the correctness of its premise: that s 198(6) empowers a court to grant an injunction to restrain its operation when all jurisdictional preconditions are satisfied.

The meaning and application of "reasonably practicable"

65 This appeal therefore reduces to ground one of the further amended notice of contention raised by MZAPC concerning the meaning and application of "reasonably practicable". Even when the conditions in paras (a) to (d) of s 198(6) of the *Migration Act* are satisfied, the duty of an officer to remove a person is not absolute.[104] Parliament's command in s 198(6) of the *Migration Act* does not require or permit removal if removal is not "reasonably practicable". If it was reasonably arguable, in the sense that there was a "prima facie case",[105] that it was not reasonably practicable to remove MZAPC then, consistently with s 198(6), there was power for the Federal Court to restrain the removal of MZAPC.

66 The usual meaning of practicable is "capable of being put into practice, done, or effected, especially with the available means or with reason or prudence; feasible".[106] In the application of that meaning, there is considerable flexibility in the elastic notions of reason or prudence, as well as feasibility.[107] That flexibility requires that regard be had to statutory and non-statutory executive powers related to the potential removal. Hence, in *WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*,[108] Kenny and Mortimer JJ rightly said that 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".

67 In *Plaintiff S4/2014 v Minister for Immigration and Border Protection*,[109] this Court held that there was an implication in the conferral of personal, non-compellable powers upon the Minister requiring the Minister to pursue the liberty to consider whether to exercise such powers as soon as reasonably practicable and, if the Minister exercises that liberty by considering whether "to exercise [a non-

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104 *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 146 at 165-166 [64]-[69].

105 *Simsek v Macphee* (1982) 148 CLR 636 at 641.

106 *Macquarie Dictionary*, 9th ed (2023), vol 2 at 1210, "practicable", sense 1.

107 See *Uebergang v Australian Wheat Board* (1980) 145 CLR 266 at 305-306.

108 (2021) 285 FCR 463 at 492-493 [115].

109 (2014) 253 CLR 219.

compellable power]", then "any necessary inquiry, and the decision itself" should take place as soon as reasonably practicable.[110]

68 The reason for this implication is that provisions for removal as soon as reasonably practicable, such as s 198(6) of the *Migration Act*, are the "leading provision",[111] which require an implication for any action to be taken as soon as reasonably practicable in subordinate provisions concerning non-compellable powers to prevent the leading provision from rendering the subordinate provisions inutile. In other words, although the Minister is under no obligation to consider the exercise of the non-compellable powers, there must be a period in which it is reasonably practicable for the Minister to engage in the liberty to consider whether to exercise the powers and for any exercise of the powers.

69 MZAPC's principal case for a declaration, conceded by the Minister to be reasonably arguable or a prima facie case, is not merely that there was a failure to permit a period in which it was reasonably practicable for the Minister to consider the exercise of, and (if the Minister decided to do so) to exercise, the non-compellable power to grant a visa. The declaration that MZAPC seeks is, in effect, that the Minister's Department had unlawfully frustrated or impeded the Minister's liberty to consider whether to exercise the non-compellable power.[112] In other words, MZAPC does not merely assert that his removal would deprive the Minister of the time in which it would be reasonably practicable to pursue the liberty to consider exercising the non-compellable power. Rather, the effect of MZAPC's proposed declaration would be that the Minister's liberty itself was stultified by unlawful conduct of the Department. This is entirely different from the circumstance where the Minister remains at liberty to consider the exercise of the personal non-compellable power but simply has not pursued that liberty.[113]

70 This conclusion is further reinforced by the principle that is sometimes described as the "principle of legality". If s 198(6) of the *Migration Act* required MZAPC to be removed from Australia while his application for a declaration about the legality of the treatment of his requests for ministerial intervention (conceded on this appeal to have reasonable grounds) was pending, then that application would, in effect, be stultified. The principle of legality is an umbrella term for a series of background assumptions, of variable force in the interpretation and

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110 (2014) 253 CLR 219 at 234 [35].

111 (2014) 253 CLR 219 at 233-234 [35].

112 See *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 214 at 246 [147], 254 [194]; 408 ALR 381 at 419, 430.

113 See *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 349 [65].

application of legislation,[114] which include the assumption that "a person's right to a reasonable opportunity to present a case ... [cannot] usually be abolished by Parliament by a nudge and a wink".[115] That assumption is a strong counterweight against the application of open-textured provisions (such as "reasonably practicable") in a way that would deny a person any ability to vindicate unlawful conduct which caused substantial detriment to their interests.

Conclusion

71 The premise of MZAPC's claim for a declaration is that the Minister's Department had unlawfully frustrated or impeded the Minister's liberty to consider whether to exercise a non-compellable power. On that premise, the removal of MZAPC would buttress that unlawful conduct. It was not reasonably practicable to remove MZAPC while such a claim was before the courts. The Federal Court had power to issue an interlocutory injunction to restrain the removal of MZAPC until the requirements of s 198(6) of the *Migration Act* were found to have been met.

72 The appeal should be dismissed with costs.

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114 *Hurt v The King* (2024) 98 ALJR 485 at 506 [106]; 418 ALR 63 at 89-90, citing *Stephens v The Queen* (2022) 273 CLR 635 at 653 [34]. See also *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at 623 [159].

115 *BVD17 v Minister for Immigration and Border Protection* (2019) 268 CLR 29 at 52 [56].

73 STEWARD J. In this matter the respondent seeks to avoid his removal from Australia pursuant to s 198(6) of the *Migration Act 1958* (Cth) ("the Act") on the basis that he has made requests for the Minister to exercise the powers contained in ss 48B, 195A, 351 and 417 of the Act in his favour. His claim is inspired by this Court's decision in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*.[116] *Davis* concerned s 351 of the Act. I dissented.

74 Each of ss 48B, 195A, 351 and since repealed s 417 of the Act involve the conferral on the Minister of a non-compellable personal power. The Minister is under no legal duty whatsoever to consider whether he should or should not exercise each power. The Minister may lawfully never exercise any of these powers. That is because in each case the power is qualified by these words, or by words of the same effect:[117]

> "The Minister does not have a duty to consider whether to exercise the power ... in respect of any decision, whether he or she is requested to do so by the applicant or by any other person, or in any other circumstances."

75 In this matter, the respondent contends that Departmental officials refused to refer his requests to exercise those powers to the Minister. Any such refusals, for the reasons I gave in *Davis*, have no legal effect.[118] They are internal administrative steps. Nonetheless, the respondent pursues relief intended to convert, contrary to Parliament's express intention, the Minister's powers into compellable duties. That relief includes declarations that the steps taken by Departmental officers in purported compliance with Ministerial Guidelines exceed the executive power of the Commonwealth – even though no such power has yet been exercised – and mandamus to compel a relevant officer to cause the requests to be referred to the Minister for consideration and determination – even though no such legal duty to do so exists. In that respect, I remain concerned that this Court's decision in *Davis* may lead to more challenges to the internal processes of the executive government which do not otherwise give rise to any legal consequences.

76 Nonetheless, this case has presented itself to this Court on the basis of a concession, incorrectly proffered by the Minister for the reasons given above but nonetheless made, namely that the respondent has a prima facie case for

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116 (2023) 97 ALJR 214; 408 ALR 381.

117 *Migration Act 1958* (Cth), s 351(7); see also s 48B(6), s 195A(4) and s 417(7).

118 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 214 at 254-263 [196]-[250]; 408 ALR 381 at 430-443 [196]-[250].

declaratory relief. I consider myself bound by that concession. The sole question is whether an interlocutory injunction should have been granted restraining the Minister from removing the respondent to the Republic of India pending the hearing and determination of that prima facie case. In that respect, I gratefully adopt the description of the facts and procedural history which may be found in the reasons of Gageler CJ, Gordon, Gleeson and Jagot JJ.

77 As explained by Gageler CJ, Gordon, Gleeson and Jagot JJ, the dispositive answer to that question is found in the decision of this Court in *Tait v The Queen*.[119] During oral argument in that case, recorded in the Commonwealth Law Reports, Dixon CJ said: "I have never had any doubt that the incidental powers of the Court can preserve any subject matter, human or not, pending a decision".[120] The Federal Court of Australia has the same "incidental powers".[121] It follows, for the reasons given by Gageler CJ, Gordon, Gleeson and Jagot JJ,[122] that an interlocutory injunction is here justified to preserve the subject matter of this proceeding, which, on the admission of the Minister only, enjoys the status of comprising a prima facie case.

78 This appeal should be dismissed with costs.

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119 (1962) 108 CLR 620.

120 *Tait v The Queen* (1962) 108 CLR 620 at 623.

121 *Williams v Minister for the Environment and Heritage* (2003) 199 ALR 352 at 356-357 [16]-[19]; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 32 [35].

122 See at [12]-[14], [31]-[32].

79 BEECH-JONES J. The principal issue raised by this appeal is whether the Federal Court of Australia has the power to grant an interlocutory injunction to restrain officers from performing their obligation to remove an unlawful non-citizen from Australia as soon as reasonably practicable pending the determination of proceedings commenced by the non-citizen that did not challenge the existence of that obligation. Instead, the proceedings only challenged the validity of an exercise of non-statutory executive power by departmental officers to not refer to the Minister for Immigration and Multicultural Affairs ("the Minister") a request for the exercise of the power conferred by, inter alia, s 195A of the *Migration Act 1958* (Cth) to grant the non-citizen a visa, in circumstances where the Minister is not obliged to consider the exercise of that power.[123]

80 For the reasons that follow, the Federal Court does not have the power to grant such an interlocutory injunction. The effect of the interlocutory injunction granted by the Federal Court was to suspend the officers' obligation to remove the respondent from Australia prior to the Minister considering whether to exercise the power conferred by s 195A, and to render the purpose of the respondent's detention as being to await that possible consideration by the Minister. Both of those outcomes are inconsistent with the *Migration Act* as construed by previous decisions of this Court.[124] Although the Federal Court has ample power to make interlocutory orders to preserve the subject matter of proceedings and to protect the integrity of its own processes, the Court's power to grant an interlocutory injunction does not extend that far. Accordingly, the appeal should be allowed and the interlocutory injunction should be set aside.

Background

81 The respondent is an Indian national who arrived in Australia in January 2006 on a student visa. Thereafter he made a series of applications for other visas that were unsuccessful. After the expiry of the respondent's student visa, and pending a decision on one of his other visa applications, the respondent was convicted of criminal offences and his bridging visa was cancelled.[125]

82 Since 2016 the respondent has been detained in immigration detention pursuant to s 189(1) of the *Migration Act* because he is an "unlawful non-citizen", that is, someone who does not hold a visa that is in effect and entitles them to remain in Australia.[126] By the operation of s 196(1) of the *Migration Act*, the

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123 See *Migration Act 1958* (Cth), s 195A(4).

124 See below at [92].

125 *Migration Act*, s 116(1)(g); *Migration Regulations 1994* (Cth), r 2.43(1)(p)(ii).

126 *Migration Act*, ss 13, 14.

respondent's detention must continue until he is (relevantly) either removed from Australia under s 198[127] or granted a visa.[128]

83 The last of the respondent's applications for merits review of a decision to cancel his bridging visa was rejected by the Administrative Appeals Tribunal in July 2022. In February 2023 he discontinued an application for judicial review of that cancellation. In the Courts below, it was accepted that, from February 2023, the respondent had exhausted all possible avenues of review and appeal from the decision to cancel his bridging visa and the refusal to grant him another visa, and officers were obliged to remove him from Australia pursuant to s 198(6) of the *Migration Act*.

84 The respondent was notified that it was intended that he be removed from Australia on 6 July 2023. On the day prior to his removal, the respondent filed an application for judicial review of the decision to remove him from Australia. Those proceedings were dismissed, however his removal from Australia was avoided while the proceedings were determined.[129]

The proceedings below

85 On 8 August 2023, the respondent commenced the subject proceedings. The respondent's initiating process sought, inter alia: final declaratory relief to the effect that "on approximately 7 to 9 occasions" from the end of 2016 it had been erroneously determined that his requests for the Minister to exercise one or more of the non-compellable powers in ss 195A, 197AB or 417 of the *Migration Act* did not meet the Minister's or any other guidelines[130] for the referral of such requests to the Minister personally; and a writ of mandamus requiring that his requests be referred to the Minister. The respondent's initiating process also sought a final injunction restraining his removal from Australia while his requests were pending, or, in the alternative, until the Minister had a reasonable time to consider the requests if the Minister wished to do so, and an interlocutory injunction restraining the respondent's removal from Australia pending the outcome of the proceedings.

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

128 *Migration Act*, s 196(1)(c).

129 *MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FedCFamC2G 594; *MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 877.

130 Before this Court, the form of declaratory relief sought by the respondent was refined to "purported compliance with the 'Guidelines on Minister's detention intervention power (s 195A of the *Migration Act*)' (November 2016)". See reasons of Gageler CJ, Gordon, Gleeson and Jagot JJ at [6].

86 On 21 August 2023, the primary judge granted the interlocutory injunction.[131] The primary judge found that there was a serious question to be tried as to whether: (a) while in detention between 2016 and 2022 the respondent made informal requests to his case managers for the exercise by the Minister of the powers conferred by ss 195A and 417 of the *Migration Act*; (b) those requests had been assessed by departmental officers against the "Guidelines on Minister's detention intervention power (s 195A of the Migration Act)" issued in November 2016 concerning the power conferred by s 195A; and (c) those officers had (improperly) "decided", based on their assessments, not to refer the respondent's requests to the Minister for consideration of the exercise of the Minister's power under s 195A.[132] The primary judge found that there was a "sound legal basis for ... the declaratory relief" sought by the respondent, although that observation only applied to the declaratory relief sought in relation to s 195A of the *Migration Act*.[133]

87 Even though the respondent did not contend that the duty to remove him from Australia under s 198(6) had not arisen, the primary judge held that the respondent's removal from Australia would "practically deprive the [respondent] of the subject matter of the proceeding (*his interest in remaining in Australia*)" (emphasis added).[134] This was because "while remote, any possibility of the grant [to the respondent] of a visa under s 195A would be lost if the [respondent] were removed from Australia".[135]

88 The appellants were granted leave to appeal to the Full Court of the Federal Court of Australia from the orders of the primary judge granting the interlocutory injunction, but, by a majority, the appeal was dismissed (Colvin and Jackson JJ, Sarah C Derrington J dissenting).[136] Although the respondent accepted that the duty to remove him under s 198(6) of the *Migration Act* was engaged, Colvin and

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131 *MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 989.

132 *MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 989 at [48]-[49].

133 *MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 989 at [14].

134 *MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 989 at [57].

135 *MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 989 at [57].

136 *Minister for Immigration, Citizenship and Multicultural Affairs v MZAPC* (2024) 302 FCR 159.

Jackson JJ found that an interlocutory injunction could be granted to restrain the performance of that duty in order to "preserve the subject matter of the proceedings and the integrity of [the Federal Court's] procedures"[137] because of the "future possibility" that final declaratory relief "may be granted that requires steps to be taken to reinvigorate that request and, consequently, the possibility of the request being acceded to thereby, at that time, bringing the party making the request outside the operation of s 198(6)".[138] Given the primary judge's findings, the reference to "that request" can only mean requests for the exercise of the power conferred on the Minister by s 195A that the primary judge accepted may have been made by or on behalf of the respondent during the period between 2016 and 2022.

89 In dissent, Sarah C Derrington J found that, as there was no challenge to the existence of any preconditions to the engagement of the duty to remove the respondent under s 198(6), there could not be any (proper) frustration of the Federal Court's process which had (only) been engaged in relation to different provisions of the *Migration Act* concerning the Minister's non-compellable powers.[139]

90 The appellants were granted special leave to appeal to this Court from the decision of the Full Court. The appellants and the Attorney-General of the Commonwealth (intervening) contended that Colvin and Jackson JJ erred in failing to find that the primary judge erred in concluding that the Federal Court had power to grant the interlocutory injunction. The respondent supported the reasoning of their Honours but also sought to support the granting of the interlocutory injunction on two grounds outlined in a further amended notice of contention. The first ground contended that the obligation to remove an unlawful non-citizen under s 198(6) of the *Migration Act* was not engaged where that non-citizen has requested the Minister exercise a personal non-compellable power and that request has not been brought to the Minister's attention. The second ground contended that, if the effect of s 198(6) was to deny the Federal Court power to grant the interlocutory injunction, then it was invalid to that extent because it was inconsistent with Ch III of the *Constitution*.

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137 *Minister for Immigration, Citizenship and Multicultural Affairs v MZAPC* (2024) 302 FCR 159 at 188-189 [130].

138 *Minister for Immigration, Citizenship and Multicultural Affairs v MZAPC* (2024) 302 FCR 159 at 189 [133].

139 *Minister for Immigration, Citizenship and Multicultural Affairs v MZAPC* (2024) 302 FCR 159 at 174 [54].

Section 195A and the obligation to remove an unlawful non-citizen

91 Given that the primary judge found that an arguable case was only established in relation to the respondent's requests for the exercise of the power conferred on the Minister by s 195A, it is only necessary to consider that provision. Section 195A relevantly provides:

> "**Minister may grant detainee visa (whether or not on application)**
>
> *Persons to whom section applies*
>
> (1) This section applies to a person who is in detention under section 189.
>
> *Minister may grant visa*
>
> (2) If the Minister thinks that it is in the public interest to do so, the Minister may grant a person to whom this section applies a visa of a particular class (whether or not the person has applied for the visa).
>
> (3) In exercising the power under subsection (2), the Minister is not bound by Subdivision AA, AC or AF of Division 3 of this Part or by the regulations, but is bound by all other provisions of this Act.
>
> *Minister not under duty to consider whether to exercise power*
>
> (4) The Minister does not have a duty to consider whether to exercise the power under subsection (2), whether he or she is requested to do so by any person, or in any other circumstances.
>
> *Minister to exercise power personally*
>
> (5) The power under subsection (2) may only be exercised by the Minister personally."

92 Similar provisions conferring a personal non-compellable power on the Minister to intervene in a non-citizen's favour are found elsewhere in the *Migration Act*.[140] The structure and operation of those provisions has been addressed by this Court in a number of decisions,[141] the most recent being *Davis v Minister for*

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140 See, eg, *Migration Act*, ss 48B, 91L, 197AB-197AF, 351, 417.

141 See, eg, *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319; *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336; *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR

Immigration, Citizenship, Migration Services and Multicultural Affairs.[142] The analysis of provisions such as s 195A in those decisions was not challenged in this appeal. Those decisions confirm that the Minister exercises those powers, such as the power conferred by s 195A, by "personally making the first or both of two distinct sequential statutory decisions".[143] The first is a procedural decision either to consider, or not to consider, whether it is in the public interest to grant a visa to a person in detention under s 189. The second is a substantive decision either to conclude that it is in the public interest to grant a visa and to do so, or not to conclude so and not to grant the visa.[144] Both of these decisions can only be made by the Minister personally.[145] The Minister is not obliged to make either decision and cannot be compelled to do so.[146]

93 In *Davis* it was accepted that the Minister may make a procedural decision not to consider making a substantive decision in any case that did not meet specified objective criteria,[147] and may issue non-statutory instructions to departmental officers to the effect that he or she only wished to be put in a position to consider making a procedural decision in cases that met such criteria.[148] Implicit in that analysis is that there is no duty imposed on departmental officers to bring every request for the exercise of a non-compellable power to the Minister's personal attention. Where departmental officers exercise that function (ie, determining whether to bring a request to the Minister's personal attention) they

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219; *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180; *Davis v Minister for Immigration, Citizenship, Migration Services and Multicultural Affairs* (2023) 97 ALJR 214; 408 ALR 381.

142 (2023) 97 ALJR 214; 408 ALR 381.

143 *Davis* (2023) 97 ALJR 214 at 224 [14]; 408 ALR 381 at 389.

144 *Davis* (2023) 97 ALJR 214 at 224 [14]; 408 ALR 381 at 389. See also *Plaintiff M61/2010E* (2010) 243 CLR 319 at 350-351 [70].

145 See *Migration Act*, s 195A(5); *Davis* (2023) 97 ALJR 214 at 223 [12], 237 [97]; 408 ALR 381 at 388, 407.

146 *Davis* (2023) 97 ALJR 214 at 224 [14]; 408 ALR 381 at 389. See also *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 667 [99(iii)].

147 *Davis* (2023) 97 ALJR 214 at 224 [17]; 408 ALR 381 at 390.

148 *Davis* (2023) 97 ALJR 214 at 225 [19]; 408 ALR 381 at 390. See also *Plaintiff S10/2011* (2012) 246 CLR 636 at 665 [91].

are exercising non-statutory executive power. The performance of that function does not attract any requirement to afford procedural fairness.[149]

94 However, *Davis* also established that the Minister may not entrust the substantive evaluation of whether it is in the public interest to grant a visa under s 195A of the *Migration Act* to a departmental officer.[150] That substantive evaluation falls within the "zone of exclusive Ministerial personal decision-making power created" by s 195A.[151] Thus, in *Davis* the application of instructions issued by the then Minister for Immigration and Border Protection which relevantly instructed departmental officers not to refer to the Minister a request for the exercise of the non-compellable power conferred by s 351[152] unless the request was assessed by departmental officers to "have unique or exceptional circumstances"[153] was held, as a matter of substance, to have invalidly entrusted the dispositive evaluation of the public interest to departmental officers.[154] This Court granted declaratory relief to the effect that a decision made in purported compliance with those instructions exceeded the executive power of the Commonwealth.[155] The respondent seeks similar declaratory relief at the final hearing of these proceedings in relation to his alleged requests for the exercise of various non-compellable powers. The primary judge's finding that the respondent has an arguable (or at least prima facie) case for doing so in relation to s 195A was not disputed on this appeal.

Non-compellable powers, detention and removal

95 Of present significance is the interrelationship between the treatment of a request for the exercise of the power conferred by s 195A and the obligations imposed by ss 189 and 198(6) to detain and remove an unlawful non-citizen. In *Plaintiff M61/2010E v The Commonwealth* this Court held that the making of a

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149 *SZSSJ* (2016) 259 CLR 180 at 200 [54].

150 *Davis* (2023) 97 ALJR 214 at 224-225 [18], 226-227 [30], 238 [99], 274 [322]; 408 ALR 381 at 390, 393, 407-408, 458.

151 *Davis* (2023) 97 ALJR 214 at 263 [251]; 408 ALR 381 at 443.

152 Relevantly, s 351 of the *Migration Act* empowered the Minister to substitute a more favourable decision for the decision of the Administrative Appeals Tribunal if the Minister thought it was in the public interest to do so.

153 *Davis* (2023) 97 ALJR 214 at 222 [2]; 408 ALR 381 at 387.

154 *Davis* (2023) 97 ALJR 214 at 227-228 [38]; 408 ALR 381 at 394. cf *Plaintiff S10/2011* (2012) 246 CLR 636 at 653 [45]-[46].

155 *Davis* (2023) 97 ALJR 214 at 230-231 [63]; 408 ALR 381 at 398.

procedural decision under s 195A in that case meant that the obligation to remove an unlawful non-citizen as soon as reasonably practicable under s 198(2) was not engaged because "[t]he express reference in s 198(2)(c) to the possibility of making a valid application for a visa *accommodates* the consideration of whether to exercise the powers given by ss 46A and 195A" (emphasis added).[156] This "accommodation" was said to be "founded upon the taking of the first step towards the exercise of those statutory powers: the decision to consider their exercise"; ie, a procedural decision.[157] For the purposes of this appeal, ss 198(2) and 198(6) are indistinguishable. Both sub-sections expressly refer to the possibility of making a valid application for a visa as an event that precludes the obligation to remove an unlawful non-citizen from being engaged.[158]

96 In *Plaintiff M61/2010E* this Court rejected a submission by the Commonwealth that the continuation of a non-citizen's detention was permitted "while the officer detaining the person awaited the *possibility* of the exercise of power under either s 46A or s 195A" (emphasis in original); ie, prior to the making of a procedural decision.[159] The Commonwealth's submission was rejected because its acceptance would have left the period of detention wholly within the control of the Executive and subject to the vagaries of predicting the likelihood of the exercise of a non-compellable power by the Minister.[160]

97 In contrast, *Plaintiff S4/2014 v Minister for Immigration and Border Protection* held that, when a procedural decision is made to consider making a substantive decision under s 195A, the purpose of the detention moves from facilitating the removal of the non-citizen from Australia to determining whether to exercise the power to grant the visa (including making inquiries to that end) and thereafter, depending on the outcome of that decision, their removal from Australia.[161] That statement is consistent with later decisions of this Court concerning the proper purpose of immigration detention.[162] Further, even though

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156 *Plaintiff M61/2010E* (2010) 243 CLR 319 at 351 [71].

157 *Plaintiff M61/2010E* (2010) 243 CLR 319 at 351 [71].

158 See *Migration Act,* s 198(2)(c), (6)(c)-(d).

159 *Plaintiff M61/2010E* (2010) 243 CLR 319 at 348 [64].

160 *Plaintiff M61/2010E* (2010) 243 CLR 319 at 349 [65].

161 *Plaintiff S4/2014* (2014) 253 CLR 219 at 232 [27].

162 See, eg, *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1014 [31], [33]; 415 ALR 254 at 262-263.

the Minister cannot be compelled to make a decision under s 195A,[163] the purpose must be pursued and carried into effect as soon as reasonably practicable,[164] otherwise the detention will be unlawful.[165] This reflects a construction of the *Migration Act* whereby s 198(6) as the source of the obligation to remove the non-citizen as soon as reasonably practicable is the "leading provision" to which a provision such as s 195A, being only applicable to non-citizens who are in detention, is subordinated.[166]

Removal is not a decision not to consider

98 The respondent contended that, if an officer removed an unlawful non-citizen when the Department had not completed its consideration of whether to bring a request for the exercise of a non-compellable power to the Minister's attention in a lawful manner, that would involve the officer (improperly) "making the procedural decision not to consider the person's case", similar to what occurred in *Davis*. However, in removing an unlawful non-citizen pursuant to s 198(6), officers do not make or purport to make any of the types of "decisions" of the kind referred to in *Davis* (even if they might constitute a "privative clause decision" within the meaning of s 474(2)).[167] Instead, officers perform a lawful obligation imposed on them by the *Migration Act*. Giving effect to the obligation imposed by the "leading provision" in s 198(6) does not constitute making or purporting to make any form of decision under a subordinate provision such as s 195A.

A request does not postpone removal

99 The balance of the submissions in support of the first ground of the respondent's further amended notice of contention did not depend on whether a request for the Minister's intervention had been lawfully dealt with by the Department. Instead, the respondent contended that the words "as soon as reasonably practicable" in s 198(6) "do not permit or require an officer to remove an unlawful non-citizen where they have requested the Minister to exercise a personal non-compellable power in their favour and the request has not been brought to the Minister's attention". Even though there has been no finding that a procedural decision (either favourable or adverse) has been made in respect of the respondent's requests, the respondent submitted that his case was on a

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163 *Davis* (2023) 97 ALJR 214 at 224 [14]; 408 ALR 381 at 389.

164 *Plaintiff S4/2014* (2014) 253 CLR 219 at 232 [28].

165 *Plaintiff S4/2014* (2014) 253 CLR 219 at 234 [35].

166 *Plaintiff S4/2014* (2014) 253 CLR 219 at 233-234 [35].

167 See *Migration Act*, s 474(3)(g); see also *Minister for Immigration, Citizenship and Multicultural Affairs v MZAPC* (2024) 302 FCR 159 at 190 [139]-[140].

"conceptually similar footing" to *Plaintiff M61/2010E* and *Minister for Immigration and Border Protection v SZSSJ*.[168]

100 There was debate as to whether the "accommodation" referred to in *Plaintiff M61/2010E*[169] was sourced in the words "as soon as reasonably practicable" or whether there was an implied exception to ss 198(2) and 198(6) such that the duty to remove is suspended, postponed or deferred once a procedural decision is made to consider the exercise of the relevant non-compellable power. The respondent submitted that it was the former. The appellants and the Attorney-General contended that the better view was the latter.

101 It is not necessary to determine the basis for the "accommodation" referred to in *Plaintiff M61/2010E*. Irrespective of the precise basis for that accommodation, so far as removal and detention are concerned there are important differences between unlawful non-citizens who have the benefit of a procedural decision to exercise a non-compellable power such as s 195A and those who do not. Those who have the benefit of such a decision cannot be removed under s 198(6) unless or until the Minister has made a substantive decision that they will not be granted a visa[170] and the processing necessary to make such a decision must be undertaken as soon as reasonably practicable because otherwise their detention will be unlawful.[171] Accordingly, those non-citizens do not face the prospect of a period of detention within the exclusive control of the Executive which is subject to uncertain prognostications about when and whether a power will be exercised in their favour.[172]

102 The position is different for those unlawful non-citizens who do not have the benefit of a procedural decision to exercise a non-compellable power such as the power in s 195A. Given that there is no obligation on the Minister to consider any request for the exercise of the power under s 195A, to make the obligation to remove such an unlawful non-citizen under s 198(6) contingent on there being no "outstanding" request would result in the duration of the suspension of their removal, and hence the duration of their detention, being within the exclusive control of the Executive and dependent on prognostications about the possibility that the power might be exercised in their favour. Such a construction was rejected

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168 (2016) 259 CLR 180.

169 (2010) 243 CLR 319 at 351 [71].

170 *Plaintiff S4/2014* (2014) 253 CLR 219 at 239-240 [58].

171 *Plaintiff S4/2014* (2014) 253 CLR 219 at 234 [35].

172 cf *Plaintiff M61/2010E* (2010) 243 CLR 319 at 349 [65].

in *Plaintiff M61/2010E.*[173] It would subordinate s 198(6) to s 195A[174] and mean that the period of detention for those unlawful non-citizens is no longer hedged by any obligation to remove the non-citizen or permit their entry.[175]

103 A request for the exercise of s 195A need not be made by, or even on behalf of, the unlawful non-citizen concerned and could be made in relation to all unlawful non-citizens in immigration detention. According to the respondent, the mere making of any such request would suspend the obligation to remove and prolong the detention of the unlawful non-citizen no matter when, or by whom, the request was made. Such an outcome would cause chaos in the administration of the *Migration Act*.

104 This ground of the respondent's further amended notice of contention must be rejected. The obligation to remove an unlawful non-citizen is not suspended by the mere making of a request for the exercise of a non-compellable power.[176] The balance of the appeal must be addressed on the basis that was litigated before the primary judge and the Full Court, namely that there was no challenge to the existence of the obligation to remove the respondent and any final declaratory relief granted in the proceedings would not remove or suspend that obligation either.

Scope of the power to grant an interlocutory injunction

105 The jurisdiction of the Federal Court to hear the respondent's proceedings was said to derive from s 39B(1) of the *Judiciary Act 1903* (Cth) in that the respondent's initiating process sought a writ of mandamus and an injunction against officers of the Commonwealth.[177]

106 Section 22 of the *Federal Court of Australia Act 1976* (Cth) confers on the Federal Court power to grant all remedies to which any of the parties before it appears to be entitled in respect of a legal or equitable claim they properly bring

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173 *Plaintiff M61/2010E* (2010) 243 CLR 319 at 349 [65].

174 cf *Plaintiff S4/2014* (2014) 253 CLR 219 at 233-234 [35].

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

176 See *BJM16 v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 300 FCR 143 at 157 [50]; *ASU22 v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1326 at [27].

177 *Davis* (2023) 97 ALJR 214 at 229 [57]; 408 ALR 381 at 397. In this case, it appears to have been assumed that the proceedings did not relate to a "migration decision" as defined in s 5 of the *Migration Act* and thus the jurisdiction conferred by s 39B(1) of the *Judiciary Act 1903* (Cth) was not ousted or limited by s 476A.

forward. Section 23 confers on the Federal Court power in matters in which it has jurisdiction to make such orders as the Court thinks appropriate, including interlocutory orders such as interlocutory injunctions. As a superior court of record and a court of law and equity,[178] the Federal Court also possesses implied powers to make interlocutory orders enabling it to perform its functions as a court, including granting an interlocutory injunction to preserve the subject matter of proceedings and protect the integrity of its own processes.[179]

Interlocutory injunctions in aid of final relief

107 Traditionally, an interlocutory injunction – that is, an interlocutory order commanding a person to do or refrain from doing a particular act[180] – has been considered a creature of equity[181] which preserves the "status quo" or "subject matter" of a dispute, including a dispute about rights under statute,[182] pending a final hearing of the proceedings.[183] As Gleeson CJ explained in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* ("*ABC v Lenah Game*"), such an order can usually only be granted if the party seeking the order can "show sufficient colour of right to the final relief, *in aid of* which the interlocutory relief is sought"[184] (emphasis added).

108 For example, in *ABC v Lenah Game* an interlocutory injunction restraining the broadcast of video footage obtained as a consequence of a trespass was refused in circumstances where the legal or equitable rights sought to be vindicated at the final hearing could not justify final injunctive relief for the delivery up and return of that material or similar relief which the grant of such an interlocutory injunction

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178 *Federal Court of Australia Act 1976* (Cth), s 5(2).

179 See *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 640.

180 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* ("*ABC v Lenah Game*") (2001) 208 CLR 199 at 231 [60].

181 *ABC v Lenah Game* (2001) 208 CLR 199 at 232 [62].

182 *Re Minister for Immigration and Multicultural Affairs; Ex parte Fejzullahu* (2000) 74 ALJR 830 at 832 [7]; 171 ALR 341 at 343.

183 *ABC v Lenah Game* (2001) 208 CLR 199 at 216-217 [9]-[10].

184 *ABC v Lenah Game* (2001) 208 CLR 199 at 217 [11]; see also 232-233 [61]-[62] per Gaudron J, 241 [91], 248 [105] per Gummow and Hayne JJ. See also *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 396 [31].

would have been "in aid of".[185] Similarly, in *Simsek v Macphee*[186] Stephen J refused to grant an application for an interlocutory injunction preventing the removal of the applicant from Australia pending a hearing of proceedings contending that there were errors in the treatment of his application for protection under the 1951 Geneva Convention relating to the Status of Refugees and the 1967 Protocol relating to the same. Those instruments were not then enacted into statute. The applicant was a prohibited immigrant and did not challenge the validity of the deportation order made against him. Stephen J concluded that the interlocutory injunction could not be granted on the basis that it was necessary to preserve the subject matter of the proceedings without first making out a prima facie case for final injunctive relief.[187]

Interlocutory injunctions that ensure the effective exercise of jurisdiction

109 In this case the primary judge justified the grant of the interlocutory injunction on the basis that it was necessary to preserve the "subject matter" of the proceedings. In upholding the primary judge, Colvin and Jackson JJ referred to the "jurisdiction", meaning power, of the Federal Court "to preserve the subject matter and the integrity of its own processes".[188] Despite these references to preserving the "subject matter" of the proceedings, and although that is the traditional basis for granting an interlocutory injunction as addressed in *ABC v Lenah Game*, their Honours did not find that that the interlocutory injunction granted by the primary judge could be justified as being "in aid of" the final relief sought. To the contrary, notwithstanding the claim for final injunctive relief included in the respondent's initiating process, it was accepted that the obligation to remove the respondent from Australia subsisted at the time the interlocutory injunction was granted and would continue to subsist even if there was a grant of final declaratory relief of the kind granted in *Davis*. It was only in this Court, through the first ground of the respondent's further amended notice of contention which has been addressed above, that he sought to justify the grant of the interlocutory injunction as being "in aid of" the final relief sought.

110 Ordinarily, the inability of the respondent to demonstrate that an interlocutory injunction sought was granted in aid of final relief would be fatal as it was in *ABC v Lenah Game* and *Simsek*. However, in both the Courts below and

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185 *ABC v Lenah Game* (2001) 208 CLR 199 at 215 [3], 216 [8], 233 [62], 248 [105], 259 [139].

186 (1982) 148 CLR 636.

187 *Simsek v Macphee* (1982) 148 CLR 636 at 641.

188 *Minister for Immigration, Citizenship and Multicultural Affairs v MZAPC* (2024) 302 FCR 159 at 186 [116].

in this Court, the interlocutory injunction was sought to be justified on a different basis, namely the Court's power to make such interlocutory orders, at least against the parties to the proceedings against whom final relief is sought, "as are needed to ensure the effective exercise of the jurisdiction invoked".[189] This principle has also been expressed as enabling the Court to make orders preventing the abuse or frustration of the Court's process[190] or protecting the integrity of the Court's processes "once set in motion".[191]

111 The most common examples of interlocutory orders granted on this basis include some (but not all) anti-suit injunctions preventing a party litigating the subject claim in a different court[192] and "Mareva" orders[193] limiting a party's ability to dissipate their assets.[194] Such orders are not justified as being granted in aid of the final relief sought. For example, a Mareva order may be granted even though the final relief sought in the proceedings is only damages and the moving party does not claim any proprietary interest in the assets the subject of the order.[195] Instead of being granted in aid of the final relief sought, Mareva orders protect the integrity of a court's processes in that they extend "to preserving the efficacy of the execution which would lie against the actual or prospective ... debtor".[196] Leaving aside the circumstance where a third party holds another party's assets, the making of Mareva orders against a third party is justified as being for the proper administration of justice when there is some process, enforceable by the "courts",

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189 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 33 [35], citing *Tait v The Queen* (1962) 108 CLR 620.

190 *Jackson v Sterling Industries* (1987) 162 CLR 612 at 623; *Patrick Stevedores* (1998) 195 CLR 1 at 33 [35].

191 *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 391; *Cardile* (1999) 198 CLR 380 at 399 [40].

192 See *ABC v Lenah Game* (2001) 208 CLR 199 at 243 [94], citing *CSR* (1997) 189 CLR 345 at 391-392.

193 See *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509.

194 *Patrick Stevedores* (1998) 195 CLR 1 at 33 [35]; *Cardile* (1999) 198 CLR 380 at 393-394 [26].

195 See Meagher, Heydon, and Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 4th ed (2002) at 798.

196 *Cardile* (1999) 198 CLR 380 at 393 [25]; see also 401 [42], 403 [50]. See also *Jackson v Sterling Industries* (1987) 162 CLR 612 at 618-619 and 621.

that enables assets to be disgorged or that is capable of forcing the third party to contribute to the funds of the debtor.[197]

112 In this case, the absence of any enforceable duty on the part of the Minister to take any action if a *Davis* style declaration were made in the respondent's favour means that there is no functional equivalent to the process of execution of a final award of damages enforceable by the Federal Court (or any court) as exists with Mareva orders. In particular, there is no process enforceable by any court which would allow any such declaration to be effective against the officer's obligation to remove the respondent under s 198(6) of the *Migration Act.* Accordingly, it is doubtful whether the grant of the interlocutory injunction could properly be justified as necessary to protect the integrity of the Federal Court's processes or the administration of justice by the courts more generally.

Interlocutory injunctions and statutory rights and obligations

113 It is unnecessary to consider the difficulty just noted further because, regardless of the source of the Federal Court's power to grant the interlocutory injunction and regardless of the basis upon which the interlocutory injunction was granted, the Court's injunctive powers are not at large. The Federal Court's powers cannot be exercised to make orders excusing compliance with statutory obligations or preventing the exercise of authority derived from statute, the existence of which is not disputed in the proceedings.[198] Further, the Federal Court's injunctive powers cannot be exercised to rewrite or alter a statutory scheme. Although an interlocutory injunction may impair or prevent the exercise of rights, it cannot create additional rights or obligations,[199] such as creating a security interest for a plaintiff via the making of a Mareva order.[200]

114 The significance of these limits on the Federal Court's injunctive powers to this case becomes apparent once the true "subject matter" of the respondent's proceedings is identified and the effect of the interlocutory injunction on that subject matter is ascertained. As noted, the primary judge identified the subject matter of the respondent's proceedings as "his interest in remaining in Australia".[201]

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197 *Cardile* (1999) 198 CLR 380 at 401 [42], 405-406 [57].

198 *Reid v Howard* (1995) 184 CLR 1 at 16. See also *P v P* (1994) 181 CLR 583 at 620, citing *Attorney-General v Birmingham, Tame, and Rea District Drainage Board* [1912] AC 788 at 795.

199 *Jackson v Sterling Industries* (1987) 162 CLR 612 at 619, 621.

200 *Jackson v Sterling Industries* (1987) 162 CLR 612 at 625-626, 642.

201 *MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 989 at [57].

One of the appellants' grounds of appeal to the Full Court contended that the primary judge's description of the subject matter of the proceedings was erroneous. Nevertheless, Colvin and Jackson JJ appeared to accept that finding.

115 The subject matter of a proceeding is the rights that are sought to be vindicated in the proceeding; that is, the rights which the court must declare and enforce. For example, in an application for a stay of an order committing an accused to prison pending his application for special leave to appeal from that order, the subject matter of the litigation is not the accused's right to liberty but the accused's right to pursue that application for special leave.[202] With such an application, the question for the court is whether that right (and if leave is granted, the right to appeal) will be rendered futile if the stay is not granted.[203] Likewise, in circumstances where judicial review is sought of a decision made to refuse a visa under the *Migration Act*, the subject matter of the proceedings is not any "right" or interest that the applicant has to remain in the country but their right to have their visa application determined according to law.[204] In this case the respondent did not have any "right" to remain in Australia. Instead, the subject matter of the respondent's proceedings was his "right" to have his requests for the exercise of the power conferred by s 195A dealt with lawfully (although there was no obligation to deal with his requests).[205]

116 There is no doubt that if the respondent were removed from Australia, then this "right" would be rendered worthless as the power conferred by s 195A cannot be exercised if he is no longer detained under s 189 of the *Migration Act*. However, this only invites inquiry into the nature of the respondent's "right" and whether the interlocutory injunction properly preserved that right so the respondent could vindicate it in the proceedings he commenced, or whether the interlocutory injunction fundamentally changed the character of his right such that it became inconsistent with the statutory scheme to which it relates.

117 It follows from *Plaintiff M61/2010E*, *Plaintiff S4/2014* and *Davis* that, in circumstances where there is no challenge to the existence of the obligation to remove the respondent, his "right" to have his request for the exercise of the power conferred by s 195A lawfully determined only exists within, or adjacent to, a statutory context in which: (a) there is no obligation on the Minister to do anything

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202 *Beljajev v Director of Public Prosecutions* (1991) 173 CLR 28 at 31.

203 *Beljajev* (1991) 173 CLR 28 at 31. See also *Obeid v The Queen* (2016) 90 ALJR 447; 329 ALR 372.

204 *Abebe v The Commonwealth* (1999) 197 CLR 510 at 571 [167].

205 *Minister for Immigration, Citizenship and Multicultural Affairs v MZAPC* (2024) 302 FCR 159 at 173-174 [51].

with the request; (b) there are hedging duties, including s 198(6), that limit the period during which the respondent can be detained while his request is outstanding; (c) there are limits to the purposes for which the respondent can be detained while that request is outstanding; and (d) s 198(6) requires his removal. Despite this, the effect of the interlocutory injunction granted by the primary judge is to suspend the respondent's removal and prolong his detention so as to preserve the possibility that, if a *Davis* style declaration is made, the Minister might then make a procedural decision in the respondent's favour; ie, a decision to consider the exercise of the power under s 195A.

118 To grant an interlocutory injunction in these circumstances rewrites the statutory scheme of the *Migration Act* by suspending the obligation to remove the respondent prior to the making of any procedural decision to exercise the power conferred by s 195A, contrary to *Plaintiff M61/2010E*.[206] The grant of the interlocutory injunction alters the purpose of the respondent's detention so that, instead of being detained for the purpose of his removal, he is detained for the (ultimate) purpose of the Minister considering the "possibility of the exercise of power under ... s 195A", which is also contrary to *Plaintiff M61/2010E*.[207] Further, contrary to what this Court said in *Plaintiff S4/2014*, the grant of an interlocutory injunction in these circumstances subordinates the removal power in s 198(6) to s 195A.[208] Thus, the effect of granting the interlocutory injunction is that: the unchallenged statutory obligation to remove the respondent is suspended without any lawful basis; the statutory scheme of the *Migration Act* is rewritten; and the purpose of the respondent's detention is altered to yield a purpose that was rejected in *Plaintiff M61/2010E*.[209] The Federal Court's powers do not extend that far.

Tait v The Queen

119 During argument on this appeal, reliance was placed on Dixon CJ's statement during the course of argument in *Tait v The Queen*[210] that the "incidental powers of the Court can preserve any subject matter, human or not, pending a decision".[211] In *Tait* this Court adjourned the hearing of two applications for special leave to appeal and stayed the execution of the offender, Mr Tait, pending the disposal of the applications. In doing so, this Court briefly noted that the

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206 (2010) 243 CLR 319 at 348-349 [63]-[65], 351 [71].

207 (2010) 243 CLR 319 at 348-349 [63]-[65] (emphasis omitted).

208 *Plaintiff S4/2014* (2014) 253 CLR 219 at 233-234 [35].

209 *Plaintiff M61/2010E* (2010) 243 CLR 319 at 348 [64].

210 (1962) 108 CLR 620.

211 *Tait* (1962) 108 CLR 620 at 623.

applications were adjourned "without giving any consideration to or expressing any opinion as to the grounds" of the applications "but entirely so that the authority of this Court may be maintained and [the Court] may have another opportunity of considering it".[212]

120 The first application for special leave to appeal was made by D H F Scott, a concerned citizen whose petition to the Supreme Court of Victoria seeking an inquiry into Mr Tait's mental competency pursuant to s 111 of the *Mental Hygiene Act 1958* (Vic) was refused at first instance and on appeal.[213] The second application was made by Mr Tait, who sought to appeal a decision of the trial judge who ruled that he had no power to order any respite of the death sentence on the grounds that Mr Tait was or appeared to be of unsound mind when he stood trial.[214]

121 In this Court, the appellants and the Attorney-General submitted that the stay of execution ordered in *Tait* could be justified by reference to Mr Tait's application alone because, if the application had been granted and the appeal had been successful, that would have warranted the grant of final relief staying the execution pending the trial judge's consideration of the application to respite the sentence. This submission can be rejected for two reasons. First, the observation of Dixon CJ noted above was made during argument in relation to Mr Scott's application for special leave to appeal, not Mr Tait's application.[215] Second, as Gageler CJ, Gordon, Gleeson and Jagot JJ note,[216] the stay order made by the Court was entered in both applications.

122 Even so, Dixon CJ's observation provides no support for the grant of an interlocutory injunction in a case such as this where the existence of the obligation to remove the respondent is not challenged. Both at first instance and on appeal to the Full Court of the Supreme Court of Victoria, Mr Scott contended that an offender condemned to death and suggested to be insane had a right to obtain a suspension of execution by a judicial process and, "assuming there is such a right", a stranger can invoke that jurisdiction.[217] Similarly, when asked in argument in this

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212 *Tait* (1962) 108 CLR 620 at 624. Subsequently the *Mental Health Act 1959* (Vic) came into operation, Mr Tait was determined to be mentally ill, and his sentence was commuted: see *Tait* (1962) 108 CLR 620 at 625-627.

213 See *Re Tait* [1963] VR 532.

214 *Tait v The Queen* [1963] VR 547 at 561.

215 *Tait v The Queen* (unreported transcript, High Court of Australia, 31 October 1962) at 9-11.

216 See reasons of Gageler CJ, Gordon, Gleeson and Jagot JJ at [26].

217 *Re Tait* [1963] VR 532 at 533, 538.

Court how an order under the *Mental Hygiene Act* would affect Mr Tait's execution, Mr Scott's counsel submitted that, if Mr Tait were found to be insane, then "it is not to be presumed, or assumed, that the State would do something that was *unlawful*, namely, execute him" (emphasis added).[218]

123 It was following this submission that Dixon CJ made his famous observation.[219] Dixon CJ's observation was enunciated in a context where it was contended that the courts below had wrongly declined to order a judicial inquiry that, if granted, would, or at least could, have yielded a finding that Mr Tait's execution was unlawful. The timing of the hearing in *Tait* meant that there was no opportunity for this Court to consider the strength of that contention.[220] Nevertheless, in both a legal and practical sense, the preservation of the subject matter of the appeal sought to be brought by Mr Scott required that the execution be stayed, otherwise Mr Scott's contention that Mr Tait's execution would be unlawful would be rendered futile. Put another way, in *Tait* the lawfulness of the execution was in issue.[221] In this case the lawfulness of the respondent's removal from Australia is not in issue and will still not be in issue even if the respondent is successful following a final hearing.

124 Consistent with the approach in *Tait* and the statement of general principle in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia*,[222] a narrow view should not be taken of what interlocutory orders a court can make to protect the subject matter of proceedings, including proceedings seeking to vindicate rights that relate to or arise under a statutory scheme. However, interlocutory orders protecting such rights cannot be divorced from the statutory scheme which those rights arise under or relate to. In this case, where the only issue in the proceedings was whether a request for the exercise of the power conferred by s 195A was lawfully dealt with, and there is no issue that the statutory obligation to remove the respondent is engaged, then, like in *Simsek*, the power to

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218 *Tait v The Queen* (unreported transcript, High Court of Australia, 31 October 1962) at 9.

219 *Tait* (1962) 108 CLR 620 at 623; *Tait v The Queen* (unreported transcript, High Court of Australia, 31 October 1962) at 11.

220 The hearing before this Court in *Tait* took place the day before the scheduled execution date.

221 See *Minister for Immigration, Citizenship and Multicultural Affairs v MZAPC* (2024) 302 FCR 159 at 170 [36] per Sarah C Derrington J.

222 (1998) 195 CLR 1 at 33 [35], citing *Tait v The Queen* (1962) 108 CLR 620.

preserve the subject matter of proceedings cannot be used to "circumvent the safeguard which the requirement that a prima facie case be made out provides".[223]

Section 198(6) "accommodates" the injunction

125 A further basis for the grant of the interlocutory injunction is said to be that the obligation to remove an unlawful non-citizen in s 198(6) should be construed so that it "accommodates" the grant of an interlocutory injunction restraining the removal of a non-citizen. It was contended that if there is such an injunction in place then it is not "reasonably practicable" to remove the non-citizen.

126 If the effect of this contention is that, where an interlocutory injunction restraining the removal of a non-citizen has been made, then officers will not be in breach of any legal duty, including that imposed by s 198(6), by observing the injunction, then it may be accepted. However, if the contention is meant to have any significance beyond that, then it should be rejected. The issue in this appeal is whether the interlocutory injunction should have been granted in the first place. Such an injunction could only be granted if it were apprehended that an unlawful non-citizen such as the respondent would be removed from Australia. The only persons who could be injuncted were the officers threatening to remove the respondent and the only source of their obligation and power to do so is s 198(6). For the reasons already stated, unless the respondent's case for the grant of the injunction engaged, at least at a prima facie level, with the existence of that obligation, then the injunction should not have been granted. If it had not been granted, then the duty imposed by s 198(6) would have been required to be performed. Since the injunction was granted, then it had to be observed.

Chapter III of the Constitution

127 Lastly, the respondent contended that, if the effect of s 198(6) of the *Migration Act* is that the Federal Court did not have the power to grant the interlocutory injunction, then the provision was invalid to that extent because it deprived the Federal Court of an essential characteristic of a court, namely the capacity to protect its own processes by granting interlocutory relief to preserve the subject matter of proceedings of the kind commenced by the respondent. However, the above conclusion does not rest upon the contention that the Federal Court does not have the power to grant an interlocutory injunction to protect the subject matter of its own proceedings. Instead, the conclusion follows from the fact that the interlocutory injunction granted by the Federal Court went beyond what was necessary to protect the subject matter of the proceedings and created different rights and obligations to the statutory scheme to which that subject matter related. In those circumstances no question regarding Ch III of the *Constitution* arises.

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223 *Simsek v Macphee* (1982) 148 CLR 636 at 641.

Outcome of the appeal

128 The appeal should be allowed, the order of the Full Court dismissing the appeal should be set aside and, in lieu thereof, the appeal to that Court should be allowed, the interlocutory injunction granted by the primary judge should be set aside and the respondent's application for interlocutory relief should be dismissed.