HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN: **MINISTER FOR IMMIGRATION 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

SUPPLEMENTARY SUBMISSIONS OF THE RESPONDENT
ON GROUND ONE OF THE FURTHER AMENDED NOTICE OF CONTENTION

PART I FORM OF SUBMISSIONS

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

PART II ISSUE

2. Does s 198(6) of the *Migration Act 1958* (Cth) (the **Act**) permit (indeed, require) the removal of the respondent from Australia where, in excess of executive power, a departmental officer decided not to bring his case to the Minister's attention for possible consideration of whether to exercise a personal non-compellable power in his favour or where the respondent has requested the Minister exercise such a power and that request has not been brought to the Minister's attention?

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

3. Sufficient notice has been given under s 78B of the *Judiciary Act 1903* (Cth): **CAB 101–106**.

PART IV MATERIAL FACTS

4. On an application for interlocutory relief, the primary judge found that the Department had assessed the respondent's circumstances against ministerial guidelines and decided, based on those assessments, not to bring his case to the Minister's attention for consideration under s 195A of the Act: **CAB 29 [49]**; see also **CAB 27 [44]**. The primary judge further found that it was reasonably arguable that the departmental officers who did so acted in excess of executive power: **CAB 19-20 [12]-[13]**].

10 5. Further, on 18 June 2023, the respondent submitted a request for ministerial intervention under ss 351 and 417 of the Act, and a request for ministerial intervention under s 48B of the Act: **CAB 24 [29]**. On 3 July 2023, the respondent requested the Minister to exercise powers under s 195A to grant him a visa and under s 197AB to permit him to reside in the community: **CAB 24 [30]**. And on 4 July 2023, the respondent submitted a further request for Ministerial intervention under ss 351 and 417: **CAB 24 [31]**. There is no evidence or finding that these requests were brought to the Minister's attention.

PART V ARGUMENT

A. THE CONTENT OF THE DUTY AND POWER IN SECTION 198(6)

6. Section 198(6) of the Act imposes a duty on an officer to remove an unlawful non-citizen
20 from Australia "as soon as reasonably practicable" once certain preconditions in paragraphs (a) to (d) have been met. There is no dispute that paragraphs (a) to (d) were satisfied in the respondent's case.

7. In *Plaintiff M61/2010E v Commonwealth* (***Plaintiff M61***), this Court held that:[1]

> …the obligation created by s 198(2)(a) to remove an unlawful non-citizen who is covered by s 193(1)(c) "as soon as reasonably practicable" should be read as accommodating the making of inquiries, in the words quoted earlier, "to enable

[1] (2010) 243 CLR 319 at [35] (the Court).

> the Minister … to decide whether to allow an application for a visa to be made by unauthorised arrivals on excised offshore places". That is, s 198(2) should be read as accommodating the taking of steps for the purpose of informing the Minister of matters relevant to the possible exercise of the power under either s 46A or s 195A.

8. That is, it was not reasonably practicable to remove an unlawful non-citizen under s 198(2) where inquiries were being made to inform the Minister's consideration of whether or not to exercise the personal non-compellable power in the unlawful non-citizen's favour. As the Full Federal Court's decision in *SZSSJ v Minister for Immigration and Border Protection (No 2)* (***SZSSJ***) recognises, what the High Court said about s 198(2) applies with equal force to s 198(6).[2]

9. Both *Plaintiff M61* and *SZSSJ* arose in a context where a procedural decision had been made by the Minister to consider exercising the personal non-compellable power. The expression "as soon as reasonably practicable" was held in those cases to permit steps to be taken for the Minister to consider exercising their power.

10. The respondent's case is factually different because there is no finding that the Minister has made a procedural decision (either favourable or adverse) in respect of the respondent, but the respondent's case is on a conceptually similar footing.

11. Specifically, the respondent submits that s 198(6) and the words "as soon as reasonably practicable" do not permit or require an officer to remove an unlawful non-citizen where they have requested the Minister to exercise a personal non-compellable power in their favour and the request has not been brought to the Minister's attention. That includes a case where, as here, departmental officers have considered whether to bring the unlawful non-citizen to the Minister's attention and decided, unlawfully, not to do so.

12. If an officer removes an unlawful non-citizen in such circumstances, that officer will, by their conduct, prevent the Minister from making a procedural decision to consider exercising a statutory non-compellable power in that unlawful non-citizen's favour. Indeed, to remove a person from Australia where that person has sought a decision from the Minister, or where

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[2] (2015) 234 FCR 1 at [38]-[39], [48]-[49] (the Court).

the Department has not completed its consideration of whether to bring their case to the Minister's attention in a lawful manner, would amount to the removing officer, rather than the Minister, making the procedural decision not to consider the person's case. In the case of the power to grant a visa pursuant to s 195A(2) or the power to permit the making of a valid visa application pursuant to s 48B(1), any exercise of the power would be rendered nugatory by the removal. The benefit of those provisions is not available to a person who is not in detention (in the case of s 195A) or not in the migration zone (in the case of s 48B, when read with s 48A).

13. All of this would be contrary to this Court's decision in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (***Davis***),[3] which emphasised that *only* the Minister can make the procedural decision not to consider exercising a personal non-compellable power.[4] To remove a person from Australia where that person has sought a decision from the Minister, or where the department has not completed its consideration of whether to bring their case to the Minister's attention in a lawful manner, would amount to the procedural decision not to consider the person's case being made by a person other than the Minister, contrary to the statutory requirement that each of the personal non-compellable powers be exercised by the Minister personally.[5] "[T]he departmental officers both decided that the Minister should not make a procedural decision about the request and, in substance, made a negative procedural decision about the request. In so doing, the departmental officers acted beyond the executive power, which was confined by s 351 of the Act".[6]

14. Before removal may occur, at a minimum, a request for the exercise of a personal non-compellable power must be brought to the Minister's attention, or, if the Department is considering whether to refer a person's case to the Minister of their own volition, they must do so lawfully. This does not invite continuation of detention "at the unconstrained discretion of the Executive"[7] because the duration of the person's detention can be controlled through an application for mandamus to compel the Secretary to bring the request to the attention of

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3 (2023) 97 ALJR 214.

4 *Davis* (2023) 97 ALJR 214 at [18], [28] (Kiefel CJ, Gageler and Gleeson JJ), [93], [97] (Gordon J), [147] (Edelman J), [198] (Steward J), [302] (Jagot J). See also *Plaintiff M61* (2010) 243 CLR 319 at [70].

5 See ss 48B(2), 195A(5), 351(3), 417(3).

6 *Davis* (2023) 97 ALJR 214 at [318] (Jagot J). See also at [172] (Edelman J).

7 *Plaintiff M61* (2010) 243 CLR 319 at [64].

the Minister.[8] The Secretary has an enforceable duty to bring a person's case to the attention of the Minister.[9]

15. The respondent's construction of s 198(6) gives personal non-compellable powers and the duty to remove an harmonious construction. The time for an officer's performance of the duty to remove is not permitted to cut-across and stymie the extraordinary power vested by the Parliament in the Minister. In the result, this analysis allows "for the duties in s 198 to remove a person to be performed in a way which accommodates other aspects of the statutory scheme".[10]

B. RESOLUTION OF GROUND 1 OF THE FURTHER AMENDED NOTICE OF CONTENTION

16. The injunction issued by the primary judge in this case did not require the executive not to comply with the law. There was, in the circumstances of this case, no immediate duty to remove.

17. *First*, departmental officers having assessed the respondent's case but unlawfully refrained from bringing it to the Minister's attention, the respondent is not required to be removed, and cannot be removed, under s 198(6) until his case is brought to the Minister's attention or it is lawfully kept from the Minister's attention.

18. *Second*, there was no evidence that the latest requests were brought to the Minister's attention. Unless and until that is done, or some lawful instruction is given by the Minister by which that need not be done, it is not reasonably practicable to remove the respondent.

19. In these circumstances, there was no duty or power to remove under s 198(6). It was not yet reasonably practicable to remove the respondent. Rather, the expression "as soon as reasonably practicable" accommodated at least the bringing of the respondent's case to the Minister's attention. There being no evidence of that having occurred, an interlocutory

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8 See, by analogy, *Commonwealth v AJL20* (2021) 273 CLR 43 at [52] (Kiefel CJ, Gageler, Keane and Steward JJ).

9 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 288 FCR 23 at [87] (Griffiths J), [259]-[270] (Charlesworth J).

10 *WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 285 FCR 463 at [115] (Kenny and Mortimer JJ).

injunction did not, at the time of its grant, prohibit any officer from doing that which they were required to do.

20. As for the position after an injunction has been granted (ground 1c of the Further Amended Notice of Contention), the respondent relies on the submissions filed on 13 August 2024.

PART VI ESTIMATED TIME

21. The Respondent estimates that up to 2 hours will be required for his oral argument on all issues arising in the appeal.

Dated: 12 September 2024

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Craig Lenehan
Fifth Floor St James' Hall

Anthony Krohn
Owen Dixon Chambers East

Christopher Tran
Banco Chambers

Amanda Sapienza
Level 22 Chambers

Counsel for the Respondent

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ANNEXURE TO THE SUPPLEMENTARY SUBMISSIONS OF THE RESPONDENT

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the Respondent sets out below a list of the constitutional provisions and statutes referred to in his supplementary submissions.

No	Description	Version	Provision(s)
1.	*Migration Act 1958* (Cth)	Current	ss 48A, 48B, 197AB, 198, 351, 417