IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY **NO M47 OF 2018**

BETWEEN: **PLAINTIFF M47/2018**

Plaintiff

AND: **MINISTER FOR HOME AFFAIRS**

First Defendant

THE COMMONWEALTH OF AUSTRALIA

Second Defendant

OUTLINE OF ORAL SUBMISSIONS OF THE DEFENDANTS

Filed on behalf of the Defendants by:

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PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

I. Correctness of *Al-Kateb* (2004) 219 CLR 562 does not arise (Cth [9]-[14])

2. For two reasons, the Court should not draw either of the inferences the Plaintiff seeks. ***First***, the Court should not infer that there is "no real likelihood or prospect of removal in the reasonably foreseeable future", because it should not infer that it is beyond the power of the Plaintiff to facilitate his removal to Algeria should he chose to do so.

2.1. Upon the Plaintiff's arrival, when he was told no Norwegian interpreter was available, he advised his second preference was Algerian: see **SCB 318.2**.

2.2. The Plaintiff said he lived in Tindouf, Algeria as a child: see **SCB 105, 108, 111**.

2.3. The Plaintiff contacted the Moroccan Embassy in Canberra by telephone and identified himself as Algerian: **RSC [23] (SCB 49), SCB 327.6, 331.3**.

2.4. The Moroccan Embassy concluded, on basis of an interview, that the Plaintiff was not from Morocco or Western Sahara, and was likely an Algerian Berber from the Kabyle region in northern Algeria: **SCB 327, 445, 484, 494 [15]**.

2.5. The Plaintiff refused to speak Arabic during his subsequent interview with Algerian officials: **SCB 328.6, 330.6, 494 [16]**.

2.6. During an interview with Departmental officers, the Plaintiff claimed to have been born in a refugee camp in Tindouf, Algeria, said that he spent the first few years of his life there with his mother and older brother, and said his parents were still alive and living in Western Sahara, while he had 3 brothers living in Algeria. However, he was adamant that he would not countenance return to Algeria/Morocco: **RSC [28] (SCB 51), SCB 266-268, 497 [25]**.

2.7. The Plaintiff's father-in-law alleged that the Plaintiff's parents and brother are in Algeria, and that he was in contact with his mother: **SCB 496 [21], 504 [43]-[44]**

2.8. The Departmental identity report assesses that the Plaintiff is most likely a citizen of Algeria, and that he is likely concealing details as to his identity: **SCB 487, 502 [25]-[36], 503 [37], [39], 508 [56]**.

2.9. The Plaintiff even now refuses to meet with Algerian officials: **Supp SC [4.2]**.

3. ***Second***, the Department is continuing to attempt to identify third countries that might accept the Plaintiff, whether or not he has a right to enter or reside in such countries and despite his uncertain identity: **RSC [77], [78] (SCB 59-61); Supp SC [4.3]-[4.7]**.

3.1. *Plaintiff M76/2013* (2013) 251 CLR 322 at 371-372 [147] (Crennan, Bell and Gageler JJ), 392 [243]-[244] (Kiefel and Keane JJ) [**v 3 tab 19**]

II. *Al-Kateb* is not distinguishable (Cth [15]-[16], [36]-[42])

4. As to the asserted factual distinction, the Court could never draw an inference that a person can never be removed, as that assumes certainty about future events beyond Australia's control that simply does not exist: *Al Kateb* at 639 [228]-[229], 640 [231] (Hayne J), 658-659 [290] (Callinan J). In any event, even if that inference was drawn, the majority in *Al-Kateb* rejected <u>any</u> implied limitation on the duration of detention by reference to the likelihood or prospect of removal: see at 581 [33]-[34] (McHugh J), 651 [268] (Hayne J), 661-662 [298]-[299] (Callinan J).

5. As to the amendments made by the *Migration Amendment (Detention Arrangements) Act 2005* (Cth) [**v 1 tab 5**], those amendments strengthen the conclusion in *Al-Kateb*, or alternatively do not provide a reason to distinguish that decision.

5.1. *Plaintiff M76* at 345 [34]-[36] (Hayne J), 382-383 [194]-[195], [197] (Kiefel and Keane JJ).

5.2. *Al-Kateb* at 578 [22] (Gleeson CJ).

5.3. *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1 at 7 (arg), 129 [331], 130 [333], 131 [334], [336] (Heydon J) [**v 3 tab 17**].

III. *Al-Kateb* should not be re-opened (Cth [17]-[21])

6. The Plaintiff requires leave to challenge *Al-Kateb*. Such leave should be refused.

6.1. *Plaintiff M76* at 365 [125], 366 [128] (Hayne J), 372 [148] (Crennan, Bell and Gageler JJ), 382 [192]-[193], 383 [199] (Kiefel and Keane JJ).

IV. Sections 189 and 196 authorise the Plaintiff's detention (Cth [23]-[42])

7. If reached, the construction of ss 189, 196 and 198 adopted in *Al-Kateb* should be upheld for the reasons given by Hayne J. Read together, ss 196(1)(a) and 198 require detention to continue <u>until</u> the point that removal <u>becomes</u> reasonably practicable, and detention to <u>cease</u> once removal <u>is</u> "reasonably practicable".

7.1. *Plaintiff M76* at 363 [116], 364 [118], 366 [126]-[127] (Hayne J), 377-378 [175]-[176], 379-380 [182]-[183], 380 [186]-[187], 381 [189] (Kiefel and Keane JJ).

7.2. *Al-Kateb* at 640 [231], 641 [235]-[237] (Hayne J).

7.3. *Plaintiff M47/2012* at 106 [269] (Heydon J).

8. The majority in *Al-Kateb* did not overlook the principle of legality: *Plaintiff M76* at 378 [177]-[178], 379 [182], 380 [184] (Kiefel and Keane JJ).

V. Sections 189 and 196 are valid (Cth [43]-[51])

9. There is no rule that – where at any point in time the practical ability of the Executive to remove a particular alien becomes so restricted that there is no real likelihood of removal in the reasonably foreseeable future – there is a strict constitutional barrier to continuing the detention of the person which up until that time had been lawful. The Ch III limit on executive detention is that it must not be punitive: that is, it must not be imposed as punishment for breach of the law.

9.1. *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27, 32 (Brennan, Deane and Dawson JJ) [**v 2 tab 10**].

9.2. *Falzon v Minister for Immigration and Border Protection* (2018) 92 ALJR 201 at [29], [33], [82], [96]-[97] [**v 2 tab 11**].

10. Once the Executive has exercised its undoubted power to refuse to admit a non-citizen into the Australian community, to achieve that objective the Executive may exclude the non-citizen from the community until he or she can be removed. Such detention does not become punitive because removal is delayed by reason of matters outside the Commonwealth's control.

10.1. *Al-Kateb* at 648-650 [255], [262], [266] (Hayne J, Heydon J agreeing), 584-586 [45]-[46], [48]-[49] (McHugh J), 658 [289], 659 [291] (Callinan J).

10.2. *Plaintiff M76* at 367 [129]-[130] (Hayne J), 384-385 [205]-[209] (Kiefel and Keane JJ).

10.3. *Plaintiff M96A v Cth* (2017) 261 CLR 582 at 598 [31]-[33] [**v 3 tab 20**].

Date: 13 February 2019

Stephen Donaghue **Perry Herzfeld** **Zelie Heger**