HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 14 Nov 2024 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	M66/2024
File Title:	CZA19 v. Commonwealth of Australia & Anor
Registry:	Melbourne
Document filed:	Form 27F - Applicant's outline of oral submissions (joint with]
Filing party:	Applicants
Date filed:	14 Nov 2024

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE & PERTH REGISTRIES

BETWEEN:

CZA19
Applicant

and

COMMONWEALTH OF AUSTRALIA
First Respondent

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
Second Respondent

DBD24
Plaintiff

and

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

APPLICANT'S AND PLAINTIFF'S JOINT OUTLINE OF ORAL SUBMISSIONS

PART I INTERNET PUBLICATION

1 This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

A. The narrow question arising in these cases

2 Is the present regime for mandatory detention of unremovable unlawful non-citizens with protection findings reasonably capable of being seen as necessary for a legitimate non-punitive purpose while their visa applications remain undetermined?

3 These cases are not about whether such people have a right to remain in Australia. They do not. But they do have a right to liberty. Those concepts are not to be elided.

B. The ends – the purpose(s) of detention under ss 189 and 196

Constitutional context

4 Australia has a sovereign power to exclude or expel aliens: *Lim* p 29 (JBA vol 3 tab 7 p 375). It is the "vulnerability of the alien to exclusion or deportation" that "diminish[es]" the protection of Ch III and allows the Executive to detain them in certain circumstances: *Lim* p 29 (JBA vol 3 tab 7 p 375); *Falzon* [39] (JBA vol 4 tab 11 p 754); *NZYQ* [29] (JBA vol 7 tab 32 p 2054). This informs the *Migration Act*'s regime for detention.

Making available for potential removal is the animating purpose of detention

5 Sections 189(1) and 196(1) apply to all "unlawful non-citizens" in Australia, whether or not: (a) they have an undetermined visa application; and/or (b) a removal duty is engaged. The only purpose capable of explaining the breadth of the detention power, in all its applications, is making an unlawful non-citizen available for their potential removal.

6 Detention during visa processing is ultimately directed to the single overarching purpose of potential removal: AS [44]-[50]. The processing purpose is not independent of but is related (or even subsidiary) to the purpose of removal: *Lim* p 46 (JBA vol 3 tab 7 p 392); *Re Woolley* [81(4)] (JBA vol 6 tab 21 p 1526-7).

7 That is why in the operation of the Act the removal duty is the "leading provision", and the "duration of detention" is "ultimately bounded" by the removal requirement; the visa processing provisions are "subordinate": *Plaintiff S4/2014* [33], [35] (JBA vol 5 tab 19 p 1452-3).

8 The idea that the removal and visa processing purposes are independent is also incorrect:

8.1. All aliens who have an undetermined visa application remain vulnerable to "potential removal": *Plaintiff M96A/2016* [28] (JBA vol 5 tab 17 p 1359); *Nabil* [38] (JBA vol 8 tab 34 p 2109).

8.2. The removal duty can be engaged even during visa processing by a request for removal: s 198(1) (JBA vol 1 tab 3 p 80) – the availability of removal was significant to the validity of the scheme in *Lim* p 34 (JBA vol 3 tab 7 p 380).

8.3. The Commonwealth appears to accept that visa processing is not capable of independently justifying detention where the removal duty is engaged: RWS [64].

9 Separation from the community *per se*, is not a legitimate, non-punitive purpose of detention: *NZYQ* [42]-[43], [48]-[49] (JBA vol 7 tab 32 p 2056-8).

C. The means – mandatory detention

If Applicant's and Plaintiff's argument about animating purpose is accepted

10 10 If it is accepted that availability for potential removal is the animating purpose of detention under ss 189 and 196, then the logic of *NZYQ* applies. Once there is no real prospect of removal becoming practicable in the reasonably foreseeable future, the ultimate purpose for which detention is pursued cannot be achieved: *NZYQ* [45] (JBA vol 7 tab 32 p 2057).

If Applicant's and Plaintiff's argument is rejected, and visa processing purpose is an independent purpose – detention still not "reasonably capable of being seen as necessary"

11 If the visa processing purpose is an independent purpose *capable* of justifying Executive detention, it does not do so for the class of persons here: AR [4(c)], [18]ff. The statutory regime is not "sufficiently tailored" to that purpose: *Jones* [78] (JBA vol 7 tab 31 p 2021).

20 See also *Re Woolley* [150] (JBA vol 6 tab 21 p 1552).

12 Detention under ss 189 and 196 while a valid visa application remains undecided is "mandatory": *Al-Kateb* [254] (JBA vol 3 tab 6 p 330); *AJL20* [85] (JBA vol 3 tab 9 p 553-4) and thus required even where:

12.1. all investigations have been completed necessary to inform the Minister's decision (including as to a detainee's identity, nationality, criminal history, security profile and health): cf RWS [56(a)], see also *UNHCR Guidelines* [24]-[28] (JBA vol 9 tab 41 p 2257-8);

12.2. the decision-maker can be confident that, should any further inquiries be necessary, the visa applicant will be cooperative even if not in detention: cf *UNHCR*

30 *Guidelines* [22] (JBA vol 9 tab 41 p 2256);

12.3. there is no risk of absconding: cf *Re Woolley* [164] (JBA vol 6 tab 21 p 1552), see also *UN Working Group* [22] (JBA vol 9 tab 42 p 2338); and

12.4. there is no concern as to the risk presented by the alien that would warrant consideration of an application for a community safety order: cf RWS [56(d)].

13 Relatedly, the duration of detention under the *Migration Act* is not calibrated to the completion of administrative processes for the visa decision: *Plaintiff M76/2013* [140] (JBA vol 5 tab 18 p 1412); *Plaintiff M96A/2016* [21] (JBA vol 5 tab 17 p 1356).

13.1. The scheme considered in *Lim* included a "a number of significant restraints", including a maximum time period of detention and the requirement for removal of an unlawful non-citizen on request: *Lim* p 33-4 (JBA vol 3 tab 7 p 379-80).

13.2. The current scheme does not include a maximum time limit within which the Minister must make a decision. An alien in the position of the Applicant and Plaintiff could not be removed on request (absent a request to be removed to the place where they were found to be owed protection).

13.3. The temporal constraints referred to in *AJL20* were predicated on the ultimate availability of removal: *AJL20* [28] (JBA vol 3 tab 9 p 533), relevantly quoting from *Plaintiff S4/2014* [23] (JBA vol 5 tab 19 p 1459).

13.4. The "tenuous" connection between the duration of detention and the completion of processes that are actually required, or are even made easier by, detention reveals the punitive purpose: *Re Woolley* [88] (JBA vol 6 tab 21 p 1528-9).

14 The disconnect between means and ends is illustrated by the availability of less restrictive means of advancing the visa processing purpose, e.g.: a regime for community detention or residence determinations such as in s 197AB (JBA vol 1 tab 1 p 75); a discretionary (cf mandatory) power to detain (Dunn and Howard's discussion of UK (JBA vol 9 tab 38 p 2176)); detention for purposes such as identity verification (*Re Woolley* [111] (JBA vol 6, tab 21 p 1536)); "reporting obligations, sureties or other conditions" (*Bakhtiyari* [9.3] (JBA vol 9 tab 37 p 2160-61)); other alternatives discussed in *UNHCR Guidelines* Annex A (JBA vol 9 tab 41 p 2281 ff).

Dated: 14 November 2024

David Hooke SC **Julian R Murphy** **Chris Fitzgerald**

For CZA19

David Hooke SC **Jason Donnelly** **Matthew Crowley**

For DBD24