HIGH COURT OF AUSTRALIA

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Details of Filing

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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' REPLY

PART I: CERTIFICATION

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

PART II: UPDATED FACTS IN DBD24

2. On 1 October 2024, DBD24 was granted a protection visa and released from detention.

3. On 22 October 2024, a writ and statement of claim was filed in the original jurisdiction of this Court. Notices under s 78B of the *Judiciary Act 1903* (Cth) were filed and served on the same day.

PART III: ARGUMENT

Summary

4. These submissions adopt the abbreviations used in the applicants' consolidated submissions in chief (**AS**). In summary, the applicants submit in reply to the respondents' first argument:

   (a) Contrary to the respondents' reliance on non-contextual comments in previous decisions of the Court (**RS [20] and [34]–[40]**) do not support it. And if those authorities stood for the proposition that there is an independent and free-standing visa processing purpose, they do not answer the question in this case of whether detention for that purpose is constitutionally permissible where there is no real prospect of removal.

   (b) The applicants do not assert any 'error' in *NZYQ* (or *ASF17*) (cf **RS [41] and [46]**). Rather, the logic of *NZYQ* supports the applicants' arguments.

   (c) Contrary to the Commonwealth's purported identification of four ways in which detention "assists in achieving a decision to grant or refuse" a visa (**RS [56]**), the connection of those matters to mandatory detention for all visa applicants reveals a disconnect between means and ends, showing that the scheme is not reasonably capable of being seen as necessary for a legitimate non-punitive purpose.

5. As to the Commonwealth's second argument, the applicants submit:

   (a) Unreasonable delay in performance of the duty to make a decision with respect to a visa application may (and does here) support an inference that the Minister departed from a proper purpose of detaining an alien, and that the alien's detention became unlawful as a result.

   (b) The evidence before the Court is sufficient to support findings that the decisions on their visa applications were not made in a "reasonable time". However, they

would not oppose remittal if there is insufficient evidence to determine whether the Minister exceeded a "reasonable time" in making the decisions (**RS [82]**).

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

Previous authorities relied on by the Commonwealth

6. The Commonwealth submits passing comments in earlier decisions of the Court concerning the "admission purpose" (scil. visa processing purpose) (**RS [34]**). However, those decisions do not support a siloed understanding of the visa processing and removal purposes of detention. In fact, none of the judgments turned on it and thus did not address the question in terms. The better reading of those authorities is that they acknowledge that the prospect of removal is an assumption underlying the power to detain for visa processing.

7. The Commonwealth relies first on *Lim* (**RS [36]**). However, in doing so it abstracts the plurality's words from their context. The passage on which the Commonwealth relies was introduced: "In the light of what has been said above …".[1] Their Honours were directing themselves to the particular statutory provisions earlier considered. Those provisions – like the present provisions – did not distinguish between the power to detain for removal or for visa processing. Rather, the statute required detention "unless and until he or she is removed from Australia or given an entry permit".[2] It is because the statute expressed itself in the alternative that their Honours similarly expressed themselves. Their Honours spoke in general terms of the "significant restraints" on the power of detention, without distinguishing between those restraints tailored to visa processing and those tailored to the removal purpose.[3]

8. In any event, the applicants say that Mason CJ's expression of power in *Lim* at 10 is more accurate; insofar as it acknowledges the relation between detention for visa processing and, if the visa is refused, removal (see **AS [58]**).[4] Gaudron J framed the inquiry as whether laws for the detention of aliens "are capable of being seen as appropriate and adapted to regulating entry into Australia and facilitating departure as and when required".[5]

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[1] *Lim*, 33 (Brennan, Deane and Dawson JJ, Mason CJ agreeing at 10).
[2] *Lim*, 33 (Brennan, Deane and Dawson JJ, Mason CJ agreeing at 10), quoting then s 54L of the *Migration Act*.
[3] See *Lim*, 33 (Brennan, Deane and Dawson JJ; Mason CJ agreeing at 10).
[4] Referred to in *Plaintiff M76/2013*, [139] (Crennan, Bell and Gageler JJ).
[5] *Lim*, 58 (Gaudron J); see also 57: "Laws regulating their entry to and providing for their departure from Australia (including deportation, if necessary) are directly connected with their alien status."

9. This reading of *Lim* is consistent with the its treatment in *Plaintiff M76/2013*, where three members of the Court used "and" rather than "or" to connect visa processing and removal. Their Honours said: "The constitutional holding in *Lim* was therefore that conferring limited legal authority to detain a non-citizen in custody as an incident of the statutory conferral on the executive of powers to consider and grant permission to remain in Australia, and to deport or remove if permission is not granted."[6]

10. The Commonwealth next relies on Gleeson CJ's observations in *Re Woolley* (**RS [36]**). However, this ignores Gleeson CJ's reference to "the power to exclude" (cf **AS [47]**). His Honour recognised that the ultimate prospect of removal informed "the power … to hold the non-citizen in detention for the time necessary to follow the required procedures of decision-making".[7]

11. As to *Plaintiff S4* (**RS [38]**), it may be accepted that the Court there identified "three purposes". However, the Court's earlier reference – using the plural – to "the purposes for which detention is being effected"[8] tells that the Court accepted their interrelation. Thus, the discussion of the different purposes in *Plaintiff M96A*, where it was said that even where a person is detained while the Minister considers whether to permit them to apply for a visa: "The purpose of potential removal is nevertheless one of the purposes of detention".[9]

12. Finally, the Commonwealth relies on the majority's comments in *AJL20* at [24] (**RS [39]**). However, in the very next paragraph the majority quoted from the following observations of McHugh J in *Al-Kateb*: "The Parliament of the Commonwealth is entitled … to take such steps as are likely to ensure that unlawful non-citizens do not enter Australia or become part of the Australian community and that they are available for deportation when that becomes practicable."[10] Again, their Honours recognised the power to detain pending a visa decision having the prospect of removal as its ultimate horizon.

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[6] *Plaintiff M76/2013*, [140] (Crennan, Bell and Gageler JJ).
[7] *Re Woolley*, [26] (Gleeson CJ).
[8] *Plaintiff S4*, [26] (the Court, emphasis added).
[9] *Plaintiff M96A/2016 v The Commonwealth* (2017) 261 CLR 582, [28] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).
[10] *Al-Kateb*, [45] (McHugh J), quoted in *AJL20*, [25] (Kiefel CJ, Gageler, Keane and Steward JJ).

13. Even if, contrary to these submissions, there is an independent, free-standing visa processing purpose for detention, a question raised by the present cases is when does detention for *that* purpose become punitive? When do the means overshoot the ends?

14. This requires the Commonwealth to mount a Ch III justification, rather than rely on passing comments in cases not deciding the point. It has not.

NZYQ is authority for what it decided, but its logic supports the applicants

15. The Commonwealth submits that the applicants "implicitly contend that the Court erred" in *NZYQ* (and *ASF17*) by confining its statement of the constitutional limit to an alien who has failed to obtain permission to remain in Australia (**RS [41]**, **[45]**). That bends *NZYQ* to the Commonwealth's favour, and misrepresents the applicants' submissions.

16. *NZYQ* is only authority for what it decided.[11] That is why the applicants accept that the *ratio* of *NZYQ* does not dictate the outcome of this case. But nor can the constitutional clarity brought about by *NZYQ* be ignored. It sheds light on the present question. In particular, an important part of the reasoning in *NZYQ* was to reject as "circular and self-fulfilling" the Commonwealth's contention that the authorities, particularly *Lim*, permitted a law for "separation from the Australian community", which in turn permits "separation … by means of detention".[12]

17. Notwithstanding that reasoning, the effect of the Commonwealth's primary submission in the present cases is that detention during visa processing is constitutionally permissible without any factual inquiry as to the necessity of detention to process the visa (**RS [61]**). But that "impermissibly conflates detention with the purpose of detention and renders any inquiry into whether a law authorising the detention is reasonably capable of being seen to be necessary for the identified purpose circular and self-fulfilling";[13] that is, detention divorced from the surrounding reality and for its own sake.

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[11] *Coleman v Power* (2004) 220 CLR 1, [79] (McHugh J); *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 214, [42] (Kiefel CJ, Gageler and Gleeson JJ) and [182] (Edelman J).
[12] *NZYQ*, [49] (the approach of six Justices).
[13] *NZYQ*, [49] (the approach of six Justices).

Mandatory detention not reasonably capable of being seen as necessary during all visa processing

18. Apparently recognising that "further justification is required for the admission purpose", the Commonwealth identifies four ways in which detention purportedly "assists in achieving a decision to grant or refuse" a visa (**RS [56**]). But the tenuous connection of those matters to the regime for the mandatory detention of all visa applicants reveals a disconnect between the means and the ends such that the scheme is not reasonably capable of being seen as necessary for a legitimate non-punitive purpose.

19. The Commonwealth's first stated advantage of detention during visa processing is that it makes "the detainee available for necessary investigations into their identity, nationality, criminal history, security profile and health" (**RS [56(a)**]). Three responses are made to that submission.

20. *First*, the statutory detention regime is not tailored to limiting detention for such inquiries (compare the regime in Canada: **AS [65]**). Rather, the regime purports to authorise detention even after all necessary inquiries have been made, and all that is occurring is consideration of whether or not to grant the particular visa sought.

21. *Secondly*, the submission appears to assume that "the alternative to detention is unconditional admission to Australia",[14] which might make such investigations difficult (subject to what is said in the following paragraph). However, assuming constitutional validity of the BVR regime for present purposes, it can be seen that the Commonwealth can maintain a high degree of control over a person (and thus make whatever investigations are necessary) while they are not in detention.

22. *Thirdly*, even if the correct comparison is between a person being in detention and completely at liberty in the community, there is an unproven assumption in the Commonwealth's submission that investigations will be more efficient if a person is in detention. That is speculative. A person in the community may be just as cooperative in such inquiries given the purpose of them is to secure for themselves an entitlement to remain in Australia; in contrast to detention to make a person "available for removal",[15] which, it can be inferred, will assist, as people might not be so cooperative in facilitating their own removal.

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[14] *Al-Kateb*, [219] (Hayne J).
[15] *AL-Kateb*, [213] and [218] (Hayne J).

23. The Commonwealth's second stated advantage of detention during visa processing is to promote "the integrity of the visa application system by ensuring", in essence, that a person does not enter the Australian community before their visa application is determined (**RS [56(b)]**). But that it is a re-packaging of the asserted importance of maintaining a binary between persons who do not hold visas (who must be detained) and persons who hold visas (who are entitled to be free). But that same binary was shown to be imperfect in *Love*, and was shown to be incapable of justifying detention in *NZYQ*. Reduced to its essence, the Commonwealth's submission is that it is important to detain people who do not hold visas, because they do not hold visas.

24. Next, the Commonwealth submits that detention during visa processing assists, "in the event the visa application is refused, making the applicant available for removal" (**RS [56(c)]**). In the applicants' submission, this is the only purpose capable of completely justifying detention during visa processing; but it is incapable of justifying that detention in the case of a person who, during the visa processing, is revealed to be incapable of removal, such as the two applicants before the Court.

25. Finally, the Commonwealth submits that detention assists "to permit the Department to obtain information relevant to whether a BVR should be granted subject to conditions, or an application for a community safety order [made]" (**RS [56(d)]**). As with the Commonwealth's first submission, those objectives do not justify the mandatory detention of all persons during visa processing (even those who are not being considered for a BVR, or in respect of whom there is no consideration of a community safety order).

26. In conclusion, it should not pass unnoticed that the Commonwealth's submissions on these matters are framed in language that devalues the constitutional protection of liberty. The Commonwealth submits that detention "assists" various administrative ends (**RS [56]**), but even if that were so, it would not establish compatibility with Ch III. Detention in immigration detention has rightly been likened to imprisonment.[16] For a law to justify the Executive holding a human being in such confinement, the *Constitution* requires more than that it merely "assists" in some administrative ends – it must be reasonably capable of being seen as necessary.

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[16] *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 283 FCR 602, [5] (Allsop CJ).

27. The Commonwealth's submissions tellingly do not address the relation between means and ends. In the applicants' submission, that is because the connection cannot be justified in the manner required by Ch III.

Second argument – Detention unlawful while unreasonably delaying visa consideration

28. The applicants maintain that where there is an unreasonable delay in performance of the duty to make a decision with respect to a visa application concerning an alien who is being detained, it may be inferred (and should be here) that (1) the Commonwealth has departed from the asserted proper purpose of detaining the alien for the processing purpose, and (2) the Commonwealth is detaining the alien for the improper purpose of continuing to secure the alien in detention for their potential removal in the future (which, here, could not be achieved) or for the improper purpose of simply segregating the alien from the community while they do not have a visa: see **AS [86]-[88]**.[17] The Commonwealth has not met that submission.

29. The evidence before the Court is sufficient to support findings that the decisions on the applicants' visa applications were not made in a "reasonable time". However, now that the applicants are both in the community (albeit on stringent conditions), they would not oppose remittal if the Court were of the view that there are insufficient facts to determine whether (or when) the Minister exceeded a "reasonable time" in making their visa decisions (**RS [82]**).

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[17] Compare to *AJL20*, [146]-[151] and [156] (Edelman J, dissenting).