HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	M66/2024
File Title:	CZA19 v. Commonwealth of Australia & Anor
Registry:	Melbourne
Document filed:	Form 27D - Respondent's submissions
Filing party:	Defendant
Date filed:	18 Oct 2024

Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE AND PERTH REGISTRIES

M66 of 2024

BETWEEN

CZA19
Applicant

and

COMMONWEALTH OF AUSTRALIA
First Respondent

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
Second Respondent

P29 of 2024

BETWEEN

DBD24
Applicant

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
First Respondent

COMMONWEALTH OF AUSTRALIA
Second Respondent

CONSOLIDATED SUBMISSIONS OF THE RESPONDENTS

PART I FORM OF SUBMISSIONS

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

PART II ISSUES PRESENTED

2. These applications, which have been removed from the Full Federal Court (sitting in its original jurisdiction), concern the application of the constitutional limitation identified in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (***NZYQ***),[1] namely that Ch III of the Constitution prevents the detention of a non-citizen who has failed to obtain permission to remain in Australia if there is no real prospect of removal becoming practicable in the reasonably foreseeable future.

3. The issue raised by the present cases is whether that constitutional limitation should be extended to apply to unlawful non-citizens who are detained, not for the purpose of removal, but for the purpose of investigating, considering and determining an extant visa application. Such unlawful non-citizens are detained at a point in time before any power or duty to remove them from Australia arises. Nevertheless, the applicants contend that Ch III prevents the detention of such unlawful non-citizens if:

   (a) during the visa processing period it becomes apparent that, *if* the application for a visa is ultimately refused, *then* there would be no real prospect of removal becoming practicable in the reasonably foreseeable future; or

   (b) the processing period has exceeded a 'reasonable time'.

4. The respondents (**the Commonwealth**) submit that the *NZYQ* limit does not apply to either of these circumstances and should not be extended to cover them. Both principle and the existing authority of this Court confirm that detention for the purpose of the investigation and determination of a visa application is legitimate and non-punitive. It follows that the applicants' detention was validly authorised and required by ss 189(1) and 196(1) of the *Migration Act 1958* (Cth) (**Migration Act**) at all times up until the determination of their visa applications. No question arises in these proceedings about the lawfulness of detention after that point, as both applicants were granted visas and released.

PART III NOTICES UNDER SECTION 78B OF THE JUDICIARY ACT

5. Each applicant has filed a notice under s 78B of the *Judiciary Act 1903* (Cth).

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[1] (2023) 97 ALJR 1005 (***NZYQ***).

PART IV FACTS

6. The parties have filed a statement of agreed facts in each matter.[2]

CZA19

7. CZA19 is a citizen of the Republic of Poland (**CZA SOAF [1]**). He arrived in Australia on 28 October 2009 as the holder of a Tourist visa. He was immediately arrested and was subsequently convicted of an offence relating to the commercial importation of drugs (**CZA SOAF [5]**). On 2 September 2011, he was sentenced to a period of 10 years and 8 months' imprisonment (**CZA SOAF [7]**).

8. On 8 April 2016, CZA19 escaped from prison (**CZA SOAF [8]**). On 6 June 2018, he was convicted of a further offence of escaping from lawful custody and sentenced to 9 months' imprisonment (**CZA SOAF [9]**). On 8 December 2018, CZA19 was released on parole, and transferred into immigration detention (**CZA SOAF [10]-[11]**).

9. CZA19 applied for a protection visa on 14 January 2019, which was refused on 12 February 2019 (**CZA SOAF [14]-[15]**). He then variously sought merits and judicial review from 15 February 2019 to 10 November 2022, when the Tribunal remitted his application, directing that he meets the criterion in s 36(2)(aa) of the Migration Act (**CZA SOAF [16]-[23]**).

10. In the period after 10 November 2022, officers of the Department of Home Affairs (**Department**) sought and obtained information about CZA19's extensive domestic and international criminal record, including providing him with opportunities to comment on adverse information as it arose (**CZA SOAF [25]-[56]**). On 13 May 2024, a delegate of the second respondent decided to refuse the visa application, and granted a Bridging (Removal Pending) (subclass 070) visa (**BVR**) subject to conditions including monitoring and curfew (**CZA SOAF [57]-[58]**).

11. By amended originating application filed in the Federal Court,[3] CZA19 sought, among other orders, a declaration that his detention in the period from 10 November 2022 to 13 May 2024 was unlawful. On 2 July 2024, Mortimer CJ ordered that the question of

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2 For CZA19, see the amended Statement of Agreed Facts dated 22 August 2024 (**CZA SOAF**) in Volume 1 of the Joint Cause Removed Book (**JCRB-1 74**). For DBD24, see the amended Statement of Agreed Facts dated 25 July 2024 (**DBD SOAF**) in Volume 2 of the Joint Cause Removed Book (**JCRB-2 446**).

3 Amended Originating Application filed 30 May 2024, Prayer 1(a) (**JCRB-1 12**).

CZA19's entitlement to that relief be heard separately and in advance of the remaining issues.[4] On 31 July 2024, Gageler CJ removed the separate question into this Court.[5]

DBD24

12. DBD24 is a citizen of Vietnam, who arrived in the waters near Ashmore Island by boat on 22 April 2013 (**DBD SOAF [1]-[4]**). He was taken to Darwin, and detained under s 189 of the Migration Act, but on 27 August 2013, the second respondent made a residence determination under s 197AB, allowing DBD24 to reside in community detention (**DBD SOAF [10]**).

13. Shortly after he began residing in community detention, DBD24 absconded (**DBD SOAF [12]**). He remained at large in Australia, without a visa, for 8 years between 21 October 2013 and 24 June 2021 (**DBD SOAF [14]**).

14. On 24 June 2021, DBD24 was arrested and remanded in custody, charged with offences relating to the supply of commercial quantities of drugs (**DBD SOAF [7]**). On 24 January 2022, he was sentenced to 3 years' imprisonment, backdated to commence on 24 June 2021 and suspended after 2 years (**DBD SOAF [8]**). At the end of his sentence on 23 June 2023, he was taken into immigration detention (**DBD SOAF [15]**).

15. On 15 November 2021, DBD24 applied for a Safe Haven Enterprise (Class XE) (Subclass 790) visa, which was refused by a delegate of the second respondent on 11 January 2022 (**DBD SOAF [18]-[19]**). DBD24 sought merits review and on 18 December 2023, the Tribunal remitted his visa application for reconsideration with a direction that DBD24 satisfies s 36(2)(aa) (**DBD SOAF [20]-[21]**).

16. In the period after 18 December 2023 and prior to 1 October 2024, officers of the Department sought and obtained information about DBD24's identity and criminal history, considered risks that he might pose, and requested, received and considered information relevant to his visa application (**DBD SOAF [23]-[34]**).

17. By amended originating application filed in the Federal Court on 11 June 2024, DBD24 sought orders including for a writ of habeas corpus requiring his release.[6] On 2 July 2024, Mortimer CJ ordered that the question of his entitlement to that relief be heard separately

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4 Order of Mortimer CJ dated 2 July 2024, [2] (**JCRB-1 62**).
5 Order of Gageler CJ dated 31 July 2024, [2] (**JCRB-1 66**).
6 Amended Originating Application filed 7 June 2024, Prayer 1 (**JCRB-2 436**).

and in advance of the remaining issues in the proceeding.[7] On 31 July 2024, Gageler CJ removed the separate question into this Court.[8]

18. On 1 October 2024, DBD24 was granted his protection visa and released from detention. In view of that development, the answer to the separate question in his case is that he is not entitled to habeas corpus.[9] The respondents have recently been informed that DBD24 wishes to reformulate his claim to seek a declaration as to the lawfulness of his detention during the processing period (as occurred in CZA19's case), although he has not yet done so. The below submissions are advanced in the event that he does so, such that the validity of the application of ss 189(1) and 196(1) of the Migration Act to DBD24 during the processing period remains in issue.

PART V ARGUMENT

OVERVIEW

19. Both matters before the Court raise the lawfulness of detention during the period in which delegates of the second respondent were processing a valid application for a protection visa (the **processing period**).

20. The detention of each of the applicants during the processing period was authorised and required by ss 189(1) and 196(1) of the Migration Act. Those provisions authorised and required that detention for the constitutionally permissible purpose of enabling visa applications to be investigated, considered, and determined (the **admission purpose**). This Court has repeatedly confirmed, and never doubted, that detention for the admission purpose is consistent with Ch III.[10]

21. *NZYQ* articulated a constitutional limitation on detention for the purpose of removal.[11] That constitutional limitation is not relevant to detention for the admission purpose. That is so because, absent a written request for removal under s 198(1), there is no power to remove

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7 Order of Mortimer CJ dated 2 July 2024, [1] (**JCRB-2 442**).

8 Order of Gageler CJ dated 31 July 2024, [2] (**JCRB-2 640**).

9 See the separate question at Order 1 of the Orders of Mortimer CJ dated 2 July 2024 (**JCRB-2 442**), referring to Prayer 1 in the Amended Originating Application filed 7 June 2024 (**JCRB-2 436**).

10 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 (***Lim***) at 33 (Brennan, Deane and Dawson JJ, Mason CJ agreeing at 10); *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 (***Plaintiff S4***) at [26] (the Court); *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 (***Plaintiff M76***) at [138]-[140] (Crennan, Bell and Gageler JJ); *Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582 (***Plaintiff M96A***) at [21]-[22], [27] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ); *Commonwealth v AJL20* (2021) 273 CLR 43 (***AJL20***) at [27]-[28] (Kiefel CJ, Gageler, Keane and Steward JJ), [128]-[129] (Edelman J).

11 *NZYQ* (2023) 97 ALJR 1005.

an unlawful non-citizen who has an undetermined protection visa application.[12] The prospect of removal is not relevant to the constitutional validity of detention when an unlawful non-citizen is detained for the admission purpose, for the premise of detention for that purpose is that there is not yet any power to remove.

22. By their first argument, the applicants seek an unprincipled and radical extension of *NZYQ* into a period before the power or duty to remove has arisen (**AS [31]-[78]**). The argument is unprincipled because it fails to recognise that consideration of an extant visa application is itself a constitutionally permissible end for which an alien may lawfully be detained and which, at all times, remained "capable of being achieved in fact".[13] It is radical because it inverts the scheme of the Migration Act, which first requires a visa application to be processed, then a decision to be made on the application, and then the person to be removed *if* the application is refused. The applicant's argument seeks to invert that structure, and would require the Commonwealth to justify detention from the outset by reference to the prospects of removal, even though the time for removal has not yet arrived (and may never arrive if the visa is granted).

23. By their second argument, the applicants seek a different extension of *NZYQ*, such that the Migration Act does not validly authorise detention if the time taken to process a visa application exceeds a 'reasonable time' (**AS [79]-[105]**). That argument is contrary to existing authority, including the holding in *ASP15 v Commonwealth* (***ASP15***),[14] which was approved and applied by the majority in *Commonwealth v AJL20* (***AJL20***).[15] *NZYQ* does not disturb the authority of those decisions. Further, the applicants' argument is wrong in principle, because it fails to give sufficient weight to the duty – which is enforceable by mandamus – to determine visa applications within a reasonable time. It is that enforceable duty which ensures that detention for the admission purpose does not contravene Ch III.

STATUTORY PROVISIONS

24. Division 3 of Part 2 of the Migration Act provides for visa applications by non-citizens. The Minister is required by s 47(1) to "consider a valid application for a visa" and then must

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12 The power of removal under s 198(6) arises only after a visa application is finally determined or if it cannot be granted. Similarly, the removal obligation in s 198(5) is subject to a prohibition on removal while there is an extant protection visa application: s 198(5A).

13 *NZYQ* (2023) 97 ALJR 1005 at [40] (the Court) (emphasis added).

14 (2016) 248 FCR 372 (***ASP15***).

15 (2021) 273 CLR 43 at [5] (Kiefel CJ, Gageler, Keane and Steward JJ).

either grant or refuse the visa in accordance with s 65(1). The Minister is required to determine a visa application within a reasonable time.[16]

25. Section 189(1) of the Migration Act requires an officer to detain a person who is in the "migration zone" if the officer knows or reasonably suspects that the person is an "unlawful non-citizen". An "unlawful non-citizen" is a person in the migration zone who is not an Australian citizen and who does not hold a visa.[17]

26. Section 196(1) provides that a person detained under s 189 must be kept in immigration detention until they are either granted a visa, removed under ss 198 or 199, deported under s 200, or taken to a regional processing country under s 198AD.

27. Section 198(1) provides that an officer is obliged to remove an unlawful non-citizen "as soon as reasonably practicable" after the non-citizen makes a written request for removal.

28. Section 198(6) provides that an officer is obliged to remove an unlawful non-citizen as soon as reasonably practicable who, relevantly, has made a valid application for a substantive visa which has been refused and finally determined, and who has not made another valid application for a substantive visa. As is apparent from its text, that power is <u>not engaged</u> until a visa application has been finally determined.[18]

29. 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 duties to remove under s 198 arise "irrespective of whether there has been an assessment, according to law, of non-refoulement obligations" (s 197C(2)). However, s 197C(3) then provides that s 198 does not "require or authorise" the removal of an unlawful non-citizen if (relevantly) they made a protection visa application that has been finally determined and a protection finding has been made in the course of considering the application (subject to certain exceptions).

30. The significance of the above is that, during the processing period:

(a) the power to remove the applicants under s 198(6) was not yet enlivened; and

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16 *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 179 (***Plaintiff S297***) at [37] (Crennan, Bell, Gageler and Keane JJ), citing *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 573-574; *Re O'Reilly; Ex parte Australena Investments Pty Ltd* (1983) 58 ALJR 36 at 36; 50 ALR 577 at 578; *Shahi v Minister for Immigration and Citizenship* (2011) 246 CLR 163 at 174 [28]; *ASP15* (2016) 248 FCR 372 at [20] (Robertson, Griffiths and Bromwich JJ).

17 *Migration Act 1958* (Cth) (**Migration Act**), ss 13 and 14.

18 Migration Act, s 198(6)(c)(i). The analysis is no different if the removal obligation under s 198(5) was enlivened, because there is a statutory prohibition on removing a person with an undetermined protection visa application: s 198(5A).

(b) the limiting effect on removal that arises under s 197C(3) by reason of a protection finding was not yet engaged.

31. The scheme of the above provisions points strongly against the conclusion that, at the same time as the Minister is required to be considering whether to grant a visa to allow an unlawful non-citizen to stay in Australia (and at a time when officers have no power to remove the non-citizen), the Department is required to be undertaking inquiries and other steps directed to the removal of the unlawful non-citizen in the event that the application for a visa is refused. Indeed, in circumstances where removal efforts "can be expected frequently to include administrative processes directed to removal which require the cooperation of the detainee and in which the detainee has the capacity to cooperate",[19] a construction of the Migration Act which requires the Department to take steps directed to removal in parallel with a decision on admission would have the practical consequences that unlawful non-citizens would need to be asked to cooperate with efforts to remove them (including, for example, applying for travel documents) at a time prior to a decision being made on their application for admission. That will almost inevitably generate confusion and distress (and perhaps also allegations of prejudgment). However, it may not be possible to determine whether there are real prospects of removal to some countries unless such cooperation is sought.

CONSTITUTIONAL FRAMEWORK

32. The adjudgment and punishment of criminal guilt is an exclusively judicial function. Chapter III of the Constitution invalidates a Commonwealth law that, as a matter of substance rather than form, purports to vest any part of that function in the Executive.[20]

33. The respondents accept that the power to detain a person in custody is *prima facie* punitive.[21] Accordingly, the question in these cases is whether that *prima facie* status is displaced because detention is reasonably capable of being seen as necessary for a legitimate and non-punitive purpose.[22] Answering that question involves an exercise in characterisation, which

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19 *ASF17 v Commonwealth* (2024) 98 ALJR 782 (***ASF17***) at [41].

20 *Lim* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ; Mason CJ agreeing); *Benbrika v Minister for Home Affairs* (2023) 97 ALJR 899 (***Benbrika [No 2]***) at [33]-[34] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [56], [60] (Gordon J); *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 (***Alexander***) at [79] (Kiefel CJ, Keane and Gleeson JJ), [158] (Gordon J).

21 *Benbrika [No 2]* (2023) 97 ALJR 899 at [35] (Kiefel CJ, Gageler, Gleeson and Jagot JJ); *NZYQ* (2023) 97 ALJR 1005 at [40] (the Court); *ASF17* (2024) 98 ALJR 782 at [33] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).

22 *Jones v Commonwealth* (2023) 97 ALJR 936 (***Jones***) at [38]-[39] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [63] (Gordon J), citing *Lim* (1992) 176 CLR 1 at 33; *NZYQ* (2023) 97 ALJR 1005 at [39] (the Court).

requires an "assessment of both means and ends, and the relationship between the two".[23]

The admission purpose is a separate legitimate purpose

34. The separate questions which have been removed into this Court concern the legality of detention during the processing period. Those questions are readily answered because, in their application to CZA19 and DBD24 during the processing period, ss 189(1) and 196(1) of the Migration Act validly authorised and required their detention for the constitutionally permissible purpose of investigating and determining their visa applications.

35. This Court has consistently held, and has never doubted, that detention for the admission purpose is compatible with Ch III.[24] Further, it has never accepted the proposition, which is central to the applicants' argument, that the admission purpose is *merely subsidiary* to (or a *derivative* of) the purpose of removal. That is, it is not the case that detention during visa processing is legitimate solely because detention makes the person available for removal in the event that the visa is refused. On the contrary, the Court has repeatedly treated detention for the admission purpose as a conceptually separate legitimate end for which a person may be detained consistently with Ch III.

36. In *Lim*, the Court held that laws providing for the detention of persons in custody would be for a legitimate purpose if "the detention which they require and authorize is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered".[25] The holding in *Lim* was later applied by Gleeson CJ in *Re Woolley; Ex parte Applicants M276/2003* (***Re Woolley***), with his Honour stating that:[26]

> [I]f a law is reasonably capable of being seen as necessary for the purpose of exclusion, dealing with an application for permission to enter, or removal, then ordinarily it will be proper to regard it as having the character of an incident of the executive power to receive, investigate and determine an application for an entry permit and, after determination, to admit or deport.

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23 *NZYQ* (2023) 97 ALJR 1005 at [44], citing *Jones* (2023) 97 ALJR 936 [43], [78], [154]-[155], [188].

24 *Lim* (1992) 176 CLR 1 at 33 (Brennan, Deane and Dawson JJ; Mason CJ agreeing at 10), see also at 53 (Gaudron J), 65-66 (McHugh J); *Plaintiff S4* (2014) 253 CLR 219 at [25]. See further *Plaintiff M76* (2013) 251 CLR 322 at [138]-[140] (Crennan, Bell and Gageler JJ); *Plaintiff M96A* (2017) 261 CLR 582 at [21]-[22], [27] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ); *AJL20* (2021) 273 CLR 43 at [27]-[28] (Kiefel CJ, Gageler, Keane and Steward JJ), [128]-[129] (Edelman J).

25 *Lim* (1992) 176 CLR 1 at 33 (Brennan, Deane and Dawson JJ; Mason CJ agreeing at 10) (emphasis added), see also at 53 (Gaudron J), 65-66 (McHugh J).

26 (2004) 225 CLR 1 at [25]-[26] (Gleeson CJ).

Applying *Lim*, his Honour went on to state that "a law providing for detention during the process of decision-making is not punitive in nature".[27]

37. That understanding of the holding in *Lim* was also reflected in *Plaintiff S4*.[28] There, the Court observed that *Lim* had upheld the validity of the "authority to detain an alien in custody, when conferred in the context and for the purpose of executive powers to receive, investigate and determine an application by that alien for permission to enter and remain in Australia".[29] It then stated:[30]

> Importantly, the Court [in *Lim*] further held that the provisions of the Act which then authorised mandatory detention of certain aliens were valid laws if the detention which those laws required and authorised was limited to what was reasonably capable of being seen as necessary for the purposes of deportation or to enable an application for permission to enter and remain in Australia to be made and considered. It follows that detention under and for the purposes of the Act is limited by the purposes for which the detention is being effected. And it further follows that, when describing and justifying detention as being under and for the purposes of the Act, it will always be necessary to identify the purpose for the detention. Lawfully, that purpose can only be one of three purposes: the purpose of removal from Australia; the purpose of receiving, investigating and determining an application for a visa permitting the alien to enter and remain in Australia; or, in a case such as the present, the purpose of determining whether to permit a valid application for a visa.

38. Thus, *Plaintiff S4* differentiated between three statutory purposes (removal, the admission purpose, and the purpose of deciding whether to permit a valid application for a visa), and considered all of them to be legitimate ends.

39. Similarly, the majority in *AJL20* accepted that, where an unlawful non-citizen has a pending application for permission to enter the community, "a law providing for detention during the process of decision-making is not punitive in nature".[31]

40. The applicant has not sought leave to reopen any of those authorities.

***NZYQ* established a constitutional limit on detention for the purpose of removal**

41. The applicants accept that the holding of *NZYQ* was limited to "an alien who has failed to obtain permission to remain in Australia" (**AS [31]**). They are clearly correct to do so, as

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27 *Re Woolley* (2004) 225 CLR 1 at [26] (Gleeson CJ), see also at [182]-[183] (Kirby J), [262] (Callinan J). Gleeson CJ's comments were cited with approval in *Plaintiff M76* (2013) 251 CLR 322 at [139] (Crennan, Bell and Gageler JJ) and in *AJL20* (2021) 273 CLR 43 at [24] (Kiefel CJ, Gageler, Keane and Steward JJ).

28 (2014) 253 CLR 219.

29 *Plaintiff S4* (2014) 253 CLR 219 at [25]. See further *Plaintiff M76* (2013) 251 CLR 322 at [138]-[140] (Crennan, Bell and Gageler JJ); *Plaintiff M96A* (2017) 261 CLR 582 at [21]-[22], [27] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ); *AJL20* (2021) 273 CLR 43 at [27]-[28] (Kiefel CJ, Gageler, Keane and Steward JJ), [128]-[129] (Edelman J).

30 *Plaintiff S4* (2014) 253 CLR 219 at [26] (emphasis added) (citations omitted).

31 (2021) 273 CLR 43 at [24] (Kiefel CJ, Gageler, Keane and Steward JJ), quoting *Re Woolley* (2004) 225 CLR 1 at [26]. See also *Plaintiff M76* (2013) 251 CLR 322 at [139] (Crennan, Bell and Gageler JJ).

the Court expressly and deliberately confined the constitutional limit in that way in both *NZYQ* and *ASF17*.[32] Nevertheless, the applicants and the proposed intervener at least implicitly contend that the Court erred in doing so. They submit that the Court's reasoning applies "*mutatis mutandis*" where a person is detained for the admission purpose (**AS [20], [32])**, or that "principle and logic" require the same limitation to apply "regardless of whether their application for permission to remain in Australia remains under consideration" (**LPSP [16]**).

42. Those submissions misunderstand the basis for the holding in *NZYQ*. They mistakenly equate the absence of a capability to achieving one purpose (removal) with incapacity to achieve a different legitimate purpose (determination of a visa application).

43. In *NZYQ*, the issue was therefore whether it was constitutionally permissible to detain the applicant for the purpose of removal, in circumstances where there was no real prospect of his removal becoming practicable in the reasonably foreseeable future. In holding that it was not, the Court stated the relevant constitutional principle as follows: [33]

> [E]xpressing the constitutionally permissible period of executive detention of an alien who has failed to obtain permission to remain in Australia 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 follows directly from the principle in *Lim*. This is the appropriate expression of the applicable constitutional limitation under a statutory scheme where there is an enforceable duty to remove an alien from Australia as soon as reasonably practicable.

44. The Court recognised that, separately to the removal purpose, detention for the purpose of considering whether to grant an alien permission to remain in Australia is both "legitimate" and "non-punitive".[34] Importantly, it also recognised that the constitutional limitation it had identified was not relevant to detention for that purpose, stating: [35]

> [I]f the only purposes peculiarly capable of justifying executive detention of an alien are, as was said in *Lim*, removal from Australia or enabling an application for permission to remain in Australia to be made and considered, then the absence of any real prospect of achieving removal of the alien from Australia in the reasonably foreseeable future refutes the existence of the first of those purposes.

45. The final words in that passage make clear that the absence of a real prospect of removal does not refute the purpose of considering an application for permission to remain in Australia. There is no other way to read those words. If the absence of any real prospect of

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32 *NZYQ* (2023) 97 ALJR 1005 at [55]; *ASF17* (2024) 98 ALJR 782 at [31].
33 *NZYQ* (2023) 97 ALJR 1005 at [55] (the Court) (emphasis added).
34 *NZYQ* (2023) 97 ALJR 1005 at [30], [31], [46] (the Court).
35 *NZYQ* (2023) 97 ALJR 1005 at [46] (the Court) (emphasis added).

removal refutes both purposes (as the applicants and proposed intervener contend), the Court could very easily have said so.

46. The reasoning in *NZYQ* makes clear that the Court did not err in the manner that the applicants and the proposed intervener implicitly suggest. The reason the absence of a real prospect of removal "refutes the existence of" a purpose of removal[36] is because the legitimate purpose of detention "must be capable of being achieved in fact".[37] If it is not, the law ceases to be "sufficiently tailored to the achievement of [the] purpose", and will be characterised as punitive.[38] As the Court put it in *NZYQ*:[39]

> The *Lim* principle would be devoid of substance were it enough to justify detention, other than through the exercise of judicial power in the adjudgment and punishment of guilt, that the detention be designed to achieve an identified legislative objective that there is no real prospect of achieving in the reasonably foreseeable future.

Thus, the absence of a real prospect of removal in the reasonably foreseeable future prevents reliance on the removal purpose because it shows that that purpose cannot be achieved (at least within the relevant timeframe). It says nothing about detention for the admission purpose, because the absence of a real prospect of removal does not negate that purpose.

47. Consistently with the above, in *ASF17*,[40] the plurality repeated that the *NZYQ* limit applies to "an alien who has failed to obtain permission to remain in Australia".[41] Their Honours made repeated references to the holding of *NZYQ* in terms of the removal obligation under ss 198(1) or 198(6). They also pointed out that one condition of removal being "practicable" was that removal "must be permissible under the [Migration Act]",[42] before discussing the circumstances in which the power to remove under s 198 would be enlivened. That discussion makes clear that, before the constitutional limitation identified in *NZYQ* becomes relevant, there must be "an enforceable duty to remove"[43] (because otherwise the unlawful non-citizen cannot "permissibly be removed under s 198(1) or s 198(6)").

48. The above point is important to the disposition of these cases. It is important because, if an unlawful non-citizen has made a valid application for a protection visa that has not yet been

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36 *NZYQ* (2023) 97 ALJR 1005 at [46] (the Court).

37 *NZYQ* (2023) 97 ALJR 1005 at [40] (the Court), citing *Alexander* (2022) 276 CLR 336 at [242]. See also Twomey, 'NZYQ v Minister for Immigration and its Legislative Progeny' (2024) 98 *Australian Law Journal* 103 at 104, cited in *ASF17* (2024) 98 ALJR 782 at [68] (Edelman J).

38 *Jones* (2023) 97 ALJR 936 at [78] (Gordon J).

39 *NZYQ* (2023) 97 ALJR 1005 at [45] (the Court) (emphasis added).

40 *ASF17* (2024) 98 ALJR 782 at [1], [31], [33], [35], [36], [38], [40], [41], [42], [47], see also at [54] (Edelman J).

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

42 *ASF17* (2024) 98 ALJR 782 at [35], see also [46].

43 *NZYQ* (2023) 97 ALJR 1005 at [55] (the Court).

determined, then unless that non-citizen requests removal under s 198(1) there is no power to remove that non-citizen until the visa application has been finally determined, because only then is s 198(6) engaged.[44]

49. If an unlawful non-citizen is detained for the admission purpose, the absence of a real prospect of removal does not "[refute] the existence"[45] of that purpose, or render it incapable of being achieved in fact.[46] So much is illustrated by the facts of these cases. Indeed, the achievability of the admission purpose was effectively conceded by CZA19 and DBD24 at the outset, as both originally sought mandamus to compel decisions on their visa applications,[47] thereby conceding that such decisions remained possible.[48] That position stands in stark contrast to *NZYQ* where, as the Court observed, the plaintiff "understandably" did not seek mandamus because it "would be futile if there was no real prospect of removal".[49]

The *NZYQ* limit should not be extended to detention for the admission purpose

50. The applicants attempt to sidestep the fact that they were detained for the admission purpose by inviting the Court to focus upon the prospects of their removal after their visa applications were determined. The crux of their submission is that, whatever decision was made on their visa applications, their release was "inevitable" because they would either be granted a visa or released as a result of *NZYQ*. That is said to have the consequence that their detention was not for a legitimate purpose, because the dominant purpose of detention became the illegitimate purpose of detention itself (cf **AS [29], [32], [56]**).

51. The above argument depends on subsuming the admission purpose into the removal purpose (cf **AS [44], [47]**). Thus, the applicants contend that "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" (**AS [50]**). As already addressed, that submission is not consistent with the way in which this Court has approached the

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44 Similarly, if the power and duty to remove in s 198(5) was engaged, s 198(5A) would prevent removal until the final determination of any protection visa application.

45 *NZYQ* (2023) 97 ALJR 1005 at [46] (the Court).

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

47 Amended Originating Application for Relief filed by CZA19 (**JCRB-1 11**);

48 Their implied concessions have been borne out by the course of history, as both of their visa applications have now been determined.

49 *NZYQ* (2023) 97 ALJR 1005 at [13] (the Court).

permissible purposes of immigration detention in any of the leading decisions, including *Lim*,[50] *Re Woolley*,[51] *AJL20*,[52] *NZYQ*,[53] and *ASF17*.[54]

52. The applicants seek to support their argument principally by relying upon a carefully selected passage from the judgment of Gleeson CJ in *Re Woolley*,[55] in which his Honour said that "the power to exclude the non-citizen extends to a power to investigate and determine an application by the non-citizen for permission to remain" (**AS [47]**). However, the full passage in which that statement appears is as follows: [56]

> Plainly [the plurality in *Lim*] did not contemplate 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. They were referring to the time necessarily involved in receiving, investigating and determining an application for an entry permit. In a particular case, that time may be brief, or, depending upon the procedures of review and appeal that are invoked, it may be substantial. If a non-citizen enters Australia without permission, then the power to exclude the non-citizen extends to a power to investigate and determine an application by the non-citizen for permission to remain, and to hold the non-citizen in detention for the time necessary to follow the required procedures of decision-making. The non-citizen is not being detained as a form of punishment, but as an incident of the process of deciding whether to give the non-citizen permission to enter the Australian community. Without such permission, the non-citizen has no legal right to enter the community, and a law providing for detention during the process of decision-making is not punitive in nature.

53. Far from supporting the applicants' argument, Gleeson CJ plainly did not see the admission purpose as a mere subsidiary or "extension"[57] of the removal purpose. Rather, his Honour accepted that detention "for the time necessary to follow the required procedures of decision-making" was an "incident of the process of deciding whether to give the non-citizen permission to enter the Australian community".[58] That is, his Honour accepted that detention during the investigation and determination of a visa application was for a legitimate end and was consistent with Ch III. His Honour's conclusion in that respect was cited with approval in both *NZYQ*[59] and *AJL20*.[60]

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50 *Lim* (1992) 176 CLR 1.
51 *Re Woolley* (2004) 225 CLR 1.
52 *AJL20* (2021) 273 CLR 43.
53 *NZYQ* (2023) 97 ALJR 1005.
54 *ASF17* (2024) 98 ALJR 782.
55 *Re Woolley* (2004) 225 CLR 1 at [26].
56 *Re Woolley* (2004) 225 CLR 1 at [26] (emphasis added).
57 Cf **AS [46]**.
58 *Re Woolley* (2004) 225 CLR 1 at [26], see also at [24].
59 *NZYQ* (2023) 97 ALJR 1005 at [50] (the Court).
60 *AJL20* (2021) 273 CLR 43 at [24] (Kiefel CJ, Gageler, Keane and Steward JJ).

54. None of the short quotations from *AJL20*,[61] *NZYQ*,[62] and *Falzon*[63] in **AS [48]-[49]** actually concern whether detention for the admission purpose is justified only because it facilitates ultimate removal, as is unsurprising given the admission purpose did not arise on the facts of those cases. The applicants frame the same point slightly differently in asserting that "the purpose of detention is frequently described in terms of *both* the processing and removal purpose" (**AS [51]**). It may be accepted that, in many cases, detention during visa processing may serve both the admission purpose and, in the event that a visa application is ultimately refused, the removal purpose. So much was recognised by Crennan, Bell and Gageler JJ in *Plaintiff M76*[64] in the passage quoted at **AS [52]**. But that provides no support for the much more radical claim that the admission purpose is simply a subset or manifestation of the removal purpose. Indeed, in *Plaintiff M76*, Crennan, Bell and Gageler JJ declined to consider the correctness of *Al-Kateb* because "consideration of granting the plaintiff permission to remain in Australia had not been completed" and the removal obligation was therefore not enlivened.[65] Logically, that course was available only because the unlawful non-citizen in question was validly detained for the admission purpose, whether or not there was a real prospect of removal in the event the visa applications were refused.[66]

55. Nor does the applicants' selected excerpt from *Lim* suggest that the admission purpose is exhausted if there will not be a real prospect of removal once the visa application is determined (cf **AS [56]-[58]**). In *Lim*, the plurality made clear that "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 and deport, constitutes an incident of those executive powers."[67] That can only be understood as saying that detention is an incident of executive powers to receive, investigate and determine an application by the alien, not that they only arise as an incident of the power to "deport".

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61 *AJL20* (2021) 273 CLR 43 at [21] (Kiefel CJ, Gageler, Keane and Steward JJ).
62 *NZYQ* (2023) 97 ALJR 1005 at [44] (the plurality), [54] (Edelman J).
63 *Falzon* (2018) 262 CLR 333 at [39] (Kiefel CJ, Bell, Keane and Edelman JJ).
64 (2013) 251 CLR 322.
65 *Plaintiff M76* (2013) 251 CLR 322 at [145], [149] (Crennan, Bell and Gageler JJ). See also [4], [31], [135].
66 See also *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at [72], [226]-[227], [404], [460].
67 *Lim* (1992) 176 CLR 1 at 32 (Brennan, Deane and Dawson JJ; Mason CJ agreeing at 10) (emphasis added).

56. Insofar as any further justification is required for the admission purpose, detention (the means) assists in achieving a decision to grant or refuse admission to the Australian community (the end) in at least the following non-punitive and complementary ways:

(a) making the detainee available for necessary investigations into their identity, nationality, criminal history, security profile and health;

(b) promoting the integrity of the visa application system by ensuring that a non-citizen who seeks permission to enter or remain in Australia does not enter the Australian community before that application is investigated and determined;[68]

(c) in the event the visa application is refused, making the applicant available for removal until either removal occurs or it becomes apparent that there is no real prospect of removal in the reasonably foreseeable future; and

(d) in appropriate cases, 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 under Part 9.10 of the *Criminal Code* (Cth) is required.

57. DBD24's case illustrates the second of these purposes, for he absconded shortly after a residence determination was made in his favour, and he then remained at large in the community without a visa for some 8 years (**DBD SOAF [10]-[14]**). That is a practical example of the way in which detention for the admission purpose serves the public interest in ensuring the integrity of the visa application system. A defining characteristic of territorial sovereignty is the power to exclude or remove an alien.[69] A corollary of that power is the power to make an alien's entitlement to enter or remain in the territory subject to the grant of permission. That power would be undermined if a person could not be detained even while consideration is being given to whether to grant a non-citizen permission to enter or remain in the Australian community.

58. CZA19's case illustrates the fourth of these purposes. In the course of processing his visa application, the Department became aware of new, serious allegations of overseas criminality, including that he had committed violent offences overseas (including causing death), sexual violence, illegal use of firearms, fraud, theft and drug supply over a period of 16 years (**CZA SOAF [32]**), and that he was "wanted" for failing to return to a Polish penitentiary (**CZA SOAF [33]**). If sufficiently credible, those allegations were capable of

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68 See *Re Woolley* (2004) 225 CLR 1 at [101], [105]-[106] (McHugh J).

69 *Lim* (1992) 176 CLR 1 at 29-32 (Brennan, Deane and Dawson JJ); *NZYQ* (2023) 97 ALJR 1005 at [44] (the Court); *Jones* (2023) 97 ALJR 936 at [78] (Gordon J).

rationally bearing upon the decision to grant the BVR subject to electronic monitoring and curfew conditions, even though, following *NZYQ*, he could not continue to be detained after the refusal of his visa (**CZA SOAF [58]**).

59. If *NZYQ* were extended as the applicants suggest, then in practice – from the moment an unlawful non-citizen arrived in Australia – the Commonwealth would be constitutionally required to be in a position to prove a real prospect of removal on any habeas corpus application brought by a detainee.[70] That would be so even if the Department had not yet finished its inquiries concerning the identity, health, and background of the unlawful non-citizen, and so did not yet know which countries it should approach with respect to the removal of the non-citizen. It would also be so even if a visa application had only just been made, and may not be determined for some time. Yet the Commonwealth would need to engage with other countries in an attempt, for example, to obtain travel documents, simply in order to ensure it was in a position to resist a possible habeas claim, even though any such documents as are obtained may well have expired by the time any removal power was actually enlivened. That manifestly inconvenient result – which departs markedly from the scheme reflected in the Migration Act – points against the correctness of the applicants' argument.

60. Finally, it bears repeating that, having regard to the terms of ss 198(5A) and 198(6), the existence of an undetermined application for a protection visa will usually[71] mean there is no power to remove the unlawful non-citizen until the application has been determined. For that reason, the existence of such an undetermined application will ordinarily, by itself, mean that it is not currently practicable to remove the unlawful non-citizen, for the simple reason that there will be no power to remove the non-citizen until after the visa application is decided.[72] That no doubt explains the Court's care in confining the *NZYQ* limitation to aliens who had failed to obtain permission to remain in Australia.

61. For the above reasons, it would make no sense to ask whether there is a "real prospect of removal" during the period when an unlawful non-citizen is detained for the admission

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70 See, for example, cases in which habeas corpus has been granted not because there is a positive finding that the limit is reached, but because the Minister and the Commonwealth have not been able to prove that it is not: *CRS20 v Secretary of the Department of Home Affairs* [2024] FCA 619 at [281]-[282] (Wheelahan J); *GMZ18 v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) FLR 336 at [83]-[84] (Judge Manousaridis); *Adam v Secretary of Dept of Home Affairs* [2024] FedCFamC2G 179 at [131] (Judge Mansini); *David v Secretary of Dept of Home Affairs* [2024] FedCFamC2G 178 at [140], [144] (Judge Mansini).

71 Unless a request is made for removal under s 198(1).

72 It must first be permissible under the Migration Act to remove a person to a country before it can be practicable to do so: *ASF17* (2024) 98 ALJR 782 at [35], [41] (plurality).

purpose, because the statutory scheme authorises and requires removal only after the admission purpose is complete (unless a request is made under s 198(1)). Indeed, to require the Commonwealth to demonstrate a real prospect of removal during the processing period with respect to a protection visa would be to require the Commonwealth to demonstrate that there is a real prospect of something occurring that the Migration Act does not, at that time, authorise or require.

An "inevitability of release" does not make detention for the admission purpose illegitimate

62. The applicants and the proposed intervenor submit that the fact that the applicants' detention will only be "temporary" and that, "whatever the result", they must be released into the community, requires the conclusion that detention is "an end in itself" (**AS [56]; LPSP [41]**). That argument should be rejected for two reasons.

63. *First*, as has just been discussed, absent a request for removal under s 198(1), the Migration Act confers no power to remove an unlawful non-citizen who has applied for a visa until after a decision is made on that application. There is nothing in the Migration Act that requires officers to give any consideration to whether removal is practicable before that time, or to undertake any associated inquiries (including inquiries of possible third countries). As a result, in practice there will often be no factual foundation upon which to assess whether or not an unlawful non-citizen will "inevitably" be released as a result of *NZYQ* even if they are refused a visa. Whether or not that is so will depend upon inquiries that will not be made until a removal power is enlivened. For that reason, the Court should not accept the premise for the applicants' submission, being that there is a subset of non-citizens who will "inevitably" be released as a result of *NZYQ* and who are identifiable before the Migration Act requires any steps to be taken towards possible removal.

64. *Second*, even if there are cases where – at some point during the processing period[73] – it does become apparent that an unlawful non-citizen is likely to be released as a result of *NZYQ* even if their application for a visa is refused, such an unlawful non-citizen nevertheless remains detained for the admission purpose. It is only if the unlawful non-citizen's application for a visa is refused or withdrawn, or if removal is requested under s 198(1), that a power to remove is enlivened. Only then is the unlawful non-citizen detained for the removal purpose, such that the *NZYQ* limitation becomes potentially relevant. Otherwise, the non-citizen remains detained for the admission purpose until such

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[73] For example, if a protection finding is made that enlivens s 197C(3) so as to prevent a non-citizen from being removed to their home country.

time as a decision is made on the visa application. That decision remains of practical importance, for it will determine the *terms and conditions* on which the unlawful non-citizen will be admitted to the Australian community. Those terms and conditions vary depending on the visa for which the unlawful non-citizen has applied. They may differ markedly from the terms and conditions upon which a non-citizen is admitted if that occurs only as a result of *NZYQ*.

65. In light of the above, the applicants' submissions that there was no real prospect of their removal from the time when protection findings were made that engaged s 197C(3) are not to the point (see **AS [13], [18] and [73]**). As the applicants never requested removal under s 198(1) of the Migration Act, no removal power was engaged until a decision was made on their visa applications. They remained detained for the admission purpose until that decision was made. The *NZYQ* limit was irrelevant to the validity of their detention prior to that date.

Reasonable necessity

66. The applicants submit that their detention during the processing period is not reasonably necessary for a legitimate purpose (**AS [59]-[69]**). That submission is inconsistent with authorities including *Lim*,[74] *Re Woolley*[75] and *Plaintiff S4*,[76] each of which accept that mandatory detention for the admission purpose is consistent with Ch III. Those authorities do not suggest that it is necessary to conduct a case by case assessment of whether detention is reasonably necessary for the purpose of considering any particular visa application. Nor are they consistent with the applicants' rather tentative suggestion that it is necessary to consider whether there are "reasonable alternatives" to detention for the admission purpose, such as the processing arrangements in place prior to 1992 (**AS [63]**), or those in place in Canada (**AS [65]**) and the European Union (**LPSP [48]**), or whether more widespread use could be made of residence determinations (**AS [64]**). It is not surprising that this submission is advanced only tentatively, because to succeed the applicants would need to re-open the decision in *Lim* (which upheld provisions requiring mandatory immigration detention notwithstanding the suggested "alternatives").

67. As to the submission by the proposed intervenor that the Court should adopt a structured proportionality approach (**LPSP [31]; also AS [40]**) to assessing the validity of immigration

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74 *Lim* (1992) 176 CLR 1.
75 See *Re Woolley* (2004) 225 CLR 1.
76 *Plaintiff S4* (2014) 253 CLR 219.

detention against Ch III, that submission should again be rejected (as it has been on multiple occasions before). Where the question is whether an exclusively judicial power has been conferred upon the Executive, this Court has unequivocally held that "[q]uestions of proportionality cannot arise under Ch III".[77] The reason for that is clear enough. There is no scope to confer exclusively judicial power on the Executive simply because that is reasonably necessary in pursuit of a legitimate end. The "means and ends" inquiry that the Court has embraced in determining whether detention is punitive provides no warrant for importing a full structured proportionality analysis into Ch III, such as would require analysis of matters such as whether there are completely different ways that Parliament might have pursued its purpose that the Court is persuaded are "obvious and compelling".

68. Even more problematically, the proposed intervenor observes that his preferred structured proportionality approach "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" (**LPSP [48]**). The example of potentially permissible detention that is given is where detention is necessary for reasons of national security or public order. That submission reveals that the proposed intervener envisages that the structured proportionality analysis would be undertaken on a *detainee-by-detainee* basis. That overlooks that the validity of detention under ss 189(1) and 196(1) of the Migration Act is properly analysed at the level of the statute.[78] That is, the relevant question is the "constitutional question" of whether the statutory authority conferred on the Executive is consistent with Ch III and thus within the power of the Parliament, rather than the "statutory question" of whether the executive action in question is authorised by the statute.[79]

The duration of detention during the processing period is not arbitrary

69. The applicants submit that, the "duration of detention during visa processing is arbitrary, and unconnected to purpose" in circumstances where there is no real prospect of removal if the visa is refused (**AS [61]**). Further, they assert that acceptance of the Commonwealth's

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77 *Falzon* (2018) 262 CLR 333 at [32] (Kiefel CJ, Bell, Keane and Edelman JJ); *Jones* (2023) 97 ALJR 936 at [43] (Kiefel CJ, Gageler, Gleeson and Jagot JJ). See also at [78] (Gordon J). Those passages were cited with approval in *NZYQ* (2023) 97 ALJR 1005 at [44]; *ASF17* (2024) 98 ALJR 782 at [32] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).

78 *AJL20* (2021) 273 CLR 43 at [43].

79 *AJL20* (2021) 273 CLR 43 at [43].

submissions "would enable indefinite detention under the Act for the purpose of visa processing with no temporal constraint" (**AS [68]**).

70. Again, that submission is both contrary to authority and incorrect in principle. Detention for the admission purpose must come to an end when a decision is made on the extant visa application. The Minister is under an enforceable obligation to ensure that such a decision is made within a reasonable time.[80] There is therefore an enforceable temporal constraint upon detention for the admission purpose, which means that "the duration, and thus lawfulness, of the detention authorised by the Act is capable of determination from time to time".[81] The "terms of the Act circumscribe the purposes of detention of an unlawful non-citizen so that they do not include punishment".[82] Thus, at the point where a decision is made on the visa application:

(a) if the unlawful non-citizen has been granted a visa they must be released (as is contemplated by s 196(1) and as occurred in DBD24's case), without any question of removal ever arising;

(b) if the unlawful non-citizen has been refused a visa, then they will be detained pending removal from Australia under s 198(6), the power and duty to remove under that provision having only just have arisen, unless there is no real prospect that their removal will become practicable in the reasonably foreseeable future. In the absence of such a real prospect of removal, *NZYQ* establishes that ss 189 and 196 no longer authorise detention, such that the unlawful non-citizen must be released.

71. As to the supposed "anomalous results" referred to in **AS [69]**, they are overstated. It is true that, in theory, if an unlawful non-citizen who is released as a result of *NZYQ* both was not granted a visa (such as a BVR) and also applied for another visa, then that unlawful non-citizen could be re-detained whilst that application was considered (because their detention would be for the admission purpose). There is no evidence to suggest that has yet occurred, and it is unlikely that it will (given that, in practice, BVRs are granted to non-citizens to whom *NZYQ* applies). Otherwise, the "anomalous results" upon which the applicants rely either have an erroneous premise (such as the suggestion that the power in s 195A is available to grant a visa to a person who is released pursuant to *NZYQ*), or the submission assumes the answer to questions that would need to be fully argued in a case in which they

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80 *Plaintiff S297* (2014) 255 CLR 179 at [37]; *ASP15* (2016) 248 FCR 372 at [20] and [42] (Robertson, Griffiths and Bromwich JJ); *AJL20* (2021) 273 CLR 43 at [36]-[37].

81 *AJL20* (2021) 273 CLR 43 at [45]; *Plaintiff M96A* (2017) 261 CLR 582 at [31].

82 *AJL20* (2021) 273 CLR 43 at [45].

actually arise on the facts (eg if a non-citizen's liberty depended on release pursuant to *NZYQ* – rather than, for example, holding a BVR – and the Minister then commenced considering whether to lift a statutory bar to permit a new visa application to be made). The suggested anomalies – which are far removed from any issue concerning the applicants – are of no assistance in resolving the legal issues that actually require decision.

DETENTION IS LAWFUL IF PROCESSING EXCEEDS A REASONABLE TIME

72. The second argument made by the applicants is that their detention became unlawful after the expiry of a "reasonable time" for the processing of their visa applications, either as a matter of statutory construction or constitutional law.

73. The argument as a matter of statutory construction is not open. **AS [80]-[93]** repeat an argument that has been unsuccessfully advanced on multiple prior occasions (as is emphasised by the applicants' extensive reliance upon dissenting judgments). The argument is contrary to the construction of ss 189 and 196 that was adopted in *Al-Kateb*, affirmed by the majority in *AJL20*, and which the unanimous Court in *NZYQ* declined to re-open. Indeed, in *NZYQ*, the unanimous Court referred to those cases in recognising that the construction of the word "until", in conjunction with the word "kept", indicated that detention under s 189(1) is "an ongoing or continuous state of affairs that is to be maintained up to the time that the event (relevant, the grant of a visa or removal) *actually occurs*".[83] Each of those authorities would need to be re-opened before the applicant would be entitled to contend that, as a matter of statutory construction, detention ceases to be lawful *before* any of those events listed in s 196(1) "actually occurs" (such as if a decision is not made on a visa application within a reasonable time). The applicants' reliance (**AS [89]-[92]**) on particular observations from *Plaintiff S4* (which was not a constitutional case) in an attempt to support the contrary view is misplaced, particularly in light of its treatment in the more recent authorities just noted.

74. As a matter of constitutional law, the argument is similarly contrary to a significant body of authority. In rejecting an identical argument in *ASP15*, Robertson, Griffiths and Bromwich JJ said (in rejecting both the construction and constitutional arguments):[84]

> It follows that once a valid visa application has been made, unless and until a decision is made either to grant or refuse a visa, detention is authorised and required by s 196(1) … Such detention does not cease to be for the purpose of considering and determining an application for a visa because the necessary process has not been completed within the time

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83 *NZYQ* (2023) 97 ALJR 1005 at [22] (emphasis in original).

84 *ASP15* (2016) 248 FCR 372 at [40]-[42] (emphasis added). For a more recent decision to the same effect, see *BVZ21 v Commonwealth* [2022] FCAFC 122 at [48]-[49].

> required by the *Migration Act*, be that time period express or implied. If in fact a court determines that the process to make a visa decision has gone on for too long, it nonetheless remains detention for that purpose and is both validly authorised and required by s 196(1) of the *Migration Act*. The normal remedy is court action to compel a visa decision to be made, one way or the other.
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> Nor does any question of inconsistency with Ch III of the *Constitution of the Commonwealth* arise. Detention while a visa application is being considered does not deprive that detention of its statutory purpose because a reasonable time to make a decision about a visa in furtherance of that purpose has been exceeded.
>
> … The regime for immigration detention is valid for the purposes of making a visa decision precisely *because* it imposes an obligation on the Minister to make that decision within whatever time limit applies; detention only remains valid so long as such a purpose under the *Migration Act* continues to exist. In the case of detention pending a visa decision, failure to do so within the required time renders the Minister liable to the issue of a writ of mandamus to compel him or her to perform their statutory duty. However it does not render invalid the provision which authorises detention in the first place.

75. In *AJL20*, Kiefel CJ, Gageler, Keane and Steward JJ expressly and emphatically approved the above reasoning, stating: [85]

> There is no room for any doubt that the interpretation of ss 196(1) and 198 that … was applied again more recently by the Full Court of the Federal Court (Robertson, Griffiths and Bromwich JJ) in *ASP15 v The Commonwealth*, faithfully reflects the intention of the Act. No constitutional imperative requires departure from it.

76. The majority in *AJL20* held that immigration detention was validly authorised by ss 189(1) and 196(1) of the Migration Act because it was "hedged about by enforceable duties, such as that in s 198(6), that give effect to legitimate non-punitive purposes", after which time detention is brought to an end.[86] Specifically, detention for the admission purpose will be brought to an end once the enforceable duty to make the decision is satisfied. If an unlawful non-citizen who has made a valid application for a visa that has not yet been determined wants to be removed from Australia prior to that application being determined, the non-citizen can request removal under s 198(1). However, in the absence of such a request, the non-citizen is required by ss 189 and 196(1) to be detained "until" the visa application is decided. That is the statutory expression of the recognition in *Lim* that the executive may validly detain non-citizens for the purpose of "receiving, investigating and determining an application for a visa permitting the alien to enter and remain in Australia".[87] *AJL20*[88] and *ASP15*[89] both establish that detention for that purpose is valid even if the executive has taken an unreasonable time to decide that application. In that event, the unreasonable delay does

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85 *AJL20* (2021) 273 CLR 43 at [5] (emphasis added). At [36]-[37], the majority quoted at length from the passages in *ASP15* that are set out immediately above.

86 *AJL20* (2021) 273 CLR 43 at [44].

87 As understood in *Plaintiff S4* (2014) 253 CLR 219 at [25].

88 *AJL20* (2021) 273 CLR 43.

89 *ASP15* (2016) 248 FCR 372.

not render detention unlawful. Instead, the appropriate remedy is mandamus to require a decision to be made.[90]

77. The applicant seeks to avoid the effect of *ASP15* and *AJL20* by submitting that they were premised on the correctness of *Al-Kateb*, which was relevantly overruled in *NZYQ* (**AS [71]-[72]**). It is true that the correctness of the constitutional holding in *Al-Kateb* was not in issue in *AJL20*.[91] However, the applicant in *NZYQ* did not seek leave to re-open *AJL20*, arguing only that it could be distinguished with respect to persons who were detained for the purpose of removal but where that purpose could not be achieved because there was no real prospect of removal becoming practicable in the foreseeable future. *AJL20* not having been challenged, it would be wrong to read *NZYQ* as having generally overruled it, or as having departed from what the majority in *AJL20* described as "this Court's settled view of the constitutional validity and proper construction" of ss 189, 196 and 198 of the Migration Act.[92] That the Court in *NZYQ* did not generally overrule *AJL20* (cf **AS [72]**) is confirmed by the Court's indication in *NZYQ* that it was dealing with an issue not raised in *AJL20*.[93]

78. The central reasoning in *AJL20* – that ss 189(1) and 196(1) of the Migration Act are valid because the mandatory detention that they require is subject to enforceable hedging duties that ensure that this detention is for legitimate purposes (relevantly including the removal and admission purpose) – is inconsistent with the applicants' argument. While that reasoning is *qualified* by the holding in *NZYQ* with respect to cases where detention is for the purpose of removal but there is no real prospect of removal in the reasonably foreseeable future, the qualification arises only because in that situation the necessary connection between means and ends is severed. That qualification is irrelevant to detention for the admission purpose, for the simple reason that <u>that purpose</u> (as opposed to the purpose of removal) remains achievable.[94]

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90 *AJL20* (2021) 273 CLR 43 at [52].
91 *AJL20* (2021) 273 CLR 43 at [26].
92 *AJL20* (2021) 273 CLR 43 at [11].
93 *NZYQ* (2023) 97 ALJR 1005 at [24] and [47].
94 *NZYQ* (2023) 97 ALJR 1005 at [46].

There was no unreasonable delay

79. If, contrary to the above, the Court concludes that unreasonable delay does bear upon the lawfulness of detention, the respondents deny that there was any unreasonable delay in the processing of the applicants' visa application.[95]

80. A reasonable time is assessed by reference to factors including the subject matter of the power, its importance both to the public at large and the interests of persons it is directed to address, and practical limitations which attend the preparation, investigation and considerations which are called for.[96] As the Full Court has recently confirmed, the question of unreasonable delay must also take account of resourcing constraints and the existence of competing demands on the relevant officers' time.[97]

81. The agreed facts do not provide an appropriate foundation for the Court to resolve this issue. There is, for example, no agreement as to the significance, in CZA19's case, of the information that came to light on on 23 May 2023, referred to above at paragraph 58, which was highly relevant whether he is a "danger to the Australian community" (s 36(1C)), particularly given his conviction in Australia for escape from prison in 2016 and his attempt in 2021 to escape detention.[98] Further, any assessment of whether there was unreasonable delay would need to determine the significance of the fact that on 10 March 2023, 27 June 2023, 25 July 2023, 22 August 2023, 20 September 2023, and 27 October 2023, the applicant himself requested significant extensions of time to respond to procedural fairness opportunities given by the Department. In each case, the applicant requested an extension of at least 28 days, but on 27 October 2023, he requested an extension to 16 February 2024 (**CZA SOAF [29], [34], [36], [40], [42], [44]**). Those requests – which are not mentioned by the applicant (**AS [102]**) – suggest that much of the delay in processing the visa is attributable to the applicants' own requests.

82. Even if sufficient facts were available, the resolution of a dispute about whether or not the time taken to process particular visa applications was reasonable in all the circumstances is not an appropriate task for this Court. Accordingly, if the Court holds that unreasonable delay in making a visa decision is relevant to the legality of detention for the admission

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95 *KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 279 FCR 1 at [176]; *ASP15* (2016) 248 FCR 372 at [21]-[23]; *Thornton v Repatriation Commission* (1981) 52 FLR 285 at 292.

96 See, eg, *BMF16 v Minister for Immigration and Border Protection* [2016] FCA 1530 at [25]-[26].

97 *Patrick v Australian Information Commissioner* (2024) 304 FCR 1 at [46].

98 CZA SOAF [8]; Detention Incident Reports (**CRB-1 123-125**).

purpose, the respondents submit that it should remit to the Federal Court so much of these matters as concerns when (if at all) the delay became unreasonable in each case.

PART VI RELIEF

83. The separate questions should be answered, in each case, that the applicant does not have an entitlement to a declaration in the terms sought.

PART VII ESTIMATE

84. The respondents estimate that they will require 2.25 hours to present oral argument.

Dated 18 October 2024

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IN THE HIGH COURT OF AUSTRALIA

MELBOURNE AND PERTH REGISTRIES **M66 of 2024**

BETWEEN **CZA19**
Applicant

and

COMMONWEALTH OF AUSTRALIA
First Respondent

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
Second Respondent

P29 of 2024

BETWEEN **DBD24**
Applicant

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
First Respondent

COMMONWEALTH OF AUSTRALIA
Second Respondent

ANNEXURE TO THE SUBMISSIONS OF THE RESPONDENTS

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

No.	Description	Version	Provisions
Constitutional provisions			
1	*Commonwealth Constitution*	Current (Compilation 6, 29 July 1977 – present)	Ch III
Commonwealth statutory provisions			
2	*Migration Act 1958*	Current (Compilation 162), 14 October 2024 – present	ss 4, 46A, 47, 65, 189, 196, 197C, 198
3	*Criminal Code Act 1995*	Current (Compilation 162), 14 October 2024 – present	Part 9.10