HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

M66 of 2024

BETWEEN:

CZA19
Applicant

and

COMMONWEALTH OF AUSTRALIA
First Respondent

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
Second Respondent

IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

P29 of 2024

BETWEEN:

DBD24
Applicant

and

COMMONWEALTH OF AUSTRALIA
First Respondent

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
Second Respondent

SUBMISSIONS OF LPSP
SEEKING LEAVE TO INTERVENE OR BE HEARD AS AMICUS CURIAE

PART I: CERTIFICATION

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

PART II: BASIS OF LEAVE TO INTERVENE OR BE HEARD AS *AMICUS CURIAE*

2. LPSP, the lead applicant in a representative proceeding pending in the Federal Court of Australia,[1] seeks leave to intervene, or alternatively to be heard as *amicus curiae*, in support of the applicant in each matter.

3. In his Federal Court proceeding, LPSP contends that he was unlawfully held in immigration detention and claims to be entitled to damages. By reason of that claim, he has a legal interest that is likely to be substantially affected by the outcome of these matters.

PART III: REASONS FOR LEAVE TO INTERVENE OR TO BE HEARD

4. The central issue in each matter is whether ss 189(1) and 196(1) of the *Migration Act 1958* (Cth) (the **Act**) validly apply to authorise the detention of an alien who has made a valid application for permission to remain in Australia, if there is no real prospect of the alien being removed in the reasonably foreseeable future.

5. The same issue arises in LPSP's pending proceeding in the Federal Court. On 25 August 2020, the Administrative Appeals Tribunal concluded that LPSP was a person in respect of whom Australia had protection obligations because he was a refugee, thereby satisfying the criterion in s 36(2)(a) of the Act with respect to South Sudan.[2] However, LPSP remained in detention.[3] He continued to be detained until he was released on 23 December 2022,[4] but was then re-detained from 27 February 2023 to 1 March 2023, and for a further period from 6 April 2023 to 8 March 2024 when he was eventually granted his protection visa.[5] In total, he spent 1,192 days in immigration detention after a protection finding was made in his favour.[6]

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1 VID1116 of 2023.

2 Affidavit of Hannah Dickinson affirmed 4 October 2024 (**Dickinson Affidavit**) at [8].

3 Dickinson Affidavit at [8].

4 Dickinson Affidavit at [12]. As part of a cohort following the decision in *Pearson v Minister for Home Affairs* (2022) 295 FCR 177.

5 Dickinson Affidavit at [11]-[12].

6 Dickinson Affidavit at [12].

6. In December 2023, while he was still in detention, LPSP commenced a proceeding in the Federal Court on his own behalf seeking a writ of habeas corpus.[7] He commenced by concise statement, in which he identified his argument as that detention following a protection finding is unlawful because there would be no real prospect of his removal to South Sudan or any other country becoming practicable in the reasonably foreseeable future.[8] He cited *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*.[9]

7. Prior to trial, LPSP was granted a protection visa,[10] rendering it unnecessary for him to pursue habeas. LPSP then reconstituted his proceeding as a representative proceeding on his own behalf and on behalf of all persons who, in summary terms, were from South Sudan and had been detained following a protection finding.[11]

8. Unbeknown to LPSP and his lawyers, CZA19, the applicant in one of the present proceedings, commenced litigation in the Federal Court in March 2024; DBD24, the applicant in the other proceeding, commenced his Federal Court proceeding in May 2024.[12] The Federal Court held a call-over on 28 June 2024 at which the applicants' matters and another matter were listed to determine an efficient way to resolve proceedings which raised overlapping or identical arguments.[13] For unknown reasons, LPSP's representative proceeding was not identified in this call-over.

9. LPSP's contention was, and remains, that once he was found to satisfy the protection criterion in s 36(2)(a), there was no real prospect that he would be removed in the reasonably foreseeable future and his subsequent detention was therefore unlawful.[14] The Commonwealth parties have pleaded in their defence that LPSP's detention was authorised for the legitimate and non-punitive purpose of enabling his application for permission to remain in Australia to be considered, and that the question of whether there was a real prospect of removal as soon as reasonably practicable is "not relevant" to the

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7 Dickinson Affidavit at [14].

8 Dickinson Affidavit at [8] and Exhibit HD-4 (Concise statement).

9 (2023) 97 ALJR 1005.

10 Dickinson Affidavit at [11].

11 Dickinson Affidavit at [15].

12 Dickinson Affidavit at [20].

13 See *BOE21 v Commonwealth of Australia* [2024] FCA 709.

14 Dickinson Affidavit, Exhibit HD-6 (Statement of Claim) at [8].

lawfulness of his detention.[15] However, the Commonwealth parties have also admitted that, following the commencement of amendments to s 197C of the Act by the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth) on 25 May 2021, there was no real prospect of removal of LPSP to South Sudan or any other country in the reasonably foreseeable future.[16]

10. LPSP's interest in these proceedings therefore goes beyond a mere "contingent affection".[17] Rather, his legal interest "in other pending litigation is likely to be affected substantially by the outcome of the proceedings in this Court", thereby satisfying "a precondition for leave to intervene".[18] Satisfaction of that precondition enlivens the Court's discretion to determine whether to "exercise its jurisdiction by granting leave to intervene".[19] That leave should be granted, having regard to the following considerations.

11. *First*, LPSP's submissions—which he may seek to supplement succinctly at the hearing if leave is granted—will "assist [the Court] to reach a correct determination" on the issues raised for its consideration.[20] LPSP substantially supports both the reasoning and conclusions in the applicants' submissions, but seeks to supplement them by addressing the available methods for analysing the relationship between "means" and "ends" for the purposes of the principle in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*.[21] In particular, these submissions elaborate on how proportionality—variously described as a "separate basis" for analysing the principle in *Lim*,[22] and as a statement of the "same principle" at a different level of generality[23]—can be used to analyse the issue presented for this Court's determination. LPSP's proposed

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15 Affidavit, Exhibit HD-7 (Defence) at [8](a)-(b).

16 Affidavit, Exhibit HD-7 (Defence) at [8](g). The Commonwealth parties allege in their defence that prior to the amendment to s 197C, there was a real prospect of removal of LPSP to South Sudan then becoming reasonable in the reasonably foreseeable future.

17 *Roadshow Films Pty Ltd v iiNet Ltd [No 1]* (2011) 248 CLR 37 at 39 [2] (the Court).

18 *Roadshow Films* (2011) 248 CLR 37 at 39 [2] (the Court).

19 *Levy v Victoria* (1997) 189 CLR 579 at 603 (Brennan CJ); *Roadshow Films* (2011) 248 CLR 37 at 39 [3] (the Court).

20 See *Roadshow Films* (2011) 248 CLR 37 at 39 [6] (the Court).

21 (1992) 176 CLR 1.

22 See *ASF17 v Commonwealth* (2024) 98 ALJR 782 at 793 [58] (Edelman J).

23 See *Jones v Commonwealth* (2023) 97 ALJR 936 at 968 [151] (Edelman J).

submissions are thus "additional and complementary to those presented by" the applicants.[24]

12. *Second*, in addition to the "demonstrable"[25] affection of LPSP's own legal interests, his pending proceeding is brought on behalf of group members whose interests are also affected by the outcome of these proceedings.[26] Broadly, the group members encompass persons who were detained after the Minister had formed a state of satisfaction that those persons satisfied the protection visa criterion in s 36(2) of the Act (or were persons in respect of whom Australia otherwise owed non-refoulement obligations), in circumstances where they did not have a right to enter and reside in any country other than South Sudan. Damages are sought on their behalf, and a writ of habeas corpus is sought in respect of each group member who remains in immigration detention.

13. *Third*, a grant of leave would not delay the conduct of the proceedings, and would not add materially to the parties' preparation for, or the length of, the hearing.[27]

14. Alternatively, LPSP seeks leave to be heard as *amicus curiae*. For the reasons set out above, LPSP's submissions about the analysis of the constitutional limitation "will assist the Court in a way in which the Court would not otherwise have been assisted".[28] Again, a grant of leave would neither delay the proceedings nor substantially affect the parties' preparation for, or the length of, the hearing.[29]

PART IV: PROPOSED ARGUMENT

A. OVERVIEW

15. *NZYQ* establishes that there is a constitutional limitation, which "follows directly from the principle in *Lim*", that "the constitutionally permissible period of executive detention of an alien who has failed to obtain permission to remain in Australia … [comes] to end when there is no real prospect of removal of the alien from Australia becoming practicable

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24 *ASF17* (2024) 98 ALJR 782 at 786 [16] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ); see also at 798 [84] (Edelman J).

25 *Levy* (1997) 189 CLR 579 at 602 (Brennan CJ).

26 Dickinson Affidavit, HD-6 (Statement of Claim) at [1]-[2].

27 See *Roadshow Films* (2011) 248 CLR 37 at 39 [4] (the Court).

28 *Levy* (1997) 189 CLR 579 at 604 (Brennan CJ). See also *Unions NSW v New South Wales* (2019) 264 CLR 595 at 619 [56] (Kiefel CJ, Bell and Keane JJ).

29 *Levy* (1997) 189 CLR 579 at 605 (Brennan CJ); *Roadshow Films* (2011) 248 CLR 37 at 39 [4] (the Court).

in the reasonably foreseeable future".[30] Sections 189(1) and 196(1) of the Act do not validly apply to authorise detention after that point.

16. As a matter of principle and logic, the same limitation must apply to an alien in respect of whom there is no real prospect of removal from Australia becoming practicable in the reasonably foreseeable future, regardless of whether their application for permission to remain in Australia remains under consideration. In summary, that is so for the following reasons.

(1) *First*, the legitimate and non-punitive purpose of considering an application for permission to remain in Australia (the **visa consideration purpose**) is derivative of the legitimate and non-punitive purpose of removing an alien from Australia (the **removal purpose**). The legitimacy of the former purpose—and detention in aid of that purpose—arises because detention for that purpose ensures the immediate availability of the alien for removal in the event that the application is unsuccessful. Put another way, the visa consideration purpose, and detention in its aid, cannot be understood in isolation from the removal purpose.

(2) *Second*, ss 189(1) and 196(1) are not reasonably capable of being seen as <u>necessary</u> for the visa consideration purpose where the removal of the alien is not a possible outcome of that process. That may be demonstrated by approaching the question as one of "disproportionality" between "means" and "ends". Such detention lacks a rational connection to, or alternatively is not necessary to, or alternatively is manifestly disproportionate to, the fulfilment of the visa consideration purpose.

B. CONSTITUTIONAL PRINCIPLE

<u>*The principle in* Lim *and the constitutional limitation in* NZYQ</u>

17. The principle identified in *Lim*[31] is that a Commonwealth law "which authorises the detention of a person, other than through the exercise by a court of the judicial power of the Commonwealth in the performance of the function of adjudging and punishing criminal guilt, will contravene Ch III of the Constitution unless the law is reasonably

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30 (2023) 97 ALJR 1005 at 1018 [55] (the Court) (emphasis added).

31 (1992) 176 CLR 1 at 27-28 (Brennan, Deane and Dawson JJ, with Mason CJ agreeing).

capable of being seen to be necessary for a legitimate and non-punitive purpose".[32] The requirement of a non-punitive purpose reflects the proposition that Ch III "requires a punishment to be imposed by a court if it is to be imposed at all".[33] As a matter of "default characterisation", a power to impose detention is punitive unless specifically justified by reference to such a purpose.[34] The requirement for a legitimate purpose demands a purpose that is "compatible with the constitutionally prescribed system of government", and is confined to exceptional purposes.[35]

18. The "only purposes" identified in *Lim* as "peculiarly capable of justifying executive detention of an alien" were: (1) the purpose of removing the person from Australia (described in these submissions as the **removal purpose**); and (2) the purpose of enabling an application for permission to remain in Australia to be made and considered (described in these submissions as the **visa consideration purpose**).[36] If detention is not limited to what is reasonably capable of being seen as necessary for those purposes, the detention is "of a punitive nature" and will transgress the exclusive vesting of Commonwealth judicial power in Ch III courts.[37]

19. Further, "a Commonwealth statute which authorises executive detention must limit the duration of that detention to what is reasonably capable of being seen to be necessary to effectuate an identified statutory purpose"—namely, a legitimate and non-punitive purpose—"which is reasonably capable of being achieved".[38] Proceeding from that understanding, this Court's decision in *NZYQ* establishes that the detention of an alien "who has failed to obtain permission to remain in Australia" ceases to be lawful if and when "there is no real prospect of removal of the alien from Australia becoming

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32 *NZYQ* (2023) 97 ALJR 1005 at 1015 [39] (the Court).

33 *Benbrika v Minister for Home Affairs* (2023) 97 ALJR 899 (***Benbrika (No 2)***) at 911 [45] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

34 *NZYQ* (2023) 97 ALJR 1005 at 1015 [39]-[40] (the Court).

35 *NZYQ* (2023) 97 ALJR 1005 at 1015 [40] (the Court).

36 *NZYQ* (2023) 97 ALJR 1005 at 1016 [46] (the Court). See *Lim* (1992) 176 CLR 1 at 32-33 (Brennan, Deane and Dawson JJ, with Mason CJ agreeing). Compare *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at 231 [26] (referring also to an ancillary purpose of determining whether to permit a valid application for a visa), 233-234 [35] (the Court).

37 *Lim* (1992) 176 CLR 1 at 33 (Brennan, Deane and Dawson JJ, with Mason CJ agreeing).

38 *NZYQ* (2023) 97 ALJR 1005 at 1015 [41] (the Court), quoting *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at 625 [374] (Gageler J).

practicable in the reasonably foreseeable future".[39] That is, "the absence of any real prospect of achieving the removal of the alien from Australia in the reasonably foreseeable future refutes the existence of the first of [the] purposes" identified in *Lim*.[40] Or, on a "slightly different" approach, the detention is otherwise "not reasonably capable of being seen as necessary … to ensure that they are available for removal when practicable".[41]

20. The practical effect of *NZYQ*, given the scheme of the Act, is that where a protection finding has been made and the applicant cannot be removed to any other country, an applicant for a visa must be released from immigration detention regardless of the outcome of their visa application. That will be either because they will eventually be granted a visa, or because they will not be granted a visa but the constitutional limitation in *NZYQ* requires their release.

The derivative nature of the visa consideration purpose — and its implications

21. In order to understand the basis on which the visa consideration purpose identified in *Lim* is "legitimate and non-punitive", it is necessary to recall the manner in which the principle in *Lim* was derived and explained.

22. In *NZYQ*, the Court observed that the reasoning underlying the principle in *Lim* contained three "statements of background principle which have come to be regarded as authoritative".[42] Among those background principles was the identification of the "relevant difference" between a non-alien and an alien, which explains their different susceptibilities to executive detention.[43] The difference lies in "the vulnerability of the alien to exclusion or deportation", which "flows from both the common law and the provisions of the Constitution".[44] The difference is reflected in the proposition, affirmed in *Lim*, that the power of the Commonwealth Parliament to make laws with respect to aliens "extends to authorizing the Executive to restrain an alien in custody to the extent

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39 *ASF17* (2024) 98 ALJR 782 at 789 [31] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ), referring to *NZYQ* (2023) 97 ALJR 1005 at 1018 [55] (the Court).

40 *NZYQ* (2023) 97 ALJR 1005 at 1016 [46] (approach of six members of the Court) (emphasis added).

41 *NZYQ* (2023) 97 ALJR 1005 at 1017 [51], 1018 [54] (approach of Edelman J).

42 (2023) 97 ALJR 1005 at 1013 [26] (the Court).

43 *NZYQ* (2023) 97 ALJR 1005 at 1013 [29] (the Court).

44 *Lim* (1992) 176 CLR 1 at 29 (Brennan, Deane and Dawson JJ), cited in *NZYQ* (2023) 97 ALJR 1005 at 1013 [29] (the Court).

necessary to make the deportation effective";[45] that is, "for the purposes of expulsion or deportation".[46]

23. That single difference—the susceptibility of an alien to exclusion or deportation—was and remains the sole underlying basis on which the purposes identified in *Lim* are capable of being described as legitimate and non-punitive. As the joint reasons in *Lim* explained, the Parliament may authorise the executive to detain an alien "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", because such detention "constitutes an incident of those executive powers".[47] The visa consideration purpose contemplates two binary outcomes: admission or removal.[48] In those circumstances, detention "pending" the making of a decision ensures the immediate availability of the alien to be removed in the event of the latter outcome. The visa consideration purpose is therefore an outworking of the general susceptibility of an alien to deportation or removal, or derivative of the removal purpose. Put another way, the identification of the visa consideration purpose as a legitimate and non-punitive purpose is premised on an assumption that removal may follow if permission is not granted. It is not conceptually correct to speak of detention in aid of the visa consideration purpose as untethered from detention in aid of the (prospective) removal purpose.

24. The proposition that the derivative nature of the visa consideration purpose authorises detention is not novel. Although Gleeson CJ explained in *Re Woolley; Ex parte Applicants M276/2003* that it "[p]lainly" cannot be 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 for the Executive to consider such an application while the applicant is in custody", the reason why detention for that purpose is lawful is that it is an "exten[sion]" of "the power to exclude the non-citizen" (in the sense of removing them from Australia).[49] Thus, when the joint reasons in *Lim* referred to the "necessity" of detention for the purposes of deportation or to enable an application for an entry permit to be made

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45 (1992) 176 CLR 1 at 30-31.

46 (1992) 176 CLR 1 at 32.

47 (1992) 176 CLR 1 at 32 (emphasis added).

48 See *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at 77-78 [176]-[178] (Hayne J).

49 (2004) 225 CLR 1 at 14 [26] (Gleeson CJ), quoted in *NZYQ* (2023) 97 ALJR 1005 at 1017 [50] (approach of six members of the Court).

and considered, their Honours were not positing that "detention *itself*" would be "necessary" for the latter purpose.[50]

25. The connection between the visa consideration purpose and the removal purpose was similarly explained in *Plaintiff S4/2014 v Minister for Immigration and Border Protection*. The "outer limit" of an alien's detention is always supplied by the prospect of the removal purpose, even when a visa application is under consideration.[51] The removal duty is the "leading provision, to which provisions allowing consideration of … the grant of … a visa to an unlawful non-citizen who is being held in detention [is] to be understood as subordinate".[52] Unless the visa consideration purpose "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".[53]

26. The justification of detention based on the derivative nature of the visa consideration purpose—and the existence of a single underlying rationale—is also reflected in the terms in which six members of the Court in *NZYQ* rejected the view that mere "separation of an alien from the Australian community" constitutes a legitimate and non-punitive purpose.[54] As was there explained, the principle in *Lim* "necessitates that the purpose of detention … must be something distinct from detention itself".[55] "Separation" by means of detention was justified "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".[56] Implicit in that statement is a recognition that the visa consideration purpose is part of a composite set of "administrative processes" which are directed towards the question of whether that person may be removed from Australia.[57]

27. Similarly, it has been recognised that under the European Convention on Human Rights, detention while an application for asylum is being considered may be justified

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50 Cf *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 369 [139] (Crennan, Bell and Gageler JJ) (emphasis in original).

51 *Plaintiff S4* (2014) 253 CLR 219 at 232-233 [30], [33] (the Court).

52 *Plaintiff S4* (2014) 253 CLR 219 at 233-234 [35] (the Court).

53 *Plaintiff S4* (2014) 253 CLR 219 at 233-234 [35] (the Court).

54 (2023) 97 ALJR 1005 at 1016-1017 [47]-[50] (approach of six members of the Court).

55 *NZYQ* (2023) 97 ALJR 1005 at 1016 [48] (approach of six members of the Court).

56 *NZYQ* (2023) 97 ALJR 1005 at 1016 [48] (approach of six members of the Court) (emphasis added).

57 See *Plaintiff M76* (2013) 251 CLR 322 at 368 [135], 369-370 [139]-[140] (Crennan, Bell and Gageler JJ).

derivatively as detention "with a view to deportation", provided that there is a "true prospect" of deportation being executed.[58]

28. The derivative nature of the visa consideration purpose may also find support in *ASF17*, where it was said that "where an alien detainee has the benefit of a protection finding, the power and duty to remove the detainee is affected by Australia's non-refoulement obligations under s 197C, and whether there is a real prospect of removal of the detainee from Australia becoming practicable in the reasonably foreseeable future is then relevant to whether the detention of the alien under ss 189(1) and 196(1) of the Act is justified".[59]No less than for any other constitutional limitation, the manner in which the *Lim* principle is articulated and analysed must maintain fidelity to the "principled consideration[s]" which underlie it.[60] Thus, to treat the visa consideration purpose as being analytically distinct from the question of removal—such that it is unaffected by whether the "administrative processes" being undertaken could realistically lead to removal—would be to apply the *Lim* principle in a manner untethered from the "constitutional rationales or values" from which it was derived.[61]

C. APPLICATION OF CONSTITUTIONAL PRINCIPLE

Disproportionality between "means" and "ends"

29. In *NZYQ* and *ASF17*, two approaches were taken to the principle in *Lim*. On one approach, the principle in *Lim* poses a "single question of characterisation (whether the power is properly characterised as punitive)", which is to be answered by "an assessment of both means and ends, and the relationship between the two".[62] On the second approach (Edelman J's approach), the question to be asked is whether the detention imposed is "disproportionate to, in the sense of being not reasonably capable of being seen as

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58 *Nabil v Hungary* (European Court of Human Rights, Former Second Section, Application No 62116/12, 22 September 2015) at [38]. Detention in these circumstances is not always permissible, and requires justification (eg, by reference to a risk that the person might frustrate their removal in the event protection is found not to be owed): see at [40]-[41].

59 (2024) 98 ALJR 782 at 790 [39] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).

60 Cf *McCloy* (2015) 257 CLR 178 at 237 [149] (Gageler J). See generally Rosalind Dixon, "Functionalism and Australian Constitutional Values" in Rosalind Dixon (ed), *Australian Constitutional Values* (2018) 3.

61 Cf *Jones* (2023) 97 ALJR 936 at 957 [97] (Gordon J).

62 *NZYQ* (2023) 97 ALJR 1005 at 1016 [44] (approach of six members of the Court). See also *ASF17* (2024) 98 ALJR 782 at 789 [32] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).

necessary for, a legitimate purpose".[63] Those different approaches do not reflect any difference in constitutional principle. The principle in *Lim* was "unanimously explained" and unanimously articulated in *NZYQ*.[64] So too was the "constitutional limitation" identified in *NZYQ* itself. The approaches are "slightly different"[65] only in the level of generality at which the principle is expressed and applied.

30. If a law confers Commonwealth judicial power on the executive, the law cannot be "saved" from invalidity "by asserting that its operation is proportionate to an object that is compatible with Ch III".[66] That, however, is not how proportionality is used in this context. The question is not whether the vesting of judicial power is proportionate to a legitimate purpose. Rather, proportionality is applied at the antecedent stage of characterising whether judicial power has been vested. It is reflected in the focus on whether a law authorising detention is "reasonably capable of being seen as necessary" for a legitimate and non-punitive purpose. It is therefore unobjectionable to say that the principle in *Lim* involves a "requirement of proportionality".[67]

31. As to the relevance of a "structured" approach to proportionality, the principle in *Lim* neither demands nor prevents the application of "[s]tructured proportionality".[68] While structured proportionality is not to be "confused with the constitutional principle it serve[s]",[69] it is nevertheless a tool of analysis. When applied, it offers a "structured and transparent" analysis, or "a more particular, less general" framework for analysing the principle in *Lim*.[70] Thus, even if a structured approach is not ultimately adopted, the substance of that analysis can (and should) inform the question of whether detention complies with the constitutional principle. For those reasons, LPSP submits that a

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63 *NZYQ* (2023) 97 ALJR 1005 at 1017 [51]-[52] (approach of Edelman J) (emphasis added). See also *ASF17* (2024) 98 ALJR 782 at 793 [58] (Edelman J).

64 *ASF17* (2024) 98 ALJR 782 at 788-789 [31]-[32] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).

65 *NZYQ* (2023) 97 ALJR 1005 at 1017 [51] (approach of Edelman J).

66 *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 344 [32] (Kiefel CJ, Bell, Keane and Edelman JJ), quoting *Re Woolley* (2004) 225 CLR 1 at 34 [80] (McHugh J).

67 See *ASF17* (2024) 98 ALJR 782 at 802 [102] (Edelman J).

68 *Jones* (2023) 97 ALJR 936 at 968 [151] (Edelman J).

69 *Brown v Tasmania* (2017) 261 CLR 328 at 376 [158] (Gageler J), citing *McCloy v New South Wales* (2015) 257 CLR 178 at 213 [68] (French CJ, Kiefel, Bell and Keane JJ). See also *Jones* (2023) 97 ALJR 936 at 947 [44] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

70 *Jones* (2023) 97 ALJR 936 at 968 [151] (Edelman J).

proportionality approach can usefully illuminate how the principle in *Lim* applies to the issue in these proceedings.

32. It should be observed that "structured proportionality" need not be viewed as an indivisible or rigid framework.[71] While structured proportionality, when applied in the context of the implied freedom of political communication, or s 92 of the Constitution, has involved the "generally accepted" three-stage approach of suitability, necessity and adequacy in balance,[72] it is not invariably so. Structured proportionality can be conceived of as "a flexible and variable method";[73] it can be appropriately moulded to reflect that (for example) the question before the court does not concern a burden on a constitutional freedom but instead the determination of whether judicial power has been conferred, or to reflect the appropriate "degree of latitude" that ought to be afforded to the Parliament.[74] Indeed, comparative experience shows that the discipline of applying "structured proportionality" does not always require applying the balancing stage of the three-stage approach, because that stage has been either unnecessary or undesirable.[75] As Tridimas has observed, even in Europe, which may be regarded as the origin of structured proportionality, "[a]ll aspects of the proportionality analysis have to be seen as a continuum and not as separate elements".[76] The perceived inapplicability or undesirability of one stage of the traditional three-stage approach does not mean that the framework of structured proportionality is jettisoned altogether.

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71 Cf *Palmer v Western Australia* (2021) 272 CLR 505 at 553-554 [144]-[145] (Gageler J).

72 See *McCloy* (2015) 257 CLR 178 at 217 [79] (French CJ, Kiefel, Bell and Keane JJ).

73 Adrienne Stone, "Proportionality and Its Alternatives" (2020) 48 *Federal Law Review* 123 at 138.

74 *ASF17* (2024) 98 ALJR 782 at 802 [104] (Edelman J). See also Bradley Selway, "The Rise and Rise of the Reasonable Proportionality Test in Public Law" (1996) 7 *Public Law Review* 212 (discussing a spectrum from a "high level" to a "low level" test of reasonable proportionality).

75 See *A v Secretary of State for the Home Department* [2005] 2 AC 68 at 103 (Lord Bingham, with Lord Nicholls agreeing), adopting a test focusing in effect on suitability and necessity, without an additional balancing stage. See the later decision in *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700 at 770-771 [20] (supplementing that test with the balancing stage). See Rosalind Dixon, "A New Australian Constitutionalism? Constitutional Purposes, Proportionality and Process-theory" (George Winterton Memorial Lecture, University of Western Australia, 11 April 2024) (suggesting the possibility of "two-stage" proportionality testing comprising the questions of suitability and necessity).

76 Takis Tridimas, "The Principle of Proportionality" in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law* (2018) vol 1, 243 at 247.

33. It is important for any analytical framework to reflect the principled considerations and the "constitutional values" that underpin the principle in *Lim*.[77] The principle in *Lim* is not an individual right; it is a principle that flows from the separation of judicial power in Ch III of the Constitution. However, that understanding should not detract from the acknowledged fact that the *Lim* principle "is recognised under our system of government as a safeguard on liberty",[78] being "the most elementary and important of those basic common law rights".[79] The importance of liberty informs how the principle has been derived, explained and applied, and underpins the default characterisation of detention as an exclusively judicial function. More generally, the "historical judicial protection of liberty against incursions by the legislature or the executive" is, together with judicial independence, "a key constitutional value underpinning the separation of judicial power" effected by Ch III.[80] These constitutional values are given an analytical home and can be transparently brought to bear in a proportionality analysis, just as they ought to be transparently brought to bear in an approach focusing on a "single question" of characterisation.[81] Consideration of the values that underpin constitutional principles is, after all, consistently reflected in the way that proportionality has been applied in other contexts such as those concerning the implied freedom of political communication.[82]

34. In *Falzon*, it was said that, given the "absolute" nature of the prohibition on laws which involve the exercise of the judicial power of the Commonwealth, the "reasonably capable of being seen as necessary" test in *Lim* should not be equated with "quite different" notions of "necessity" as used in proportionality.[83] However, provided that it is approached flexibly and suitably tailored to reflect constitutional values, a "structured"

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77 Cf *Garlett v Western Australia* (2022) 277 CLR 1 at 48 [128] (Gageler J), 57 [163], 59 [168], 62-63 [174]-[175] (Gordon J); *Jones* (2023) 97 ALJR 936 at 947 [44] (Kiefel CJ, Gageler, Gleeson and Jagot JJ). See also *McCloy* (2015) 157 CLR 178 at 237-238 [149]-[150] (Gageler J).

78 *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 (***Benbrika (No 1)***) at 97 [36] (Kiefel CJ, Bell, Keane and Steward JJ).

79 *Garlett* (2022) 277 CLR 1 at 47 [125] (Gageler J); see also at 57 [163] (Gordon J).

80 *Benbrika (No 2)* (2023) 97 ALJR 899 at 916 [67] (Gordon J). See *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11-12 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

81 *McCloy* (2015) 257 CLR 178 at 216 [75] (French CJ, Kiefel, Bell and Keane JJ); *Brown* (2017) 261 CLR 328 at 369 [125] (Kiefel CJ, Bell and Keane JJ); *Clubb v Edwards* (2019) 267 CLR 171 at 202 [74] (Kiefel CJ, Bell and Keane JJ).

82 See, eg, *McCloy* (2015) 257 CLR 178 at 220-221 [93] (French CJ, Kiefel, Bell and Keane JJ) (referring to "equality of access to government"); *Clubb* (2019) 267 CLR 171 at 204 [82], 208-209 [98]-[101] (Kiefel CJ, Bell and Keane JJ) (referring to civic dignity).

83 *Falzon* (2018) 262 CLR 333 at 343 [28], 344 [30]-[32] (Kiefel CJ, Bell, Keane and Edelman JJ).

form of proportionality is capable of ensuring that "the application of the principle in *Lim* … proceed[s] in a manner that is … faithful to the constitutional values safeguarded by that principle".[84] This would be consistent with comparative experience,[85] which suggests that not all stages of structured proportionality need to be applied in the same way in all contexts (or are always apposite).

Application of a "structured" analytical framework

35. **Suitability.** The first analytical step in a structured framework is to consider whether the law authorising detention "exhibits a rational connection to its purpose", in the sense that the law is "capable of realising" the identified purpose.[86]

36. The derivative nature of the visa consideration purpose brings into sharp relief the absence of a rational connection between that purpose and the detention of a person pending the determination of a visa application where that person cannot and will not be removed from Australia regardless of the outcome. In the ordinary case, it is possible to describe the purpose of detention as being the consideration of an application the outcome of which will determine whether that person is susceptible to being removed from Australia. In that context, the law authorising detention is "capable of realising" or contributing to the realisation of that purpose, insofar as it ensures that the person is available for removal in the event that, and as soon as, the application is unsuccessful and the person becomes liable to removal.

37. However, as noted earlier, it is of no utility (and therefore "[p]lainly" not "essential") for an alien to be detained merely to enable that alien to make an application for a visa or for the executive government to consider the application, if the person cannot be removed from Australia regardless of the outcome.[87] Hence, in the circumstances of an alien who cannot be removed from Australia, there is no relevant relationship between the fact of their detention and the consideration or determination of their visa application. The only relationship is a coincidental temporal connection: the detention continues for as long as the application remains under consideration, but without contributing anything to the realisation of that purpose.

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84 *Jones* (2023) 97 ALJR 936 at 947 [44].

85 See [32] above.

86 *Comcare v Banerji* (2019) 267 CLR 373 at 400 [33] (Kiefel CJ, Bell, Keane and Nettle JJ).

87 *Re Woolley* (2004) 225 CLR 1 at 14 [26] (Gleeson CJ).

38. **Necessity.** The analytical step described as "necessity" is appropriately framed as being whether there is an obvious and compelling alternative (being an exercise of power which is to be characterised as non-judicial), which is equally practicable and available and has a less restrictive effect on liberty.[88] That includes an assessment of whether the hypothetical alternative measure, which here would not involve an involuntary deprivation of liberty, would be "as effective in achieving the legislative purpose" of allowing the making or consideration of an application for a visa.[89] Put another way, the detention must be no more than is necessary to accomplish that legislative objective.

39. A relevant alternative is the conditional grant to an alien of permission to be at liberty in the Australian community while their visa application remains under consideration but there is no real prospect that, as an outcome of that process, they will be removed in the reasonably foreseeable future. Release of an alien in those circumstances "is not to be equated with a grant of a right to remain in Australia".[90] If "a state of facts comes to exist giving rise to a real prospect of [an applicant's] removal from Australia becoming practicable in the reasonably foreseeable future",[91] including during the duration of the consideration of their visa application, ss 189(1) and 196(1) of the Act would authorise their detention or re-detention.

40. The lack of "necessity" to detain an alien, given that alternative, is illustrated by two points.

41. *First*, the alternative plainly does not detract from the achievement of the legislative purpose. Where there is no realistic prospect of the alien being susceptible to removal, the only possible justifying purpose for detention is the purpose of allowing the making or consideration of an application for a visa. Again, the detention of an alien while a visa application is being considered has no conceivable effect on the capacity of the executive government to consider that application. That is, whether an applicant for a visa is

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88 Cf *Banerji* (2019) 267 CLR 373 at 401 [35] (Kiefel CJ, Bell, Keane and Nettle JJ). See *ASF17* (2024) 98 ALJR 782 at 802 [104] (Edelman J).

89 See *Tajjour v New South Wales* (2014) 254 CLR 508 at 571 [114] (Crennan, Kiefel and Bell JJ).

90 *NZYQ* (2023) 97 ALJR 1005 at 1020 [72] (the Court).

91 *NZYQ* (2023) 97 ALJR 1005 at 1020 [72] (the Court).

detained has no bearing, "quantitatively, qualitatively, and probability-wise",[92] on the fulfilment of the legislative purpose.

42. *Second*, the alternative is obvious and reasonably practicable. There is nothing theoretical about it: it already exists within the scheme of the Act and the *Migration Regulations 1994* (Cth) (the **Regulations**). Subdivision AF of Div 3 of Pt 2 of the Act provides for the grant of a bridging visa which, relevantly, permits a non-citizen to remain in Australia during a specified period or until a specified event happens;[93] but does not otherwise affect either an application for another visa or the grant of such a visa.[94] Relevantly, the Regulations provide for a "Subclass 051 Bridging (Protection Visa Applicant) visa" for certain classes of non-citizens who have made a protection visa application that is not finally determined.[95] Such mechanisms would reconcile the "common law liberty"[96] of the non-citizen with the recognition that, if or when it could be established (before or after the determination of the visa application) that there was a real prospect of removal in the reasonably foreseeable future, the person could be lawfully re-detained.

43. **Adequacy in the balance.** In the context of the implied freedom of political communication, the issue of "adequacy in the balance" has been framed as whether "the benefit sought to be achieved by the law is manifestly outweighed by its adverse effect on the implied freedom".[97] Adapted to the present context, and bearing in mind the underlying justification for the principle in *Lim*, the focus is on the existence of a "benefit" which is sufficient to justify an involuntary deprivation of liberty.

44. The task of identifying and evaluating the "benefit" does not look abstractly to the "general social importance"[98] of the legislative purpose; rather, the focus is on identifying "the benefits gained by the law's policy" or, put another way, the contribution that the law makes to the realisation of any relevant benefits.[99] Any benefits are to be assessed

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92 *Tajjour* (2014) 254 CLR 508 at 571 [114] (Crennan, Kiefel and Bell JJ), quoting Barak, *Proportionality: Constitutional Rights and their Limitations* (2012) at 324.

93 Act, s 73.

94 Act, s 76.

95 Regulations, regs 2.20(7)-(11) and 2.24(2)(a).

96 *NZYQ* (2023) 97 ALJR 1005 at 1021 [71] (the Court).

97 *Banerji* (2019) 267 CLR 373 at 402 [38] (Kiefel CJ, Bell, Keane and Nettle JJ).

98 *McCloy* (2015) 257 CLR 178 at 219 [87] (French CJ, Kiefel, Bell and Keane JJ).

99 *McCloy* (2015) 257 CLR 178 at 219 [87] (French CJ, Kiefel, Bell and Keane JJ). See also *Banerji* (2019) 267 CLR 373 at 402-403 [38] (Kiefel CJ, Bell, Keane and Nettle JJ); *Clubb* (2019) 267 CLR 171 at 201 [72] (Kiefel CJ, Bell and Keane JJ).

against the impact on the principled considerations or values that underpin the principle in *Lim*—specifically, the protection of liberty. As Edelman J has explained (in reference to what his Honour described as detention for "protective punishment"), detention will cease to be justified where the purpose is "slight or trivial compared with the extent of the constraint upon liberty".[100]

45. Divorced from the possibility that an alien might be removed, detention of that alien pending the determination of a visa application does not produce any discernible legitimate "benefit". Again, detention of an alien does not assist in making or considering an application for permission to remain in Australia. And, consistently with the recognition that mere "separation of an alien from the Australian community" is not itself a legitimate and non-punitive purpose,[101] the fact that immigration detention results in the alien being separated from the Australian community cannot be regarded as a cognisable "benefit" to be weighed in the balance against the involuntary deprivation of the alien's liberty.

46. Consistently with the derivative nature of the visa consideration purpose, the only identifiable legitimate "benefit" of detention while a visa application is being considered is to ensure that the person is available for removal in the event that the application is unsuccessful. Such a benefit, being incidental to the sovereign "right to decide which non-citizens shall be permitted to enter and remain in this country",[102] can be characterised as important. But the benefit does not exist if there is no real prospect that the alien could, upon the determination of the application, be removed from Australia. Hence, this is not even a case where a benefit is "slight or trivial". Put bluntly, the detention "contributes nothing to the achievement of the benefit … sought to be achieved".[103]

47. **Conclusion.** For the above reasons, ss 189(1) and 196(1) are not suitable, or alternatively are not necessary, or alternatively are not adequate in their balance, insofar as they authorise the detention of an alien for whom there is no real prospect of removal in the reasonably foreseeable future irrespective of the outcome of their visa application.

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100 *Garlett* (2022) 277 CLR 1 at 94 [258] (emphasis added), referring to *Benbrika (No 1)* (2021) 272 CLR 68 at 169 [226] (Edelman J).

101 *NZYQ* (2023) 97 ALJR 1005 at 1016 [48] (approach of six members of the Court).

102 *Falzon* (2018) 262 CLR 333 at 358 [92] (Nettle J); see also at 346 [39] (Kiefel CJ, Bell, Keane and Edelman JJ).

103 *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1 at 47 [119] (Gageler J).

The means (detention) are not rationally connected to (and are disproportionate to) the stated end (consideration of that alien's visa application).

48. For completeness, the application of structured proportionality in this context does not mean that there would be no circumstances in which a visa applicant for whom there is no real prospect of removal in the reasonably foreseeable future could be detained. Even in Europe, where there is a legislative starting point that "a person should not be held in detention for the sole reason that he or she is seeking international protection",[104] structured proportionality can justify detention in certain circumstances. One example is where detention is required for the protection of national security or public order.[105]

Assessment of relationship between "means" and "ends"

49. No different conclusion follows from focusing on the relationship between "means" and "ends", without explicitly adopting a proportionality-based approach.

50. As has been explained, where an alien has made a valid application for permission to remain in Australia which is being considered, and there is no realistic possibility of removal as an outcome, it cannot be said that the law is "reasonably capable of being seen as necessary" for the purpose of considering that application. Detention pending the determination of such an application would ordinarily be capable of justification based on the principle in *Lim*, on the basis that a possible outcome of the process is that the alien will be rendered liable to removal, and detention in the meantime ensures the availability of the alien to be removed. Absent that prospect, the only purpose served by the detention is to separate the alien from the Australian community while the consideration of the application is ongoing. That is a temporal connection, not a purposive one. The purpose of the detention reduces to mere separation from the community, as highlighted by the fact that—given the constitutional limitation in *NZYQ*—the alien would inevitably have to be released at the conclusion of the process, irrespective of outcome. A purpose of mere separation falls "outside the limited range of legitimate purposes identified in *Lim*", and stands at odds with the recognition that the "purpose of detention, in order to be legitimate, must be something distinct from detention itself".[106]

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104 *N v Staatssecretaris voor Veiligheid en Justitie* [2016] 1 WLR 3027 at 3033 [13] (Grand Chamber of the Court of Justice of the European Union).

105 See *N* [2016] 1 WLR 3027 at 3041-3046 [54]-[81].

106 *NZYQ* (2023) 97 ALJR 1005 at 1016-1017 [48]-[49] (approach of six members of the Court).

PART V: ESTIMATE OF TIME

51. If the Court grants leave for LPSP to appear at the hearing, it is estimated that 15 minutes would be needed for oral submissions.

Dated: 4 October 2024

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

M66 of 2024

BETWEEN:

CZA19
Applicant

and

COMMONWEALTH OF AUSTRALIA
First Respondent

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
Second Respondent

IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

P29 of 2024

BETWEEN:

DBD24
Applicant

and

COMMONWEALTH OF AUSTRALIA
First Respondent

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
Second Respondent

ANNEXURE TO THE SUBMISSIONS OF LPSP

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

No.	Description	Version	Provisions
1.	*Commonwealth Constitution*	Current	Ch III
2.	*Migration Act 1958* (Cth)	Current	ss 73, 76, 189, 196, 197C, 198
3.	*Migration Regulations 1994* (Cth)	Current	regs 2.20 and 2.24