HIGH COURT OF AUSTRALIA

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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

BETWEEN: **DBD24**

Applicant

and

COMMONWEALTH OF AUSTRALIA

First Respondent

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS

Second Respondent

APPLICANTS' JOINT SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2. The issues, which are common to both matters, are as follows: in circumstances where an alien has made a valid visa application which has not been finally determined, do ss 189(1) and 196(1) of the *Migration Act 1958* (Cth) (**Act**), when read with s 3A and the *Constitution*, authorise their continuing detention where:

   (a) it is inevitable that they will be released into the Australian community upon the final determination of their visa application (either by the grant of a visa or by force of the limit on the power to detain identified in ***NZYQ*** *v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005); or

   (b) the Minister[1] has failed to make a decision with respect to their visa application within a reasonable time?

PART III: NOTICE UNDER S 78B OF THE *JUDICIARY ACT 1903* (CTH)

3. Each applicant has given notice under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: REPORTS OF THE JUDGMENTS BELOW

4. There are no judgments below.

PART V: FACTS

5. A statement of agreed facts has been filed in each matter.[2] Accordingly, the following summary refers only to the most important facts and the inferences that the applicants would have the Court draw from those facts.

CZA19

6. CZA19 is a citizen of the Republic of Poland who, on 28 October 2009, first arrived in Australia as the holder of a tourist visa. On his arrival, he was arrested and charged with a drug importation offence and taken into police custody (**CZA ASOAF, [1] and [5]**). After his tourist visa was cancelled, on 16 August 2010, he was granted a criminal justice stay visa (**CZA ASOAF, [6]**). CZA19 was in police custody, save for the period 8 April 2016 to 20 December 2017, when he was at large after escaping from prison (**CZA ASOAF, [8]**), until 8 December 2018, when he was released from prison on

[1] The relevant minister now being the Minister for Immigration and Multicultural Affairs.
[2] With respect to CZA19, see the amended statement of agreed facts dated 22 August 2024 (**CZA ASOAF**) at **Tab 11, pp 73-86** of the joint cause removed book (**JCRB**). For the amended statement of agreed facts in DBD24 dated 22 July 2024 (**DBD ASOAF**), see **JCRB Tab 16, pp 445-452**.

parole; his criminal justice stay visa ceased by operation of law; and he was detained under s 189 of the Act (**CZA ASOAF, [11]**).

7. On 14 January 2019, CZA19 applied for a protection visa, which was refused by a delegate of the second respondent (**Minister**) on 12 February 2019 (**CZA ASOAF, [14]-[15]**).

8. CZA19 then variously sought merits and judicial review (**CZA ASOAF, [16]-[22]**), and on 10 November 2022, the Administrative Appeals **Tribunal** remitted the protection visa application for reconsideration with a direction that CZA19 met the criterion in s 36(2)(aa) of the Act (**CZA ASOAF, [23]**).[3]

9. For the following 16 months, CZA19 remained detained, without determination of the protection visa application he had submitted in January 2019. It is submitted that the Court would find that a decision was not made on his visa application within a reasonable time.

10. On 27 March 2024, CZA19 commenced the present proceedings in the Federal Court of Australia (**CZA ASOAF, [52]**). The Full Court of the Federal Court was subsequently satisfied that it was through commencing the proceedings that CZA19 secured his release from detention, and that it was "plain" CZA19 would have succeeded in obtaining a writ of mandamus directed to the Minister.[4]

11. On 13 May 2024, a delegate of the Minister decided to, (1) refuse CZA19's protection visa application; and (2) grant CZA19 a bridging visa. CZA19 was then released from detention (**CZA ASOAF, [12], [57]**).[5]

12. There is no real prospect of CZA19's removal to Poland becoming practicable in the reasonably foreseeable future due to the Tribunal having directed that he satisfies the criterion in s 36(2)(aa) and there has been no such prospect since 10 November 2022.

13. At no time since 10 November 2022 has there been any evidence that would indicate that CZA19 could be removed to a member State of the European Union or that he has a right to enter and reside in any third country (**CZA ASOAF, [64]**). Because the respondents bear the onus, the appropriate inference is that there is no such right. It is submitted that the Court would infer that, from this date, there was no real prospect of his removal from Australia becoming practicable in the reasonably foreseeable future.

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[3] A copy of the Tribunal's decision record is at **JCRB Tab 11.1, pp 87-112**.
[4] *CZA19 v Commonwealth of Australia* [2024] FCAFC 66, [5(1)] and [5(4)] (the Court).
[5] A copy of the protection visa decision record dated 13 May 2024 is at **JCRB Tab 11.12, pp 290-320**. A copy of the decision notification letter concerning the grant of the bridging visa is at **JCRB Tab 11.13, pp 321-334**.

DBD24

14. DBD24 was born in Vietnam and is a citizen of that country. He has never been a citizen of Australia, and does not hold, and has never held, a visa permitting him to remain in Australia and has at all times since his arrival been an unlawful non-citizen (**DBD ASOAF, [1]-[3]**).

15. DBD24 first arrived in Australia, by boat, on 22 April 2013. His boat entered the area of waters near Ashmore Island, and he was taken to Darwin (**DBD ASOAF, [4]**).

16. On 15 November 2021, DBD24 applied for a protection visa, which was refused on 11 January 2022.[6] On 21 January 2022 he applied for a review in the Tribunal. On 24 January 2022, DBD24 was sentenced to 3 years' imprisonment by the Supreme Court of the Northern Territory for various offences. He has remained in immigration detention since his release upon suspension of his sentence on 23 June 2023 (**DBD ASOAF, [8], [15], [18]-[20]**).

17. On 18 December 2023, the Tribunal remitted the visa application for reconsideration with a direction that the applicant satisfies s 36(2)(aa) of the Act.[7] At the time of writing, no decision has been made in relation to DBD24's protection visa application (**DBD ASOAF, [21], [35]**).

18. There is no real prospect of DBD24's removal to Vietnam becoming practicable in the reasonably foreseeable future due to the Tribunal having directed that he satisfies the criterion in s 36(2)(aa) and there has been no such prospect since 18 December 2023. There is presently no evidence that would indicate that DBD24 has a right to enter and reside in any third country. Because the respondents bear the onus, the appropriate inference is that there is no such right and, therefore, no real prospect of his removal from Australia becoming practicable in the reasonably foreseeable future (**DBD ASOAF, [38]-[40]**).

PART VI: ARGUMENT

19. Broadly speaking, the applicants make two arguments corresponding to the issues identified in Part II above.

20. *First*, the Act does not authorise the detention of an alien who has made a visa application in circumstances where, if the visa application were to be refused, there would be no real prospect of that person being removed in the reasonably foreseeable

[6] A copy of the protection visa decision record is at **JCRB Tab 16.1, pp 453-462**.
[7] A copy of the Tribunal's decision record is at **JCRB Tab 16.2, pp 463-473**.

future. This is because the constitutional limit on the power to detain an alien pending removal identified in *NZYQ* also limits, *mutatis mutandis*, the power to detain an alien pending determination of their visa application.

21. *Secondly*, in the alternative, the authority to detain an alien under the Act while their visa application is being decided runs out once the Minister has had a reasonable time in which to make the decision but has not done so. The applicants submit that this follows either: (a) as a matter of statutory construction; or (b) to ensure that the power to detain does not infringe Ch III of the *Constitution*.

The statutory scheme

22. The critical provisions of the Act in these matters are ss 3A, 4, 47, 65, 189, 196, 197C and 198. Section 3A(1) has the effect that, if a provision of the Act has an invalid application but also at least one valid application, Parliament intends it not to have the invalid application but to have each valid application.

23. Section 4 sets out the object of the Act and how the object is to be advanced. The object is "to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens". Section 4(2) provides that, to advance that object, the Act "provides for visas permitting non-citizens to enter or remain in Australia and the Parliament intends that this Act be the only source of the right of non-citizens to so enter or remain". Section 4(4) further provides that, to advance that object, the Act "provides for the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted by" the Act.

24. Non-citizens may apply for a visa under Div 3 of Part 2.[8] Where a non-citizen has made a "valid visa application",[9] the Minister is required by s 47(1) to "consider" the "valid application for a visa". That requirement "continues until", *inter alia*, "the Minister grants or refuses to grant the visa": s 47(2)(b).

25. After considering a valid application for a visa, the Minister must either grant or refuse to grant the visa in accordance with s 65(1) (subject to ss 84 and 86). While there is no express time period within which the Minister must make a decision, it is implied in the Act that the Minister must make a decision within a "reasonable time".[10]

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[8] See s 45(1).
[9] See s 46.
[10] ***Re Woolley****; Ex parte Applicants M276/2003* (2004) 225 CLR 1, [94] (McHugh J); ***Plaintiff S297/2013*** *v Minister for Immigration and Border Protection* (2014) 255 CLR 179, [37] (Crennan, Bell, Gageler and Keane JJ). Former s 65A included a time limit of 90 days for the Minister to make a decision on a protection visa application.

26. Divisions 7 and 8 of Part 2 of the Act contain "two distinct categories of duty and power". Broadly, "Div 7 imposes a 'duty' upon the Executive to keep unlawful non-citizens in immigration detention for proper purposes, with a power to cease that detention by granting them a visa". Division 8 "imposes a duty upon the Executive to remove unlawful non-citizens as soon as reasonably practicable" on one or more terminating events.[11]

27. Section 189(1) in Div 7 provides that if an officer knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, the officer must detain the person. Subject to limits on the authority to detain – such as that identified in *NZYQ* and those identified below in these submissions – "detention authorised by s 189(1) must continue until the first occurrence of a terminating event specified in s 196(1)".[12]

28. There are four "terminating events", which relevantly include when the unlawful non-citizen is "removed from Australia under section 198 or 199" or "granted a visa": ss 196(1)(a) and 196(1)(c).

29. Section 198 requires the removal of an unlawful non-citizen as soon as reasonably practicable in a variety of circumstances, including where (s 198(6)):

    (a) the non-citizen is a detainee; and

    (b) the non-citizen made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and

    (c) one of the following applies:

        (i) the grant of the visa has been refused and the application has been finally determined;

        (ii) the visa cannot be granted; and

    (d) the non-citizen has not made another valid application for a substantive visa that can be granted when the applicant is in the migration zone.

30. Section 197C provides that, for the purpose of s 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen (s 197C(1)) and that the duty to remove as soon as practicable an unlawful non-citizen under s 198 arises irrespective of whether there has been an assessment, according to law, of non-refoulement obligations in respect of the non-citizen (s 197C(2)). However, s 197C(3) provides that, despite sub-ss (1) and (2), s 198 does not "authorise or require" the

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[11] See *Commonwealth v* ***AJL20*** (2021) 273 CLR 43, [110] (Edelman J, dissenting on outcome).

[12] *AJL20*, [49] (Kiefel CJ, Gageler, Keane and Steward JJ) and [85] (Gordon and Gleeson JJ). See also *Chu Kheng* ***Lim*** *v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 32-33 and 36 (Brennan, Deane and Dawson JJ).

removal of an unlawful non-citizen in respect of whom, as in each of these cases, a protection finding has been made in the course of considering a visa application.[13]

First argument – *NZYQ* limit applies to detention pending a visa decision

Overview

31. In *NZYQ*, this Court expressed the constitutionally permissible period of executive detention under ss 189 and 196 of the Act as "coming to an end when there is no real prospect of removal of the alien from Australia becoming practicable in the reasonably foreseeable future".[14] That holding was limited to "an alien who has failed to obtain permission to remain in Australia".[15]

32. In this case, the question of principle raised by the applicants' first argument is whether that limit applies, *mutatis mutandis*, to the power to detain an alien who has made a visa application that has not yet been finally determined. As is explained in more detail below, the executive detention of an alien who has made a visa application is punitive in the Ch III sense, and therefore not authorised by the Act, if it is inevitable the alien will be released on the final determination of their visa application.

33. For more than a century, this Court has consistently said that "the power of expulsion is, in truth, but the complement of the power of exclusion" from Australia.[16] A visa is no more than legal permission to enter and remain lawfully in Australia.[17] Where there is no real prospect of removal in any event, detention for the purposes of determining a visa application is detention as "an end in itself".[18] *NZYQ* is direct authority against its constitutional legitimacy.

34. In the language of *NZYQ*, the detention is not reasonably capable of being seen as necessary for the furtherance of the legitimate and non-punitive purposes of facilitating the consideration of visa applications and the removal of those whose applications are unsuccessful. Rather, the detention of persons in the applicants' position functions as a form of punitive limbo, detaining them solely for the illegitimate purpose of

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[13] Subject to exceptions in s 197C(3)(c).
[14] *NZYQ*, [55] (the Court).
[15] ***ASF17*** *v Commonwealth of Australia* (2024) 98 ALJR 782, [31] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ), see also [54] (Edelman J) referring to ss 196(1)(a), (aa) and (b) of the Act.
[16] *Robtelmes v Brenan* (1906) 4 CLR 395, 400 (Griffiths CJ), quoting *The Attorney-General for Canada v Cain and Gilhula* (1906) 22 TLR 757, 759 (Lord Atkinson).
[17] *SZ v Minister for Immigration and Multicultural Affairs* (2000) 101 FCR 342, [32] (Branson J, with whom Beaumont and Lehane JJ agreed).
[18] ***Plaintiff S4/2014*** *v Minister for Immigration and Border Protection* (2014) 253 CLR 219, [24] (the Court).

segregation and doing so futilely because they must inevitably be released into the Australian community on the making of a visa decision, whatever that decision is.

Chapter III principles

35. No person, alien or non-alien, "may be detained by the executive absent statutory authority or judicial mandate".[19] "[A] law enacted by the Commonwealth Parliament which authorises detention of a person, other than through the exercise by a court of the judicial power of the Commonwealth in the performance of the function of adjudging and punishing criminal guilt, will contravene Ch III of the *Constitution* unless the law is reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose" (***Lim* principle**).[20] The *Lim* principle ultimately requires "the detriment" (here, detention) be "justified".[21]

36. Application of the *Lim* principle – like other formulations of the concept of "reasonable necessity",[22] such as reasonably "appropriate and adapted"[23] – "requires an assessment of both means and ends, and the relationship between the two".[24] As to *ends*, this refers to "the 'public interest sought to be protected and enhanced' by the law".[25] It "may be identified by reference to 'the mischief' that the law seeks to redress".[26] The ends must be "both legitimate *and* non-punitive".[27] In this context, "'[l]egitimate' refers to the need for the purpose said to justify detention to be compatible with the constitutionally prescribed system of government".[28]

37. The purpose "will not be legitimate if it is punitive".[29] Further, "the purpose of detention, in order to be legitimate, must be something distinct from detention itself".[30] In other words, "[d]etention is the thing to be justified by a legitimate purpose": it is

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[19] Save for presently irrelevant exceptions: *NZYQ*, [27] (the Court) and footnote 26. See also *Lim*, 27 (Brennan, Deane and Dawson JJ). See also *Minister for Home Affairs v* ***Benbrika*** (2021) 272 CLR 68, [71] (Gageler J).
[20] *NZYQ*, [39] (the Court).
[21] ***Jones*** *v Commonwealth of Australia* (2023) 97 ALJR 936, [43] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), see also [77] (Gordon J). See also *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 (***NAAJA***), [98] (Gageler J, dissenting on result but not as to this principle); *NZYQ*, [39] (the Court).
[22] *Jones*, [42] (Kiefel CJ, Gageler, Gleeson and Jagot JJ). See also *Lim*, 71 (McHugh J).
[23] *Lim*, 57-58 (Gaudron J).
[24] *NZYQ*, [44] (the Court, expressing the approach of Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ (**plurality**)). See, earlier, *Jones*, [78] (Gordon J).
[25] ***Alexander*** *v Minister for Home Affairs* (2022) 276 CLR 336, [102] (Gageler J). See also *Jones*, [19] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [65] (Gordon J).
[26] *Jones*, [65] (Gordon J). See also *Alexander*, [102] (Gageler J).
[27] *NZYQ*, [44] (plurality, emphasis in original).
[28] *NZYQ*, [40] (the Court).
[29] *ASF17*, [66] (Edelman J).
[30] *NZYQ*, [49] (plurality).

"not the purpose itself".[31] Detention for detention's sake will thus not be compatible with Ch III.

38. As to *means*, this refers to the "'mechanism' … by which the law is designed to achieve th[e] purpose"[32] or "the manner in which th[e] purpose is implemented".[33] As to the *relationship between means and ends*, this directs attention to whether the statutory mechanism is "sufficiently tailored to the achievement of its purpose".[34] The word "necessary" in the *Lim* principle is used in the sense "reasonably appropriate and adapted".[35]

39. Where what is sought to be justified is detention (rather than some other form of detriment), the relationship between means and ends requires that "the duration of that detention meets at least two conditions. The first is that the duration of the detention is reasonably necessary to effectuate a purpose which is identified in the statute conferring the power to detain and which is capable of fulfilment. The second is that the duration of the detention is capable of objective determination by a court at any time and from time to time".[36]

40. As to whether the relationship between means and ends involves considerations of proportionality, it has been said that "Questions of proportionality cannot arise under Ch III".[37] If that statement was intended to be limited to *structured* proportionality, it may be accepted, at least insofar as Ch III does not *require* a structured proportionality analysis.[38] But insofar as that *dictum* was intended to foreclose more general considerations of proportionality in the Ch III analysis it is, with respect, too prohibitive.[39] It is too prohibitive because it was founded upon the understanding that Ch III only requires an assessment of "the true purpose of the law authorising detention" and does not permit or require consideration of how the law seeks "the achievement of a relevant legislative purpose".[40] In fact, while Ch III is "ultimately

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[31] *ASF17*, [67] (Edelman J).
[32] *Alexander*, [101] (Gageler J).
[33] *ASF17*, [69] (Edelman J).
[34] *Jones*, [78] (Gordon J).
[35] *Jones*, [42] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).
[36] *NAAJA*, [99] (Gageler J, dissenting on result but not as to this principle).
[37] ***Falzon*** *v Minister for Immigration and Border Protection* (2018) 262 CLR 333, [32] (Kiefel CJ, Bell, Keane and Edelman JJ), see also [95] (Nettle J).
[38] *Jones*, [44] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [78] (Gordon J), [203] (Steward J).
[39] For further discussion of this *dictum*, see *Jones*, [149]-[154] (Edelman J).
[40] *Falzon*, [31] (Kiefel CJ, Bell, Keane and Edelman JJ). For similar (erroneous) reasoning, see *Re Woolley*, [77]-[80] (McHugh J); *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1, [349] (Heydon J).

directed to a single question of characterisation" - it "requires an assessment of both means and ends, and the relationship between the two".[41]

41. Thus, as Edelman J has explained, the reasonable necessity inquiry can be understood to involve consideration of whether the means employed by the statute are "disproportionate to its legitimate purpose".[42] Disproportion in this context might be evinced by pointing to instances "where the purpose is contradicted or frustrated in some of its applications".[43] For Edelman J, the *Lim* principle's "proportionality limit" is concerned with the same matters animating structured proportionality testing: "whether there are alternative, reasonably practicable, means of achieving the same object but which have a less restrictive effect".[44]

42. Ultimately, the process of characterisation of a power, and whether it is properly characterised as punitive, is a matter of "substance and not mere form":[45] "the concern of Ch III is with substance" and it "cannot be evaded by formal cloaks".[46]

The "ends" in this case – visa processing and making available for removal

43. In *Lim*, an earlier scheme of detention required by the Act was assessed as being: "for the purposes of executive powers to receive, investigate and determine an application by [an] alien for an entry permit and (after determination) to admit or deport".[47] More recently, the detention authorised by ss 189(1) and 196(1) has been described as serving three purposes: "the purpose of removal from Australia [**removal purpose**]; the purpose of receiving, investigating and determining an application for a visa[48] permitting the alien to enter and remain in Australia [**processing purpose**]; or … the purpose of determining whether to permit a valid application for a visa [**bar lift purpose**]".[49] The first two of those purposes were described in *NZYQ* as "two

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[41] *NZYQ*, [44] (plurality).
[42] *NZYQ*, [52] (the Court, expressing the approach of Edelman J (**Edelman J**)). See also *Jones*, [149]-[154] (Edelman J); *ASF17*, [70], [102] (Edelman J).
[43] *ASF17*, [100] (Edelman J).
[44] *ASF17*, [104] (Edelman J, citations omitted).
[45] *Lim*, 27-28 (Brennan, Deane and Dawson JJ); *NZYQ*, [28] (the Court); *Alexander*, [158] (Gordon J).
[46] *Re Woolley*, [82] (McHugh J); *SDCV v Director-General of Security* (2022) 227 CLR 241, [175] (Gordon J).
[47] *Lim*, 32 (Brennan, Deane and Dawson JJ), see also 10 (Mason CJ) see also 33: "…the purposes of deportation or necessary to enable an application for an entry permit to be made and considered".
[48] The second purpose would extend to consideration of whether to grant a visa without application, such as under s 195A. See *AJL20*, [129] footnote 235 (Edelman J).
[49] *Plaintiff S4/2014*, [26] (the Court). See also ***Plaintiff M76/2013*** *v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322, [138]-[140] (Crennan, Bell and Gageler JJ); ***Plaintiff M96A/2016*** *v Commonwealth* (2017) 261 CLR 582, [21]-[22] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ); *AJL20*, [27]-[28], [65] (Kiefel CJ, Gageler, Keane and Steward JJ) and [128]-[129] (Edelman J); *NZYQ*, [48] (the plurality).

legitimate purposes of considering whether to grant the alien permission to remain in Australia and deporting or removing the alien if permission is not granted".[50]

44. However, the first two purposes are intrinsically related because it is only the prospect of removal (contingent on an adverse visa decision) that can justify mandatory (or any) detention for so long as a visa application remains undecided.

45. It is necessary to first emphasise a matter of terminology in light of the way the respondents have foreshadowed putting their case. It is inapt, and potentially misleading, to refer to the second of the above purposes as the "admission purpose".[51] That is so for two reasons. *First*, the second purpose authorises detention for the Executive to determine whether an alien already in Australia (potentially for many years) ought to be permitted to remain here. *Secondly*, and more importantly in the present cases, the second purpose is premised on a near[52] perfect binary between remaining and removal; that is, the consideration entailed in whether or not to grant or refuse a visa will almost[53] always involve consideration of whether to allow an alien to remain in Australia or require their removal.

46. That much is apparent from sub-ss 4(2) and (4) of the Act, and was explained in *Plaintiff S4/2014* as follows:

> Both the text and the structure of the Act show that regulation of the coming into, and presence in, Australia of non-citizens is effected by providing that the Act – and the visas for which it provides – are to 'be the only source of the right of non-citizens to so enter or remain' (s 4(2)) in Australia, and by further providing that non-citizens whose presence in Australia is not permitted by the Act shall be removed or deported (ss 4(4), 198).[54]

47. Thus, there is a necessary relation between the processing purpose and the removal purpose. So close is the relation that the former must be understood to be an extension of the latter. In *Re Woolley*, Gleeson CJ said that "the power to exclude the non-citizen extends to a power to investigate and determine an application by the non-citizen for

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[50] *NZYQ*, [48] (plurality).
[51] Respondents' defence in CZA19 dated 21 June 2024, [27.2] (**JCRB Tab 5, pp 43**).
[52] Subject to *Love v Commonwealth* (2020) 270 CLR 152.
[53] Again, subject to *Love v Commonwealth* (2020) 270 CLR 152.
[54] *Plaintiff S4/2014*, [23] (the Court).

permission to remain".[55] By analogy, the purpose of detention during visa processing is an extension of the purpose of detention for removal.

48. Indeed, at a high level of generality, the purpose of the Act's detention regime is the same as between the processing and removal purposes:

(a) Detention for the removal purpose is exactly that: the detention of an alien is authorised "to ensure that they are available for removal when practicable".[56] That is how detention "facilitate[s]" removal.[57]

(b) Detention for the processing purpose similarly involves "prevent[ing] the alien from entering Australia or the Australian community" on the understanding that one of the two binary outcomes of processing is removal.[58] In other words, as was understood of the regime in *Lim*, detention during visa processing is "to ensure" that aliens "leave Australia if they are not given an entry permit".[59] Similarly, in *Re Woolley*, the regime was defended on the basis that its purpose was "of ensuring that unlawful non-citizens are available for prompt location and removal from Australia if their applications are unsuccessful … because in some instances there is only a short window of opportunity for the removal of that person".[60]

49. In each case, detention is prescribed to segregate persons who have no right to be in the community (unless and until they obtain that right by the grant of a visa) and to ensure that they are available for removal once they exhaust their attempts to obtain such a right.[61] In each case, the authority to detain devolves from the power to exclude,[62] albeit "[t]he reference to 'exclusion' may also be an Orwellian euphemism".[63]

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[55] *Re Woolley*, [26] (Gleeson CJ). See also *Robtelmes*, 400 (Griffiths CJ) quoting *Cain*: "[t]he power of expulsion is in truth but the complement of the power of exclusion" so that "[i]f entry be prohibited it would seem to follow that the Government which has the power to exclude should have the power to expel …".

[56] *NZYQ*, [54] (Edelman J), see also [44] (plurality). See also *Falzon*, [39] (Kiefel CJ, Bell, Keane and Edelman): "[t]he sovereign power to make laws providing for the expulsion and deportation of aliens extends to authorising the Executive to restrain them in custody to the extent necessary to make their deportation effective".

[57] *AJL20*, [21] (Kiefel CJ, Gageler, Keane and Steward JJ).

[58] *NZYQ*, [44] (plurality).

[59] *Lim*, 46 (Toohey J).

[60] *Re Woolley*, [81(4)] (McHugh J).

[61] Similarly, where an unlawful non-citizen is brought to Australia for medical treatment, the purpose of their detention while in Australia is not medical treatment, it is to ensure their availability for removal after receiving treatment: *Plaintiff M96A/2016*, [27] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ). See also *AJL20*, [134] (Edelman J).

[62] *Lim*, 32 (Brennan, Deane and Dawson JJ); *Re Woolley*, [27]-[28] (Gleeson CJ), [44] (McHugh J).

[63] *Re Woolley*, [137] (Gummow J).

50. Accordingly, properly understood, the statute's scheme for detention *during* visa processing and detention *after* visa processing is directed to the one overarching purpose of segregation pending prospective removal.

51. That is why the purpose of detention is frequently described in terms of *both* the processing and removal purpose, including by Government parties seeking to defend the detention regime against constitutional challenge. Gaudron J said in *Lim* that the purpose of the Act's detention regime is "regulating entry or facilitating departure if and when departure is required".[64] In *Re Woolley*, the Solicitor-General for the Commonwealth explained: "[t]he purpose of detention is to prevent the non-citizen from entering the community until the determination of the application for a visa, and to ensure that the non-citizen is available for removal from Australia if the application for admission is ultimately unsuccessful".[65]

52. In *Plaintiff M76/2013*, Crennan, Bell and Gageler JJ said of the detainee in that case: "[h]er present detention is for the purpose of completing statutory processes, which will result in a determination of whether she is or is not to be granted permission to remain in Australia, and for the purpose of removing her if that permission is not granted".[66] Edelman J in *ASF17* said "the purpose of ss 189(1) and 196(1), properly articulated, is the general removal of classes of aliens from Australia".[67]

The "means" – mandatory detention, including of those who must inevitably be released

53. The means chosen by the Act to pursue its ends is a blunt one: *mandatory* detention of *all* unlawful non-citizens before, during and after the making of any visa application. While it is true that the Minister has the power to relax the obligation to detain in the individual case by the powers in ss 48B, 195A and 197AB,[68] these are non-compellable, and the reasonable necessity of the detention required by ss 189 and 196 must be assessed in light of the practical reality that, from the perspective of the detainee, detention is mandatory. As is explained below, the recognition by Parliament that visa applications can be considered while aliens are in the community pursuant to residence determinations points *against* the reasonable necessity of mandatory detention for visa processing.

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[64] *Lim*, 57 (Gaudron J).
[65] *Re Woolley*, 6.
[66] *Plaintiff M76/2013*, [135] (Crennan, Bell and Gageler JJ), see also [139], cf [207] (Kiefel and Keane JJ).
[67] *ASF17*, [101] (Edelman J).
[68] *ASF17*, [113] (Edelman J).

The relationship between "means" and "ends"

54. Where an alien has applied for a visa and there is a prospect that, if the visa is refused, the person will be removed, detention of that person during visa processing is reasonably capable of being seen as necessary for the visa processing and removal purpose (or, globally, for the purpose of segregation pending prospective removal). It is the prospect of removal (being one of the only two outcomes of visa processing), and the permissibility of detaining a person to make them available for removal, that allows detention to be justified in those circumstances.

55. The justification does not hold in circumstances where there is no prospect of the alien being removed if their visa application is refused. In those circumstances, detention during visa processing cannot succeed in segregating the person from the community in the event of an adverse visa decision. Rather, detention in those circumstances could only ever *temporarily* segregate the person from the community. That is because the person *must* be released on the final determination of their visa application, whatever the outcome: either they will be released on a visa or, if their visa is refused, they will be released by force of the constitutional limit identified in *NZYQ* (as inevitably occurred for CZA19 and will inevitably occur for DBD24).

56. To require the detention of a person temporarily while their visa application is being considered when, whatever the result, they must be released into the community on its final determination is to require detention "as an end in itself",[69] or segregation for its own sake. This is not an "incident" of the legitimate purpose to which it is purportedly directed. As was explained in *NZYQ*:

> The purpose of separation of an alien from the Australian community is outside the limited range of legitimate purposes identified in *Lim*, and repeatedly affirmed in cases following *Lim*. The separation of an alien from the Australian community by means of executive detention was identified in *Lim* as permissible not as an element of some more expansive purpose but only as an "incident" of the implementation of one or other of the two legitimate purposes of considering whether to grant the alien permission to remain in Australia and deporting or removing the alien if permission is not granted.[70]

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[69] *Plaintiff S4/2014*, [24] (the Court).
[70] *NZYQ*, [48] (plurality).

57. One need go no further than *Lim* itself. Brennan, Deane and Dawson JJ did not say that the aliens power authorises executive detention of aliens independently of the right to exclude and expel. Their Honours said unequivocally:[71]

> Such authority to detain an alien in custody, when conferred upon the Executive in the context and for the purposes of an executive power of deportation or expulsion, constitutes an incident of that executive power.

58. It was only by analogy to this proposition that their Honours went on to say that "the authority to detain an alien in custody, when conferred in the context and for the purposes of executive powers to receive, investigate and determine an application by that alien for an entry permit and (after determination**) to admit or deport**" was also an "incident of those executive powers".[72] The core proposition remained that "[w]hen conferred upon the Executive, [detention] takes it character from the executive powers to **exclude, admit and deport of which it is an incident**".[73]

Duration

59. The lack of sufficient tailoring in this aspect of the Act's detention scheme can also be seen by focusing on the requirement that, to be consistent with Ch III, "the duration of the detention is **reasonably necessary to effectuate a purpose** which is identified in the statute conferring the power to detain and which is capable of fulfilment".[74]

60. Where there is a real prospect that an alien will be removed, their detention for the duration of visa processing is (subject to the applicants' second argument below) reasonably necessary to effectuate the purpose of making them available for removal if the visa is refused. In those circumstances, removal sets the outer limit on the detention authorised by the Act, whether or not the immediate purpose of detention is to process a visa application. As was said in *Plaintiff S4/2014*:

> 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**.[75]

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[71] *Lim*, 32 (Brennan, Deane and Dawson JJ).
[72] *Lim*, 32 (Brennan, Deane and Dawson JJ, emphasis added).
[73] *Lim*, 32 (Brennan, Deane and Dawson JJ, emphasis added).
[74] *NAAJA*, [99] (Gageler J, dissenting on result but not as to this principle, emphasis added).
[75] *Plaintiff S4/2014*, [33] (the Court, emphasis added).

61. By contrast, the duration of detention during visa processing is arbitrary, and unconnected to purpose, in circumstances where at the end of the process the person must be released from detention, whatever the outcome of the visa decision.

62. That is especially so in circumstances where a person in the applicants' position cannot, by a removal request, bring their detention to an end and await the outcome of their visa application in another country (they cannot do so because there is no country to which they can be removed).[76] The availability of a removal request was "a critical element"[77] of the reason in *Lim* that the detention regime did not infringe Ch III.[78] McHugh J subsequently accepted that the fact that detention could not be voluntarily brought to an end by a removal request was an "important … if not determinative" "indication" "that the detention is punitive".[79]

Alternatives[80]

63. Insofar as it is permissible to look to alternatives to mandatory detention of persons in the applicants' position, an obvious alternative is presented by the scheme as it existed prior to 1992, which did not entail mandatory detention.[81] It has never been suggested that "it is essential for a person to be in custody in order to make an application for an entry permit, or that it is only possible … to consider such an application while the applicant is in custody";[82] no more can it be said to be necessary to detain where the person will inevitably be released when their visa application is finally determined.

64. Another alternative is suggested by s 197AB, which reflects a recognition by Parliament that a substantive visa could be considered while a person is the subject of a residence determination, rather than being in detention, an idea that has been the subject of international comment.[83]

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[76] See Dunn and Howard, "Reaching Behind Iron Bars: Challenges to the Detention of Asylum Seekers" (2003) 4 *The Drawing Board: An Australian Review of Public Affairs* 45, 60-62.
[77] *Re Woolley*, [97] (McHugh J).
[78] *Lim*, 34 (Brennan, Deane and Dawson JJ), 72 (McHugh J), discussed in *Re Woolley*, [97] (McHugh J) and *ASF17*, [43] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ), [105] (Edelman J).
[79] *Re Woolley*, [86] and [95] (McHugh J).
[80] See also Nicholas, "Protecting Refugees: Alternatives to a Policy of Mandatory Detention" (2002) 8 *Australian Journal of Human Rights* 69; UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (9 April 2012); UN Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on Deprivation of Liberty of Migrants*, U.N. Doc. A/HRC/39/45 (July 2018).
[81] Mandatory detention was prescribed by the *Migration Amendment Act 1992* (Cth).
[82] *Re Woolley*, [26] (Gleeson CJ).
[83] *Bakhtiyari v Australia*, United Nations Human Rights Committee, UNHCR Communication No 1069/2002, CCPR/C/79/D/1069/2002, 29 October 2002, [9.3].

65. Other alternatives can be seen in the way other countries address the issue. In Canada, for example, a non-citizen seeking a right to remain in the country can be detained to determine their identity and in limited circumstances such as a security or flight risks.[84]

66. Another alternative to the present scheme for mandatory (purportedly indefinite) detention during visa processing is to put a time limit on the length of detention during visa processing. The previous 273-day limit on "application custody" was one of the "significant restraints"[85] on the detention regime in *Lim* that ensured that it did not offend Ch III.

Testing the contrary proposition

67. It is anticipated that the respondents will submit that the Act authorises detention of an alien for so long as the alien's visa application is being "processed" or remains extant; no matter how long that may be, and no matter that at the end of that period the person must be released from detention (by one of the means described above). That contention, if advanced, should be rejected for at least two reasons.

68. *First*, if accepted, it would enable indefinite detention under the Act for the purpose of visa processing with no temporal constraint.[86] That cannot withstand the logic of *NZYQ* or earlier statements to the effect that cases may also arise where the connection between the alleged purpose of detention and the length of detention becomes so tenuous that it is not possible to find that the purpose of the detention is to enable visa applications to be processed pending the grant of a visa. If the law in question has such a tenuous connection, the proper inference will ordinarily be that its purpose is punitive.[87]

69. *Secondly*, the respondents' position would lead to anomalous results. If the mere fact that consideration was being given to granting a visa (or lifting the bar to permit an application for a visa)[88] could justify detention, then a person in the position of NZYQ who obtained *habeas corpus* on the basis there was no real prospect of their removal could be re-detained if, and for so long as, the Minister considered of their own motion whether to lift the bar to permit a further application for a protection visa. Such a person might also be re-detained if, and for so long as, the Minister considered whether

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[84] See the discussion in *Re Woolley*, [111] (McHugh J).
[85] *Lim*, 33 (Brennan, Deane and Dawson JJ), discussed in *Re Woolley*, [88] (McHugh J).
[86] Compare *AJL20*, [28] (Kiefel CJ, Gageler, Keane and Steward JJ).
[87] *Re Woolley*, [88] (McHugh J). See also *NZYQ*, [32] (the Court).
[88] *GMZ18 v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 380 FLR 336, [74] (Judge Manousaridis).

to grant them a visa without application, e.g. under s 195A of the Act.[89] Indeed, on the respondents' argument, if CZA19's visa (which was granted to him without his having applied) lapsed or expired he could be re-detained for so long as the Minister was considering whether to grant him another visa – despite the respondents accepting that, at least since 13 May 2024, CZA19 falls within the logic of *NZYQ*.

70. It is anticipated that the respondents will also seek to rely on the decision of the Full Court of the Federal Court in ***ASP15*** *v Commonwealth*[90] and the references to aspects of that decision in *AJL20*. Those decisions do not impede the applicants here.

71. The Court in *ASP15* understood itself[91] to be applying the constitutional holding in ***Al-Kateb*** *v Godwin*,[92] which was overturned in *NZYQ*. The fundamental correction effected by *NZYQ* undoes the premise on which *ASP15* was based.

72. The correctness of the constitutional holding in *Al-Kateb* was not in issue in *AJL20*.[93] Further, the joint majority's reasoning in *AJL20* must now be read in light of *NZYQ*. Adopting McHugh J's statement in *Al-Kateb*, the majority in *AJL20* said (at [44]) that the constitutional question is whether detention is "reasonably capable of being seen as necessary **for the purpose of segregation** pending receipt, investigation and determination of any visa application or removal of an unlawful non-citizen depends on the connection between the detention and action or removal". That was expressly overruled in *NZYQ* as a "circular and self-fulfilling" conflation of the constitutionally legitimate purpose and detention itself.[94]

Application of NZYQ limit to CZA19

73. On and from 13 May 2024 there has been no real prospect of the removal of CZA19 from Australia becoming practicable in the reasonably foreseeable future.[95] However, the respondents do not accept (albeit they have not tried to prove otherwise) that that was true from 10 November 2022 — when the Tribunal made a protection finding in respect of CZA19 — until 13 May 2024, when he was released from detention.[96]

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[89] *AJL20*, [129] footnote 235 (Edelman J).
[90] ***ASP15*** *v Commonwealth* (2016) 248 FCR 372.
[91] *ASP15*, [30]-[33], [39]-[40] (the Court).
[92] *Al-Kateb v Godwin* (2004) 219 CLR 562.
[93] *AJL20*, [26]; as to *AJL20*, see *NZYQ*, [24] (the Court) and [47]-[48] (plurality).
[94] *NZYQ*, [49] (plurality, emphasis added).
[95] **CZA ASOAF, [66]**.
[96] **CZA ASOAF, [64]-[65]**.

74. Notwithstanding the respondents' faint-hearted factual contest on this issue, the Court would comfortably find that there was no real prospect of CZA19's removal throughout that period in light of the following:

(a) Throughout the relevant period, CZA19 was a citizen of Poland,[97] and there is no evidence that he had a right of entry to, and long term stay in, any other country, subject only to members of the European Union, to which he could not be removed.

(b) On the making of a protection finding on 10 November 2022,[98] it became unlawful for the respondents to remove CZA19 to Poland. That finding remained in place throughout the period of CZA19's detention (in the sense that no "s 197D decision" was made).

(c) Throughout the period of CZA19's detention, the respondents maintained a policy whereby they would only remove a person to a country of citizenship or a country where they have the right of entry and long-term stay.[99]

(d) There is no evidence suggesting the prospect of removal of CZA19 to any country other than Poland throughout the relevant period. Save for investigating the possibility of removing CZA19 to Cambodia, which was unsuccessful,[100] the respondents did not make any inquiry or undertake any investigation as to whether CZA19 could be removed to any other place other than Poland.[101]

(e) The respondents admit that for the period from 10 November 2022 to 13 May 2024, there was no real prospect of CZA19's removal from Australia to a member State of the European Union becoming practicable in the reasonably foreseeable future.[102]

(f) The agreed facts do not warrant any different conclusion being reached with respect to any other country for the period between 10 November 2022 and 13 May 2024: there is simply no evidence that there was a real prospect of the removal of CZA19 becoming practicable in the reasonably foreseeable future. It ought to be inferred that there was no real prospect of removal *throughout* the period of his detention.

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[97] **CZA ASOAF, [1] and [64]**.
[98] **CZA ASOAF, [23] and AF-1**.
[99] Defence in CZA19, [24.1] (**JCRB Tab 5, pp 42**).
[100] **CZA ASOAF, [61]-[62]**.
[101] **CZA ASOAF, [63]**.
[102] **CZA ASOAF, [64]**.

75. If the Court makes that finding, and accepts CZA19's first argument (outlined above) as to the prospect of removal conditioning the power to detain during visa processing, the Court would hold that CZA19's detention between 10 November 2022 and 13 May 2024 was unlawful.

Application of NZYQ limit to DBD24

76. On 15 November 2021, DBD24 made an application for a Safe Haven Enterprise (Class XE) (Subclass 790) visa. As submitted earlier, that application remains pending. DBD24 also has a protection finding for the purposes of s 197C of the Act.

77. On the material before the Court, there is no real prospect of DBD24 being removed to a safe third country. Accordingly, the continued detention of DBD24 serves no constitutionally permissible purpose. Regardless of the outcome of DBD24's pending visa application, he will have to be released from immigration detention based on the *ratio decidendi* of *NZYQ*.

78. The continued detention of DBD24 is, therefore, effectively punitive, as the constitutional limits established in *NZYQ* make it clear that he must be released from immigration detention, whatever the outcome of the pending visa application.

Second argument – Detention unlawful by reason of expiry of "reasonable time"

79. The question raised by the applicants' second argument is whether the implied statutory obligation to make a decision with respect to a visa application under s 65 within a reasonable time conditions the power to continue detaining an alien, so that after a reasonable time has elapsed without a decision being made, detention becomes unlawful. It is submitted that an affirmative answer is compelled as a matter of statutory construction (either because the obligation to make a decision in a reasonable time conditions the power to detain, or because the failure to make a decision in a reasonable time evidences a departure from the permitted purpose of detention); or, if necessary, as a matter of constitutional invalidity.

Detention only lawful up until expiry of "reasonable time" for decision

80. When application is made for a protection visa, the Minister comes under an implied statutory obligation "to consider a valid application … and to make a decision … **within a reasonable time**".[103] Indeed, the Act acknowledges the inverse proposition by the reference in s 51(2) to unreasonable delay.[104] Properly understood, the

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[103] *Plaintiff S297/2013*, [37] (Crennan, Bell, Gageler and Keane JJ, emphasis added).
[104] *Plaintiff S297/2013*, [37] (Crennan, Bell, Gageler and Keane JJ).

obligation to make a decision within a reasonable time conditions the authority to detain while that decision is being made. This follows from the application of a long line of case law, albeit much of it in the context of the obligation to remove (relied upon by analogy).

81. In *Koon Wing Lau v Calwell*, Dixon J said of a power to detain "pending deportation" in the *War-time Refugees Removal Act 1949* (Cth), "I think the words 'pending deportation' imply purpose. The two provisions read together mean that a deportee may be held in custody for the purpose of fulfilling the obligation to deport him until he is placed on board the vessel. It appears to me to follow that unless within a reasonable time he is placed on board a vessel he would be entitled to his discharge on habeas".[105] While those comments were distinguished by the majority in *AJL20*,[106] it was on the basis that the statute allowed detention "at the discretion of the Executive". So too is detention while visa processing, in a sense, at the discretion of the Executive because it is the Executive who is the author of the terminating event (the visa decision), and it is the Executive who can otherwise bring detention to an end by a residence determination.

82. In *Lim*, Mason CJ said "a failure to remove a designated person from Australia 'as soon as practicable' pursuant to s 54P(1), after that person has asked the Minister in writing to be removed, would, in my view, deprive the Executive of legal authority to retain that person in custody".[107]

83. In *Re Woolley*, Gleeson CJ held that the power to detain was for "the time **necessarily involved** in receiving, investigating and determining an application for an entry permit", and explained that the power to detain existed for *that* time, that is: "to hold the non-citizen in detention for the time **necessary** to follow the required procedures of decision-making".[108]

84. In ***CPCF** v Minister for Immigration and Border Protection*, French CJ said of an analogous statutory power to detain for the purpose of taking a person to another country, "[t]he power to detain does not authorise indefinite detention. It can only be exercised for a reasonable time having regard to its statutory purpose".[109] Similarly,

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[105] *Koon Wing Lau v Calwell* (1949) 80 CLR 533, 581 (Dixon J).
[106] *AJL20*, [59]-[60] (Kiefel CJ, Gageler, Keane and Steward JJ).
[107] *Lim*, 12 (Mason CJ).
[108] *Re Woolley*, [26] (Gleeson CJ, emphasis added).
[109] *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, [45] (French CJ).

Keane J held, "the power is exercisable for the purposes stated in ss 31 and 32 of the Act, and by the application of the ordinary rule that a power must be exercised within a reasonable time having regard to the purpose for which it was conferred and the circumstances in which it falls to be exercised".[110]

85. Most recently, Gordon and Gleeson JJ's reasoning in *AJL20* illustrates the way in which statutory powers of detention can be implicitly conditioned upon a time period fixed by reference to the time reasonably needed to fulfil the purpose of detention. Their Honours held that, reading the provisions of the Act together, and against background constitutional concerns, "the Executive's authority to keep an unlawful non-citizen in immigration detention stops when time for removal as soon as reasonably practicable has expired. As will be explained, it is not the *event* of removal, but a *time* by which removal must occur, that defines the lawfulness of detention".[111] So too here, reading the power to detain together with the implied obligation to decide a visa application in a reasonable time, and reading the Act against constitutional concerns for efficient administration and individual liberty, the Executive's authority to keep an unlawful non-citizen in detention ends with the reasonable time for decision.

Alternatively, failure to make decision in "reasonable time" evinces departure from purpose

86. Put slightly differently, failure to decide in a reasonable time might not render detention unlawful *per se* but might (and does in these cases) evidence a departure from the permitted purpose of detention, and thus show detention to have been unlawful. Acknowledging the different question of construction under consideration in *AJL20*, Edelman J's reasoning in that case is instructive in this regard,[112] and the majority apparently accepted that delay could evince a departure from purpose.[113]

87. The foundation for that argument is that an unlawful non-citizen can only be taken and "kept" in detention under s 189 if the detention is within the scope and purposes of the Act.[114] The purpose of immigration detention is assessed objectively by reference to all the circumstances. Its lawfulness "depends upon the Executive continuing to act in accordance with one of the statutory purposes for the detention".[115]

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[110] *CPCF*, [453] (Keane J).
[111] *AJL20*, [84] (Gordon and Gleeson JJ, italics in original, dissenting on outcome).
[112] See, by analogy, *AJL20*, [145] (Edelman J, dissenting on outcome).
[113] *AJL20*, [60] (Kiefel CJ, Gageler, Keane and Steward JJ).
[114] See *AJL20*, [124]-[126] (Edelman J, dissenting on outcome).
[115] *AJL20*, [103] (Gordon and Gleeson JJ); *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, [35] (the Court); *Plaintiff M76/2013*, [30] (French CJ) and [89] (Hayne J); *Plaintiff S4/2014*, [26], [28] and [34]-[35] (French CJ, Hayne, Crennan, Kiefel and Keane JJ).

88. In circumstances like the present, the only statutory purpose for the detention is the "processing" purpose.[116] If that is the purpose justifying ongoing detention, and the Executive fails to perform its duty to make a decision with respect to a visa application within a reasonable time, then it may be inferred that the alien has been detained for a "substantial purpose"[117] not permitted by statute, so that the detention was unlawful.[118]

89. That conclusion is consistent with authority. In *Plaintiff S4/2014*, in the context of a person detained for two years while the Minister's department inquired into his eligibility for a protection visa (for the purpose of the Minister deciding whether to lift the bar under s 46A) and where s 198 was enlivened, this Court held:

> The purpose for his detention had to be carried into effect as soon as reasonably practicable. That is, consideration of whether a protection visa may be sought by or granted to the plaintiff had to be undertaken and completed as soon as reasonably practicable. Departure from that requirement would entail departure from the purpose for his detention and could be justified only if the Act were construed as permitting **detention at the discretion of the Executive**. The Act is **not to be construed** as permitting detention of that kind.[119]

90. The Court further explained, "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**".[120]

91. The obvious reading of the unanimous observations in *Plaintiff S4/2014* is that, "The lawfulness of detention under s 196(1) depends upon the Executive continuing to act in accordance with one of the statutory purposes for the detention".[121] When the Executive ceases to do so, an alien's detention ceases to be lawful.

92. That understanding of *Plaintiff S4/2014* is consistent with previous authority. Discussing the *Lim* principle, the plurality in *Plaintiff M76/2013* (Crennan, Bell and Gageler JJ) held that "[t]he necessity referred to in that holding in *Lim* is not that detention *itself* be necessary for the purposes of the identified administrative processes but **that the period of detention be limited to the time necessarily taken in administrative processes directed to the limited purposes identified**". Their

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[116] Because, as here, the removal purpose could not be achieved as a result of a protection finding.
[117] *Thompson v Randwick Corporation* (1950) 81 CLR 87, 106 (Williams, Webb and Kitto JJ).
[118] Cf *ASP15*, [40] (the Court). Compare to *AJL20*, [103] (Gordon and Gleeson JJ, dissenting).
[119] *Plaintiff S4/2014*, [34] (the Court, emphasis added).
[120] *Plaintiff S4/2014*, [35] (the Court, emphasis added).
[121] *AJL20*, [103] (Gordon and Gleeson JJ).

Honours added, "[w]hat begins as lawful custody under a valid statutory provision can cease to be so".[122]

93. Similarly, Edelman J held in *AJL20* that the duty of continuing detention under s 189, that a person be "kept" in detention, "must be performed within the scope and purposes of the enactment";[123] it "does not permit continued detention of that person for purposes beyond the scope and purposes of the act".[124] The duration of detention is "authorised under s 196 only so long as it is [is] 'under section 189'".[125]

Detention not reasonably necessary for visa processing after expiry of reasonable time

94. If these constructions of the Act are not compelled by the text and context alone, they are required by Ch III of the *Constitution*, because the Act's regime for detention would go beyond what is reasonably capable of being seen as necessary for the visa processing purpose if it authorised detention beyond the reasonable time required to make a visa decision.[126]

95. Since *NZYQ*, the constitutional character of the power to detain depends on the real prospect *in fact* of detention ending *in the particular case* in the reasonably foreseeable future; not just the existence *in law* of an enforceable duty that is calibrated *in the general run of cases* to bring about a detention-ending event.

96. Parliament has imposed an implied duty to make a decision on a visa application within a reasonable time. No other duration of detention could be seen as necessary to enable an application for an entry permit to be made and considered. While the reasonable time necessary to decide a visa application will vary,[127] detention beyond that time will not be reasonably necessary for the legitimate purpose purportedly pursued.

97. In circumstances where a reasonable time has been exceeded, "the connection between the alleged purpose of detention and the length of detention becomes so tenuous that it is not possible to find that the purpose of the detention is to enable visa applications to be processed", so that the proper inference to draw is that its purpose is punitive.[128]

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[122] *Plaintiff M76/2013*, [139] (Crennan, Bell and Gageler JJ, emphasis added in bold). See also at [30] (French CJ).
[123] *AJL20*, [126] (dissenting in outcome, emphasis in original); see also [132].
[124] *AJL20,* [109], see also [130]-[136].
[125] *AJL20*, [118] (Edelman J).
[126] See further Dunn and Howard, "Reaching Behind Iron Bars: Challenges to the Detention of Asylum Seekers" (2003) 4 *The Drawing Board: An Australian Review of Public Affairs* 45, 51, 56, 62.
[127] *Re Woolley*, [26] (Gleeson CJ).
[128] *Re Woolley*, [88] (McHugh J).

98. To the same effect, if detention were authorised beyond the reasonable time necessary to decide a visa application it could not be said that "the *period* of detention [is] … limited to the time necessarily taken in administrative processes directed to the limited purposes identified".[129]

Unreasonable delay in CZA19

99. What is a "reasonable time" for the considering a visa application and making a decision must be assessed with reference to the circumstances of the case and the particular decision-making framework under consideration.[130] The test for determining whether "reasonable time" has passed is "whether there are circumstances which a reasonable [person] might consider render this delay justified and not capricious", rather than "a delay for a considered reason and not in consequence of neglect, oversight or perversity".[131] Where there has been unreasonable delay in the making of an administrative decision, the onus shifts to the decision-maker to establish a satisfactory justification or explanation.[132] Absent a satisfactory justification or explanation, the delay is to be regarded as unreasonable.[133]

100. In CZA19's case, he was detained by the Executive for a period of around five years and four months after he made his application for a protection visa.[134]

101. Applying the above principles, the Court would find that the Executive had had a reasonable time to make a decision on his visa application shortly after 10 November 2022, when the Tribunal found that he was owed protection and remitted his visa application for reconsideration. His detention from that time until his release on 13 May 2024 would therefore be held to be unlawful.

102. The basis for the finding that it was reasonable for the Minister to have made a decision on CZA19's visa application on or around 10 November 2022 includes the length and often unexplained delays that followed, the confined issues for consideration after the

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[129] *Plaintiff M76/2013*, [139] (Crennan, Bell and Gageler JJ, italics in original), see also [140].
[130] *Plaintiff S297/2013*, [37] (Crennan, Bell, Gageler and Keane JJ). See also ***CWE22*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 180 ALD 376, [62]-[68] (Wigney J).
[131] ***Thornton*** *v Repatriation Commission* (1981) 62 FLR 285, 292 (Fisher J); *ASP15*, [21]-[23] (the Court).
[132] *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506, [109(1)] (Gordon and Steward JJ); *AQM18 v Minister for Immigration and Border Protection* (2019) 268 FCR 424, [59] (Besanko and Thawley JJ); *Thornton*, 292-293 (Fisher J).
[133] *BMF16 v Minister for Immigration and Border Protection* [2016] FCA 1530, [27] (Bromberg J); *CWE22*, [60] (Wigney J).
[134] See **CZA ASOAF, [14] and [57]**.

Tribunal's remittal, and the absence of any significant new information in addition to what was already known by the respondents prior to 10 November 2022.

Unreasonable delay to DBD24

103. DBD24's protection visa application was made on 15 November 2021. On 18 December 2023, the Tribunal remitted his visa application to the Department for reconsideration with a direction that he satisfies s 36(2)(aa) of the Act. The application remains undetermined.

104. Since remitter, the historical facts indicate that consideration has been given to the potential refusal of DBD24's visa application on character grounds. There has been an unreasonable delay in processing the application since at least April 2024.

105. A period exceeding four months since the Tribunal remitted the application to the Department is unreasonable for a decision to be made regarding DBD24's visa application. This submission is made in light of the full context of his application, which was initially lodged in November 2021.

PART VII: ORDERS SOUGHT

106. CZA19 seeks declaratory relief to the effect that his detention by the respondents in the period from 10 November 2022 until his release on 13 May 2024 was unlawful.

107. DBD24 seeks a writ of *habeas corpus* directed to the respondents requiring them to release DBD24 forthwith.

PART VII: ESTIMATE

108. The applicants estimate that they will require a total of 2.5 hours for oral argument, exclusive of any time for reply.

Dated: 20 September 2024

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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

BETWEEN: **DBD24**

Applicant

and

COMMONWEALTH OF AUSTRALIA

First Respondent

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL

Second Respondent

ANNEXURE TO THE JOINT SUBMISSIONS OF THE APPLICANTS

Pursuant to Practice Direction No. 1 of 2019, the applicants set out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
Constitutional provisions			
1.	*Commonwealth Constitution*	Current	Ch III
Statutory provisions			
2.	*Migration Act 1958* (Cth)	Compilation No. 161 (1 July 2024 to present)	Sections 3A, 4, 47, 65, 189, 195A, 196, 197AB, 197C and 198