HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 13 Jun 2024 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	P21/2024
File Title:	Minister for Immigration, Citizenship and Multicultural Affairs
Registry:	Perth
Document filed:	Form 27A - Appellants' & A-G Cth submissions
Filing party:	Appellants
Date filed:	13 Jun 2024

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN:

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
First Appellant

SECRETARY, DEPARTMENT OF HOME AFFAIRS
Second Appellant

THE RELEVANT OFFICERS ACTING UNDER SECTION 198 OF THE MIGRATION ACT 1958
Third Appellant

and

MZAPC
Respondent

JOINT SUBMISSIONS OF THE APPELLANTS AND THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

PART I: CERTIFICATION

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

PART II: STATEMENT OF ISSUES

2. Does the Federal Court's power to grant an interlocutory injunction include the power to direct officers of the Commonwealth to disobey the law?

3. Does the Federal Court have power to grant an interlocutory injunction restraining officers of the Commonwealth from complying with the duty to remove an unlawful non-citizen from Australia imposed by s 198 of the *Migration Act 1958* (Cth) where no claim in the substantive proceedings impugns the existence of, or requirement to perform, that duty?

PART III: NOTICE OF CONSTITUTIONAL MATTER

4. The Attorney-General of the Commonwealth intervenes in this proceeding under s 78A of the *Judiciary Act 1903* (Cth), in support of the appellants (together, **the Commonwealth parties**).

5. The respondent issued a notice under s 78B of the *Judiciary Act* on 30 May 2024 (**CAB 101-106**). The Commonwealth parties do not consider that any further notice is required.

PART IV: DECISIONS OF THE COURTS BELOW

6. The reasons of the Full Court of the Federal Court of Australia are not reported; the medium neutral citation is *Minister for Immigration, Citizenship and Multicultural Affairs v MZAPC* [2024] FCAFC 34 (**FC**). The reasons of the primary judge are not reported; the medium neutral citation is *MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 989.

PART V: FACTUAL BACKGROUND

7. The respondent is an unlawful non-citizen. His visa was cancelled in November 2015. His merits review application to the Administrative Appeals Tribunal (**Tribunal**) was dismissed in July 2022. A judicial review application brought by him in the Federal Circuit and Family Court of Australia (Division 2) was discontinued in February 2023. He has exhausted all rights of review and appeal in relation to his immigration status and has no extant visa application. He is in immigration detention.

8. In those circumstances, it was common ground in the Full Court below that there was a duty imposed by s 198(6) of the *Migration Act* on officers of the Commonwealth to remove the respondent from Australia as soon as reasonably practicable. Yet the primary judge made orders restraining the appellants from performing that duty.

9. The primary judge made those orders because his Honour concluded that there was, following this Court's decision in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*,[1] a serious question to be tried as to whether officers of the Department had, acting beyond power, made assessments of the respondent's circumstances against ministerial guidelines concerning referral of cases to the Minister for personal consideration under ss 195A and 417 of the *Migration Act*. Those provisions confer a personal power on the Minister to grant a visa to a person in immigration detention (s 195A(2)) or to substitute a more favourable decision for a

[1] (2023) 97 ALJR 214.

decision made by the Tribunal (s 417(1)). The Minister does not have a duty to consider whether to exercise either power, whether requested to do so by any person or in any other circumstances (ss 195A(4), 417(7)).

10. Each member of the Full Court accepted that nothing in the respondent's challenge to the Departmental assessments impugned the existence of, or requirement to perform, the duty upon officers of the Commonwealth to remove the respondent from Australia. Indeed, as was the case in *Davis*, the only final relief that could be granted to MZAPC would be a declaration that officers acted beyond power in not referring his requests to the Minister.[2] In those circumstances, there was simply no basis for the primary judge to make an order restraining removal. To do so was to direct officers of the Commonwealth to disobey the law. Yet that order was upheld by a majority of the Full Court (Colvin and Jackson JJ; SC Derrington J dissenting). That conclusion involved fundamental error.

PART VI: ARGUMENT

The error by the majority

11. It may be accepted that, in general, the Federal Court has power to grant an interlocutory injunction to preserve the status quo with respect to the rights and obligations of the parties which are in issue in the substantive proceedings. Thus, in a case where a person challenges the validity of the refusal or cancellation of a visa, the Court can grant an interlocutory injunction restraining their removal from Australia. That is because the engagement of the duty to remove depends on the validity of the visa refusal or cancellation, which would be a matter in issue in the substantive proceedings.

12. This Court's decision in *Tait v The Queen*[3] is an example of an injunction of this kind. In that case, it is important to note that there were ***two*** applications for special leave. The first application was filed by Mr David Horace Forde Scott, who had presented a

---

[2] It is true that the respondent has sought final injunctions – see prayers 6 and 7 of his originating application (**CAB 6**). However, they depend on an assertion that the "pendency" of the requests postpones the obligation to remove the respondent from Australia. That case has already been rejected as untenable by the Federal Circuit and Family Court of Australia (Division 2) and the Federal Court: *MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FedCFamC2G 594; *MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 877. These proceedings have been conducted on the basis that the respondent could not get that relief.

[3] (1962) 108 CLR 620.

petition to the Supreme Court of Victoria "requesting that an inquiry be directed into the state of the prisoner's sanity under s 111 of the *Mental Hygiene Act* 1958".[4] That petition had been dismissed by the Full Court of the Supreme Court of Victoria.[5] The second application was filed by Mr Tait, and was made in respect of a decision of the Supreme Court of Victoria holding that that Court did not have power to "respite" Mr Tait's sentence.[6] It is clear that, if the second application had been granted and the High Court had ultimately concluded that the Supreme Court of Victoria did have power to "respite" the sentence, that power may have been exercised in Mr Tait's favour. In those circumstances, the injunction issued by the High Court operated to preserve the status quo with respect to the rights of the parties that were in issue in the proceedings.

13. In the present case, however, it was accepted by each member of the Full Court below that no aspect of the respondent's substantive proceedings impugns the duty to remove him from Australia: see FC [26], [37], [44]–[48], [54] (SC Derrington J); [70], [74], [80], [83]–[84], [97], [115]–[116] (Colvin and Jackson JJ) (**CAB 57, 60, 71–74, 78, 82**). Before the commencement of his proceedings in the Federal Court, there was an obligation to remove him from Australia. Immediately upon their determination, whether favourable or unfavourable to the respondent, there will remain an obligation to remove him from Australia. The primary judge's order does not preserve the status quo pending a determination as to whether some step proposed by one of the parties proceeds on a premise which will be falsified by the Court's decision. To the contrary, as the majority below accepted, the primary judge's orders operate to "restrain performance of an undisputed statutory duty" (FC [115]) (**CAB 82**).

14. It may also be accepted that, in general, the Federal Court has power to grant interlocutory relief to prevent the frustration of that Court's proceedings.[7] Thus, the Court has power to grant a freezing order against a respondent to a claim for damages

---

4 (1962) 108 CLR 620 at 622.

5 *Re Tait* [1963] VR 532.

6 *Tait v The Queen* [1963] VR 547 at 561–564.

7 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at [35] (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ), quoted at FC [39] (**CAB 61**).

where there is a risk that the respondent's dissipation of assets will render the claim nugatory.

15. The majority below apparently considered that the primary judge's order here was of that kind (FC [113]–[116]) (**CAB 81-82**). The insuperable difficulty is that the order made here directs officers of the Commonwealth not to comply with a legal duty imposed upon them by legislation in circumstances where nothing in the proceedings can cast doubt on the existence of that duty. The equivalent would be a freezing order against a respondent directing the respondent to disobey a statutory duty concerning the distribution of assets, where nothing in the substantive proceeding impugns the existence or performance of that duty.[8] In each case, the order directs the persons bound by it to disobey the law.

16. There are many authorities against making an order of that kind:

    a. Earl Loreburn LC said over a hundred years ago: "A Court of law has no power to grant a dispensation from obedience to an Act of Parliament".[9]

    b. Lord Evershed MR observed over seventy years ago that a court cannot by injunction impose an obligation to do something which is unlawful.[10]

    c. Commenting on the inherent power of the Supreme Court of New South Wales and the power conferred by s 23 of the *Supreme Court Act 1970* (NSW) ("The Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales"), four judges of this Court said in 1995: "Neither the inherent power nor the completely general terms of s 23 can authorise the making of orders excusing compliance with obligations or preventing the exercise of authority deriving from statute".[11]

---

[8] Compare, for example, *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 617-618 (Wilson and Dawson JJ) and *Hortico (Australia) Pty Ltd v Energy Equipment Co (Australia) Pty Ltd* (1985) 1 NSWLR 545 at 558 (Young J), recognising the limits of the Mareva order and, in particular, that the remedy does not allow a court to circumvent, or rewrite, insolvency law.

[9] *Attorney-General v Birmingham, Tame and Rea District Drainage Board* [1912] AC 788 at 795, quoted in *P v P* (1994) 181 CLR 583 at 620 (Brennan J) and *Meggitt Overseas Ltd v Grdovic* (1998) 43 NSWLR 527 at 531–532 (Mason P; Sheller and Beazley JJA agreeing).

[10] *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd* [1953] Ch 149 at 181.

[11] *Reid v Howard* (1995) 184 CLR 1 at 16 (Toohey, Gaudron, McHugh and Gummow JJ).

d. Referring to this passage, the New South Wales Court of Appeal observed last year: "The inherent jurisdiction cannot authorise the making of orders excusing compliance with statutory obligations or preventing the exercise of authority deriving from statute".[12]

17. The majority below pointed to no authority which supported its radical conclusion that the Federal Court had power to "restrain performance of an undisputed statutory duty" (FC [115]) and countermand a "legislated command the validity of which is not challenged and which it is accepted must be performed" (FC [116]) (**CAB 82**). None of the authorities mentioned at FC [116]–[130] (**CAB 82-85**) do so:

a. In *CPK20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*,[13] Mortimer J ***refused*** to grant an interlocutory injunction restraining removal precisely because the substantive claim involved no challenge to the duty to remove (see FC [121]) (**CAB 83**).

b. In *Mastipour v Secretary, Department of Immigration and Multicultural and Indigenous Affairs*[14] — a decision not referred to by any party and on which the Full Court received no submissions — Mansfield J apparently took the view, not embraced by the majority of the Full Court here, that the duty in s 198(6) of the *Migration Act* was not an absolute one so that there was no "clash" between the duty it imposed and an interlocutory injunction restraining removal (FC [124]–[125]) (**CAB 84**).

c. The reasons of Stephen J in *Simsek v MacPhee*[15] — again, a decision not referred to by any party and on which the Full Court received no submissions — stand ***against*** the majority's conclusion. There, the applicant contended that, as a result of the breaches of international law he alleged in his substantive claim, he could not be removed from Australia and, on this basis, he sought an interlocutory injunction restraining his removal.[16] He also sought

---

[12] *Hartnett v Bell* (2023) 112 NSWLR 463 at [123(8)] (Bell CJ; Adamson JA and Griffiths AJA agreeing).

[13] [2020] FCA 825 at [80].

[14] (2004) 140 FCR 137.

[15] (1982) 148 CLR 636.

[16] (1982) 148 CLR 636 at 639–640.

such an order on the broader basis of preserving the subject matter of his claim. Stephen J refused to accept this broader basis, describing it as "misconceived".[17] His Honour said that it was necessary for the applicant to establish a *prima facie* case that there was not a present duty to remove him from Australia[18] and refused the injunction because no such *prima facie* case could be established.[19]

18. In fact, there are two decisions of the Federal Court that are inconsistent with the majority's conclusion.[20] *First*, in *P1/2003 v Minister for Immigration and Multicultural and Indigenous Affairs*,[21] the Court considered an application for an interlocutory injunction restraining removal of the applicant in circumstances where the applicant had brought civil proceedings against the Minister for damages. Justice French expressly accepted the Minister's submission that the mandatory terms of s 198 of the *Migration Act* left no room for the applicant to remain in Australia "merely for the purpose of pursuing legal proceedings in Australia".[22] *Secondly*, in *NAEX v Minister for Immigration and Multicultural and Indigenous Affairs*,[23] in refusing an injunction to restrain removal, Lindgren J stated that he could not "conceive of circumstances in which it would be right for the Court to make an order, the effect of which would be to require an officer not to discharge such a clear statutory obligation [as that imposed by s 198]".[24]

19. The majority below asserted that, in the face of an undoubted statutory duty, "the Court must recognise the seriousness of restraining the enforcement of a valid law in considering the balance of convenience" (FC [127]) (**CAB 85**). This in terms asserts a discretion in the Court to decide whether or not an undoubted duty in an unchallenged law should be obeyed.

---

17 (1982) 148 CLR 636 at 640.

18 (1982) 148 CLR 636 at 641.

19 (1982) 148 CLR 636 at 641–645.

20 See also *Li v Minister for Immigration and Multicultural Affairs* [2001] FCA 1414 at [29]–[31], [37], [48], [55] (Emmett J) and *Li v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 667 at [20]–[25] (Sackville J), where doubts about the existence of a power to issue an interlocutory injunction in similar circumstances were expressed, but it was not necessary to decide the point.

21 [2003] FCA 1029.

22 [2003] FCA 1029 at [51].

23 [2002] FCA 1633.

24 [2002] FCA 1633 at [28].

The constitutional argument

20. By notice of contention filed on 30 May 2024 (**CAB 98-100**), the respondent submits that if, on its proper construction, s 198(6) of the *Migration Act* prevents a court exercising the judicial power of the Commonwealth from granting interlocutory relief to preserve the subject matter in dispute or the integrity of its own processes:

    a. s 198(6) is inconsistent with Ch III of the Constitution because it deprives the court of certain of its essential characteristics and is therefore incapable of validly applying to that extent;

    b. by reason of s 3A of the *Migration Act*, s 198(6) is to be construed such that it does not have that invalid application; and

    c. for that further reason, the Full Court of the Federal Court was correct in its conclusion that the primary judge had power to grant an interlocutory injunction restraining the respondent's removal from Australia.

21. The nature of the asserted invalidity, and the reasons for it, are not fully exposed in either the notice of contention or the respondent's s 78B notice. In particular, the "certain … essential characteristics" of which the Court would be "deprived" are not identified. The Commonwealth parties will address the contention more fully in reply. For present purposes, the Commonwealth parties make the following three points.

22. *First*, the constitutional issue identified by the respondent does not arise. On the construction advanced by the Commonwealth parties, s 198(6) of the *Migration Act* does not prevent a court from doing anything. It does not expressly or impliedly deal with the circumstances in which a court can grant injunctive relief. It imposes a duty on officers to remove unlawful non-citizens as soon as reasonably practicable.

23. The question in these proceedings is whether the Court can command those officers not to fulfil that duty in circumstances where the duty is accepted to be enlivened on the facts and the existence of the duty or the matters upon which it depends are not challenged. Whether a court has power to restrain removal where the duty under s 198(6) has otherwise arisen depends on the general law principles governing the grant of interlocutory injunctions. The validity of s 198(6) does not depend upon those principles.

24. *Secondly*, as noted above, it may be accepted that, pursuant to general law principles, the Federal Court has power to grant an interlocutory injunction to preserve the status quo with respect to the rights and obligations of the parties which are in issue in the substantive proceedings, or to prevent the frustration of that Court's proceedings. However, the exercise of that power by the Federal Court is an exercise of the judicial power of the Commonwealth. "The judicial power is conferred and exercised by law."[25] It would be contrary to the "essential characteristics" of a Ch III court to exercise judicial power otherwise than in accordance with law.

25. In issuing an injunction that commanded officers of the Department not to comply with s 198(6), the Federal Court did not exercise the judicial power of the Commonwealth in accordance with law. It exercised an open-ended and apparently unrestrained discretion to excuse compliance with statutory obligations or to authorise conduct that is unlawful. In this regard, in *Polyukhovich v Commonwealth*,[26] Deane J said that the judicial power vested in courts must be exercised "in accordance with the essential attributes of the curial process", and that the judicial power must be exercised by "courts acting as courts with all that that notion essentially requires".[27] His Honour went on to say:[28]

> Accordingly, the Parliament cannot … infringe the vesting of that judicial power in the judicature by requiring that it be exercised in a manner which is inconsistent with the essential requirements of a court or with the nature of judicial power. ***It would, for example, be beyond legislative competence to vest jurisdiction to deal with a particular class of matter in a Ch III court and to provide that, in the exercise of that jurisdiction, the judge or judges constituting the court should disregard both the law and the essential function of a court of law and do whatever they considered to be desirable in the public interest.***

---

[25] *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 452 (Barton J). See also *Fencott v Muller* (1983) 152 CLR 570 at 608 (Mason, Murphy, Brennan and Deane JJ) ("[t]he unique and essential function of the judicial power is the quelling of such controversies by ascertainment of the facts, ***by application of the law*** and by exercise, where appropriate, of judicial discretion") (emphasis added); *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [142] (Hayne, Crennan, Kiefel and Bell JJ, quoting *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 496 (Gaudron J) (the "general features of the judicial process" include "the identification of the applicable law, followed by an application of that law" to the facts).

[26] (1991) 172 CLR 501 at 607.

[27] (1991) 172 CLR 501 at 607.

[28] (1991) 172 CLR 501 at 607 (emphasis added).

26. The grant of the injunction by the primary judge involved the exercise of a kind of jurisdiction that, in Deane J's view, could not permissibly be conferred on a Ch III court.

27. No suggestion is made by the Commonwealth parties that judicial power may ***never*** be exercised to restrain the performance of the duty to remove under s 198(6) of the *Migration Act* or that the obligation to perform that duty will always take precedence over the exercise of judicial power. To the contrary, the Commonwealth parties accept that performance of that duty ***may*** be restrained by interlocutory injunction where proceedings are commenced which challenge the existence of the duty, for instance where there is a challenge to the validity of a decision that, if invalid, would mean that there was never a duty to remove.

28. That was the circumstance in *Moana v Minister for Immigration and Border Protection*.[29] That case concerned the removal of a non-citizen from Australia whilst proceedings were extant where it was argued that, if successful, the foundation for compliance with the requirement to remove would no longer exist.[30] In such a case, the resolution of the issue to be litigated will determine whether the power to remove is actually engaged, and if it is not engaged then final relief to prevent removal would be available. The position is different where, as here, the Court could not restrain removal on a final basis even if the judicial review challenge succeeds. In those circumstances, removal cannot be restrained on an interlocutory basis because that relief is not capable of properly being seen as appropriate to the protection of the subject matter in dispute or the Court's processes.[31]

29. The unavailability of interlocutory relief restraining removal in these circumstances does not impermissibly undermine the Court's capacity to protect its own processes. The general law principles simply reflect the difference between "the duty of the Court

---

[29] (2019) 265 FCR 337.

[30] (2019) 265 FCR 337 at [44]–[47] (Allsop CJ).

[31] Compare, for example, *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at [62] (Gaudron J); see also [3], [8], [11]–[12] (Gleeson CJ), [105] (Gummow and Hayne JJ). See also *Minister for Immigration, Local Government and Ethnic Affairs v Msilanga* (1992) 34 FCR 169 at 179 (Beaumont J; Black CJ agreeing); *Minister for Immigration and Multicultural and Indigenous Affairs v VFAD* (2002) 125 FCR 249 at [123]–[124] (the Court).

to respect, indeed, to defer to",[32] a validly enacted legislative duty,[33] and its ability to protect its processes by restraining performance of a duty where proceedings are commenced which challenge the existence of, or foundation for, the duty. There is no need for the modification of those principles to conform with any constitutional limit derived from Ch III.[34]

30. For these reasons, the Full Court erred in observing that "[a] court which lacked [the power to issue an injunction of the kind issued in this case] would not be a court", and that that "power is inherent in its character" (FC [126]) (**CAB 84-85**). Rather, as Lindgren J correctly observed — in the case upon which the majority below relied in support of that proposition — "[i]t would be inconsistent with the rule of law if courts could be denied their role of resolving judicial disputes ***in accordance with law***".[35]

31. *Finally*, properly characterised, the injunction upheld by the Full Court purported to create an exception from compliance with the duty in s 198(6) for as long as the injunction is in force. That is an exception that Parliament could have, but did not, create. Moreover, it is an exception that is inconsistent with Parliament's decision to impose a mandatory obligation, rather than a discretion to remove. The Constitution requires a "great cleavage" between legislative and judicial power,[36] for good reason. In a passage that has been quoted by members of this Court, Blackstone said that "[w]ere [judicial power] joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose ***decisions*** would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe".[37] In cases

---

[32] Compare, by analogy, *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148 at 156 (Mason ACJ).

[33] Indeed, covering cl 5 of the Constitution makes clear that all laws validly made by the Commonwealth Parliament "shall be binding on the courts [and] judges". See also *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at [173] (Kirby J) ("For an Australian court, a refusal to apply, and to give effect to, provisions of a valid federal act is not an available option. Fundamental to the Australian Constitution is respect for the rule of law. If the law is clear and constitutionally valid, it is the duty of Australian courts to apply its terms").

[34] Cf *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566 (the Court).

[35] *Williams v Minister for the Environment and Heritage* (2003) 199 ALR 352 at [17] (emphasis added).

[36] Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910) at 101, quoted in *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 117 (Evatt J); *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529 at 546 (the Board); *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); *Grollo v Palmer* (1995) 184 CLR 348 at 393 (Gummow J).

[37] See, eg, *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 382–383 (Isaacs J) (describing the passage, amongst others, as "a key" to the meaning of the judicial power of the Commonwealth) (emphasis in

where the duty to remove is not impugned, it is no part of the judicial power of the Commonwealth to modify the application of that duty contrary to the will of Parliament.

32. In this regard, a court could not suspend or modify the operation of a law simply because the consequence of its enforcement will mean that particular proceedings either cannot or will not be maintained. For example, if Parliament passed a law that imposed a tax payable by an applicant in proceedings and the validity of that tax was not impugned in those proceedings, a court could not excuse the applicant from paying that tax on the basis that, in doing so, it would make it harder for the applicant to continue with the proceedings or even might send them bankrupt. As Brennan CJ said in *Nicholas v The Queen*,[38] "[i]t is the faithful adherence of the courts to the laws enacted by the Parliament, however undesirable the courts may think them to be, which is the guarantee of public confidence in the integrity of the judicial process and the protection of the courts' repute as the administrator of criminal [and civil] justice".

PART VII: ORDERS SOUGHT

33. The Commonwealth parties seek the following orders (**CAB 96-97**):

1. Appeal allowed.

2. Set aside paragraphs 2 and 3 of the orders of the Full Court of the Federal Court of Australia and, in their place, order that:

    a. the appeal to the Full Court of the Federal Court of Australia be allowed, with costs;

    b. the orders of the primary judge be set aside and, in their place, order that the application for interlocutory injunctive relief sought in the originating application filed on 8 August 2023 be dismissed, with costs.

3. The appellants pay the respondent's costs of, and incidental to, the appeal.

---

original); *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580 (Deane J); *Palmer v Ayres* (2017) 259 CLR 478 at [77] (Gageler J). See also Montesquieu, *The Spirit of Laws* (1748), quoted in *Grollo v Palmer* (1995) 184 CLR 348 at 393 (Gummow J) and *Palmer v Ayres* (2017) 259 CLR 478 at [76] (Gageler J) ("[w]ere [the power of judging] joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator").

[38] (1998) 193 CLR 173 at [37].

PART VIII: ESTIMATED TIME

34. The Commonwealth parties estimate that up to 1.5 hours will be required for oral argument, including reply.

Dated: 13 June 2024

Perry Herzfeld
02 8231 5057
pherzfeld@elevenwentworth.com

Cobey Taggart
08 9220 0408
ctaggart@francisburt.com.au

Jackson Wherrett
02 8066 0898
wherrett@elevenwentworth.com

IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN:

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
First Appellant

SECRETARY, DEPARTMENT OF HOME AFFAIRS
Second Appellant

THE RELEVANT OFFICERS ACTING UNDER SECTION 198 OF THE MIGRATION ACT 1958
Third Appellant

and

MZAPC
Respondent

ANNEXURE TO THE JOINT SUBMISSIONS OF THE APPELLANTS AND THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the Commonwealth parties set out below a list of the constitutional provisions and statutes referred to in their submissions.

No	Description	Version	Provision(s)
1.	Constitution	Current	Ch III
2.	*Migration Act 1958* (Cth)	Current	ss 3A, 195A, 198, 417