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
BRISBANE REGISTRY

BETWEEN: **BRENDAN CRAIG THOMS**
Applicant

and

COMMONWEALTH OF AUSTRALIA
Respondent

APPLICANT'S OUTLINE OF ORAL SUBMISSIONS

PART I: INTERNET PUBLICATION

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

PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Partial disapplication – a 'reasonable suspicion' as to whether a person is an 'unlawful non-citizen' is irrelevant if they are not an 'alien'

2. Section 189 of the *Migration Act 1958* (Cth) (**Migration Act**) uses 'unlawful non-citizen' as a proxy for the term 'alien'. 'Unlawful non-citizen' is usually a correct approximation for 'alien', but, as ***Love*** *v Commonwealth* (2020) 270 CLR 152 shows, Mr Thoms is not an alien (even though he is an 'unlawful non-citizen').

3. It is uncontroversial that, as a result of *Love*, some partial disapplication of s 189(1) in respect of Mr Thoms is required (**AS** [41]-[45]; **RS** [28]). Disapplication of s 189(1) is not novel (*Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 412-413; [52] (Gaudron J) (**JBA, Vol 6, Tab 23**)) and is not complicated: ***Clubb*** *v Edwards* (2019) 267 CLR 171 at 313; [415] to 322 [433] (Edelman J) (**JBA, Vol 4, Tab 11**); s 3A Migration Act; s 15A ***Acts Interpretation Act*** *1901* (Cth). There are many instructive examples: see *Clubb* at [438]-[440]*; Newcastle Hunter River Steamship Co v Attorney-General* (*Cth*) (1921) 29

CLR 357 at 367-369 (**JBA, Vol 5, Tab 16**); *R v Hughes* (2000) 202 CLR 535 at 556-557, [43]-[44] (**JBA, Vol 5, Tab 21**).

4. The Commonwealth's submission that *Commonwealth v* ***AJL20*** (2021) 95 AJLR 567 (**JBA, Vol 7, Tab 28**) describes 'fully' the effective purpose of detention (**RS** [12]; [25]) is not to the point (**Reply** [14]). The majority there was concerned with an 'alien' and acknowledged that:

   (a) a non-alien Aboriginal Australian does not need a visa to be lawfully in Australia: *AJL20* at 578, [35]; and

   (b) the duty to detain is temporally limited by the events in s 196: 577, [28]; at 578, [34]; at 582, [52].

5. None of the obligations that require detention to be brought to an end, imposed by s 196, are applicable in respect of a non-alien. Section 189(1) has only one application: to direct an officer's attention to whether a person is an unlawful non-citizen or not. To ask whether a person is an 'unlawful non-citizen' or an 'alien' is to ask two different questions.

6. There is no power or obligation in s 189(1) for an officer to form any reasonable suspicion as to alienage. To give s 189(1) that construction, as the Commonwealth submits this Court should, would require reading words into the provision (cf **RS** at [37]). That is not the appropriate method of disapplication:

   (a) it would result in a meaning, different in a substantial respect, from what would have been its intended operation: Migration Act s 3A(2)(b); and,

   (b) it reads into s 189(1) words which are 'too much at variance with the language in fact used by the legislature' (*Clubb* at [436], citing *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531 at 548 [38]): *Clubb* at [435] to [437] (Edelman J).

Ruddock v Taylor is not 'closely analogous' to the present case

7. The submission that s 189(1) operates in circumstances that are 'very closely analogous' to those before the Court in ***Ruddock*** *v Taylor* (2005) 222 CLR 612 (**JBA, Vol 6, Tab 24**) (**RS** [13]) should not be accepted (**Reply** [10]-[11]).

8. A majority of this Court identified that Mr Taylor never submitted that s 189(1) was invalid: *Ruddock* at [35]. The majority observed that the NSW Court of Appeal did not examine s 189(1) separately from an examination of the lawfulness of the Minister's exercise of power: *Ruddock* at [29].

9. *Ruddock* is authority for the proposition that a visa cancellation decision, affected by an error of law, is capable of supporting an officer's reasonable suspicion that a person is an unlawful non-citizen (**AS** [50]-[59]; cf **RS** [23]).

10 **Conclusion**

10. Section 189, in its application to Mr Thoms, is, and always was, invalid. A suspicion (reasonable or otherwise) of an officer as to his alienage is irrelevant. The part of the cause in proceedings QUD 224 of 2020, removed into this Court pursuant to order Keane J on 11 October 2021, should be answered as follows:

Question: Was the detention of Mr Thoms between 28 September 2018 and 11 February 2020 unlawful?

Answer: Yes.

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Stephen Keim Kate Slack Arron Hartnett

9 March 2022