HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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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 **P34 of 2024**

BETWEEN: **DBD24**
Plaintiff

and

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

OUTLINE OF ORAL SUBMISSIONS OF THE RESPONDENTS/DEFENDANTS

PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Structure of the Migration Act (RS [24]-[30])

2. The *Migration Act 1958* (Cth) (**Vol 1, Tab 3**) authorises and requires detention of unlawful non-citizens who have applied for a visa during two distinct phases, which correspond to two distinct legitimate and non-punitive purposes of immigration detention of "removing [an] alien from Australia or enabling an application by the alien for permission to remain in Australia to be made and considered": *NZYQ* (2023) 97 ALJR 1005 (**Vol 7, Tab 32**) at [31], [48]. Those two distinct phases are:

   (a) ***Processing:*** The Minister must consider the unlawful non-citizen's application for a visa (s 47), and must determine that application (s 65) within a reasonable time.

   (b) ***Removal:*** If a non-citizen's application is refused and finally determined, or if they request removal, they must be removed as soon as reasonably practicable: ss 198(1), 198(6). Once a visa application is finally determined, a non-citizen cannot be removed to a country in respect of which the Minister or delegate has made a "protection finding": ss 36A, 197C(3).

3. Those two distinct phases can both result in immigration detention being brought to an end. As to the processing phase, detention will end on the grant of a visa: s 196(1)(c). If the application for a visa is refused and finally determined, or if removal is requested under s 198(1), detention will end upon removal: s 196(1)(a).

4. During the processing phase, there is ordinarily no power or duty to remove an unlawful non-citizen unless a request is made under s 198(1).

The *NZYQ* limit only applies once a duty to remove arises (RS [31], [41]-[49], [56]-[65])

5. The *NZYQ* limit does not apply during the processing period. NZYQ was required to be removed under ss 198(1) and (6): *NZYQ* (2023) 97 ALJR 1005 (**Vol 7, Tab 32**) at [4]-[5], [13]. He had no extant visa application, such that he was detained solely for the purpose of removal. In the absence of a real prospect of removal becoming practicable in the foreseeable future, that purpose was not "capable of being achieved in fact" and so could not justify his ongoing detention: *NZYQ* at [40], [46].

6. As inability to remove a non-citizen in the foreseeable future does not refute the legitimate and non-punitive purpose of enabling an application for permission to remain in Australia

to be made and considered (the **admission purpose**), the constitutional limit identified in *NZYQ* was framed as a limit on detention that is applicable only to "an alien who has failed to obtain permission to remain in Australia": *NZYQ* at [46], [50], [55]; *ASF17* (2024) 98 ALJR 782 (**Vol 7, Tab 23**) at [31], [33].

7. Detention during the processing period assists in achieving the admission purpose in two ways unrelated to removal. *First*, it makes non-citizens available for investigations into their identity, nationality, criminal history, security profile and health, and allows conditions to be imposed or other steps to be taken to mitigate any risks that are identified as a result, before a non-citizen enters the community: RS [56(a)], [56(d)]. *Second*, it reduces the risk that the integrity of the visa application process will be undermined by non-citizens absconding into the community before their claims can be investigated (as occurred in DBD24's case): RS [56(b)]; **SCB 16 [12]**.

8. The applicants' argument inverts the scheme of the Migration Act. Until the application process is complete, there is ordinarily no power or authority to remove a non-citizen from Australia. For that reason, during the processing period, the Act does not require officers to take steps directed towards removal of the kind that would often be necessary in order to ascertain whether there is a real prospect of removal in the event that a visa is refused. To treat detention as being for the purpose of removal, even during periods when the Act confers no power to remove, would render the Act unworkable. In particular, if the *NZYQ* limit applies during the processing period, then in order to meet its onus in any application for habeas corpus the Commonwealth would need to investigate the prospects of removing immigration detainees from the moment they are taken into detention (AS [13], [18]; RS fn 70). It would need to do so at the same time as it investigated and considered any visa application. As investigating prospects of removal would commonly require the cooperation of the non-citizen (see *ASF17* (2024) 98 ALJR 782 (**Vol 7, Tab 23**) at [35]), this would be likely to confuse and distress visa applicants, and it would waste the time of foreign governments addressing inquiries about non-citizens who Australia then decides to admit.

No "one overarching purpose" of removal (RS [34]-[40], [51]-[55])

9. The applicants' argument that removal is the only purpose of immigration detention (subsuming the admission purpose) is foreclosed by authority: *Lim* (1992) 176 CLR 1 (**Vol 3, Tab 7**) at 10, 32-33; *Re Woolley* (2004) 225 CLR 1 (**Vol 3, Tab 21**) at [25]-[27], [81]-[82], [99]; ***Plaintiff M76/2013*** (2013) 251 CLR 322 (**Vol 3, Tab 18**) at [138]-[141]; *Plaintiff S4* (2014) 253 CLR 219 (**Vol 5, Tab 19**) at [25]-[26]; *NZYQ* (2023) 97 ALJR 1005 (**Vol 7, Tab 32**) at [30]-[31], [46], [50].

10. *Plaintiff M76* is authority for the proposition that a present incapacity to remove does not affect the validity of detention for the admission purpose. That follows because the Court found it unnecessary to determine the plaintiff's challenge to *Al-Kateb* because "administrative processes capable of resulting in the plaintiff being granted permission to remain in Australia ha[d] not yet been exhausted": *Plaintiff M76* (2013) 251 CLR 322 at [30]-[31], [135]-[136], [141]-[142], [146]. That course would not have been open if the absence of a real prospect of removal invalidated detention for the admission purpose.

Processing period is reasonably necessary for admission purpose (RS [66]-[71])

11. Detention for the admission purpose will be valid if the duration of that detention (as opposed to the detention itself) is reasonably capable of being seen as necessary for that purpose: *Plaintiff M76* (2013) 251 CLR 322 (**Vol 3, Tab 18**) at [139]; *Plaintiff M96A* (2017) 261 CLR 582 (**Vol 5, Tab 17**) at [21]; *NZYQ* (2023) 97 ALJR 1005 (**Vol 7, Tab 32**) at [31], [33], [41], [50]; *ASF17* (2024) 98 ALJR 782 (**Vol 7, Tab 23**) at [32]. The availability of alternatives to detention that may be thought to be less burdensome is therefore irrelevant to the Ch III analysis: cf AS [63]-[66]; LPSP [31]-[34], [38]-[42]. The Court should again reject the attempt to import into Ch III proportionality testing of the kind used in other contexts: *Jones* (2023) 97 ALJR 936 (**Vol 7, Tab 31**) at [43].

12. Detention during the processing period is "hedged about" by an enforceable duty to determine a visa application within a reasonable time: *AJL20* (2021) 273 CLR 43 (**Vol 3, Tab 9**) at [44]; *ASP15* (2016) 248 FCR 372 (**Vol 7, Tab 24**) at [42]. That duty ensures that detention is limited to a period reasonably capable of being seen as necessary for the admission purpose: *AJL20* at [37], [45]. In the event of unreasonable delay, mandamus provides an effective remedy. *NZYQ* did not overrule *AJL20* nor qualify it in this respect.

13. Most of the applicants' submissions concerning "reasonable necessity" are premised on the notion that the only legitimate, non-punitive end of immigration detention is removal: AS [54]-[62]. Once that premise is rejected, those submissions fall away.

Dated: 14 November 2024

Stephen Donaghue Patrick Knowles Michael Maynard