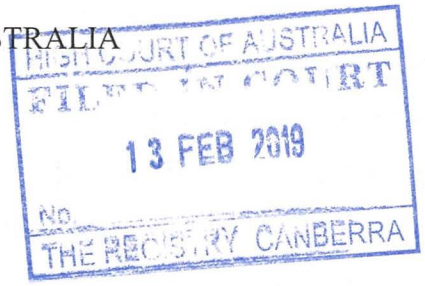
IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY



No. M47 of 2018

BETWEEN:

Plaintiff M47/2018
Plaintiff

and

Minister for Home Affairs
First Defendant

The Commonwealth of Australia
Second Defendant

PLAINTIFF'S OUTLINE OF ORAL ARGUMENT

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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

2. ***No real prospect of the plaintiff's removal*** **(P[4]-[13]; R[2]-[7]):** The defendants say that ss189 and 196 of the *Migration Act 1958* (Cth) authorise the plaintiff's continued custodial detention "for the purpose of removal from Australia as soon as that becomes reasonably practicable" (RSC[12]; Defence [50.1.3]). But there is no real prospect of removing him.

3. Apart from a belief that he was born in the Canary Islands and then taken to Western Sahara, the plaintiff has little information on his birthplace or parents. Despite extensive investigations, and independently verifiable information from Norway (see SCB 92-3), the defendants have reached no conclusions on these matters. Nor have they found a country willing to accept the plaintiff, whether as a national, as a person with a right of entry or otherwise. The compelling inference from the agreed facts is that this position is not likely to change: cf *M76/2013 v MIMAC* (2013) 251 CLR 322 at [147]. This is largely because the defendants "are not satisfied of the plaintiff's identity" (RSC[32]), can point to no inquiries likely to succeed in establishing his identity (RSC[76]), and most countries that have refused to consider resettling him have cited this issue as a reason for that refusal (RSC[78.3]; SSC[4.6]-[4.7]). Further, there is no realistic prospect that Morocco or Algeria will take him: see RSC[75], SCB 327-330, SSC[4.1].

4. This Court should infer that there is no real prospect of removing the plaintiff, a stateless person, at all or in the reasonably foreseeable future. This is so even if the mere "possibility" of removal exists: cf *SHFB v Goodwin* [2003] FCA 294 at [17], [19], [26].

5. ***The scheme purportedly authorising the plaintiff's custodial detention*** **(PS[22]-[25], [36]-[41]):** Six features of the present Act will be noted: (i) its object under s 4; (ii) s189; (iii) s196(1); (iv) s198; (v) Div 7 Subdiv B; (vi) s195A. The effect of ss189, 196 and 198, read with Subdiv B and 195A, is that the requirement to keep an unlawful non-citizen in detention is wholly qualified by the Minister's broad, non-compellable and, in practice, unreviewable power to choose non-custodial rather than custodial detention; cf *M76* at [87], [93].

6. ***A scheme materially different from that considered in Al-Kateb*** **(P[34]-[35], [42]; R[8]-[9]):** At the time of *Al-Kateb v Godwin* (2004) 219 CLR 562, "detain", "detention" and "immigration detention" within ss189 and 196(1) meant *custodial detention*: s5(1). Four Justices held (at [33], [241], [298], [303]) that ss189, 196 and 198 unambiguously mandated custodial detention of unlawful non-citizens until removal, deportation or a visa grant. But the Act no longer requires custodial detention until one of those events occurs. Rather, when

s 189 authorises detention, the Minister may choose to restrain the person in custody or release him/her to a place in the community deemed to be "immigration detention". The Minister may also choose to make any person in detention under s 189 a lawful non-citizen (s195A). The insertion of at least Div 7 Subdiv B, but also s 195A, means that a key plank of the majority's reasoning in *Al-Kateb* is no longer applicable to the Act. These changes also undermine a further aspect of the reasoning of three majority Justices: the proposition that Parliament had (validly) legislated to require the detention of unlawful non-citizens for a potentially indefinite period for the purpose of preventing them from entering the Australian community (*Al-Kateb* at [48], [74], [256], [266]-[268]; and see [9] below).

10 7. If the above submissions are incorrect, *Al-Kateb* should be reopened (**P[48]-[53]**).

8. ***Construction*** **(P[16], [32]-[33], [44]-[47], [54]-[55]; R[10]-[11]):** Sections 189, 196 and 198 must be interpreted by reference to: (i) the principle of legality, requiring the selection of an available construction involving the least interference with a person's liberty, whether or not the person is a citizen (*NAAJA v NT* (2015) 256 CLR 569 at [11]; *Tan Te Lam v Tai A Chau* [1997] AC 97 at 114); and (ii) the presumption of validity, requiring the selection of an available construction that keeps a law within constitutional bounds (*Chu Kheng Lim v MILGEA* (1992) 176 CLR 1 at 14; Act, s3A; *Acts Interpretation Act 1901* (Cth), s15A).

9. Given the latter presumption, it is necessary to understand the constitutional holding foreshadowed in *Koon Wing Lau v Calwell* (1949) 80 CLR 535, reached in *Lim*, and
20 explained in *M76, S4/2014 v MIBP* (2014) 253 CLR 219 and *M96A/2016 v Commonwealth* (2017) 261 CLR 582. It has these elements. *First*, custodial immigration detention by the Executive is not discretionary. It is an incident of the execution of the executive powers to expel, deport or admit aliens: *S4* at [29]; *Lim* at 30-33. *Second*, laws enacted under s51(xix) of the Constitution conferring executive power to detain aliens in custody will be valid only if the authorised detention is reasonably capable of being seen as necessary for the purposes of deportation or to enable a visa application to be made and considered: *M76* at [138]-[140]; *S4* at [25]-[26]; *M96A* at [21]. Otherwise, the laws will contravene Ch III: *Lim* at 33. *Third*, the constitutionally permissible purposes for such detention under s51(xix) are limited to removal from Australia or determining (or determining whether to permit) a visa application:
30 see *S4* at [26], [34]; *M96A* at [21] (cf [22]); *Lim* at 30-33; *Calwell* at 556, 581, 586-7. They do not include segregating aliens from the community: *Lim* at 33-34; *Re Woolley* (2004) 225 CLR 1 at [150]; cf *M76* at [205], [207]. *Fourth*, custodial detention is for the purpose of deportation/removal if it is necessary to make a given deportation/removal effective: *Lim* at 30-31; *Falzon v MIBP* (2018) 92 ALJR 201 at [29]. *Fifth*, the detention's duration must be

fixed by reference to the time necessarily involved in fulfilling the limited purposes: *S4* at [29]; *M96A* at [21]; *M76* at [139]. *Sixth*, the duration must also be capable of objective determination; Parliament cannot avoid judicial scrutiny of the detention's legality by making its length depend upon the Executive's unconstrained opinion: *M96A* at [31].

10. It follows that custodial detention by the Executive of a non-citizen purportedly for the purpose of removal from Australia is unconstitutional if there is no real prospect of removing him/her at all or in the reasonably foreseeable future. The detention's duration is then tied to an object likely incapable of fulfilment; in practice, it terminates only at the Executive's discretion; and the link with the requisite constitutionally permissible purpose is severed.

11. *Application*: The present Act permits detention only for the purpose of removal or processing/facilitating a visa application: *S4* at [26]. Read in context, and applying the above principles, s196 does not authorise custodial detention of a person in respect of whom there is no real prospect of removal at all or in the reasonably foreseeable future: see eg *R(O) v Home Secretary* [2016] 1 WLR 1717 at [46]-[49]; *Tan Te Lam* at 111; *Zadvydas v Davis* 533 US 678 (2001) at 689-90, 699-700. In this situation, "until" in s196(1) loses a necessary assumption for the provision's continued operation: that s 198 can provide for removal as soon as reasonably practicable: *Al-Kateb* at [14], [22], [121]-[122]. "Until" does not mean "unless": see *M47/2012 v D-G of Security* (2012) 251 CLR 1 at [114]-[116]. Further, such detention – objectively assessed by reference to all the circumstances (*M96A* at [22]) – is no longer sufficiently directed towards the authorised purpose of removal.

12. Section 196(1)(a) should be read such that the mandate to "ke[ep]" an unlawful non-citizen in the form of "immigration detention" consisting of custodial detention (s5(1)) suspends when his/her removal is not practicable at all or in the reasonably foreseeable future. Thus, ss189, 196 and 198 no longer authorise the plaintiff's present detention.

13. ***Validity* (P[56]-[65]; R[12]-[16]):** If the construction in [12] above is rejected, ss189 and 196 are invalid to the extent they authorise the plaintiff's present detention, as they contravene the principles described at [9]-[10] above. Given that there is no real prospect of removing the plaintiff, his custodial detention has no sufficient connection to the purpose of removal, and the period of his restraint in custody depends solely on the Executive's non-compellable and practically unreviewable discretion to release him under ss197AB or 195A.

14. ***Relief* (P[66]-[67]):** On either basis articulated above, this Court should find that the plaintiff's present detention is unlawful and issue a writ of habeas corpus, or mandamus, requiring his release on such conditions as may be determined by a single Justice.

13 February 2019 **R Merkel QC, L T Livingston, E Nekvapil and C G Winnett**