HIGH COURT OF AUSTRALIA

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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

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

PART I: CERTIFICATION

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

PART II: REPLY

2. ***Material facts.*** The proceedings below were conducted on the basis that "the only final relief that could be granted to [the respondent] would be a declaration" (cf **RS [4]**, see **AS fn 2**). That was the premise of the Full Court's reasons. The respondent has not filed a notice of contention raising the issue of the availability of relief. The respondent's submission that he would be entitled to mandamus or a final injunction is contrary to a series of decisions of the Federal Court, including one in which the respondent was the applicant.[1] The respondent does not attempt any explanation of why those decisions are wrong. In any event, none of the respondent's submissions in this Court depend upon the availability of other final relief; his case is, indeed, to the contrary.

3. As to **RS [5]**, when these proceedings were commenced, the time for the performance of the duty had "crystallised". It was not postponed by their mere commencement. The question is whether, in cases where the duty to remove is not impugned, the Federal Court has power to grant an interlocutory injunction that would have the ***effect*** of removal no longer being reasonably practicable when it otherwise would be.

4. ***General principles.*** The Federal Court's power to grant interlocutory relief to prevent the frustration of that Court's proceedings is not a power that can be exercised wherever the order is "capable of properly being seen as 'appropriate' to the case in hand" (contra **RS [8], [20]**). In the passage from *Cardile* upon which the respondent relies, the plurality referred to the reasons of Deane J in *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, where his Honour said "[w]ide though [the power in s 23 of the *Federal Court Act*] is, it is subject to both jurisdictional and other limits" (at 622). The relevant "limit" in the present case is ***the law***, specifically s 198(6). The correct "focus" is "upon what is demanded by the interests of justice" ***according to law*** (cf **RS [9]**). The respondent's discussion of *Tait* in **RS [7]** involves the error of failing to read reasons for judgment in the context of the facts and issues in the case (cf **AS [12]**).

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[1] As to mandamus, see *MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 877 at [30] (Colvin J). As to injunctions, see *Marya v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 433 at [23] (Rofe J); *MZAPC* [2023] FCA 877 at [43]-[44] (Colvin J); *BJM16 v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 995 at [36]-[47] (Rares J); *ASU22 v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1326 at [26]-[32] (Wigney J).

5. ***Proper construction of s 198(6).*** The respondent's submissions are temporally misfocussed. The Commonwealth parties accept that, where a court has issued an injunction restraining removal, removal is therefore not "reasonably practicable" while it is in force. Here, removal of the respondent is not presently "reasonably practicable" by reason of the injunction. But ***before*** it was issued, there ***was*** an "immediate and absolute obligation" to remove the respondent. That is not an "assumption" — it is what s 198(6) required and was the basis of the Full Court's reasons (cf **RS [11]**).

6. As to **RS [12]**, in *Mastipour*, Mansfield J was wrong to consider that the duty to remove was not immediately applicable where the applicant had commenced civil proceedings relating to his detention (at [33]-[34]). The factual differences between *Mastipour* and *P1* identified at [37] were, even if true, irrelevant — in both cases, the duty to remove was immediately applicable (as French J correctly accepted in *P1*). *Mastipour* is also inconsistent with this Court's decision in *Ex parte De Braic* (1971) 124 CLR 162, in which Windeyer J said that "[a] prohibited immigrant cannot escape the consequences of his status and remain in Australia by commencing an action in an Australian court" (at 167, see also 165 (Barwick CJ, McTiernan, Menzies and Owen JJ agreeing)). The "significant factual differences" identified by Mansfield J at [31] are irrelevant — the reason the person was liable to be removed in both cases was the same: ***their status***.

7. The decision of the Full Court of the Federal Court in *M38/2002* provided no support for Mansfield J's conclusion (cf **RS [12]**). There is no doubt that "[w]hether the removal of a non-citizen is 'reasonably practicable' may direct attention to a range of considerations". But the Court did not suggest that one of those "considerations" is the mere institution of proceedings in which the duty to remove is not impugned. The supposedly "[s]imilar reasoning" in *WKMZ* is, similarly, irrelevant (cf **RS [13]**). Even if s 198(6) does not preclude the Executive from taking time to consider alternative possibilities for a person to remain in Australia (as suggested in that case), there is no suggestion that any such consideration is being given in the present case.

8. In relation to **RS [14]**, the "obvious" possibility contemplated by Parliament in s 153(2) is that a court might make an interlocutory order enjoining a person's removal when the court has power to make such an order. Again, the Commonwealth parties accept that s 198(6) "accommodates deferral of removal for the duration of an order made in exercise of the court's power to ensure the effective exercise of its jurisdiction" (which is consistent with s 153). The relevant question is whether the court has power to make that order in the first place.

9. Contrary to **RS [15]**, neither *SZSPI* (2014) 233 FCR 279 nor *Moana* (2019) 265 FCR 337 provide support for the availability of injunctive relief in proceedings where the duty to remove is not impugned (a point already made in relation to *Moana* at **AS [28]**). Indeed, in *SZSPI*, the Full Court observed that, to the extent that observations made by a previous Full Court "may be read as meaning that no removal can take place whilesoever any application remains pending in the Court, it is too wide" (at [20]). Their Honours expressly accepted that a person may be removed even where they have a "subsisting and pending application" in the Federal Court (at [46]).

10. For these reasons, contra **RS [16]**, it ***is*** the case that the order of the primary judge "directs officers of the Commonwealth not to comply with a legal duty imposed upon them by legislation". It is true that those officers will not act in breach of that duty by not removing the respondent for as long as the injunction is in force. But that is the problem: they are being directed not to comply with their duty, even though nothing in the proceedings casts doubt upon its existence, solely ***because of*** the injunction.

11. ***Restraining performance of the duty.*** Where an applicant brings proceedings challenging the duty to remove and an interlocutory injunction is granted on that basis, it is true that — in the event that the proceedings fail — the court will have made orders restraining compliance with an obligation that, it turns out, ought to have been performed (cf **RS [19]**). That is an ordinary feature of interlocutory injunctive relief. The point is that, in a proceeding of that kind, there is doubt about whether the duty to remove is engaged, which will be resolved by those proceedings. The injunction operates to preserve the status quo until then. By contrast, in the present case, there is no doubt that the duty to remove is engaged (but for the injunction) and the proceedings will not resolve any doubt in that regard.

12. In relation to **RS [20] (and RS [36]**), the decision in *Mastipour* was wrongly decided for the reasons set out above. *Attorney-General (NSW) v Ray* (1989) 90 ALR 263 is distinguishable, as a matter of fact and law. In that case, the Supreme Court of New South Wales held that the deportation of a person in the face of pending criminal proceedings, so that those proceedings could not be completed, would be a contempt (at 271). Section 20 of the *Migration Act* (as then in force) was held not to be a defence, because the Court construed it as ***not*** requiring "the executive to carry out the deportation order come what may" (at 275) including, relevantly, where that would be a contempt. The Court thus had power to grant an injunction restraining the threatened contempt. Under the current *Migration Act*, s 153 provides that no law (including the

law of contempt) prevents removal or deportation where the Act requires removal or deportation and no "criminal justice stay certificate" or "criminal justice stay warrant" is in place. Accordingly, there could not now be any threatened contempt to restrain. Consistently with this, there is no suggestion in this case that any contempt would be committed if the respondent were removed, absent an injunction.

13. Contrary to **RS [21]**, which adopts the reasons of the Full Court in this case, the power to issue an injunction in a case where the duty to remove is not impugned cannot turn on whether there is a "reasonable justification" to excuse compliance with the duty. That would involve a discretion to decide whether the law should be obeyed.

14. In *CPK20*, as the respondent correctly notes (**RS [22.6]**), Mortimer J concluded that the subject matter of the proceeding would not be at further risk if an injunction were not granted. Accordingly, her Honour did not need to consider whether interlocutory relief would be available if the contrary had been found (contra **RS [23], [34]**). Contrary to **RS [24]**, there is no "similar point" in *SZQRB* at [279], where their Honours made an entirely orthodox statement about one of the circumstances in which an injunction can be ordered. Likewise, in *Fejzullahu* (2000) 74 ALJR 830, no question arose as to the Court's power to grant an interlocutory injunction in the circumstances there, as Gleeson CJ held that there was no serious question to be tried in relation to the substance of the applicants' claims (**RS [26]**).

15. ***Factor in the balance of convenience.*** Whether or not the law should be followed cannot be a factor that is weighed in the balance of convenience (contra **RS [27]**). Neither of the cases relied upon by the respondent support the contrary view (and the joint reasons below provide an example of the wrong approach (contra **RS [30]**)).

16. Contrary to **RS [28]**, French J's observations in *P1* at [51] were not part of his Honour's assessment of the balance of convenience. As the respondent points out, that matter is dealt with in the previous paragraph. His Honour accepted the Minister's submission that "the mandatory terms of the legislation ***leave no room***" for unlawful non-citizens to remain in Australia for the purpose of pursuing legal proceedings. If there is "no room", there is no discretion to exercise and the balance of convenience is irrelevant.

17. Contrary to **RS [29]**, Lindgren J's use of the word "right" in *NAEX* at [28] does not "suggest[] an element of discretion rather than absence of power". His Honour was saying that he could not conceive of circumstances in which it would be "right" in the

sense of "correct", or more specifically ***in accordance with law***, to make an order that would require that an officer not discharge "such a clear statutory obligation".

18. ***Power to be exercised in accordance with principle.*** The respondent says that "[t]here can be no doubt that the grant of an interlocutory injunction to ensure the effective exercise of its jurisdiction must be done in accordance with the law" (**RS [31]**). Contrary to the apparent suggestion of the respondent, the relevant "law" is not only the law that governs the grant of an interlocutory injunction — it is all law. Relevantly for present purposes, the law in accordance with which the power to issue an interlocutory injunction must be exercised includes s 198(6) of the *Migration Act*.

19. In relation to *Simsek*, contrary to **RS [33]** it is necessarily implicit in Stephen J's reasons that the prima facie case that the applicant had to establish was that there was not a present duty to remove him from Australia. As explained in **AS [17(c)]**, the broader basis upon which the applicant sought the injunction was rejected as "misconceived". Again, the respondent fails to read the reasons as a whole and in context.

20. ***Other authorities.*** All of the cases at **AS [16]** are inconsistent with the respondent's case (contra **RS [35]**). What is said by the respondent to distinguish *Reid* is opaque.

21. ***Essential characteristics of a court.*** In relation to **RS [40]-[44]**, even if the inherent power of a court to protect the integrity of its processes is an "essential characteristic", it must be an aspect of that "essential characteristic" that that power be exercised in accordance with law (which is accepted at **RS [31]**). There can be no "substantial impairment" of that "essential characteristic" by a court's applying a law whose validity and application are not impugned in the proceeding. Otherwise, the court would have power to dispense with any law that might make it more difficult for a person to conduct proceedings, like the tax example in **AS [32]**. While courts are not required to act at the dictation of the Executive (**RS [42]**), they are required to apply the unchallenged laws made by Parliament. That is, indeed, a hallmark of judicial power.

Dated: 18 July 2024

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THE RELEVANT OFFICERS ACTING UNDER SECTION 198 OF THE MIGRATION ACT 1958
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ANNEXURE TO THE JOINT REPLY 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.	*Federal Court of Australia Act 1976* (Cth)	Current	s 23
2.	*Migration Act 1958* (Cth)	Current	ss 153, 198
3.	*Migration Act 1958* (Cth)	As at 13 November 1989	s 20