HIGH COURT OF AUSTRALIA

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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

10 Third Appellant

MZAPC

Respondent

RESPONDENT'S FURTHER REPLY SUBMISSIONS

PART I FORM OF SUBMISSIONS

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

PART II REPLY

Accommodation of steps to inform the possible exercise of power after a procedural decision

2. While the respondent should succeed regardless of which of the two approaches identified in the Commonwealth's further submissions (**CFS**) **at [16]** is adopted, the respondent contends that
20 the second approach in **CFS [16(b)]** is the correct one. It is not "reasonably practicable" to remove an unlawful non-citizen while steps are being taken to inform the Minister in relation to the making of a substantive decision. This Court in *Plaintiff M61 v Commonwealth*[1] should not be understood to have tethered itself to the specific language of s 198(2)(c), which refers to the possibility of making a valid application. On its face, s 198(2)(c) does appear to have some plausible connection with s 46A, which imposes a bar on valid applications (s 46A(1)) that can be lifted (s 46A(2)). But s 195A is not about valid *applications*, but the actual *grant* of a visa simpliciter.

3. One might reason that the reference to an "unlawful non-citizen" throughout s 198 provides a foothold to accommodate the consideration of whether to exercise power under s 195A (because,

[1] (2010) 243 CLR 319.

upon the grant of a visa, the person will instead be a lawful non-citizen). But absent some cogent reason to the contrary, the more natural place to locate an accommodation between competing parts of a statute must surely lie in the open-textured language "as soon as reasonably practicable". As the Commonwealth accepts, that position is open on the authorities, particularly *Plaintiff S4/2014 v Minister for Immigration and Border Protection*.[2]

4. The Commonwealth's reason for fossicking around in the statute and putting this obvious language to one side is that practicability is only concerned with the practical capacity to remove and nothing more: **CFS [21]-[22]** (relying on the ordinary meaning of that term). But "reasonable practicability" must be assessed in the context of the statute as a whole and what it reveals about the statutory design, which is far more helpful than seeking to make a fortress out of the dictionary.[3] While it goes too far and is unhelpful to say that the word "'reasonably' operates in an 'opposing sense to the word 'practicable'",[4] it cannot be correct to read reasonable practicability as unconcerned with matters other than the logistical ability to remove a person. To do so would not read the statutory language in the overall statutory context. To do so could not explain why it is sometimes inappropriate to remove a person while they have litigation on foot;[5] litigation in Australia says nothing about the willingness of another country to receive a person and the ability to arrange a flight to take them there.

Accommodation prior to a procedural decision

5. The linchpin of the Commonwealth's argument is that the Minister has no duty to consider exercising a personal non-compellable power even if they are requested to do so. However, to say that the Minister has no duty to consider exercising power is not to deny that the Minister has been given a liberty to exercise, which serves an important function in the overall statutory scheme. And to say that a request by an unlawful non-citizen does not trigger a corresponding duty to consider in the Minister does not mean that a request must have "***no*** legal significance": **CFS [24]**. The Act assumes and implies that an application (ie a request) can be made.[6] It is, on any view, a thing in

[2] (2014) 253 CLR 219.
[3] *Thiess v Collector of Customs and Others* (2014) 250 CLR 664 at [23].
[4] *NATB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 506 at [50] (Wilcox, Lindgren and Bennett JJ).
[5] See generally *Moana v Minister for Immigration and Border Protection* (2019) 265 FCR 337; *SZSPI v Minister for Immigration and Border Protection* (2014) 233 FCR 279.
[6] See *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at [31]).

fact the existence of which is expressly contemplated by the statute. The *legal consequences* of the doing of that thing is then a question of construction,[7] which requires close attention to the particular power or duty in issue.

6. That constructional question, to be resolved by construing the Act as a whole, is whether and when action can (indeed, must) be taken under s 198 where to do so would deny the Minister that liberty which the Act confers uniquely upon the Minister. Removing a person before a procedural decision is made is more, not less, inimical to the liberty which is the Minister's alone. In that event, the Minister has not even been made aware that an opportunity to consider whether to exercise the personal non-compellable power has arisen.

10 **7.** Take a situation where the Minister has made lawful guidelines about when it is the Minister wishes to consider exercising a personal non-compellable power. While departmental officers are considering the application of those guidelines to determine whether or not to refer the case to the Minister, it would not be a reasonable construction of the Act as a whole to conclude that another officer can (indeed must) remove the person. To do so would deny the liberty conferred by the Act upon the Minister.

8. The Commonwealth expresses a concern about "intolerable imprecision and uncertainty" and the potential for detention to be prolonged: **CFS [28]-[29]**. Some of the questions the Commonwealth raises are better left to cases where there are facts to permit them to be answered; how matters play out in the facts of this case is addressed below. It is important though to dispel
20 any concern about "necessarily uncertain prognostications", which may in turn raise a constitutional issue about limits on detention.

9. *First*, there is an enforceable duty to tell the Minister that a person has made a request for the Minister to exercise a personal non-compellable power in their favour. Just as the Act assumes and implies that a request can be made, so it assumes and implies that the existence of a request will be made known to the Minister. That is necessary otherwise the request would be pointless: cf **CFS [43]**. Lacunae of that nature have readily supported implications of the kind for which the respondent contends in the context of the Act.[8] That *the Minister* has no duty to consider a request

[7] See *New South Wales v Kable* (2013) 252 CLR 118 at 138-139 [52] (Gageler J).
[8] See *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 303 (Mason, Deane and Dawson JJ): the "legislative provision will be without effective content" in the absence of the implication.

does not mean that *others* do not have an implied duty to bring the existence of the request to the Minister's attention: cf **CFS [41]**.

10. *Second*, this duty is of course subject to the Minister issuing a lawful instruction to officers about when the Minister does not wish to consider a request. Removal cannot occur while officers are considering whether the application of that instruction has the consequence that the person's request will not be considered by the Minister. But once that determination is lawfully made, removal can and must occur (provided the removal is otherwise reasonably practicable). The ability of the Minister to give such an instruction is not inconsistent with the existence of the duty posited above: cf **CFS [46]**. It is simply a qualification on it.

11. Put another way, absent a lawful instruction, a request for the exercise of a personal non-compellable power *is* to be brought to the Minister's attention.[9] So much is required by the legislative command that the procedural decision be made by the Minister personally. If a request is kept from the Minister otherwise than pursuant to a lawful instruction from the Minister, the Minister is unable to make a personal procedural decision should they choose to do so.[10]

12. *Third*, accommodating actions by officers prior to the making of a procedural decision does not invite detention at the whim of the executive without enforceable constraints. The implied obligation to bring a request to the Minister's attention is one that derives from the Act and, reading the Act as a whole (and in light of the purposive nature of detention under the Act), it is subject to the same obligation in s 198 to act as soon as reasonably practicable.[11] If an officer takes too long in assessing a case against lawful instructions, then mandamus can be sought on the basis that the request has not been brought to the Minister's attention as soon as reasonably practicable, which ensures that detention remains within constitutional limits.[12]

Application to this case

13. No finding has been made that the respondent's requests for the exercise of personal non-

[9] *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 288 FCR 23 at [258]-[260] (Charlesworth J; Griffiths J agreeing at [87]).
[10] None of the references in **CFS [36]** to *Davis v Minister for Immigration, Citizenship, Migration Services and Multicultural Affairs* (2023) 97 ALJR 214 is to the contrary. It is implicit in the reasons of the majority that, in the absence of a lawful instruction to the contrary, the Minister will at least be made aware that an *occasion* for making a procedural decision (positive or negative) has arisen or will arise: see at [16], [26], [39] (Kiefel CJ, Gageler and Gleeson JJ), [109]-[113], [146], [148], [169]-[171] (Edelman J), [253], [312], [321] (Jagot J).
[11] *Plaintiff S4* (2014) 253 CLR 219 at [28], [34], [35]; *Commonwealth v AJL20* (2021) 273 CLR 43 at [69].
[12] *Commonwealth v AJL20* (2021) 273 CLR 43 at [52] (Kiefel CJ, Gageler, Keane and Steward JJ).

compellable powers were brought to the Minister's attention. It is thus arguable that the duty to remove had not yet been triggered. The mere commencement of proceedings is not a sufficient basis on which to find that they were brought to the Minister's attention. It is notorious that the Minister is the named respondent to much litigation. It cannot be inferred absent evidence that the Minister is aware of each case. It is at least equally likely that instructions are given pursuant to delegations of authority in respect of the conduct of litigation. This is enough to justify the interlocutory injunction that was granted, because it is arguable that the duty to remove under s 198 had not arisen.

14. The Department's independent consideration of whether to bring the respondent's case to the Minister's attention is in a different position. Wholly voluntary assessments by the Department of a person's case (unconnected to a request on behalf of an applicant or instruction from the Minister) do not make removal "not reasonably practicable", because that would invite open ended detention of the kind rejected in *Plaintiff M61*. But the Department's consideration of the respondent's case was *not* independent here. It was doing so because the Minister had indicated (by way of the 2016 Ministerial Guidelines) that the Department should assess cases "on an ongoing basis" and bring cases to the Minister's attention: see **CAB 27 [42]**. Given that the respondent's prima facie case is that those Guidelines are invalid, it might be said that so too, therefore, is the Minister's expression of an interest in considering cases brought to their attention. It might also be said to follow that the Department's (invalid) consideration of the Guidelines does not make removal "not reasonably practicable". But the better analysis is that, the Minister having expressed such a willingness (albeit in an invalid way), the relevant officers understood (at least as a matter of fact) that the Minister wanted some presently unknown group of cases, which may include the respondent's case, to be brought to their attention. In that state of affairs, it was at least arguable that it was not reasonably practicable to remove the respondent until his case was brought to the Minister's attention or the Minister made it clear (for example by giving lawful instructions) that the Minister did not want to consider it. Again, this is enough to justify the interlocutory injunction that was granted.

Dated: 24 October 2024

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SECRETARY, DEPARTMENT OF HOME AFFAIRS
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THE RELEVANT OFFICERS ACTING UNDER SECTION 198 OF THE *MIGRATION ACT* 1958
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AND:

MZAPC
Respondent

ANNEXURE TO THE RESPONDENT'S FURTHER REPLY SUBMISSIONS

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 reply submissions.

No	Description	Version	Provision(s)
1.	*Migration Act 1958* (Cth)	Current	ss 46A, 195A, 198