IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M76 of 2013

BETWEEN

PLAINTIFF M76/2013
Plaintiff

and

MINISTER FOR IMMIGRATION, MULTICULTURAL AFFAIRS AND CITIZENSHIP
First Defendant

THE OFFICER IN CHARGE, SYDNEY IMMIGRATION RESIDENTIAL HOUSING
Second Defendant

SECRETARY, DEPARTMENT OF IMMIGRATION AND CITIZENSHIP
Third Defendant

COMMONWEALTH OF AUSTRALIA
Fourth Defendant

PLAINTIFF'S REPLY

Date of document: 28 August 2013
Filed on behalf of: The Plaintiff

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Part I: Publication of Submissions

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

Part II: Argument in Reply

A. Entry into Australian territory vs entry into the Australian community

2. The Defendants seek to make much of an asserted power "to determine who is to be admitted into the Australian community and who is to be refused admission".[1] However, the Defendants have conflated entry into Australian territory with admission into the Australian community. Yet the latter is quite different form the former, as was recognised by French J in *Ruddock v Vardarlis* in the passage quoted by the Defendants.[2]

10 3. Entry into Australian territory is a simple question of fact — is or is not a person within Australia's territory? In relation to the Plaintiff the answer is clear: she is present in Australian territory.

4. By contrast, admission into the Australian community is a more complex concept. At one level a person may be absorbed into the Australian community such that the process of immigration has ceased (although such absorption does not remove the person's status as an alien).[3] At another level, the concept is directed at a legislative process of naturalisation, being admission to formal membership of the Australian community.[4] In this case the Plaintiff has not entered into the Australian community or become a formal member of that community; nor would she enter the Australian community in the constitutional sense upon release from detention.

20 5. Detention is not determinative of membership in the Australian community. An alien who is granted a visa to stay in Australia and who is not detained is not thereby a member of the Australian community and cannot be said to have "entered" that community. Conversely, an Australian citizen who is convicted of a crime and is detained under sentence does not thereby cease to be a member of the Australian community.[5] Thus the fact that Australia may decide who is to be "admitted into the Australian community" is no justification for indefinite detention of those who are not to be so admitted.

6. A further element of the Defendants' case is that the plaintiff has no "right to liberty" in Australia (DS [43]) that engages the principle of legality, unless some positive law first grants her that privilege. That misunderstands the nature of the rights the principle protects: see PS
30 [48]. Further, an alien present in Australian territory is not, by reason of her status as alien, an outlaw. When an alien enters Australian territory he or she is subject to Australian law. This is a fundamental aspect of the rule of law, in accordance with which the Constitution is framed[6] and to which Ch III gives practical effect.[7] Australian law both imposes obligations and confers rights on aliens. So, eg, an alien cannot be assaulted simply because she is an alien — any assault would carry criminal penalties for the perpetrator; and rights in tort for the

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[1] Defendants' Submissions at [7]; see also [8]-[9], [42]-[44].

[2] (2001) 110 FCR 491 at 542 [192] , where his Honour said "Australia's status as a sovereign nation is reflected in its power to determine *who may come into its territory* and who may not and *who shall be admitted into the Australian community* and who shall not" [emphasis added].

[3] See, eg, *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 64-65 (Knox CJ); *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178.

[4] *Re Minister for Immigration and Multicultural Affairs; Ex part Te* (2002) 212 CLR 162 at 171[24] (Gleeson CJ).

[5] *Roach v Electoral Commissioner* (2007) 233 CLR 162, [83]-[84] (Gummow, Kirby and Crennan JJ).

[6] *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193 (Dixon J); *South Australia v Totani* (2010) 242 CLR 1 at 155 [423] (Crennan and Bell JJ).

[7] *Thomas v Mowbray* (2007) 233 CLR 307 at 342 [61] (Gummow and Crennan JJ).

alien. Another significant, and constitutionally protected, right is liberty,[8] including a right to be free from executive detention. That right is basal but not absolute. No doubt an alien may be detained in order to facilitate his or her removal from Australian territory, being one of the *Lim* exceptions; but that does not mean that the alien may be detained for the purpose of segregation from the Australian community independently of any such removal or in the mere hope or subjective intention of removal where there are objectively no prospects of such removal. The Defendants seek to rely upon the remarks of some members of this Court to advance a contrary proposition (DS [63] and footnote 134). But that is not a matter which has been authoritatively determined[9]. It rests upon an erroneous understanding of the executive power to "exclude" – the power to "exclude" entry at the border being no more than the "complement" of the power to expel or deport an alien in territory.[10] For that reason, and for the reasons given by Gummow J in *Woolley*, that submission should not be accepted.[11]

7. On the other hand, the obligations that aliens are subject to include those imposed by the criminal law and by the law respecting control orders in Division 104 of the Commonwealth *Criminal Code* (each of which involve the judicial branch in determining restrictions on liberty). To the extent that the Defendants' submissions suggest that the Plaintiff's argument leaves the Commonwealth unable to respond to perceived threats to security posed by a particular alien, that argument ought to be rejected.

B. Lim does not require an inquiry as to whether detention is "punitive"

8. The Defendants' explanation of *Lim* rests upon a false syllogism. It is true that Brennan, Deane and Dawson JJ observed that, exceptional cases apart, involuntary detention by the State "is penal or punitive in character" (at 27). It is also true that some of the "exceptional cases" were explained as involving "detention that is non punitive in character and as not necessarily involving the exercise of judicial power" (at 28, emphasis added). But, as those emphasised words make clear, it does not follow that "it is only a conclusion that the Executive is imposing detention for a punitive purpose" that enlivens the principle in *Lim* (contra DS [54] and see also DS [52]). Their honours said no such thing. Nor has that proposition been accepted as the doctrine of the Court in the later authorities upon which the Defendants rely.[12]

9. One rather starts with the "general proposition" identified in *Lim* that apart from the exceptional cases, the power to order involuntary detention is "under the doctrine of the separation of judicial and executive powers enshrined in our Constitution, part of the judicial power of the Commonwealth entrusted exclusively to Chapter III Courts".[13] That proposition,

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[8] *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); *R v Davison* (1954) 90 CLR 353 at 380-381 (Kitto J); *South Australia v Totani* (2010) 242 CLR 1 at 155-156 [423] (Crennan and Bell JJ).

[9] While Callinan J in *Al-Kateb v Godwin* (2004) 219 CLR 562 said that it "may be the case" that detention for such purposes is constitutionally permissible (and identified a number of practical considerations that might favour that view) he expressly refrained from deciding that issue: at 658 [289].

[10] See *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 555-556 (Latham CJ).

[11] See *Re Woolley; Ex parte M276/2003* (2004) 225 CLR 1 at 52-55 [135]-[151].

[12] See DS at [53]. For example, in *Al-Kateb*, Hayne J (with whom Heydon J agreed) seemingly doubted the utility of the punitive/non-punitive analysis, by reason of the difficulties in drawing a distinction between those species of detention (see at 648, [257]-[258]). His Honour's subsequent discussion of the nature of the detention in issue in *Al-Kateb* is premised upon the caveat that appears at 649 [261]: "If the line to be drawn attaches importance to the characterisation of the consequences as punitive..." (emphasis added). His Honour reiterated those views in *Woolley* at 77 [227] (again, Heydon J agreeing). The passage from *Woolley* extracted by the Defendants at DS [53] is to be understood in that context.

[13] See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic* (1992) 176 CLR 1 at 28-29 per Brennan, Deane and Dawson JJ and see, citing *Lim* for that proposition, Gleeson CJ in *Vasiljkovic v Commonwealth* (2006) 227 CLR 614 at 630-631 [37].

deeply rooted in history,[14] immediately directs attention to the question of whether detention purportedly authorised by the executive falls within one of the exceptions. There is no anterior inquiry as to whether the objective purpose for authorising the detention is or is not punitive, with all its attendant difficulties.[15]

10. Nor does the question of punitive/non-punitive detention enter the inquiry at the point of considering the exceptions. For, as noted in the Plaintiff's submissions in chief, it could hardly be the organising or animating principle when two of the five exceptions identified in *Lim* at 28 involve detention for a punitive object.[16] That may also be illustrated by reference to the reasoning of all members of the Court in *Vasiljkovic v Commonwealth.*[17] It may readily be accepted that the authorisation of detention for the purposes of extradition does not, at a level of generality, involve an objective legislative "punitive purpose" (as Gleeson CJ observed at 629, [34]). Yet neither his Honour, nor any other member of the Court, approached the question arising from Lim on the basis that the absence of such a purpose was decisive in determining whether detention for that purpose constituted a further exception.[18] Attention was rather devoted to the whether one could draw a relevant analogy with any of the existing exceptions and the historical provenance of executive detention associated with extradition. If their Honours had considered that the "absolutely central plank" of the inquiry was the punitive/non-punitive distinction (DS at [52]), then they would have said so. It is not and they did not. Like the notion of community confidence in the courts in the context of the *Kable* doctrine, that distinction is not the organising or animating principle,[19] and is perhaps best regarded as a convenient shorthand to describe that which is and that which is not protected by the constitutionally mandated separation of powers.

11. Whatever be the status of Gummow J's reasons in *Fardon*,[20] this Court has made plain (consistent with his Honour's reasons in *Fardon* at 612-3 [81]-[82] and with the general proposition from *Lim* identified above) that the concern is with the deprivation of liberty without adjudication of guilt, rather than with the further question of whether detention is for a punitive purpose.

C. Reliance upon Gaudron J's reasons in Kruger

12. The Defendants also seek to undermine *Lim*, relying on what was said by Gaudron J in *Kruger*. Three points should be made regarding that submission. **First**, her Honour's views are to be understood by reference to her preference for an approach based upon a proposition concerning the reach of the heads of power in s51 (reiterating similar observations her Honour made in *Lim* at 57). That proposition has not found favour with the other members of this Court.[21] **Secondly**, her Honour was, with respect, wrong to suggest that the exceptions

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[14] See the extract from Blackstone which immediately precedes it in *Lim* at 28. Note also Vile, MJC *Constitutionalism and the Separation of Powers* 2ed (1998), in particular chapters 4 and 5, Tyler, "The Forgotten Core Meaning of the Suspension Clause" (2012) 125 *Harv. LR* 901 (2012) at 928 and 933 and *Ex parte Merryman: Case No 9,487*, 17 F Cas 144 at 150 (1865) per Taney CJ.

[15] See the Plaintiff's submissions in chief at [65]-[66] and note also the passages from Hayne J's reasons in *Al-Kateb* and *Woolley* identified above.

[16] A matter seemingly accepted by the Defendants – at DS [52]. Note, also, as regards military justice, *Haskins v Commonwealth* (2011) 244 CLR 22 at 35-36, [21].

[17] (2006) 227 CLR 614 at 648 [108].

[18] See Gleeson CJ at 630-631 [37]-[38]; Gummow and Hayne JJ at 649-650 [112]-[116] (Heydon J agreeing at 676 [222]) – see also Kirby J (dissenting) at 669-671, [193], [196]-[198].

[19] *Fardon* at 617-8 [102] per Gummow J and 629[144] per Kirby J; *Totani* at 82 [206] per Hayne J.

[20] Note in that regard that both Gummow and Hayne JJ's reasons in *Vasiljkovic* at 650 [117] (seemingly adopting, unequivocally, Gummow J's suggested re-formulation in *Fardon*) and Hayne J's reasons in *Totani* at 83 [210] suggest a rather less agnostic view of that matter than is suggested by the Defendants at footnote [123] of their submissions. See also *Al-Kateb* at [135]-[138] per Gummow J (Kirby agreeing); *Mowbray* at 356 [114], [115] per Gummow and Crennan JJ and at 430 [353] per Kirby J.

[21] See eg *Al-Kateb* at 582, [39] per McHugh J, at 610-611, [130]-[132] per Gummow J and at 644-5 [245]-[247] per Hayne J.

identified in *Lim* necessarily required the development of further far broader "exceptions" that would swallow the rule (at 110.5). The approach applied in *Vasiljkovic*, drawing on history and applying orthodox methods of judicial reasoning, suggests that that concern is overstated. Thirdly, in addition to being accepted many times by members of this Court (including in the context of consideration of Gaudron J's reasons in *Kruger*[22]), the principle in Lim was applied as a step in the reasoning in *Kable* of Toohey J and Gummow J and was reflected in the reasoning of Gaudron J and McHugh J.[23] The Defendants may wish to "deny" its existence; yet it exists.

D. Defendant's submissions on proportionality

13. A number of points may be made here. First, if the Plaintiff's primary submission is accepted, the question of proportionality does not arise for the reasons given at PS [77]: there is simply no permissible object. The self-levitating argument concerning segregation at DS [64] fails for the reasons given above. Indeed, the fact that the Commonwealth accepts that the Act is directed to that (impermissible) object leads to invalidity regardless of any asserted connection with removal.[24]

14. Secondly, contrary to DS [61]-[63], it is clear that the test to be applied in the current context requires scrutiny of the relationship between means and ends – see *Lim,* which requires executive detention to be "limited to what is reasonably capable of being seen as necessary for the purposes of deportation."[25] That logic has been followed in numerous judgments.[26] No particular difficulty arises from describing that inquiry as one that involves considerations of proportionality.[27] On the other hand, the proportionality analysis proposed by the Defendants at [62] (drawing on the work of Professor Barak) ignores the cautionary statements made by this Court about the care that is required in this area: in particular, the notion of "balancing" finds no place in autochthonous proportionality doctrine. The other matters there identified are encompassed in the analysis in the Plaintiff's submissions at [78]-[81].

15. Thirdly, the suggestion that "either a law usurps or interferes with the exclusive function of the judiciary ... or it does not" (DS [61]) misses the mark. That is a conclusory statement that says nothing about the antecedent test to ascertain usurpation or interference. Indeed the same may be said of the constraint imposed by implied freedom,[28] yet that has not led to the abandonment of the second Lange question. The short point is that, assuming the existence of a permissible purpose (which is not this case), the ascertainment of whether or not a law transgresses constitutional limits will require some finer analysis. The suggestion that there is some form of incoherence at the heart of the Plaintiff's argument (at DS [63]) similarly mistakes the outcome of legal reasoning ("strict preclusion", which appears to be a slogan for the notion of a constitutional constraint upon power) for the judicial method that is applied to arrive at that outcome.

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[22] See eg *Vasiljkovic* at 630-631 [37]-[38].
[23] (1996) 189 CLR 51 at 97-98, 106-107, 121-122 and 131-132.
[24] See eg *Betfair v Western Australia* (2008) 234 CLR 418 at 464 [48].
[25] *Lim* per Brennan, Deane and Dawson JJ at 33, Mason CJ agreeing at 10.
[26] See eg *Al-Kateb* per Callinan J (at 660 [294]); *Woolley* per Gleeson CJ at 14 [21]-[22], [25], Gummow J at 51-52 [133]-[134] and 60 [163]-[165], Callinan J at 84 [260]; *Fardon* per Callinan J and Heydon J at 653-654 [215] (in regards to detention generally); *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 per Kirby J at 527 [118]-[119] and Callinan J at 559 [218]; *Kruger v Commonwealth* (1997) 190 CLR 1 per Gummow J at 162 (in regards to detention generally); although compare *Al-Kateb* per Hayne J at 647-648, [252]-[256] (Heydon J concurring) and per McHugh J at 584 [45]; *Woolley* per McHugh J at 33 [78] and Hayne J at 77 [227]-[228] (Heydon J concurring) and *Behrooz* per Hayne J at 541-542, [171].
[27] *Monis v The Queen* (2013) 87 ALJR 340 at [283], per Crennan Kiefel and Bell JJ at [344]-[347]; *Lange v ABC* (1997) 189 CLR 520 at 562; see also *Mulholland v AEC* (2004) 220 CLR 181 per Gleeson CJ at [31]-[32]; *Coleman v Power* (2004) 220 CLR 1 per Gleeson CJ at [33], per Kirby J at [210].
[28] See eg *Coleman* at 49, [91] per McHugh J.

E. Other matters relevant to construction and validity of ss 189 and 196

16. Contrary to the Defendants' submissions at [35.5] and [35.6], nothing can be made of the fact that Parliament has from time to time amended the Migration Act, including ss 189 and 196(1), but has not taken steps to "overturn" *Al Kateb*.[29] The principle in *Platz v Osborne*[30] (on which the Defendants rely) has no application unless it appears that Parliament "intended to apply their minds to the subject".[31] But all that Parliament's inaction reveals is that it has not turned its mind to amendments relating to indefinite detention. In any event, Parliament's "intention" is expressed in, and to be gleaned from, the words of the legislation, not from any speculation as to the subjective intention of Parliament,[32] let alone a subjective intention based on an absence of action. The Defendants' attempts to downplay the significance of the principle of legality take matters no further: the Defendants seem to treat that principle as divorced from (and perhaps in violent competition with) the modern approach to statutory construction, requiring attention to matters such as the context and legislative history. But those principles are in fact applied in a harmonious fashion to arrive at an interpretation that is an expression of the set of constitutional relationships identified in *Cai*. The difficulty for the Defendants is that, so applied, the vague textual and contextual matters upon which the Defendants rely do not manifest (with the requisite irresistible clearness) an intention to authorise the drastic infringement on liberty in issue here: indefinite detention, potentially until death. The words of ss 189 and 196(1) ought to be construed in the manner articulated by the minority in *Al Kateb* and by Gummow and Bell JJ in *Plaintiff M47,* for the reasons outlined in the Plaintiff's submissions.[33]

17. Contrary to the Respondent's submissions at [47.2], the constitutional principle for which the Plaintiff contends does not require the executive to take a *positive* action with respect to a non-citizen; this is mere sophistry. Freedom from detention does not require a positive action — it requires a negative, that the executive cease to take the positive steps it is currently taking, or threatening to take (ie physical restraint that would otherwise constituted an assault), should the Plaintiff attempt to leave the detention facility without permission. And to the extent that the Defendants rely here on the will of Parliament, that is to invert the proper constitutional inquiry.

F. Error in non-referral of Plaintiff's case to the Minister

18. The power in s 46A(2) is tethered to the Act, and specifically the criteria for a protection visa, both in positive terms (as set out in s 36) and negative as reflected in s 501, in three ways. First, s 46A reflects parliament's intentions to Australia international obligations under the Refugees Convention.[34] Second, s 198(2) permits detention while steps are taken to determine whether a person should be permitted to apply for a protection visa.[35] Third, s 46A(2) is a power to direct that the exclusion in s 46A(1) does not apply in relation to an application for a visa.

19. Having embarked on consideration of the exercise of that power, an essential aspect was to relate the circumstances of the Plaintiff back to the criteria for the visa for which consideration was being given. That involved an assessment of all of the relevant statutory provisions that bore upon any visa application that the Plaintiff might be permitted to make.

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[29] Cf *Plaintiff M47* at [334] (Heydon J).
[30] (1943) 68 CLR 133.
[31] *Williams v Dunn's Assignee* (1908) 6 CLR 425 at 441 per Griffith CJ and *Melbourne Corporation v Barry* (1922) 31 CLR 174 at 186-7, 188 per Isaacs J.
[32] *Zheng v Cai* (2009) 239 CLR 446 at [28]; *Byrnes v Kendle* (2011) 243 CLR 253 at [97] (Heydon and Crennan J), quoting Oliver Wendell Holmes, "The Theory of Legal Interpretation" (1899) 12 *Harv LR* 417 at 419.
[33] As to the defendants' objections to re-opening *Al-Kateb* at DS [25], see *Babaniaris v Lutony Fashions Pty Limited* 163 CLR 1 at 13-14 per Mason J.
[34] *Plaintiff M61* at [34].
[35] *Plaintiff M61* at [25]-[27].

20. The breadth of the public interest does not break the nexus between s 46A and the criteria for a protection visa as reflected in s 36 and s 65. *Plaintiff M61* established that a legal error in an assessment of protection obligations, for example a misunderstanding as to the meaning of persecution, could be the subject of a declaration and, although not expressly decided, injunctive relief.

21. The policy of the Minister in relation to ASA's meant that the consideration under s 46A that was undertaken did not permit any examination of whether the Plaintiff would meet the criteria for a protection visa and would not be excluded by s 501. It necessarily follows, for the reasons given at PS [9]-[25], that there is currently no duty under s198(2) to be fulfilled and that the detention of the Plaintiff is unlawful.

22. Further, it is not right to say the second step has not been reached. The Minster has already engaged with the process of consideration of s 46A by requiring information be obtained. The exercise of the power in s 46A is necessarily favourable to the affected person. To stop the process is to refuse to exercise the power. It is not sufficient in order to address the error for the "department" to agree to consider whether or not to refer the Plaintiff's case to the Minister. The Minister not having indicated taking any step in relation to the Plaintiff, and mandamus not being available, the prospect of any further consideration by the Minister is speculative and does not render the continued detention lawful.

Dated: 28 August 2013

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