HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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Details of Filing

File Number:	P21/2024
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Important Information

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IN THE HIGH COURT OF AUSTRALIA

PERTH REGISTRY

BETWEEN:

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS & ORS

Appellants

and

MZAPC

Respondent

FURTHER OUTLINE OF ORAL SUBMISSIONS OF THE RESPONDENT

PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Ground 1 of the notice of contention

1. ***Facts:*** The primary judge found that the respondent had made requests for the Minister to exercise personal non-compellable powers in his favour in June and July 2023, and that it was arguable that he did so at times between 2016 and 2022: **CAB 24 [29]-[31], 27 [44], 28-29 [47]-[48]**. There was no finding or evidence that any request was made known to the Minister personally.

2. ***Relevant principle:*** It is not reasonably practicable to remove an unlawful non-citizen who has requested the Minister to exercise a personal non-compellable power in their favour in circumstances where that request has not been made known to the Minister personally, unless the Minister has indicated that they do not wish for it to be made known to them or that they do not wish to consider exercising the power: see **RSS [18]-[19]**.

3. This principle is a necessary implication from the exclusive conferral of these non-compellable powers upon the Minister personally. To remove without making the request known to the Minister subverts the Minister's role and, in substance, makes the decision for the Minister not to consider the request. See **RSS [12]-[13]**, **RSR [6]-[7]**.

    - *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 214 (**JBA Vol 7, Tab 39**)

4. Via the statutory stipulation that removal must be "as soon as reasonably practicable", the removal obligation imposed on officers accommodates the Minister's personal non-compellable powers. See **RSR [2]-[4]**.

5. ***Objections:*** The Commonwealth's objections to this principle are unpersuasive.

(a) The fact that the Minister does not have a duty to consider a request, thereby conferring the Minister a most wide decisional freedom, does not mean that an officer can act in a way that takes away the Minister's decisional freedom entirely.

(b) The fact that the Act does not provide in terms for a request to be made does not mean that a request, if made, cannot have legal significance.

(c) Concerns about intolerable uncertainty are overstated. Whether a request has been made known to the Minister personally (or whether the Minister has indicated an unwillingness for a request to be made known to them or to consider it) are factual questions.

(d) The Minister maintains the ability to indicate, via guidelines or directions, how to deal with cases or classes of cases. Conceivably absurd results are thus avoided; the Commonwealth's construction leads to absurdity by contrast.

(e) Indeterminate and arbitrary executive detention does not result. There is an enforceable statutory obligation on an officer given a request to provide it to the Minister unless the Minister has indicated an unwillingness for a request to be made known to them or a wish not to consider it.

- *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 288 FCR 23 at [87], [259]–[270] (**SJBA Tab 10**)

6. ***The Department's consideration of the respondent's case:*** Separately, the Court found that the Department, applying the Minister's guidelines, determined not to refer the respondent's case to the Minister for consideration. It is arguable that, if those guidelines are invalid, the Minister has invited requests to be made known to them in cases otherwise unknown. To remove an unlawful non-citizen without bringing their case to the Minister personally or the Minister indicating (validly) how to proceed would similarly subvert the Minister's personal non-compellable power. See **RSS [17]-[19]**, **RSR [14]**.

Notice of appeal

7. The respondent had a special interest in obtaining the relief sought such as to have had standing to bring the proceeding, which would be rendered nugatory if the respondent were to have been removed without an injunction being made requiring him to be kept in Australia: see **RS [21]**, **RSS [12]**.

8. A superior court can issue interlocutory relief to preserve the utility of the relief claimed in the proceeding: see **RS [7]**. This does not depend upon the protection of any legal or equitable right: see **RS [8]-[9], [23]-[26]**. It also does not depend on the respondent having a legal right to be in Australia (or a claim to have such a right).

   - *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at [35] (**JBA Vol 5, Tab 25**); *Tait v The Queen* (1962) 108 CLR 620 at 624 (**JBA Vol 6, Tab 33**); *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at [26], [31], [35]-[42] (**JBA Vol 3, Tab 11**)

9. Section 198(6) was engaged but an injunction did not require an officer not to do that which they were compelled by law to do.

   - See *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 146 at [64], [65] (**JBA Vol 7, Tab 40**); *Mastipour v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 140 FCR 137 at [32]-[33] (**JBA Vol 7, Tab 41**).

10. Clear words would be needed before s 198(6) would be interpreted to exclude the Federal Court's power to make an interlocutory order necessary to protect its own processes.

Ground 2 of the notice of contention

11. Section 198(6) could not validly prevent the Federal Court from making an interlocutory order necessary to protect its own processes. See **RS [37]-[49]**.

   - *Dupas* (2010) 241 CLR 237 at [15] (**JBA Vol 4, Tab 17**); *Hogan v Hinch* (2011) 243 CLR 506 at [85]-[91] (**JBA Vol 4, Tab 21**); *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 [187] (**JBA Vol 3, Tab 14**); *Dietrich* (1992) 177 CLR 292 at 326, 327 (**JBA Vol 4, Tab 16**); *Totani* (2010) 242 CLR 1 at [1] (**JBA Vol 6, Tab 32**); *SDCV* (2022) 96 ALJR 1002 at [138], [237] (**JBA Vol 7, Tab 50**)

Dated: 13 November 2024

Craig Lenehan	**Anthony Krohn**	**Christopher Tran**	**Amanda Sapienza**
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